

TRANSPARENCY: “ARE WE READY TO LIFT THE VEIL OF CONFIDENTIALITY OF ARBITRATION?”

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Almost all investment treaties nowadays provide the investors with the procedural right to bring a claim against the government of the host state through an effective dispute resolution mechanism, usually known as investment arbitration. For a long time, the information on the investor-state dispute is often kept confidential due to several sensitive reasons. Accordingly, under the arbitration rules governing the arbitral proceedings, including the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), the details of the disputes can remain hidden from public view from their commencement through conclusion.

However, with the development of the World Trade Organization (WTO), along with the birth of a number of free trade areas, which more and more improvement in the level of regional economic integration, in order to offer a friendly environment for investment, the host country must gain a higher degree of transparency and the investment arbitration shall not fall out of such tendency. Recognizing the public interest in investor-state arbitration, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“*UNCITRAL Transparency Rules*”) is introduced in 2014 providing an international legal standard to ensure the transparency in investor-state arbitration. Furthermore, to enhance the application of the UNCITRAL Transparency Rules, on 17th March 2015, the United Nation Convention on Transparency in Treaty-Based Investor-State Arbitration was opened for signature (“*Transparency Convention*”). These mechanisms have created sound framework to facilitate the transparency in investment arbitration in particular and the ISDS in general.

Being a dynamic factor in the region, Vietnam also has some positive movement to catch up with that current trend. Nevertheless, for a long time, Vietnam has always been familiar with the confidentiality in the investment arbitration, in which it is the Respondent. A question posed to not only the government but also the practitioners and scholars is whether Vietnam is really ready to pierce the veil of confidentiality and get

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along with the world of transparency in arbitration. This article shall focus on analyzing the development of transparency in the dispute resolution mechanism in Vietnam and the implication of the UNCITRAL Transparency Rules and Transparency Convention to Vietnam in order to find the answer for such question.

I. OVERVIEW

1. Overview of foreign investment in Vietnam

Vietnam has usually been widely regarded as an attractive place to invest. Favorable government policy and investment-friendly laws have combined with the natural assets to bring Vietnam become a stand-out performer in South-East Asia in terms of foreign investment attraction. Taking its advantages, in recent years, Vietnam has concluded a number of international treaties, bilateral and multilateral, on protection and encouragement of investment to attract the foreign investment. Until 1st August 2016, Vietnam has entered into 66 Bilateral Investment Treaties (BITs) and 10 regional treaties on investment, Free Trade Agreements (FTAs), Economic Partnership Agreements (EPAs) with provisions on protection and encouragement of investment (hereinafter referred to generally as the “investment treaties”).² Furthermore, Vietnam is also on the process of negotiation of 5 other FTAs with important partners from all over the world.³

The conclusion of the investment treaties along with the economic integration of Vietnam brings about plenty of positive outcomes. One of the most apparent results that can be easily seen is the total volume of foreign direct investment (FDI) to Vietnam gradually increase over the years. In particular, adding up until September 2016, Vietnam attracted USD 292 billion of FDI through 22,155 projects from 112 countries and territories.⁴ Furthermore, in the 11 months of 2016, the total newly-registered and increased capital is USD 18.103 billion, the disbursed FDI projects is USD 14.3 billion, making up a 8.3% increase in comparison with the same period of 2015.⁵ Notably, among 112 countries and territories having investment in Vietnam, the Republic of Korea is currently the biggest investor in terms of both the number of projects and registered capital. As of October 2016, the total registered capital of Korea to Vietnam reached more than USD 50 billion with 5,593 effective projects. The Korean FDI enterprises play an important role in the economy of Vietnam by creating jobs for 700 thousand labors and contributing about 30% of the total export value of Vietnam. From the other side, Korea is regarded as the 4th biggest trading partner of Vietnam, only after

² Tran Anh Tuan (M.A), Department of International Law – Ministry of Justice, “*The Mechanism of Investment Dispute Resolution under the Commitment of the Treaty on Protection and Encouragement of Investment and Investment Chapter of the Free Trade Agreements and Economic Partnership Agreement*” (August 2016)

³ <https://aric.adb.org/fta-country>

⁴ Information from the Foreign Investment Department of the Ministry of Planning and Investment of Vietnam: <http://fia.mpi.gov.vn/tinbai/5131/Tiep-tuc-gia-tang-dau-tu-cua-Han-Quoc-vao-Viet-Nam>

⁵ Information from the Foreign Investment Department of the Ministry of Planning and Investment of Vietnam: <http://fia.mpi.gov.vn/tinbai/5171/Tinh-hinh-thu-hut-dau-tu-nuoc-ngoai-11-thang-nam-2016>

the United States, China and Hong Kong.⁶ Especially, on 05th May 2015, the Minister of Industry and Trade of Vietnam and Ministry of Trade, Industry and Energy of Korea officially signed the Vietnam – Korea FTA (VKFTA), which came into force as from 20th December 2015. This instrument promises to bring more prospects for the two countries, particularly on investment cooperation.

Nonetheless, along with the opportunities, the increase of investment also opens door for more and more foreign investment disputes. Among them, the investor-state disputes tend to suddenly boost in the number as well as the complexity of the disputes due to several reasons. As of August 2016, Vietnam has been the Respondent in eight investment arbitrations.⁷ Among which, Vietnam successfully settled the famous case *Trinh Vinh Binh v. Vietnam*⁸ under the Vietnam-Netherland BIT and won three other cases including *South Fork v. Vietnam*⁹ under the US-Vietnam BTA, *Dialasie v. Vietnam*¹⁰ and *Recofi v. Vietnam*¹¹ both under the Vietnam-France BIT. Besides, the government of Vietnam also involved in 02 other pending cases (*TVB2 v. Vietnam* and *Saigon Metropolitan v. Vietnam*) and 02 other cases in which the Claimants have submitted the Notice of Intent to Submit a Claim to Arbitration.¹² Notably, all these eight arbitrations were conducted confidentiality with very little information leaked to the public. The content of the claims as well as results of the cases can only be accessed through the official announcement of the Ministry of Justice of Vietnam (MOJ) when the arbitration already terminated. Furthermore, in the case that the Government has

⁶ Information from the Foreign Investment Department of the Ministry of Planning and Investment of Vietnam: <http://fia.mpi.gov.vn/tinbai/5078/Tong-quan-quan-he-hop-tac-Viet-Nam—Han-Quoc>

⁷ Tran Anh Tuan (n 2)

⁸ A Dutch-Vietnamese businessman, Mr. Trinh Vinh Binh has settled his claim against the Vietnamese Government on confidential terms, bringing to an end an UNCITRAL arbitration which had been proceeding with little publicity under the Netherlands-Vietnam bilateral investment treaty. On 14th March 2007, the UNCITRAL proceeding, which was being administered by the Stockholm Arbitration Institute, was terminated at the request of the parties.

⁹ According to the official Press Release of the Ministry of Justice of Vietnam, on 18th November 2010, the Claimant Michael L. Mackenzie (South Fork) initiated arbitration against Vietnam under the US-Vietnam BTA on the ground that the Vietnamese authorities had failed to protect his investment in a resort development project in Vietnam. In December 2013, the PCA-administered Arbitral Tribunal upheld Vietnam's jurisdictional objections that: (1) Mr. Mackenzie had not made a protected "investment" under the BTA as he had failed to demonstrate his ownership and control of the entity; and (2) Mr. Mackenzie had failed to initiate the investor–state arbitration in good faith.

¹⁰ In 2011, Dialasie SAS initiated arbitration against Vietnam under the France-Vietnam BIT, claiming compensation for its health-services investment. According to the Ministry of Justice, Dialasie had a contract with Vietnam's security agency to operate a private dialysis clinic in Ho Chi Minh City but it was closed in 2006 amidst a series of disputes with local health-care authorities. After losing in a VIAC arbitral proceedings against Saigon Co-op, a local company and with the award being enforced by the local courts, Dialasie initiated an investment arbitration against Vietnam. In its Statement on 31st December 2014, the Ministry of Justice announced that Vietnam had prevailed in the case.

¹¹ The case *RECOFI v. Vietnam* is another arbitration initiated under the France-Vietnam BIT and conducted under the UNCITRAL Rules. RECOFI submitted its Notice of Arbitration on July 2013. On a latest update, on 28th September 2016, the Geneva-seated arbitral tribunal declined jurisdiction over Recofi's claims that the ground that no investment in host state but merely cross-border sales and the Swiss Federal Supreme Court has upheld an UNCITRAL tribunal's decision.

¹² <http://viac.vn/tin-tuc/lop-boi-duong-kien-thuc-phap-luat-giai-quyet-tranh-chap-quoc-te-cho-cong-chuc-vien-chuc-a634.html>

successfully reached the settlement agreement, the terms of such agreement are never open to the public. This analysis indicated a fact that Vietnamese Government still feels comfortable with the confidentiality of the investment arbitration. As a result, it is very likely that the transparency trend may become a real challenge for Vietnam.

2. *The necessity of transparency in investment arbitration*

As the investor-state disputes often related to huge investment projects and required the balance between the interest of the investor and the protection of public policy of the host country, there is high demand of the public to access to the information on the dispute resolution proceedings and even taking part in the arbitral proceedings as a third party.

Both the UNCITRAL Transparency Rules and Transparency Convention are towards addressing the “*public interest in transparency in treaty based investor-state arbitration*”. These instruments have opened a solution to an inception against the investor-state arbitration that: the arbitral tribunals in investment arbitration often decide matters of public importance behind closed doors.¹³ With the open to public, the arbitral tribunal would be more careful in making their decision, which would make the arbitral awards become fairer more accountable. Furthermore, the mechanism for collecting information from the investor-state claims of non-ICSID arbitration provided by the UNCITRAL Transparency Rules and Transparency Convention would enhance the capacity to monitor, collect and analyze the statistics to forecast and identify the number as well as types of claims being brought against the host states under the investment treaties. To some extent, the publication of investment arbitral awards, though may not easily be developed as a system of precedent/case law as in the common law jurisdictions, shall become a good source of reference and affect the reasoning of the arbitral tribunal towards the uniformity in the interpretation of the investment treaties. For these reasons, it has firm basic to believe that transparency in investor-state arbitration would be “*fundamental for the accountability, good governance and the rule of law*”, which are essential elements for the sustainable development.¹⁴ Standing before that open door with opportunities and challenges, how Vietnam will face it? The next section shall provide the answer for that question.

II. THE DEVELOPMENT OF TRANSPARENCY IN VIETNAM

1. *The development of transparency in dispute resolution under the laws of Vietnam*

In the last meeting session in November 2015, the National Assembly of Vietnam has approved a number of new legislation, which is believed to create significant changes to the substantive as well as procedural legal matters in Vietnam. Among them, one of the most important is the 2015 Civil Procedure Code (CPC) coming into force as from

¹³ Esme Shirlow, A Step toward Greater Transparency: the UN Transparency Convention (March 2015) <http://kluwerarbitrationblog.com/2015/03/30/a-step-toward-greater-transparency-the-un-transparency-convention/>

¹⁴ <http://ccsi.columbia.edu/work/projects/promoting-transparency-arbitration/>

1st July 2016. Implementing the Resolution of the Polity Bureau of Vietnamese Communist, the CPC allows the publication and application of precedent (case law). The application of precedent shall be guided and supervised by the Supreme People's Court. In particular, on 6th April 2016, the Chief Judge of the Supreme People's Court issued Decision No. 220/QD-CA deciding on the publication of 6 judgments to be used as precedent. Additionally, on 19th October 2016, other 4 judgments were published increasing the number of precedent to 10 cases.¹⁵ The publication and application of precedent is expected to increase the transparency in the trial of the court and contribute to uniformity in application and interpretation of the law.

Furthermore, apart from the publication and application of case law, the CPC also specified the publication of every judgment in the web portal of the court for public access. In the past, the content of judgments is normally not published in any official gazette or website of either Supreme People's Court or the Ministry of Justice. In accordance with the old CPC, only the litigating parties involved, the State Agencies of Enforcement of Civil Judgment or the public prosecutors of the same level are provided by the court with the extracts from or full of the judgments. Nonetheless, under the 2015 CPC, the effective judgments of the courts of every level shall be open to the access of public through the web portal of the courts. Notably, to effectively implement such new provisions, the Supreme People's Court has just issued Decision No. 752/QD-TANDTC dated 30th November 2016 on piloting the public service of online registration for providing extracts of judgments, documents in the case files of the court. In accordance with that Decision, as from 1st December 2016, people can access a website to register for provision of the judgments as well as other documents in the case files of the Supreme People's Court, the High People's Court in Hanoi, Ho Chi Minh City and Da Nang City and the People's Court of 14 provinces/cities of central level.¹⁶ This change is regarded as a significant development of the litigation procedure in Vietnam towards the transparency trend. It is expected that such transparent procedure shall enhance the quality of the judgments as well as ensure the right to access to judicial information of the public.

With regard to arbitration, under the 2010 Law on Commercial Arbitration, the arbitral proceeding is not open to public unless otherwise agreed by the parties and the arbitral tribunal is under legal obligation to keep confidential all aspects of the disputes heard by them. Accordingly, the publication of the award is not permitted without the consent of the parties. Nevertheless, the Vietnam International Arbitration Center (VIAC), the leading arbitration center in Vietnam, collected and edited the some of their arbitral awards to publish books on collections of arbitral awards for reference and education purposes.

2. Transparency of investor-state dispute resolution mechanism under the new FTAs concluded by Vietnam

¹⁵ Published precedents can be accessed at <http://anle.toaan.gov.vn>

¹⁶ Registration for providing of judgments and litigation documents can be made at <http://dichvucong.toaan.gov.vn>

Recently, Vietnam has concluded or on the process of negotiation of a number of important modern FTAs with investment provisions. The transparency in investor-state disputes resolution is expressly or impliedly incorporated in these agreements.

2.1. *Eurasian Economic Union-Viet Nam Free Trade Agreement (VN-EAEU FTA)*

The Vietnam - Eurasian Economic Union Free Trade Agreement was signed in Kazakhstan on 29th May 2015 by the Prime Minister of Vietnam and Prime Ministers of other member states of the Eurasian Economic Union including Russia, Armenia, Belarus, Kazakhstan and Kyrgyzstan. Per the statement of the Ministry of Foreign Affairs of Vietnam, the two sides have completed procedures and the agreement comes into effect as from 5th October 2016.¹⁷

This agreement is listed by the UNCITRAL as one of the most recent 18 investment treaties concluded after 1st April 2014 where the UNCITRAL Transparency Rules or provisions modeled on the Rules on Transparency are applicable in some instances of investor-state dispute resolution.¹⁸ The ISDS mechanism is provided by Article 8.38 of Chapter 8 on Trade in Services, Investment and Movement of Natural Persons of the Agreement. Though Article 8.38 does not directly mention the transparency in ISDS, item b, paragraph 3 of this Article refers to the resolution of the investor-state dispute at an “*ad hoc arbitration court in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law*” as a choice of the investor. Hence, by referring to the UNCITRAL Arbitration Rules in general without any express reservation, in accordance with Article 1 paragraph 4 of the 2014 UNCITRAL Arbitration Rules and Article 1 paragraph 1 of the UNCITRAL Transparency Rules, the Transparency Rules shall be automatically applied to the investor-state arbitration which the investor initiates under the UNCITRAL Arbitration Rules. In case the claimant selects another arbitration rules to be applied as provided by Article 8.38 paragraph 3 item c, d and e (ICSID, ICSID Additional Facility or other arbitration rules), the UNCITRAL Transparency Rules shall only be applied upon the mutual consent of the parties.

2.2. *Vietnam – European Union Free Trade Agreement (EVFTA)*

On 02nd December 2015, Vietnam and the EU finally declared the completion of negotiation process of the EU-Vietnam Free Trade Agreement (EVFTA)¹⁹. Being regarded as “*one of the most ambitious and comprehensive FTA’s to date*”²⁰, the EVFTA applies a new mechanism of ISDS in which the disputes between an investor of Vietnam and the EU and/or a member state of the EU or vice versa shall be resolved by a two-tier tribunal system. Article 20 of Section 3, Chapter II, Chapter 8 of the EVFTA on *Trade in Services, Investment and E-commerce* clearly stipulates the

¹⁷ <http://wtocenter.vn/other-agreement/vietnam-eurasian-economic-union-fta-full-content>

¹⁸ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html

¹⁹ <http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/>

²⁰ ‘Trade deals: The EU-Vietnam FTA’ (March 2016) <<http://www.ciarb.org/e-solver/march-2016/trade-deals-the-eu-vietnam-fta>> accessed on 10 December 2016

Transparency of proceedings of ISDS. Accordingly, a number of provisions of the UNCITRAL Transparency Rules are incorporated.

In particular, apart from the documents listed in Article 3(1) of the UNCITRAL Transparency Rules,²¹ the EVFTA also requires that the request for consultations, the notice of intent, the notice of determination of the respondent, the notice of challenge of the member of the Tribunal/Appeal Tribunal in a division and the decision on challenge shall also be made available to public. Furthermore, the publication of other documents may be made in compliance with the decision of the Tribunal upon its own initiative or request from any person after consultation with the disputing parties.

The documents as required in Article 3(1) of the UNCITRAL Transparency Rules as well as other documents stipulated in Article 20(2) shall be made publicly available by the EU and Vietnam as well as the repository referred to in the UNCITRAL Transparency Rules.

Furthermore, the transparency rules under the EVFTA clearly excluded the disclosure of information claimed to be confidential or protected information by either of the disputing parties.

Besides, the EVFTA does not allow the submission or participation of third persons, except for the non-disputing party, being Viet Nam when the respondent is the European Union or a Member State of the European Union, and the European Union when Viet Nam is the respondent.

2.3. Trans-Pacific Partnership (TPP)

On 04th February 2016, Vietnam, along with other 11 member countries, has signed the Trans-Pacific Partnership (TPP), a new generation free trade agreement. The ISDS mechanism under the TPP also provides a provision regarding the transparency of the proceedings in which the publication of a number of arbitral documents as well as the public hearing are clearly stipulated.²²

2.4. Vietnam – Korea Free Trade Agreement (VKFTA) and ASEAN – Korea Free Trade Agreement (AKFTA)

The Free Trade Agreement between Vietnam and Korea (VKFTA) was signed on 5th May 2015 and officially came into effect on 20th December 2015 while the ASEAN – Korea Free Trade Agreement (AKFTA) was concluded in 2005 with the Investment Agreement taking effect as from June 2009. Both VKFTA and AKFTA do not have provisions on transparency in investment arbitration. Furthermore, as signing and

²¹ **Article 3 of the UNCITRAL Transparency Rules. Publication of documents**

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

²² Article 9.24 of Chapter 9 on Investment of the TPP

coming into force after 1st April 2014, the VKFTA directly referred to the application of the UNCITRAL Arbitration Rules 2010 and expressly excluded the application of the UNCITRAL Transparency Rules.²³

With the improvement of transparency policy in dispute resolution in general and investment arbitration in particular, especially in the playground with the developed countries, is Vietnam prepared and ready to lift the veil of confidentiality of arbitration? The next section shall give the answer to that question.

III. IS VIETNAM READY TO LIFT THE VEIL OF CONFIDENTIALITY OF ARBITRATION

1. The possibility of application of UNCITRAL Transparency Rules to Vietnam

Generally, the UNCITRAL Transparency Rules only applies to investment arbitration conducted under the UNCITRAL Arbitration Rules under the investment treaties concluded **after 1st April 2014**. Furthermore, the Rules can be applied to arbitration conducted under other arbitration rules upon the consent of the disputing parties. Besides, when the Transparency Convention come into force, the UNCITRAL Transparency Rules shall be applied for investor-state arbitration brought under the investment treaties concluded before 1st April 2014, regardless of the arbitration rules, when both the country of the investor and the respondent state are member states of the Convention. Hence, apart from the mandatory application under the investment treaties as analysed above, there is very low chance that the UNCITRAL Transparency Rules would be applicable to the investment arbitration where Vietnam is the respondent as Vietnam is not a member state of the Transparency Convention. Furthermore, the transparency rules of the investment treaties of which Vietnam is member do not fully incorporate the UNCITRAL Transparency Rules. It indicates that Vietnam still hesitates about the transparency in investment arbitration and only agrees to be bound by such rules of transparency under the pressure of reaching the trade deal with big trading partners like the EU or the US.

2. The attitude of Vietnamese government towards the ICSID, UNCITRAL Transparency Rules and Transparency Convention

The International Convention on Settlement of Investment Disputes (ICSID) can be regarded as the initiation and inspiration of the transparency rules in investment arbitration. Vietnamese government has considered the possibility of acceding to this Convention for several times. However, until now, after a number of meetings of different levels between the General Secretary and delegation of ICSID and the competent authority of Vietnam, such as the MOJ, the Ministry of Industry and Trade, etc., Vietnam has not shown any clear intention to enter into this Convention.

Furthermore, realising that the UNCITRAL Transparency Rules has very low chance of applicable to investment disputes in which Vietnam is the Respondent, the Government of Vietnam shows no interest in the accession to the Transparency

²³ Article 9.28 and footnote 25 of Chapter 9 on Investment of the VKFTA

Convention. Additionally, the VKFTA even expressly excluded the application of the UNCITRAL Transparency Rules, which appears that both parties to such Agreement try to restrict the access of public to their investment disputes.

3. *The concept of “protected information” under Vietnamese laws – exception to the publication of judgments of the court*

Article 7 of the UNCITRAL Transparency Rules allows the confidentiality of the protected information as an exception to the transparency of the proceedings. The EVFTA and the TPP also have similar reservation.²⁴ Accordingly, the information classified as protected or confidential shall not be made available to public. The concept of “protected information” can be interpreted in accordance with the law of the respondent country. Under Vietnamese laws, the protected information is defined in the 2015 CPC and is also considered as exception for the publication of the judgments of the court. Pursuant to the 2015 CPC, protected information is contents related to “*State secrets, fine customs and practices of the nation, professional secrets, business secrets, family secrets or secrets of individuals' private lives*” at the legitimate requests of the involved parties.²⁵ Therefore, even in case the transparency rules is applied for Vietnam as an obligation under the investment treaties, Vietnam can still count on such provisions to object to the disclosure of these classified information.

4. *The necessity of transparency to improve the investment environment*

It is undeniable that transparency in investment including transparency in the dispute resolution is a fundamental element to attract foreign investment.²⁶ This is also a criterion which the big investors like Canada, the US or the EU pay much concern about in the negotiation of their investment treaties. That is the reason why Vietnam, though not really interested in transparency in investment arbitration, has to agree with such rules in their FTAs with big trading partners as a trade-off for the trade deals that Vietnam would reach through such agreements.

5. *The transparency obligation under the international treaties which Vietnam is a member*

Whether desire or not, Vietnam has committed to the transparency rules in investment arbitration proceedings under a number of international treaties such as the VN-EAEU FTA, the EVFTA and the TPP. As a contracting state, Vietnam has no other choice than to comply with the stipulation of these agreements. Otherwise, not only does Vietnam involve in the investor-state disputes, but may also be claimed under the state-to-state

²⁴ Article 20, Section 3, Chapter II of Chapter 8 of the EVFTA and Article 9.24 paragraph 3 and 4 of Chapter 9 of the TPP

²⁵ Article 109 paragraph 2 of the 2015 CPC

²⁶ For detail analysis, please see: Zdenek Drabek and Warren Payne, *The Impact of Transparency on Foreign Direct Investment* < https://www.wto.org/english/res_e/reser_e/erad-99-02.doc > accessed on 9th December 2016 and *Transparency - UNCTAD Series on Issues in International Investment Agreements II* < http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf > accessed on 9th December 2016

dispute resolution mechanism for not fulfilling the obligation under the relevant agreements. That will definitely not be the scenario that Vietnam expects.

For these analyses above, it is clear that Vietnam has not been ready to lift the veil of confidentiality of investment arbitration. The hesitation to reference to the UNCITRAL Transparency Rules as well as the limitation of the scope of application of the transparency of proceedings in the investment treaties which Vietnam is a member state indicates that Vietnam still tries to hide behind the veil where a number of state secrets are kept.

When the transparency rules are applied, Vietnam must be prepared to face with the challenge that all the information of the arbitration shall be open to public. Therefore, the confidential terms of settlement like Trinh Vinh Binh case shall no longer be acceptable. Furthermore, in a higher level of transparency, Vietnam shall also be prepared for the participation and submission of third persons in the investment arbitration. Nevertheless, it should also be borne in mind that in order to avoid the open to public of all the information which Vietnam does not desire, Vietnam would enhance the domestic mechanism to control the disputes from the pre-arbitration stages or try to settle the dispute through negotiation or mediation, which still upholds the confidentiality principle. It is also a good way to improve.

Anyway, the transparency in investment arbitration is an open door and Vietnam has gotten one foot in that door by entering in a number of investment treaties with transparency provisions. Vietnam has a choice to just stand there or go ahead through the door by approaching to higher level of transparency as provided in the UNCITRAL Transparency Rules and Transparency Convention. Regardless of choosing either way, it is high time for Vietnam to prepare itself to face with the challenge of open information to public and transparent in the investment arbitral proceedings. This preparation shall not only assist Vietnam in fulfilling its obligation under the investment treaties but also promises to improve the investment environment to attract more foreign investment. For those benefits, why Vietnam not give it a try?