Vietnam's International Investment Agreements: Various Substantive Compatibility Thresholds For Legislative Measures

Submitted by

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ABBREVIATIONS OF COUNTRY NAMES, ORGANISATIONS, AGENCIES AND TERMS

ASEAN	Association of Southeast Asian Nations
BIT(s)	Bilateral Investment Treati(es)
BLEU	Belgium and Luxembourg Economic Union
BTA	Bilateral Trade Agreement
CIL	Customary International Law
EAEU	Eurasian Economic Union
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA(s)	Free Trade Agreement(s)
FTC	Free Trade Commission
FTT	Free Transfer Treatment
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
IIA(s)	International Investment Agreement(s)
IMF	International Monetary Fund
IPRs	Intellectual Property Rights
IPA	Investment Partnership Agreement
ISDS	Investor-State Dispute Settlements
LCIA	London Court of International Arbitration
MFN	Most-Favored-Nation
MIA	Multilateral Investment Agreement
MOFA	Ministry of Foreign Affairs
MOJ	Ministry of Justice
MPI	Ministry of Planning and Investment
MST	Minimum Standard of Treatment
Non-DM	Non-Impairment of Foreign Investments by Discriminatory Measures

Non-UDM/UM/DM	Non-Impairment of Foreign Investments by Unreasonable or Discriminatory Measures
Non-UM	Non-Impairment of Foreign Investments by Unreasonable Measures
NPM	Non-Performance Measures
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
SBV	State Bank of Vietnam
SCC	Stockholm Chamber of Commerc
SEDP(s)	Socio-Economic Development Plan(s)
SEDS(s)	Socio-Economic Development Strateg(ies)
SPS measures	Sanitary and Phytosanitary Measures
SDGs	Sustainable Development Goals
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

ABBREVIATIONS OF TREATIES AND CONVENTIONS

ACIA	*ASEAN Comprehensive Investment Agreement*, Brunei Darussalam–Cambodia–Indonesia–Laos–Malaysia–Myanmar–Philippines–Singapore–Thailand–Vietnam, signed 26 February 2009, ILM (entered into force 24 February 2012)
Argentina-Chile BIT	*Treaty between the Republic of the Argentine and the Republic of Chile on the Promotion and Reciprocal Protection of Investments*, signed 2 August 1991, ILM (entered into force 1 January 1995, terminated 1 May 2019)
Argentina-US BIT	*Treaty between the United States of America and the Argentina Republic Concerning the Reciprocal Encourangement and Protection of Investment*, signed 14 November 1991, ILM (entered into force 20 October 1994)
ASEAN-ANZ FTA	*Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed 27 February 2009, ILM (entered into force 10 January 2010)
ASEAN-China IA	*Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations*, signed 15 August 2009, ILM (entered into force 1 January 2010)
ASEAN-Hong Kong IA	*Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations*, signed 12 November 2017, ILM (entered into force 17 June 2019)
ASEAN-India IA	*Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India*, signed 12 November 2014 (not yet in force)
ASEAN-Korea IA	*Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of*

	Southeast Asian Nations and the Republic of Korea, signed 2 June 2009, ILM (entered into force 1 September 2009)
ASEAN IGA	*Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments*, opened for signature 15 December 1987, ILM (entered into force 2 August 1988, terminated 29 March 2012)
Canada-Venezuela BIT	*Agreement between the Government of Canada and the Goverment of the Republic of Venezuela for the Promotion and Protection of Investments*, signed 1 July 1996, ILM (entered into force 28 January 1998)
CAFTA-DR FTA	*Free Trade Agreement between Central America, the Dominican Republic and the United States of America*, signed 5 August 2004, ILM (entered into force 1 January 2009)
CETA	*Comprehensive Trade and Economic Agreement between Canada and the European Union*, signed 30 October 2016, ILM (entered into force provisionally 21 September 2017)
CPTPP	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Australia–Brunei Darussalam–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore, signed 8 March 2018, ILM (entered into force 2018)
ECHR	*European Convention on Human Rights (ECHR) (formally European Convention for the Protection of Human Rights and Fundamental Freedom),* opened for signature 4 November 1950, ILM (entered into force 3 September 1953)
Ecuador-US BIT	*Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment*, signed 28 August 1993, ILM (entered into force 11 May 1997, terminated 17 May 2018)
ECT	*The Energy Charter Treaty*, signed in December 1994, ILM (entered into force 24 April 1998)
GATS	*Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (enterered into force 1 January 1995) annex 1B

	(‘*General Agreement on Trade in Services*’)
GATT	*Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (enterered into force 1 January 1995) annex 1A (‘*General Agreement on Trade and Tariffs*’)
Germany-Zimbabwe BIT	*Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments,* signed 19 September 1995, ILM (entered into force 14 April 2000)
ICSID Convention	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, ILM (entered into 14 October 1966)
IMF Agreement	*Articles of Agreement of the International Monetary Fund*, opened for signature 22 July 1944, ILM (entered into 27 December 1945)
India-Germany BIT	*Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments,* signed 10 July 1995, ILM (entered into force 13 July 1998, terminated 3 June 2017)
India-Mauritius BIT	*Agreement between the Government of the Republic of Mauritius and the Government of Republic of India for the Promotion and Protection of Investments*, signed 4 September 1998, ILM (entered into force 20 June 2000, terminated 22 March 2017)
Kazakhstan-US BIT	*Treaty between the United States of America and the Republic of Kazakhstan concerning Encouragement and Reciprocal Protection of Investment,* signed 19 May 1992, ILM (entered into force 12 January 1994)
NAFTA	*North American Free Trade Agreement*, signed 12 August 1993, ILM (entered into force 1 January 1994, replaced 1 July 2020)
Netherlands-Slovakia BIT	*Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Czech and Slovak Federal Republic,* signed 19 April 1991, ILM (entered into

	force 1 October 1992, terminated 31 March 2021)
Oman-US FTA	*Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area,* signed 19 January 2006, ILM (entered into force 1 January 2009)
Pakistan-Turkey BIT	*Agreement between the Islamic Republic of Pakistan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments*, signed 16 March 1995, ILM (entered into force 3 September 1997)
Peru-Canada FTA	*Free Trade Agreement between Canada and Peru,* signed 29 May 2008, ILM (entered into force 1 August 2009)
Romania-US BIT	*Treaty between the United States of America and the Republic of Romania concerning the Reciprocal Encouragement and Protection of Investment*, signed 28 May 1992, ILM (entered into force 15 January 1994)
RCEP	*Regional Comprehensive Economic Partnership, ASEAN-Australia–China–Japan–Korea (Republic)–New Zealand*, signed 15 November 2020, ILM (not yet in force)
Singapore-China BIT	*Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments*, signed 21 November 1985, ILM (entered into force 7 February 1986, replaced 16 October 2019)
Singapore-Poland BIT	*Agreement between the Government of the Republic of Singapore and the Government of the Republic of Poland on the Promotion and Protection of Investments*, signed 3 June 1993, ILM (entered into force 29 December 1993)
Spain-Mexico BIT	*Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain,* signed 10 October 2006, ILM (entered into force 3 April 2008)
SPS Agreement	*Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (enterered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary or Phytosanitary*

	Measures')
Switzerland-Zimbabwe BIT	*Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments*, signed 15 August 1996, ILM (entered into force 9 February 2001)
Tanzania-UK BIT	*Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments*, signed 7 January 1994, ILM (entered into force 2 August 1996)
TPP	*Trans-Pacific Partnership*, Australia–Brunei Darussalam–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore–United States of America, signed 4 February 2016, ILM (not yet in force)
USMCA	*Agreement between the United States of America, the United Mexican States, and Canada*, signed 30 November 2018, ILM (entered into force 1 July 2020)
VCLT	*Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
Vietnam-Argentina BIT	*Agreement between the Government of the Argentine Republic and the Government of the Socialist Republic of Vietnam on the Promotion and the Reciprocal Protection of Investments*, signed 3 June 1996, ILM (entered into force 1 June 1997)
Vietnam-Armenia BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Armenia on the Promotion and Protection of Investments*, signed 13 December 1992, ILM (entered into force 28 April 1993)
Vietnam-Australia BIT	*Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments*, signed 5 May 1991, ILM (entered into force 11 September 1991, terminated 14 January 2019)
Vietnam-Austria BIT	*Agreement between the Republic of Austria and the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 27 March 1995, ILM (entered into force 1

	October 1996)
Vietnam-Bangladesh BIT	*Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Socialist Republic of Vietnam and the Government of the People's Republic of Bangladesh*, signed 1 May 2005 (not yet in force)
Vietnam-Belarus BIT	*Agreement on the Promotion and Protection of Investment between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Belarus*, signed 8 July 1992, ILM (entered into force 24 Novermber 1994)
Vietnam-BLEU BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Belgium-Luxemburg Economic Union on Promotion and Reciprocal Protection of Investments*, signed 24 January 1991, ILM (entered into force 11 June 1999)
Vietnam-Bulgaria BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Bulgaria on Mutual Promotion and Protection of Investments*, signed 19 September 1996, ILM (entered into force 15 May 1998)
Vietnam-Cambodia BIT (amended 2012)	*Agreement between the Government of the Kingdom of Cambodia and the Government of the Socialist Republic of Vietnam Concerning the Encouragement and Protection of Investments*, signed 1 September 2001, ILM (entered into force 24 October 2005, amended 24 June 2012)
Vietnam-Chile BIT	*Agreement between the Government of the Republic of Chile and the Government of the Socialist Republic of Vietnam for the Reciprocal Promotion and Protection of Investments*, signed 16 September 1999 (not yet in force)
Vietnam-China BIT	*Agreement between the Government of the People's Republic of China and the Government of the Socialist Republic of Vietnam concerning the Encouragement and Reciprocal Protection of Investments*, signed 2 December 1992, ILM (entered into force 1 September 1993)
Vietnam-Cuba BIT (1995)	*Agreement on the Promotion and Protection of Investment between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Cuba*, signed 12 October 1995, ILM (entered into force 1 October 1996,

	replaced 22 January 2009)
Vietnam-Cuba BIT (2007)	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of Investments,* signed 28 September 2007, ILM (entered into force 22 January 2009, amended 28 September 2007)
Vietnam-Czech BIT (amended 1997)	*Agreement between the Government of the Czech Republic and the Government of the Socialist Republic of Vietnam for the Promotion and Reciprocal Protection of Investment*, signed 25 November 1997, ILM (entered into force 9 July 1998, amended 25 November 1997)
Vietnam-Denmark BIT	*Agreement between the Government of the Kingdom of Denmark and the Government of the Socialist Republic of Vietnam concerning the Promotion and Reciprocal Protection of Investments*, signed 23 July 1993, ILM (entered into force 7 August 1994)
Vietnam-EAEU FTA	*Free Trade Agreement between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part*, signed 29 May 2015, ILM (entered into force 5 October 2016)
Vietnam-Egypt BIT	*Agreement on the Promotion and Protection of Investment between the Government of the Socialist Republic of Vietnam and the Government the Arab Republic of Egypt*, signed 6 September 1997, ILM (entered into force 4 March 2002)
Vietnam-Estonia BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Estonia on the Promotion and Protection of Investments*, 24 September 2009, ILM (entered into force 11 February 2012)
Vietnam-EU IPA	*Investment Protection Agreement Between the European Union and its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part*, signed 30 June 2019, ILM (not yet in force)
Vietnam-Finland BIT (1993)	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Finland on the Promotion and Reciprocal Protection of Investments*,

	signed 13 September 1993, ILM (entered into force 2 May 1996, replaced 4 June 2009)
Vietnam-Finland BIT (2008)	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Finland on the Promotion and Protection of Investments*, signed 21 February 2008, ILM (entered into force 4 June 2009)
Vietnam-France BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of France on Reciprocal Encouragement and Protection of Investments*, signed 26 May 1992, ILM (entered into force 10 August 1994, jointly interpreted 26 May 1992)
Vietnam-Germany BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Federal Republic of Germany on Promotion and Reciprocal Protection of Investments*, signed 3 April 1993, ILM (entered into force 10 August 1994, amended 3 April 1993)
Vietnam-Greece BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments*, signed 13 October 2008, ILM (entered into force 8 December 2011
Vietnam-Hungary BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of Republic of Hungary for the Promotion and Reciprocal Protection of Investment*, signed 6 August 1994, ILM (entered into force 16 June 1995)
Vietnam-Iceland BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Iceland on the Promotion and Protection of Investments*, signed 20 September 2002, ILM (entered into force 10 July 2003)
Vietnam-India BIT	*Agreement between the Government of the Republic of India and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 8 March 1997, ILM (entered into force 1 December 1999, terminated 22 March 2017)

Vietnam-Indonesia BIT	*Agreement between the Government of the Republic of Indonesia and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 25 October 1991, ILM (entered into force 3 April 1994, terminated 7 January 2016)
Vietnam-Italy BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Italian Republic for the Promotion and Protection of Investment,* signed 18 May 1990, ILM (entered into force 6 May 1994)
Vietnam-Iran BIT	*Agreement on the Encouragement and Reciprocal Protection of Investment between the Government of the Socialist Republic of Vietnam and the Islamic Republic of Iran*, signed 23 March 2009, ILM (entered into force 19 March 2011)
Vietnam-Japan BIT	*Agreement between Japan and the Socialist Republic of Vietnam for the Liberalization, Promotion and Protection of Investment*, signed 14 November 2003, ILM (entered into force 19 December 2004)
Vietnam-Kazakhstan BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Repubic of Kazakhstan for the Promotion and Reciprocal Protection of Investments*, signed 15 September 2009, ILM (entered into force 7 April 2014)
Vietnam-Korea (Democratic) BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Democratic People's Republic of Korea for the Promotion and Protection of Investment*, signed 2 May 2002 (not yet in force)
Vietnam-Korea BIT (1993)	*Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 13 May 1993, ILM (entered into force 4 September 1993, replaced 5 June 2004)
Vietnam-Korea BIT (2003)	*Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Vietnam for the Promotion and Reciprocal Protection of Investments*, signed ILM (entered into force 05 June 2004)

Vietnam-Korea FTA	*Free Trade Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Viet Nam*, signed 5 May 2015, ILM (entered into force 20 December 2015)
Vietnam-Kuwait BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the State of Kuwait for Encouragement and Reciprocal Protection of Investments*, signed 23 May 2007, ILM (entered into force 16 March 2011)
Vietnam-Laos BIT	*Agreement between the Government of the Lao People's Democratic Republic and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 14 January 1996, ILM (entered into force 23 June 1996)
Vietnam-Latvia BIT	*Agreement between the Government of the Republic of Latvia and the Government of the Socialist Republic of Viet Nam for the Promotion and Protection of Investments*, signed 6 November 1995, ILM (entered into force 20 February 1996)
Vietnam-Lithuania BIT	*Agreement between the Government of the Republic of Lithuania and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 27 September 1995, ILM (entered into force 24 April 2003)
Vietnam-Macedonia BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Macedonia on Promotion and Reciprocal Protection of Investments*, signed 15 October 2014, ILM (entered into force 11 January 2016)
Vietnam-Malaysia BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of Malaysia for the Promotion and Protection of Investments*, signed 21 January 1992, ILM (entered into force 9 October 1992)
Vietnam-Mongolia BIT	*Agreement between the Government of Mongolia and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 17 April 2000, ILM (entered into force 13 December 2001)

Vietnam-Morocco BIT	*Agreement between the Government of the Kingdom of Morocco and the Government of the Socialist Republic of Vietnam on the Promotion and Protection of Investments*, signed 15 June 2012 (not yet in force)
Vietnam-Mozambique BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Mozambique on Promotion and Reciprocal Protection of Investments*, signed 16 January 2007, ILM (entered into force 29 May 2007)
Vietnam-Myanmar BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Myanmar on the Promotion and Protection of Promotion Investments*, signed 15 February 2000 (not yet in force)
Vietnam-Namibia BIT	*Agreement on the Encouragement and Reciprocal Protection of Investments between the Republic of Namibia and the Government of the Socialist Republic of Vietnam*, signed 30 May 2003 (not yet in force)
Vietnam-Netherland BIT	*Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Socialist Republic of Vietnam*, signed 10 March 1994, ILM (entered into force 1 February 1995)
Vietnam-Oman BIT	*Agreement between the Government of the Sultanate of Oman and the Government of the Socialist Republic of VietNam for the Promotion and Reciprocal Protection of Investments*, signed 10 January 2011, ILM (entered into force 23 June 2011)
Vietnam-Palestine BIT	*Agreement on the Government of the State of Palestine and the Government of the Socialist Republic of Vietnam for the Promotion and Reciprocal Protection of Investments*, signed 21 November 2013 (not yet in force)
Vietnam-Philippines BIT	*Agreement between the Government of the Republic of the Philippines and the Government of the Socialist Republic of Vietnam on the Promotion and Protection of Investments*, signed 27 February 1992, ILM (entered into force 29 January 1993)

Vietnam-Poland BIT	*Agreement between the Republic of Poland and the Socialist Republic of Vietnam for the Promotion and Reciprocal Protection of Investments*, signed 31 August 1994, ILM (entered into force 24 November 1994)
Vietnam-Qatar BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments*, signed 8 March 2009 (not yet in force)
Vietnam-Romania BIT	*Agreement between the Socialist Republic of Vietnam and the Government of Romania on the Promotion and Reciprocal Protection of Investments*, signed 15 September 1994, ILM (entered into force 16 August 1995)
Vietnam-Russia BIT	*Agreement on the Promotion and Protection of Investment between the Government of the Socialist Republic of Vietnam and the Government of the Russian Federation*, signed 16 June 1994, ILM (entered into force 3 July 1996)
Vietnam-Singapore BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Singapore on the Promotion and Protection of Investments*, signed 29 October 1992, ILM (entered into force 25 December 1992)
Vietnam-Slovakia BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Slovak Republic on the Promotion and Protection of Investments*, signed 17 December 2009, ILM (entered into force 18 August 2011)
Vietnam-Spain BIT	*Agreement between the Socialist Republic of Vietnam and the Kingdon of Spain on the Promotion and Reciprocal Protection of Investments*, signed 20 February 2006, ILM (entered into force 29 July 2011)
Vietnam-Sri Lanka BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments*, signed 22 October 2009 (not yet in force)
Vietnam-Sweden BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments*,

	signed 8 September 1993, ILM (entered into force 2 August 1994)
Vietnam-Switzerland BIT	*Agreement between the Swiss Confederation and the Socialist Republic of Vietnam Concerning the Promotion and Reciprocal Protection of Investments*, signed 3 July 1992, ILM (entered into force 3 December 1992)
Vietnam-Taiwan BIT (1993)	*Agreement on the Promotion and Protection of Investments between the Vietnam Economic and Cultural Office in Taipei and the Taipei Economic and Cultural Office in Ha Noi*, signed 21 April 1993, ILM (entered into force 23 April 1993)
Vietnam-Taiwan BIT (2019)	*Agreement the Taipei Economic and Cultural Office in Vietnam and the the Vietnam Economic and Cultural Office in Taipei on the Promotion and Protection of Investments*, signed 18 December 2019 (not yet in force)
Vietnam-Tajikistan BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Tajikistan concerning the Promotion and Protection of Investments*, signed 19 January 1999 (not yet in force)
Vietnam-Thailand BIT	*Agreement between the Socialist Republic of Vietnam and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments*, signed 30 October 1991, ILM (entered into force 7 February 1992)
Vietnam-Turkey BIT	*Agreement between the Government of the Republic of Turkey and the Government of the Socialist Republic of Viet Nam concerning the Reciprocal Promotion and Protection of Investments*, signed 15 January 2014, ILM (entered into force 19 June 2017)
Vietnam-UAE BIT	*Agreement between the Government of the United Arab Emirates and the Government of the Socialist Republic of Viet Nam for the Protection and Promotion of Investments*, signed 16 February 2009 (not yet in force)
Vietnam-UK BIT	*Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, ILM (signed and entered into force

	1 August 2002)
Vietnam-UK FTA	*Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Socialist Republic of Vietnam*, signed 19 December 2020 (not yet in force)
Vietnam-Ukraine BIT	*Agreement between the Government of the Ukrainian National Republic and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 8 June 1994, ILM (entered into force 8 December 1994)
Vietnam-Uruguay BIT	*Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Eastern Republic of the Uruguay on Promotion and Protection of Investments*, signed 12 May 2009, ILM (entered into force 9 September 2014)
Vietnam-US BTA	*Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, ILM (signed and entered into force 13 July 2000)
Vietnam-Uzbekistan BIT	*Agreement between on Promotion and Protection of Investments between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Uzbekistan*, signed 28 March 1996, ILM (entered into force 6 March 2014)
Vietnam-Venezuela BIT	*Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Bolovarian Republic of Venezuela for the Promotion and Protection of Investments*, signed 20 November 2008, ILM (entered into force 17 June 2009)
WHO FCTC	*The World Health Organisation's Framework Convention on Tobacco Control,* opened for signature 16 June 2003, ILM (entered into force 27 February 2005)

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ABSTRACT

Vietnam is keen to attract foreign investments and conclude international investment agreements (IIAs). However, whether Vietnam's IIAs taken together constrain Vietnam's self-regulatory powers remains an important and valid question. This thesis seeks to reveal one part of the picture – compatible substantive aspects of legislative measures.

The thesis finds that Vietnam's IIAs impose various substantive compatibility thresholds on legislative measures, ranging from the strictest-and-rigid to the least-strict-and-flexible thresholds. As to individual investment protection obligations, all studied IIAs formulate three separate groups of five main thresholds for legislative measures to be compatible with fair and equitable treatment (FET), free transfer treatment (FTT) and national treatment (NT) respectively, and a group of six for non-expropriation. As to individual treaty lines, IIAs with formulae in this thesis nominated as 'AAx', 'AAAy' and 'BAxC', separately generate five, four and three main thresholds, and IIAs with 'ABCy' and 'BBCC' each provide two. These conclusions are generated from two bundles of subsidiary findings: (i) different substantive requirements/qualifications possibly imposed by FET, expropriation, FTT and NT provisions; and (ii) different substantive qualifications potentially required by treaty exception provisions. The thesis extracts these requirements/qualifications through comparative analysis and legal analysis founded on the *Vienna Convention on the Law of Treaties* interpretation rules. To collect data for the analysis, it uses both qualitative and quantitative synthesis and in-depth interviews.

The findings of this thesis serve as strong evidence for the argument that all the strict thresholds required by Vietnam's IIAs create narrow policy spaces as compared to the broadest space drawn from the least strict thresholds, and thus constrain the state's right to regulate for, at least, sustainable development goals falling within the scope of the latter space, and others potentially permitted under future sustainable development-friendly treaties. They also function as a detailed map to assist Vietnam's policymakers in formulating appropriate policy options and further propose a frame for identifying the regulatory space in IIAs.

STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis accepted for the award of any other degree or diploma.

No other person's work has been used without due acknowledgment in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

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Chapter 1
THESIS INTRODUCTION AND BACKGROUND

I RATIONALE FOR RESEARCH AND KNOWLEDGE GAP

In recent decades, international investment law has witnessed an explosion of international lawsuits brought by foreign investors challenging governments around the world over their public policies. This explosion triggers a vast discussion among academics and policymakers on the relationship between international investment agreements (IIAs) and the state's right to regulate – whether, and to what extent, the former limits the latter for pursuing public policy interests or sustainable development goals (SDGs)? While many scholars hold their contradictory views on the issue; policymakers in different countries decide to review and thus reform their existing IIAs, and/or draft SDGs-friendly clauses in their Model BIT or new IIAs. In the context of Vietnam, after being constantly challenged by foreign investors in front of international arbitral tribunals in four cases within almost five years since 2010, policymakers have increased attention to improving human resources and strengthen their cooperation in addressing grievances, conflicts or disputes initiated by foreign investors. This attention and subsequent actions of Vietnam's policymakers reflect their implicit concerns over the constraints of contemporary investment treaties. However, the question of to what extent these treaties actually or potentially restrict the regulatory powers of policymakers in implementing domestic development policies has not been discussed publicly. Existing literature relevant to this issue is limited and fragmented, and where it is available, it pays an attention to newly-concluded treaties entered into by Vietnam. No study has addressed the question directly and/or approached Vietnam's IIAs as a whole system that require(s) all local and central authorities as one public actor, in exercising their regulatory powers, to comply with different obligations of all treaties. Given these reasons as briefed here and more clarified below, a search for the relationship between Vietnam's IIAs and the state's right to regulate begins with this thesis.

As mentioned above, public policies have been challenged by many investor-state dispute settlements (ISDS) claims. They are diverse but can be grouped into three categories. The first category of public policies comprises those dealing with economic and financial crises. For example, Argentina's 2002 Emergency Law, together with regulatory changes in tariff and monetary systems during the 2001/2002 economic crisis, has prompted 40 (known) disputes with foreign investors.[1] Argentina's subsequent enactment of legislation to restructure its sovereign debt in 2005 and its settlement with foreign holders of its defaulted bonds likewise face challenges under three (known) cases.[2] Greece's enactment of legislation amending sovereign bond terms during its 2012 sovereign debt crisis has also been the subject of a claim from Cypriot and Slovakian investors.[3]

The second category of public policies challenged by foreign investors worldwide relates to regulatory reforms commonly responding to domestic development needs such as renewable energy, health insurance, gas production or the mining sector. For instance, between 2012 and 2014, Spain (in 2012, 7% already suspended) and the Czech Republic (in 2014, 28%) imposed a 'sun tax' (solar levy) on solar-generated electricity in addition to reducing, or withdrawing, investment incentives for concentrated solar plants, while Italy progressed similar policies to the latter; those regulatory changes have resulted the three countries facing nearly 60 (known) arbitral cases.[4] Legal arrangements responding

[1] Note that this figure is calculated by the author from data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>. See, eg, *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) ('*LG&E v Argentina'*); *Impregilo SpA v Argentine Republic (I) (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) ('*Impregilo v Argentina (I)*'); *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/26, 8 December 2016) ('*Urbaser and CABB v Argentina'*).

[2] See *Ambiente Ufficio SpA and others (formerly Giordano Alpi and others) v Argentine Republic (Order of Discontinuance of the Proceeding)* (ICSID Arbitral Tribunal, Case No ARB/08/9, 28 May 2015) ('*Ambiente Ufficio and others v Argentina'*); *Abaclat and others (formerly Giovanna A Beccara and others) v Argentine Republic (Settlement Agreement)* (ICSID Arbitral Tribunal, Case No ARB/07/5, 21 April 2016) ('*Abaclat and others v Argentina*').

[3] *Poštová banka, AS and Istrokapital SE v Hellenic Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/8, April 2015) ('*Poštová banka and Istrokapital v Greece'*).

[4] Note that this number include 44 known cases against Spain, seven known cases against the Czech Republic, and eight known cases against Italy, which are calculated by the author from data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>. See, eg, *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/36, 4 May 2017) ('*Eiser and Energía Solar v Spain*'); *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/1, 16 May 2018) ('*Masdar v Spain*'); *Charanne BV and Construction Investments Sàrl v Spain (Final Award)* (SCC Arbitral Tribunal, Case No 062/2012, 21 January 2016) ('*Charanne and Construction Investments v Spain*'); *Novenergia II - Energy & Environment (SCA), SICAR v Kingdom of Spain (Final Arbitral Award)* (SCC Arbitral Tribunal, Case No 063/2015, 15 February 2018) ('*Novenergia v Spain*'); *JSW Solar (zwei) GmbH & CoKG, Gisela Wirtgen, Jürgen Wirtgen, and Stefan Wirtgen v Czech Republic (Final Award)* (PCA Arbitral Tribunal, Case No 2014-03, 11 October 2017) ('*JSW Solar and Wirtgen v Czech'*);

to other international obligations (other than international investment obligations) are also contested by foreign investors, including Canada's new limit requirements and custom duties on softwood exports in 2006 following the *US-Canada Softwood Lumber Agreement*,[5] and Poland's imposition of quotas on isoglucose (a wheat-derived sweetener) in 2004 during its accession to the EU.[6]

The final category of challenged measures encompasses those grounded on environmental protection and public health. Well-known examples include Canada's export ban on PCB wastes from Canada to the US in 1996,[7] Canada's ban on the use of lindane-based pharmaceuticals in 2004,[8] or the US's ban on the use of MTBE (a fuel additive) in 2002.[9] Italy's ban on oil and gas exploration and production activity within a 12-mile limit from the coastline[10] and Canada's moratorium on offshore wind farms have recently been added to this category.[11] Public health measures are no exception to international arbitration; contested cases include new packaging and labeling requirements for cigarettes in Uruguay and Australia following the tobacco control policies of the *World Health Organization's Framework Convention on Tobacco Control* (FCTC).[12]

Photovoltaik Knopf Betriebs-GmbH v The Czech Republic (Award) (PCA Arbitral Tribunal, Case No 2014-21, 15 May 2019) ('*Photovoltaik Knopf Betriebs v Czech*'); *Belenergia SA v Italian Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/15/40, 6 August 2019) ('*Belenergia v Italy'*). For recent analyses on these cases, see, eg, Hui Pang, 'Investor-State Dispute Settlement in Renewable Energy: Friend or Foe to Climate Change?' in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020) 144, 150–67; Fernando Dias Simões, 'Investment Law and Renewable Energy: Green Expectations in Grey Times' in George Ulrich and Ineta Ziemele (eds), *How International Law Works in Times of Crisis* (Oxford University Press, 2019) 206.

[5] *Pope & Talbot v Government of Canada (Interim Award)* (UNCITRAL Arbitral Tribunal, 26 June 2000) ('*Pope & Talbot v Canada*').

[6] *Cargill, Incorporated v Republic of Poland (Final Award)* (UNCITRAL Arbitral Tribunal, 29 February 2008) ('*Cargill v Poland*').

[7] *SD Myers, Inc v Government of Canada (Partial Award)* (UNCITRAL Arbitral Tribunal, 13 November 2000) ('*Myers v Canada*').

[8] *Crompton (Chemtura) Corp v Government of Canada (Award)* (UNCITRAL Arbitral Tribunal, 2 August 2010) ('*Chemtura v Canada'*).

[9] *Methanex Corporation v United States of America (Final Award)* (UNCITRAL Arbitral Tribunal, 3 August 2005) ('*Methanex v US*').

[10] *Rockhopper Exploration Plc, Rockhopper Italia SpA and Rockhopper Mediterranean Ltd v Italian Republic (Decision on the Intra-EU Jurisdictional Objection)* (ICSID Arbitral tribunal, Case No ARB/17/14, 26 June 2019) ('*Rockhopper v Italy'*).

[11] *Windstream Energy LLC v The Government of Canada (Award)* (PCA Arbitral Tribunal, Case No 2013-22, 27 September 2016) ('*Windstream Energy v Canada*').

[12] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) ('*Philip Morris v Uruguay*'); *Philip Morris Asia Limited v The Commonwealth of Australia (Final Award Regarding Costs)* (PCA Arbitral Tribunal, Case No 2012-12, 8 March 2017) ('*Philip Morris v Australia'*).

The increasing number of public policy-related investment claims has triggered a controversy among academics and policymakers over the relationship between IIAs and state rights to regulate. In the academic field, many scholars argue that IIAs, specifically 'old generation' agreements, have threatened the state's right to regulate for public policy in different ways. Among other things, certain scholars point that the surge in investor-state dispute settlement proceedings can potentially cause 'regulatory chill' among policymakers, including internalisation chill, threat chill and/or cross-border chill.[13] Other scholars support this proposition, pointing to arbitral tribunals taking a broad discretion to decide whether a state is allowed to adopt public legislation or regulate its key economic sectors.[14] Still others argue that host states' defences of environmental protections have not been given due weight in investor–state dispute settlements,[15] with similar issues in cases of host states' defences of human rights,[16] cultural protections[17] and public health.[18]

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[13] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606; Julia G Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3(1) *Western Journal of Legal Studies* Article 3; Taejoon Ahn, 'The Utility of Carve-Out Clauses in Addressing Regulatory Concerns in Investment Treaty Arbitration' (2016) 12(1) *Asian International Arbitration Journal* 65, 69; Lone Wandahl Mouyal (ed), *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Taylor & Francis Group, 2016) 67–8; Francesco Costamagna, 'Protecting Foreign Investments in Public Services: Regulatory Stability at Any Cost?' (2017) 17(3) *Global Jurist* 1; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) *Transnational Environmental Law* 229; Tarald Laudal Berge and Axel Berger, 'Does Investor-state Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation' (Research Paper, 2019) <https://www.semanticscholar.org/paper/Does-investor-state-dispute-settlement-lead-to-from-Berge-Berger/4afb08a676d0c17058db629b4134c52d28bf6942>; Maryam Malakotipour, 'The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response' (2020) 22(2) *International Community Law Review* 235; Gus Van Harten (ed), *The Trouble with Foreign Investor Protection* (Oxford University Press, 2020) 99–132. But see Oleksandra Vytiaganets, 'Smoking Chills? Tobacco Regulatory Chill, Foreign Investment, and the NCD Crisis in the Post-Soviet Space: A Case Study from Ukraine' (2020) 21(5) *The Journal of World Investment & Trade* 753. This article found that tobacco regulatory chill in Ukraine was based on factors other than international commitments in investment treaties.

[14] Catharine Titi (ed), *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014). See also Catharine Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law' in Gillian Moon and Lisa Toohey (eds), *The Future of International Economic Integration* (Cambridge University Press, 2018) 122, 122.

[15] Joshua Paine, 'Failure to Take Reasonable Environmental Measures as a Breach of Investment Treaty?' (2017) 18(4) *The Journal of World Investment & Trade* 745; James J Nedumpara and Aditya Laddha, 'Human Rights and Environmental Counterclaims in Investment Treaty Arbitration' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020).

[16] Diane A Desierto (ed), *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford University Press, 2015) 310, citing Diane A Desierto, 'Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses' (2012) 9(2) *Manchester Journal of International Economic Law* 162; Diane A Desierto, 'Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment during Economic Crises' (2013) 10(1) *Transnational Dispute Management* 1, 10; Riccardo Pavoni, 'Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009); Vivian Kube and E U Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11(1) *Asian Journal of WTO and International Health Law and Policy* 65.

Some researchers conclude that there is insufficient policy/regulatory space in existing investment treaty law.[19] Conversely, some scholars hold that arbitral tribunals only consider whether aggrieved investors are entitled to compensation due to state measures, without prejudice to the regulatory power of respondent states.[20] Other scholars note investment cases in which foreign investors have lost their claims against public interests,[21] emphasising that arbitral tribunals have applied a balanced approach (eg proportionality analysis) to review state measures and balance the interests of foreign investors and respondent states, or have shown considerable deference to host states.[22] Some researchers express a concern that the inclusion of provisions safeguarding the right to regulate in investment treaties might defeat the very purpose of investment treaties – protecting foreign investors from the abuse of state power.[23] To reconcile investment protection obligations and state rights to regulate, some suggest a need for 'a quest for regulatory space' in international investment treaties,[24] or policy options to protect

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[17] Valentina Sara Vadi, 'Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage' (2015) 18(1) *Journal of International Economic Law* 51; Valentina Vadi, 'Culture Clash: Investor's Rights v Cultural Heritage in International Investment Law & Arbitration' (Conference Paper, Society of International Economic Law, 19 June 2012); Valentina Sara Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42(3) *Columbia Human Rights Law Review* 797.

[18] See generally Valentina Sara Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 452; Tania Voon, 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18(4) *Journal of International Economic Law* 795; Catalina Sofia Rizo Massu, 'International Investment Law and the Right to Health' (2020) 47(1) *Revista Chilena de Derecho* 73.

[19] Tarcisio Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) 15(5–6) *The Journal of World Investment & Trade* 929.

[20] David Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties' (Working Paper, OECD, No 2017/02, 2017) 7–8, citing Charles N Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52(3) *Columbia Journal of Transnational Law* 689, 748.

[21] Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15(1) *Journal of International Economic Law* 223, 241; Stephan W Schill and Vladislav Djanic, 'International Investment Law and Community Interests' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) 221, 239.

[22] Benedict Kingsbury and Stephan W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 75; Thanh Tra Pham, 'The Impact of Treaty-Based Investment Protection upon Host States' Regulatory Autonomy' (PhD Thesis, Katholieke Universiteit Leuven, 2011); Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v Uruguay*' (2017) 14(2) *Brazilian Journal of International Law* 95; Attila Tanzi, 'On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector' (2012) 11(1) *The Law and Practice of International Courts and Tribunals* 47. See also Schill and Djanic (n 21) 237–9.

[23] Gaukrodger (n 20) 7.

[24] Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements (2010) 13(4) *Journal of International Economic Law* 1037; Catharine Titi (ed), *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014); Talkmore Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' (2019) 20(2) *Oregon Review of International Law* 437; Yosra Abid, 'The Quest for Domestic Regulatory Space in the Investment Chapter

regulatory autonomy,[25] or smart flexibility clauses based on economic contract theory.[26] Others calls for harmonising investment treaty law and other international public law – such as human rights law or environmental law – from an integrated systems perspective,[27] 'reshaping the purpose' of international investment law,[28] 'reconceptualizing international investment law',[29] or directing international investment law towards sustainable developments.[30]

Separately from the ongoing controversy in the academic field, policymakers in many countries have adopted differing policies to respond to the issue of public policies being challenged by foreign investors. To date, at least 110 countries – with recent additions being South Africa, Colombia, Germany, Thailand and Indonesia – have reviewed the contents of their existing treaties, including investment protection provisions and rights to regulate, with some additionally conducting risk and impact assessments of their investment treaty obligations with respect to state regulatory power.[31]

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of the Comprehensive and Progressive Trans-Pacific Partnership' (2020) 27 *Willamette Journal of International Law and Dispute Resolution* 28;

[25] Andrew Mitchell and Elizabeth Sheargold, 'Protecting the Autonomy of States to Enact Tobacco Control Measures under Trade and Investment Agreements' (Research Paper, October 2014) <https://www.researchgate.net/publication/266971092_Protecting_the_Autonomy_of_States_to_Enact_Tobacco_Control_Measures_under_Trade_and_Investment_Agreements>.

[26] Anne van Aaken, 'Smart Flexibility Clauses in International Investment Treaties and Sustainable Development: A Functional View' (2014) 15(5–6) *Journal of World Investment & Trade* 827.

[27] Abdullah Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11(4) *The Journal of World Investment & Trade* 539; Julie Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54(2) *Virginia Journal of International Law* 367.

[28] Howard Mann, 'The Right of States to Regulate and International Investment Law' (Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, 2002).

[29] Kate Miles, 'Reconceptualising International Investment Law: Bringing the Public Interest into Private Business' in Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press, 2010) 295.

[30] Markus W Gehring and Avidan Kent, 'Sustainable Development and IIAs: From Objective to Practice' in Armand De Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Taylor & Francis Group, 2012) 284; Gudrun Monika Zagel, 'Achieving Sustainable Development Objectives in International Investment Law' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020) 1; Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011); Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press, 2004); Ilze Dubava, 'The Future We Want: Sustainable Development as an Inherent Aim of Foreign Investment Protection' in George Ulrich and Ineta Ziemele (eds), *How International Law Works in Times of Crisis* (Oxford University Press, 2019) 173; Rahim Moloo and Jenny J Chao, 'International Investment Law and Sustainable Development: Bridging the Unsustainable Divide' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press, 2014) 273.

[31] Investment and Enterprise Division, UNCTAD, *Taking Stock of IIA Reform* (IIA Issues Note No 1, 2016) 7–8 ('*IIA Reform/2016*').

Policymakers further take different approaches to reconciling investment protection commitments and regulatory space in their old-generation treaties. The first policy option, used by several countries, is treaty amendments through protocols. Countries in Eastern Europe have amended their BITs to comply with EU law, such as by adding security and money transfer exceptions.[32] Canada and Chile have updated the investment chapter in their FTA three times, most recently in 2017 when they clarified existing obligations and reaffirmed the state's right to regulate.[33] The Republic of Korea and the US similarly signed an amendment to their 2007 FTA in 2018 to clarify, inter alia, the meaning of minimum standard of treatment.[34] The *ECT* parties are conducting different negotiations to modernise the *ECT* (Modernisation of the *ECT*).[35] Other countries prefer the joint interpretation of existing treaty provisions to treaty amendments; examples are the parties to the *Bangladesh-India BIT* (2009), *Canada-Colombia FTA* (2008), *Colombia-France BIT* (2014), or the *Canada-EU (CE)TA* (2016) where the parties signed a Joint Interpretative Notes Declaration/Instrument in 2017.[36] Similarly, the parties to the *Colombia-India BIT* (2009) signed a Joint Interpretative Declaration in 2018.[37] Notably, India proactively composed a Joint Interpretative Statement in 2016 and proposed it to its 25 treaty partners.[38] Some treaty parties agree to establish an authoritative body having authority to issue binding clarification of treaty provisions, if necessary, as occurred under the *Australia–Peru FTA* (2018), *Belarus–India BIT* (2018), *Central America–Republic of Korea FTA* (2018), *CPTPP* (2018), *EU–Singapore IPA* (2018), *United States-Mexico-Canada Agreement – USMCA* (2018), the 2018 amendments to the *Korea (Republic)–US FTA* (2007), the Netherlands model BIT (2018) and the *Vietnam-EU IPA* (2019).[39] The final approach, used by many countries, is to bilaterally or unilaterally terminate 'outdated' agreements, or to replace them with new agreements. Countries that have taken this approach include India with 67 BIT terminations, Indonesia with 31 BIT terminations, Ecuador with 25 BIT terminations, Poland with 23 BIT terminations, and

[32] See UNCTAD, *Investment and The Digital Economy* (Word Investment Report, 7 June 2017) ('*WIR/2017*') 133–4; Investment and Enterprise Division, UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties* (2 IIA Issues Note No 2, 2017) 10–1 ('*IIA Reform/2017*').
[33] See UNCTAD, *Investment and New Industrial Policies* (Word Investment Report, 06 June 2018) ('*WIR/2018*') 99–100; Investment and Enterprise Division, UNCTAD, *Recent Developments in the International Investment Regime* (IIA Issues Note No 1, 2018) 7 ('*IIA Development/2018'*).
[34] UNCTAD, *Special Economic Zones* (Word Investment Report, 12 June 2019) 110 ('*WIR/2019*').
[35] Ibid.
[36] See *WIR/2018* (n 33) 98-9; *IIA Development/2018* (n 33) 6–7; *WIR/2019* (n 34) 109–10.
[37] *WIR/2019* (n 34) 110.
[38] See *WIR/2018* (n 33) 98; *IIA Development/2018* (n 33) 6.
[39] See collectively *WIR/2018* (n 33) 99; *IIA Development/2018* (n 33) 7; *WIR/2019* (n 34) 110; *Vietnam-EU IPA* art 4.1.

EU members with the termination of their intra-EU BITs.[40] By the end of 2019, at least 349 treaty terminations had come into effect (effective terminations).[41]

In addition to amending existing treaty provisions in three ways mentioned above, many countries have begun negotiating and including provisions on the state's right to regulate and sustainable development into their new agreements or (new) treaty models. From 2011 to 2019, at least 164 of 300 IIAs concluded contained sustainable development-oriented features or -friendly provisions.[42] Among them, 120 IIAs have preambles referring to the protection of health and safety, labour rights, the environment or sustainable development; 105 have general exceptions (for example, for the protection of human, animal or plant life or health, or the conservation of natural resources); and 84 explicitly address standards (ie parties should not relax health, safety or environmental standards to attract investment).[43] Recently, countries including Brazil, Canada, Colombia, Egypt, Germany, India, Indonesia, the Netherlands, Norway and Saudi Arabia have inserted similar features/provisions into draft or new model IIAs.[44] The these reactions among policymakers illustrate that the concern over the limitation imposed by investment protection obligations on the state's right to regulate is real, even if some countries have taken a 'wait and see' approach.

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[40] Note that this figure is calculated by the author from data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/international-investment-agreements>.

[41] UNCTAD, *International Production Beyond the Pandemic* (World Investment Report, 16 Jun 2020) 106 ('*WIR/2020*').

[42] Note that the total number is calculated by the author from figures provided by UNCTAD's World Investment Reports from 2012 to 2020 and by UNCTAD's IIA Issues Notes if necessary: 20 out of 40 IIAs concluded in 2011; 17 out of 30 IIAs concluded in 2012; 18 out of 44 IIAs concluded in 2013; 18 out of 31 IIAs concluded in 2014; 16 out of 31 IIAs concluded in 2015; 18 out of 37 IIAs concluded in 2016; 13 out of 18 IIAs concluded in 2017; 29 out of 40 IIAs concluded in 2018; and 15 out of 22 IIAs concluded in 2019. See respectively, UNCTAD, *Towards a New Generation of Investment Policies* (World Investment Report, 05 July 2012) ('*WIR/2012*') 84, 90; UNCTAD, *Global Value Chains: Investment and Trade for Development* (Word Investment Report, 27 July 2013) ('*WIR/2013*') 101–2; UNCTAD, *Investing in the SDGs: An Action Plan* (Word Investment Report, 24 June 2014) ('*WIR/2014*') 116–7; UNCTAD, *Reforming International Investment Governance* (Word Investment Report, 24 June 2015) ('*WIR/2015*') 107, 112; UNCTAD, *Investor Nationality: Policy Challenges* (World Investment Report, 21 June 2016) ('*WIR/2016*') 31 and *IIA Reform/2016* (n 31) 19; *WIR/2017* (n 32) 111, 119; *WIR/2018* (n 33) 88, 95; *WIR/2019* (n 34) 99, 105; *WIR/2020* (n 41) 106, 112.

[43] For the year 2011, see *WIR/2012* (n 42) 90; *IIA Reform/2016* (n 31) 15. For the year 2012, see *WIR/2013* (n 42) 102; *IIA Reform/2016* (n 31) 16. For the year 2013, see *WIR/2014* (n 42) 116–7; *IIA Reform/2016* (n 31) 17. For the year 2014, see *WIR/2015* (n 42) 112–3; *IIA Reform/2016* (n 31) 18. For the year 2015, see *IIA Reform/2016* (n 31) 19. For the year 2016, see *WIR/2017* (n 32) 119, 121. For the year 2017, see *WIR/2018* (n 33) 95–7; *IIA Development/2018* (n 33) 4–5. For the year 2018, see *WIR/2019* (n 34) 105, 107; Investment and Enterprise Division, UNCTAD, *Taking Stock of IIA Reform: Recent Development* (IIA Issues Note No 3, 2019) 2, 10 ('*IIA Reform/2019*'). For the year 2019, see *WIR/2020* (n 41) 112–3, 115; Investment and Enterprise Division, UNCTAD, *The Changing IIA Landscape: New Treaties and Recent Policy Developments* (IIA Issues Note No 1, 2020) 6, 9 ('*IIA Development/2020*').

[44] *IIA Reform/2016* (n 31) 5–7; *WIR/2019* (n 34) 100. For the India Model BIT and Model SADC BIT, see also Sonia E Rolland and David M Trubek (eds), *Emerging Powers in the International Economic Order: Cooperation, Competition and Transformation* (Cambridge University Press, 2019) 104, 107–8.

Beyond the context of individual countr(ies), many discussions have been held at the multilateral level to reform international investment law. A series of forums took place between 2011 and 2012 to address the relationship between investment and sustainable development and the need to balance the interests of foreign investors and state parties, and to call for responsible (ie sustainable and ethical) investment. Examples include the 2011 Revision of the OECD Guidelines for Multilateral Enterprises, the 2011 Revision of the International Chamber of Commerce's Guidelines for International Investment, the Doha Mandate adopted at the UNCTAD XIII Ministerial Conference 2012, and the 2012 Rio+ Conference together with the Outcome Document titled 'The Future We Want'.[45] Additionally, the OHCHR's 2011 Guiding Principles on Business and Human Rights offer non-binding recommendations for countries protecting their regulatory ability to prevent negative effects of economic/investment activities on human rights.[46] In 2012, the Secretariat of the Commonwealth prepared a handbook 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries', which lists policy options for different treaty provisions including those creating regulatory space for states.[47]

Since 2015 when UNCTAD published the 'Investment Policy Framework for Sustainable Development',[48] all principles and steps to develop investment policies at the national and international levels aimed at inclusive growth and sustainable development has become systematic and available for the countries to references. According to the Framework, 'the overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development'.[49] To achieve this overarching objective, ten core principles need to be observed. The fourth and fifth principles are worth mentioning here, namely, that investment policies should be balanced in setting out rights and obligations of States and investors in the interests of development for all (balanced rights and obligations), and that each country has the sovereign right to establish entry and operating conditions for foreign investment, subject to international commitments, in the interest of

[45] *WIR/2012* (n 42) 91.
[46] The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011).
[47] J Anthony Van Duzer, Penelope Simons and Graham Mayeda (eds), *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, 2012).
[48] UNCTAD, *Investment Policy Framework for Sustainable Development* (2015).
[49] Ibid 28, 30.

the public good and to minimise potential negative effects (the state's right to regulate).[50] To support reform of investment policies at the international level, UNCTAD adopted a 'Reform Package for International Investment Regime' in 2017, and revised it in 2018.[51] This Reform Package identifies five priority areas for IIA reform; the issue of safeguarding the right to regulate for public interests while providing investment protection is at the top of the list.[52] These UNCTAD publications play a major role in helping countries across the world reconcile investment obligations with the state's right to regulate and to pursue sustainable development objectives with investment policies.

The concern about insufficient regulatory space has become explicit in the present time of the COVID-19 pandemic, as countries across the world have adopted various measures to protect public health and deal with the economic and social impact of the pandemic. Such measures, which might affect the operations of foreign-owned enterprises, include mandatory production,[53] temporary export bans on medical equipment and medications,[54] financial or fiscal support to domestic suppliers such as SMEs,[55] and acquisition of equity in companies, including nationalisation.[56] Such concern is evidenced by the fact that

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[50] Ibid.

[51] UNCTAD, *Reform Package for the International Investment Regime* (2017); UNCTAD, *Reform Package for the International Investment Regime* (2018) ('*IIA 2018 Reform Package*').

[52] *IIA 2018 Reform Package* (n 51) 22–4. The other four key areas include (ii) reforming investment dispute settlement, (iii) strengthening the investment promotion and facilitation function of IIAs, (iv) ensuring investor responsibility, and (v) enhancing systemic coherence. Regarding the area of safeguarding the right to regulate for public interests, the *IIA 2018 Reform Package* clarifies that:

> While IIAs contribute to a favourable investment climate, they inevitably place limits on contracting parties' sovereignty in domestic policymaking. Given the rising concerns that such limits go too far, especially if combined with effective enforcement, IIA reform needs to ensure that countries retain their right to regulate for pursuing public policy interests, including sustainable development objectives (e.g. for the protection of the environment, the furtherance of public health or other social objectives) (WIR12). Safeguarding the right to regulate may also be needed for implementing economic or financial policies (WIR11). At the same time, however, policymakers must be vigilant that providing the necessary policy space for governments to pursue bona fide public goods does not inadvertently provide legal cover for investment protectionism or unjustified discrimination.

[53] Eg, the US's 2020 Order to compel a car manufacturer (General Motors) to switch its production to medical ventilators; Spain's Royal Decree 463/2020 to intervene and temporarily occupy factories, production units and private health care facilities; or Switzerland's similar legislation granting the Federal Council power to order both mandatory production and confiscation of public health-related goods: see UNCTAD, *Investment Policy Responses to the COVID-19 Pandemic* (Investment Policy Monitor Special Issue, 4 May 2020) 9 ('*Policy Responses to Pandemic*').

[54] According to UNCTAD's research, as of 14 April 2020, at least 47 countries have implemented one or more measures affecting exports of products or sub-products used in the public health response to the COVID-19 outbreak, including medical supplies (such as masks, gloves and gowns) and PPE (Personal Protective Equipment) in general, sanitiser products, medical ventilators and other devices, drugs, pharmaceutical ingredients and raw materials for PPE manufacturing: see *Policy Responses to Pandemic* (n 53) 9.

[55] Eg, the government of Australia is providing temporary cash flow support of up to USD100,000 for eligible small and medium enterprises (SMEs) that employ staff to help with their cash flow so that they can keep operating, pay their rent and other bills, and retain staff: see *Policy Responses to Pandemic* (n 53) 7.

[56] Eg, Italy's nationalisation of its national airline (Alitalia): see *Policy Responses to Pandemic* (n 53) 6.

UNCTAD highlights how relevant provisions might touch on COVID-related measures including expropriation, fair and equitable treatment (FET), free transfer treatment (FTT) and national treatment (NT).[57] From its perspective, the purposes of IIAs – to provide legal stability and predictability to foreign investors – can 'place constraints on government measures',[58] and '[t]his is especially true for those IIAs that lack the necessary exceptions and refinements to safeguard policy space'.[59] To forestall a surge in ISDS cases, the International Institute for Sustainable Development (IISD) highlights the need for collective action among countries,[60] and the Columbia Center on Sustainable Investment (CCSI) has proposed an immediate and complete moratorium on, and permanent restriction of, all arbitration claims related to COVID-19.[61] UNCTAD also provides a rapid support for countries wishing to discuss accelerating IIA reform to better respond to today's challenges while maintaining investment protection in the post-pandemic period. The UNCTAD's International Investment Agreements Reform Accelerator was launched on 12 November 2020 for this purpose.[62]

In Vietnam's context, there is an implicit concern among policymakers about the negative effect of treaty investment obligations on the state's right to regulate, evidenced by various recent conferences organised by central bodies and institutions in Vietnam. It should be noted that Vietnam is considered to be a dynamic country in concluding international investment agreements. Since 1990, Vietnam has signed 70 BITs (with 51 of them enforced), and 15 other IIAs – regional investment agreements and trade agreements with investment chapters (with nine of them enforced).[63] Despite their long history, Vietnam's IIAs only began to attract attention from scholars and policymakers after the government exposed to investor-state claims between 2010 and 2013, namely *Mckenzie v Vietnam*,[64] *Dialasie v Vietnam*[65] and *RECOFI v Vietnam*.[66] The number of such disputes

[57] See *Policy Responses to Pandemic* (n 53) annex. See also *IIA Development/2020* (n 43) 5; UNCTAD, *Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019* (IIA Issues Note No 2, 2020) 6 ('*ISDS Review/2020*').
[58] *Policy Responses to Pandemic* (n 53) 11.
[59] Ibid.
[60] *IIA Development/2020* (n 43) 5; *ISDS Review/2020* (n 57) 6.
[61] Ibid.
[62] UNCTAD, *International Investment Agreements Reform Accelerator* (United Nations, 2020) ('*IIA Reform Accelerator*').
[63] See below Part IV(C) Table 1.3. See also apps 1.1, 1.2.
[64] *Michael McKenzie v Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 11 December 2013) ('*McKenzie v Vietnam*').
[65] *Dialasie SAS v Socialist Republic of Vietnam (Award) (*UNCITRAL Arbitral Tribunal, 17 November 2014) ('*Dialasie v Vietnam*').
[66] *RECOFI v Vietnam (Final Award)* (UNCITRAL Arbitral Tribunal, 28 September 2015).

has now increased to eight, with one settled,[67] one discontinued,[68] two stopped at the jurisdiction stage,[69] one stopped at the merits stage[70] and three pending as of the time of writing.[71] Together with this increase in a number of arbitral challenges, many conferences have been taken place, focusing on two relevant topics: (i) investor-state dispute settlements (ISDS), and (ii) international investment dispute prevention and management. The first topic concerns current issues of different ISDS modes and the question of whether Vietnam should enter into the *ICSID Convention*. It has been discussed in numerous conferences, including the most notable forums 'Investor-State Dispute Settlements: The Position and Role of Ministry of Justice and Corporation Scheme among Ministries and National and Subnational Bodies' (organised by Vietnam's Ministry of Justice (MOJ) and Star Plus in July 2012), and 'International Economic Dispute Settlements in the Process of Vietnam's Economic Integration' (hosted by the MOJ in 2013).[72] The second topic of dispute prevention and management has also been discussed in many conferences organised by the MOJ and Vietnam's Ministry of Planning and Investment (MIP). These conferences include 'Prevention and Settlement of International Investment Disputes' (convened by the MOJ and USAID in October 2015), a series of training workshops titled 'Capacity Building on Prevention and Settlement of International Investment Disputes' (or similar kinds) started from 2016,[73] 'International Exchange of Experiences on Investment Dispute Prevention' (organised by the MIP and Australian Department of Foreign Affairs and Trade in May 2017), 'Prevention and Mitigation of International Investment Disputes' (convened by the MIP and MOJ in June 2018), and 'Consultation Workshop on Enhancing the Effectiveness of Investor-State

[67] *Trinh Vinh Binh and Binh Chau Joint Stock Company v Socialist Republic of Vietnam (I) (Award)* (UNCITRAL Arbitral Tribunal, 14 March 2007) ('*Trinh and Binh Chau v Vietnam (I)*').
[68] *Bryan Cockrell v The Socialist Republic of Vietnam (Discontinued)* (PCA Arbitral Tribunal, Case No 2015-03) ('*Cockrell v Vietnam*').
[69] *Michael McKenzie v Vietnam* (n 64)); *RECOFI v Vietnam* (n 66).
[70] *Dialasie v Vietnam* (n 65).
[71] *Trinh Vinh Binh and Binh Chau JSC v Vietnam (II) (Award)* (PCA Arbitral Tribunal, Case No 2015-23, 10 April 2019) ('*Trinh and Binh Chau v Vietnam (II)*'); *ConocoPhillips and Perenco v Vietnam (Pending)* (UNCITRAL Arbitral Tribunal); *Shin Dong Baig v Socialist Republic of Vietnam (Pending)* (ICSID Arbitral Tribunal, ICSID Case No ARB(AF)/18/2) ('*Baig v Vietnam*').
[72] For additional conferences hosted by academic institutions, see, eg, 'Legal Practice Concerning International Investment Dispute Settlement Mechanisms under the UNCITRAL and the ICSID: Experience for Vietnam (Conference, Ho Chi Minh City University of Law, Graduate School of Law (Nagoya University) and Faculty of Law (Kobe University), March 2018); 'Mechanisms for Resolving International Investment Disputes in Accordance with Vietnam's Laws and Legislation and New-Generation Free Trade Agreement Entered into by Vietnam' (Conference, Faculty of International Trade and Business Law (Hanoi Law University), September 2019); 'State-Investor Dispute Settlements under Investment Protection Treaties and Free Trade Agreements to which Vietnam is a Member' (Conference, Vietnam Academy of Social Sciences, Institute of State and Law, Vietnam, October 2020).
[73] Note that the training workshops was first convened by the MOJ and USAID in August 2016 in Ninh Binh province and in Ho Chi Minh city, then by the MOJ, USAID and IFC in November 2019 in Ha Noi capital, and by the MOJ in August 2020 in Binh Duong province.

Dispute Settlement in Vietnam' (arranged by the MOJ and the United Nations Development Programme in July 2020). Recently, Vietnam's Ministry of Industry and Trade has launched a series of training programmes on commitments under the *CPTPP* and the *EVFTA* with the first one in May 2020, which aims at raising awareness and understanding of relevant actors. However, there has been no public discussion on the relationship between investment obligations and the state's right to regulate for public interests in Vietnam. The government of Vietnam has not published – and may not have undertaken – any impact assessment of investment treaties or a comprehensive review of the content of Vietnam's IIAs.[74]

The questions of (i) whether a general statement that contemporary international investment treaty law unduly constrains the state's right to regulate is true in the context of Vietnam, and of (ii) whether such law, particularly in relation to safeguarding the right to regulate for public interests, should be reformed in the context of Vietnam's IIAs, remain open to research. To answer these questions, specific legal and practical aspects need to be addressed first; they include: (a) the extent to which Vietnam's IIAs require state legislative measures to be compatible with individual and all obligation(s), or with individual or all treat(ies) in order to define the boundary between compatible and incompatible regulatory measures, or the boundary of policy space; (b) the extent of Vietnam's contemporary and future need to regulating domestic affairs, in order to define the boundary of the required policy space; and (c) whether, and to what extent, Vietnam's authorities have demonstrated regulatory chill and/or provided compensation/concessions for aggrieved foreign investors in consequence of treaty compliance? Taking a sole focus on the first (a) aspect, this thesis finds that there are a limited number of existing articles and studies directly or closely exploring different investment protection provisions and different areas of policy space in Vietnam's IIAs, particularly from position of Vietnam.[75] However, these have not comprehensively answered the question, acknowledging their different objectives and scopes. In other words, some outlines and areas have already sketched out in the literature, but many gaps remain and certain areas have not connected.

[74] See, eg, OECD, *Investment Policy Reviews: Vietnam 2018* (2018) 175 ('*Vietnam 2018 Review*'). It provides that '[t]he analysis of investment treaties suggests that Vietnam might wish to consider reviewing its existing agreements to ensure that they well-reflect government intent and emerging sound practices in recent treaty policy'.

[75] Note that any work that refers to provisions in Vietnam's IIAs rather than analyses them in drawing final findings is not listed.

On the topic of expropriation and non-expropriation, Tran Thi Thuy Duong and Tran Viet Dung respectively examine expropriation provisions under Vietnam's BITs (i) and those under intra-ASEAN BITs (including Vietnam's BITs with certain other ASEAN members) and the *ACIA* (ii).[76] In the first article, Tran Thi Thuy Duong argues that Vietnam's BITs could cover a broad scope of expropriation and that measures in 'grey areas' would possibly amount to expropriation when otherwise unstated.[77] Tran Viet Dung additionally argues, in the second article, that Vietnam's BITs with other ASEAN members provide broader protection of foreign investments than does the *ACIA*. However, to support their main points, both articles provide the examples of expropriation provisions rather than all expropriation provisions in Vietnam's BITs or intra-ASEAN BITs, or relevant figures (eg provision articles or classifications). Additionally, the first article bases its discussion of the 'grey area' only on expropriation provisions, without considering treaty exceptions and treaty scopes, while the second focuses on the prominent features of examined provisions rather than going into the normative interaction between/among expropriation, public welfare measures and treaty exceptions, particularly under the *ACIA*.

In the matter of FET and non-FET, Dao Kim Anh provides an overview of FET provisions in Vietnam's IIAs, focusing mainly on the examination of arbitral cases related to foreign investors' legitimate expectations.[78] The article argues that state measures which frustrate foreign investors' legitimate/reasonable expectations would likely not lead to a violation of FET under the *Vietnam-EU IPA* and *CPTPP* but might lead to a violation of FET under other IIAs. However, the article examines the explicit clause on the

[76] Tran Thi Thuy Duong, 'Provisions on Expropriation of Foreign Investors' Property Rights in Bilateral Investment Treaties' [2015] (2) *Legislative Studies Journal* 9; Tran Viet Dung, 'Implementation of the ASEAN Comprehensive Agreement: Issues on the Overlap of Vietnam's Foreign Investment Protection Commitments' [2017] (4) *Vietnamese Journal of Legal Science* 11.

[77] The grey area in the article refers to unclear situations of whether measures to, inter alia, protect the environment, public health, prevent crimes, increase taxes, or administrate competition would be considered expropriation with compensation: see Tran Thi Thuy Duong (n 76) 15.

[78] Dao Kim Anh, 'Protecting Investors' Legitimate Expectations in International Investment Law and Some Notes for Vietnam' [2018] (4) *Jurisprudence Journal* 3. Note that Tuan's thesis is a significant work on the protection of the FET standard under international investment law in Vietnam; however, the thesis extracts a common understanding of FET, rather than analysing FET provisions in Vietnam, so FET in general or under Vietnam's IIAs is perceived as including the protection of legitimate expectation, transparency, denial of justice, arbitrariness and/or discrimination and good faith, vigilance and protection obligation: Nguyen Van Tuan, 'The Protection of the Fair and Equitable Treatment Standard under International Investment Law: a Case Study of Vietnam' (PhD Thesis, La Trobe University, 2016). Other articles refer to FET provisions in Vietnam's IIAs but do not closely address the question: see, eg, Nguyen Thu Dung and Cao Thi Le Thuong, 'Fair and Equitable Treatment in International Dispute Settlements between Foreign Investors and Host States' [2017] (8) *Journal of State and Law* 45; Nguyen Xuan My Hien, 'Evolution of the Standard of Fair and Equitable Treatment in New Generation Free Trade Agreements' [2019] (6) *Vietnamese Journal of Legal Science* 48.

protection of foreign investors' legitimate expectations under FET provisions instead of analysing the language of all FET provisions.

On the subject of FTT and restrictions on investment-related transfers, Nguyen Thi Anh Tho is a rare contribution. Even though the article mainly examines international cases related to FTT, it is worth taking into account here.[79] Based on the article, it could be argued that – depending on the various IIAs – state measures must protect non-exhaustive or exhaustive investment-related transfers, and that restrictions on transfers could be clearly accepted under a treaty having limitations and could be justified by exceptions under the *IMF Agreement*, *GATT*, *GATS* or the plea of necessity under CIL. However, this article does not survey all FTT provisions under Vietnam's IIAs to identify the relative popularity of open verses the closed approaches, or of FTT provisions with versus without exceptions and limitations. Additionally, the findings are based only on FTT provisions, not on treaty exceptions for security interests or public order.

In the area of NT and reasonable nationality-based discriminations, Nguyen Mai Linh explores NT provisions in the *CPTPP* and *Vietnam-EU IPA*.[80] The article points out that state measures might be governed by a broad NT application, brought about by a possible broad interpretation of NT provision under the *CPTPP*, which is arguably similar to that under the *NAFTA* and the *Argentina-US BIT*, or by a more limited NT application, brought about by limitations in NT provisions under the *Vietnam-EU IPA*. However, the finding is, to a certain extent, limited to the analysis of NT portions, having not considered treaty exceptions or treaty scopes.

On the topic of investment protection obligations and the explicit policy space for environment protection, Nguyen Thanh Tu, Nguyen Thi Nhung and Le Thi Ngoc Ha, and Tran Thang Long provide overviews of environment-related exceptions in Vietnam's IIAs.[81] In the first article, scholars identify a pattern of treaty provisions explicitly

[79] Nguyen Thi Anh Tho, 'Comments on Cases related to the Principle of Free Transfers of Fund in International Investment Law' [2020] (10) *Journal of State and Law* 60.
[80] Nguyen Mai Linh, 'Disputes Concerning the Principle of National Treatment in International Investment Law and Lessons for Vietnam' [2020] (2) *Journal of International Studies* 225.
[81] Nguyen Thanh Tu, Nguyen Thi Nhung and Le Thi Ngoc Ha, 'Environmental Protection from a Perspective of Investor–State Dispute Settlement: Implications for Vietnam' [2017] (3) *Vietnamese Journal of Legal Science* 3; Tran Thang Long, 'Application of Environmental Exceptions in International Investment Law and Some Comparison with Vietnamese Practice' [2019] (4) *Legislative Studies Journal* 54–64. Some other articles refer to environment-related exceptions in Vietnam's IIAs but do not closely address the question: see, eg, Nguyen Thi Lan Huong, 'Linking the Standard of "Fair and Equitable Treatment" to the Environmental Protection Objective in the Comprehensive and Progressive Agreement

granting Vietnam a policy space for environmental protection together with space for investment protections in Vietnam's IIAs. This is expanded to some extent in the second article, which analyses environment-related exceptions in the *ACIA*, ASEAN's IIAs, *Vietnam-Korea FTA* and *Vietnam-EU IPA*. However, while the first article allows little room for analysis of the mentioned provisions, the second skips over the effect of environmental protections indirectly accorded by exceptions for human, animal or plant life or health, or the conservation of non-renewable natural resources.

In the matter of investment protection obligations and the explicit policy space for human rights, Cuc Thi Kim Nguyen and Ha Thi Ngoc Le, and Nguyen Thi Lan Huong, Tran Thi Thuan Giang and Ngo Nguyen Thao Vy make a number of salient arguments. The first article analyses human rights-related exceptions under ASEAN's IIAs through a comparison with those under EU's IIAs.[82] The authors argue that the former explicitly grant less policy space for treaty members to protect and promote human rights of host state populations than do the latter. The second article examines expressions of public power doctrine in the *CPTPP* and *Vietnam-EU IPA*; such expressions arguably help Vietnam to protect public health, especially in the event of a pandemic. However, both articles focus only on the explicit policy space for human rights and public health respectively in the mentioned treaties.

In addition to the above articles, two publications produced by the OECD in 2009 and 2018 provide excellent overviews of striking features under Vietnam's IIA system at the time of publication.[83] The 2018 OECD publication mentions the phrases '[t]he analysis of investment treaties'[84] and '[t]he review of the substantive and procedural provisions in Vietnamese investment treaties'[85] and specifies that '[t]he review analysed treaties available on different databases (ASEAN Briefing, OECD, UNCTAD)'.[86] However, the

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for Trans-Pacific Partnership – Some Recommendations for Vietnam' [2019] (6) *Vietnamese Journal of Legal Science* 82; Ngo Nguyen Thao Vy, 'Evaluation of Provisions on Environmental Protection in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership – Experience for Vietnam as a Host State' [2019] (6) *Vietnamese Journal of Legal Science* 71.

[82] Cuc Thi Kim Nguyen and Ha Thi Ngoc Le, 'Human Rights of Host State Population in EU and ASEAN International Investment Agreements with Asia-Pacific Countries' [2020] (5-6) *International Business Law Journal* 591; Nguyen Thi Lan Huong, Tran Thi Thuan Giang and Ngo Nguyen Thao Vy, 'Reviewing Police Power Doctrine in Vietnam's New Generation FTAs and the Possibilities of Applying Measures to Protect Public Health' (Conference Paper, Ho Chi Minh City University of Law, October 2020) 227.

[83] OECD, *Investment Policy Reviews: Vietnam 2009* (2009) ('*Vietnam 2009 Review*'); *Vietnam 2018 Review* (n 74).

[84] *Vietnam 2018 Review* (n 74) 175.

[85] Ibid 165.

[86] Ibid 179.

research for that analysis/review finds that there has been no published review of Vietnam's treaty contents on the ASEAN Briefing website, five- and fifteen-page overviews respectively in the 2009 and 2018 OECD publications,[87] and one two-page overview in the 2009 UNCTAD publication.[88] No public comprehensive analysis of Vietnam's treaty content has been found.

Given the above review, and the need for fill in the 'blank' spaces and establish the connections between/within the various issues mentioned above, the present study offers an enormous examination of investment protection provisions relating to FET, expropriation, FTT, NT and treaty exception provisions, and their interactions under Vietnam's IIAs. The study aims to define the possible extent to which legislative measures must comply with individual obligation(s) and/or individual treaty line(s). Expected findings contributes to clarifying the relationship between Vietnam's IIAs and the state's right to regulate (the first-mentioned (i) question) and providing guidelines for policymarkers in composing appropriate policy approaches (the second-mentioned (ii) question).

[87] *Vietnam 2009 Review* (n 83) 25–9; *Vietnam 2018 Review* (n 74) 164–178.
[88] UNCTAD, *Investment Policy Review: Vietnam* (2009) 41–2 ('*Vietnam Review*').

II RESEARCH QUESTION

To fill the gap in knowledge identified in the previous section, this thesis investigates the extent to which Vietnam's contemporary IIAs require legislative measures to be compatible with different investment protection obligations from a substantive perspective. To this end, three subsidiary questions are addressed:

(i) What is the context of investment protection provisions governing substantive aspects of legislative measures in Vietnam's IIAs? (Chapter 2)
(ii) What are the substantive requirements and/or qualifications for legislative measures possibly imposed by provisions on investment protections in Vietnam's IIAs, including fair and equitable treatment, (non-)expropriation, free transfer treatment and national treatment? (Chapters 3, 4, 5 and 6).
(iii) What are the substantive qualifications for exceptional legislative measures possibly imposed by provisions on treaty exceptions in Vietnam's IIAs, including those for security interests and public interests? (Chapters 7 and 8).

Having addressed these three subsidiary questions, this thesis ultimately finds that Vietnam's contemporary IIAs impose various thresholds of substantive requirements and qualifications for legislative measures to be compatible with individual investment protection obligation(s) and with individual treaty line(s) (Chapter 9 Part I). Based on these findings, the thesis takes a further step in making an argument related to the limitation of Vietnam's IIAs on the state's right to regulate (Chapter 9 Part II(A)), and then to provide a detailed map for policymakers in Vietnam to compose appropriate options for treaty implementation, negotiation and reform (Chapter 9 Part II(B)), and a frame for policymakers in general to identify the regulatory space in investment treaties (Chapter 9 Part II(C).

In comparison with general usage, the phrases 'substantive requirements' and 'substantive qualifications' have, in this thesis, specific meanings. 'Substantive requirements' here refers to requirements imposed by investment protection obligation provisions. Legislative measures that meet substantive requirements are those that are fair and equitable, non-expropriatory, non-restrictive, or non-discriminatory. 'Substantive qualifications', on the other hand, refers to those qualifications allowed by way of exception to specific investment protection obligation(s) and treaty exceptions to all

obligations studied. Unfair and inequitable, expropriatory, restrictive or discriminatory measures could be accepted as meeting substantive qualifications, regardless of the fact that they do not meet substantive requirements.

III Research Methodology

A *Data Collection by Research Synthesis and In-depth Interviews*

1 *Number of IIAs Studied*

To answer the three subsidiary questions, this study synthesises and analyses legal provisions in Vietnam's IIAs.

As of May 2021, Vietnam had signed 85 IIAs (70 BITs and 15 other IIAs), including 60 enforced, seven terminated and 18 unenforced agreements (Table 1.3). Of the 70 signed BITs, there are 51 enforced, six terminated and 13 unenforced treaties. Differing numbers and statuses of Vietnam's BITs are provided by (i) the UNCTAD Investment Policy Hub[89] and by (ii) Vietnamese authorities.[90] According to the first source, there are 67 BITs signed by Vietnam, including 49 enforced, five terminated and 13 unenforced agreements.[91] According to the second source, however, two agreements – the *Vietnam-Armenia BIT* and *Vietnam-Oman BIT* – that are unenforced according to the first source, have already come into force; this increases the number of enforced BITs to 50. Similarly, according the second source, the *Vietnam-Cuba BIT* (1995) was terminated and replaced by the *Vietnam-Cuba BIT* (2007), increasing the number of terminated BITs to six. Additionally, according to the second source two BITs – the *Vietnam-Qatar BIT* and *Vietnam-Palestine BIT* – were signed but have not yet come into force, meaning the number of unenforced BITs remains at 13. Regarding other Vietnam's IIAs than BITs, both sources provide figures of 15 signed, including nine enforced, one terminated and five unenforced.

[89] See the website of UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam>.
[90] Documents provided at the conference 'Capacity Building on Prevention and Settlement of International Investment Disputes' (held by the Ministry of Justice and USAID in August 2016 in Ninh Binh).
[91] Note that the *Vietnam-Korea BIT* (1993), the *Vietnam-Finland BIT* (1993) and the *Vietnam-Australia BIT* (1991) are replaced by *Vietnam-Korea BIT* (2003), the *Vietnam-Finland BIT* (2008) and the *CTPPP* (2018) respectively.

This study surveys all 60 of Vietnam's enforced IIAs (Table 1.1). There are 42 IIAs available in English on the website of UNCTAD Investment Policy Hub,[92] and provided by Vietnam's central authorities.[93] The remaining 18 IIAs are available in Vietnamese on two websites specialising in Vietnam's international relations and legal documents.[94] Notably, while the study uses the 60 enforced IIAs as the main sources for its analysis, to a certain extent it does examine the unenforced IIAs – *Vietnam-EU IPA*, *Vietnam-UK FTA* and *RCEP*, as well as two terminated BITs with India and Indonesia. The *Vietnam-EU IPA* is predicted to come into force in late 2021 and, when it does so, will replace Vietnam's 20 existing BITs with EU members.[95] The two terminated BITs are considered because they still have effect in relation to existing foreign investments from Indonesia for the period of 10 years from the date of termination on 07 January 2016, and from India for the period of 15 years from 23 July 2017, as a result of treaty sunset clauses.[96]

Table 1.1: Number of Vietnam's IIAs Studied

Treaty Type	**Vietnam's 60 IIAs Enforced**	
	Accessible Treaty Texts in English	Accessible Treaty Texts in Vietnamese
BITs	33	18
Other IIAs	9	0
Total	42[97]	18[98]

[92] Treaty texts available in English: see at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam>.
[93] Note that they are provided by Vietnam's Ministry of Planning and Investment and Ministry of Justice.
[94] Note that those websites are not run by Vietnam's governmental bodies but are considered highly reliable by academics. For Vietnam Chamber of Commerce and Industry's WTO Centre, see at <https://trungtamwto.vn/hiep-dinh-khac>. For Thu Vien Phap Luat Limited Company, see at <www.thuvienphapluat.vn>.
[95] See *Vietnam-EU IPA* art 4.20(4), n 1. The mentioned treaties refer to Vietnam's BITs with Italy, BLEU, France, Denmark, Germany, Sweden, Hungary, Netherlands, Poland, Romania, Austria, Latvia, Lithuania, Bulgaria, Czech, Estonia, Finland, Greece and Slovakia.
[96] See *Vietnam-Indonesia BIT* art XIII; *Vietnam-India BIT* art 15.2.
[97] They include *Vietnam-China BIT*; *Vietnam-Egypt BIT*; *Vietnam-Iceland BIT*; *Vietnam-Japan BIT*; *Vietnam-Kazakhstan BIT*; *Vietnam-Korea BIT (2003)*; *Vietnam-Kuwait BIT*; *Vietnam-Laos BIT*; *Vietnam-Malaysia BIT*; *Vietnam-Mongolia BIT*; *Vietnam-Mozambique BIT*; *Vietnam-Oman BIT*; *Vietnam-Philippines BIT*; *Vietnam-Singapore BIT*; *Vietnam-Thailand BIT*; *Vietnam-Turkey BIT*; *Vietnam-UK BIT*; *Vietnam-Venezuela BIT*; *Vietnam-Austria BIT*; *Vietnam-Bulgaria BIT*; *Vietnam-Czech BIT*; *Vietnam-Denmark BIT*; *Vietnam-Estonia BIT*; *Vietnam-Finland BIT (2008)*; *Vietnam-Greece BIT*; *Vietnam-Hungary BIT*; *Vietnam-Latvia BIT*; *Vietnam-Lithuania BIT*; *Vietnam-Netherlands BIT*; *Vietnam-Poland BIT*; *Vietnam-Romania BIT*; *Vietnam-Spain BIT*; *Vietnam-Sweden BIT*; *Vietnam-US BTA*; *ACIA*; *ASEAN-China IA*; *ASEAN-Korea IA*; *ASEAN-ANZ FTA*; *Vietnam-Korea FTA*; *Vietnam-EAEU FTA*; *CPTPP*; *ASEAN-Hong Kong IA*.
[98] They include *Vietnam-Argentina BIT*; *Vietnam-Armenia BIT*; *Vietnam-Belarus BIT*; *Vietnam-Cambodia BIT (amended 2012)*; *Vietnam-Cuba BIT (2007)*; *Vietnam-Iran BIT*; *Vietnam-Macedonia BIT*; *Vietnam-Russia BIT*; *Vietnam-Switzerland BIT*; *Vietnam-Taiwan BIT (1993)*; *Vietnam-Ukraine BIT*; *Vietnam-Uruguay BIT*; *Vietnam-Uzbekistan BIT*; *Vietnam-BLEU BIT*; *Vietnam-France BIT*; *Vietnam-Germany BIT*;

2 *Quantitative and Qualitative Synthesis*

The study combines quantitative and quantitative synthesis of the data collected from Vietnam's IIAs for the analysis. Quantitative synthesis takes the form of a survey of how many IIAs contain provisions on obligations such as non-expropriation, FET, FTT, NT, or on exceptions for security and/or public interests. The study also surveys how many IIAs contain similar provision formulations and how many obligations and exceptions occur in each treaty. Qualitative synthesis takes the form of assessing the convergence and divergence of provisions on obligations or exceptions and classifying provisions into groups. Criteria for the survey are flexibly adopted from UNCTAD's works on IIA issues and several other studies,[99] with modifications to suit the context of Vietnam's IIAs and the aim of this study. Qualitative synthesis also involves reviewing certain disputes between foreign investors and states resolved by international arbitral tribunals. Both number (size) and content (convergences and divergences) of treaty provisions are primary data for deducing findings through the process of legal and comparative analysis.

3 *In-depth Interviews*

The research also collected fieldwork data through in-depth interviews, following the ethical approval. The interviews involved only a small sample (ten) selected based on their roles in state organs. The approach was qualitative, with the focus being on the content of the discussions rather than the enumeration of specific themes. The interviewer both took written notes and used audio recording in the interviews depending on the interviewee's comfort level with each method. Audio recording was the preferred method as it enabled the interviewer to focus on the interviewee's responses and ask follow-up questions, probe answers, and attempt to pin down specifics. When interviews were

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Vietnam-Italy BIT; *Vietnam-Slovakia BIT*.

[99] UNCTAD, *National Treatment: UNCTAD Series on Issues on International Investment Agreements* (1999) ('*National Treatment*'); UNCTAD, *Transfer of Funds: UNCTAD Series on Issues on International Investment Agreements* (2000) ('*Transfer of Funds'*); UNCTAD, *The Protection of National Security in IIAs: UNCTAD Series on International Investment Policies for Development* (2009) ('*National Security*'); UNCTAD, *Expropriation: UNCTAD Series on Issues on International Investment Agreements II* (rev ed, 2012) ('*Expropriation*'); UNCTAD, *Fair and Equitable Treatment*: *UNCTAD Series on Issues on International Investment Agreements II* (rev ed, 2012) ('*Fair and Equitable Treatment'*); Prabhash Ranjan, 'India's International Investment Agreements and India's Regulatory Power as a Host Nation' (PhD Thesis, King's College London, 2012); Richard Karugarama Lebero, 'The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice' (PhD Thesis, University of Glasgow, 2012); Pakittah Nipawan, 'The ASEAN Way of Investment Protection: An Assessment of the ASEAN Comprehensive Investment Agreement' (PhD Thesis, University of Glasgow, 2015).

recorded, the author could also listen to them again at a later time. On the other hand, taking notes created a more informal and friendly environment for interviewees to share their opinions. Three interviewees were happy for their conversations to be recorded, while for the remainder the interviewer take notes. All interviewees were coded by number (1, 2, 3, etc) according to the interviewing sequence rather than by names or occupational roles. The data acquired from the interviews helps to articulate the practical context of Vietnam's IIAs and thus contributes to the policy options recommended by the study in chapter 9.

B *Data Analysis by Legal Analysis and Comparative Empirical Analysis*

1 Legal Analysis: Based on the VCLT's Interpretation Rules to Analyse Treaty Provisions

This study uses a textual approach to analyse treaty provisions, including those on FET, expropriation, FTT, NT and treaty exceptions. This textual approach follows the interpretations rules of customary international law (CIL) codified in Article 31 of the *Vienna Convention on the Law of Treaties (VCLT)*.[100] The *VCLT*'s interpretation rules have long been used by international arbitration tribunals/courts in interpreting IIAs and other international conventions.[101] Most importantly, they are expected to guide any process of interpretation or application of Vietnam's IIAs, given that Vietnam is party to the *VCLT* (since 20 October 2001) as are its 45 treaty partners.

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[100] *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'). The Article 31 on General Rules of Interpretation states:

> 1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) Any agreement relating to the treaty which was made between all parties in connexion with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.
> 4. Special meaning shall be given to a term if it is established that the parties so intended.

[101] Yen Hai Trinh (ed), *The Interpretation of Investment Treaties* (Brill Publisher, 2014).

According to Article 31(1) of the *VCLT*, every interpretation has recourse to the ordinary meaning of treaty terms unless treaty parties give a special meaning to them, and such ordinary meaning is not to be determined in the abstract but must be consistent with the context of the treaty and treaty object and purpose.[102] In other words, the 'ordinary meaning' of a treaty term and provision is based on the text of the provision, including the term, (textual element) and the context of the treaty (contextual element) and the objectives and purposes of the treaty (teleological element). It should be noted that these three elements are together engaged in one single interpretation process to define the 'ordinary meaning' of the provision rather than three separate interpretative processes.[103]

Applying the *VCLT*'s interpretation rules to the analysis of provisions in Vietnam's IIAs, the study first focuses on the text of the provision,[104] with the ordinary meaning of the terms obtained from dictionaries. The text of the provision may provide (i) clear meaning, (ii) unclear meaning, or (iii) more than one ordinary meaning. The study then identifies the context of the treaty containing the provision and evaluates whether that context contributes to clarifying the ordinary meaning of the provision (or which possible ordinary meaning is the most appropriate in that context). As Chang Fa Lo states, 'the ordinary meaning is not to be given to a term in isolation from the context'.[105] The context of the treaty could be formed by many sources: (i) other provisions preceding or following the interpreted provisions in the treaty, such as text, preambles, footnotes, and annexes (Article 31(2)); (ii) legal instruments/agreements made in connection with the conclusion of the interpreted treaty (Article 31(2)); (iii) legal agreement/practice relating to the interpretation or application of the provision, such as a joint interpretation statement or a binding interpretation of authoritative body established by treaty (Article 31(3)(a)–(b)); and (iv) relevant rules of international law applicable in the relations between the parties (Article 31(3)(c)). The relevant rules of international law here consist of all primary sources of international law as prescribed under Article 38(1) of the ICJ Statute, namely treaties, international customary rules and general principles of law.[106] It

[102] Mark E Villiger (ed), *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2008) 541.
[103] Ibid. See also Chang-Fa Lo (ed), *Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification* (Springer Verlag, 2018).
[104] Villiger (n 102) 541–3.
[105] Lo (n 103) 196.
[106] Statute of the International Court of Justice art 38(1) ('ICJ Statute'). It provides that '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations'.

should be noted that although the *VCLT* does not include the last two types of sources mentioned in a clause specifying the context of the treaty, it lists them as certain kinds that shall be taken into account together with the context. In this study, the legal analysis of treaty provisions considers all of the four types of sources in sequence where they are available, so these types together formulate the context of the treaty in a broad sence. In addition to the context, the study will resort to the treaty objectives and purposes to identify the most suitable or appropriate ordinary meaning among other possible ordinary meanings. The treaty objective and purpose can be identified from the title of the treaty, treaty preamble, treaty separate articles/provisions on objective and purpose, or the objective and purpose of an overall framework under which the treaty is operating.

Using legal analysis founded on the *VCLT* interpretation rules, this study aims to find the most appropriate interpretation of treaty terms and provisions, and further extracts substantive requirements for legislative measures. Substantive requirements imposed by each provision formulation are found in the concluding section while those imposed by all formulations are summarised in the chapter conclusion. They together contribute to the final findings in Chapter 9 (Part I).

2 Comparative Empirical Analysis

This study applies comparative empirical analysis to various degrees at different stages. However, it is primarily employed before and after the main analysis of treaty provisions in each body chapter to address specific tasks as follows.

Before the main analysis in chapters from 3 to 8, the study compares the texts of provisions on each type of investment protection, such as FET, expropriation, FTT, NT, and treaty exceptions for security and public interests in Vietnam's 60 IIAs, to find their common and distinctive features. Only after these are found can this study shape provision formulations for the legal analysis. This comparison is not technical but normative, since it does not simply search for variations in structure and language in the treaty provisions, but rather identifies features that could influence substantive aspects of legislative measures. This explains why one type of classification is chosen over another, and why several components of provisions are disregarded or do not become classification criteria. The result of this analytical process is provided in Part I of each given chapter, including its tables.

After all the analyses set out in body chapters, the study compares substantive requirements for legislative measures that are imposed, either by provisions on each type of investment protection or by each treaty line, to generate different compatibility thresholds, ranging from the strictest to the least strict ones. The findings of this study could not be displayed in a systematic way if the comparative analysis was absent. Those findings are set out in Part I of Chapter 9, including its tables.

3 Relevant Factors: Practical Questions Suggested by the Focused Review of Tribunals' Interpretation Approaches in International Arbitration Practice

This study analyses treaty provisions on FET, expropriation, NT, FTT and treaty exceptions for security interests and public interests in the chapters respectively from 3 to 8 on the basis of the *VCLT* rules, as provided earlier in Part III(B)(1). The analysis of treaty provisions also considers practical questions that are drawn from, or suggested by, the focused review of tribunals' interpretation approaches to relevant provisions set out in this study. These questions do not shift the analysis away from the rules of treaty interpretation under the *VCLT*, but rather makes the analysis more specific and critical. One could also view them as analytical questions for treaty provisions, if they stand on their own.

Given that no public access to arbitral awards/decisions settling disputes between foreign investors and Vietnam is available, the review discussed above takes focus on other arbitral awards/decisions addressing treaty provisions that are similar to those in Vietnam's IIAs in treaty-based claims, as brought by foreign investors against host states (ISDS claims). Claims that involve legislative or regulatory measures are favourably employed in this study. Relevant award/decisions do not, obviously, form the context of Vietnam's IIAs; however, tribunals' approaches to similar sets of treaty provisions and their reasonings in these awards/decisions can serve as suitable reference points.

IV SCOPE OF STUDY

A *Legislative Measures and Substantive Aspects*

It should be noted that even though the direct aim of the study is to find the extent to which substantive requirements for legislative measures may be imposed by Vietnam's IIAs, the broader picture it provides is of the relationship between IIAs and the state's right to regulate. That is the reason why the study focuses only on legislative, rather than administrative or judicial, measures. In addition, the study focuses only on substantive requirements/qualifications of legislative measures rather than procedural requirements.

In the context of Vietnam, legislative measures are adopted in legislative documents, or normative legal documents, containing normative regulations by central or local authorities.[107] Legislative documents are defined as those 'contain[ing] normative regulations and the promulgation of which complies with regulations of law on authority, manner, and procedures'.[108] Given normative regulations, they must be: (i) general rules of conduct, commonly binding; (ii) applied repeatedly to agencies, organisations and individuals nationwide or within a certain administrative division; (iii) promulgated by the regulatory agencies and competent persons, and (iv) implemented by the state.[109]

Vietnam's legislative documents include a Constitution and law documents, namely codes and laws of the National Assembly, and ordinances of Standing Committee of the National Assembly (Table 1.2). They also include by-law documents: resolutions of National Assembly or Standing Committee of the National Assembly; joint resolutions of the National Assembly, Standing Committee of the National Assembly or the Government with certain central authorities;[110] orders of the President; decisions of the President, Prime Minister or State Auditor General; decrees of the Government; circulars of Ministers, Heads of ministerial agencies, executive judge of the People's Supreme Court, or the Chief Procurator of the Supreme People's Procuracy; and joint circulars of

[107] Law on Promulgation of Legislative Documents 2015 (Vietnam) art 4; Law on Amending and Supplementing a Number of Articles of Law on Promulgation of Legislative Documents 2020 (Vietnam) arts 4(3), 4(8) ('Law on Amendments 2020').
[108] Law on Promulgation of Legislative Documents 2015 (n 107) art 2.
[109] Ibid art 3.1.
[110] Law on Promulgation of Legislative Documents 2015 (n 107) art 4; Law on Amendments 2020 (n 107) art 1.1.

Ministers or Heads of ministerial agencies with certain central authorities (Table 1.2).[111] The by-law documents also include those adopted by local authorities, namely resolutions of the People's Councils of provinces, districts, or communes; decisions of People's Committees of provinces, districts or communes; and legislative documents of administrative-economic units (Table 1.2). Among these, foreign investors generally pay greater attention to law documents and by-law documents such as decrees of the Government, circulars of Ministers or Heads of ministerial agencies, and decisions of People's Committees of provinces, districts or communes. It should be noted that official letters adopted by central or local authorities for foreign investors are not legislative documents.

Table 1.2: Vietnam's System of Legislative Documents

<table>
<tr><th colspan="2">System of Legislative Documents</th><th colspan="2">Central and Local Authorities (Hierarchy)</th></tr>
<tr><td>Constitution</td><td>Constitution</td><td>The National Assembly</td><td rowspan="14">Central Authorities</td></tr>
<tr><td rowspan="3">law documents</td><td>codes</td><td rowspan="2">The National Assembly</td></tr>
<tr><td>laws</td></tr>
<tr><td>ordinances</td><td>Standing Committee of the National Assembly</td></tr>
<tr><td rowspan="6">by-law documents</td><td rowspan="2">resolutions</td><td>The National Assembly</td></tr>
<tr><td>Standing Committee of the National Assembly</td></tr>
<tr><td rowspan="2">joint resolutions</td><td>Standing Committee of the National Assembly and Management Board of Central Committee of Vietnamese Fatherland Front</td></tr>
<tr><td>Standing Committee of the National Assembly, the Government, and Management Board of Central Committee of Vietnamese Fatherland Front</td></tr>
<tr><td>orders</td><td rowspan="2">The President</td></tr>
<tr><td>decisions</td></tr>
<tr><td>decrees</td><td>The Government</td></tr>
<tr><td>joint resolutions</td><td>The Government and Management Board of Central Committee of Vietnamese Fatherland Front</td></tr>
<tr><td>decisions</td><td>the Prime Minister</td></tr>
<tr><td>resolutions</td><td>Judge Council of the People's Supreme Court</td></tr>
</table>

[111] Ibid.

	circulars	executive judge of the People's Supreme Court	
		The Chief Procurator of the Supreme People's Procuracy	
		Ministers	
		Heads of ministerial agencies	
	decisions	State Auditor General	
	joint circulars	Among executive judge of the People's Supreme Court, the Chief Procurator of the Supreme People's Procuracy, State Auditor General, Ministers, Heads of ministerial agencies	
	resolutions	The People's Councils of central-affiliated cities and provinces	Local Authorities
	decisions	the People's Committees of provinces	
	legislative documents	local governments in administrative-economic units	
	resolutions	The People's Councils of districts, towns, and cities within provinces	
	decisions	The People's Committees of districts	
	resolutions	The People's Councils of communes, wards, and towns within districts	
	decisions	The People's Committees of communes	

B *Certain Investment Protection Provisions Governing Substantive Aspects of Legislative Measures*

As mentioned earlier, this study focuses on substantive aspects of legislative measures. This leads to a focus on treaty provisions governing substantive aspects of legislative measures or those, in the words of UNCTAD, 'particularly implicated in delineating the balance between investment protection and the right to regulation in the public interest'.[112] Among these, provisions on FET, expropriation, FTT, NT and relevant exceptions (in Vietnam's IIAs) are only studied in this thesis for following reasons.

Firstly, in the general context, the above provisions have formulated substantive standards of investment treaty law and provided fundamental protections for foreign investors. Provisions on FET, expropriation and FTT have been included in almost all IIAs and those on NT have had the similar inclusion in recently-concluded IIAs.[113] Foreign investors would hardly make decisions to investing overseas if they have not achieved state guarantees to protect their investments, at the least, from expropriation, irrational measures including unreasonable discrimination, and restrictions on transferring abroad their profits and proceeds accuring from liquidation of their investments. A state as either capital-exporting or -importing country cannot avoid ensuring these guarantees in an investment treaty and legislative measures adopted by state's authorities must follow all requirements imposed by relevant treaty provisions.

Among the provisions, FET provision can accord a certain level of substantive protections which are covered by several other clauses. For example, the prohibition of impairing foreign investments under a clause on non-impairment of the management, maintenance, use, enjoyment or disposal of foreign investments by arbitrary and/or discriminatory measures (a non-UDM/DM/UM clause) are guaranteed by the protection against arbitrariness or discrimination under the FET provision. Similarly, the obligation to maintain the stable legal framework applied to foreign investments, if any, required by stabilisation clauses in contracts/licenses and umbrella clauses in treaties – requiring a state to observe its obligations with foreign investors in contracts or other arrangements to

[112] *IIA 2018 Reform Package* (n 51) 33.
[113] See generally *National Treatment* (n 99); *Transfer of Funds* (n 99); *National Security* (n 99); *Expropriation* (n 99); *Fair and Equitable Treatment* (n 99); *WIR/2018* (n 33) 95–8; *WIR/2019* (n 34) 104–7; *WIR/2020* (n 41) 112–115.

wholly or partly stabilise the legal framework for foreign investments – are covered by the obligation to respect prior specific commitments possibly imposed by a FET provision without limitation to customary international law (CIL). Notably, all Vietnam's IIAs having non-UDM/DM/UM clauses and/or umbrella clauses contain this FET formulation.

Finally, in the context of treaties concluded by other countries, provisions on FET, expropriation, FTT and NT have been frequently invoked by foreign investors in many ISDS cases to challenge state regulations for public policies. This fact is demonstrated previously in Part I and discussed later in the review parts (Part II) of different chapters from 3 to 8. They also gain the first attention in UNCTAD's discussion on reviewing and reforming IIAs, including the area of safeguarding the right to regulate.[114]

C *Vietnam's IIA System*

This study only examines Vietnam's IIA system. One might ask why Vietnam's IIAs were chosen as a topic, and one reason would be that the author has a background in the Vietnamese legal system and could better access and collect data from Vietnam's IIAs where English versions are not available.[115] However, another important reason is that to develop a broad picture of the relationship between IIAs and the state's right to regulate in the area of international investment law, it is first necessary to explore the smaller picture in individual countries. Vietnam was chosen for the following seasons.

First, Vietnam's IIA system contains 85 treaties – both old and new generation, and both bilateral and regional – which amounts to approximately 3.2% of IIAs (N = 2654) globally for the 1980–2019 period,[116] even though it only joined the global IIA regime in the second stage of the latter's evolution.[117] Vietnam began the process of investment liberalisation in 1990 when it first signed a BIT with Italy. Prior to that, Vietnam had chiefly traded with the Soviet-bloc countries and relied on their assistance for its production inputs and capital goods. However, after the Soviet Union collapsed, these trading relations and assistance were disrupted. At that time, Vietnam had gone through serious economic turmoil caused by the adverse effects of its centrally planned economic

[114] Ibid.
[115] See above Part III(A)(1).
[116] As to the (most recent) number of IIAs signed globally, see *WIR/2020* (n 41) 106.
[117] Note that the IIA regime has evolved through three stages, namely the era of dichotomy (1965–1989), the era of proliferation (1990–2007) and the re-orientation era (2008-present): see *IIA 2018 Reform Package* (n 51) 14.

policies.[118] That painful experience spurred Vietnam to undertake comprehensive reform, which is called 'Doi Moi' ('Revolution'). It aimed to transfer Vietnam's centrally planned economy to a market-oriented economy and allowed private ownership of enterprises, including foreign ownership.[119] Objectives of the reform included, inter alia, opening market access to other countries and attracting foreign investment to develop the domestic economy.[120] The conclusion of the *Vietnam-Italy BIT* marked the Vietnam's first effort to move towards this objective.

Since 1990, Vietnam has proactively negotiated IIAs with other countries at a bilateral level. During the 1990–2007 period,[121] Vietnam's IIAs blossomed, with 56 IIAs signed, including 54 BITs (Table 1.3).[122] The two other IIAs were the *Vietnam-US BTA* with an investment chapter, and the ASEAN Investment for the Promotion and Protection of Investments. Notably, the latter only applied after Vietnam joined ASEAN in 1995 and signed the *Framework Agreement on the ASEAN Investment Area* in 1998. As to international investment relations, Vietnam joined the ASEAN Free Trade Area in 1995, the Asia-Pacific Economic Cooperation in 1998, four Framework Agreements on Comprehensive Economic Cooperation between ASEAN and other parties – China, India, Korea (Republic) and Japan – from 2002 to 2008 and the World Trade Organization (WTO) in 2007.

Since Vietnam acceded to the WTO and legal arrangements required for that accession in Vietnam were put into place, Vietnam has established many regional and multilateral investment relationships, as well as bilateral ones. From 2008 to 2021 – the re-orientation era of the world's IIA regime[123] – Vietnam has signed six regional investment agreements,[124] four multilateral trade agreements with investment chapters[125] and one bilateral FTA with an investment chapter,[126] in addition to 16 BITs (Table 1.3).[127]

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[118] See, eg, Melanie Beresford, 'Vietnam: the Transition from Central Planning' in Garry Rodan, Kevin Hewison and Richard Robison (eds), *The Political Economy of South-East Asia: Markets, Power and Contestation* (Oxford University Press, 3rd ed, 2006) 200; *Vietnam 2018 Review* (n 74) 23.
[119] See, eg, *Vietnam 2018 Review* (n 74) 21, 25.
[120] *Vietnam Review* (n 88) 3.
[121] Note that this period had experienced the proliferation of the global IIA regime (see above n 117) and is used to classify Vietnam's IIAs.
[122] See also apps 1.1, 1.2.
[123] *IIA 2018 Reform Package* (n 51) 14,.
[124] *ACIA*; *ASEAN-Korea IA*; *ASEAN-China IA*; *ASEAN-India IA*; *ASEAN-Hong Kong IA*; *Vietnam-EU IPA*.
[125] *ASEAN-ANZ FTA*; *Vietnam-EAEU FTA*; *TPP*; *CPTPP*; *RCEP*.
[126] *Vietnam-Korea FTA*.
[127] See also apps 1.1 and 1.2.

Table 1.3: Vietnam's IIAs Signed, Enforced, Terminated and Unenforced

Periods	IIAs Types	Signed	Enforced	Terminated	Unenforced
1990-2007	BITs	54	41[128]	6[129]	7[130]
	Other IIAs	2	1[131]	1[132]	0
	Total	**56**	**42**	**7**	**7**
2008-today	BITs	16	10[133]	0	6[134]
	Other IIAs	13	8[135]	0	5[136]
	Total	**29**	**18**	**0**	11
1990-today	BITs	70	51	6	13
	Other IIAs	15	9	1	5
	Total	**85**	**60**	7	18

[128] *Vietnam-Italy BIT* (1990); *Vietnam-Thailand BIT* (1991); *Vietnam-BLEU BIT* (1991); *Vietnam-Armenia BIT* (1992); *Vietnam-China BIT* (1992); *Vietnam-Malaysia BIT* (1992); *Vietnam-Philippines BIT* (1992); *Vietnam-Singapore BIT* (1992); *Vietnam-Belarus BIT* (1992); *Vietnam-France BIT* (1992); *Vietnam-Switzerland BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Denmark BIT* (1993); *Vietnam-Germany BIT* (1993); *Vietnam-Sweden BIT* (1993); *Vietnam-Russia BIT* (1994); *Vietnam-Ukraine BIT* (1994); *Vietnam-Hungary BIT* (1994); *Vietnam-Netherlands BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Latvia BIT* (1995); and *Vietnam-Lithuania BIT* (1995); *Vietnam-Argentina BIT* (1996); *Vietnam-Uzbekistan BIT* (1996); *Vietnam-Bulgaria BIT* (1996); *Vietnam-Egypt BIT* (1997); *Vietnam-Czech BIT* (1997); *Vietnam-Laos BIT* (1996); *Vietnam-Mongolia BIT* (2000); *Vietnam-Estonia BIT* (2000); *Vietnam-Cambodia BIT* (2001, amended 2012); *Vietnam-Iceland BIT* (2002); *Vietnam-UK BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-Japan BIT* (2003); *Vietnam-Spain BIT* (2006); *Vietnam-Cuba BIT* (2007); *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT* (2007). See also app 1.1.

[129] *Vietnam-Finland BIT* (1993); *Vietnam-Korea BIT* (1993); *Vietnam-Cuba BIT* (1995); *Vietnam-Indonesia BIT* (1991); *Vietnam-Australia BIT* (1991); *Vietnam-India BIT* (1997). See also app 1.1.

[130] *Vietnam-Algeria BIT* (1996); *Vietnam-Tajikistan BIT* (1999); *Vietnam-Chile BIT* (1999); *Vietnam-Myanmar BIT* (2000); *Vietnam-Korea (Democratic) BIT* (2002); *Vietnam-Namibia BIT* (2003); *Vietnam-Bangladesh BIT* (2005). See also app 1.1.

[131] *Vietnam-US BTA* (2000). See also app 1.2.

[132] *ASEAN Agreement for the Promotion and Protection of Investments* (1987). See also app 1.2.

[133] *Vietnam-Finland BIT* (2008); *Vietnam-Greece BIT* (2008); *Vietnam-Venezuela BIT* (2008); *Vietnam-Iran BIT* (2009); *Vietnam-Kazakhstan BIT* (2009); *Vietnam-Uruguay BIT* (2009); *Vietnam-Slovakia BIT* (2009); *Vietnam-Oman BIT* (2011); *Vietnam-Macedonia BIT* (2014); *Vietnam-Turkey BIT* (2014). See also app 1.1.

[134] *Vietnam-Sri Lanka BIT* (2009); *Vietnam-UAE BIT* (2009); *Vietnam-Qatar BIT* (2009); V*ietnam-Morocco BIT* (2012); *Vietnam-Palestine BIT* (2013); *Vietnam-Taiwan BIT* (2019). See also app 1.1.

[135] *ACIA* (2009); *ASEAN-China IA* (2009); *ASEAN-Korea IA* (2009); *ASEAN-ANZ FTA* (2009); *Vietnam-Korea FTA* (2015); *Vietnam-EAEU FTA* (2015); *CPTPP* (2018); *ASEAN-Hong Kong IA* (2019). See also app 1.2.

[136] *ASEAN-India IA* (2014); *TPP* (2016); *Vietnam-EU IPA* (2019*); RCEP* (2020); *Vietnam-UK FTA* (2020). See also app 1.2.

Second, Vietnam's IIAs system involves a complex net of treaty obligations. It should be noted that among Vietnam's 60 enforced IIAs, six – namely, the *ACIA*, *ASEAN-China IA*, *ASEAN-Korea IA*, *Vietnam-EAEU FTA*, *Vietnam-Korea FTA* and *CPTPP* – have coexisted with 13 BITs between Vietnam and their individual members.[137] The *CPTPP* has also coexisted with the *ASEAN-ANZ FTA*.[138] Such coexistence creates an assumption that Vietnam might have to accord different levels of protection to foreign investors from different countries. In particular, Vietnam's might be required to treat investors from certain members of ASEAN (namely Cambodia, Laos, the Philippines, Thailand, Malaysia and Singapore) differently since, as a preliminary observation, investment protection obligations under *ACIA* are, to some extent, different from those under the six BITs signed between Vietnam and those individual countries.[139] Differences might also arise in cases of investors from Korea, China, Australia, New Zealand, Japan and certain members of the EAEU such as Armenia, Belarus, Kazakhstan and Russia.[140]

Finally, all of Vietnam's enforced IIAs have 'real' legal effect in practice. Foreign investments/investors from almost all of Vietnam's IIA contracting countries have direct investments in Vietnam at the current time. As previously noted, to date Vietnam has signed 85 IIAs with 60 being enforced. As a result, Vietnam has (enforced) treaty relationships with 65 countries and territories across the world (Vietnam's IIA partners), including 26 from Europe, five from Eurasia, 21 from Asia, nine from the Americas, two from Africa and two from Oceania.[141] Of these 65 countries, 60 have direct investments in Vietnam.[142] The current picture of FDI in Vietnam from its IIA partners is quite colourful. Investors from eight Asian countries and territories – Korea, Japan, Singapore, Taiwan, Hong Kong, China, Malaysia and Thailand – account for 76.7% of total

[137] Cambodia; Laos; the Philippines; Thailand; Malaysia; Singapore; China; Korea; Japan; Armenia; Belarus; Kazakhstan; Russia.
[138] Australia; New Zealand.
[139] See app 1.3.
[140] Ibid.
[141] Noted that the 26 IIA partners from Europe are Austria, Belgium, Bulgaria, Czech, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Macedonia, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden, Switzerland, Ukraine and the UK. The five partners from Eurasia are Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. The 20 partners from Asia include nine ASEAN members (Myanmar, Cambodia, Indonesia, Laos, the Philippines, Thailand, Brunei, Malaysia, and Singapore) and twelve other partners, namely China, Japan, Hong Kong, India, Iran, South Korea, Kuwait, Mongolia, Oman, Taiwan, Turkey and Uzbekistan. The nine partners from the Americas are Argentina, Canada, Chile, Cuba, Mexico, Peru, the US, Uruguay, and Venezuela. The two partners from Africa are Egypt and Mozambique and the two from Oceania are Australia and New Zealand. If the Vietnam-EU IPA comes into force, six IIA partners will be added to the list: Croatia, Cyprus, Ireland, Malta, Portugal and Slovenia.
[142] The latter five partners are Macedonia, Mozambique, Kyrgyzstan, Peru and Uzbekistan. See also app 1.3.

investment projects in Vietnam, equivalent to nearly 76.4% of the total registered investment capital.[143] Investors from seven European countries – the UK, the Netherlands, France, Germany, Luxembourg, Switzerland and Belgium – have around 6.3% of total investment projects in Vietnam, equivalent to nearly 6.4% of the total registered investment capital in Vietnam.[144] Investors from two American countries (the US and Canada) and two Oceanic countries (Australia and New Zealand) account for about 3.9% and 1.7% of total investment projects in Vietnam respectively, equivalent to around 3.7% and 0.55% respectively of total registered investment capital in Vietnam.[145] Taken altogether, foreign investors from these 19 countries and territories own 88.5% of investment projects in Vietnam and 87% of total registered investment capital.[146] The remaining 11.5% of investment projects and 13% of the registered investment capital come from the remaining 41 partners having enforced treaties with Vietnam and 78 partners having unenforced treaties and no treaty with Vietnam.[147] This colourful picture of FDI indicates that Vietnam is not only bound by a net of treaty obligations on paper but also in the real world, and thus required to provide legitimate treatments of, at least, foreign investors from 60 IIA partners with current direct investments in Vietnam. Therefore, whatever substantive requirements for legislative measures are imposed by Vietnam's IIAs, Vietnam's current central and local authorities as treaty implementers must comply with them.

Table 1.4: Countries and Territories Having Treaties with Vietnam and/or Direct Investment in Vietnam

Countries and Territories Having Enforced Treaty/Treaties and Direct Investment	60
Countries and Territories Having Enforced Treaty but No Direct Investment	5
Countries and Territories Having Unenforced Treaty and Direct Investment	10
Countries and Territories Having No Treaty but Direct Investment	68
Countries and Territories Having Unenforced Treaty but No Direct Investment	6

[143] These eight countries have 25,525 out of 33,294 investment projects that register USD300,459.09 million out of USD393,325.49 million. For relevant figures with respect to individual country, see app 1.3.
[144] These seven countries have 2,086 out of 33,294 investment projects that register USD25,099.81 million out of USD393,325.49 million. For relevant figures with respect to individual country, see app 1.3.
[145] The mentioned two American countries have 1,305 out of 33,294 investment projects that register 14,625.45 million out of USD393,325.49 million; and, the mentioned two Oceanic countries have 563 out of 33,294 investment projects that register USD2,145.42 million out of USD393,325.49 million. For relevant figures with respect to individual country, see app 1.3.
[146] The mentioned 19 countries have 29,479 out of 33,294 investment projects that register USD342,329.77 million out of USD393,325.49 million. See also above nn 143–45.
[147] See app 1.3.

V SIGNIFICANCE OF STUDY

In terms of its contribution to the current literature, the study's findings concerning the various compatibility thresholds for legislative measure provide new evidence from Vietnam's IIAs for the general argument that contemporary IIAs unduly limit the state's right to regulate.[148] In particular, almost all strictest thresholds are stringent ones and do not meet Vietnam's existing demands for policy space. Given their existence, Vietnam's central and local authorities, as the implementing bodies of all Vietnam's IIAs, may be required either to refrain from adopting any legislative measures inconsistent with such strictest thresholds (regulatory chill), or to pay policy costs for adopting inconsistent legislative measures, even if such measures comply with the least or second least strict thresholds. The findings also challenge any suggestion that more sustainable development-friendly IIAs afford the government of Vietnam more leeway in adopting legislative measures. This is because an increase in these IIAs does not lead to the disappearance of the strictest (and the less strict) thresholds and reduce the difficulties of central and local authorities in implementing, also to comply with, all IIAs.

Regarding its empirical contribution, the study's findings regarding the various compatibility thresholds for legislative measures can support state authorities in different roles. It provides a detailed map for Vietnam's central and local authorities, as treaty implementers, to assess the compatibility of draft legislative measures and to formulate appropriate strategies to negotiate with potential aggrieved foreign investors. It additionally provides data for Vietnam's central authorities as treaty policymakers/negotiators to formulate which thresholds are 'favourable', 'negotiable' or 'non-negotiable' for future treaty negotiations, and/or decide whether to establish a new threshold in future IIAs. The study also provides Vietnam's central authorities as treaty policymakers with a reason to consider whether to make reforms to safeguard the right to regulate for public interests while providing investment protection among the five key areas framed by the UNCTAD. These reforms, if undertaken, will contribute to shifting the current system of the global IIAs to a sustainable development-oriented one. As further practical implications, the study's findings could, to a relevant extent, assist state authorities and foreign investors in preparing their arguments for dispute settlement, and adjudicators in interpreting provisions of applicable treat(ies) entered into by Vietnam.

[148] See above Part I.

Last, but not least, following the study's findings and pursuing the metaphor of the map, the thesis further formulates a frame with 'main lines' to identify the regulatory space in investment treaties. This frame can serve as a reference in discussing and making policies in academic and/or policy forums.

VI THESIS STRUCTURE

The structure of this study is necessarily complex. This thesis has nine chapters, including an Introduction and a Conclusion. Chapter 1 (*Thesis Introduction and Background*) – the instant chapter – introduces the study rationale including the gap in current knowledge (Part I), what the study is about (Part II), how the study collects and analyses data (Part III), the scope of the study and its findings (Part IV), the study's contribution to knowledge and legal practice (Part V), and how the study is organised (Part VI). The Introduction also provides select background information necessary to clarify each section and locate the study within the academic field of international investment law.

The next seven chapters address three subsidiary questions of the study, as previously outlined.[149] Chapter 2 provides the answer to the first question.[150] It identifies textual elements of investment protection provisions that govern substantive aspects of legislative measures: historical developments (Part I), different treaty purposes and objectives (Part II), and different treaty scopes (Part III).

Chapters 3, 4, 5 and 6 provide answers to the second subsidiary question.[151] They are structured in a similar way to conduct a similar function. Chapter 3 identifies different substantive requirements for legislative measures to be fair and equitable. To do so, the chapter first classifies FET provisions in Vietnam's IIAs into provisions without limitation to CIL, and provisions limited to CIL (Part I). It then suggests five practical questions, identified from international arbitration practice, for the analysis of FET provisions in the context of Vietnam's IIAs (Part II). Based on the *VCLT* interpretation rules and considering the five practical questions, the chapter then analyses and compares FET provisions without limitation to CIL (Part III) and those limited to CIL (Part IV).

Chapter 4 explores different substantive requirements for legislative measures to be non-expropriatory. The chapter first classifies expropriation provisions in Vietnam's IIAs into undefined expropriation provisions and defined expropriation provisions (Part I). It then suggests two practical questions, derived from international arbitration practice, for the analysis of expropriation provisions in the context of Vietnam's IIAs (Part II). Based on the *VCLT* interpretation rules and considering the two practical questions, the chapter then

[149] See above Part II.
[150] Ibid.
[151] Ibid.

analyses and compares undefined expropriation provisions (Part III) and defined expropriation provisions (Part IV).

Chapter 5 identifies different substantive requirements for legislative measures to be non-restrictive. The chapter first classifies FTT provisions in Vietnam's IIAs into FTT provisions without exceptions, FTT provisions with references to international agreements, FTT provisions with economic safeguard exceptions, and FTT provisions with references to domestic laws (Section II). It then suggests four practical questions, drawn from international arbitration practice, for the analysis of FTT provisions in the context of Vietnam's IIAs (Part II). Based on the *VCLT* interpretation rules and considering the four practical questions, the chapter then analyses and compares the four FTT provision categories to find different objects of FTT protection and compatible restrictive effect levels for legislative measures (Part III), and standard or specific exceptions for restrictive legislative measures (Part IV).

Chapter 6 considers different substantive requirements for legislative measures to be non-discriminatory. The chapter first classifies NT provisions in Vietnam's IIAs into NT provisions without exceptions/exceptions, NT provisions with sector/matter-based and/or economic safeguard-based exceptions, NT provisions with public interest-based exceptions, and NT provisions with references to domestic laws and development policies (Part I). It then suggests three practical questions, derived from international arbitration practice, for the analysis of NT provisions in the context of Vietnam's IIAs (Part II). Based on the *VCLT* interpretation rules and considering the three practical questions, the chapter then analyses and compares the four NT provision designs to find different objects of NT protection and compatible intent and compatible discriminatory effect level for legislative measures (Part III), and standard or specific exceptions for discriminatory legislative measures (Part IV).

Chapters 7 and 8 provide answers to the final subsidiary question.[152] They are structured in a similar way to the preceding chapters. Chapter 7 examines the extent to which legislative measures could be accepted even though they might not meet substantive requirements and standard exceptions (if any) under investment protection provisions. This assessment is based on substantive qualifications for security measures imposed by non-self-judging security exception provisions (Part III) and self-judging security

[152] Ibid.

exception provisions (Part IV), and treaty contexts in which such treaty exception provisions are applicable or prevail over standard exceptions (Part V). To reach its findings, the chapter first classifies treaty security exception provisions in Vietnam's IIAs into non-self-judging security exceptions and self-judging security exceptions (Part I). It also provides three practical questions, drawn from international arbitration practice, for the *VCLT*-driven analysis of provisions on security exceptions in the context of Vietnam's IIAs (Part II).

Chapter 8 identifies the extent to which legislative measures could be accepted even though they might not meet substantive requirements and standard exceptions (if any) under investment protection provisions. The discussion is based on substantive qualifications for measures for public interests imposed by traditional general exception provisions (Part III) and GATT/GATS-like general exception provisions (Part IV), and treaty contexts in which such treaty exception provisions are applicable or prevail over standard exceptions (Part V). The chapter first classifies treaty exception provisions on public interests in Vietnam's IIAs into traditional general exception provisions and GATT/GATS-like general exception provisions (Part I). It also suggests three practical questions, based on international arbitration practice, for the *VCLT*-driven analysis of treaty exception provisions on public interests in the context of Vietnam's IIAs (Part II).

The final chapter does not simply summarise the answers provided by the preceding chapters but, rather, systhesises all the answers in particular order(s), from a comparative perspective, to generate two possible main findings and then make the final argument – a response to the study question. Chapter 9 (*Thesis Conclusion and Implications*) finds that Vietnam's IIAs impose various thresholds of substantive requirements and qualifications for legislative measures to be compatible with individual investment protection obligation(s) and with individual treaty line(s) (Part I). Based on this main finding, the study comments on the relationship between the various thresholds and the state's right to regulate (Part II(A)), sketches relevant ways forward for the implementation of Vietnam's existing IIAs, the negotiation of new IIAs and the reform of Vietnam's IIA system (Part II(B)) and suggests a frame for identifying the regulatory space in investment treaties in general (Part II(C)). The flow of the thesis is mapped in the Appendix 10.

Chapter 2
AN OVERVIEW OF VIETNAM'S IIA SYSTEM: CONTEXTUAL ELEMENTS OF INVESTMENT PROTECTION PROVISIONS GOVERNING SUBSTANTIVE ASPECTS OF LEGISLATIVE MEASURES

INTRODUCTION

Before examining investment protection provisions in Vietnam's IIAs to identify substantive requirements for legislative measures in the next chapters, it is necessary to provide the contexts of those investment provisions. Their contextual elements include historical developments (Part I), treaty purposes and objectives (Part II), treaty scopes based on the objects of treaty application (state measures), and the objects of treaty protection (investments, foreign investors) (Part III).

I HISTORICAL DEVELOPMENTS OF TREATY PROVISIONS

Vietnam began to open its trade doors and attract foreign investments in 1987 when an economic reform – called 'Doi Moi' – was launched to transform its centrally planned economy to a market-based economy.[1] It also started facilitating investment liberalisation through its first BIT with Italy in 1990.[2] Since then, Vietnam has experienced two stages of the world's IIA regime evolution – the era of proliferation (1990–2007) and the era of re-orientation (2008–2020). Additionally, it has concluded a large number of IIAs and adopted different approaches to design treaty provisions. For this study, only investment protection provisions governing substantive aspects of legislative measures and the state-right-to-regulate provisions under the 42 enforced Vietnam's IIAs concluded in the 1990-2007 period and the 18 concluded in the 2008–2020 period are considered.

Treaty provisions on investment protection have been approached inconsistently, both within and between the two periods, with the exception of most-favoured-nation (MFN) provisions.

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[1] UNCTAD, *Investment Policy Reviews: Vietnam* (2009) 3 ('*Vietnam 2009 UN Review*'); OECD, *Investment Policy Reviews: Vietnam 2009* (2009) 10 ('*Vietnam 2009 Review*'); OECD, *Investment Policy Reviews: Vietnam 2018* (2018) 25 ('*Vietnam 2018 Review*'). See also Christian Schaefer, Ross MacLeod and Luyen Vo, 'Foreign Investment and Investment Arbitration in Vietnam' in Carlos Esplugues (ed), *Foreign Investment and Investment Arbitration in Asia* (Intersentia, 2019) 299, 300.

[2] *Agreement between the Italian Republic and the Socialist Republic of Vietnam for the Promotion and Protection of Investments*, signed 15 May 1990, ILM (entered into force 6 May 1994) ('*Vietnam-Italy BIT*'). See also *Vietnam 2018 Review* (n 1) 164.

More specifically, fair and equitable treatment (FET) and expropriation provisions are not clarified, or rarely clarified, in IIAs concluded in the first period, but are clarified occasionally in those (other than BITs) concluded in the second period.[3] The change in clarification approach might arise from Vietnam and its partners seeking to prevent broad interpretations by potential tribunals, after witnessing tribunals in many cases adopting different approaches to interpret undefined FET or expropriation provisions.[4] Similarly, free transfer treatment (FTT) provisions in IIAs concluded in the first period for the most part do not contain exceptions or indications to exceptions, while those concluded in the second period usually do.[5]

National treatment (NT) provisions are also less popular in IIAs concluded in the first period than those concluded in the second period,[6] probably because Vietnam could not afford to treat foreign investments/investors as favourably as domestic investments/investors from 1987 to 2005. At that time, Vietnam had separate legal frameworks to regulate foreign investments and domestic investments,[7] and privately owned enterprises and state-owned enterprises.[8] However, as a result of its accession to WTO, from July 2006 onwards Vietnam has applied unified domestic rules to all investors (foreign and domestic)[9] and created a single set of rules for all business entities (private and state owners),[10] making it less difficult for Vietnam to accord NT in its IIAs.

Clauses on non-impairment of investment activities by unreasonable or discriminatory measures (non-UDM/UM/DM clauses) and umbrella clauses are nevertheless more

[3] See app 2.1.
[4] See chapter 3 Part II, chapter 4 Part II.
[5] See app 2.1.
[6] Ibid.
[7] Noted that foreign businesses and investors were regulated by the Law on Foreign Investment 1987 (amended 1990 and 1992) (Vienam) and later by the Law on Foreign Investment 1996 (amended 2000) (Vietnam); however, domestic investors were regulated by the Law on Promotion of Domestic Investment 1994 (amended 1998 and 2001) (Vietnam). See *Vietnam 2018 Review* (n 1) 26, 35.
[8] Note that sole proprietorships were regulated by the Law on Private Enterprises 1990 (amended 1994) (Vietnam) and limited liability enterprises by the Law on Companies 1990 (amended 1994) (Vietnam); however, state-owned enterprises were regulated by the Law on State-Owned Enterprises 1995 (Vietnam) and later by the Law on State-Owned Enterprises 2003 (Vietnam). See *Vietnam 2018 Review* (n 1) 25–6, 35.
[9] Note that all investors were formerly regulated by the Law on Investment 2005 (Vietnam), then the Law on Investment 2014 (Vietnam) and are now governed by the Law on Investment 2020 (Vietnam). See *Vietnam 2018 Review* (n 1) 35; Schaefer, MacLeod and Vo (n 1) 302.
[10] Note that all enterprises were formerly regulated by the Law on Enterprises 2005 (amended 2013) (Vietnam), then by the Law on Enterprises 2014 (Vietnam) and are currently governed by the Law on Enterprises 2020 (Vietnam). See *Vietnam 2018 Review* (n 1) 35.

common in IIAs concluded in the first period than in the second.[11] The popularity of non-UDM/UM/DM clauses may be partly explained by the fact that NT provisions are unavailable in certain of those IIAs,[12] which thus provide a minimum treatment of reasonable discrimination (either nationality-based or others-based) for foreign investments/investors. The umbrella clauses appear more common probably because Vietnam wanted to create greater confidence for foreign investors investing in Vietnam as a transition country undergoing frequent reforms, by converting state authorities' unilateral promises/representations or bilateral commitments between state authorities and foreign investors into treaty obligations. Indeed, Vietnam has provided guarantees to protect foreign investors' interests in the event of regulatory changes in domestic laws since 1992.[13]

Unlike the abovementioned provisions, MFN provisions have been approached relatively consistently throughout the two periods. This consistency is understandable as Vietnam has governed foreign investments/investors under the same legal framework since 1987.[14]

Regarding state-right-to-regulate provisions, they have not been strongly integrated into Vietnam's IIAs throughout the two periods. These provisions refer to treaty exceptions and sustainable development orientations. In particular, while treaty exceptions for security and public interests appear more commonly in IIAs concluded in the second period, they are rarely included in IIAs concluded in the first period.[15] The scarcity of treaty exceptions for security and public interests may be explained by the fact that from

[11] See app 2.1.
[12] See *Vietnam-Italy BIT* (1990); *Vietnam-Switzerland BIT* (1992); *Vietnam-Sweden BIT* (1993); *Vietnam-Romania BIT (*1994); *Vietnam-Egypt BIT* (1997); *Vietnam-Cuba BIT (2007)*; *Vietnam-Cambodia BIT* (2001, amended 2012).
[13] See Law on Foreign Investment 1992 (amending Law on Foreign Investment 1987) (Vietnam) art 21; Decree on Providing Details for the Implementation of Law on Foreign Investment [the Government of Vietnam], No 18-CP, 16 April 1993, art 99; Law on Foreign Investment 2000 (amending Law on Foreign Investment 1996) (Vietnam) art 21; Law on Investment 2005 (Vietnam) art 11; Decree on Providing Detailed Provisions and Guidelines for Implementation of a Number of Articles of Law on Investment [the Government of Vietnam], No 108/2006/NĐ-CP, 22 Semptember 2006, art 20; Law on Investment 2014 (Vietnam) art 13; Decree on Providing Detailed Provisions and Guidelines for Implementation of a Number of Articles of Law on Investment [the Government of Vietnam], No 118/2015/NĐ-CP, 12 November 2015, art 3; Law on Investment 2020 (Vietnam) art 13; Decree on Providing Detailed Provisions and Guidelines for Implementation of a Number of Articles of Law on Investment [the Government of Vietnam], No 31/2021/NĐ-CP, 26 March 2021 art 5. See also Tuan Van Nguyen, 'The Protection of Legitimate Expectations under Investor-State Dispute: Case Studies of Vietnam' (2015) 12(6) *Transnational Dispute Management* 1, 14–9.
[14] Note that all foreign businesses and investors were formerly regulated by the Law on Foreign Investment 1987 (amended 1990 and 1992), and later by the Law on Foreign Investment 1996 (amended 2000) and the Law on Investment 2005, then the Law on Investment 2014 and are currently governed by the Law on Investment 2020.
[15] See app 2.1. See *Vietnam 2018 Review* (n 1) 26.

1987 to June 2015 Vietnam only permitted foreign investment in certain sectors/matters (the 'positive list' approach),[16] or the fact that there were already admission-based hedges in domestic laws. However, since June 2015 Vietnam has allowed foreign investment in all sectors/matters not expressly prohibited (the 'negative list' approach)[17] and has signed IIAs protecting both post- and pre-established investments;[18] therefore, it needs to resort to exceptions-based hedges in treaty laws.

Similarly, sustainable development orientations are rarely mentioned in Vietnam's IIAs.[19] They include treaty objectives to protect and promote foreign investment for sustainable development-related purposes, provisions on not lowering environment standards, provisions on investment and environmental, health and other regulatory objectives. It is difficult to explain why sustainable development goals (SDGs) have not often been stipulated in Vietnam's IIAs, given that Vietnam recognised the importance of sustainable development in the early stages of its domestic policies and has been increasingly integrating SDGs into domestic policies. In 1996, Vietnam first used the word 'sustainable' together with 'economic growth', and 'ecosystem' in its socio-economic development strategy (SEDS) for the 1996–2000 period.[20] Since then it has fully integrated the concept of sustainable development across three aspects (economic growth, social improvement and environmental protection) throughout its SEDSs for different ten-year periods,[21] as well as its socio-economic development plans (SEDPs) for different five-year periods.[22] Vietnam also promulgated a strategic orientation towards sustainable development (Vietnam Agenda 21) in 2004[23] and designed a sustainable development

[16] See *Vietnam 2018 Review* (n 1) 140.
[17] Ibid 140, 147.
[18] See below Part III(B).
[19] See app 2.1.
[20] See the Executive Committee of Vietnam's Communist Party, Socio-economic Development Strategy for 1996–2000 (the Eighth Party Congress's Reports, 1996) ('*SEDS 1996–2000*').
[21] For Vietnam's SEDS, see the Executive Committee of Vietnam's Communist Party, Socio-economic Development Strategy for 2001–2010 (the Ninth Party Congress's Reports, 2001) ('*SEDS 2001–2010*'); The Executive Committee of Vietnam's Communist Party, Socio-economic Development Strategy for 2011–2020 (the Eleventh Party Congress's Reports, 2011) ('*SEDS 2011–2020*'); The Executive Committee of Vietnam's Communist Party, Socio-economic Development Strategy for 2021–2030 (the Thirteenth Party Congress's Reports, 2021) ('*SEDS 2021–2030*').
[22] For Vietnam's SEDP, see Resolution on SEDP for the period of 2006-2010 [National Assembly of Vietnam], No 56/2006/QH11, 26 June 2006; Resolution on SEDP for the period of 2011-2015 [National Assembly of Vietnam], No 10/2011/QH13, 8 November 2011; Resolution on SEDP for the period of 2016-2020 [National Assembly of Vietnam], No 142/2016/QH13, 14 April 2016; Resolution on SEDP for 2021, No 124/2020/QH14, 11 November 2020.
[23] Decision on the Promulgation of the Strategic Orientation for Sustainable Development in Vietnam [Vietnam's Prime Minister], No 153/2004/QĐ-TTg, 17 August 2004.

strategy (SDS) for the period 2011–2020 in 2011.[24] Since then, it has concretised sustainable development goals in strategies, plans and policies across all sectors and fields.[25] It should be noted that Vietnam has committed to the United Nations Agenda 2030 for sustainable development and issued a National Action Plan in 2017 to implement the Agenda, including through the goal of fully integrating Vietnam's sustainable development goals into the content of its strategy for socio-economic development for the period 2021–2030.[26] To facilitate this process, it develops guidance on integrating sustainable development goals into the SEDPs of each ministry, industry and province for different 5-year periods from the end of 2019[27] and adopts a SDS for the period 2020–2030.[28]

[24] See Decision on Approving the Vietnam Sustainable Development Strategy for the 2011–2020 period [Prime Minister of Vietnam], No 432/QĐ-TTg, 12 April 2012.
[25] See, eg, Decision on the Approval of the National Strategy for Climate Change [Vietnam's Prime Minister], No 2139/QĐ-TTg, 05 December 2011; Decision on the Approval of the National Strategy for Green Growth [Vietnam's Prime Minister], No 1393/QĐ-TTg, 25 September 2012; Decision on the Approval of National Targeted Progamme for Sustainable Poverty Deduction for the 2012-2015 Period [Vietnam's Prime Minister], No 1489/QĐ-TTg, 08 October 2012.
[26] See Decision on the Issue of the National Action Plan to Implement the 2030 Agenda for Sustainable Development [Vietnam's Prime Minister], No 622/QĐ-TTg, 10 May 2017.
[27] See Decision on Promulgation of Guidance on Integrating Sustainable Development Goals into Ministry's, Industry's, and Locality's 5-year Socio-Economic Development Plan for the Period of 2021–2025 and 2026–2030 [Vietnam's Ministry of Planning and Investment], No 2158/QĐ-BKHĐT, 31 December 2019.
[28] Resolution on the Socio-Economic Development Plan for 2021 [the National Assembly of Vietnam], No 2020/QH14, 11 November 2020.

II DIFFERENT TREATY PURPOSES AND OBJECTIVES

A *Section Overview*

The treaty objectives and purposes of Vietnam's IIAs can be found in the various treaties' preambles. While treaty objectives answer the question of what the treaty – or, more specifically, treaty parties – want to achieve, treaty purposes explain why the treaty parties want or need to achieve those goals. Understanding treaty objectives and purposes helps us understand the underlying force of provisions, including those concerning investment protection, in Vietnam's IIAs. Treaty objectives and purposes also play an important role in interpreting treaty provisions, following the interpretation rules of the *VCLT* as provided in Chapter 1 (Part III(B)(1)). Where the text of treaty provisions is not clear or has multiple possible interpretations, it is necessary to consider whether the treaty objectives and purposes provide clues to the meaning of the text, or to which interpretation is the most appropriate.

B *Protecting and Promoting Investment for Economic Developments*

The objective and purpose of 50 out of the 60 IIAs surveyed is to promote and protect investment for economic development, in addition to establishing economic cooperation among treaty parties. The objective of investment protection and promotion can be achieved through 'creat[ing] and maintain[ing] favorable conditions for investments of investors [or investors]',[29] or 'maintain[ing] fair and equitable treatment'.[30] Treaty parties are aware that achieving the investment protection and promotion objective will stimulate 'business initiatives',[31] 'investment activities',[32] 'the flow of investments [or capital]',[33]

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[29] *Vietnam-Argentina BIT* Preamble; *Vietnam-Armenia BIT* Preamble; *Vietnam-China BIT* Preamble; *Vietnam-Cuba BIT (2007)* Preamble; *Vietnam-Egypt BIT* Preamble; *Vietnam-Iceland BIT* Preamble; *Vietnam-Iran BIT* Preamble; *Vietnam-Kazakhstan BIT* Preamble; *Vietnam-Korea BIT (2003)* Preamble; *Vietnam-Kuwait BIT* Preamble; *Vietnam-Laos BIT* Preamble; *Vietnam-Macedonia BIT* Preamble; *Vietnam-Malaysia BIT* Preamble; *Vietnam-Mongolia BIT* Preamble; *Vietnam-Oman BIT* Preamble; *Vietnam-Philippines BIT* Preamble; *Vietnam-Russia BIT* Preamble; *Vietnam-Singapore BIT* Preamble; *Vietnam-Switzerland BIT* Preamble; *Vietnam-Taiwan BIT (1993)* Preamble; *Vietnam-Thailand BIT* Preamble; *Vietnam-Ukraine BIT* Preamble; *Vietnam-UK BIT* Preamble; *Vietnam-Uruguay BIT* Preamble; *Vietnam-Uzbekistan BIT* Preamble; *Vietnam-Venezuela BIT* Preamble; *Vietnam-EAEU FTA* Preamble. See also *Vietnam-Austria BIT* Preamble; *Vietnam-BLEU BIT* Preamble; *Vietnam-Bulgaria BIT* Preamble; *Vietnam-Czech BIT* Preamble; *Vietnam-France BIT* Preamble; *Vietnam-Germany BIT* Preamble; *Vietnam-Greece BIT* Preamble; *Vietnam-Hungary BIT* Preamble; *Vietnam-Italy BIT* Preamble; *Vietnam-Latvia BIT* Preamble; *Vietnam-Lithuania BIT* Preamble; *Vietnam-Poland BIT* Preamble; *Vietnam-Romania BIT* Preamble; *Vietnam-Slovakia BIT* Preamble; *Vietnam-Spain BIT* Preamble.

[30] *Vietnam-Sweden BIT* Preamble; *Vietnam-Denmark BIT* Preamble; *Vietnam-Netherlands BIT* Preamble.

[31] *Vietnam-Argentina BIT* Preamble; *Vietnam-Cuba BIT* Preamble; *Vietnam-Egypt BIT* Preamble; *Vietnam-*

'the flow of capital and technology,'[34] or 'the productive use of resources',[35] and will ultimately benefit 'economic prosperity'[36] and/or 'economic development' of each party,[37] and develop/strengthen economic copperation/relationships between/among the parties.[38] The final purpose of Vietnam's IIAs is thus to develop the economy of the country. Any interpretation of treaty provisions that creates favorable conditions for investment would be likely appropriate.

Among the 50 IIAs having the economic development as their sole purpose, certain treaties also refer in their preambles to (i) state sovereignty, (ii) other international obligations and/or (iii) different levels of state development. However, such references would be unlikely to be understood as referring to other development purposes or as supporting an interpretation under which foreign investors' interests are not the priority unless the treaty texts state otherwise.

Kazakhstan BIT Preamble; *Vietnam-Korea BIT (2003)* Preamble; *Vietnam-Kuwait BIT* Preamble; *Vietnam-Laos BIT* Preamble; *Vietnam-Macedonia BIT* Preamble; *Vietnam-Malaysia BIT* Preamble; *Vietnam-Mongolia BIT* Preamble; *Vietnam-Oman BIT* Preamble; *Vietnam-Singapore BIT* Preamble; *Vietnam-Taiwan BIT (1993)* Preamble; *Vietnam-UK BIT* Preamble; *Vietnam-Uruguay BIT* Preamble; *Vietnam-Venezuela BIT* Preamble; *ASEAN-Hong Kong IA* See also *Vietnam-Bulgaria BIT* Preamble; *Vietnam-Czech BIT* Preamble; *Vietnam-Germany BIT* Preamble; *Vietnam-Greece BIT* Preamble; *Vietnam-Hungary BIT* Preamble; *Vietnam-Italy BIT* Preamble; *Vietnam-Latvia BIT* Preamble; *Vietnam-Lithuania BIT* Preamble; *Vietnam-Poland BIT* Preamble; *Vietnam-Slovakia BIT* Preamble; *Vietnam-Spain BIT* Preamble; *Vietnam-Sweden BIT* Preamble.

[32] *Vietnam-Cambodia BIT (amended 2012)* Preamble.

[33] *Vietnam-Laos BIT* Preamble; *Vietnam-Malaysia BIT* Preamble; *Vietnam-Mongolia BIT* Preamble; *ASEAN-Korea IA* Preamble; *ASEAN-Hong Kong IA* Preamble. See also *Vietnam-Latvia BIT* Preamble.

[34] *Vietnam-France BIT* Preamble; *Vietnam-Nertherlands BIT* Preamble.

[35] *Vietnam-Denmark BIT* Preamble

[36] *Vietnam-Argentina BIT* Preamble; *Vietnam-Cuba BIT* Preamble; *Vietnam-Egypt BIT* Preamble; *Vietnam-Iceland BIT* Preamble; *Vietnam-Kazakhstan BIT* Preamble; *Vietnam-Kuwait BIT* Preamble; *Vietnam-Laos BIT* Preamble; *Vietnam-Macedonia BIT* Preamble; *Vietnam-Malaysia BIT* Preamble; *Vietnam-Mongolia BIT* Preamble; *Vietnam-Oman BIT* Preamble; *Vietnam-Philippines BIT* Preamble; *Vietnam-Singapore BIT* Preamble; *Vietnam-Switzerland BIT* Preamble; *Vietnam-Taiwan BIT (1993)* Preamble; *Vietnam-Thailand BIT* Preamble; *Vietnam-Ukraine BIT* Preamble; *Vietnam-UK BIT* Preamble; *Vietnam-Uruguay BIT* Preamble; *Vietnam-Venezuela BIT* Preamble. See also *Vietnam-Germany BIT* Preamble; *Vietnam-Italy BIT* Preamble; *Vietnam-Latvia* Preamble*; Vietnam-Lithuania BIT* Preamble; *Vietnam-Romania BIT* Preamble.

[37] *Vietnam-Armenia BIT* Preamble; *Vietnam-Belarus BIT* Preamble; *Vietnam-Kazakhstan BIT* Preamble; *Vietnam-Korea BIT (2003)* Preamble; *Vietnam-Kuwait BIT* Preamble; *Vietnam-Laos BIT* Preamble; *Vietnam-Turkey BIT* Preamble; *ASEAN-Korea IA* Preamble. See also *Vietnam-France BIT* Preamble; *Vietnam-Nertherlands BIT* Preamble.

[38] *Vietnam-Argentina BIT* Preamble; *Armenia BIT* Preamble; *Vietnam-Belarus BIT* Preamble; *Vietnam-China BIT* Preamble; *Vietnam-Egypt BIT* Preamble; *Vietnam-Iceland BIT* Preamble; *Vietnam-Iran BIT* Preamble; *Vietnam-Macedonia BIT* Preamble; *Vietnam-Malaysia BIT* Preamble; *Vietnam-Mongolia BIT* Preamble; *Vietnam-Oman BIT* Preamble; *Vietnam-Philippines BIT* Preamble; *Vietnam-Singapore BIT* Preamble; *Vietnam-Switzerland BIT* Preamble; *Vietnam-Taiwan BIT (1993)* Preamble; *Vietnam-Thailand BIT* Preamble; *Vietnam-Ukraine BIT* Preamble; *Vietnam-Uruguay BIT* Preamble; *Vietnam-Uzbekistan BIT* Preamble; *Vietnam-Venezuela BIT* Preamble*; Vietnam-US BTA* Preamble; *Vietnam-EAEU FTA* Preamble; *ASEAN-Korea IA* Preamble. See also*Vietnam-Austria BIT* Preamble; *Vietnam-BLEU BIT* Preamble; *Vietnam-Bulgaria BIT* Preamble; *Vietnam-Czech BIT* Preamble; *Vietnam-France BIT* Preamble; *Vietnam-Germany BIT* Preamble; *Vietnam-Greece BIT* Preamble; *Vietnam-Hungary BIT* Preamble; *Vietnam-Italy BIT* Preamble; *Vietnam-Latvia BIT* Preamble; *Vietnam-Lithuania BIT* Preamble; *Vietnam-Nertherlands BIT* Preamble; *Vietnam-Poland BIT* Preamble; *Vietnam-Romania BIT* Preamble; *Vietnam-Slovakia BIT* Preamble; *Vietnam-Spain BIT* Preamble; *Vietnam-Sweden BIT* Preamble.

In particular, Vietnam's eight IIAs with China, Thailand, the US, the Philippines, Cambodia, Bulgaria, Singapore and Taiwan refer the protection and promotion of foreign investments for economic development to the principles of sovereignty, equality and mutual benefits. For example, the *Vietnam-China BIT* states that treaty parties desire to

> encourage, protect and create favorable conditions for investments by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both states.[39]

Similar expressions to the above statement can be found, citing 'the basis of respect for the independence and sovereignty of each other, equality and mutual benefit',[40] 'the basis of equality, mutual benefit and mutual respect for the independence and sovereignty of each Contracting Party,'[41] or 'the basis of equality and mutual benefit'.[42] One might argue that the inclusion of such principles in the preambles would invite an interpretation that reconciles foreign investors' interests and states' regulatory interests. This is uncertain, however, because state sovereignty – including regulatory power – is an inherent right of any independent country, regardless of whether it is recognised or not. When state sovereignty is recognised here in the context of Vietnam's IIAs, its expression is too general for an interpreter to make any departure from the main objective and purpose of the treaty – investment protection and promotion for economic development.

The *Vietnam-EAEU FTA*, in a different way, reaffirms the contracting parties' rights and obligations under other agreements in its preamble. Other agreements here refer to WTO agreements and other existing international agreements.[43] Such a reaffirmation indicates that Vietnam and EAEU members were fully awared of their other international commitments at the time of drafting the FTA. In cases where the FTA explicitly considers foreign investors' and public interests in its treaty body, including provisions/clauses on clarifications, limitations, exceptions and references, all the parties already harmonised their economic and non-economic commitments or addressed norm conflicts, if any, between the FTA and other agreements. In cases where the FTA does not express so, the

[39] *Vietnam-China BIT* Preamble.
[40] *Vietnam-Thailand BIT* Preamble. See also *Vietnam-US BTA* Preamble.
[41] *Vietnam-Philippines BIT* Preamble. See also *Vietnam-Cambodia BIT (amended 2012)* Preamble.
[42] *Vietnam-Singapore BIT* Preamble; *Vietnam-Taiwan BIT (1993)* Preamble; *Vietnam-EAEU FTA* Preamble; *Vietnam-Bulgaria BIT* Preamble.
[43] *Vietnam-EAEU FTA* Preamble.

reaffirmation may not be of assistance in suggesting an interpretation of investment protection provision that is in favour of public interests or reconciles these interests with foreign investors' interests. This is because the reaffirmation is not a treaty objective/purpose to have influence on an interpretation process, but rather provides a reason, among others, why Vietnam and EAEU members drafted treaty provisions in the current way. However, to a possible extent, state measures that are adopted in implementing other international obligations, as referred by the preamble of the FTA, will have a strong rational basis to be considered non-arbitrary measures.

In another direction, the *Vietnam-US BTA* and *ASEAN-Korea IA* recognise the different stages of economic development among treaty parties.[44] Such recognition does not itself represent a treaty objective/purpose, or modify such an objective/purpose, so it would hardly help to clarify the content or meaning of any treaty provision. In an ideal case, a tribunal might consider the state's level of development in examining whether legal arrangements taken by a state frustrate foreign investor's reasonable expectations and thus violate FET or expropriation, or whether the state measures were genuinely necessary to qualify as exceptions.

In conclusion, most of Vietnam's IIAs have the sole objective and purpose as investment protection and promotion for economic development. This indicates that treaty provisions would be designed in such a way as to achieve such an objective and purpose. It also implies that where a treaty provision is unclear or has more than one meaning, the appropriate meaning would be that consistent with the treaty's objective and purpose.

[44] *Vietnam-US BTA* Preamble; *ASEAN-Korea IA* Preamble.

C *Protecting and Promoting Investment for Economic, Social and Environmental Developments*

In addition to economic development, ten of Vietnam's IIAs also mention sustainable developments, or certain aspects of such developments. Two takes sustainable development or its elements as a treaty direct objective (an immediate goal), while the remaining eight consider them as treaty purposes underlying all treaty provisions and designs.

The *CPTPP* and the *Vietnam-Korea FTA* express treaty parties' desire to pursue SDGs/develop sustainable economy. The *CPTPP* contains many statements in its preamble expressing the treaty parties' objective of developing their economy, society, and environment.[45] The preamble twice states the goal of 'sustainable growth' and 'sustainable development'. It specifies that the *CPTPP* aims to improve social values and benefits by creating new working opportunities, raising the living standard, benefitting consumers, reducing poverty, protecting and enforcing labor rights, and improving working conditions and living standards. It also seeks to promote a high level of environmental protection through effective enforcement of environmental laws, supportive trade, and environmental policies and practices. The *CPTPP* further recognises treaty parties' right to regulate or reserve the flexibility to set legislative and regulatory priorities, safeguard and protect legitimate public welfare objectives, adopt, maintain or modify the health care system and strengthen macroeconomic cooperation. It also recognises treaty parties' perception that trade and investment can expand opportunities to enrich cultural identity and diversity inside and outside of a country. Such objectives and implied purposes are strongly expressed through the use of a number of verbs, including 'bring', 'create', 'contribute', 'benefit', 'promote', 'raise', 'improve', 'enrich' and 'strengthen'. In a more limited extent, the *Vietnam-Korea FTA* only provides a goal to 'promote economic growth and create new employment opportunities'[46] among many other objectives for economic development.

The *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-China IA* do not refer to an immediate goal of improving or raising sustainable development values. However, their final purpose is to develop the economy sustainably. This purpose is expressed through treaty parties'

[45] *CPTPP* Preamble.
[46] *Vietnam-Korea FTA* Preamble.

recognition that 'a conducive investment environment will enhance freer flow of capital, goods and services, technology and human resource and overall economic and social development in ASEAN'.[47] Such a purpose is also demonstrated by treaty parties' stated confidence that the treaty 'will strengthen economic partnership, serve as an important building block towards regional economic integration and support sustainable economic development',[48] or 'the realization of the sustainable economic growth and development goals to allow the flexibility to treaty parties to address their sensitive areas'.[49]

Vietnam's five BITs with Turkey, Japan, Mozambique, Finland, and Estonia also recognise SDGs, indeed certain of these, in their preambles. They all refer to economic development with respect for health, safety and environmental standards through '[r]ecognizing that [the] objectives [of the BIT] can be achieved without relaxing health, safety, and environmental standard of general application'.[50] The *Vietnam-Mozambique BIT* further refers to economic development having respect for international labour rights, separately from respect for health, safety and environmental standards. Its preamble expresses parties' recognition that 'the development of economic and business ties can promote respect for internationally recognized worker rights'.[51] The *Vietnam-Finland BIT (2008)* and *Vietnam-Estonia BIT* also provide in their preambles the parties' agreement that 'a stable framework for investment will contribute to maximizing the effective utilization of economic resources and improve living standards'.[52] The stated purposes of these five IIAs underscore that while the protection of foreign investment remains central, it must not be pursued at the expense of the environment or of other important values of the society. Driven by such purposes, the *Vietnam-Turkey BIT* and *Vietnam-Japan BIT* compose provisions on exceptions for security/public interests,[53] and the latter additionally contains a provision on the need to avoid not lowering health, safety, and environmental standards to attract foreign investment.[54] In cases where a similar provision is not available,[55] the purposes of social and environmental improvements should be given due weight in interpreting treaty provisions. Such purposes might not be

[47] *ACIA* Preamble.
[48] *ASEAN-ANZ FTA* Preamble.
[49] *ASEAN-China IA* Preamble.
[50] *Vietnam-Turkey BIT* Preamble; *Vietnam-Mozambique BIT* Preamble; *Vietnam-Japan BIT* Preamble. See also *Vietnam-Finland BIT* Preamble; *Vietnam-Estonia BIT* Preamble.
[51] *Vietnam-Mozambique BIT* Preamble.
[52] *Vietnam-Estonia BIT* Preamble.
[53] *Vietnam-Turkey BIT* art 4; *Vietnam-Japan BIT* art 15.
[54] *Vietnam-Japan BIT* art 21.
[55] *Vietnam-Mozambique BIT* Preamble; *Vietnam-Finland BIT* Preamble; *Vietnam-Estonia BIT* Preamble.

achieved if unclear provisions are interpreted in such a way as to favour investors' interests.

In conclusion, the preamble of the *CPTPP* clearly shows that its objectives are to promote sustainable development; therefore, it imposes certain provisions having direct application to achieve these objectives. In contrast, the preamble references to sustainable development purposes in the other treaties mentioned could serve only as an invitation to an interpretation balancing investors' and public interests. Any interpretation that defeats that sustainable development purposes would be contrary to the good faith principle of interpretation under the *VCLT*.

D *Section Remark*

The Vietnam's IIAs studied have different objectives and purposes. Of these, 50 IIAs express the objective of protecting and promoting foreign investment for economic development purpose. The other ten IIAs state the objective of protecting and promoting foreign investment for economic, social and environmental development purposes. Such treaty objectives and purposes explain how current treaty provisions were designed and formulated, and furnish a teleological point of reference for defining the ordinary meanings of such treaty provisions, as discussed in the following chapters. The sustainable development objectives and purposes are expected to invite a fair interpretation that balances foreign investors' interests and public interests.

Table 2.1: Different Treaty Objectives and Purposes in Vietnam's IIAs

Treaty Objectives and Purposes	Treaty Contexts (60)	Treaty Contexts* (42)
Protecting and Promoting Investment for Economic Development	50[56]	32[57]
Protecting and Promoting Investment for Economic, Social and Environmental Developments	10[58]	10[59]
Note: Treaty Contexts*: Number of Vietnam's IIAs if the *EU-Vietnam IPA* and *RCEP* come into effect.		

[56] Vietnam's 28 BITs with Argentina, Armenia, Belarus, Cambodia, China, Cuba, Egypt, Iceland, Iran, Kazakhstan, Korea, Kuwait, Laos, Macedonia, Malaysia, Mongolia, Oman, the Philippines, Russia, Singapore, Switzerland, Taiwan, Thailand, the UK, Ukraine, Uruguay, Uzbekistan and Venezuela (non-EU members); Vietnam's four (other) IIAs – *Vietnam-US BTA*, *Vietnam-EAEU FTA*, *ASEAN-Korea IA* and *ASEAN-Hong Kong IA*; Vietnam's 18 BITs with Austria, BLEU, Bulgaria, Czech, Denmark, France, Germany, Greece, Hungary, Latvia, Lithuania, Italy, Netherlands, Poland, Romania, Slovakia, Spain and Sweden (EU members).

[57] Vietnam's 28 BITs with non-EU members and four (other) IIAs: see above n 56.

[58] Vietnam's three BITs with Turkey, Mozambique and Japan (non-EU members); Vietnam's five (other) IIAs – *CPTPP*, *Vietnam-Korea FTA*, *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-China IA*; Vietnam's two BITs with Finland and Estonia (EU members).

[59] Vietnam's three BITs with non-EU members and five (other) IIAs (see above n 58); *Vietnam-EU IPA*; *RCEP.*

III DIFFERENT TREATY SCOPES

A *State Measures Governed by Vietnam's IIAs*

1 *State Measures without Matter Exclusions*

Of the 60 Vietnamese IIAs, 40 BITs do not exclude any measures from the scopes of treaty investment protection provision(s) studied in this thesis (FET, expropriation, FTT and NT).[60] It means that all Vietnam's measures, particularly legislative measures, must follow all requirements imposed by these provisions. It should be noted that the term 'measures' is not defined in these contexts but it is in certain treaties having measure exclusions as later mentioned. Accordingly, 'measures' means 'any measure of [a state] … whether in the form of laws, regulations, rules, procedures, decisions, and administrative actions or practice'.[61] Given this, legislative measures are only those among, or relevant to, others – administrative and judicial measures. These measures can be adopted or maintained by (i) central, regional or local government or authorities and (ii) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities. In the context of Vietnam, legislative documents of governmental bodies are specified in the previous chapter (Table 1.2).

[60] Vietnam's 22 BITs with Argentina, Armenia, Belarus, Cambodia, China, Cuba, Egypt, Iran, Kuwait, Laos, Malaysia, Mongolia, the Philippines, Russia, Singapore, Switzerland, Taiwan, Thailand, Turkey, Ukraine, Uzbekistan and Venezuela (non-EU members); Vietnam's 18 BITs with Austria, BLEU, Bulgaria, Czech, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Romania, Spain and Sweden (EU members). See also app 2.2.

[61] See *ACIA* art 4(f); *ASEAN-Korea IA* art 1(n); *ASEAN-China IA* art 1(g)–(h); *ASEAN-ANZ FTA* art 2(g); *ASEAN-Hong Kong BIT* art 1(h).

Unlike Vietnam's 40 BITs as above mentioned, the remaining 20 IIAs leave a number of matters outside the scopes of all FET, expropriation, FTT and NT provisions, or the scope of any of these.[62] In particular, Vietnam's four BITs with Macedonia, Kazakhstan, Slovakia and Uruguay completely exclude taxation and governmental subsidies/grants from their application[63] and Vietnam's two FTAs with Korea and EAEU, the *ACIA* and ASEAN's four IIAs with ANZ, Korea, China and Hong Kong do so with the latter.[64] In these treaties and several others, expropriation provisions do not apply to land-related expropriation[65] and measures related to intellectual property rights (IPRs),[66] and FET and NT provisions do not apply to taxation.[67] NT provisions in 12 out of the 20 IIAs also carve-out other matters listed in treaty annexes from their operation.[68] Given these measure exclusions, Vietnam can adopt any relevant legislative measures, even if adversely impacting foreign investments/investors, without violating treaty obligations as listed earlier.

[62] Vietnam's nine BITs with Japan, Iceland, Kazakhstan, Korea, Macedonia, Mozambique, Oman, the UK and Uruguay (non-EU members); Vietnam's nine (other) IIAs – *Vietnam-US BTA*, *Vietnam-EAEU FTA*, *Vietnam-Korea FTA*, *ACIA*, *ASEAN-ANZ FTA*, *ASEAN-China IA*, *ASEAN-Korea IA*, *ASEAN-Hong Kong IA* and the *CPTPP*; Vietnam's two IIAs with Greece and Slovakia (EU members). See also app 2.2.

[63] *Vietnam-Macedonia* BIT art 2(3); *Vietnam-Kazakhstan BIT* art 2(3); *Vietnam-Slovakia BIT* art 2(3); *Vietnam-Uruguay BIT* art 2(3).

[64] *Vietnam-Korea FTA* ch 9 art 9.1(3); *Vietnam-EAEU FTA* ch 8 art 8.29(3); *ACIA* art 3(4); *ASEAN-ANZ FTA* ch 11 art 1; *ASEAN-Korea* art 2(2); *ASEAN-China IA* art 3(4); *ASEAN-Hong Kong IA* art 2(2).

[65] *Vietnam-Kazakhstan BIT* art 6(3); *Vietnam-Greece BIT* art 5(2); *Vietnam-Oman BIT* art 6(2); *Vietnam-Macedonia BIT* art 6(3); *Vietnam-Slovakia BIT* art 6(3); *ASEAN-China IA* art 8(4); *ASEAN-Korea IA* art 12(4); *ACIA* art 14, n 10; *ASEAN-ANZ FTA* ch 11 art 9(6); *ASEAN-Hong Kong IA* art 10(4); *Vietnam-Korea FTA* art 9.7(5); *Vietnam-EAEU FTA* art 8.35(5); *CPTPP* art 9.8, n 16, annex 9-C [2]. See also Chapter 4 Part I(A).

[66] *Vietnam-Mozambique BIT* art 4(5); *ASEAN-China IA* art 8(6); *ASEAN-Korea IA* art 12(5); *ACIA* art 14(5); *ASEAN-ANZ FTA* art 9(5); *Vietnam-EAEU FTA* art 8.35; *Vietnam-Korea FTA* art 9.7(6); *CPTPP* art 9.8(5); *ASEAN-Hong Kong IA* art 10(5). See also Chapter 4 Part I(A).

[67] See *Vietnam-US BTA* ch VII art 4; *ACIA* art 3(4); *ASEAN-China IA* art 3(4); *ASEAN-Korea IA* art 2(2); *ASEAN-Hong Kong IA* art 2(2); *CPTPP* ch 19 art 29.4.

[68] Twelve Vietnam's IIAs with non-EU members: see *Vietnam-Iceland BIT* art 3; *Vietnam-Japan BIT* art 2; *Vietnam-Korea BIT (2003)* art 3; *Vietnam-Oman BIT* art 4; *Vietnam-UK BIT* art 3; *Vietnam-US BIT* art 2; *Vietnam-Korea FTA* art 9.3; *CPTPP* art 9.4; *ACIA* art 5; *ASEAN-Korea IA* art 3; *ASEAN-ANZ FTA* art 4; and *ASEAN-Hong Kong IA* art 3. See also Chapter 6 Part I(A).

B *'Investment' Protected by Vietnam's IIAs*

1 *'Investment' as 'Every Kind of Assets'*

Once foreign investments are established, Vietnam as a host state is obligated to provide treaty protection for such investments and their investors under the 60 IIAs studied. Certain treaties also require Vietnam to provide investment protection treatments, such as NT and/or FTT before the establishment of investments.[69] The broader investments are defined; the broader investment protections are required.

Under most of Vietnam's IIAs (53 out of 60), 'investment' is defined broadly.[70] It refers to 'every kind of assets' permitted by a host state (say, Vietnam),[71] or 'all kinds of financial, material and other property and intellectual values'[72] without limitation to investment characteristics. It includes, but is not limited to, movable and immovable property, including property rights (eg mortgages, liens, pledges, usufructs, privileges or guarantees). 'Investment' can also mean both tangible and intangible property. Intangible property here refers to shares, stocks, bonds, debentures and other securities materialising participation in companies, as well as intellectual property rights (eg copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill). Legal, contractual or quasi-contractual rights, conferred by laws, legitimate contract, licences, permits, or concessions, are also defined as forms of 'investment'.[73] The right to claim money and other rights relating to services having a

[69] See Chapter 5 Part III(A)(2), Chapter 6 Part III(A)(1).
[70] See below nn 71–2.
[71] For the definition of 'investment' in Vietnam's 32 IIAs with non-EU members: see *Vietnam-Argentina BIT* art 1(1); *Vietnam-Armenia BIT* art 1(2); *Vietnam-Belarus BIT* art 1(1); *Vietnam-Cambodia BIT (amended 2012)* art 1(1); *Vietnam-China BIT* art 1(1); *Vietnam-Cuba BIT (2007)* art 1(1); *Vietnam-Egypt BIT* art 1(1); *Vietnam-Iceland BIT* art 1(2); *Vietnam-Iran BIT* art 1(1); *Vietnam-Japan BIT* art 1(2); *Vietnam-Kazakhstan BIT* art 1(1); *Vietnam-Korea BIT (2003)* art 1(1); *Vietnam-Kuwait BIT* art 1(1); *Vietnam-Laos BIT* art 1(1)(a); *Vietnam-Malaysia BIT* art 1(1)(a); *Vietnam-Macedonia BIT* art 1(1); *Vietnam-Mongolia BIT* art 1(a); *Vietnam-Mozambique BIT* art 1(1); *Vietnam-Philippines BIT* art 1(1); *Vietnam-Russia BIT* art 1(a); *Vietnam-Singapore BIT* art 1(1); *Vietnam-Switzerland BIT* art 1(2); *Vietnam-Taiwan BIT (1993)* art 1(3); *Vietnam-Thailand BIT* art 1(3); *Vietnam-Turkey BIT* art 1(1); *Vietnam-UK BIT* art 1(a); *Vietnam-Uruguay BIT* art 1(1); *Vietnam-Uzbekistan BIT* art 1(1); *Vietnam-Venezuela BIT* art 1(1); *Vietnam-US BTA* ch IV art 1(1); *ASEAN-China IA* art 1(d); *ASEAN-ANZ FTA* art 2(c). For the definition of 'investment' in Vietnam's 20 BITs with EU members: see *Vietnam-Austria BIT* art 1(1); *Vietnam-BLEU BIT* art 1(2); *Vietnam-Bulgaria BIT* art 1(1); *Vietnam-Czech BIT* art 1(1); *Vietnam-Denmark BIT* art 1(1); *Vietnam-Estonia BIT* art 1(2); *Vietnam-Finland BIT (2008)* art 1(1); *Vietnam-France BIT* art 1(1); *Vietnam-Germany BIT* art 1(1); *Vietnam-Greece BIT* art 1(1); *Vietnam-Hungary BIT* art 1(1); *Vietnam-Italy BIT* art 1(1); *Vietnam-Latvia BIT* art 1(a); *Vietnam-Lithuania BIT* art 1(a); *Vietnam-Netherlands BIT* art 1(a); *Vietnam-Poland BIT* art 1(1); *Vietnam-Romania BIT* art 1(2); *Vietnam-Slovakia BIT* art 1(1); *Vietnam-Spain BIT* art 1(1); *Vietnam-Sweden BIT* art 1(1).
[72] For the definition of 'investment' in the remaining BIT in this group: see *Vietnam-Ukraine BIT* art 1(1).
[73] See, eg, *Vietnam-Czech BIT* art 1(1)(e); *Vietnam-Egypt BIT* art 1(1)(e); *Vietnam-Greece BIT* art 1(1)(e);

financial value provide examples of these; however, it should be noted that claims to money without having 'investment characteristics', ordinary commercial transactions and relevant credit extension (eg trade financing) are explicitly excluded from the definition of investment by certain treaties.[74]

Certain IIAs also afford reinvestment – including returns which are reinvested – the same protection as initial investments,[75] even though one might argue that reinvestment is not a foreign investment because there is no inflow of money from outside the country.[76] The *Vietnam-Mozambique BIT*, *ASEAN-China IA* and *ASEAN-ANZ FTA*, for instance, similarly specify that '[f]or the purpose of the definition of investment … returns that are invested should be treated as investments'.[77] Returns or proceeds from liquidation – which might, or might not, be in the form of 'reinvestment' – are also treated as 'investment' and enjoy treaty protections, as explicitly specified by several (four) of Vietnam's IIAs. For example, the *Vietnam-Japan BIT* generally states 'investments' as including 'the amounts yield by investments, in particular, profits, interest, capital gains, dividends, royalties and fees'[78] (ie returns) while the *Vietnam-Kuwait BIT* and *Vietnam-Venezuela BIT* consider '[t]he term "investment"' as applying to 'proceeds from "liquidation"'.[79]

Given that 'investment' includes, but is not limited to, different types of assets as mentioned, Vietnam must provide broad protection treatments. For example, FET or NT is granted not only to 'investment' in the form of property and property rights but also to 'investment' as a contractual right or the right to claim the money. The same treatment is accorded to initial investments, reinvestments and, where expressed by treaties, returns or proceeds from liquidation. When 'investment' includes many separate rights, partial expropriation might occur if Vietnam as the host state severely damages each right (or several rights) rather than an investment project as a whole, as analysed in Chapter 4 (Part III(A)(2)).

Vietnam-Hungary BIT art 1(1)(e); *Vietnam-US BTA* art 1(1)(f).
[74] See, eg, *Vietnam-Mozambique BIT* art 1(1); *Vietnam-Kazakhstan BIT* art 1(1).
[75] See below nn 77–9.
[76] UNCTAD, *Foreign Direct Investment and the Challenge of Development* (World Investment Report, July 1999) 160–2.
[77] *Vietnam-Mozambique BIT* art 1(1); *ASEAN-China IA* art 2; *ASEAN-ANZ FTA* art 1.
[78] *Vietnam-Japan BIT* art 1(2).
[79] *Vietnam-Kuwait BIT* art 1(1); *Vietnam-Venezuela BIT* art 1(1).

'Investment' is defined more narrowly in seven of Vietnam's IIAs.[80] Under those agreements, an 'investment' must have certain characteristics to enjoy treaty protections. These investment characteristics include (i) the commitment of capital or other resources, (ii) the expectation of gain or profits, and (iii) the assumption of risk.[81] These characteristics were put forward by the tribunal in *Salini v Morocco*, in which the tribunal stated four criteria for an investment: contribution of the investor, duration of the project, the existence of economic risks in the project, and a contribution to the host state's development.[82] These criteria were subsequently embodied by certain *ICSID* tribunals for the purpose of defining the jurisdiction of the ICSID tribunal over investment disputes under Article 25 of the *ICSID Convention.*[83]

Given the above, amounts yielded by investments (ie returns) such as profits, interest, capital gains, dividend, royalties and/or fees in the *ACIA* will need to have the characteristics of an investment to enjoy treaty protection. Such amounts are already required by the *ASEAN-Korea IA*, *ASEAN-Hong Kong IA* and *Vietnam-EAEU FTA* as getting reinvested in the host state so as to be considered 'investment'.[84] Certain assets such as short-term lending instruments, speculative portfolio investment or other forms of debts (eg claims to a payment immediately resulted from ordinary commercial transactions),[85] and certain rights generated from an order or judgment, or a judicial or administrative action,[86] would possibly be excluded from the definition of 'investment', if failing to satisfy investment characteristics.

In conclusion, by explicitly identifying investment characteristics, the seven IIAs focus on protecting the 'true' form of investment and exclude associated activities. Therefore,

[80] *ACIA* art 4(c); *ASEAN-Korea IA* art l(j); *ASEAN-Hong Kong IA* art 1(e); *Vietnam-EAEU FTA* ch 8 art 8.28(a); *Vietnam-Korea FTA* ch 9 art 9.28; *CPTPP* ch 9 art 9.1; *Vietnam-Oman* BIT art 1.1.
[81] Notably, the *Vietnam-Oman BIT* requires 'investment' as 'every kind of asset effected as a long-term investment' instead of the three listed characteristics: see *Vietnam-Oman BIT* art 1.1.
[82] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 23 July 2001) [52] ('*Salini v Morocco*'). See also UNCTAD, *Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II* (2011) 53–5 ('*Scope and Definition*').
[83] See generally *Scope and Definition* (n 82) 48-61.
[84] *ASEAN-Korea IA* art 1(j); *ASEAN-Hong Kong IA* art 1(e); *Vietnam-EAEU FTA* ch 8 art 8.28(a).
[85] *ASEAN-Korea IA* art 1(j); *ASEAN-Hong Kong IA* art 1(e)(iv) n 2; *Vietnam-EAEU FTA* ch 8 art 8.28(a) n 3; *Vietnam-Korea FTA* ch 9 art 9.28 and n 20; *CPTPP* ch 9 art 9.1 n 2.
[86] *ASEAN-Hong Kong IA* art 1(e) n 1; *Vietnam-Korea FTA* ch 9 art 9.28 n 19; *CPTPP* ch 9 art 9.1.

investment protection treatments are expected for property, property rights, and legal/contractual/quasi-contractual rights having investment characteristics.

C *'Investor' Protected by Vietnam's IIAs*

1 *'Investor' Having 'Investment'*

Many treaty obligations require state protections not only for investments but also for investors as an actor having, operating and managing 'investment' or associated activities. Under most of the IIAs studied (54 out of 60), 'investors' refers to parties who have invested in the capital-importing state (say, Vietnam).[87] It implies that all investment provisions in a treaty apply only to investors already having investments in Vietnam.

The term 'investor' in Vietnam's IIAs is defined as 'a natural person' or 'a legal/judicial person' in accordance with the laws and regulations of his/her home country.[88] Such definition is, in certain IIAs, accompanied by the specification 'who invests'[89] or 'who effected or is effecting investments'[90] in the territory of the host state. For example, the *ASEAN-Hong Kong IA* and *Vietnam-EAEU FTA* similarly state 'investor of a Party means a natural person or judicial person of a Party that has made an investment in the territory of another Party'.[91] In certain treaties where the term 'investor' does not come with such a specification, it has a similar meaning since 'investment' and thus 'investor' only enjoys

[87] See below n 88.
[88] For the definition of 'investor' in Vietnam's 34 IIAs with non-EU members: see *Vietnam-Argentina BIT* art 1(2); *Vietnam-Armenia BIT* art 1(1); *Vietnam-Belarus BIT* art 1(2); *Vietnam-Cambodia BIT (amended 2012)* art 1(2); *Vietnam-China BIT* art 1(2); *Vietnam-Cuba BIT* art 1(3); *Vietnam-Egypt BIT* art 1(2); *Vietnam-Iceland BIT* art 1(1); *Vietnam-Iran BIT* art 1(2); *Vietnam-Japan BIT* art 1(1); *Vietnam-Kazakhstan BIT* art 1(2); *Vietnam-Korea BIT (2003)* art 1(2); *Vietnam-Kuwait BIT* art 1(2); *Vietnam-Laos BIT* art 1(1)(c); *Vietnam-Malaysia BIT* art 1(1)(c); *Vietnam-Macedonia BIT* art 1(2); *Vietnam-Mongolia BIT* art 1(c); *Vietnam-Mozambique BIT* art 1(2); *Vietnam-Oman BIT* art 1(2); *Vietnam-Philippines BIT* art 1(2); *Vietnam-Russia BIT* art 1(b); *Vietnam-Singapore BIT* art 1(3)–(4); *Vietnam-Switzerland BIT* art 1(1); *Vietnam-Taiwan BIT (1993)* art 1(2); *Vietnam-Thailand BIT* art 1(1)–((2); *Vietnam-Turkey BIT* art 1(2); *Vietnam-UK BIT* art 1(c)–(d); *Vietnam-Ukraine BIT* art 1(4); *Vietnam-Uruguay BIT* art 1(2); *Vietnam-Uzbekistan BIT* art 1(1); *Vietnam-Venezuela BIT* art 1(2); *Vietnam-US BTA* ch IV art 1(9) *ASEAN-Hong Kong IA* art 1(f); *Vietnam-EAEU FTA* ch 8 art 8.28(b). For the definition of 'investor' in Vietnam's 20 BITs with EU members: see *Vietnam-Austria BIT* art 1(2); *Vietnam-BLEU BIT* art 1(1); *Vietnam-Bulgaria BIT* art 1(3); *Vietnam-Czech BIT* art 1(2); *Vietnam-Denmark BIT* art 1(3); *Vietnam-Estonia BIT* art 1(1); *Vietnam-Finland BIT (2008)* art 1(3); *Vietnam-France BIT* art 1(2)–(3); *Vietnam-Germany BIT* 1(3)–(4); *Vietnam-Greece BIT* art 1(3); *Vietnam-Hungary BIT* art 1(2); *Vietnam-Italy BIT* art 1(2); *Vietnam-Latvia BIT* art 1(c); *Vietnam-Lithuania BIT* art 1(c); *Vietnam-Netherlands BIT* art 1(b); *Vietnam-Poland BIT* art 1(2); *Vietnam-Romania BIT* art 1(1); *Vietnam-Slovakia BIT* art 1(3); *Vietnam-Spain BIT* art 1(2); *Vietnam-Sweden BIT* art 1(3).
[89] *Vietnam-Egypt BIT* art 1(2).
[90] *Vietnam- Philippines BIT* art 1(2).
[91] *ASEAN-Hong Kong IA* art 1(f); *Vietnam-EAEU FTA* ch 8 art 8.28(b).

protections under these treaties once it has been established in Vietnam. The establishment of 'investment' would depend on Vietnam's laws and regulations at the time of admission.

2 *'Investor' Seeking, and/or Making and Having 'Investment'*

Under six IIAs, 'investor' not only refers to who 'has made an investment' but also to who 'is making' or 'is seeking to make' an investment.[92] Where the term 'investor' includes the latter, treaty obligations such as FTT and NT would, to a certain extent, apply to pre-established 'investment' and relevant 'investor'.

In particular, the *ACIA* and *ASEAN-China IA* define 'investor' as natural/juridical person that 'is making or has made an investment'[93] in the capital-attracting/importing state (say, Vietnam). Three other IIAs – *ASEAN-Korea IA*, *ASEAN-ANZ FTA* and *Vietnam-Korea FTA* – broaden the scope of the term 'investor' to who 'is seeking to make' an investment.[94] Such an investor needs to take 'active steps to initiate a notification or approval process, where applicable, for making an investment', as clarified by these treaties.[95] Similarly, the *CPTPP* includes natural/juridical person that 'attempts to make' an investment in the definition of 'investor'[96] and requires her/him taking 'concrete action or actions to make an investment' (eg channeling resources or capital in order to set up a business, or applying for a permit or license).[97]

D *Section Remark*

Vietnam's 60 IIAs studied have different treaty scopes. Of these, 40 BITs apply to all legislative measures without exclusions, which protect an investment as every kind of assets and an investor having such investment (Table 2.2). The remaining 20 IIAs exclude certain matter-based measures from the scopes of FET, expropriation, FTT and/or NT provisions, which protect an investment as every kind of assets or having characteristics and an investor having, making and/or seeking this investment (Table 2.2).

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[92] *ACIA* art 4(d); *ASEAN-China IA* art 1(e); *ASEAN-Korea IA* art 1(k); *ASEAN-ANZ FTA* ch 11 art 2(d); *Vietnam-Korea FTA* ch 9 art 9.28; *CPTPP* ch 9 art 9.1.
[93] *ACIA* art 4(d); *ASEAN-China IA* art 1(e).
[94] *ASEAN-Korea IA* art 1(k); *ASEAN-ANZ FTA* ch 11 art 2(d); *Vietnam-Korea FTA* ch 9 art 9.28.
[95] *ASEAN-Korea IA* art 1(k) n 3. See also *ASEAN-ANZ FTA* ch 11 art 2(d), n 4; *Vietnam-Korea FTA* ch 9 art 9.28, n 24.
[96] *CPTPP* ch 9 art 9.1.
[97] Ibid ch 9 art 9.1, n 12.

Table 2.2: Different Treaty Scopes in Vietnam's IIAs

Treaty Contexts (60)	**Scope Elements**			**Treaty Contexts* (42)**
	Legislative Measures	'Investment'	'Investor'	
40 BITs[98]	No Matter-Based Exclusions	Every Kind of Assets	Having 'Investment'	22[99]
11 IIAs[100]	Matter-based Exclusions	Every Kind of Assets	Having 'Investment'	9[101]
ASEAN-China IA *ASEAN-ANZ FTA*			Seeking, and/or Making and Having 'Investment'	2
Vietnam-Oman BIT *ASEAN-Hong Kong IA* *Vietnam-EAEU FTA*	Matter-based Exclusions	Every Kind of Assets Having Investment Characteristics	Having 'Investment'	4[102]
ACIA *ASEAN-Korea IA* *Vietnam-Korea FTA* *CPTPP*			Seeking, and/or Making and Having 'Investment'	5[103]
Note: Treaty Context*: Number of Vietnam's IIAs if the *EU-Vietnam IPA* and the *RCEP* come into force.				

[98] Vietnam's 22 BITs with non-EU members and Vietnam's 18 BITs with EU members: see above n 60.
[99] Vietnam's 22 BITs with non-EU members: see above n 60.
[100] Vietnam's nine IIAs with Japan, Iceland, Kazakhstan, Korea, Macedonia, Mozambique, the UK, Uruguay, the US (non-EU members); Vietnam's two BITs with Greece and Slovakia (EU members).
[101] Vietnam's nine IIAs with non-EU members: see above n 100.
[102] Vietnam's current three IIAs with non-EU members: *Vietnam-Oman BIT; ASEAN-Hong Kong IA*; *Vietnam-EAEU FTA.* They also include the *Vietnam-EU IPA*: at ch 1 art 1.2(h)–(i), ch 2 art 2.1.
[103] Vietnam's current four IIAs with non-EU members: *ACIA*; *ASEAN-Korea IA*; *Vietnam-Korea IA*; *CPTPP.* They also include the *RCEP*: at ch 10 arts 10.1(c)–(d), 10.2.

CONCLUSION: CONTEXTUAL ELEMENTS

This chapter identifies the contextual elements of investment protection provisions governing substantive aspects of legislative measures in Vietnam's 60 IIAs, some of which are analysed in the following chapters.

First, investment protection provisions, except for MFN, have not been consistently approached across or within the 1990–2007 and 2008–present periods, and state-right-to-regulate provisions appear only occassionally throughout the two periods. This suggests that no consistent approach has been adopted by Vietnam and that provision designs depend, inter alia, on Vietnam's treaty partners.

Secondly, the treaty objectives and purposes of Vietnam's 50 IIAs are to protect and promote foreign investment for economic development, and those of the other ten IIAs are to protect and promote foreign investment for economic development and social and environmental development. Such different treaty objectives and purposes suggest that even though treaty provisions on FET, expropriation, FTT or NT have similar designs, they might be interpreted differently to achieve relevant treaty objectives and purposes.

Lastly, Vietnam's 40 IIAs apply to all state measures protecting any investment involving any kind of assets and any investor having such investment, and the remaining 20 IIAs apply to almost state measures, excepting subject- or matter-based exclusions, protecting (i) any kind of assets or those having investment characteristics and (ii) investors seeking/making/having such investment. These variations in scope suggest that even though treaty provisions on FET, expropriation, FTT or NT may set similar substantive requirements for legislative measures, certain legislative measures would not have to meet such requirements due to falling outside the relevant treaty scope.

Chapter 3
FAIR AND EQUITABLE TREATMENT PROVISIONS IN VIETNAM'S IIAS: SUBSTANTIVE REQUIREMENTS FOR LEGISLATIVE MEASURES

INTRODUCTION

It is acknowledged that fair and equitable treatment (FET) provisions aim to provide procedural and substantive protections for foreign investments.[1] In this thesis, only substantive protections of FET are discussed. The substantive elements frequently raised in international arbitration practice are the obligation to act in good faith, protection against arbitrariness and discrimination, and the protection of foreign investor's reasonable expectations.[2] Indeed, the question of what specific elements FET should cover, or what FET-related rules exist in customary international law (CIL) have yet to be answered.[3] Having said that, the extent to which FET provisions in Vietnam's IIAs substantively require legislative measures to protect foreign investments depends largely on the treaty text, which is examined in this chapter.

To define substantive requirements for legislative measures in Vietnam's IIAs, the chapter first surveys FET provisions. It finds that almost all of Vietnam's IIAs (59 out of 60) oblige Vietnam to accord FET to foreign investments. Provisions on FET take two forms: FET provisions without limitations to CIL in 53 IIAs – A, and FET provisions with limitations to CIL in six IIAs – B (Part I).

Before analysing the two forms of FET provisions in Vietnam's IIAs, the chapter reviews tribunals' approaches to (i) the threshold of FET and (ii) substantive requirements for legislative measures while interpreting FET provisions (Part II). Notably, the FET provisions selected in this review have similar features with Formulations A or B in Vietnam's IIAs. Regarding the threshold of FET, the chapter finds that it was, among

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[1] See *Ioan Micula, Viorel Micula and others v Romania (I) (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/05/20, 11 December 2013) [520] ('*Micula v Romania (I)*'). See also Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 151, 159–60.

[2] See, eg, *Micula v Romania (I)* (n 1) [520]; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016*)* [320]–[323] ('*Philip Morris v Uruguay*').

[3] Jacob Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment' (2012) 25(1) *Leiden Journal of International Law* 77, 90–2; Christopher L Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30(4) *Journal of International Arbitration* 361, 373–4.

tribunals taking the autonomous approach FET is perceived as additional to CIL requirements, while tribunals taking the equating approach view it as equal to what is required under CIL. However, the substantive requirements for legislative measures resulting from each approach are similar. Based on the review, the section contributes five practical questions to the analysis of FET provisions in the context of Vietnam's IIAs.

Considering the five practical questions in international arbitration practice and based on the VCLT interpretation rules, the chapter analyses two formulations of FET provisions in Vietnam's IIAs to find substantive requirements for legislative measures. FET provisions with Formulation A may oblige Vietnam to act in good faith, protect foreign investments against arbitrariness and/or arbitrary/unreasonable discrimination, and respect specific (unilateral or bilateral) commitments previously granted by state authorities to foreign investors (Part III). It suggests that legislative measures are (i) in good faith (bona fide), (ii) not arbitrary and (iii) reasonably discriminatory, and (iv) do not have the effect of reversing granted specific commitments without proportionality. FET provisions with Formulation B may oblige Vietnam to meet the first three requirements (Part IV). Non-arbitrariness here is required at least at the 'rational' level.

The chapter concludes with substantive requirements for fair and equitable legislative measures imposed by FET provisions with Formulations A and B. Unfair and inequitable measures could be accepted to a certain extent if undertaken for security or public interests and if they meet other qualifications, brought about by treaty exceptions in certain treaty contexts as analysed in Chapters 7 and 8.

I A MAP OF PROVISION FORMULATIONS – FAIR AND EQUITABLE TREATMENT PROVISIONS IN VIETNAM'S IIAS

A *Section Overview*

Of the Vietnam's 60 IIAs surveyed, 59 treaties have provisions on FET, the *Vietnam-Iceland BIT* being the sole exception. FET provisions across Vietnam's IIAs are not the same. They can be classified as undefined FET provisions having the term 'fair and equitable treatment' only (50 IIAs),[4] and defined FET provisions additionally expressing non-denial of justice as a FET element (ten IIAs) (Table 3.1).[5] FET provisions can also be divided into those without limitations to CIL in 53 IIAs – Formulation A, and those with limitations to CIL in six IIAs – Formulation B (Table 3.1). While both classification approaches are flexibly adopted from other scholars in the general FET context,[6] the second is taken for the purpose of this study.

The variety of provision formulations will remain the same even after the *Vietnam-EU IPA* and the *RCEP* come into force. The FET provision in the *Vietnam-EU IPA* could be classed as Formulation A since it does not limit FET to CIL. It differs from current Formulation A FET provisions only to the extent that it lists, *inter alia*, many substantive elements of FET. Specifically, a violation of FET could be found if a measure or series of measures regarding their substantive aspects constitute: (i) manifest arbitrariness; (ii) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (iii) abusive treatment such as […] abuse of power or similar bad faith conduct.[7] The provision also mentions the frustration of an investor's legitimate expectation, caused by state measures, as a considerable element taken by a dispute settlement body.[8] In contrast, FET provision in the *RCEP* is similar to those in the Formulation B category, particularly those found in ASEAN's IIAs.[9]

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[4] See below nn 10, 12, 16.
[5] See below nn 13, 15, 17.
[6] UNCTAD, *Fair and Equitable Treatmen: UNCTAD Series on Issues in International Investment Agreements II* (rev ed, 2012) 17–35 ('*Fair and Equitable Treatment*').
[7] *Vietnam-EU IPA* ch 2 art 2.5(2). See also app 3.
[8] *Vietnam-EU IPA* ch 2 art 2.5(4). It specifies that 'whether a Party made *a specific representation* to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated' (emphasis added). See also app 3.
[9] *RCEP* ch 10 art 10.5, annex 9-A. See also app 3.

Table 3.1: Formulations of FET Provisions in Vietnam's IIAs

Features of Fair and Equitable Treatment Provisions		Formulations	Treaty Context (60)	Treaty Context* (42)
FET Provisions without Limitation to CIL	FET Term without Elements	A (53 IIAs)	46[10]	28[11]
	FET Term without Elements but with Reference to International Law		2[12]	0
	FET Term with Elements		4[13]	5[14]
	FET Term with Elements and Reference to International Law		1[15]	1
FET Provisions with Limitation to CIL	FET Term without Elements	B (6 IIAs)	1[16]	1
	FET Term with Elements		5[17]	6[18]
No FET Provisions			1[19]	1
Note: Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and *RCEP* come into force.				

[10] Twenty eight BITs with non-EU members: see *Vietnam-Argentina BIT* art 3(1); *Vietnam-Armenia BIT* art 4(1); *Vietnam-Belarus BIT* art 2(2); *Vietnam-Cambodia BIT (amended 2012)* art 2(2); *Vietnam-China BIT* art 3(1); *Vietnam-Egypt BIT* art 2(2); *Vietnam-Iran BIT* art 4(1); *Vietnam-Japan BIT* art 9(1); *Vietnam-Korea BIT (2003)* art 2(2); *Vietnam-Kazakhstan BIT* art 3(2); *Vietnam-Kuwait BIT* art 2(2); *Vietnam-Laos BIT* art 2(2); *Vietnam-Malaysia BIT* art 2(2); *Vietnam-Mongolia BIT* art 2(2); *Vietnam-Mozambique BIT* art 2(3); *Vietnam-Oman BIT art* 3(2); *Vietnam-Philippines BIT* art 11(2); *Vietnam-Russia BIT* art 3; *Vietnam-Singapore BIT* art 3(2); *Vietnam-Switzerland BIT* art 3(2); *Vietnam-Taiwan BIT (1993)* art 3(2); *Vietnam-Thailand BIT* art 4(1)–(2); *Vietnam-Turkey BIT* art 2(2); *Vietnam-Ukraine BIT* art 2(2); *Vietnam-UK BIT* art 2(2); *Vietnam-Uruguay BIT* art 3(2); *Vietnam-Uzbekistan BIT* art 4(1); *Vietnam-Venezuela BIT* art 2(2). For 18 BITs with EU's members, see *Vietnam-Austria BIT* art 2(2); *Vietnam-BLEU BIT* art 3(1); *Vietnam-Bulgaria BIT* art 2(1); *Vietnam-Czech BIT* art 2(2); *Vietnam-Denmark BIT* art 3(1); *Vietnam-Estonia BIT* art 2(2); *Vietnam-Finland BIT* art 2(2); *Vietnam-Germany BIT* art 2(1); *Vietnam-Greece BIT* art 3(2); *Vietnam-Hungary BIT* art 2(2); *Vietnam-Italy BIT* art 2(2); *Vietnam-Latvia BIT* art 2(2); *Vietnam-Lithuania BIT* art 2(2); *Vietnam-Netherlands BIT* art 3(1); *Vietnam-Poland BIT* art 2(2); *Vietnam-Romania BIT* art 3(2); *Vietnam-Slovakia BIT* art 3(2); *Vietnam-Sweden BIT* art 2(1).

[11] Twenty eight BITs with non-EU members: see above n 10.

[12] Two BITs with EU members: see *Vietnam-Spain BIT* art 3(1); *Vietnam-France BIT* art 3.

[13] Four IIAs with non-EU members: see *Vietnam-Macedonia BIT* art 3(2)–(3); *ACIA* art 11; *ASEAN-China IA* art 7; *Vietnam-EAEU FTA* ch 8 art 8.31.

[14] Four IIAs with non-EU members: see above n 13. See also *Vietnam-EU IPA* ch 2 art 2.5, annex 3.

[15] One BIT with a non-EU member: see *Vietnam-Cuba BIT* art 4.

[16] One BIT with a non-EU member: see *Vietnam-US BTA* ch IV art 3(1).

[17] Five IIAs with non-EU members: see *ASEAN-Korea IA* art 5; *ASEAN-ANZ FTA* ch 11 art 6; *ASEAN-Hong Kong IA* art 5; *Vietnam-Korea FTA* ch 9 art 9.5, annex 9-A; *CPTPP* ch 9 art 9.6, annex 9-A. See also app 3.

[18] Five IIAs with non-EU members: see above n 17. For the *RCEP*, see above n 9.

[19] One BIT with a non-EU member: see *Vietnam-Iceland BIT*.

B *FET Provisions without Limitation to Customary International Law – Formulation A*

As ealier mentioned, FET provisions in 53 IIAs do not limit FET to CIL (Formulation A). These provisions include both provisions that do not define FET in 48 treaties and provisions that do in five treaties (Table 3.1). Some provisions mention FET as a standalone standard, such as '[e]ach Contracting Party shall ensure in its own territory fair and equitable treatment to investors of the other Contracting Party'.[20] Some combine FET with other treatments, such as non-impairment of foreign investments by unreasonable or discriminatory measures (non-UDM/UM/DM),[21] full protection and security (FPS),[22] national treatment (NT) and most-favoured-nation treatment (MFN).[23]

Notably, FET provisions in the *Vietnam-Cuba BIT (2007)*, *Vietnam-Spain BIT* and *Vietnam-France BIT* refer FET to international law but do not limit FET to CIL (Table 3.1). Those in the first two treaties require FET 'in accordance with international law',[24] while the provision in the last treaty requires FET 'in accordance with principles of international law'.[25]

[20] See, eg, *Vietnam-Armenia BIT* art 4(1) [tr author].
[21] See, eg, *Vietnam-Egypt BIT* art 2(2); *Vietnam-Kuwait BIT* art 2(2); *Vietnam-Turkey BIT* art 2(2).
[22] See, eg, *Vietnam-Kuwait BIT* art 2(2); *Vietnam-Mozambique BIT* art 2(3).
[23] See, eg, *Vietnam-Iran BIT* art 4(1).
[24] *Vietnam-Cuba BIT* art 4(1); *Vietnam-Spain BIT* art 3(1). This FET provision in the *Vietnam-Spain BIT* fully states that '[i]nvestments made by investors of one Contracting Party in the territory of the other Contracting Party *shall be accorded fair and equitable treatment* and shall enjoy full protection and security *in accordance with international law*' (emphasis added).
[25] *Vietnam-France BIT* art 3.

C *FET Provisions with Limitation to Customary International Law – Formulation B*

Unlike those in the 53 IIAs mentioned above, FET provisions in the remaining six IIAs directly and indirectly link FET to CIL (Table 3.1). FET provisions include both undefined FET provision in one treaty and defined FET provisions in five treaties (Table 3.1). The former is found only in the *Vietnam-US BTA*, which provides that '[e]ach Party shall at all times accord to covered investment fair and equitable treatment and full protection and security and shall in no case accord treatment less favourable than that required by applicable rules of customary international law'.[26] The latter is found in the *ASEAN-Korea IA*, *ASEAN-ANZ FTA*, *ASEAN-Hong Kong IA* and *Vietnam-Korea FTA*, which clarifies that FET does not 'require treatment in addition to or beyond that which is provided under *the customary international law* and do[es] not create additional substantive rights'.[27] The provision in the *Vietnam-Korea FTA* additionally describes FET (and FPS) 'in accordance with customary international law'.[28] While having a similar specification, that in the *CPTPP* considers FET as a part of CIL, rather than an obligation complying with CIL.[29]

[26] *Vietnam-US BTA* ch IV art 3(1).
[27] *ASEAN-Korea IA* art 5(2)(c); *ASEAN-ANZ FTA* ch 11 art 6(2)(c); *ASEAN-Hong Kong IA* art 5(1)(c); *Vietnam-Korea FTA* ch 9 art 9.5(2). Notably, the clarification does not apply to Indonesia in the first two contexts: see *ASEAN-Korea IA* art 5(2)(c) n 9; *ASEAN-ANZ FTA* art 6(2)(c) n 6.
[28] *Vietnam-Korea FTA* ch 9 art 9.5(1). See also app 3.
[29] *CPTPP* ch 9 art 9.6. See also app 3.

II A Focused Review of Tribunals' Interpretation Approaches – Fair And Equitable Treatment Provisions in International Arbitration Practice

A *Section Overview*

It should be noted that, only Formulation A FET provisions in the *Vietnam-France BIT* and *Vietnam-Netherlands BIT* among those in Vietnam's IIAs have been interpreted by tribunals, in *Dialasie v Vietnam* and *Trinh and Binh Chau v Viet Nam (II)* respectively.[30] No public access to relevant arbitral awards – and therefore no interpretation of these provisions – is available. However, FET provisions in other IIAs concluded by other countries have been interpreted at least in 279 claims over at least 552 claims (there may be others).[31] The review below focuses on tribunals' interpretations of certain issues in these cases.

In interpreting FET provisions, tribunals have adopted two different approaches: (i) the autonomous approach and (ii) the equating approach (Part II(B)). Where tribunals took the first approach, the threshold of FET was arguably perceived as being higher than that required under CIL – minimum standard of treatment (MST). Under the second approach, the threshold of FET was perceived as being equal to that for MST. The term MST here refer to the 'minimum' standard of treatment, or the 'minimum' level of protection, that a state must accord to foreign investors under CIL.[32] A debate on whether FET is an autonomous obligation or grounded in CIL possibly derives from the first reason that FET was originally drafted and required to 'confor[m] to the "minimum standard" which forms part of customary international law'.[33] This debate is ongoing also because FET provisions still 'diffe[r] significantly' in treaty law, such as those with and without

[30] *Dialasie SAS v Socialist Republic of Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 17 November 2014) ('*Dialasie v Vietnam*'); *Trinh Vinh Binh and Binh Chau JSC v Vietnam (II) (Award)* (PCA Arbitral Tribunal, Case No 2015-23, 10 April 2019) ('*Trinh and Binh Chau v Vietnam (II)*'). Notably, the FET provision in Article 3(1) of the Chapter IV of the *Vietnam-US BTA* was invoked by the claimant in *Michael McKenzie v Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 11 December 2013); however, no interpretation was taken place because the case was declined at the jurisdiction stage.

[31] Of the mentioned 279 claims resolved at the merit stage, 144 claims are in favor of foreign investors and those arisen from Formulation-B-like FET provisions account for a small number. This figure is collected by the author from data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

[32] See generally Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013) 13–30.

[33] OECD, Draft Convention on the Protection of Foreign Property: Text with Notes and Comments (1967) art 1. See also *Fair and Equitable Treatment* (n 6) 5, 8.

reference to CIL or general principles of international law, and some elements of FET and MST 'clearly overlap'.[34]

However, when the tribunals came to define the content of FET, no distinction can be found between requirements drawn from the first approach and those drawn from the second (Part II(C)). In both cases, requirements relevant to substantive aspects of state measures include (i) the obligation to act in good faith, (ii) protection against arbitrary or discriminatory measures, and (iii) the protection of investor's legitimate expectations. It should be noted that many scholars have studied FET-related cases and come up with the above two approaches.[35] However, this study only reviews cases dealing with similar sets of FET provisions, similar to either Formulation A or B in Vietnam's IIAs, and convergence and divergence of the two approaches in concretising FET requirements.

[34] *Fair and Equitable Treatment* (n 6) 7–8.

[35] See, eg, Directorate for Financial and Enterprise Affairs, OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (Working Paper, No 2004/3, September 2004) 8, 13–8, 22–5 <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf> ('Fair and Equitable Treatment'). Jean Kalicki and Suzana Medeiros, 'Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?' (2007) 22(1) *ICSID Review—Foreign Investment Law Journal* 24, 41–5; J Roman Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone too Far' (2008) 9(4) *Journal of World Investment & Trade* 255, 257–60; Katia Yannaca-Small, 'Fair and Equitable Treatment Standard' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 1st ed, 2010) 385, 387–93; Thanh Tra Pham, 'The Impact of Treaty-Based Investment Protection upon Host States' Regulatory Autonomy' (PhD Thesis, Katholieke Universiteit Leuven, 2011) 181–9; Ying Zhu, 'Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development' (2018) 58(2) *Natural Resources Journal* 319, 327–34.

B *Different Thresholds of Fair and Equitable Treatment*

1 *Additional to What is Required under Customary International Law: Autonomous Approach*

FET has been approached as an autonomous standard by certain tribunals in interpreting FET provisions resembling Formulation A, which was deemed 'more demanding'[36] than requirements prescribed by CIL. This approach was based on the texts of the FET provisions at issue.

Where FET provisions mentioned the term FET only, certain tribunals applied the *VCLT* interpretation rules to define the meaning of FET through treaty terms, treaty objectives/purposes and treaty context, similar to defining other independent treaty provisions. In *MTD v Chile*,[37] the tribunal looked to the dictionary to conclude that '[i]n their ordinary meaning, the terms "fair" and "equitable" … mean "just", "even-handed", "unbiased", "legitimate"'.[38] Additionally, it referred to treaty objectives and purposes to confirm that FET should be 'understood to be treatment in *an even-handed and just manner*'.[39] In its view, the objectives of FET were 'conducive to fostering the promotion of foreign investment',[40] in addition to 'prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors'.[41] Based on this point, the tribunal implied that FET's threshold was higher than MST's. The tribunals in *Saluka v Czech*,[42] *Micula v Romania* and *Philip Morris v Uruguay* also followed this path.[43]

Where FET provisions mentioned the term FET with references to international law or its principles, tribunals perceived FET as 'higher standar[d] than required by international

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[36] Using the words of the *Occidental v Ecuador (I)* and *Sempra v Argentina* tribunals. See *Occidental Exploration and Production Company v Republic of Ecuador (I) (Award)* (LCIA Arbitral Tribunal, Case No UN3467, 1 July 2004) [189] ('*Occidental v Ecuador (I)*'); *Sempra Energy International v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) [302] ('*Sempra v Argentina*').
[37] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/7, 25 May 2004) ('*MTD v Chile*').
[38] Ibid [113].
[39] Ibid (emphasis added).
[40] Ibid.
[41] Ibid.
[42] *Saluka Investments BV v The Czech Republic (Partial Award)* (UNCITRAL Arbitral Tribunal, 17 March 2006) ('*Saluka v Czech*');
[43] S*aluka v Czech* (n 42) [300]–[301]; *Micula v Romania (I)* (n 1) [504]; *Philip Morris v Uruguay* (n 2) [316]–[319].

law',[44] or as not assimilated to MST.[45] The reference 'in accordance with [or in conformity with] principles of international law' in FET provisions, according to certain tribunals, referred to 'a wider range of principles related to fairness and equity' than MST only.[46] Additionally, the phrase 'in accordance with [or in conformity with] international law' in FET provisions, in other tribunals' view, meant to understand FET as having 'the *additive* character of the fairness elements'.[47] Similarly, the reference 'no … less than required by international law' in FET provisions was interpreted by certain tribunals more specifically to establish a minimum, not maximum, standard for FET. For example, the tribunal in *Azurix v Argentina (I)* viewed that the phrase as functioning to '*set a floor, not a ceiling*, in order to avoid a possible interpretation of these standards below what is required by international law'.[48] Tribunals in *Enron v Argentina*[49] and *Sempra v Argentina* also expressed that FET 'require[d] a treatment *additional to, or beyond* that of, customary law'.[50] According to these two tribunals, FET might be 'more precise' than MST in 'more vague circumstances' although they might be 'equated' in 'sufficiently elaborate and clear' circumstances.[51] These interpretations of the tribunals possibly stem from a similar perception of various sources of international law. More specifically, international law covers not only CIL but also general principles of international law according to Article 38(1) of the ICJ Statute.[52] Certain of these general principles might become customary international rules but not all of them could do so.

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[44] Using the words of the *Azurix v Argentina (I)* tribunal. See *Azurix Corp v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 14 July 2006) [361] ('*Azurix v Argentina (I)*').

[45] Using the words of the *Lemire v Ukraine* and *OKO v Estonia* tribunals. See *Joseph Charles Lemire v Ukraine (Decision on Jurisdiction and Liability)* (ICSID Arbitral Tribunal, Case No ARB/06/18, 14 January 2010) [252] ('*Lemire v Ukraine (II)*'); *OKO Pankki Oyj and others (formerly OKO Osuuspankkien Keskuspankki Oyj and others) v Republic of Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/6, 19 November 2007) [236] ('*OKO v Estonia*').

[46] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux) v Argentine Republic (Award II)* (ICSID Arbitral Tribunal, Case No ARB/97/3, 20 August 2007) [7.4.6] ('*Vivendi v Argentina (I) (Resubmission)*'); *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/23, 11 June 2012) [1001] ('*EDF and others v Argentina*'). The *Crystallex v Venezuela* tribunal took a similar view: see *Crystallex International Corporation v Bolivarian Republic of Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/11/2, 4 April 2016) [530] ('*Crystallex v Venezuela*').

[47] *Pope & Talbot v Government of Canada (Award on the Merits of Phase 2)* (UNCITRAL Arbitral Tribunal, 10 April 2001) [111] ('*Pope & Talbot v Canada*') (emphasis added). The tribunal in *OKO v Estonia* (n 45) [235]–[236] also shared a similar perception.

[48] *Azurix v Argentina (I)* (n 44) [361] (emphasis added). The tribunal in *Lemire v Ukraine (II)* (n 45) similarly perceived that 'the international customary minimum standard should not operate as a ceiling, but rather as a floor': at [253].

[49] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) ('*Enron v Argentina*').

[50] *Enron v Argentina* (n 49) [258]; *Sempra v Argentina* (n 36) [302] (emphasis added).

[51] Ibid.

[52] See Statute of the International Court of Justice art 38(1) ('ICJ Statute').

2 *Equal to What is Required under Customary International Law: Equating Approach*

FET has also been approached as equal to MST by many tribunals in interpreting FET provisions resembling Formulation A/B. This approach has been based on different reasonings: (i) FET's actual content in certain arbitral practice, and (ii) treaty texts including binding interpretation.

Where FET provisions mention the term FET only, some tribunals have reasoned that FET's content was 'not materially different' from MST's, so that FET and MST required the 'minimum' level of protection (ie the high level of violations) (i). In *Biwater v Tanzania*,[53] the tribunal acknowledged the opinions of certain leading scholars on the autonomous character of FET, but observed that '*the actual content* of the treaty standard of fair and equitable treatment is *not materially different* from the content of the minimum standard of treatment in customary international law'.[54] In its view, the threshold for violating FET and MST was 'high'.[55] The tribunal in *Deutsche v Sri Lanka*[56] took the same position.[57]

Where FET provisions mentioned the term FET with references to international law or its principles, certain tribunals also reasoned FET and MST were not different but required a higher level of protection (ie the lower level of violations) since MST had evolved (i). In *Rusoro v Venezuela*,[58] the tribunal interpreted the phrase 'in accordance with the principles of international law' in the FET provision at issue as a reference to MST under CIL.[59] In the tribunal's view, there was '*no substantive difference* in the level of protection afforded by both standards [FET and MST]',[60] and they required states not to take actions or make omissions that infringed 'certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor'.[61] In

[53] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008) ('*Biwater v Tanzania*').
[54] Ibid [592] (emphasis added) (citations omitted).
[55] Ibid [597].
[56] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/2, 31 October 2012) ('*Deutsche Bank v Sri Lanka*').
[57] Ibid [419].
[58] *Rusoro Mining Ltd v Bolivarian Republic of Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/5, 22 August 2016) ('*Rusoro Mining v Venezuela*').
[59] Ibid [520].
[60] Ibid (emphasis added).
[61] Ibid [523] (citations omitted).

Murphy v Ecuador (II),[62] for example, the tribunal held that 'th[e] debate [between FET and MST] is *more theoretical than substantial*'[63] when interpreting the sentence 'investments … shall in no case be accorded treatment less than required by international law' in the FET provision at issue.[64] In its view, it was well recognised that MST and FET encompassed 'transparency, consistency, stability, predictability, conduct in good faith, and the fulfillment of an investor's legitimate expectations'.[65] Interpreting a similar phrase, the tribunal in *Cargill v Poland* concluded that FET was indeed equal to an evolving MST.[66]

In the context of the *NAFTA*, tribunals consistently agreed that FET was equal to MST after July 2001, when the *NAFTA* Free Trade Commission (FTC) issued the joint interpretation statement of Article 1105 on MST which included FET via the reference 'in accordance with international law' (ii).[67] The statement stated that '[t]he concept of "fair and equitable treatment" … do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.[68] Although what constitutes MST required further discussion,[69] the FTC's binding interpretation of Article 1105 at least limited the threshold of FET.

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[62] *Murphy Exploration & Production Company – International v The Republic of Ecuador (II) (Partial Final Award)* (PCA Arbitral Tribunal, Case No 2012-16, 6 May 2016) ('*Murphy v Ecuador (II)*').
[63] Ibid [206] (emphasis added).
[64] *Ecuador-US BIT* art II(3)(a).
[65] *Murphy v Ecuador (II)* (n 62) [206] (citations omitted).
[66] *Cargill, Incorporated v Republic of Poland (Final Award)* (UNCITRAL Arbitral Tribunal, 29 February 2008) [453] *('Cargill v Poland').*
[67] See, eg, *Mondev International Ltd v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/2, 11 October 2002) [121]–[122] ('*Mondev v US*'); *Cargill, Incorporated v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009) [268] ('*Cargill v Mexico*'); *Mesa Power Group LLC v Government of Canada (Award)* (PCA Arbitral Tribunal, Case No 2012-17, 24 March 2016) [503] ('*Mesa Power v Canada*'); *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I) (Decision on Liability and Principles of Quantum)* (ICSID Arbitral Tribunal, Case No ARB(AF)/07/4, 22 May 2012) [152] ('*Mobil and Murphy v Canada (I)*').
[68] NAFTA Free Trade Commission, Notes of Interpretation of Certain Provisions of NAFTA Chapter 11 (31 July 2001 s B(2).
[69] See generally Patrick Dumberry, 'The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31(1) *Journal of International Arbitration* 47; Stephen Fietta, 'The "Legitimate Expectations" Principle under Article 1105 NAFTA: *International Thunderbird Gaming Corporation v The United Mexican States*' (2006) 7(3) *The Journal of World Investment & Trade* 423; Yannaca-Small (n 35) 389–91.

C *Different Substantive Requirements for Legislative Measures*

1 *Obligation to Act in Good Faith: Necessary Requirement*

The FET has been consistently perceived by tribunals following the autonomous/equating approach to include the obligation to act in good faith (bona fide). In other words, the presence of bad faith (mala fide) was perceived by the tribunals to lead to a violation of FET.

This perception arose from the reasoning, expressed by certain tribunals following the equating approach, that the obligation to act in good faith was a 'minimum' treatment states must apply to foreign investments/investors. For example, the tribunal in *Genin v Estonia*[70] stated that '[a]cts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling fair below international standards, or even subjective bad faith'.[71] This reasoning could be implied in the cases where certain tribunals, following the autonomous approach, considered good faith as a non-controversial feature of FET. The *Micula v Romania* tribunal asserted that '[t]here is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or *in bad faith*, will violate the fair and equitable treatment standard'.[72]

Notably, the absence of good faith (or the presence of bad faith) was not an essential factor to find a violation of FET, as articulated by tribunals following the autonomous/equating approach.[73] In other words, state actions/regulations causing harm to foreign investors could be at variance with FET even when good faith was found. For example, the tribunal in *CMS v Argentina,*[74] following the equating approach, asserted

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[70] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 June 2001) ('*Genin v Estonia*').
[71] Ibid [367] (citations omitted).
[72] *Micula v Romania (I)* (n 1) [522] (emphasis added). The tribunals in *Saluka v Czech* and *Philip Morris v Uruguay* took similar views: see *Saluka v Czech* (n 42) [303]; *Philip Morris v Uruguay* (n 2) [320].
[73] See, eg, *Cargill v Mexico* (n 67) [296]; *Waste Management v United Mexican States (II) (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3, 30 April 2004) [98] ('*Waste Management v Mexico (II)*'); *Mondev v US* (n 67) [116]; *Azurix v Argentina (I)* (n 44) [372]; *Técnicas Medioambientales Tecmed v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [153] ('*Tecmed v Mexico*'); *Loewen Group, Inc and Raymond L Loewen v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/98/3, 26 June 2003) [132] ('*Loewen v US*'); *Siemens AG v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [299]–[300] ('*Siemens v Argentina*'); *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/19, 18 August 2008) [341] ('*Duke Energy v Ecuador*').
[74] *CMS Gas Transmission Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No

that 'such intention [deliberate intention] and bad faith can aggravate the situation but are not an essential element of the [FET] standard'.[75] Similarly, the *Murphy v Ecuador (II)* tribunal, following the equating approach, concluded that 'the treaty's FET standard "is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not"',[76] after adopting this reasoning from *Occidental v Ecuador (I)*.

One might find that bad faith was perceived as a necessary feature of FET violations by the tribunal in *Genin v Estonia*.[77] However, it should be noted that the *Genin v Estonia* tribunal on the minimum treatment decided to choose the word 'include' in its statement as mentioned above,[78] which means it did not require bad faith at the same time as other violation features. As articulated by the *LG&E v Argentina* tribunal, '[t]he [*Genin v Estonia*] tribunal merely stated: "Acts that would violate this minimum standard *would include* acts showing a willful neglect of duty … or even subjective bad faith"'.[79]

According to certain tribunals following the equating approach, the absence of good faith was not always required to find a violation of FET in treaty law because contemporary MST under CIL required a higher threshold of protection. This reasoning was expressed in many cases through discussion of what constituted MST. MST has been linked by state respondents to a standard established by the Mexican-US General Claims Commission in *Neer v Mexico* in 1926, which required 'bad faith' or 'wilful neglect of duty' to violate MST.[80] This proposition was rejected by many *NAFTA* tribunals for several reasons. First, the tribunals reasoned that states across the world now provided a higher threshold for treatments than that established by the *Neer v Mexico* Commission. In particular, they reviewed the historical development of contemporary CIL and found that the protection against arbitrariness and unreasonable discrimination, the obligation not to deny justice and the obligation to guarantee due process have become customary international rules, in

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ARB/01/8, 12 May 2005) ('*CMS v Argentina*').

[75] Ibid [280]. See also *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) [129] ('*LG&E v Argentina*').

[76] *Murphy v Ecuador (II)* (n 62) [206], citing *Occidental v Ecuador (I)* (n 36) [186].

[77] See *Azurix v Argentina (I)* (n 44) [372].

[78] *Genin v Estonia* (n 70) [367].

[79] *LG&E v Argentina* (n 75) [129] (emphasis in original) (citations omitted).

[80] *L F H Neer and Pauline Neer (US) v United Mexican States (Decision)* (2006) IV UN Rep 60, 61 [4] ('*Neer v Mexico*'). The Commission fully stated that 'the treatment of an alien, in order to constitute an international delinquency, should amount to *an outrage*, to *bad faith*, to *wilful neglect of duty*, or to insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency' (emphasis added).

addition to the obligation not to act in bad faith.[81] Second, the tribunals reasoned that the standard established by the Commission itself did not qualified as CIL in the investment context, even at that time. According to the tribunals, the case involved the failures of Mexican police to investigate the death of a US citizen and the Commission did not examine whether an established treatment standard met two conditions of CIL – 'consistent state practice' and 'a sense of obligation' (*opinio juris*).[82] Similar reasoning could be implied in the cases where tribunals approached FET as greater than MST in terms of the threshold of treatment.[83]

2 *Protection against Arbitrariness and/or Discrimination*

(a) Necessary Requirements

FET has consistently been interpreted by tribunals following the autonomous/equating approach as including the requirement for protection against arbitrariness and/or discrimination. The failure to ensure such protection will thus lead to a violation of FET.

This interpretation, as expressed by certain tribunals following the equating approach, arose from the reasoning that protection against arbitrariness and/or discrimination has been considered a minimum customary international rule. For example, the tribunal in *Myers v Canada*[84] held that 'a breach of Article 1105 [on MST] occurs only when it is shown that an investor has been treated in such as *unjust or arbitrary manner* that the treatment rises to the level that is unacceptable from the international perspective'.[85] Similar reasoning could be implied in the cases where tribunals adopted this view or similar views of other tribunals.[86]

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[81] See, eg, *Mondev v US* (n 67) [116]; *Tecmed v Mexico* (n 73) [154]; *Cargill v Mexico* (n 67) [281], [296]; *Mesa Power v Canada* (n 67) [501]–[502]. See also *ADF Group Inc v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/1, 9 January 2003) [179] ('*ADF v US*'); *Clayton and Bilcon of Delaware Inc v Government of Canada (Award on Jurisdiction and Liability)* (PCA Arbitral Tribunal, Case No 2009-04, 17 March 2015) [440]–[441] ('*Clayton/Bilcon v Canada*'); *Glamis Gold Ltd v United States of America (Award)* (UNCITRAL Arbitral Tribunal, 8 June 2009) [616] ('*Glamis Gold v US*'); *Merrill & Ring Forestry LP v The Government of Canada (Award)* (ICSID Arbitral Tribunal, Case No UNCT/07/1, 31 March 2010) [207]–[210], [213] ('*Merrill & Ring v Canada*').

[82] See, eg, *Mondev v US* (n 67) [115]; *Mesa Power v Canada* (n 67) [497]–[498]; *Merrill & Ring v Canada* (n 81) [204]; *ADF v US* (n 81) [181]; *Windstream Energy LLC v The Government of Canada (Award)* (PCA Arbitral Tribunal, Case No 2013-22, 27 September 2016) [352] ('*Windstream Energy v Canada*').

[83] For examples of tribunals taking the approach, see above Part II(B)(1).

[84] *S D Myers, Inc v Government of Canada (Partial Award)* (UNCITRAL Arbitral Tribunal, 13 November 2000) ('*Myers v Canada*').

[85] Ibid [263] (emphasis added).

[86] See, eg, *Saluka v Czech* (n 42) [297], quoting *Myers v Canada* (n 84) [263]; *Micula v Romania* (n 1) [523], quoting *Saluka v Czech* (n 42) [307]; *Philip Morris v Uruguay* (n 2) [323], quoting *Waste Management v Mexico (II)* (n 73) [98].

In cases where the treaties at issue contained non-UDM clauses and FET provisions, tribunals also perceived protection against arbitrariness and/or discrimination as the requirement(s) of FET. This perception was implied by the fact the tribunals incorporated claims on non-UDM clauses' violations into claims on FET's violations.[87] This perception is also evident in cases where the tribunal examined these two types of claims separately but referred to the same facts, reasoning and findings.[88]

(b) Non-Arbitrariness: 'Non-shocking', 'Rational' or 'Appropriate' Level?

Even though the protection against arbitrariness has been considered a FET requirement by many tribunals, the extent to which state measures were treated as arbitrary or non-arbitrary ones has been approached dissimilarly among tribunals. While certain tribunals accepted non-arbitrariness based on 'non-shocking' level, many others required it based on 'rational' or 'appropriate' level.[89]

According to certain tribunals, mostly those following the equating approach, state measures would only be considered 'arbitrary' when they had 'egregious', 'outrageous' or 'shocking' impacts on foreign investors. This means that non-arbitrary measures are those with 'non-shocking' effect (a 'non-shocking' level). The requirement of 'shocking' was elucidated by the Mexico/US General Claim Commission in *Neer v Mexico*[90] and by the Chamber of the International Court of Justice (ICJ Chamber) in *ELSI*.[91] For example, the ICJ Chamber defined arbitrariness 'as something opposed to the rule of law,'[92] and as

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[87] See, eg, *CMS v Argentina* (n 74) [290]; *MTD v Chile* (n 37) [196]; *El Paso Energy International Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [230] ('*El Paso v Argentina*'). See also *Fair and Equitable Treatment* (n 6) 78.

[88] See, eg, *EDF and others v Argentina* (n 46) [1107]; *Philip Morris v Uruguay* (n 2) [445]. Specifically, the tribunal in *Philip Morris v Uruguay* held that '[t]here is no reason regarding the present claim to apply a test different from the one applied to the claim of breach of the FET, considering that the factual and legal basis of the two claims are the same'.

[89] Note that this classification is different from other existing classifications in the literature. For the latter, see, eg, August Reinisch and Christoph Schreuer, 'Protection against Arbitrary or Discriminatory Measures' in August Reinisch and Christoph Schreuer (eds), *International Protection of Investments: The Substantive Standards* (Cambridge University Press, 2020) 813, 824–31; Patrick Dumberry, 'The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 15(1-2) *The Journal of World Investment & Trade* 117, 145–7; Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures', *SSRN* (Research Paper, 24 May 2013) 10–2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268927>; Stone (n 3) 93–103; Christoph Schreuer, 'Protection against Arbitrary or Discriminatory Measures' in Catherine A Rogers and Roger P Alford (ed), *The Future of Investment Arbitration* (Oxford University Press, 2009) 183, 184–7 ('Non-ADM').

[90] See above n 80.

[91] *Elettronica Sicula SPA (ELSI) (United States of America v Italy) (Judgement)* [1989] ICJ Rep 15 ('*ELSI*').

[92] Ibid 76–7 [128].

'a wilful disregard of due process of law, an act which *shocks*, *or at least surprises*, a sense of juridical propriety'.[93] This definition was considered, by other tribunals, as 'the "best expression" of arbitrariness',[94] or 'the standard definition of "arbitrariness" under international law'.[95] Notably, certain tribunals supported the 'shocking' level of arbitrariness but observed that 'what the international community views as "outrageous" may change over time'[96] and that 'we may be shocked by State actions now that did not offend us previously'.[97]

However, many tribunals explicitly rejected the 'shocking' standard for arbitrariness because states in practice provided a higher standard of treatment than merely 'non-shocking'. In *Pope & Talbot v Canada*, the tribunal – following the autonomous approach – interpreted Article 1105 on MST of the *NAFTA* as requiring that 'covered investors and investments receive the benefits of the fairness elements […], *without any threshold limitation* that *the conduct complained of be "egregious," outrageous"* or *"shocking"* or *otherwise extraordinary*'.[98] The *Mondev v US* tribunal, in spite of taking the equating approach, similarly perceived that '[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious'.[99] This perception was subsequently adopted by the *Micula v Romania* tribunal – following the autonomous approach – in establishing that 'the state's conduct need not be outrageous to breach the fair and equitable treatment standard'.[100]

According to other tribunals following the autonomous/equating approach, state measures would only be considered 'arbitrary' when they did not have a rational basis for their pursued objectives and/or a rational relationship with such objectives. This means that non-arbitrary measures were those with a rational basis and relationship (a 'rational' level). The tribunal in *Belokon v Kyrgyzstan*[101] understood state measures as 'unreasonable and arbitrary' when 'there is *a lack of a rational basis* between *the*

[93] Ibid (emphasis added).
[94] *Cargill v Mexico* (n 67) [291] (citations omitted). The *Cargill v Mexico* tribunal later concluded that arbitrary state actions might offend FET but when 'mov[ing] *beyond* a merely inconsistent or questionable application of administrative or legal policy or procedure *to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals*': at [293] (emphasis added).
[95] *Philip Morris v Uruguay* (n 2) [390] (citations omitted).
[96] *Glamis Gold v US* (n 81) [612].
[97] Ibid [616].
[98] *Pope & Talbot v Canada* (n 47) [118] (emphasis added).
[99] *Mondev v US* (n 67) [116].
[100] *Micula v Romania (I)* (n 1) [524].
[101] *Valeri Belokon v Kyrgyz Republic (Award)* (UNCITRAL Arbitral Tribunal, 24 October 2014) ('*Belokon v Kyrgyzstan*').

authority of the state to do something and *the facts supporting the use of that authority*'.[102] Similarly, the *Enron v Argentina* tribunal rejected a claim of arbitrariness because it found a rational basis for Argentina's 2001/2002 emergency measures. It articulated that 'the measures adopted might have been good or bad … but they were *not arbitrary* in that they were *what the Government believed and understood was the best response to the unfolding crisis*'.[103] One might notice that these interpretations were made in the context of treaties that provided non-UDM clauses independent of FET provisions; however, these tribunals approached, or arguably approached, the former as a part of the latter.[104] The requirement of non-arbitrariness at the 'rational' level could be found when tribunals required a violation threshold to be 'manifest'.[105] The same threshold could be found in the cases tribunals required 'arbitrary, grossly unfair, [or] unjust' impropriety.[106]

In contrast to the above approaches, some tribunals required state measures to have an 'appropriate' relationship with their objectives/purposes to be non-arbitrariness (an 'appropriate' level). This appropriateness could range from 'suitable' to 'proportionate'. For example, the tribunal in *AES v Hungary (II)*[107] judged the 'unreasonableness' of state measures according to the presence of two elements: 'the existence of a rational policy' and 'the reasonableness of the act of the state in relation to the policy'.[108] In its view, rational policy was 'taken by a state following a *logical* (good sense) explanation and with the aim of addressing a public interest matter';[109] and reasonableness needed to be 'an *appropriate* correlation between the state's public policy objective and the measure adopted to achieve it'.[110] One might notice that these two elements are quite similar to the requirement of non-arbitrariness at the 'rational' level. However, it should be noted that the second element – the 'appropriate' relationship – requires more than just 'rationality'; it could be 'suitable', 'necessary' or 'proportionate'. In *Micula v Romania*, the tribunal

[102] Ibid [260] (emphasis added).
[103] *Enron v Argentina* (n 49) [281] (emphasis added).
[104] *Belokon v Kyrgyzstan* (n 101) [257]–[258]. The *Enron v Argentina* tribunal arguably took the approach while endorsing the view of the *Tecmed v Mexico*, *Occidential v Ecuador (I)* and *Pope & Talbot v Mexico* tribunals which considered the protection against arbitrariness as a requirement of FET and approaching FET higher than MST: see *Enron v Argentina* (n 49) [257]–[258].
[105] See, eg, *Glamis Gold v US* (n 81) [616]; *International Thunderbird Gaming Corporation v The United Mexican States (Award)* (UNCITRAL Arbitral Tribunal, 26 January 2006) [194] ('*Thunderbird v Mexico'*).
[106] See, eg, *Mobil and Murphy v Canada (I)* (n 67) [152]; *Waste Management v Mexico (II)* (n 73) [98]. See also *Mesa Power v Canada* (n 67) [502].
[107] *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* (II) *(Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 23 September 2010) ('*AES v Hungary (II)*').
[108] Ibid [10.3.7].
[109] Ibid [10.3.8] (emphasis added).
[110] Ibid [10.3.9] (emphasis added). The tribunal also asserted that 'a rational policy is not enough to justify all the measures taken by a state in its name'.

adopted these two elements but clarified the second, noting that 'the state's acts have been *appropriately* tailored to the pursuit of that rational policy *with due regard for the consequences imposed on investors*'.[111] The consideration of 'consequences imposed on investors' here is aimed to define whether measures were 'necessary' or 'proportionate' rather than just being 'suitable'. Similarly, the *LG&E v Argentina* tribunal asserted that non-arbitrariness involved 'a rational decision-making process',[112] which included 'a consideration of the *effect* of measures on foreign investments and a *balance* of the interests of the State with any burden imposed on such investments'.[113] The consideration of 'any burden imposed on such investment' is arguably to examine a 'necessary' or 'proportionate' relationship between state measures and pursued objectives.[114] Notably, claims of arbitrariness in these cases were based on non-UDM clauses and FET provisions. It is assumed that the requirement of non-arbitrariness at the 'appropriate' level was somehow influenced by the word 'unreasonable' provided by the non-UDM clauses[115] or the main treaty objective to 'stimulate the flow of private capital'.[116]

(c) Non-Discrimination: Rational/Reasonable Level?

Generally, discrimination can include rational/reasonable and irrational/unreasonable types. In the context of FET, discrimination has been perceived by tribunals as referring to the latter and the requirement of non-discrimination does not target the former. This approach has also been identified by other scholars.[117] It should be noted that discrimination in the FET context is not only based on investors' nationalities but also on other grounds such as religion or political affiliation,[118] which is distinguished from that in the NT and MFN contexts – nationality-based discrimination.

The mentioned approach can be found in *Saluka v Czech* and *Micula v Romania (I)*. For example, the *Saluka v Czech* tribunal clarified that 'any differential treatment of a foreign

[111] *Micula v Romania (I)* (n 1) [525] (emphasis added).
[112] *LG&E v Argentina* (n 75) [158].
[113] Ibid (emphasis added).
[114] This point is based on three prongs of the proportionality analysis: suitability, necessity and *stricto sensu* proportionality: see Chapter 4 Part II(D).
[115] *Micula v Romania (I)* (n 1) [525]. See also *AES v Hungary (II)* (n 107) [10.3.1], [10.3.7], [10.3.9].
[116] See *LG&E v Argentina* (n 75) [158].
[117] See, eg, Kenneth J Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43(1) *New York University Journal of International Law and Politics* 43, 63–6.
[118] See, eg, *National Grid PLC v The Argentine Republic (Award)* (UNCITRAL Arbitral Tribunal, 3 November 2008) [198] ('*National Grid v Argentina*'). As Reinisch and Schreuer summarises, '[d]iscriminatory measures can be based on race, religion, political affiliation, disability and a number of other criteria': see Reinisch and Schreuer (n 89) 125.

investor must *not* be based on *unreasonable* distinctions and demands'[119] or '*unjustifiable* distinctions'.[120] In its views, such difference must be justified 'by showing that it bears a *reasonable* relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment'.[121] This view was similarly approached by the *Micula v Romania (I)* tribunal.[122] The *Enron v Argentina* tribunal also looked for 'any *capricious, irrational or absurd* differentiation in the treatment[s]'[123] between foreign investors and other entities, and found no such differentiation.

The view of rational/reasonable discrimination as compatible with FET can be found in cases where the tribunals accepted justification for prima facie cases of differential treatment. For example, the *BG v Argentina* tribunal applied the 'three-part' test, including justification, which was previously used by the *Thunderbird v Mexico* tribunal to examine a claim on the violation of NT.[124] It specified that '[under] this test, it is necessary to … consider such factors [comparators and levels of treatment] as may be relevant to *justify* any difference in treatment'.[125]

3 *Protection of Foreign Investor's Reasonable Expectations*

(a) Necessary Requirement or Relevant Factor?

Based on different grounds, FET has been perceived differently by tribunals to whether include the protection of foreign investor's reasonable, or legitimate, expectations.

According to many tribunals following the autonomous/equating approach, FET protects the reasonable expectations of foreign investors, ie the repudiation of such reasonable expectations would lead to FET violation. This perception, in certain tribunals' view, arises from the good faith principle recognised in international law.[126] In other reasoning provided by some tribunals, the protection of investors' reasonable expectations, particularly based on specific commitments, is among international law principles related

[119] *Saluka v Czech* (n 42) [307] (emphasis added).
[120] Ibid [309] (emphasis added).
[121] Ibid [307] (emphasis added).
[122] *Micula v Romania (I)* (n 1) [523].
[123] *Enron v Argentina* (n 49) [282] (emphasis added).
[124] See *BG Group Plc v The Republic of Argentina (Final Award)* (UNCITRAL Arbitral Tribunal, 24 December 2007) [356] ('*BG v Argentina*'), citing *Thunderbird v Mexico* (n 105) [170].
[125] Ibid (emphasis added).
[126] *Tecmed v Mexico* (n 73) [154]. Several tribunals took the same approach when adopting this view of the *Tecmed v Mexico* tribunal: see *Enron v Argentina* (n 49) [262]; *Sempra v Argentina* (n 36) [298]; *LG&E v Argentina* (n 75) [124], [127]; *Cargill v Poland* (n 66) [456].

to fairness and equity, so FET was interpreted to include such protection – the treaty thus invites consideration of a wider range of principles related to fairness and equity. Such principles cover 'the duty to aim for respect of specific commitments'.[127] The given perception has also been adopted by certain tribunals because it had been previously recognised by many tribunals[128] or it was, in the words of Dolzer and Schreuer, 'firmly rooted in arbitral practice'.[129] This reasoning is implied in cases where tribunals considered the protection of reasonable expectation as 'the most important function of the fair and equitable treatment standard',[130] 'the dominant element of that [FET] standard',[131] 'one of the major components of the FET standard',[132] or 'part of the FET standard'.[133]

However, as viewed by certain tribunals following the equating approach, FET does not directly protect the reasonable expectations of foreign investors, ie the repudiation of such reasonable expectations did not in itself constitute as an unfair and inequitable treatment. This is because, in certain tribunals' view, the protection of investor's reasonable expectations has not been considered a customary international 'minimum' treatment rule. This reasoning can be found in cases where tribunals required legislative measures to exhibit more in the way of unfair and inequitable features than the frustration of investors' expectations to be deemed as a violation of MST or FET.[134] In other cases, tribunals viewed the protection of investors' reasonable expectations as a relevant factor in the FET analysis because FET was not a guarantee of the stability of legal and business framework, ie economic/political risk issurance, while governments, policies, and rules were changed as 'facts of life'.[135] Certain tribunals relied on the view of these tribunals or

[127] See, eg, *EDF and others v Argentina* (n 46) [1001].
[128] See, eg, *Philip Morris v Uruguay* (n 2) [320]; *Micula v Romania (I)* (n 1) [667]. See also McLachlan, Shore and Weiniger (n 4) 378–9.
[129] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 1st ed, 2008) 134. Many tribunals cited this conclusion of Dolzer and Schreuer: see *Micula v Romania (I)* (n 1) [667]; *Yuri Bogdanov and Yulia Bogdanova v Republic of Moldova (IV)* (Final Award) (SCC Arbitral Tribunal, Case No 091/2012, 16 April 2013) [183] ('*Bogdanov v Moldova (IV)*').
[130] *Electrabel SA v The Republic of Hungary (Decision on Jurisdiction, Applicable Law and Liability)* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [7.75] ('*Electrabel v Hungary*').
[131] *Saluka v Czech* (n 42) [302].
[132] *EDF (Services) Limited v Republic of Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 8 October 2009) [216] ('*EDF v Romania*').
[133] *Crystallex v Venezuela* (n 46) [546].
[134] See, eg, *Waste Management v Mexico (II)* (n 73) [98]; *Cargill v Mexico* (n 67) [296]; *Adel A Hamadi Al Tamimi v Sultanate of Oman (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/33, 3 November 2015) [390] ('*Al Tamimi v Oman*').
[135] See, eg, *Mobil and Murphy v Canada (I)* (n 67) [153].

similar views of other tribunals to accept the protection of investors' reasonable expectations only as a relevant factor in the FET analysis.[136]

In short, certain tribunals relied on the good faith principle in international law, or on the proposed international principles law related to fairness and equity, or saw it as a part of arbitral practice to interpret the protection of foreign investors' reasonable/legitimate expectations as a requirement of FET. Other tribunals relied on the conditions of CIL, the function of FET or arbitral practice to reject such a perception.

(b) Foreign Investors' Reasonable Expectations: Based on Specific Commitments or Based on Specific Legal Framework?

In the cases where investors' reasonable expectations were recognised as either a requirement or a relevant factor to FET, tribunals also varied in their approaches to the questions of on what kinds of foundation could foreign investors based their expectations (i), and to what extent such expectations were considered as being repudiated by legislative measures (ii). It should be noted that tribunals have consistently agreed at certain points: foreign investors' expectations for the stability of legal and business framework applied to their investments must be based on certain grounds legally provided by a host state (the objectivity of expectations);[137] foreign investors must rely on such bases to establish investments, and/or make further business decision(s) during the lifetime of such investments (the existence of reliance);[138] and, in addition to their reliance, foreign investors as any businessmen must carefully examine all relevant circumstances (eg economic, political, social, regulatory and environmental) including the development level of the host state before making investments/decisions (the exercise of due diligence and the reasonabless of expectations).[139]

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[136] See, eg, *Mesa Power v Canada* (n 67) [502]. The tribunal in this case shared the view held by the *Waste Management v Mexico (II)* and *Cargill v Mexico* tribunals.

[137] See, eg, Claudia Annacker, 'Role of Investors' Legitimate Expectations in Defense of Investment Treaty Claims' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy, 2013-2014* (Oxford University Press, 2015) 229, 231–9.

[138] See, eg, Christoph Schreuer and Ursula Kriebaum, 'At What Time Must Legitimate Expectations Exist?' (2012) 9(1) *Transnational Dispute Management* 1, 267–9, 273–6.

[139] See ibid 266–7. See also Roland Kläger (ed), '*Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press, 2011) 193, 200–1; Simon Maynard, 'Legitimate Expectations and the Interpretation of the Legal Stability Obligation' (2016) 1(1) *European Investment Law and Arbitration Review* 99, 102–3; Yulia Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law' (2020) 67(2) *Netherlands International Law Review* 233, 238–41.

In certain tribunals' view, foreign investors' expectations were reasonable only if based on legitimate *specific* representations, assurances or commitments previously given by state authorities, unilaterally or bilaterally, to refrain from wholly or partly changing legal frameworks applying to relevant foreign investments, including stablisation clauses (i). For example, the tribunal in *Micula v Romania (I)* found that although Romania's EGO 24/1998 which provided certain incentives to investors investing in certain 'disfavoured' regions only created 'a generalized entitlement' (the legal framework),[140] the claimant's investment certificates (PICs) had crystallised this generalised entitlement into 'a specified entitlement' of the claimant (the specific assurance).[141] In its view, the latter provided a concrete basis for the claimants' expectations. A similar view can be discerned in cases where tribunals rejected foreign investors' expectations that were generated from a specific or general legal framework, such as in *Paushok v Mongolia*[142] and *Parkerings v Lithunia*.[143] The tribunal in *Parkerings v Lithunia*, for instance, asserted that the expectation was legitimate 'if the investor received *an explicit promise or guarantee* from the host-State',[144] or 'if *implicitly*, the host-State made *assurances or representation* that the investor took into account in making the investment'.[145] In the situation where the host state made no assurance or representation, it was also necessary to analyse 'the *conduct of the State* at the time of the investment' to determine the legitimate expectation of an investor',[146] as held by the tribunal.

However, expectations are only repudiated when state measures cause significant changes to the legal and business framework applied to foreign investments and guaranteed by previous specific commitments, without restoring economic equilibrium (ii). In the words of the *EDF and others v Argentina* tribunal, 'failure to abide by express commitments without re-establishing economic balance in a reasonable period of time constitutes inequitable conduct'.[147] In *LG&E v Argentina*, the tribunal concluded that Argentina had gone too far 'by *completely dismantling* the very legal framework constructed to attract

[140] *Micula v Romania (I)* (n 1) [674].
[141] Ibid.
[142] *Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v The Government of Mongolia* (Award on Jurisdiction and Liability) (UNCITRAL Arbitral Tribunal, 28 April 2011) ('*Paushok v Mongolia*').
[143] *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 11 September 2007) ('*Parkerings v Lithuania*').
[144] Ibid [331] (emphasis added).
[145] Ibid (emphasis added).
[146] Ibid (emphasis added).
[147] *EDF and others v Argentina* (n 46) [999] (emphasis added).

investors'[148] in the gas transmission sector; however, it previously observed that 'there was no *real* renegotiation, but rather the imposition of a [renegotiation] process'[149] of public service contracts as conferred by Argentina's Gas Law. The tribunal also found that Argentina's Resolution No 38/02 issued on 9 March 2002 ordered its authority to discontinue all tariff reviews and to refrain from adjusting tariffs or prices in any way.[150]

In other cases, tribunals additionally accepted foreign investors' expectations if based on a *specific* legal framework previously adopted by state authorities to attract foreign investments (i). In *Murphy v Ecuador (II)*, the tribunal viewed that although state's specific representations or undertakings played 'an important role in creating legitimate expectations on the part of the investor,'[151] they were 'not necessary for legitimate expectation to exist'.[152] According to the tribunal, in the absence of state's specific representations or promises, the claimant might have legitimate expectations 'based on *an objective assessment of the legal framework*'.[153] The legal framework here, as noted by the tribunal, included a host state's international law obligation, and its domestic legislation and regulations, in addition to any contractual agreements between foreign investors and the state.[154] The tribunal in *Toto v Lebanon*[155] similarly perceived that '[t]he investor may even sometimes be entitled to presume that *the overall legal framework* of the investment will remain stable'.[156]

However, such expectations were only repudiated when legislative measures caused significant changes to the characteristics of established investments, which involved the consideration of significant damages (ii). For example, the *Murphy v Ecuador (II)* tribunal found that the 2006 Ecuador measures – namely, Law No 42 in March 2006 allowing the state to receive at least 50% of abnormal/windfall income generated by rising oil prices, and Presidential Decree 1672 in July 2006 fixing that percentage at 50%[157] – did not *'fundamentally'* change the operation of the cooperative agreement

[148] *LG&E v Argentina* (n 75) [139] (emphasis added).
[149] Ibid [137] (emphasis added).
[150] Ibid [138].
[151] *Murphy v Ecuador (II)* (n 62) [248].
[152] Ibid.
[153] Ibid (emphasis added).
[154] Ibid.
[155] *Toto Costruzioni Generali SPA v Republic of Lebanon (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) ('*Toto v Lebanon*').
[156] Ibid [159] (emphasis added). The tribunal expressed this perception after acknowledging that '[l]egitimate expectations may follow 'from explicit or implicit representations made by the host state, or from its contractual commitments'.
[157] *Murphy v Ecuador II* (n 62) [82]–[84].

(participation contract) and thus did not break the investors' expectation.[158] This was because the Consortium, having the claimant as one of its members, still received 50% of its revenue from sales of its production shares and 50% of the profit before the price increases, as reasoned by the tribunal.[159] However, the 2007 Ecuador measure – Presidential Decree 662 in October 2007 raising the income rate to 99%[160] – changed *'the foundation premise'* of the participation contract, the contractor's right to ownership of the product (ie the right to enjoyment) having been almost entirely removed;[161] therefore, the measure broke the claimant's expectation, according to the tribunal.[162] Similarly, the tribunal in *Achmea v Slovakia (I)*[163] pointed out that the 2007/2009 Slovakia measures – Act 530/2007 creating 'the removal of the right to generate profits' ('ban on profits') and Act 192/2009 imposing 'a ban on the transfer of the portfolio' ('ban on transfers')[164] – '*effectively* deprived Claimant of access to the commercial value of its investment'[165] in the way 'the investment could neither be maintained so as to generate profits nor be sold'.[166] According to the tribunal, these bans were contrary to what foreign investors fundamentally expected – 'an essential precondition of Eureko's decision to invest in the Slovak Republic'.[167] A similar view can be found in *Toto v Lebanon* where the tribunal rejected Toto's claim because it had failed to prove that Lebanon in increasing tax and customs duties on cement, building materials, diesel and steel brought about 'a drastic or discriminatory consequence'.[168] As reasoned by the tribunal, changes in the regulatory framework would offend FET 'only in case of *drastic* or discriminatory *change* in the essential features of the transaction'.[169]

One might notice that in many cases against members to the *Energy Charter Treaty* (*ECT*), tribunals accepted that the reasonable expectations of foreign investors based on the *general* legal frameworks were protected by a FET provision under the *ECT*.[170]

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[158] Ibid [279].
[159] Ibid.
[160] Ibid [87].
[161] Ibid [282].
[162] Ibid [292].
[163] *Achmea BV (formerly Eureko BV) v The Slovak Republic (I) (Final Award)* (PCA Arbitral Tribunal, Case No 2008-13, 7 December 2012) ('*Achmea v Slovakia (I)*').
[164] Ibid [96], [99].
[165] Ibid [279] (emphasis).
[166] Ibid.
[167] Ibid [280].
[168] *Toto v Lebanon* (n 155) [244].
[169] Ibid (emphasis added).
[170] See, eg, *Novenergia II - Energy & Environment (SCA), SICAR v Kingdom of Spain (Final Arbitral Award)* (SCC Arbitral Tribunal, Case No 063/2015, 15 February 2018) ('*Novenergia v Spain*'); *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic (Award)* (ICSID Arbitral Tribunal, Case No

However, it should be noted that that FET provision includes state's obligation to 'encourage and create stable, equitable, favourable and transparent conditions' for foreign investors.[171] Given that no such clause is present in the two formulations of FET provisions in Vietnam's IIAs, relevant cases are not reviewed here.

D *Section Remark: Suggesting Five Practical Questions for an Analysis of FET Provisions in Vietnam's IIAs*

From the above international arbitration practice, this section poses five specific questions for the analysis of FET provisions in the context of Vietnam' IIAs to define the threshold of FET and substantive requirements for legislative measures. The questions are: (i) whether FET provisions in Vietnam's IIAs require the higher, or equal, threshold of treatment to MST; whether, and to what extent, FET provisions under Vietnam's IIAs facilitate an interpretation that FET requires (ii) the obligation to act in good faith, (iii)–(iv) the protection against arbitrariness and/or discrimination (v) the protection of foreign investors' reasonable expectations? Answers to these questions are clarified in later sections (Parts III and IV).

ARB/14/3, 27 December 2016) ('*Blusun v Italy*'); *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/1, 16 May 2018) ('*Masdar v Spain*'); *Eiser Infrastructure Limited and Energía Solar Luxembourg SÀRL v Kingdom of Spain (Award)* (ICSID Case No ARB/13/36, 4 May 2017) ('*Eiser and Energía Solar v Spain*'); *Charanne BV and Construction Investments SARL v Spain (Final Award)* (SCC Arbitral Tribunal, Case No 062/2012, 21 January 2016) ('*Charanne v Spain*').

[171] ECT pt III art 10(1). It provides that '[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, *encourage and create stable, equitable, favourable and transparent conditions* for Investors of other Contracting Parties to make Investments in its Area': at pt III art 10(1) (emphasis added). See also Kaj Hobér, *The Energy Charter Treaty* (Oxford University Press, 2020) 193–226.

III AN ANALYSIS OF FORMULATION A: SUBSTANTIVE REQUIREMENTS FOR LEGISLATIVE MEASURES

A *The Threshold of Fair and Equitable Treatment: Additional to What is Required under Customary International Law*

FET provisions with Formulation A mostly employ the term FET as it is and, occasionally, combine it with its element (non-denial of justice), as previously identified in Part I(A). They do not specifically link FET to MST under CIL. In international arbitration practice, such FET provisions were approached differently by tribunals: treatment higher than MST or equal to MST.[172] The question is whether Formulation A FET provisions in Vietnam's IIAs would likely be interpreted, according to the *VCLT* interpretation rules, as obliging Vietnam to grant 'fair and equitable' treatment additional to or equal to MST under CIL.

The texts of FET provisions with Formulation A and their treaty contexts suggest that FET is an autonomous treaty standard. Following the *VCLT* interpretation rules,[173] the FET provisions cannot be read as being link to MST where that link is not written into the provision. As pointed out by the tribunal in *Saluka v Czech* while interpreting a FET provision analogous to Formulation A,[174] 'Article [on FET] omits any express reference to the customary minimum standard[;] … [t]his clearly points to the autonomous character of a "fair and equitable treatment" standard'.[175] If Vietnam and its treaty parties intended to refer to MST under CIL or provide a similar standard of treatment, they would have expressly done so. This point is indeed put forward by many scholars when commenting on FET provisions analogous to Formulation A.[176] As reasoned by Schreuer,

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[172] See above Part II(B).
[173] *VCLT* art 31.
[174] The FET provision at issue stated '[e]ach Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors': see *Czech-Netherlands BIT* art 3(1).
[175] *Saluka v Czech* (n 42) [294].
[176] Rudolf Dolzer and Margrete Stevens (eds), *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1995) 60 (stating that 'the fact that parties to BITs have considered it necessary to stipulate this standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard'); *Fair and Equitable Treatment* (n 6) 13 (stating that 'if States and investors believe that the fair and equitable treatment standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments'); Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) *The Journal of World Investment and Trade* 357, 360 (stating that '[i]f the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such

for instance, 'it is inherently implausible that a treaty would use an expression such as "fair and equitable treatment" to denote *a well-known concept* such as the *"minimum standard of treatment in customary international law*"'.[177] This reasoning is reaffirmed by Dolzer and Schreuer.[178] The fact that FET provisions with Formulation A discussed here do not refer to MST but those with Formulation B do so, as later analysed,[179] confirms that Vietnam and its treaty parties did not intend to equalise FET and MST in composing Formulation A FET provisions. One might notice that the concept of FET is orginally referred to MST under CIL;[180] however, this notice only proves that FET is rooted in MST but not MST itself.

That FET refers to broader rules than MST is clearly shown in FET provisions containing references such as 'in accordance with international law' and 'in accordance with principles of international law' in the *Vietnam-Spain BIT* and *Vietnam-France BIT* respectively. Firstly, the phrase 'in accordance with' means 'following or obeying a rule, law, wish'[181] or 'according to a rule or the way that somebody says that something should be done';[182] this suggests that Vietnam could provide treatment equal to or higher than that required by the principles of international law. In the words of the *Pope and Talbot v Canada* tribunal, foreign investors thus are 'entitled to the international law minimum, *plus* the fairness elements'.[183] Additionally, while 'international law' includes all MST rules, 'principles of international law' could include, but not be limited to, certain MST rules. The principles here refer to 'a wider range of principles related to fairness and equity'[184] or 'a wider range of [contemporary] international law principles than the minimum standard alone'.[185] In the words of the *EDF and others v Argentina* tribunal, 'nowhere mentions "minimum standard" as such, but rather speaks simply of principles

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rather than using a different expression').
[177] Schreuer (n 176) 360 (emphasis added).
[178] See Dolzer and Schreuer (n 129) 124.
[179] See below Part IV.
[180] *Fair and Equitable Treatment* (n 6) 8; OECD, 'Fair and Equitable Treatment' (n 35) 10. These works refer to the same primary source – OECD, Draft Convention on the Protection of Foreign Property: Text with Notes and Comments (1967), Note and Comments to Article 1, paragraph (a), Section 4 – which states '[t]he standard required conforms in effect to the "minimum standard" which forms part of customary international law'.
[181] *Cambridge Dictionary* (online at 20 May 2021) 'accordance'.
[182] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'accordance'.
[183] *Pope & Talbot v Canada* (n 47) [110] (emphasis in orginal). Note that the tribunal expressed its view before the NAFTA FTC issued a joint interpretation statement of Article 1105 which contains the phrase 'in accordance with international law', to limit FET to MST in July 2001.
[184] *EDF and others v Argentina* (n 46) [1001].
[185] *Vivendi v Argentina (I) (Resubmission)* (n 46) [7.4.7].

of international law';[186] similarly, in the words of the tribunal in *Vivendi v Argentina (I) (Resubmission)*, 'no basis for equating principles of international law with the minimum standard of treatment' was expressed.[187]

The same effect can be found in the context of *Vietnam-Cuba BIT (2007)* even though the provision containing FET in Article 4 of the BIT is structured similarly to the interpretation regarding treatment in Article 1105 of the *NAFTA* FTC in 2001 as mentioned previously.[188] The provision requires a contracting party to provide 'treatment in accordance with international law, including fair and equitable treatment',[189] and clarifies the concept of FET as not requiring 'treatment in addition to or beyond that which is required by th[e] article, and do not create additional substantive rights'.[190] Under this provision, FET is linked to international law rather than CIL, and this treatment is equal to what is required under international law rather than MST under CIL. Given the time of treaty conclusion, it cannot be denied that Vietnam and Cuba as contracting parties intentionally drafted the provision in this way so that investors can receive 'fair and equitable' treatment brought about by many sources of international law, not by a specific source such as CIL. This expression is arguably to avoid the interpretation of equating FET with MST. It should be noted that this point is made when the provision is titled, if closely translated, as 'General Standard of Treatment',[191] instead of 'Minimum Standard of Treatment'.

Given that FET is rooted in MST, the question is how far it extends beyond the latter. The answer is unclear, except for what can be 'extracted' from the original meaning of FET. It is generally perceived by tribunals and many scholars that the original meaning of FET is relatively 'vague'[192] and might 'not provide much assistance'[193] in crystallising specific requirements of FET.[194] Nonetheless, such meaning plays a determining role, at least from a theoretical perspective, in defining which existing customary international rules, international law principles or new attributes are appropriate to FET. According to *Black's*

[186] *EDF and others v Argentina* (n 46) [1001].
[187] *Vivendi v Argentina (I) (Resubmission)* (n 46) [7.4.7].
[188] See above Part II(B)(2).
[189] *Vietnam-Cuba BIT* art 4(1) [tr author].
[190] Ibid art 4(3) [tr author].
[191] The provision in Article 4 of the *Vietnam-Cuba BIT* is titled in Vietnamese as 'Tiêu chuẩn chung về đối xử'. Note that when an English version of the BIT is inaccessible, the close translation of this title is first taken for the analysis.
[192] See, eg, *Saluka v Czech* (n 42) [279]; *AWG Group Ltd v The Argentine Republic (Decision on Liability)* (UNCITRAL Arbitral Tribunal, 30 July 2010) ('*AWG v Argentina'*) [213].
[193] See, eg, *Micula v Romania (I)* (n 1) [504].
[194] See Reinisch and Schreuer (n 89) 272–3.

Law Dictionary, the word 'fair' means 'characterized by honesty, impartiality, and candor; just; equitable; disinterested',[195] or 'free of bias or prejudice';[196] and, the word 'equitable' means 'just; consistent with principles of justice and right'.[197] The word 'treatment' is defined as 'a way of behaving towards or dealing with a person or thing'.[198] Given the dictionary meanings of the words 'fair', 'equitable' and 'treatment',[199] FET refers to treatment in *'an even-handed and just manner*'[200] without '*bias or prejudice*' and '*consistent with principles of justice and right*', which thus refers to subjective and objective aspects of state measures. In the words of UNCTAD, FET requires 'an attitude to governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a State's decision in question, including the host State's population at large'.[201]

In conclusion, since Formulation A FET provisions in Vietnam's IIAs do not link FET to MST, they cannot reasonably be read as requiring Vietnam to provide MST. Whatever is considered a requirement of FET, it needs to be compatible with the original meaning of FET or, in the words of the *Merrill & Ring v Canada* tribunal, 'a sense of fairness, equity, and reasonableness'.[202]

[195] *Black's Law Dictionary* (11th ed, 2019) 'fair' (def 1).
[196] Ibid (def 2).
[197] Ibid 'equitable' (def 1).
[198] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'treatment' (def 2).
[199] This study follows a perception that fair' and 'equitable' are interchangeable terms and thus FET should not be read as separate treatments. For the recognition of this perception, see *Fair and Equitable Treatment* (n 6) 7; Reinisch and Schreuer (n 89) 276.
[200] The phrase is adopted from *MTD v Chile* (n 37) [113].
[201] *Fair and Equitable Treatment* (n 6) 7.
[202] *Merrill & Ring v Canada* (n 81) [210]. Note that this tribunal used the phrase when interpreting a provision on MST of the NAFTA; however, it is valid to the point that even MST, which is considered as providing 'minimum' treatment towards foreign investments/investors, needs to be interpreted in the light of 'fair and equitable treatment' meaning, so FET should certainly be.

B *Substantive Requirements for Fair and Equitable Legislative Measures: Good Faith as a Necessary Requirement*

Given that FET provisions with Formulation A in Vietnam's IIAs are likely understood as additional to MST, they require Vietnam, first and foremost, to provide customary 'minimum' treatments. MST has consistently been found in international arbitration practice to include the obligation to act in good faith.[203] However, tribunals have not explicitly cited the original meaning of FET provisions in reaffirming that the obligation to act in good faith was a 'fair and equitable' element among other elements of MST.

In this study, it is not insignificant to examine whether, and to what extent, Formulation A FET provisions in Vietnam's IIAs facilitate a literal reading that FET always requires legislative measures to be good faith.[204] The FET provisions with Formulation A only mention FET as the term is, or additionally cover the non-denial of justice element, not the good faith element.[205] However, the original meaning of the FET term could capture that of 'good faith'. The term 'good faith', as defined by *Black's Law Dictionary*, refers to 'a state of mind consisting in … honesty in belief or purpose, … faithfulness to one's duty or obligation, … observance of reasonable commercial standards of fair dealing in a given trade or business, or … absence of intent to defraud or to seek an unconscionable advantage'.[206] An alternative expression of good faith – bona fide – is succinctly defined as being 'made … without fraud or deceit' or 'sincere; genuine'.[207] The FET – treatment in 'an even-handed and just manner' without 'bias or prejudice' and 'consistent with principles of justice and right'[208] – certainly demands this state of honesty or sincerity from state's representatives when they adopt measures, if any, affecting foreign investments. Given its dictionary meaning, 'good faith' represents the subjective aspect of fair and equitable measures. FET cannot be achieved if legislative measures are conducted in bad faith, or deliberately 'destroy or frustrate the investment by improper means'.[209]

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[203] See above Part II(C)(1).

[204] This perception arises from the context that good faith is considered to play different roles in international law such as an autonomous defense or a general principle of international law before arguably considering it as a substantive element of FET: see generally Sanja Djajić, 'Good Faith in International Investment Law and Policy' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020) 1, 26–31; Martins Paparinskis, 'Good Faith and Fair and Equitable Treatment in International Investment Law' in Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press, 2015) 143, 146–54; Andreas R Ziegler and Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law' in Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press, 2015) 9; Marion Panizzon (ed), *Good Faith in the*

Given that good faith refers to the subjective aspect, the question is whether the treaty obligation to act in good faith applies to (i) all state measures towards foreign investments/investors, implementing contractual obligations and (ii) other treaty obligations.

One might argue that state measures here are required to be in good faith when a host state implements contractual obligations (i), such as not taking advantage of the contract's unclear terms to contravene the contract's main purpose. However, the concern here is whether the host state takes a role of the other contracting party of foreign investors (a 'private' role) or a role of governmental authority (a 'public' role). If the host state takes a 'private' role and implements contractual obligations in bad faith, foreign investors could dispute its conduct as violating the good faith principle, but such a claim would be equivalent to a contract claim.[210] In contrast, if the host state takes a 'public' role and abuses its legislative power to interfere with contractual obligations, foreign investors could claim its measures violate the good faith principle at the treaty level. Therefore, state measures implementing contractual obligations with foreign investors are only required to be good faith in the context of FET when the host state takes a 'public' role.

One might also argue that state measures here are required to be in good faith when a host state implements treaty obligations (ii). Such a perception may arise from a reading of Article 13 of the 1949 Draft Declaration on Rights and Duties of States, which codified states' customary international obligation: '[e]very State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its law as an excuse for failure to perform this duty'.[211] Two readings of the article could be made. Firstly, it may mean that every state

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Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement (Hart Publishing, 2006) 11–47; Hugh Thirlway (ed), *The Sources of International Law* (Oxford University Press, 2nd ed, 2019) 113–4. Good faith is also considered 'a pervasive and multifaceted principle': see Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10(1) *The Journal of World Investment & Trade* 103, 117.

[205] See above Part I(B).

[206] *Black's Law Dictionary* (11th ed, 2019) 'good faith'.

[207] Ibid 'bona fide'.

[208] See above Part III(A).

[209] The words are adopted from *Waste Management v Mexico II* (n 73) [138].

[210] See generally Charles T Kotuby Jr and Luke A Sobota (eds), *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2017) 88–105.

[211] International Law Commission, United Nations, Draft Declaration on Rights and Duties of States (1949) art 13. Note that the Draft Declaration is adopted and proclaimed by the General Assembly of the United

must implement treaty obligations following treaty objectives and purposes. Secondly, in situations not covered by treaty obligations, a state as a treaty party must still behave in accordance with treaty purposes/objectives. Following the second reading, a foreign investor could claim state measures violated FET and the good faith principle separately; this is similar to cases in which a foreign investor could make separate claims of breaking contractual obligations and the good faith principle in certain administrative and judicial proceedings. However, it should be noted that Article 13 refers to 'obligations arising from treaties and other sources of international law' in general, so the treaties here could be understood as Vietnam's IIAs with or without FET provisions. In the context of the *Vietnam-Iceland BIT*, which does not reference FET, good faith could be considered as being independent of treaty obligations. In this case, the good faith principle, together with other customary rules, would ensure the purpose of fairness and equity. In the context of Vietnam's 53 Formulation A IIAs (and its six IIAs with Formulation B), the FET provisions, offering a broader meaning than 'good faith', would fulfill that purpose. Therefore, state measures required to be good faith in the context of FET should refer to those implementing treaty obligations and those compatible with treaty purposes/objectives.

From their dictionary meaning and treaty contexts as analysed above, FET provisions with Formulation A in Vietnam's IIAs would likely facilitate a reading that required legislative measures, in any case, to be good faith when implementing treaty obligations and – to a certain extent – contractual obligations.

Nations and not a binding source of United Nations' members; however, the principles formulated in the Draft Declaration (including state duty in Article 13) could be considered, or recommended, an existing international law – another expression of customary international law.

C *Substantive Requirements for Fair and Equitable Legislative Measures: Non-Arbitrariness and Non-Discrimination at a 'Rational' Level*

The protection against arbitrariness or discrimination has been recognised as a requirement of FET by tribunals, as discussed earlier in Part II(C), and many other scholars.[212] However, the tribunals in question did not analyse the original meaning of 'arbitrariness' or 'discrimination' in relation to the dictionary meaning of FET. They simply viewed MST as including such protection, and therefore as FET.

In the context of Vietnam's IIAs, it is worth examining whether FET provisions with Formulation A facilitate a literal reading that FET requires legislative measures to be non-arbitrary and non-discriminatory (i).[213] The Formulation A FET provisions in Vietnam's IIAs only mention FET as the term is, or additionally cover the requirement of non-denial of justice, neither of which entail protection against arbitrariness and discrimination, as provided previously in Part I(B). However, the original meaning of the FET term could cover the meanings of not being 'arbitrary' and 'discriminatory'.

Regarding the word 'arbitrary' or 'arbitrariness', *Black's Law Dictionary* only provides the definitions of the adjective 'arbitrary', its synonym, 'unreasonable', and its antonyms, 'reasonable'. Accordingly, the word 'arbitrary' means 'depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures',[214] or 'founded on prejudice or preference rather than on reason or fact'.[215] Similarly, the word 'unreasonable' is defined as 'not guided by reason; irrational or capricious'.[216] By contrast, the word 'reasonable' means 'fair, proper, or moderate under the circumstances; sensible'.[217] As to the noun 'arbitrariness', it generally refers to 'the quality of being based on chance rather than being planned or based on reason'.[218] Given these meanings, the phrase 'not being arbitrary' could be understood as being 'founded on reason or fact' rather than on

[212] See, eg, Schreuer, 'Non-ADM' (n 89) 188–9; Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 87, 106–8; Reinisch and Schreuer (n 89) 843–5 [128]–[135].
[213] This perception arises from the situation that the protection against arbitrariness or non-discrimination is considered a general principle of international law, a standing-alone standard, or a part of FET. See generally Dumberry (n 89) 139–45; Reinisch and Schreuer (n 89) 845–53 [136]–[173]; Kriebaum (n 89) 4–8; Schreuer, 'Non-ADM' (n 89) 189–92; Stone (n 3) 90–2.
[214] Ibid 'arbitrary' (def 1).
[215] Ibid (def 2).
[216] Ibid 'unreasonable' (def 1).
[217] *Black's Law Dictionary* (11th ed, 2019) 'reasonable' (def 1).
[218] *Cambridge Dictionary* (online) 'arbitrariness'.

'individual discretion' or 'prejudice or preference', which is put forward by many tribunals and reaffirmed by scholars in the general IIA context.[219] The requirement of non-arbitrariness here can guarantee the 'just', 'free-from-prejudice', or 'consistent-with-principles-of-justice-and-right' aspects of FET[220] – an objective aspect of fair and equitable measures.

Regarding 'discriminatory' or 'discrimination', *Black's Law Dictionary* only has the definition of the noun 'discrimination', which means 'the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability',[221] or 'differential treatment; esp, a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured'.[222] As to the adjective 'discriminatory', it is generally defined as 'treating particular people, companies, or products differently from others, especially in an unfair way'.[223] Given the meanings of these words, the phrase 'not being discriminatory' could be understood as 'not [being] characterised by differential treatment' or by 'unreasonable distinction' such as for reasons of 'race, age, sex, nationality, religion, or disability'; this meaning is also viewed by many scholars in literature.[224] The requirement of non-discrimination can guarantee the 'equitable'/'free-from-bias' aspects of FET[225] – another objective aspect of fair and equitable measures.

Another issue to be examined is whether Formulation A FET provisions in Vietnam's IIAs in some way propose the level of non-arbitrariness and non-discrimination that fair and equitable legislative measures must attain (ii). At least from their original meanings, FET provisions possibly suggest non-arbitrariness at a 'rational' level, and non-discrimination or discrimination at a 'rational/reasonable' level.

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[219] See, eg, *Azurix v Argentina (I)* (n 44) [392]; *Siemens v Argentina* (n 73) [318]; *CMS v Argentina* (n 74) [291]; *LG&E v Argentina* (n 75) [157]; *El Paso v Argentina* (n 87) [319]: *Ronald S Lauder v Czech Republic (Award)* (UNCITRAL Arbitral Tribunal, 3 September 2001) [221] ('*Lauder v Czech*'); *Plama Consortium Limited v Republic of Bulgaria (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 27 August 2008) [184] ('*Plama v Bulgaria*'). See also Dumberry (n 89) 121–5; Reinisch and Schreuer (n 89) 820 [26]; Kriebaum (n 89) 9; 85; Heiskanen (n 212) 101–3; Schreuer, 'Non-ADM' (n 89) 184; Vaughan Lowe, 'Arbitrary and Discriminatory Treatment' in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 307, 312–3;
[220] See above Part III(A).
[221] *Black's Law Dictionary* (11th ed, 2019) 'discrimination' (def 1).
[222] Ibid (def 2).
[223] *Cambridge Dictionary* (online) 'discriminatory'.
[224] Kriebaum (n 89) 12-13; Lowe (n 219) 310-12; Schreuer, 'Non-ADM' (n 89) 193.
[225] See above Part III(A).

As to the level of 'non-arbitrariness', it has been required differently by tribunals in arbitration practice.[226] However, in the context of the 53 IIAs, 'non-arbitrariness' would possibly be at the 'rational' level rather than at the 'non-shocking' or 'appropriate' level. This is because the meaning of not being 'arbitrary' is being 'rational', 'logical', 'reliable' or 'reasonable' rather than being 'appropriate', 'suitable', 'necessary' or 'proportionate'. The requirement of non-arbitrariness is thus more relevant to the objective basis of state measures rather than the efficiency of state measures such as suitability, necessity or proportionality. The rational level here refers to the rational basis of state measures and the rational relationship between these measures and objectives pursued.

Notably, among Vietnam's 53 IIAs having FET provisions with Formulation A, 21 contain non-UDM clauses,[227] and two contain clauses on non-impairment by unreasonable measures (non-UM clauses);[228] therefore, protection against non-arbitrariness could be partly secured by non-UDM/non-UM clauses. One might argue that such clauses would indicate non-arbitrariness at the 'appropriate' level rather than at the 'rational' level because they prohibit unreasonable measures rather than arbitrary measures. However, 'reasonable' has a synonym – 'rational' – which is also an antonym of 'arbitrary'. Reasonable or non-arbitrary measures thus refer to those based on 'reason'/'fact' rather than on 'chance'/'desire', as analysed above. The plain meaning of the terms 'unreasonable' and 'arbitrary' in the words of the *National Grid v Argentina* tribunal is 'substantially the same in the sense of something done capriciously, without reason'.[229] Furthermore, where Non-UDM/Non-UM clauses follow FET provisions, they could play a role in clarifying FET, or '*lex specialis*' in the words of the tribunal in *Cargill v Poland*.[230] A good statement of this point could be found in *Noble Ventures v*

[226] See above Part II(C)(2)(b).
[227] Eleven BITs with non-EU members: see *Vietnam-Argentina BIT* art 3(1); *Vietnam-Cambodia BIT (amended 2012)* art 3.1; *Vietnam-Egypt BIT* art 2(2); *Vietnam-Kazakhstan BIT* art 3(1); *Vietnam-Kuwait BIT* art 2(2); *Vietnam-Oman BIT* art 3(2)*; Vietnam-Mozambique BIT* art 2(3); *Vietnam-Turkey BIT* art 2(2); *Vietnam-UK BIT* art 2(2); *Vietnam-Venezuela BIT* art 2(2); *Vietnam-US BTA* art ch IV 3(2). For ten BITs with EU members, see *Vietnam-Denmark BIT* art 3(1); *Vietnam-Finland BIT* art 2(3); *Vietnam-Netherland BIT* art 3(1); *Vietnam-Slovakia BIT* art 3(2); *Vietnam-Romania BIT* art 3; *Vietnam-Spain BIT* art 3(2); *Vietnam-BLEU BIT* art 3(2); *Vietnam-Italy BIT* art 2(2); *Vietnam-Germany BIT* art 2(3)*; Vietnam-Greece BIT* art 3(2). See also app 2.1.
[228] Two BITs with EU members: see *Vietnam-Estonia BIT* art 2(3); *Vietnam-Sweden BIT* art 2(1). See also app 2.1.
[229] *National Grid v Argentina* (n 118) [197].
[230] *Cargill v Poland* (n 66) [519].

Romania,[231] where the tribunal analysed the structure of the article including the FET provision and non-UDM clause.[232] It affirmed that 'this [FET standard] is to be *a more general standard* which *finds its specific application in finds in* inter alia […] *the prohibition of arbitrary and discriminatory measures*'.[233]

As to the level of 'non-discrimination', it has been consistently understood by different tribunals in arbitral practice as indicating discrimination at the rational/reasonable level rather than no discrimination at all, either reasonable or unreasonable. This perception is possible in the context of Vietnam's 53 Formulation A IIAs because the dictionary definition of 'discrimination' or 'discriminatory' refers only to 'a failure to treat all persons equally when *no reasonable distinction* can be found between those favoured and those not favoured' or '*unfair*; treating somebody or one group of people worse than others'.[234] Only unreasonable discrimination should be considered an 'unfair' and 'inequitable' treatment.

It should be noted that non-discrimination could be guaranteed by non-UDM clauses under Vietnam's 21 IIAs having Formulation A FET provisions as mentioned above, and by clauses on non-impairment of foreign investments by discriminatory measures (non-DM clauses) under two IIAs.[235] However, the level of non-discrimination accorded by these non-UDM/DM clauses is likely to be the same with that analysed above — rational/reasonable discrimination. That is because the clauses function as a clarification of FET and it is unrealistic to require no discrimination in any circumstances.

From their dictionary meaning and treaty contexts, FET provisions with Formulation A in Vietnam's IIAs would likely facilitate a reading that legislative measures must, in any case, not be arbitrary (or be rational), and to be only reasonably discriminatory.

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[231] *Noble Ventures, Inc v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/11, 12 October 2005) ('*Noble Ventures v Romania'*)**.**
[232] The article at issue is Article II(2) of the *Romania-US BIT*.
[233] *Noble Ventures v Romania* (n 231) [182] (emphasis added).
[234] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'discrimination' (emphasis added).
[235] *Vietnam-Switzerland BIT* art 3(4); *Vietnam-Armenia BIT* art 4(4). See also app 2.1.

D *Substantive Requirements for Fair and Equitable Legislative Measures: No Reverse Effects on Granted Specific Commitments without Proportionality*

1 *Less Concrete Grounds for the Protection of Foreign Investor's Reasonable Expectations in General*

Formulation A FET provisions in Vietnam's IIAs, as previously identified in Part I(B), include undefined provisions – in which the concept of FET appears on its own – and defined provisions, where the concept of FET is clarified to include a procedural obligation – non-denial of justice. None of them specify that FET obliges a host state (say, Vietnam) to protect foreign investor's reasonable expectations, as certain investment treaties signed by other countries do (such as the *CETA*).[236] International arbitration practice, on the other hand, shows that tribunals have considered the protection of legitimate expectation as a requirement, which is previously noted in Part II(C)(3). The question is whether FET provisions with Formulation A would facilitate a reading that FET requires Vietnam to protect foreign investors' reasonable expectations. The answer is negative, for the following reasons.

Firstly, the original meaning and the function of FET do not support the position that the FET obligation of the state is to respect the expectations of foreign investors. In the words of *Arbitrator Pedro Nikken*, '[t]he assertation that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the dictionary meaning to be given to the terms "fair and equitable"'.[237] The *MTD v Chile (Annulment)* committee took a similar view when questioning 'the [*Tecmed v Mexico*] tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation)'.[238] That is because the FET obligation requires the consideration of the objective grounds of state measures and the subjective aspects of state authority, while the expectations of foreign investors

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[236] *CETA* art 8.10.

[237] Pedro Nikken, 'Separate Opinion of Arbitrator Pedro Nikken', *italaw* (2010) [3] <https://www.italaw.com/cases/106> ('Separate Opinion'). This opinion is made to the Decision on Liability in *AWG v Argentina*.

[238] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/7, 21 March 2007) [66]–[78] (citations omitted) ('*MTD v Chile (Annulment)*'). See also *CMS Gas Transmission Company v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/8, 25 September 2007) [89] ('*CMS v Argentina (Annulment)*').

refer to the subjective aspects of foreign investors. Additionally, FET could not require a state to guarantee the stability of the legal framework for foreign investments, nor could foreign investors expect such stability under the state's FET obligation unless otherwise stated.[239] This is because FET does not, and can not, function as a stabilisation clause like those in contracts/agreements between state authorities and foreign investors or licences granted to foreign investors by a state authority.[240]

One might argue that foreign investors' expectations would be reasonably defined on objective grounds, including credible reliance and overall examination of all factors (economic, social, environmental, legal and political) at the time of making investments, rather than simply on the subjective assumption of foreign investors.[241] Therefore, they should enjoy the protection of these expectations under FET. However, if that was the case, these objective grounds should become direct factors in defining whether state measures violated FET. These grounds would be reframed as factors: whether specific commitments were previously granted to foreign investors by state authorities, whether foreign investors relied on such commitments in making investments, and whether state measures reversed such commitments and thus led to 'unfair and inequitable' treatment. There is no need to make a detour to concluding state measures violated FET for the reason that state measures frustrated foreign investors' expectations. FET can protect foreign investments by protecting specific commitments previously granted to foreign investors by a host state, rather than through protecting foreign investors' expectations, as discussed in the following subsection.

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[239] *Methanex Corporation v United States of America (Final Award)* (UNCITRAL Arbitral Tribunal, 3 August 2005) pt IV ch D [9]–[10] ('*Methanex v US*').

[240] Peter Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55(3) *The International and Comparative Law Quarterly* 527, 542. See also *EDF (Services) Limited v Republic of Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 8 October 2009) [217] ('*EDF v Romania*'). This tribunal specifically stated that '[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework'.

[241] See, eg, *Duke Energy v Ecuador* (n 73) [339]–[340]. The tribunal stated:

> To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.

For the reasonableness of foreign investors' expectations, see generally Teerawat Wongkaew (ed), *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance* (Cambridge University Press, 2019) 187–193, 202–16; Felipe Mutis Téllez, 'Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law' (2012) 27(2) *ICSID Review* 432, 433–5.

In addition, the above reading gains no support from the objectives and purposes of Vietnam's IIAs having Formulation A FET provisions. One might notice that certain of Vietnam's IIAs recognise in their preambles the agreement of treaty parties that 'a stable framework for investment will contribute to maximising the effective utilisation of economic resources and improve living standards'.[242] An argument could be advanced here that FET could be interpreted to protect the stability of the legal framework and thereby protect the expectations of foreign investors. However, this reasoning is weak at certain points. In particular, such preambles do not indicate that the direct objective/purpose of FET is to maintain 'a stable framework'. This effect is different from that brought about by the preambles of *Argentina-US BIT* – 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for the investment and maximum effective use of economic resources'.[243] The *LG&E v Argentina* and *Enron v Argentina* tribunals relied on such preambles to require the protection of legitimate expectations under FET, as previously discussed in Part II(C)(3). Even if 'a stable framework' was interpreted as a treaty objective, the appropriate view to take would be that FET as a treaty obligation contributes to achieving such objective, rather than the objective itself being an FET requirement.

Furthermore, the contexts of Vietnam's IIAs in this group, including 'any relevant rules of international law applicable in the relations between the parties',[244] do not strongly indicate that a state has a duty to protect foreign investors' reasonable expectations under FET. Relevant rules here include general principles of international law and CIL.

One might point out that the protection of legitimate expectation is arguably considered a general principle of law so it could become a part of FET.[245] It should be noted that the 'protection of legitimate expectation' doctrine has been derived from domestic legal systems.[246] That doctrine, as known in many legal systems, includes *procedural* protections against authorities' conduct contravening certain processes and procedures

[242] *Vietnam-Finland BIT* Preamble; *Vietnam-Estonia BIT* Preamble. Similarly, the preamble of the *Vietnam-Uzbekistan BIT* expresses that 'the stable investment base will ensure maximum efficiency of the use of economic resources and the development of manufacturing forces'.
[243] *Argentina-US BIT* Preamble.
[244] *VCLT* art 31(1)(c).
[245] See Emmanuel T Laryea, 'Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020) 1, 11–4.
[246] Campbell McLachlan, Laurence Shore and Matthew Weiniger (eds), *International Investment Arbitration: Substantive Principles* (Oxford University Press, 1st ed, 2007) 234.

established in advance.[247] It also includes *substantive* protections against the revocation of lawful representations made by authorities that private parties would receive or continue to receive some kind of substantive benefit.[248] However, the protection of substantive expectation under the doctrine of legitimate expectation has not yet won global recognition. According to certain studies examining the most representative legal systems, undertaken by Schønberg,[249] Snodgrass,[250] Mairal,[251] Potestà,[252] Zeyl,[253] Groves and Weeks,[254] and Ostřanský,[255] the substantive protection of legitimate expectation is well established through the principle of *Vertrauensschutz* (protection of trust) in German law,[256] or accorded through the principle of non-retroactivity, or the principle of legal certainty as an element of the rule of law in EU law,[257] and growingly recognised as a ground of judicial review (whether there is substantive unfairness resulted from the abuse of power) by English courts.[258] It is also accepted to some extent in India,[259] Hong Kong

[247] See generally Soren Schønberg (ed), *Legitimate Expectations in Administrative Law* (Oxford University Press, 2000) 31–63.
[248] Ibid 119–31.
[249] Ibid 64–106.
[250] Elizabeth Snodgrass, 'Protecting Investor's Expectations: Recognizing and Delimiting a General Principles' (2006) 21(1) *ICSID Review—Foreign Investment Law Journal* 1, 25–30.
[251] Hector A Mairal, 'Legitimate Expectations and Informal Administrative Representations' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 413, 415–8.
[252] Michele Posteta, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) *ICSID Review* 88, 93–8.
[253] Trevor J Zeyl, 'Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law' (2011) 49(1) *Alberta Law Review* 203, 211–6.
[254] Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017).
[255] Josef Ostřanský, 'An Exercise in Equivocation: A Critique of Legitimate Expectations As a General Principle of Law Under the Fair and Equitable Treatment Standard' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill, 2018) 344, 356–66.
[256] Seee generally Mairal (n 251) 415–6; Posteta (n 252) 94; Zeyl (n 253) 215–6. See also Martina Künnecke (ed), *Tradition and Change in Administrative Law An Anglo-German Comparison* (Springer, 2007) 124–6; Chester Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts' (2009) 6(1) *Transnational Dispute Management* 1, 5; Alexander Brown (ed), *A Theory of Legitimate Expectations for Public Administration* (Oxford University Press, 2017) 153–4.
[257] Seee generally Schønberg (n 247) 71–3; Mairal (n 251) 416; Posteta (n 252) 94; Ostřanský (n 255) 363–4. See also Kim Talus, 'Revocation and Cancellation of Concessions, Operating Licences, and Other Beneficial Administrative Acts' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 453, 464–8; Wongkaew (n 241) 30.
[258] Seee generally Schønberg (n 247) 66–9; Mairal (n 251) 416; Posteta (n 252) 95–7; Zeyl (n 253) 211–4; Kristina Stern SC and Joanna Davidson, 'Substantive Fairness: A Case for Reconsidering the Breach between English and Australian Law' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 79, 81–9; Robert Thomas, 'Legitimate Expectations and the Separation of Powers in English and Welsh Administrative Law' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 53, 76; Mark Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in the United Kingdom' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 319, 343–4; Ostřanský (n 255) 357–9. See also Robert Thomas (eds), *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing, 2000) 58–62; Künnecke (n 256) 95–110; Abhijit P G Panda and Andy Moody, 'Legitimate Expectations in Investment Treaty Arbitration: An Unclear Future' (2010) 15(1) *Tilburg Law Review* 93, 99–102; Wongkaew (n 241) 32.

and Singapore,[260] South Africa[261] and Vietnam.[262] The substantive protection of legitimate expectations has not yet been accepted, or clearly accepted, by other Commonwealth nations such as Canada,[263] Australia,[264] or New Zealand.[265] In France, the concept of legitimate expectations has not been recognised in terms of either procedural or substantive aspects.[266] Global recognition could may occur in the future but at least for the time being the evidence shows otherwise. Sornarajah has already pointed out that a general principle of legitimate expectation provides only procedural protection, not substantial remedies.[267] Therefore, the protection of legitimate expectation could not convincingly be considered a general principle of law, at least from the aspect of substantive protection. Notably, whether the protection of procedural expectation under the doctrine of legitimate expectation has globally been recognised, and thus considered a general principle of law, is still a matter of question.[268]

Certain tribunals have relied on the good faith principle under CIL to infer the protection of legitimate expectation as an element of FET. For example, the *Tecmed v Mexico* tribunal, interpreting the FET provision in the *Spain-Mexico BIT*, stated that this provision 'in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the

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[259] Chintan Chandrachud, 'The (Fictitious) Doctrine of Substantive Legitimate Expectations in India' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 245, 265–6.

[260] Swati Jhaveri, 'Contrasting Responses to the "Coughlan Moment": Legitimate Expectations in Hong Kong and Singapore' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 267, 191–2.

[261] Cora Hoexter, 'The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 165, 187–8.

[262] See generally Tuan Van Nguyen, 'The Protection of Legitimate Expectations under Investor-State Dispute: Case Studies of Vietnam' (2015) 12(6) *Transnational Dispute Management* 1, 9–10, 14–19.

[263] Posteta (n 252) 97; Zeyl (n 253) 214.

[264] See generally Posteta (n 252) 97; Zeyl (n 253) 214–5; SC and Davidson (n 258) 98; Matthew Groves, 'Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017), 319, 343. See also Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32(2) *Melbourne University Law Review* 470, 495, 506–11.

[265] Philip A Joseph, 'Law of Legitimate Expectation in New Zealand' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 189, 214.

[266] See generally Schønberg (n 247) 70–1, 73; Snodgrass (n 250) 27; Mairal (n 251) 417; Posteta (n 252) 95; Zeyl (n 253) 215; Ostřanský (n 255) 361–2.

[267] M Sornarajah (ed), *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 354–355.

[268] Thomas Walde, 'Separate Opinion in the Arbitration under Chapter XI of the NAFTA and the UNCITRAL Arbitration Rules: *Thunderbird v Mexico*', *italaw* (December 2005) [3] <https://www.italaw.com/cases/571>.

investment'.[269] However, this reasoning is problematic at certain points. The good faith principle hardly creates sub-obligations, whether protection against arbitrariness or the protection of foreign investor's expectations.[270] Rather, it aims only to protect foreign investments against state measures designed with bad faith, malicious or disguised intentions/motivations (subjective aspects), as previously discussed.[271] If such state measures undermined the expectations of foreign investors, they should be cited as violations of the good faith principle under CIL or of the good faith requirement of FET under treaty law, not of the protection of legitimate expectation arguably generated by the good faith principle/requirement under CIL/treaty law. One might notice that certain tribunals – such as those in *Saluka v Czech*, *Tecmed v Mexico*, and *Euroka v Poland* – have already reasoned that the principle of good faith not only requires states to honour their treaty obligations in good faith among themselves, but also vis-à-vis any individual who drives rights and benefits from them; therefore, it was understood that FET protects investors' legitimate expectation.[272] However, it should be noted that the good faith principle deals with the intentions/motivations of state authorities, regardless of whether a state implements treaty obligations as a treaty party towards other treaty parties or as a public party towards private beneficiaries (say, foreign investors).

Regarding the statement made by the *Tecmed v Mexico* tribunal, it should be noted that the connection between the protection of legitimate expectation and FET through the good faith principle was not clearly shown. As observed by Posteta and Douglas, the tribunal did not provide authoritative evidence to support the argument that the protection of claimants' basic expectations should be included under FET, and the fact that the tribunal referred the protection of claimants' basic expectations to the good faith principle does not sufficiently explain why FET should include the former.[273] In the words of Posteta, 'it is not sufficient to explain why a treaty standard such as fair and equitable treatment should be read as encompassing the particular sub-element of the duty to

[269] *Tecmed v Mexico* (n 73) [154]. Many subsequent awards/tribunals followed the approach and cited *Tecmed v Mexico* award: see *LG&E v Argentina* (n 75) [127]; *MTD v Chile* (n 37) [114]; *Occidental v Ecuador (I)* (n 36) [185]; *CMS v Argentina* (n 74) [279]; *Sempra v Argentina* (n 36) [298]. In the words of McLachlan, Shore and Weiniger, the award provides 'the most far-reaching exposition of the principle underlying the developing notion of legitimate expectations as applied to fair and equitable treatment in investment law': see McLachlan, Shore and Weiniger (n 246) 325.
[270] See M Sornarajah (ed), *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 260; Wongkaew (n 241) 36–7.
[271] See above Part III(A).
[272] *Saluka v Czech* (n 42) [303]; *Tecmed v Mexico* (n 73) [154]; *Eureko BV v Republic of Poland (Partial Award)* (UNCITRAL Arbitral Tribunal, 19 August 2005) [235] ('*Eureko v Poland*').
[273] Posteta (n 252) 94; Zachary Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 27(1) *Arbitration International* 27, 28.

protect legitimate expectations, at least not without further elaboration'.[274]

From the above analysis, Formulation A FET provisions in Vietnam's IIAs would *not* facilitate a reading that required Vietnam to protect foreign investors' expectations. In the words of *Arbitrator Pedro Nikken*, 'the interpretation that tends to give the standard of fair and equitable treatment the effect of a legal stability provision has no basis in the BITs or the international customary rules applicable to the interpretation of treaties'.[275] Such expectations might only be protected through protecting legitimate specific commitments previously granted by state authorities to foreign investments, as discussed below.

2 *Certain Grounds for the Protection of State's Granted Specific Commitments: Inviting No Reverse Effects on Commitments without Proportionality*

As mentioned earlier, the argument that FET creates an obligation for a host state to protect the expectations of foreign investors is unconvincing, based on its original meaning and function.[276] The question is whether FET provisions with Formulation A would facilitate an interpretation that FET requires the host state to respect granted specific commitments that had generated expectations.

The answer to the above question is 'possibly', for several reasons. First, it is obviously 'unfair' to a foreign investor if a host state that previously granted specific commitments to partly or wholly fix the legal framework relevant to those investments, and then reneged on those commitments. In other words, the reversal of specific commitments could offend 'a sense of fairness, equity, and reasonableness'.[277] Second, at least one treaty context of Vietnam's 51 IIAs having Formulation A FET provisions – the *ACIA* – supports the mentioned interpretation possibility. Particularly, the *ACIA* in its expropriation provision requires consideration of whether state measures breach *prior binding written commitments* to a foreign investor to define indirect expropriation in addition to economic loss caused by these measures to the investor. It thus probably implies a similar approach to defining unfair and inequitable features of state measures – that is, whether state measures breach prior specific commitments to a foreign investor *in*

[274] Posteta (n 252) 4.
[275] Nikken, 'Separate Opinion' (n 237).
[276] See above Part III(D)(1).
[277] These words are adopted from *Merrill & Ring v Canada* (n 81) [210].

written or other forms if specific. Notably, the unenforced *Vietnam-EU IPA* reflects a similar perspective, namely 'whether a Party made a *specific representation* to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated'.[278]

However, it would be unfair were state measures reversing the effects of specific commitments to be considered a violation of FET under any circumstances. In international arbitration practice, as previously discussed,[279] tribunals such those as in *EDF and others v Argentina* and *LG&E v Argentina* have only considered state reversal of previous commitments to violate FET violations when such a reversal was significant and the state did not offer any way to restore economic balance. In the context of Vietnam's IIAs, state measures reversing commitment would possibly be considered a violation of FET if they were not necessary and imposed an excessive burden on foreign investor – the proportionate relationship between state measures and public objectives. This reading is shared by several scholars in literature.[280]

The above reading is based on two grounds. First, 'fair' and 'equitable' treatment refer to the quality of interactions between a host state (say, Vietnam) and foreign investors, so it is appropriate to consider the interests of both sides. In the words of *Arbitrator Pedro Nikken*, '[i]n essence fair and equitable treatment is a standard of conduct or behavior of the State vis à vis foreign investment'.[281] He also pointed that '[t]he conduct that each State Party to a BIT is willing and obliged to adopt for the promotion and protection of investments and, conversely, what each State is entitled to expect and does expect from the behavior of the other Party in the same situation'.[282] This means that fairness and equity are matter of the relationship between state interests and foreign investors' interests. It would be unfair if the host state only imposed a burden on a foreign investor to address its domestic affairs or, in other words, costs/damages caused by state measures to a foreign investor exceeded benefits/interests achieved by these measures for the host state's community. It would also be unfair if the state always placed a burden on the

[278] *Vietnam-EU IPA* art 2.5(4) (emphasis added).
[279] See above Part II(C)(3)(b).
[280] Alexandra Diehl (ed), *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International, 2012) 428–9; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015) 199–202.
[281] Nikken, 'Separate Opinion' (n 237) [4].
[282] Ibid.

public or, putting it differently, host state's residents had to pay taxes for compensating a foreign investor under any circumstances adversely affected by public policies or legislation.

Second, a FET provision does not function as a stabilisation clause, and the level of protection accorded by the FET provision is thus not as great as that granted by the stabilisation clause. Indeed, the stablisation clause nowadays hardly aims to freeze the legal framework applied to the investments of a foreign investor solely (a freezing clause) but, rather, to reduce the impact of legal changes by requiring compensation or concessions in cases of regulatory changes (an 'economic equilibrium' clause).[283] The stabilisation clause could offer many ways to restore economic balance for a foreign investor, including in circumstances in which economic restoration might not be offered. Thus, the FET provision could be interpreted as requiring a balance between public and private interests if state measures reversed granted specific commitments. Lastly, the treaty contexts of Vietnam's IIAs support a view that state measures reversing commitment might be considered FET violations under some cirscumstances. Of Vietnam's IIAs having Formulation A FET provisions, eight allow exceptions for security interests and/or public interests. While certain of them require state measures in relation to such interests to be rational/reasonable,[284] most already require state measures to be necessary.[285] The level of protection accorded by FET provisions in a normal situation should be higher than that in an exceptional situation. The requirement of proportionality (suitability, necessity and non-excessiveness) when state measures caused reverse effects would have that effect.

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[283] Antony Crockett, 'Stabilisation Clauses and Sustainable Development: Drafting for the Future' in Chester Brown and Kate Miles (eds), *Evolution in International Treaty Law and Arbitration* (Cambridge University Press, 2011) 516, 521–2; Katja Gehne and Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' (Research Paper, 2014) 6–8 <https://www.semanticscholar.org/paper/Stabilization-Clauses-in-International-Investment-Brillo-Gehne/a4559630ff0d2115e643ea85e43388cd9bead2a4>.

[284] Note that treaty exceptions in the *Vietnam-Uzbekistan BIT* and *Vietnam-Singapore BIT* only require state measures having a rational relationship with relevant security interests and/or public order and those in the *Vietnam-EAEU FTA*, *ACIA* and *ASEAN-China IA* similarly require state measures to be rational with their objectives to protect national treasures and conserve exhaustible natural resources: see Chapter 7 Part III(D); Chapter 8 Parts III(B) and IV(C).

[285] Note that treaty exceptions in the *Vietnam-Czech BIT*, *Vietnam-Slovakia BIT*, *Vietnam-Japan BIT*, *Vietnam-EAEU FTA*, *ACIA* and *ASEAN-China IA* require state measures to be necessary for the protection of relevant security interests and/or public interests such as the protection of human, animal or plant life or health, public order or public morality: see Chapter 7 Part IV(D); Chapter 8 Parts III(B) and IV(C).

E *Section Remark: Substantive Requirements for Fair and Equitable Legislative Measures as Imposed by Formulation A*

This section shows that FET provisions without a limitation to CIL (Formulation A) under 53 of Vietnam's IIAs would possibly facilitate a reading that FET is not limited to MST and possibly provides a higher level of protection than the latter. The original meaning of FET and relevant treaty contexts may suggest that Vietnam is required to act in good faith, provide protection against arbitrariness and arbitrary/unreasonable discrimination, and is obliged to respect granted specific commitments. For state measures to be compatible with FET they must be in good faith (bona fide) (i), not be arbitrary (ii), be reasonably discriminatory (iii) and not have the effect of reversing granted specific commitments without proportionality (iv) (Table 3.2). Non-arbitrariness is required at the 'rational' level.

IV An Analysis of Formulation B: Substantive Requirements for Legislative Measures

A *Meaning of Fair and Equitable Treatment: Equal to What is Required under Customary International Law*

Formulation B FET provisions in Vietnam's six IIAs make direct references to CIL, as previously noted.[286] These references invite a reading of equating FET with what is required under CIL.

More specifically, FET provisions in five out of six treaties clarify that the FET concept does not require 'treatment in addition to or beyond that which is required by the applicable rules of customary international law'[287] and does not create 'additional substantive rights'.[288] This clarification, which is presumably adopted from the interpretation approach issued by the *NAFTA* FTC in 2001 with regard to Article 1105 on MST in the *NAFTA*, suggests that FET is equal to customary international law minimum standard of treatment relevant to 'fair and equitable' meaning. The latter could be called as 'fair and equitable' element of MST under CIL or briefly as MST. The FET provision in the remaining treaty – the *Vietnam-US BTA* – does not provide the mentioned clarification but can generate a similar meaning. It particularly states: '[e]ach Party shall at all times accord to covered investment fair and equitable treatment … shall in *no case accord treatment less favourable than that required by applicable rules of customary international law*'.[289] This provision, it cannot be denied, sets MST as a floor, not a ceiling, for FET. This reading has been put forward by the *Azurix v Argentina* tribunal as previously discussed in Part II(A). However, the fact that such a provision encourages treaty parties to provide positive treatment towards foreign investors/investments does not mean that state measures equal to minimum treatment would be considered contrary to the provision. In other words, one cannot claim such measures violate FET if they still meet the 'floor' of treatment.

[286] See above Part I(C).
[287] *ASEAN-Korea IA* art 5(2)(c); *ASEAN-ANZ FTA* art 6(2)(c); *ASEAN-Hong Kong IA* art 5(1)(c); *Vietnam-Korea FTA* art 9.5(2); *CPTPP* art 9.6(2).
[288] Ibid.
[289] *Vietnam-US BTA* art 3 (emphasis added).

It should be noted that FET provisions in five out of six treaties only limit FET to MST under CIL but do not assimilate FET to the latter.[290] The FET provision in the *Vietnam-Korea FTA* clearly states that '[e]ach Party shall accord to covered investments *fair and equitable treatment* and full protection and security *in accordance with customary international law*'.[291] This statement respects the difference between FET and MST. Indeed, FET is currently perceived as a term born from investment treaty practice, and MST as a term arising from customary international law, a view put forward by developed countries and endorsed in the literature. They are separate concepts even in cases where treaty parties constrain the scope of FET to MST or where FET and MST overlap to a certain extent.

However, FET provision in the remaining treaty – the *CPTPP* – describes FET as a part of MST. It provides that '[e]ach Party shall accord to covered investments treatment *in accordance with applicable customary international law principles, including fair and equitable treatment* and full protection and security'.[292] The same description can be found in the *NAFTA*.[293] However, from the perspective discussed above – that is, respecting the difference in the concepts of FET and MST – this approach is problematic. FET is ambiguous but is expected to provide better than 'minimum' treatment, while MST is also ambiguous but is at least attached to whatever has been recognised under CIL. Only if one considers that the concept of MST includes many elements such as 'fair and equitable' and 'full protection and security' ones under CIL, and that the term 'fair and equitable treatment' merely presents the 'fair and equitable' element of MST, this approach will be understandable. This is because FET in the *CPTPP* is already perceived by treaty parties as limit in its scope to the 'fair and equitable' element of MST.

[290] *ASEAN-Korea IA* art 5(2)(c); *ASEAN-ANZ FTA* art 6(2)(c); *ASEAN-Hong Kong IA* art 5(1)(c); *Vietnam-Korea FTA* art 9.5(2); *Vietnam-US BTA* art 3.
[291] *Vietnam-Korea FTA* ch 9 art 9.5(1).
[292] *CPTPP* art 9.6; *Vietnam-Korea FTA* art 9.5 (emphasis added).
[293] *NAFTA* art 1105(1).

B *Content of Customary International Minimum Standard of Treatment*

Of Vietnam's six IIAs having Formulation B FET provisions, the *Vietnam-Korea FTA* and *CPTPP* provide state parties' shared undertstanding of CIL in annexes. Accordingly, CIL 'results from a general and consistent practice of States that they follow from a sense of legal obligation'.[294] This is arguably adopted from the approach conducted by the International Court of Justice[295] that has long been endorsed in investment arbitral practice.[296] Given the shared understanding, to claim any state practice as a customary international rule, a foreign investor as a claimant must show: (i) a state performs that practice consistently (consistent state practice), and (ii) the state follows that practice because it believes that it is obliged to do so – sense of legal obligation (*opinio juris*). A host state as a respondent might seek to prove otherwise in rejecting a foreign investors' position. The allocation of the burden of proof for CIL between the claimant and the respondent is still a matter of discussion in arbitral practice.[297]

The question that could be raised here is whether CIL must always be drawn from direct evidence submitted by disputing parties to qualify the requirements of CIL or whether CIL can be inferred from indirect evidence such as arbitral decisions or scholarly work where states accept or endorse relevant rules of MST. It should be noted that a similar issue was raised and discussed in the context of *NAFTA* cases, particularly in *Windstream Energy v Canada*. In this case, the tribunal agreed that 'in principle the content of a rule of customary international law such as minimum standard of treatment can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the State has accepted such practice as law'.[298] However, when no party

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[294] *Vietnam-Korea FTA* art 9.5 n 5, annex 9-A; *CPTPP* art 9.6 n 15, annex 9-A. The *RCEP* also provides the same definition in its annex: *RCEP* ch 10 art 10.5 n 20, annex on Customary International Law.

[295] The International Court of Justice (ICJ) summarised its approach to customary international law, particularly in *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99, 122–3 [55] as follows:

> It follows that the Court must determine, in accordance with Article 38(1)(b) of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with opinion juris.

For more information, see Alain Pellet and Daniel Müller, 'Competence of the Court, Article 38' in Andreas Zimmermann at el (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 3rd ed, 2019) 819, 903–17.

[296] See, eg, *Merrill & Ring v Canada* (n 81) [193]; *Windstream Energy v Canada* (n 82) [351].

[297] See, eg, *Windstream Energy v Canada* (n 82) [349]; *Mesa Power v Canada* (n 67) [234].

[298] *Windstream Energy v Canada* (n 82) [351].

produced direct evidence, the tribunal relied on 'indirect evidence to ascertain the content of the customary international law minimum standard of treatment'; this indirect evidence included decisions taken by other *NAFTA* tribunals and relevant legal scholarship.[299] According to the tribunal, the approach based on indirect evidence was 'consistent with the approach that the ICJ is required to adopt under Article 38 of its Stature, which provides that the Court may refer to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law"'.[300] In the context of Vietnam's IIAs, CIL is also required to be strongly established from direct evidence. It means that in a FET-related case and to a relevant extent, a state respondent and foreign investors as the claimant(s) must submit direct evidence to prove whatever treatment they claim is a consistent state practice motivated by a sense of legal obligation among state authorities. Depending on a case-by-case basis, adjudicators decide whether to accept indirect evidence, and the extent to which it can be employed.

It should be noted that FET provisions with Formulation B have not been interpreted in any case thus far, as provided previsouly in Part II(A), and thus there is no formal submission from treaty parties or Vietnam regarding the CIL. The provisions in the *Vietnam-Korea FTA* and *CPTPP* only provides that '[t]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens'.[301] However, FET provisions in Article 1105 of the *NAFTA* (together with a binding interpretation of FTC Note 2001) and in Article 10.5 of the *Oman-US FTA* that have contents similar to Formulation B have been invoked by foreign investors in a number of cases. These cases can serve as a reference to identify what treatment has been recognised in international arbitration practice as customary international rule at this time.

It has been acknowledged by many tribunals that CIL does not only prohibit a host state from taking 'outrageous', 'egregious' or 'bad faith' conduct, but also prohibits a host state from taking arbitrary or arbitrarily/unreasonably discriminatory measures.[302] For instance, the *Merrill & Ring v Canada* tribunal made a notable summary that even in the absence of bad faith or malicious intention on the part of the state, '[c]onduct which is

[299] Ibid.
[300] *Windstream Energy v Canada* (n 82) [351] (footnote 742).
[301] *Vietnam-Korea FTA* art 9.5 n 5, annex 9-A; *CPTPP* art 9.6 n 15, annex 9-A.
[302] See above Part II(C).

unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by *NAFTA* Tribunals as constituting a breach of fair and equitable treatment'.[303] The *Mesa Power v Canada* tribunal also systhesised components forming part of Article 1105 [on MST]: 'arbitrariness; "gross" unfairness; discrimination; "complete" lack of transparency and candor in an administrative process; lack of due process "leading to an outcome which offends judicial propriety"; and "manifest failure" of natural justice in judicial proceedings'.[304] In the context of Vietnam, its domestic legislation and policies can suggest that nowadays the state believes it must grant more favourable treatment than merely avoiding shocking or bad faith actions. Guarantees for foreign investors in cases of regulatory changes provided by domestic investment laws and regulations, among many others, can be examples.[305]

The protection of foreign investor's reasonable expectations is not yet considered customary international rule. This point is also shared by other scholars.[306] In investment arbitration practice, many tribunals have assessed CIL and reached this conclusion.[307] For example, the *Mesa Power v Canada* tribunal shared the view had hold by a majority of *NAFTA* tribunals that 'the failure to respect an investor's legitimate expectations in and of itself does *not* constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached'.[308] Following this, the breach of legitimate expectation per se does not lead to a violation of FET. In *Al Tamimi v Oman*, the tribunal acknowledged the protection of investors' reasonable expectations which were based on non-'wilful or otherwise egregious' failures rather than on the stable legal or business framework.[309] The *Mobil and Murphy v Canada (I)* tribunal also accepted investors' legitimate expectations to be protected only when those expectations were frustrated by 'arbitrary, grossly unfair or discriminatory' or 'egregious' legal changes.[310] In the context of Vietnam, FET provisions in the *Vietnam-Korea FTA* and the *CPTPP* already express that the mere fact – a Party takes or fails to take an action that may be inconsistent with an investor's expectations – does not constitute a breach of

[303] *Merrill & Ring v Canada* (n 81) [208].
[304] *Mesa Power v Canada* (n 67) [502].
[305] See Chapter 2 n 13.
[306] See Ostřanský (n 255) 347–8 (stating '[i]n comparison with other elements of FET, such as procedural propriety, due process, prohibition of arbitrariness, discrimination and sovereign interference into State contracts, the protection of LES [legitimate expectations] is not clearly rooted in the traditional State practice' (citations omitted).
[307] See above Parts II(C).
[308] *Mesa Power v Canada* (n 67) [502] (citations omitted). The tribunal referred to *Waste Management v Mexico (II)* (n 73) [96] and *Cargill v Mexico* (67) [296].
[309] *Al Tamimi v Oman* (n 134) [390].
[310] *Mobil and Murphy v Canada (I)* (n 67) [153].

FET, even if there is loss or damage to the covered investment as a result.[311] One might notice that Vietnam's domestic legal system indirectly protects investors' legitimate expectations regarding the stability of legal framework. In paticular, the foreign investors' expectations could be respected to the extent that foreign investors could continue to be entitled to prior favourable investment incentives during the period of entitlement, if legislation is changed.[312] In the case foreign investors suffer economic damages because of legislative changes for national defence and security, public order and safety, social ethics, community well-being or environmental protection, such damages could be restored by tax or other policies.[313] However, it does not mean that this treatment constitutes a part of MST that Vietnam must observe.

In conclusion, FET provisions with limitation to CIL would likely be interpreted as requiring MST to be based on state practice and *opinio juris*. For the moment, as shown by *NAFTA* and *non-NAFTA* awards, MST requires state measures to meet substantive requirements that are in good faith (bona fide), not arbitrary and reasonably discriminatory.

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[311] *Vietnam-Korea FTA* art 9.5 n 5; annex 9-A; *CPTPP* art 9.6 n 15; annex 9-A. They additionally specify that 'the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of [FET], even if there is loss or damage to the covered investment as a result'.

[312] See Law on Foreign Investment 2020 (Vietnam) art 13. It states:

> 1. Where a new legal instrument which is promulgated provides new or greater investment incentives than those which the investor currently is enjoying, the investor is entitled to enjoy the investment incentives in accordance with the new legal instrument for the remaining duration in which the project is entitled to incentives, except special investment incentives for investment projects specified in Article 20(5)(a)
> 2. Where a new legal instrument which is promulgated provides lower investment incentives than those which the investor has previously enjoyed, the investor shall continue to be entitled to the investment incentives in accordance with the previous regulations for the remaining duration in which the project is entitled to incentives.
> 3. The provisions of clause 2 of this article shall not apply in the case of change in the provisions of a legal instrument for the reason of national defence and security, public order and safety, social ethics, community well-being or environmental protection.
> 4. Where the investor is not permitted to continue to enjoy the investment incentives as prescribed in clause 3 of this article, [the investor] shall be considered for resolution by any one or more of the following measures:
>
> (a) Deducting actual loss and damage suffered by the investor from taxable income;
> (b) Adjusting the operational objectives of the investment project;
> (c) Supporting the investor to remedy loss and damage.
>
> 5. The measures of investment guarantees prescribed in clause 4 of this article shall only become effective if the investor so requests in writing in the period of three years from the effective date of the new legal instrument.

[313] Ibid.

C *Section Remark: Substantive Requirements for Fair and Equitable Legislative Measures as Imposed by Formulation B*

FET provisions with Formulation B in the six IIAs would be likely interpreted as requiring Vietnam to provide treatment equal to what is required under CIL – MST. What constitutes MST has evolved; however, it must have two features: (i) a consistent state practice (ii) motivated by a sense of legal obligation among state authorities (*opinio juris*). Currently, based on findings of arbitral awards – mostly *NAFTA* awards, which deduced rules of CIL from direct evidence – and on state practice in Vietnam, it is plausible that CIL prohibits a state from taking bad faith, arbitrary or irrationally/unreasonably discriminatory measures. To be fair and equitable, legislative measures must be in good faith (bona fide) (i), not be arbitrary (or be rational) (ii) and be reasonably discriminatory (iii) (Table 3.2).

CONCLUSION

POSSIBLE SUBSTANTIVE REQUIREMENTS FOR LEGISLATIVE MEASURES IMPOSED BY FAIR AND EQUITABLE TREATMENT PROVISIONS IN VIETNAM'S IIAS

This chapter finds that FET provisions without or with limitation to CIL (Formulation A/B) in Vietnam's IIAs possibly require legislative measures to comply with different requirements (Table 3.2). To be compatible with Formulation A, legislative measures must be good faith, (ii) not arbitrary, (iii) reasonably discriminatory and (iv) avoid reversing specific commitments previously granted to foreign investors, or where they do cause such effects reflect a proportionate balancing of interests. To be compatible with Formulation B, legislative measures must meet the first three of these requirements. Non-arbitrariness here is required at least at the 'rational' level.

Unfair and inequitable measures that reverse granted specific commitments could be compatible with FET obligation in certain cases, provided that exceptional substantive conditions are qualified (Tables 7.4 and 8.4). These exceptions are brought about by treaty exceptions for security and/or public interests as analysed in Chapters 7 and 8.

Table 3.2: Substantive Requirements for Legislative Measures as Imposed by FET Provisions in Vietnam's IIAs

Treaty Context (59)	**Substantive Requirements for Fair and Equitable Legislative Measures**	**Treaty Context* (41)**
53 IIAs	**Formulation A**	**33 IIAs; *Vietnam-EU IPA***
	(1) In Good Faith (bona fide) (2) Non-Arbitrariness (Rational Basis and Rational Relationship) (3) Rational/Reasonable Discrimination; and (4) No Revere Effects on Granted Specific Commitments without Proportionality	
6 IIAs	**Formulation B**	**6 IIAs; *RCEP***
Vietnam-US BTA *ASEAN-Korea IA* *ASEAN-ANZ FTA* *ASEAN-Hong Kong IA* *Vietnam-Korea FTA* *CPTPP*	(1) In Good Faith (bona fide) (2) Non-Arbitrariness (Rational Basis and Rational Relationship); and (3) Rational/Reasonable Discrimination	
Note: Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and *RCEP* come into force.		

Chapter 4

EXPROPRIATION PROVISIONS IN VIETNAM'S IIAS: SUBSTANTIVE REQUIREMENTS FOR NON-EXPROPRIATORY LEGISLATIVE MEASURES

INTRODUCTION

In general, customary international law (CIL) or treaty law on expropriation obliges a state not to confiscate or nationalise private property unless certain lawful conditions are met. Those conditions require expropriation to be for public purposes (i), to follow due process (ii), to be undertaken in a non-discriminatory manner (iii), and to include due/adequate compensation (iv).[1] Indeed, the final purpose of laws on expropriation is not to prevent a state adopting expropriation measures – or to require it withdraw expropriation measures, if already adopted – but to compensate foreign investors whose investments are directly or indirectly expropriated by state measures, which could be called 'protection against uncompensated expropriation'.[2] Compensation duty/liability is claimable in the event that state measures physically take the investments or properties of foreign investors together with transferring the ownership (physical/direct expropriation).[3] However, such duty/liability is not easily claimed in the case of state measures substantially interfering with foreign investments or foreign investors' properties without transferring ownership (indirect expropriation vs adverse interference).[4] This is because finding physical/direct expropriation is easier than identifying indirect one. In particular, while a factor for finding physical/direct expropriation is limited to an ownership transfer as acknowledged under CIL,[5] factors for identifying indirect expropriation are still controversial and depend much on what

[1] UNCTAD, *International Investment Agreements: Key Issues* (2004) vol 1 239–40; August Reinisch, 'Legality of Expropriation' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 171, 173–8; Rudolf Dolzer and Christoph Schreuer (eds), *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 137–8; Jeswald W Salacuse (ed), *The Law of Investment Treaties* (Oxford University Pres, 2nd ed, 2015) 249–53.

[2] August Reinisch and Christoph Schreuer, 'Expropriation' in August Reinisch and Christoph Schreuer (eds), *International Protection of Investments: The Substantive Standards* (Cambridge University Press, 2020) 1, 5; Alessandra Asteriti, 'Regulatory Expropriation Claims in International Investment Arbitrations: A Bridge Too Far?' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy 2012–2013* (Oxford University Press, 2014) 451, 456.

[3] For definition of direct expropriation, see, eg, *ACIA* annex 2 [2](a); *ASEAN-ANZ FTA* annex on Expropriation and Compensation [2](a); *ASEAN-Hong Kong IA* annex 2 [2](a); *Vietnam-Korea FTA* annex 9-B [b]; *CPTPP* annex 9-B [2]. See also UNCTAD, *Expropriation: UNCTAD Series on Issues on International Investment Agreements II* (rev ed, 2012) 6–7 ('*Expropriation*').

[4] For definition of indirect expropriation, see, eg, *ACIA* annex 2 [2](b); *ASEAN-ANZ FTA* annex on Expropriation and Compensation [2](b); *ASEAN-Hong Kong IA* annex 2 [2](b); *Vietnam-Korea FTA* annex 9-B [c]; *CPTPP* annex 9-B [3]. See also *Expropriation* (n 3) 6–7.

[5] Ibid 39. See also Dolzer and Schreuer (n 1) 138; Salacuse (n 1) 322–3.

guidance treaty law provides on indirect expropriation, and the line between indirect expropriation and non-expropriatory measures.[6] From this perspective, the chapter focuses on finding potential features of indirect expropriation under Vietnam's IIAs. Based on such factors, the chapter finally deduces possible substantive requirements for non-expropriatory legislative measures.

To find features of indirect expropriation under expropriation provisions in Vietnam's IIAs, the chapter first surveys those provisions to identify their formulations (Part I). It finds that the expropriation provisions occurring in 60 IIAs have two formulations: undefined expropriation provisions in 54 IIAs – A, and defined expropriation provisions in six IIAs – B.

Before analysing these two formulations, the chapter briefly reviews tribunals' interpretation approaches in defining indirect expropriation. These include (i) sole effect, (ii) police power, (iii) proportionality and (iv) multi-factor-based approaches (Part II). The section suggests two practical questions for analysing expropriation provisions in the context of Vietnam's IIAs.

Considering the two above questions and based on the VCLT interpretation rules, the chapter analyses each formulation of expropriation provisions in Vietnam's IIAs to find potential features of indirect expropriation. It finds that under undefined expropriation provisions, legislative measures possibly amount to indirect expropriation when they severely affect foreign investments (i) – a 'necessary and sufficient' factor (Part III). In addition to (i) having such a severe effect – a 'necessary' feature, expropriatory measures under defined expropriation provisions must (ii) reverse states' prior written commitments to foreign investments, or (iii) breach foreign investor's distinct, reasonable investment-backed expectations, and/or (iv) lack measure-objective proportionality – a 'sufficient' factor (Part IV). From these features of indirect expropriation, the chapter deduces different sets of substantive requirements for non-expropriatory legislative measures. In certain cases, legislative measures might not qualify the substantive requirements but can be considered non-expropriation, brought about by treaty exceptions for security and public interests as clarified in Chapters 7 and 8.

[6] Dolzer and Schreuer (n 1) 138; Reinisch and Schreuer (n 2) 47; Salacuse (n 1) 325–6; Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8(5) *The Journal of World Investment & Trade* 717, 720–2 ('Regulatory Takings'). In a more recent times, see Federico Ortino (ed), *The Origin and Evolution of Investment Treaty Standards* (Oxford University Press, 2019) 50.

I A MAP OF PROVISION FORMULATIONS – EXPROPRIATION PROVISIONS IN VIETNAM'S IIAS

A *Section Overview*

Expropriation provisions in Vietnam's IIAs share a common structure featuring two components, with some also including additional components. The first component relates to a general obligation of each contracting party not to expropriate, directly or indirectly, foreign investments unless a measure or series of measures taken by the party meet(s) four conditions (i). The second component expresses these four conditions, indicating that expropriation is allowed if it is for public purposes, taken in a non-discriminatory manner and in accordance with due process, and includes prompt, effective and adequate compensation (ii). Indirect expropriation, if expressed in these components, is undefined.

Under certain IIAs, expropriation provisions also contain an advanced clause or an annex providing a guidance to define indirect expropriation and to distinguish indirect expropriation from regulations/measures for public welfare (iii). Indirect expropriation, when expressed in such clauses or annexes, is defined.

Based on how indirect expropriation is expressed, expropriation provisions in Vietnam's IIAs can be divided into two formulations: undefined expropriation provisions in 54 IIAs – A, and defined expropriation provisions in six IIAs – B. This division will remain the same if the *Vietnam-EU IPA* and *RCEP* come into force, since their expropriation provisions follow B.[7]

Notably, certain IIAs exclude measures related to compulsory licences and limitation, revocation and creation of intellectual property rights, which are consistent with the *WTO TRIPs*, from the application of their expropriation provisions. They include four treaties having Formulation A[8] and all treaties having Formulation B.[9] Land expropriation is also

[7] *Vietnam-EU IPA* art 2.7, annex 4; *RCEP* art 10.13, annex 10B. See also app 4.
[8] *Vietnam-Mozambique BIT* art 4(5); *ASEAN-China IA* art 8(6); *ASEAN-Korea IA* art 12(5).
[9] *ACIA* art 14(5); *ASEAN-ANZ FTA* ch 11 art 9(5); *Vietnam-EAEU FTA* art 8.35; *Vietnam-Korea FTA* art 9.7(6); *CPTPP* art 9.8(5); *ASEAN-Hong Kong IA* art 10(5).

precluded from the scope of expropriation provisions in seven treaties having Formulation A[10] and six treaties having Formulation B.[11]

B *Undefined Expropriation Provisions – Formulation A*

Among expropriation provisions in Vietnam's 60 IIAs, those in 54 share a common feature of not clarifying indirect expropriation. This includes (i) those having general references to, or general expressions of, indirect expropriation and (ii) those not including any term related to indirect expropriation. For the purposes of this thesis, these expropriation provisions are grouped as 'undefined expropriation provisions'.

Expropriation provisions containing general references to indirect expropriation are found in 50 IIAs (Table 4.1). Of these, the provisions in 14 IIAs refer to indirect expropriation but do not provide any factors for identifying indirect expropriation or comparing this type with nationalisation or direct expropriation (Table 4.1). Some only use the word 'indirectly', such as in the phrases 'subject, directly or indirectly, to any measure of expropriation',[12] 'measures depriving, directly or indirectly, nationals or companies of the other Party',[13] 'any measures depriving, directly or indirectly, an investor of the Contracting Party'[14] or 'the arbitrary seizure of properties resulting in the deprivation of investors' interests and investments'.[15] The other provisions simply state 'similar measures',[16] 'measures tantamount to expropriation or nationalisation[17] or 'either directly or through measures equivalent to expropriation or nationalisation'.[18]

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[10] *Vietnam-Kazakhstan BIT* art 6(3); *Vietnam-Greece BIT* art 5(2); *Vietnam-Oman BIT* art 6(2); *Vietnam-Macedonia BIT* art 6(3); *Vietnam-Slovakia BIT* art 6(3); *ASEAN-China IA* art 8(4); *ASEAN-Korea IA* art 12(4);

[11] *ACIA* art 14; *ASEAN-ANZ FTA* ch 11 art 9(6); *ASEAN-Hong Kong IA* art 10(4); *Vietnam-Korea FTA* art 9.7(5); *Vietnam-EAEU FTA* art 8.35(5); *CPTPP* art 9.8, annex 9-C s 2. See also *Vietnam-EU IPA* art 2.7 and n 1; *RCEP* art 10.13(5).

[12] See, eg, *Vietnam-Philippines BIT* art VI(1); *Vietnam-Thailand BIT* art 6(1).

[13] Such phrase is translated from the original version in Vietnamese, namely 'những biện pháp tước quyền sở hữu trực tiếp hay gián tiếp của công dân và công ty của Bên ký kết kia đối với những đầu tư thuộc sở hữu của họ': see *Vietnam-France BIT* art 5(2) [tr author].

[14] See, eg, *Vietnam-Mozambique BIT* art 4(1); *Vietnam-Netherland BIT* art 6; *Vietnam-Sweden BIT* art 4(1).

[15] Such phrase is translated from the original version in Vietnamese, namely 'việc bắt giữ một tài sản nào đó một cách tùy tiện dẫn đến tước đoạt của nhà đầu tư bất kỳ quyền lợi nào hoặc những gì liên quan đến đầu tư của họ'. See, *Vietnam-Taiwan BIT (1993)* art 4 [tr author].

[16] See, eg, *Vietnam-China BIT* art 4(1); *Vietnam-Iran BIT* art 6(1); *ASEAN-China IA* art 8(1); *Vietnam-Cuba BIT* art 5(1).

[17] See, eg, *Vietnam-Japan BIT* art 9(2); *Vietnam-US BTA* ch IV art 10(1). Similarly, see *Vietnam-Thailand BIT* art 1(6) (stating '[t]he term "expropriation" shall also include acts of sovereign power which are tantamount to expropriation […]').

[18] See, eg, *ASEAN-Korea IA* art 12(1).

In addition to general references, the expropriation provisions in 36 other IIAs contain certain factors, namely effect/consequence and/or nature to compare indirect expropriation with nationalisation or direct expropriation. Among these, those in 26 IIAs indicate an/a 'effect' or 'consequence' factor only (Table 4.1), with most of using the phrase 'measure [or direct or indirect measures, or dispossession] having an effect equivalent to nationalisation or expropriation'.[19] Some use other phrases, such as 'any other deprivation or limitation of the property right through sovereign measures which in their consequences are tantamount to expropriation',[20] 'any measures whose consequence is to deprive, directly or indirectly, investors of the other Party or their investments'[21] or 'measures of similar effects'.[22] The other expropriation provisions in 10 IIAs additionally cite the 'nature' factor (Table 4.1) – for example, most use the phrase 'measures having the same nature or the same effect against investments of investors'[23] and some the phrase 'either directly or indirectly, measures having the same nature or the same effect against investment'.[24]

The remaining expropriation provisions in four IIAs do not contain any direct mention of indirect expropriation (Table 4.1). For example, an expropriation provision in the *Vietnam-Venezuela BIT* stipulates that '[i]nvestments made of investors of one Contracting Party in the territory of the other Contracting Party shall not be nationalised, [or] expropriated by the other Contracting Party except for [lawful conditions]'.[25] One might argue such a provision does not cover indirect expropriation since it mentions nationalisation and direct expropriation only. However, it should be noted that the concept of expropriation has been widely accepted as indicating both direct and indirect

[19] See, eg, *Vietnam-Argentina BIT* art 4(1); *Vietnam-Belarus BIT* art 4(1); *Vietnam-Czech BIT* art 5(1); *Vietnam-Egypt BIT* art 5(1); *Vietnam-Denmark BIT* art 5; *Vietnam-Finland BIT* art 5(1); *Vietnam-Germany BIT* art 4(2); *Vietnam-Greece BIT* art 5(1); *Vietnam-Hungary BIT* art 5(1); *Vietnam-Kazakhstan BIT* art 6(1); *Vietnam-Latvia BIT* art 5(1); *Vietnam-Malaysia BIT* art 5; *Vietnam-Mongolia BIT* art 5(1); *Vietnam-Laos BIT* art 5; *Vietnam-Spain BIT* art 5(1); *Vietnam-Estonia BIT* art 5(1); *Vietnam-Russia BIT* art 4; *Vietnam-Italy BIT* art 5(1); *Vietnam-Kuwait BIT* art 5(1); *Vietnam-Lithuania BIT* art 5(1). Similarly, see *Vietnam-Austria BIT* art 4(1) (stating that 'the term "expropriation" also comprises a nationalisation or any other measure having equivalent effect').

[20] See, eg, *Vietnam-Bulgaria BIT* art 5(1).

[21] This phrase is translated from the original version in Vietnamese, namely 'bất kể một biện pháp nào mà hậu quả của nó là truất quyền sở hữu trực tiếp hoặc gián tiếp của những người đầu tư của Bên ký kết kia và những đầu tư của họ trên lãnh thổ của mình'. See, *Vietnam-BLEU BIT* art 4(1).

[22] *Vietnam-Turkey BIT* art 5(1). See also *Vietnam-Ukraine BIT* art 4(1).

[23] See, eg, *Vietnam-Armenia BIT* art 6(1); *Vietnam-Iceland BIT* art 5(1); *Vietnam-Oman BIT* art 6(1); *Vietnam-Poland BIT* art 5(1); *Vietnam-Singapore BIT* art 6(1); *Vietnam-Cambodia BIT (amended 2012)* art 4; *Vietnam-Uzbekistan BIT* art 6(1); *Vietnam-UK BIT* art 5(1).

[24] See, eg, *Vietnam-Romania BIT* art 5(1); *Vietnam-Switzerland BIT* art 5(1).

[25] See, eg, *Vietnam-Venezuela BIT* art 5(1); *Vietnam-Slovakia BIT* art 6(1); *Vietnam-Uruguay BIT* art 6(1).

expropriation.[26] Therefore, the expropriation provisions in these IIAs are appropriately classified into this group.

Table 4.1: Features of Undefined Expropriation Provisions in Vietnam's IIAs

Undefined Expropriation Provisions		Treaty Contexts (54)	Treaty Contexts* (34)
References to/expressions of indirect expropriation	**Explicit Features of Indirect Expropriation**		
General references/expressions	No Indication	14[27]	11[28]
	Effect/Consequence Indications	26[29]	12[30]
	Effect and Nature Indications	10[31]	8[32]
No explicit references/expressions	No	4[33]	3[34]
Note: Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* comes into force.			

[26] *Expropriation* (n 3) 8.

[27] Eleven IIAs with non-EU members: see *Vietnam-Philippines BIT* art VI; *Vietnam-Thailand BIT* art 6; *Vietnam-Mozambique BIT* art 4; *Vietnam-Taiwan BIT (1993)* art 4; *Vietnam-China BIT* art 4; *Vietnam-Iran BIT* art 6; *Vietnam-Japan BIT* art 9(2); *Vietnam-Cuba BIT* art 5; *Vietnam-US BTA* ch IV art 10; *ASEAN-China IA* art 8; *ASEAN-Korea IA* art 12. For three BITs EU members, see *Vietnam-France BIT* art 5(2); *Vietnam-Netherland BIT* art 6; *Vietnam-Sweden BIT* art 4(1).

[28] Eleven IIAs with non-EU members: see above n 27.

[29] Twelve BITs with non-EU members: see *Vietnam-Argentina BIT* art 4; *Vietnam-Belarus BIT* art 4; *Vietnam-Egypt BIT* art 5; *Vietnam-Kazakhstan BIT* art 6; *Vietnam-Korea BIT (2003)* art 5(1); *Vietnam-Malaysia BIT* art 5; *Vietnam-Mongolia BIT* art 5; *Vietnam-Laos BIT* art 5; *Vietnam-Russia BIT* art 4; *Vietnam-Kuwait BIT* art 5; *Vietnam-Turkey BIT* art 5(1), *Vietnam-Ukraine BIT* art 4(1). For 14 BITs with EU members, see *Vietnam-Austria BIT* art 4; *Vietnam-BLEU BIT* art 4; *Vietnam-Bulgaria BIT* art 5; *Vietnam-Czech BIT* art 5; *Vietnam-Denmark BIT* art 5; *Vietnam-Estonia BIT* art 5; *Vietnam-Finland BIT* art 4; *Vietnam-Germany BIT* art 4(2); *Vietnam-Greece BIT* art 3(2); *Vietnam-Hungary BIT* art 5; *Vietnam-Italy BIT* art 5; *Vietnam-Latvia BIT* art 5; *Vietnam-Lithuania BIT* art 5; *Vietnam-Spain BIT* art 5.

[30] Twelve BITs with non-EU members: see above n 29.

[31] Eight BITs with non-EU members: see *Vietnam-Armenia BIT* art 6; *Vietnam-Cambodia BIT (amended 2012)* art 4; *Vietnam-Iceland BIT* art 5; *Vietnam-Oman BIT* art 6; *Vietnam-Singapore BIT* art 6; *Vietnam-Switzerland BIT* art 5; *Vietnam-UK BIT* art 5; *Vietnam-Uzbekistan BIT* art 6. For two BITs with EU members, see *Vietnam-Poland BIT* art 5; *Vietnam-Romania BIT* art 5.

[32] Eight BITs with non-EU members: see above n 31.

[33] Three BITs with non-EU members: see *Vietnam-Uruguay BIT* art 6; *Vietnam-Venezuela BIT* art 5; *Vietnam-Macedonia BIT* art 6. For one BIT with an EU member, *Vietnam-Slovakia BIT* art 6.

[34] Three BITs with non-EU members: see above n 33.

C *Defined Expropriation Provisions – Formulation B*

Unlike expropriation provisions in the 54 IIAs in the first group, the expropriation provisions and, if any, relevant annexes in six IIAs – the *ACIA*, *ASEAN-ANZ FTA*, *ASEAN-Hong Kong IA*, *Vietnam-Korea FTA*, *CPTPP* and *Vietnam-EAEU FTA* – all clarify the concept of indirect expropriation (Table 4.2). In doing so they address three aspects: (i) a definition of indirect expropriation in addition to that of direct expropriation, (ii) guidance on how to determine an indirect expropriation, and (iii) a clause aiming to exclude regulatory measures for public welfare objectives from indirect expropriation, which could be termed a clause on public welfare measures.[35] Notably, the *Vietnam-EAEU FTA* only includes the second aspect.[36] For the purposes of this study, this group is classified as 'defined expropriation provisions'.

The expropriation provisions in the *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-Hong Kong IA*, are similar in design and language regarding all three aspects. The expropriation provisions in the *Vietnam-Korea FTA* and the *CPTPP* also include the three aspects, but differ in some details. As to the first aspect, all of them similarly provide a definition of indirect expropriation through covering a situation in which 'an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure'.[37] In addressing the second aspect, the former introduces three example factors to define indirect expropriation (the second aspect) as (i) the economic impact of the government action (ii) the government action breaches the government's prior binding written commitment to the investor and (iii) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose.[38] The latter instead provides the second factor as 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations' and leaves 'the character of the government action' undefined. [39] And, last, the former provides a clause on public welfare measures (the last aspect) as '[n]on-discriminatory regulatory actions by a Party that are designed and applied to achieve

[35] *ACIA* art 14, annex 2; *ASEAN-ANZ FTA* ch 11 art 9.1, annex on Expropriation and Compensation; *ASEAN-Hong Kong IA* art 10, annex 2; *Vietnam-Korea FTA* ch 9 art 9.7, annex 9-B; *CPTPP* ch 9 art 9.8, annex 9-B; *Vietnam-EAEU FTA* ch 8 art 8.35. See also app 4.
[36] *Vietnam-EAEU FTA* ch 8 art 8.35. See also app 4.
[37] *ACIA* annex 2 [2](b). See also *ASEAN-ANZ FTA* annex on Expropriation and Compensation [2](b); *ASEAN-Hong Kong IA* annex 2 [2](b); *Vietnam-Korea FTA* annex 9-B [c]; *CPTPP* annex 9-B [3].
[38] *ACIA* annex 2 [3]; *ASEAN-ANZ FTA* annex on Expropriation and Compensation [3]; *ASEAN-Hong Kong IA* annex 2 [3]. See also app 4.
[39] *Vietnam-Korea FTA* annex 9-B [(c)(i)]; *CPTPP* annex 9-B [3]. See also app 4.

legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation',[40] whereas the latter inserts the phrase 'except in rare circumstances' into the clause.[41] These features are analysed in Parts III and IV below.

As compared to five IIAs above, the expropriation provision in the *Vietnam-EAEU FTA* focuses only on the second aspect of indirect expropriation rather than the first and third aspects mentioned above.[42] Within the second aspect, it does not refer to the reversal of the state's prior written commitments or breach of the investor's reasonable expectation to define indirect expropriation.

Table 4.2: Features of Defined Expropriation Provisions in Vietnam's IIAs

Defined Expropriation Provisions		**Treaty Contexts (6)**	**Treaty Contexts* (8)**
Features of Indirect Expropriation	**Clauses on Public Welfare Measures**		
Three explicit features	without 'except in rare circumstances' phrase	3[43]	5[44]
	with 'except in rare circumstances' phrase	2[45]	2
Two explicit features	No	1[46]	1
Note: Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.			

[40] *ACIA* annex 2 [4]; *ASEAN-ANZ FTA* annex on Expropriation and Compensation s 4; *ASEAN-Hong Kong IA* annex 2 [4]. See also app 4.
[41] *Vietnam-Korea FTA* annex 9-B [(c)(ii)]; *CPTPP* annex 9-B, s 4. See also app 4.
[42] *Vietnam-EAEU FTA* ch 8 art 8.35(2). See also app 4.
[43] Three IIAs with non-EU members: *ACIA*; *ASEAN-ANZ FTA*; *ASEAN-Hong Kong IA*.
[44] Three IIAs with non-EU members: see above n 42. They also include the *Vietnam-EU IPA* and the *RCEP*. See also app 4.
[45] Two IIAs with non-EU members: *Vietnam-Korea FTA*; *CPTPP*.
[46] One IIA with a non-EU member: *Vietnam-EAEU FTA*.

II A FOCUSED REVIEW OF TRIBUNALS' INTERPRETATION APPROACHES –EXPROPRIATION PROVISIONS IN INTERNATIONAL ARBITRATION PRACTICE

A *Section Overview*

Among the expropriation provisions in Vietnam's IIAs, only the *undefined* expropriation provision (Formulation A) in the *Vietnam-France BIT* has been interpreted by a tribunal, specifically in *Dialasie v Vietnam*.[47] As this judgment is not publicly available, this section focuses on tribunals' interpretation approaches to expropriation provisions under other countries' IIAs that are similar to Formulation A/B in Vietnam's IIAs. It should be noted that expropriation provisions in treaty law have been interpreted in at least 219 cases over 405 indirect expropriation claims, not accounting for unknown or unclassified cases.[48]

In defining indirect expropriation, tribunals have adopted four different approaches: (i) sole effect, (ii) police power, (iii) proportionality, and (iv) multi-factor-based. Of these, the first three have been adopted by tribunals in interpreting *undefined* expropriation provisions and have been well-reviewed in the literature.[49] However, the last approach has been employed by tribunals when addressing *defined* expropriation provisions, which is synthesised by this study.

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[47] *Dialasie SAS v Socialist Republic of Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 17 November 2014) ('*Dialasie v Vietnam*'). It should be noted that the government of Vietnam has been challenged in *Trinh Vinh Binh and Binh Chau Joint Stock Company v Socialist Republic of Vietnam (I) (Award)* (UNCITRAL Arbitral Tribunal, 14 March 2007) ('*Trinh and Binh Chau v Vietnam (I)*') and *Michael McKenzie v Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 11 December 2013) ('*McKenzie v Vietnam*'). However, the first case was settled and the second case was declined at the jurisdiction stage, so no interpretation of expropriation provisions in these cases was taken place.

[48] Of 405 claims, 219 claims have been resolved at the merit stage with 60 claims in favour of foreign investors, and among the resolved claims those arising from defined expropriation provisions account for a very small number. These figures are collected from data published by UNCTAD Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement?id=229>.

[49] Kriebaum, 'Regulatory Takings' (n 6) 724–9 ('the "sole effect" doctrine,' 'the radical police power doctrine' and 'the moderate police power doctrine'); Omar Chehade, 'The Evolution of the Law of Indirect Expropriation and its Application to Oil and Gas Investments' (2016) 9 *Journal of World Energy Law and Business* 64, 65–72 ('the sole effects doctrine', 'the police power or purpose doctrine' and 'proportionality'); Jaunius Gumbis and Rapolas Kasparavicius, 'State's Right to Regulate: What Constitutes a Compensable Expropriation in Investor-State Arbitration' (2017) 5 *Yearbook on International Arbitration* 153, 158–60 ('sole effect doctrine' and 'proportionality doctrine'); Pascale Accaoui Lorfing and Maria Beatriz Burghetto, 'The Evolution and Current Status of the Concept of Indirect Expropriation in Investment Treaties and Arbitration' (2018) 6(2) *Indian Journal of Arbitration Law* 98, 111–22 ('the sole effect doctrine', 'the police power doctrine' and 'the proportionality test').

Following the *sole effect* approach, tribunals identified an expropriation based on the severe effect of measures without considering, or without paying due attention, to other factors such as expropriation intention or measures' objectives (the severe effect as a 'necessary and sufficient' factor). This approach was adopted when tribunals primarily relied on the treaty texts – undefined expropriation provisions – that only express the 'effect' factor in relevant cases.

Under the *police power* approach, tribunals acknowledged that non-discriminatory measures having adverse effects on foreign investors/investments would not trigger compensation if those measures were functioning police power duties. This approach was adopted when tribunals considered the police power doctrine as CIL. A result of applying the police power approach is that state measures having severe effects (a 'necessary' factor) amount to indirect expropriation when lacking public objectives/purposes (a 'sufficient' factor).

Following the *proportionality* approach, state measures having severe effects (a 'necessary' factor) amount to indirect expropriation when lacking proportionality between the measures and their public objectives (a 'sufficient' factor). Proportionality is originally adopted as a standard of review to balance the sole effect approach and police power approach rather than based on the treaty texts on expropriation or CIL.

The *multi-factor-based* approach relies on many factors rather than just the adverse effect of state measures (a'necessary' factor), such as the absence of public purposes, the lack of measures-objectives disproportionality and/or the breach of an investor's reasonable expectation (a 'sufficient' factor). This approach differs from the proportionality approach in that it is not necessary to find a lack of measures–objectives proportionality for a finding of indirect expropriation. It was adopted when tribunals applied the guidance of defined expropriation provisions to define indirect expropriation.

B *Sole Effect Approach*

In the early disputes over expropriation claims, certain tribunals relied on the effect of state measures to find indirect expropriation (a 'necessary and sufficient' factor) and rejected the relevance of other factors such as expropriation intention or public objectives. The Iran-United States Claims Tribunal is identified as the first to adopt this practice, such as in Tippets, Phelps Dodge, and Starrett Housing.[50] The approach has subsequently been adopted by many tribunals, including those analysed below, in the context of indirect expropriation. The Committee in *Patrick Mitchell v Congo (Annulment)*[51] had generalised that '[the reference only to the effect of the measure] appears to be a practice of arbitrators – at present a majority of them – in international investment disputes when they are assessing the tantamount character'.[52] This practice has formed the 'sole effect' approach or 'sole effect' doctrine,[53] which is considered an 'orthodox' approach in the words of Newcombe.[54] It should be noted that the sole effect approach was primarily based on the text of expropriation provisions that only expressed the 'effect' factor to compare indirect expropriation with direct one and nationalisation, and considered public purposes as a condition of lawful expropriation, either direct or indirect, rather than a condition excluding police power measures from lawful expropriation.

Awards frequently cited by the claimants as illustrating this approach include *Metaclad v Mexico*[55] and *Patrick Mitchell v Congo (Annulment)*. *Siemens v Argentina*,[56] *Vivendi v*

[50] See generally Maurizio Brunetti, 'The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation' (2001) 2(1) *Chicago Journal of International Law* 203, 206–10; Hassan Sedigh, 'What Level of Host State Interference Amounts to a Taking under Contemporary International Law?' (2001) 2001(4) *The Journal of World Investment & Trade* 631, 647–53; Veijo Heiskanen, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation' (2003) 5(3) *International Law Forum* 176; Veijo Heiskanen, 'The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal' (2007) 8(2) *Journal of World Investment & Trade* 215; Romesh Weeramantry, 'The Law of Indirect Expropriation and The Iran-United States Claims Tribunal's Role in its Development' in Leon E Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 314; Sebastián López Escarcena (ed), *Indirect Expropriation in International Law* (Edward Elgar Publishing, 2014) 96–9.

[51] *Patrick Mitchell v Democratic Republic of the Congo (Decision on the Application for Annulment)* (ICSID Annulment Committee, Case No ARB/99/7, 1 November 2006) ('*Patrick Mitchell v Congo (Annulment)*').

[52] Ibid [53] (citations omitted).

[53] Kriebaum, 'Regulatory Takings' (n 6) 724; Rudolf Dolzer, 'Indirect Expropriation: New Developments?' (2003) 11(1) *New York University Environmental Law Journal* 64, 79; Rudolf Dolzer and Felix Bloch, 'Indirect Expropriation: Conceptual Realignments?' (2003) 5(3) *International Law Forum* 155, 163; Gumbis and Kasparavicius (n 49) 158. For more information on the sole effect approach, see Anne K Hoffmann, 'Indirect Expropriation' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 151, 156–9.

[54] Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20(1) *ICSID Review* 1, 9.

[55] *Metalclad Corporation v The United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No

Argentina (I) (Resubmission)[57] and *AWG v Argentina*[58] also contributed to this line of thought. In *Metaclad v Mexico*, the tribunal doubted the motivation of Mexico's authority when adopting an Ecological Decree to build an ecological preserve. As the tribunal observed, the decree was enforced after Mexico's authority refused to grant the claimant a licence to construct and operate a waste landfill, and the claimant brought the dispute to administrative authorities and court. However, the tribunal did not rely on this reason but, rather, wholly rejected the relevance of motivation and only considered the effect of the decree in establishing indirect expropriation.[59]

In *Siemens v Argentina* and *Vivendi v Argentina (I) (Resubmission),* the tribunals rejected the role of measures' purposes in finding indirect expropriation on the ground that relevant expropriation provisions considered public purposes as a condition of lawful expropriation, either direct or indirect, rather than a condition for excluding expropriation. For example, the *Siemens v Argentina* tribunal held that the purpose of the expropriation was 'one of the requirements for determining whether the expropriation is in accordance with the terms of the Treaty and not for determining whether an expropriation has occurred'.[60] If public purpose 'automatically immunise[d] the measure from being found to be expropriatory', in a view of the tribunal in *Vivendi v Argentina (I) (Resubmission)*, 'there would never be a compensable taking for a public purpose'.[61]

The tribunal in *AWG v Argentina* followed the sole effect approach to define indirect expropriation through plainly reading an expropriation provision in question; and, the committee in *Patrick Mitchell v Congo (Annulment)*, strengthened the approach by resorting to treaty objective/purpose. The *AWG v Argentina* tribunal perceived that '[dispossession] inquiry is directed particularly at the "effects" of the measure on an investment' rather than 'at the intent of the government enacting the measure'.[62] In its view, the expression of 'effect' in an expropriation provision 'affirm[ed] the importance

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ARB(AF)/97/1, 30 August 2000) ('*Metalclad v Mexico*').
[56] *Siemens AG v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) ('*Siemens v Argentina*').
[57] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux) v Argentine Republic* (*Award II)* (ICSID Arbitral Tribunal, Case No ARB/97/3, 2007) ('*Vivendi v Argentina (I) (Resubmission)*').
[58] *AWG Group Ltd v The Argentine Republic (Decision on Liability)* (UNCITRAL Arbitral Tribunal, 30 July 2010) ('*AWG v Argentina'*).
[59] *Metalclad v Mexico* (n 55) [111].
[60] *Siemens v Argentina* (n 56) [270].
[61] *Vivendi v Argentina (I) (Resubmission)* (n 57) [7.5.21].
[62] *AWG v Argentina* (n 58) [133].

of evaluating the effects' in finding indirect expropriation.[63] Before *AWG v Argentina*, the *Patrick Mitchell v Congo* tribunal also took a focus 'solely on the impact that the measure had on "investment"' when interpreting measures tantamount to direct expropriation,[64] which gained the support from the annulment committee. According to the committee, such a focus was 'consistent with the spirit of investment treaties, namely the protection of investors'.[65]

C *Police Power Approach*

In addition to the sole effect approach, the police power approach has been invoked in the analysis of indirect expropriation. It applies police power doctrine with the aim of distinguishing between non-compensable regulatory measures and indirect expropriation (compensable ones). The doctrine holds that a state is not liable for compensation when exercising its police power,[66] and thus suggests state measures having severe effects (a 'necessary' factor) only amount to indirect expropriation when they were not taken for public objectives/purposes (a 'sufficient' factor). Before its adoption by investment tribunals, the doctrine had been recognised in the 1952 *Protocol No 1 to the European Convention on Human Rights*, the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, the 1967 OECD Draft Convention on the Protection of Foreign Property with Notes and Comments, and the American Law Institute's Third Restatement of the Foreign Relations Law of the United States of 1987.[67]

The police power doctrine has been widely recognised by investment tribunals. According to their recognitions, state measures which fall 'within the accepted police

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[63] Ibid.
[64] *Patrick Mitchell v Congo (Annulment)* (n 51) [53].
[65] Ibid.
[66] *Black's Law Dictionary* (Thomson Reuters, 11th ed, 2019) 'police power'. Accordingly, 'police power' refers to '[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice; [i]t is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government'. See also Lone Wandahl Mouyal (ed), *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Taylor & Francis Group, 2016) 177; Dolzer and Schreuer (n 1) 120–3.
[67] *Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954) art 1 ('*Protocol No 1 to the European Convention on Human Rights*'); Harvard Law School, Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) 55(3) *American Journal of International Law* 548, 554 art 10(5); OECD, Draft Convention on the Protection of Foreign Property: Text with Notes and Comments (1967) art 3 note 1; American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (1987) s 712 cmt g. See also OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law (Working Paper, No 2004/04, September 2004) 7–9 ('Right to Regulate'); Ana Maria Daza-Clark (ed), *International Investment Law and Water Resources Management: An Appraisal of Indirect Expropriation* (Brill, 2016) 102–5.

powers' or 'within the framework of its police power' would not be liable for compensation. For example, the tribunal in *Lauder v Czech*[68] held that 'Parties to [the Bilateral Investment] Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State'.[69] The tribunal in *Feldman v Mexico*[70] reaffirmed the doctrine, articulating that 'governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like'.[71] Similarly, the tribunal in *Tecmed v Mexico*[72] recognised that '[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is indisputable'.[73] The tribunal in *Saluka v Czech*[74] also stated that '[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed to the general welfare'.[75]

Certain tribunals adopted the police power doctrine within limits. According to them, police power measures would not amount to indirect expropriation if certain features – such as the breach of specific commitments or the disproportionality of state measures – were absent. For example, the tribunal in *Methanex v US*[76] only accepted non-compensation for police power measures when no specific commitment was found as a breach.[77] The tribunal in *Philip Morris v Uruguay*[78] provided certain conditions for police

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[68] *Ronald S Lauder v Czech Republic (Award)* (UNCITRAL Arbitral Tribunal, 3 September 2001) ('*Lauder v Czech*').
[69] Ibid [198].
[70] *Marvin Roy Feldman Karpa v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1, 16 December 2002) ('*Feldman v Mexico*').
[71] Ibid [103].
[72] *Técnicas Medioambientales Tecmed v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) ('*Tecmed v Mexico*').
[73] Ibid [119].
[74] *Saluka Investments BV v The Czech Republic (Partial Award)* (UNCITRAL Arbitral Tribunal, 17 March 2006) ('*Saluka v Czech*').
[75] Ibid [255] (emphasis in original).
[76] *Methanex Corporation v United States of America (Final Award)* (UNCITRAL Arbitral Tribunal, 3 August 2005) ('*Methanex v US*').
[77] Ibid pt IV ch D [7]. The tribunal stated that

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

power measures to count as non-expropriation, including the proportionality of state measures.[79] Additionally, the tribunal in *Suez v Argentina*,[80] while recognising the police doctrine, considered the reasonableness of state measures.[81]

It should be noted that the reason the above tribunals recognised and/or adopted the police power doctrine in the analysis of indirect expropriation is that the doctrine was arguably considered a part of CIL. The *Feldman v Mexico* tribunal found safe to say 'customary international law recognizes' that '[r]easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation'.[82] The *Saluka v Czech* tribunal also affirmed that the principle that 'a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States"' formulated 'part of customary international law today'.[83]

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[78] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) ('*Philip Morris v Uruguay*').

[79] Ibid [305]. The tribunal articulated that

> in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate.

See also Yannick Radi, '*Philip Morris v Uruguay* Regulatory Measures in International Investment Law: To Be or Not To Be Compensated?' (2018) 33(1) *ICSID Review* 74; Elizabeth Sheargold and Andrew D Mitchell, 'Public Health in International Investment Law and Arbitration' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020) 1, 7–8.

[80] *Suez, Sociedad General de Aguas de Barcelona, SA and Interagua Servicios Integrales de Agua, SA v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) ('*Suez v Argentina*').

[81] *Ibid* [147]. The tribunal stated:

> States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers … has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor's property rights with the legitimate and reasonable need for the State to regulate.

[82] *Feldman v Mexico* (n 70) [103].

[83] *Saluka v Czech* (n 74) [262].

D *Proportionality Approach*

The third approach adopted by tribunals to find indirect expropriation is the proportionality. According to this, a state measure equivalent to nationalisation or expropriation (a 'necessary' factor) would amount to indirect expropriation if disproportionate to public objectives (a 'sufficient' factor). Unlike the sole effect approach, which is based on the text of the expropriation provision, and the police power approach, which is arguably drawn from CIL, the proportionality is not based on treaty law or international law. It is, or functions as, a standard of review adopted by tribunals in an attempt to balance the sole effect doctrine and police power doctrine.[84] That may be why investment tribunals have not been consistent in applying the proportionality approach, as discussed later.

The proportionality approach has been used in other contexts by the European Court of Justice (ECJ) and European Court of Human Rights (ECtHR) with three steps.[85] The first step of analysis is 'suitability' to evaluate whether a measure is reasonably related to the aim pursued (appropriateness), which is considered the least intensive review. The second step is 'necessity' – defining whether there are less restrictive alternatives to achieve the same objectives (the least restriction). The final step, which is conducted when a measure was found suitable and necessary,[86] is a '*stricto sensu* proportionality'. This step of the analysis is considered the most intensive review of whether the adverse effects on private interests are less than or equivalent to the public benefits achieved by a state measure (non-excessiveness or cost-benefit balance). The proportionality approach has been adopted by the WTO's Panel and Appellate Body with a focus on the first two steps when

[84] For discussion on proportionality approach, see August Reinisch, 'Expropriation' in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 407, 449–50; Asteriti (n 2) 466–8.

[85] Jan H Jans, 'Proportionality Revisited' (2000) 27(3) *Legal Issues of Economic Integration* 239, 240–41; John Morijn and Jasper Krommendijk, '"Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 1st ed, 2009) 422, 438; Alec Stone Sweet and Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 46(3) *New York University Journal of International Law and Politics* 911, 917–8; Robert Bradshaw, 'Legal Stability and Legitimate Expectations: Does International Investment Law Need a Sense of Proportion? (2020) 5(1) *European Investment Law and Arbitration Review Online* 240, 245–7.

[86] Peter Van den Bosche, 'Looking for Proportionality in WTO Law' (2008) 35(3) *Legal Issues of Economic Integration* 283, 285.

examining the 'necessary' link requirement between state measures and their objectives in security exceptions and general exceptions of the 1994 GATT and the GATS.[87]

The proportionality approach was first introduced in international investment arbitration practice in *Tecmed v Mexico*.[88] However, the tribunal skipped the first two steps and went directly to the third step of analysis – '*stricto sensu* proportionality'.[89] Specifically, the tribunal assessed whether there was 'a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure',[90] and whether there was a 'deprivation of economic rights and the legitimate expectations of [those] who suffered such deprivation'.[91] It found that Mexico's refusal to review a licence for the claimant's subsidiary to operate a waste landfill in 1998 led to the permanent closure of the landfill, the total loss of economic and commercial interests, and the breach of the claimant's legitimate expectations. Such severe effects on the claimant's investment, the tribunal concluded, surpassed (ie were disproportionate to) Mexico's objective of protecting the environment from the adverse effects caused by the subsidiary's environmental violations while running the waste landfill.

After *Tecmed v Mexico*, the *Occidential v Ecuador (II)*[92] tribunal also applied the proportionality approach but focused on the two last steps – 'necessity' and '*stricto sensu* proportionality'. In this case, Ecuador's Ministry of Energy and Mines adopted the *Caducidad* Decree on 15 May 2006 to terminate the Participation Contract signed in May 1999 between one of the claimants, Occidental Exploration and Production Company (OEPC), and a state-owned company, PetroEcuador, for the exploration and exploitation of hydrocarbon in Block 15 within the Amazon area. The adoption of the Decree arose

[87] WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* (2020) [574]–[578].
[88] See Newcombe (n 54) 18. This article states that '[t]he Tecmed award is *unique* in international expropriation law because it explicitly draws on the concept of proportionality under the European Court of Human Right's (ECHR) jurisprudence on *Protocol No 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms*'. See also Suzy H Nikièma, 'Best Practices: Indirect Expropriation' [2012] (March) *The International Institute for Sustainable Development* (IISD) 16. This article states that '[s]ince the award in *Tecmed v Mexico*, the relevance of the criterion of proportionality has been recognized as applicable to expropriation litigation in other treaty-based investor-State disputes'.
[89] This point is similarly viewed by existing scholars: see, eg, Erlend M Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3(1) *Journal of International Dispute Settlement* 95, 124.
[90] *Tecmed v Mexico* (n 72) [122].
[91] Ibid.
[92] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (II) (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/11, 5 October 2012) ('*Occidental v Ecuador (II)*').

from the fact that the claimant signed the Farmout Agreement in October 2000 assigning 40% of its economic interests in Block 15 (legal title) to another company, AEC, without seeking prior approval from the government of Ecuador. Even though the Decree was not for public purposes, it is worth mentioning as the tribunal selectively applied the proportionality approach's two last steps: (i) 'whether the Minister in fact had available to him some meaningful alternative short of declaring *caducidad*' (necessity);[93] and/or (ii) 'whether in any event the sanction of *caducidad* was in this instance a proportionate response to the violation of Article 74 of the HCL [Hydrocarbons Law] committed by OEPC' (*stricto sensu* proportionality).[94] The tribunal found the Decree was disproportionate and amounted to indirect expropriation.

The proportionality analysis was fully adopted in *PL Holdings v Poland*[95] to distinguish between regulatory measures and indirect expropriation. In this case, the Polish authority (KNF) levied certain measures to limit the rights of the claimant after the claimant acquired 99.59% shares of the FM PBP Bank, which was created by the merger of the claimant's previous bank, PBP Bank, and another bank, FM Bank. One of the purposes of these measures, as stated by Poland, was to protect the banking system, which might be affected by FM PBP Bank's capitalisation and liquidity. As suggested by the claimant, the tribunal undertook a full three-prolonged proportionality analysis to examine Poland's measures. It required that the measures must be 'suitable by nature for achieving a legitimate public purpose' (suitability),[96] 'be necessary for achieving that purpose in that no less burdensome measure would suffice' (necessity),[97] and not be excessive in that [their] advantages are outweighed by [their] disadvantages' (*stricto sensu* proportionality).[98] As a result, the tribunal found a disproportionality between Poland's measures and its claimed purposes.

It should be noted that the proportionality approach has been recognised in many cases dealing with indirect expropriation claims, such as *Azurix v Argentina (I)*, *LG&E v Argentina*, *ADM v Mexico*, *Total v Argentina*, *El Paso v Argentina* and *Continental v*

[93] Ibid [426] (emphasis in original).
[94] Ibid. The tribunal also emphasised that '[i]ssue (ii) arises even if the answer to (i) is in the negative': at [427].
[95] *PL Holdings Sàrl v Poland (Partial Award)* (SCC Arbitral Tribunal, Case No 2014/163, 28 June 2017) ('*PL Holdings v Poland*').
[96] Ibid [355]. For full analysis of suitability, see [356]–[373].
[97] Ibid [355]. For full analysis of necessity, see [374]–[383].
[98] Ibid [355]. For full analysis of excessiveness (*stricto sensu* proportionality), see [384]–[389].

Argentina.[99] However, those tribunals did not get a chance to apply the analysis because they found the effect of state measures not equivalent to direct expropriation, or the treaty exception was successfully invoked, as in the last case. In *Azurix v Argentina (I)*, the tribunal found useful guidance from the ECtHR in *James and others v UK* when using the proportionality analysis.[100] The guidance as described by the tribunal was that (i) a measure affecting private interests could be allowed if for public benefits but when a private party had an excessive burden, such measure would hardly be proportionate, and (ii) it is reasonable for host state's citizens to bear a 'greater burden' than a foreign investor because the latter did not have a role in electing or appointing authoritative persons or providing comments on the draft of host state's regulations.[101] The tribunal nevertheless could not apply the guidance to the case, since Argentina's refusal to review the tariff adjustment [as a result of the adoption of Emergency Law] did not cause a substantial effect on the claimant's investment.[102] The claimant still had its ownership of 90% of shares and its control in ABA (Azurix's Argentine subsidiary).[103]

E *Multi-factor-based Approach*

Unlike the sole effect approach (which relies primarily on the severe effect of state measures), the police power approach (which proposes the absence of public purposes as a 'sufficient' factor), and the proportionality approach (which suggests the lack of measures-objectives suitability/necessity or the lack of cost-benefit balance as a 'sufficient' factor, in addition to the severe effect as a 'necessary' factor), the multi-factor-based approach can rely on other factors to find indirect expropriation, such as the breach of foreign investors' reasonable expectations, discrimination, arbitrariness or bad faith. This approach is indeed drawn from treaty texts that define indirect expropriation.

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[99] *Azurix Corp v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 14 July 2006) [311] ('*Azurix v Argentina (I)*'); *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability)* (ICSID Case No ARB/02/1, 3 October 2006) [195] ('*LG&E v Argentina*'); *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/5, 21 November 2007) [250] ('*ADM v Mexico*'); *Total SA v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 27 December 2010) [197] ('*Total v Argentina*'); *El Paso Energy International Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [241] ('*El Paso v Argentina*'); *Continental Casualty Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [276] ('*Continental v Argentina*').

[100] *Azurix v Argentina (I)* (n 99) [311]–[312]. See also *James and Others v the United Kingdom* (European Court of Human Rights, 8793/79, 21 February 1986) [142].

[101] *Azurix v Argentina (I)* (n 99) [311].

[102] Ibid [322].

[103] Ibid.

Of three cases dealing with defined expropriation provisions, only *Bear Creek Mining v Peru* undertook such an examination.[104] It found indirect expropriation based on adverse effects, the breach of the claimant's reasonable expectations, and the lack of a public purpose.[105] The lack of public purpose is normally considered an unlawful expropriation feature but in defined expropriation provisions – and in this case – it is a factor used to determine whether indirect expropriation has occurred.[106]

Some might note that in interpreting undefined expropriation provisions, certain tribunals have examined the breach of foreign investors' reasonable expectations.[107] However, it should be noted that none of the above approaches address this as a factor, at least from their titles, or allow it a role in finding indirect expropriation. One might argue that the proportionality approach could consider such expectations in assessing whether foreign investor damages caused by challenged state measures exceed public benefits achieved by such measures, but no theoretical ground has been found.

F *Section Remark: Suggesting Two Practical Questions for an Analysis of Expropriation Provisions in Vietnam's IIAs*

The above review shows that to find indirect expropriation under *undefined* expropriation provisions resembling Formulation A in Vietnam's IIAs, tribunals in practice have relied solely on the severe effect of state measures on foreign investments or additionally on the absence of public objectives/purposes and/or the lack of measure-objective proportionality. These factors are drawn from respectively a close interpretation of treaty provisions on expropriation (*sole effect* approach), the flexible application of police power doctrine (*police power* approach) or the adoption of proportionality analysis as a standard of review (*proportionality* approach). This observation suggests one question for the following analysis in the context of Vietnam's IIAs, particularly whether *undefined* expropriation provisions in Vietnam's 54 IIAs could be interpreted as invoking any

[104] For the three cases, see *Railroad Development Corporation (RDC) v Republic of Guatemala (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/23, 29 June 2012) ('*RDV v Guatemala*'); *Adel A Hamadi Al Tamimi v Sultanate of Oman (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/33, 3 November 2015) ('*Al Tamimi v Oman*'); *Bear Creek Mining Corporation v Republic of Peru (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/21, 30 November 2017) ('*Bear Creek Mining v Peru*').
[105] *Bear Creek Mining v Peru* (n 104) [375]–[377], [415].
[106] Ibid [377], [388], [399], [414]–[415].
[107] *Feldman v Mexico* (n 70) [112]; *Tecmed v Mexico* (n 72) [150]. See also Reinisch (n 84) 448–9; 'Right to Regulate' (n 67) 19–20; Andrew Newcombe and Lluís Paradell, 'Expropriation' in Andrew Newcombe and Lluís Paradell (eds), *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 321, 348–50; Bjørn Kunoy, 'Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration' (2005) 6(3) *The Journal of World Investment & Trade* 467, 478–82.

'sufficient' factor, such as the absence of public objectives/purposes and the lack of proportionality, to define indirect expropriation in addition to severe effects being a 'necessary' factor (i).

The review also indicates that under a *defined* expropriation provision similar to Formulation B in Vietnam's IIAs, indirect expropriation has been based on a 'necessary' factor and several factors as a 'sufficient' one, including but not limited to, those mentioned above (*multi-factor-based* approach). This practice proposes a question of whether *defined* expropriation provisions in Vietnam's six IIAs could be interpreted as invoking one or many many factors as a 'sufficient' one, in addition to severe effects as a 'necessary' factor, to establish indirect expropriation (ii).

III AN ANALYSIS OF FORMULATION A: POTENTIAL FACTORS TO FIND INDIRECT EXPROPRIATION

A *Severe Effect of State Measures: A 'Necessary and Sufficient' Factor?*

1 *Role of Severe Effect*

Almost all undefined expropriation provisions (Formulation A) in Vietnam's 54 IIAs use different phrases referring to the concept of indirect expropriation, as shown earlier in Part I(B). Such phrases include 'measures having effect/consequence [and nature] equivalent/tantamount to nationalisation or expropriation', 'measures equivalent/tantamount to nationalisation or expropriation' or 'measures depriving, directly or indirectly, an investor'. It is noticeable that only effect and nature are, in certain cases, mentioned to materialise (compare) the equivalence between indirect expropriation and direct expropriation. The concern here is whether such a phrase would likely be interpreted as invoking only the 'effect' factor in finding indirect expropriation. Tribunals have expressed opposing views on a similar issue when dealing with undefined expropriation provisions in other treaty contexts than Vietnam's, as previously provided.[108] Vietnam's IIAs discussed here, except in certain cases where treaty exceptions are applicable, may suggest that interpretation possibility.

The text of the expropriation provisions in this group, especially those in 26 IIAs that only mention 'effect' or 'consequence' factors, clearly facilitates the reading that the effect of state measures is a determining or 'necessary and sufficient' factor. That reading is also feasible in 10 IIAs that introduce 'nature' together with 'effect'; that is, because the 'nature' factor is of no help other than reaffirming the character of direct expropriation, which is forcing the transfer of the ownership from foreign investors to public entities. If one invokes the 'nature' factor to require state's expropriatory intention in finding indirect expropriation, it would hardly be accepted, at least evidenced by *Metaclad v Mexico*.[109] That is because a state rarely shows, or might not have, a prior intention to deprive investor's property before adopting its regulatory measures. As Dolzer and Schreuer observe, '[a] typical feature of indirect expropriation is that the state will deny the existence of an expropriation'.[110]

[108] See above Parts II(B)–(D).
[109] See above Part II(B).
[110] Dolzer and Schreuer (n 1) 92.

The reading is also possible in the case of expropriation provisions in 14 IIAs which equate indirect expropriation with direct expropriation, and in four IIAs which do not explicitly mention the notion of indirect expropriation. This is because the equivalence of indirect expropriation with direct expropriation requires first and foremost the adverse effect of state measures, and because the division of expropriation into direct and indirect forms under CIL is based on the adverse effect of state measures as well. As codified by the 1961 Harvard Draft Convention on Responsibility of States for Injuries to Aliens,

> [a] 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.[111]

The reading is also appropriate in light of the primary objective and purpose of Vietnam's 54 IIAs mentioned above. All of these IIAs aim mainly to protect and promote investment to ultimately pursue economic development, as analysed in Chapter 2.[112] In the words of the *Patrick Mitchell v Congo (Annulment)* committee, the reading is 'consistent with the spirit of investment treaties'.[113] In five out of the IIAs that pursue social and environmental developments alongside economic development,[114] the reading is still appropriate as compared to another interpretation – the 'effect' is only a 'necessary' factor and other expropriation features as a 'sufficient' factor are still needed. The latter interpretation is uncertain because it depends largely on tribunals' approaches to reviewing state measures, which is discussed later in this chapter.[115]

One might argue that reading the effect of state mesures as a 'necessary and sufficient' factor is contrary to CIL. However, it should be noted that CIL includes rules on compensation for direct and indirect expropriation and, arguably, embraces police power doctrine. Such a reading is consistent with the former, although it might be inconsistent with the latter. In fact, both CIL and treaty provisions on expropriation are, in nature, contradictory to the police power doctrine. The former requires compensation for state measures severely affecting foreign investments, including non-discriminatory measures for public interests. In contrast, the latter does not require so for police power measures,

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[111] Harvard Draft Convention on Responsibility of States for Injuries to Aliens (n 67) art 10(3)(a).
[112] See Chapter 2 Part II(B).
[113] *Patrick Mitchell v Congo (Annulment)* (n 51) [53].
[114] *Vietnam-Turkey BIT* Preamble; *Vietnam-Japan BIT* Preamble; *Vietnam-Mozambique BIT* Preamble; *Vietnam-Finland BIT* Preamble; *Vietnam-Estonia BIT* Preamble. See also Chapter 2 Part II(C).
[115] See below Part III(B).

including non-discriminatory measures for public interests having severe effects.[116] When treaty provisions do not provide any clarification in addition to the 'effect' and/or 'nature' features of indirect expropriation as analysed above, and when police power doctrine is still ambiguous in its scope as discussed later,[117] the given reading could not be claimed as being unlikely and being incompatible with CIL.

In conclusion, given that Vietnam's IIAs in this group implicitly or explicitly consider 'effect' as a factor in comparing the equivalence of indirect expropriation to direct expropriation or nationalisation, the effect of state measures may be a determining factor, or be a 'necessary and sufficient' factor, in finding indirect expropriation. In cases where state measures for pursuing public and/or security interests are permissible under treaty exceptions, the 'effect' factor is only considered a 'necessary' factor.

2 *Severity of Effect*

As previously identified, almost all undefined expropriation provisions in Vietnam's IIAs make general references to indirect expropriation such as 'similar features', 'measures having effect/consequence equivalent/tantamount to [direct] expropriation or nationalisation' and 'measures equivalent to/tantamount to [direct] expropriation or nationalisation'.[118] Such expressions clearly indicate that a state measure falling within the scope of expropriation provision (an indirect expropriation) must be one having an effect equivalent to nationalisation or direct expropriation. Under undefined expropriation provisions in four IIAs that implicitly refer to indirect expropriation through the term 'expropriation',[119] the effect of indirect expropriation must also be equivalent to direct expropriation because that is the foremost reason why the rule on compensation for indirect expropriation could be qualified as CIL. Any lower level of severity caused by state measures and triggering compensation duty should be addressed in treaty law since CIL only includes minimum rules conditioned by 'state practice' and *opinio juris* (sense of obligation). Therefore, to claim state measure(s) as an indirect expropriation, the severe effect of state measure(s) is a prerequisite.

[116] See below Part III(B).
[117] Ibid.
[118] See above Part I(B).
[119] Ibid.

The question is how to define 'effect equivalent/tantamount to nationalisation or direct expropriation'. The effect of nationalisation or direct expropriation is found when a private party, natural or legal person, lost his/its property and property ownership rights at the same time.[120] The 'equivalent' effect means an effect 'equal in value, amount, meaning, importance, etc'.[121] Similarly, the 'tantamount' effect means 'the same bad effects'.[122] Taken together, the original meaning of the phrase 'effect equivalent/tantamount to nationalisation or direct expropriation' would likely refer to a situation in which a foreign investor could not exploit its property for economic and commercial purposes, and gain benefits generated from the exploitation of such property. In UNCTAD's words, 'indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure'.[123] In international arbitration practice, tribunals have formulated different expressions for the 'equivalent' effect of indirect expropriation. For example, the effect must reach the level 'effectively neutralis[ing] the enjoyment of the property',[124] or 'virtually annihilat[ing][125] the property ownership of foreign investors. As summarised by Fortier and Drymer and then recognised by *Biwater v Tanzania* tribunal,

> [t]he required level of interference with rights has been variously described as 'unreasonable'; 'an interference that renders rights so useless that they must be deemed to have been expropriated'; 'an interference that deprives the investor of fundamental rights of ownership'; 'an interference that makes rights practically useless'; 'an interference sufficiently restrictive to warrant a conclusion that the property has been "taken"'; 'an interference that makes any form of exploitation of the property disappear'; 'an interference such that the property can no longer be put to reasonable use'.[126]

Borrowing from the above expressions, the phrase 'effect equivalent/tantamount to nationalisation or direct expropriation' in expropriation provisions in Vietnam's IIAs could be rephrased as 'effect neutralising/disabling the property ownership rights of a

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[120] See above Part III(A)(1).
[121] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'equivalent'.
[122] Ibid 'tantamount'.
[123] *Expropriation* (n 3) 7.
[124] *Lauder v Czech* (n 68) [200]. See also *CME Czech Republic BV v The Czech Republic (Partial Award)* (UNCITRAL Arbitral Tribunal, 13 September 2001) [150] ('*CME v Czech Republic*').
[125] *Sempra Energy International v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) [285] *('Sempra v Argentina').*
[126] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008) [463] ('*Biwater v Tanzania*') (citations omitted). For the summary, see L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I know It When I See It, or Caveat Investor' (2004) 19(2) *ICSID Review—Foreign Investment Law Journal* 293, 305.

foreign investor'. In other words, the effect of indirect expropriation needs to reach the level of 'paralysing' foreign investor's property ownership rights.

Having said that, it is necessary to take into account whether different factors that affect the use, the enjoyment and the disposal of foreign investor's property reach the 'paralysing' level. The 'effective deprivation' test imposed in *Total v Argentina*[127] could be appropriately used in the context of Vietnam's IIAs. The test is grounded on 'a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation, even if formal title continues to be held',[128] including the loss of control as conferred by the term 'dispossession' in the expropriation provision concerned.[129] Additionally, the 'substantial deprivation' test imposed in *Pope & Talbot v Canada*[130] could be used in the context of Vietnam's IIAs. This test is based on total impairment or near devastation of the economic value of a foreign investment and the loss of foreign investor's control over 'the day-to-day operations of the investment'.[131] Subsequent tribunals modified this test to include the duration of state measures – that is, whether measures resulted in temporary or permanent deprivation of foreign investors' properties or investments.[132] These three factors – loss of economic values, loss of control, measures' duration – have been frequently applied in international arbitration practice to define the effect of measures.[133] In short, the 'paralysing' level of indirect expropriation in the context of Vietnam's IIAs would invite the examination of not only a serious decrease in economic values but also a loss of control of investment over a lengthy period.

It should be noted that when defining whether a state measure causes a substantial deprivation or severe effect to foreign investor's investment, one concern that could be raised is what investment was deprived by the measure or whether a deprived investment is a whole investment project or its discrete rights/assets. A foreign investor may own

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[127] *Total v Argentina* (n 99) [195].
[128] Ibid (citations omitted).
[129] Ibid [193].
[130] *Pope & Talbot v Government of Canada (Interim Award)* (UNCITRAL Arbitral Tribunal, 26 June 2000) [96], [100] ('*Pope & Talbot v Canada*'). For more information, see Jonathan Bonnitcha (ed), *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014) 251.
[131] *Pope & Talbot v Canada* (n 130) [100].
[132] See, eg, *LG&E v Argentina* (n 99) [193]; *Achmea BV (formerly Eureko BV) v The Slovak Republic (I) (Final Award)* (PCA Arbitral Tribunal, Case No 2008-13, 7 December 2012) [289] ('*Achmea v Slovakia (I)*'). For more relevant cases and quotations about the duration of state measures, see Dolzer and Schreuer (n 1) 155; Reinisch and Schreuer (n 2) 135–30; Salacuse (n 1) 38; Nikièma (n 88) 14.
[133] For more relevant cases and quotations about the three factors, see Reinisch and Schreuer (n 2) 112–56.

several parallel investments, projects, lines of business (eg several resorts in different locations) or different types of investment activities (eg gas/water facilities operation and road construction). His investment project may also involve different rights such as intellectual property rights, land use rights or rights to manufacture and export products.

In international arbitration practice, tribunals have opposing views on a similar issue to the above concern. Several considered a contractual right or the right to claim to money as capable of being expropriated,[134] so-called partial expropriation.[135] For example, the tribunal in *Eureko v Poland*[136] perceived the contractual right of the claimant to acquire an additional 21% of the shares in PZU (a Polish insurance company) from Poland as an independent investment to be protected under an expropriation provision.[137] According to the tribunal, the withdrawal of Poland's consent to sell the shares agreed in the contract with the claimant caused the loss of the claimant's possibility to acquire control of PZU.[138] In this case, if the tribunal counted the claimant's existing investment in PZU – 30% of the shares – in the whole investment affected by the measure,[139] the level of deprivation might have not been substantial and thus no indirect expropriation would have been found. In *EnCana v Ecuador*,[140] the tribunal also asserted that the right to claim VAT refunds from oil exportation constituted an independent investment falling within the scope of expropriation provision.[141] However, in *Occidental v Ecuador (I)*,[142] the tribunal expressed doubts that a right to a refund of VAT was an investment under a treaty at issue.[143] As a result, the withdrawal of the particular right of an investor was insufficient to amount to expropriation.

In the context of all Vietnam's IIAs having undefined expropriation provisions, individual rights/assets might be capable of being expropriated. This is because these IIAs only

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[134] For discussion on the object of expropriation, see Reinisch (n 84) 410–7; Dolzer and Schreuer (n 1) 156–7; Reinisch and Schreuer (n 2) 19–33; Salacuse (n 1) 318–9.
[135] For discussion on partial expropriation, see Dolzer and Schreuer (n 1) 151–2; *Expropriation* (n 3) 22–5; Escarcena (n 50) 202–3.
[136] *Eureko BV v Republic of Poland (Partial Award)* (UNCITRAL Arbitral Tribunal, 19 August 2005) ('*Eureko v Poland*').
[137] Ibid [241].
[138] Ibid [219], [241].
[139] Noted that the tribunal in the case already observed that 'Respondent has not deprived Eureko of its shares in PZU which its continues to hold and on which it receives dividends': see *Eureko v Poland* (n 136) [239].
[140] *EnCana Corporation v Republic of Ecuador (Award)* (LCIA Arbitral Tribunal, Case No UN3481, 3 February 2006) ('*Encana v Ecuador'*).
[141] Ibid [182]–[183].
[142] *Occidental Exploration and Production Company v The Republic of Ecuador (Final Award)* (LCIA Arbitral Tribunal, Case No UN3467, 1 July 2004) ('*Occidental v Ecuador (I)*').
[143] Ibid [86].

mention 'investments of investors' as an object of expropriation without limiting to 'tangible or intangible property right' and 'property interest', which is different from almost all IIAs having defined expropriation provisions.[144] Except for the *ASEAN-Korea IA,* they also defines 'investment' broadly as 'every kind of asset' owned or controlled by foreign investors without explicitly requiring investment characteristics,[145] which is again disimillar to the latter.[146] 'Investment' here covers, but is not limited to, 'tangible and intangible property', 'shares', 'intellectual property rights', 'claim to money', 'business concessions', and 'rights arising from contracts and licenses'.[147] It means that undefined expropriation provisions apply to not only an overall investment project but also separate rights/assets, a part of an overall investment project.

For individual right/assets to be capable of being expropriated (partial expropriation), Kriebaum suggests: first, 'the overall investment project can be disassembled into a number of discrete rights';[148] second, 'the state has deprived the investor of a right which is covered by one of the items in the definition of 'investment' in the applicable investment protection treaty';[149] and finally, 'this right is capable of economic exploitation independently of the remainder of the investment'.[150] Douglas also argues that the value of contracts or property cannot be the object of expropriation.[151] However, it is uncertain that these points would be considered in the context of Vietnam's IIAs to exclude certain rights/assets from the scope of undefined expropriation provisions. Under the *ASEAN-Korea IA*, rights/assets must have the characteristics of an investment to be capable of expropriation. That is because this treaty not only defines an investment as 'every kind of asset that an investor owes or controls', which is similar to other treaties as above mentioned, but also specifies that 'investment […] has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits or the assumption of risk'.[152]

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[144] See below Part IV(A)(1).
[145] See Chapter 2 Part III(B)(1); Table 2.2. Note that only does *ASEAN-Korea IA* express investment characteristics as a requirement of an investment: see Chapter 2 Part III(B)(2); app 4.
[146] See Chapter 2 Part III(B)(2); Table 2.2.
[147] See Chapter 2 Part III(B)(1).
[148] Ursula Kriebaum, 'Partial Expropriation' (2007) 8(1) *Journal of World Investment & Trade* 69, 83.
[149] Ibid.
[150] Ibid.
[151] Zachary Douglas, 'Property Rights as the Object of an Expropriation' in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 331, 341.
[152] *ASEAN-Korea IA* art 1(j).

From the above analysis, the subsection comes to a conclusion that the effect of legislative measure(s) on a foreign investment would be considered 'equivalent/tantamount to nationalisation or direct expropriation', under undefined expropriation provisions in Vietnam's IIAs, if it is severe in the sense of neutralising/disabling the right of a foreign investors to possess, use and/or dispose of his investment.

B *Public Purposes of State Measures: A Relevant Factor?*

Public purposes of state measures have been perceived by tribunals taking the proportionality approach as being a relevant factor to the analysis of indirect expropriation. In cases where tribunals recognise the police power doctrine, it is assumed that the presence of public purposes would make severe measures non-compensable ones, and the absence of these purposes might turn severe measures into indirect expropriation. However, the tribunals have not actually applied this doctrine, since measures at issue did not cause severe effects on foreign investments and/or failed to qualify all characteristics of police power measures, as mentioned below. In the context of Vietnam's 54 IIAs having provisions on undefined expropriation, the lack of public purposes might not be considered a 'sufficient' factor in finding expropriation, except in certain cases in which treaty exceptions are available. Public purposes of state measures can nevertheless be a relevant factor in certain treaty contexts.

Most of the IIAs in this group only regulate public purposes of state measures as one of the lawful conditions of expropriation, whether direct or indirect. Nowhere do the treaty texts consider public purposes as a ground for distinguishing between regulatory measures and indirect expropriation, which is different from defined expropriation provisions in other six IIAs.[153] Therefore, the treaty texts do not support a reading that public purposes would be incorporated into expropriation analysis to distinguish between indirect expropriation with compensation and regulatory measures without compensation. Nor do the objectives and purposes of those IIAs, which consider investment protection and promotion as a main objective, support that reading.

One might argue that the reading that public purposes have no role in defining indirect expropriation is not compatible with police power doctrine under CIL. However, this argument is not convincing when the police power doctrines status as CIL is still questioned by some scholars.[154] Even if accepted, measures under police power doctrine have not yet been finalised.[155] As acknowledged by *Saluka v Czech* tribunal,

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[153] See below Part IV(B).

[154] See, eg, Catharine Titi (ed), *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014), 182, 282–7. Titi views that 'the doctrine of police powers is a jurisprudential creation rather than established customary law': see at 182.

[155] Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration (2012) 15 *International Trade and Business Law Review* 254, 278.

> international law has yet to identify in a comprehensive and definite fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.[156]

If measures 'within the police or regulatory power of States' are broadly conceived ('radical police power doctrine')[157] and fully accepted in the investigation of indirect expropriation, it would have the consequence hereby that all measures that are non-discriminatory, bona fide, due process and for public purposes are non-expropriation, regardless of having an effect equivalent to direct expropriation. In this regard, all features of police power measures are equal to all requirements of lawful expropriation.[158] That consequence defeats the rationale of expropriation provisions under Vietnam's IIAs (and CIL) on compensation for expropriation; in the words of Kriebaum, '[t]his result is very problematic from the perspective of investment protection'.[159] As the *Vivendi v Argentina (I) (Resubmission)* tribunal reasoned, 'if public purpose automatically immunizes the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose'.[160]

If police power measures are perceived as having boundaries,[161] the issue becomes which measures would be accepted under the police power doctrine and which would not. Some commentators point to the taxonomy of police power; accordingly, measures for tax, public order, public morality, public health, safety, or environmental protection would be valid under the police power doctrine.[162] It should be noted that such a taxonomy is for the tribunal to consider, not the authorities taking the measure. Therefore, it is hard to identify in what circumstances the reading is contrary to CIL, specifically the police power doctrine.

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[156] *Saluka v Czech* (n 74) [263].
[157] The term is used by Kriebaum, 'Regulatory Takings' (n 6) 725.
[158] Ibid 726.
[159] Ibid 727.
[160] *Vivendi v Argentina (I) (Resubmission)* (n 57) [7.5.21].
[161] *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/16, 2 October 2006) [423] (*ADC v Hungary*). The tribunal provided its understanding of basic international law principles that 'while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries'.
[162] Simon Baughen, 'Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven' (2006) 18(2) *Journal of Environment Law* 207, 221; Newcombe and Paradell (n 107) 356–62.

Notably, where certain tribunals have spoken to the police power doctrine (or the significant role of public purpose) as pointed in literature,[163] they have found no violation because of the unqualified level of severe effect, not merely because of the police power features of state measures. *Methanex v US*, *Chemtura v Canada* and *Philip Morris v Uruguay* are the most frequently cited cases for the recognition of police power doctrine and consideration of public purposes in expropriation analysis. Tribunals in these cases concluded that challenged measures did not constitute indirect expropriation because they fell within the purview of police powers. However, nor did those measures have effects that were equivalent to direct expropriation (or were less severe instances).

For example, in *Philip Morris v Uruguay*, the tribunal accepted Uruguay's single presentation requirement (SPR) and 80/80 Regulation were promulgated under international obligations and national policy to protect public health. This obligation was recognised in Uruguay's agreement to join the *WHO Framework Convention on Tobacco Control* (FCTC), Uruguay's Constitution, and Law 18256 on Tobacco Control, which specified Uruguay's obligation under the *FCTC*.[164] The tribunal also observed that smoking in Uruguay had decreased, especially among youth, after tobacco control measures were adopted.[165] The tribunal decided that Uruguay's measures were 'a valid exercise by Uruguay of its police powers for the protection of public health'[166] bona fide, non-discriminatory and proportionate, and thus did not constitute an expropriation.[167] However, before analysing the police power feature of Uruguay's measures,[168] the tribunal found that these measures were 'far from depriving Abal of the value of its business or even causing a "substantial deprivation" of the value, use or enjoyment of the Claimant'.[169] On the contrary, the tribunal found that while the claimant's profits declined in December 2009, they increased from 2011 and gross profits between 2009 and 2013

[163] Alexis Martinez, 'Invoking State Defenses in Investment Treaty Arbitration' in Michael Waibel et al (eds), *The Blacklash against Investment Arbitration* (Kluwer Law International, 2010) 330–4.
[164] Note that Uruguay's Constitution recognised that '[t]he States shall legislate in all matters appertaining to public health and hygiene, to secure the physical, moral and well-being of all inhabitants of the country': *Philip Morris v Uruguay* (n 78) [562].
[165] *Philip Morris v Uruguay* (n 78) [306].
[166] Ibid [307]
[167] Ibid [305]. The tribunal stated that 'in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions … the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate'.
[168] Ibid [288]–[306].
[169] Ibid [284].

were higher than those in previous years.[170] Therefore, the tribunal concluded that 'as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation'[171] and rejected the claim on indirect expropriation.[172] What if the tribunal had found the state's measures to reach the requisite level of severity? Had this been the case, it is uncertain whether the police power features of Uruguay's measure would have prevailed over the effect they had on the claimant.

In the cases of Vietnam's IIAs having the social and environmental development as another among their treaty purposes, including *Vietnam-Mozambique BIT*, *Vietnam-Finland BIT*, *Vietnam-Estonia BIT*, *Vietnam-Japan BIT*, *Vietnam-Turkey BIT* and *ASEAN-China IA*,[173] the public purposes of state measures might be engaged in analysing indirect expropriation as a relevant factor. Needless to say, such treaty purposes could not be achieved if Vietnam had to pay compensation for all public measures severely affecting foreign investments/investors. However, it is unlikely that state measures for public health, safety, the environment, the promotion of worker rights and living standards, as mentioned in the given preambles, would not totally amount to indirect expropriation. This is because treaty preambles, in general, are not substantive provisions and do not function as an exception, including expropriation ones. The objectives and purposes in preambles only help interpreters seeking an appropriate original meaning for treaty terms. In this regard, public purposes of state measures might be a relevant, but not determining, factor in finding indirect expropriation.

The relevant role of public purpose is the same in the context of the *Vietnam-Japan BIT* and *Vietnam-Turkey BIT* even when the treaties additionally contain clauses on not relaxing certain standards and public welfare measures respectively. The former clause in the *Vietnam-Japan BIT* reaffirms that 'it is inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures'.[174] More specifically, a state should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion of foreign investments.[175] This clause clearly governs state measures that benefit foreign investors by lowering environmental standards. But what if state measures seriously damage

[170] Ibid [284], [285].
[171] Ibid [286].
[172] Ibid [287].
[173] See Chapter 2 Part II(C).
[174] *Vietnam-Japan BIT* art 21.
[175] Ibid.

foreign investments by upholding environmental standards or pursuing higher environmental standards? The answer to this question remains uncertain. The latter clause in the *Vietnam-Turkey BIT* nevertheless states 'non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation'.[176] However, such clause hardly takes effect of specific exceptions, similarly to clauses on public welfare measures in defined expropriation provisions as discussed later in this chapter.[177] Therefore, public welfares objectives here could only be a relevant factor to a finding of indirect expropriation.

The relevance of public purposes in indirect expropriation analysis depends greatly on tribunals' approaches in reviewing legislative measures. International arbitration practice, as noted above,[178] shows that tribunals have adopted the proportionality approach to examine benefits to the public/community created by state measures for public interests and the effects on foreign investments caused by such measures. As a possible result, legislative measures having severe effects would, if proportionate, not be considered indirect expropriation. However, few tribunals have applied, or consistently applied, proportionality in expropriation cases. Therefore, past practice does not guarantee that proportionality would be used as a standard for reviewing state measures in expropriation claims under the five BITs mentioned. In other words, it is uncertain whether legislative measures that severely affect foreign investment but are proportionate to public objectives would be compensable, having not mentioned that a finding of proportionate measures is not easy as discussed below.[179]

Beyond the above context, in certain cases, the absence of public purposes contributes to establishing that measures having effect equivalent to direct expropriation constitute indirect expropriation, although the presence of public purposes does not fullfil all substantive qualifications for exceptional measures. These cases are accorded by treaty exception provisions on public interests and/or security interests under nine IIAs,[180] which is analysed in Chapters 7 and 8.[181]

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[176] *Vietnam-Turkey BIT* art 5(2).
[177] See below Part IV(B).
[178] See above Part II(D).
[179] See below Part IV(A)(3).
[180] *Vietnam-Czech BIT*; *Vietnam-Japan BIT*; *Vietnam-Singapore BIT*; *Vietnam-Slovakia BIT*; *Vietnam-Turkey BIT*; *Vietnam-Uzbekistan BIT*; *Vietnam-US BTA*; *ASEAN-Korea IA*; *ASEAN-China IA*.
[181] See Chapter 7 Part V(C), Table 7.5; Chapter 8 Part V(B), Table 8.5.

In summary, given that most of the IIAs in this group only regulate public purposes of state measures as one of the lawful conditions, public purposes can hardly be a determining factor for excluding measures having an effect equivalent to nationalisation from claims of indirect expropriation. The lack of public purposes is thus not a 'sufficient' factor for finding indirect expropriation. Under six IIAs, public purposes could be a relevant factor to the investigation of indirect expropriation if tribunals employ the proportionality in reviewing legislative measures in challenge. In certain cases where treaty exceptions are available, the absence or the presence of public purposes would make severe measures indirect exprorpriation or potential exceptions.

C *Section Remark: Potential Factors to Find Indirect Expropriation as Imposed by Formulation A*

This section finds that under provisions on undefined expropriation, legislative measures for public purposes would amount to indirect expropriation if (i) severely depriving foreign investments, including a significant decrease in economic values of investments and loss of control over investments for a considerable period. This finding arises from the fact that undefined expropriation provisions express the effect as a criterion for comparing indirect expropriation to direct one, and implicitly/explicitly express the equivalence between indirect and direct expropriation, without further explanation. Additionally, most of the IIAs only provide public purposes as a condition for distinguishing between lawful expropriation and unlawful expropriation. It suggests that public purposes are not a factor in distinguishing between legitimate regulatory measures (without compensation) and indirect expropriation (with compensation). The police power doctrine under CIL, with its ambiguous scope, cannot clarify the definition of indirect expropriation under provisions on undefined expropriation. Therefore, the lack of public purpose is not a 'sufficient' factor in deciding regulatory measures severely affecting foreign investments to be indirect expropriation, except in certain cases where treaty exceptions are applicable.

IV AN ANALYSIS OF FORMULATION B: POTENTIAL FACTORS TO FIND INDIRECT EXPROPRIATION

A *'Necessary' and 'Sufficient' Factors*

1 *Adverse Effect of State Measures on Economic Values: A 'Necessary' Factor*

As previously identified, all defined expropriation provisions suggest that, in order to find indirect expropriation, a state measure(s) must be thoroughly examined on a case-by-case basis taking many relevant factors and factual circumstances into account.[182] Relevant factors include, but need not be limited to, the economic impact of state measures, the breach of investors' reasonable expectations, and the character of state measures. Of these, only the first factor is worded and approached the same across the expropriation provisions.

The above provisions also specify that 'although the fact that an action or series of actions taken by the government of Vietnam has an adverse effect on the economic value of an investment, [it], standing alone, does not establish that an indirect expropriation has occurred'.[183] This specification explicitly rejects an interpretation solely focusing on the effect of the state measures – or 'sole effect' doctrine – as pointed in some scholarly works in the general IIA context.[184] The adverse effect is only a 'necessary' factor but not a 'sufficient' factor in concluding whether a state measure amounts to indirect expropriation. Consequently, other expropriation features need to be present for that conclusion.

In any case, it should be noted that only when state measures have effect equivalent to direct expropriation can they be claimed as indirect expropriation. The level of severe effect depends, inter alia, on what is capable of being expropriated. The object of expropriation would be 'a tangible or intangible right or property interest in a covered investment' in five treaty contexts,[185] and 'any type of assets' having characteristics of an investment in one context.[186]

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[182] See above Part I(C).
[183] *ASEAN-ANZ FTA* annex on Expropriation and Compensation.
[184] See, eg, J Anthony VanDuzer, Penelope Simons and Graham Mayeda (eds), *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, 2012) 173.
[185] *ACIA* annex 2 [1]; *ASEAN-ANZ FTA* annex on Expropriation and Compensation [1]; *ASEAN-Hong Kong*

2 *Reversal of State's Prior Binding Written Commitments or Breach of Foreign Investor's Distinct, Reasonable-backed Expectation: Does Its Presence or Absence Affect A Finding of Indirect Expropriation?*

In addition to adverse effects, breach of an investor's reasonable expectation is identified by almost all defined expropriation provisions as a factor in considering indirect expropriation.[187] This factor is specifically expressed as the interference with 'distinct, reasonable investment-backed expectations' in the *Vietnam-Korea FTA* and the *CPTPP*,[188] or as the breach of 'the government's prior binding written commitment to the investor' in the *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-Hong Kong IA*.[189] The questions that could be raised here are (i) whether the presence of such a factor will turn state measures having severe effects on foreign investments into indirect expropriation in all circumstances, and (ii) whether the absence of such a factor, in any circumstances, will make severe measure(s) non-expropriation.

The answer to the first question is likely 'yes'. Expropriation provisions in this group suggest only that a finding of indirect expropriation needs to be based on many factors. Except for economic impact, other factors are optional or selective rather than compulsory. A finding of indirect expropriation thus requires at least one more factor in addition to economic impact. These expropriation provisions do not state that all three factors are necessary. Of course, if a state measure had many potential expropriation features, it would likely be declared an indirect expropriation. When a state measure has severe effects on the investor's economic values and frustrates the investor's reasonable expectation, indirect expropriation has occurred.

The above reasoning is also used to reject a reading that when the breach of an investor's reasonable expectation has not been found, a severe measure will be non-expropriation – an answer to the second question. Such a measure could still be claimed as indirect expropriation when it is disproportionate to its objectives as following discussed. This

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IA annex 2 [1]; *Vietnam-Korea FTA* annex 9-B [a]; *CPTPP* annex 9-B [1].

[186] *Vietnam-EUEA FTA* ch 8 arts 8.34(1), 8.28(a).

[187] No expression of legitimate expectation is found in Article 8.35 on Expropriation and Compensation of the *Vietnam-EAEU FTA*. In the context of the *Vietnam-EU IPA*, its annex 4 on Understanding on Expropriation does also not recognise any expression of legitimate expectation but rather expressing the duration of measure and series of measures and its effects.

[188] *CPTPP* annex 9-B; *Vietnam-Korea FTA* annex 9-B.

[189] *ASEAN-ANZ FTA* annex on Expropriation and Compensation; *ACIA* annex 2; *ASEAN-Hong Kong IA* annex 2. In the context of the *RCEP*, its expropriation provision at Article 10.13 together with its annex 10B also contain the same factor.

reading is contrary to the approach taken by the *Methanex v US* tribunal. According to the tribunal, a non-discriminatory measure taken in accordance with due process was not considered an expropriation unless a specific commitment was made by the state. In other words, where no breach of an investor' reasonable expectation based on specific commitment was available, no indirect expropriation could be found. The statement reads:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[190]

It should be noted that a finding of breaking investor's expectations in the *Vietnam-Korea FTA* and the *CPTPP* would be more possibly than that in the *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-Hong Kong IA*. Such expectations in the former only need to be 'distinct, reasonable', which could be generated from written commitments or specific representations at the admission of investment. However, those in the latter must only be based on 'government's prior binding written commitment to the investor' (eg contracts, licences, legal documents, and approvals in writing). The 'distinct, reasonable' expectations of foreign investors could also be formulated from specific legal framework, such as being designed to attract foreign investments. This point is compatible with the *CPTPP* when its expropriation provision specifies that a reasonableness of investment-backed expectations depends on factors such as 'whether the government provided the investor with binding written assurances' and 'the nature and extent of government regulations or the potential for government regulation in the relevant sector'.[191]

Given the above factor, a state measure having a severe effect on foreign investments would be considered indirect expropriation if it reversed the state's prior binding written commitments or breached foreign investors' distinct, reasonable investment-backed expectations.

[190] *Methanex v US* pt IV ch D [7].
[191] *CPTPP* annex 9-B n 36.

3 *Character of State Measures: Does Its Presence or Absence Affect A Finding of Indirect Expropriation?*

All defined expropriation provisions express the character of state measures as a factor in establishing indirect expropriation. Those in the *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-Hong Kong IA* clarify the character of measures as including its objective and whether the action is disproportionate to the public purposes. Those in the *Vietnam-Korea FTA*, *CPTPP* and *Vietnam-EAEU FTA* do not provide such a clarification. However, as stated by UNCTAD, the character of measures covers many substantive features, such as good faith, non-discrimination, non-arbitrariness and proportionality[192] so lacking any of these can make severe measures potential cases of indirect expropriation in any given treaty context.

Assuming that severe measures qualify non-discrimination, due process and public purposes (ie all characteristics of police power measures), the questions are (i) whether such measures with disproportionality to their public purposes will always amount to indirect expropriation, and (ii) whether those without such disproportionality will always be considered non-expropriatory. Using the same reasoning as previously provided in the context of the second factor,[193] the answer to the first question is likely 'yes' but that to second question is possibly 'no'. Severe measures with proportionality may break an investors' reasonable expectation and/or fail to fulfil all characteristics of police power measures, and thus are likely deemed as expropriation. This perception is consistent with the approach taken by the *Phillip Morris v Uruguay* tribunal. According to the tribunal,

> for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bonda fide* for protecting the public welfare, must be non-discriminatory and proportionate.[194]

It should be noted that the threshold of proportionality is quite high, which means it is not difficult for a state measure to be found disproportionate. Proportionality is generally accepted as a three-pronged test, the prongs being suitability, necessity and *stricto sensu* proportionality (non-excessiveness).[195] In the words of Haynes, it is considered 'a

[192] *Expropriation* (n 3) 78.
[193] See above Part IV(A)(2).
[194] *Philip Morris v Uruguay* (n 78) [305].
[195] See above Part II(D).

rigorous proportionality analysis'.[196] A state measure must be suitable, necessary and non-excessive.

Disproportionality between a state measure and its objectives has been found when the measure lacks one of these three features. As discussed earlier, in *Tecmed v Mexico* the tribunal only examined the last step, specifically 'a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realised by any expropriation measure'.[197] It found that the permanent closure of the claimant's waste landfill together with the loss of commercial and economic benefits and the frustration of reasonable expectations were not proportionate to the purpose of environmental protection.[198] In *Occidental v Ecuador (II)*, the tribunal examined the last two steps – necessity and stricto sensu proportionality – and found that a *Caducidad* Decree to terminate the participation contract between OEPC and PetroEcuador did not possess these two features. In *PL Holdings v Poland*, the tribunal considered all three steps and found that the actions of the the Polish authority were contrary to all three requirements of the proportionality measure.

One might notice that tribunals applied the proportionality analysis when dealing with undefined expropriation provisions rather than defined expropriation provisions; however, their findings, drawn from the application of proportionality analysis in expropriation cases, illustrate that it is not easy to defend a state measure's proportionality. In the context of Vietnam's IIAs, particularly the *Vietnam-Korea FTA*, the expropriation provision invites the last step of proportionality test through footnoting that a consideration of measure character may include 'whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest'.[199] Although such a clarification is dedicated to Korea and only mentions state measures' non-excessiveness between costs and benefits, state measures could not have proportionate character if lacking suitability and necessity.

[196] Jason Haynes, 'The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns – The Case for Regulatory Rebalancing' (2013) 14(1) *The Journal of World Investment & Trade* 114, 143.
[197] *Tecmed v Mexico* (n 72) [122].
[198] Ibid.
[199] *Vietnam-Korea FTA* annex 9-B n 26.

Given the character factor, a state measure having a severe effect on foreign investors/investments would be considered indirect expropriation if it were disproportionate with its objectives – unsuitable, unnecessary and/or excessive. The lack of other features such as non-discrimination, good faith and/or due process, and the presence of severe effects would also render legislative measures expropriatory.

4 *Subsection Remark*

This subsection has shown that identification of indirect expropriation is based on severe effects as a 'necessary' factor and on others as a 'sufficient' factor. Factors functioning as a 'sufficient' one include, but are not limited to, the reversal of the state's prior binding written commitment to the investor or the breach of foreign investors' distinct, reasonable investment-backed expectations; the lack of suitability and/or necessity; excessive damages to foreign investors; and the absence of characteristics of police power measures, such as the lack of public purposes, good faith, non-discrimination and non-arbitrariness as recognised under CIL.

B *Clauses on Public Welfare Measures: Public Purposes as A Relevant but not Determining Factor*

As previously mentioned, almost all defined expropriation provisions, except that in the *Vietnam-EAEU FTA*, contain clauses on public welfare measures with the possible aim to distinguish regulatory measures from indirect expropriation. Specifically, the clause in the *ACIA*, *ASEAN-ANZ FTA* and the *ASEAN-Hong Kong IA* take a similar form:

> *Non-discriminatory regulatory* actions by a Party that are designed and applied to *achieve legitimate public welfare objectives,* such as the protection of public health, safety, and the environment, do not constitute expropriation [of the type referred to in subparagraph 2(b) of this Article].[200]

In a slightly different way, the clauses in the *CPTPP* and *Vietnam-Korea FTA* contain the phrase 'except in rare circumstances'. For example, a clause in the *CPTPP* states:

> *Non-discriminatory regulatory actions* by a Party that are designed and applied to protect *legitimate public welfare objectives*, such as public health, safety, and the environment, do not constitute expropriation, *except in rare circumstances*.[201]

Using the same structure of the *CPTPP*, the *Vietnam-Korea FTA* takes a further step by specifying that the severity and disproportionality are examples of 'rare circumstances'. It states

> *except in rare circumstances*, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, *non-discriminatory regulatory actions* by a Party that are designed and applied to protect *legitimate public welfare objectives*, such as public health, safety, the environment, do not constitute an indirect expropriation.[202]

Given two types – clauses without and with the phrase 'except in rare circumstances' – the question is whether such clauses would support a reading that non-discriminatory measures taken for public purposes would not constitute indirect expropriation. The first type, as provided in the first example, would hardly be considered an exception, even though its structure resembles an exception. That is because the clause is so general,

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[200] *ASEAN-ANZ FTA* annex on Expropriation and Compensation s [4]. See also *ASEAN-Hong Kong IA* annex 2 [4]; *ACIA* annex 2 [4].
[201] *CPTPP* annex 9-B s 3(b) (emphasis added) (citations omitted).
[202] *Vietnam-Korea FTA* annex 9-B s c(ii). See also *Vietnam-EU IPA* annex 4 s 3. The unenforced *Vietnam-EU IPA* has a similar clause to the *Vietnam-Korea FTA*.

similar to the statement on police power doctrine. According to the clause, a state measure needs to be non-discriminatory and for public interests to be non-expropriatory. Indeed, such features are conditions of lawful expropriation. What would happen if such a measure adversely affected foreign investments? Even if the effect were severe, the state measure would be non-compensable. That result is contrary to the legal consequence of treaty expropriation provisions (compensation). It would defeat the very purpose of expropriation provisions. That is probably a reason why in the literature similar clauses are described as a 'clarification' of indirect expropriation rather than an exception to indirect expropriation.[203]

The other type (clauses with the phrase 'except in rare circumstances'), as provided in the second and third examples, is designed much more to provide exceptions for police power measures, rather than exceptions for indirect expropriation. 'Rare circumstances' indeed refers to circumstances in which non-discriminatory regulatory actions constitute indirect expropriation. In the *Vietnam-Korea BIT (2003)*, such rare circumstances include the case where an action or a series of actions is extremely severe and when an action or a series of actions is disproportionate in light of its/their purpose or effect. The first case refers to severe effects of state measures, which is a 'necessary' feature to find indirect expropriation; the second refers to measure-objective disproportionality, which is a 'sufficient' feature in establishing indirect expropriation. 'Rare circumstances' would also include situations where a state measure frustrates an investor's reasonable expectation.

Having said that, the clause with the phrase 'except in rare circumstances' does not make any difference compared with a clarification clause on expropriation. They are just different expressions. Specifically, the former could be rephrased as stipulating that a non-discriminatory measure which is undertaken for public welfare objectives in non-arbitrary and good faith manner, proportionate to such objectives, and have no severe effects on foreign investments does not amount to indirect expropriation. The latter could also be rephrased as stating that a measure, taken for public purposes and non-discriminatory, but having adverse effects on economic values, breaking an investor' reasonable expectation, and possessing disproportionality feature, would amount to indirect expropriation. These expressions have the same effect.

[203] See, eg, *Expropriation* (n 3) 88.

In conclusion, even though certain defined expropriation provisions provide clauses on public welfare measures, a state measure having a severe effect on foreign investments cannot be excluded from claims of indirect expropriation solely because they are non-discriminatory and for legitimate public welfare objectives, such as public health, safety and the environment.

C *Section Remark: Potential Factors to Find Indirect Expropriation as Imposed by Formulation B*

This section finds that under provisions on defined expropriation, regulatory measures for public purposes would amount to indirect expropriation if (i) severely depriving foreign investments, and (ii) frustrating investors' reasonable expectation, (iii) lacking measures-objectives proportionality, and/or (iv) being contrary to features of police power measures.

To come up with the above finding, two main aspects of defined expropriation provisions have been examined. The first one is a guidance on how to define indirect expropriation, which provides that indirect expropriation is determined by many factors. Accordingly, the economic impact of regulatory measures does not play a determining factor in examining indirect expropriation. The examination needs to be based additionally on other factors such as the breach of investor's reasonable expectation and the lack of measures-objectives proportionality. When either or both of these factors are present, it/they render(s) regulatory measures having a severe effect indirect expropriation.

The second aspect relates to clauses on public welfare measures. These clauses have two types; however, neither of them creates exceptions for indirect expropriation. A clause without the phase 'except in rare circumstances' is too broad. It covers all non-discriminatory measures for public welfare objectives whether or not they have a severe effect on foreign investments. It renders all non-discriminatory measures for public welfare objectives non-expropriation, which is contrary to the rationale of incorporating expropriation provisions into IIAs. A clause without the phase 'except in rare circumstances' has a more limited scope of non-discriminatory regulatory measures being as non-expropriation ones. It excludes state measures with certain features from this scope. Such features actually refer to those specified in a clarification clause on indirect expropriation – factors to define indirect expropriation.

CONCLUSION

POSSIBLE SUBSTANTIVE REQUIREMENTS FOR NON-EXPROPRIATORY LEGISLATIVE MEASURES SUGGESTED BY EXPROPRIATION PROVISIONS IN VIETNAM'S IIAS

Based on features of indirect expropriation possibly imposed by undefined and defined expropriation provisions in Vietnam's IIAs, the chapter finally deduces substantive requirements for non-expropriatory legislative measures. To be non-expropriatory under undefined expropriation provisions (in 54 IIAs), legislative measures must not cause severe effects on foreign investments – a 'necessary and sufficient' feature (Table 4.3). However, to be non-expropriation under defined expropriation provisions (in six IIAs), legislative measures must not severely affect foreign investments or where they cause severe effect, they must not reverse the state's prior binding written commitments to a foreign investor (or breach foreign investors' distinct, reasonable investment-backed expectations), lack proportionality (suitability, necessity, non-excessiveness) and lack other characteristics of police power measures (eg public purposes, good faith, non-arbitrariness and non-arbitrary or reasonable discrimination) (Table 4.3). Legislative measures having the severe effects and the features mentioned can be accepted to a certain extent, if protecting security and/or public interests and meeting other qualifications (Tables 7.5 and 8.5). This extent is clarified in Chapters 7 and 8.

Table 4.3: Substantive Requirements for Non-Expropriatory Legislative Measures as Suggested by Expropriation Provisions in Vietnam's IIAs

Substantive Requirements	Treaty Context (60)	Treaty Context * (42)
(i) No Severe Effects on Foreign Investments	54 IIAs	34 IIAs
(i) No Severe Effects on Foreign Investments; or (ii) Severe Effects and No Reverse Effects on State's Prior Binding Written Commitments (or No Breach of Distinct, Reasonable Investment-Backed Expectations); Proportionate Measure-Objective Relationship; and Characteristics of Police Power Measures (Good Faith, Public Purposes, Non-Arbitrariness, Reasonable Discrimination)	6 IIAs	6 IIAs; *Vietnam-EU IPA*; *RCEP*
Note: Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.		

Chapter 5
FREE TRANSFER TREATMENT PROVISIONS IN VIETNAM'S IIAS: SUBSTANTIVE REQUIREMENTS AND QUALIFICATIONS FOR LEGISLATIVE MEASURES

INTRODUCTION

The free transfer treatment (FTT) obligation requires a host state to accord foreign investors the freedom of transfers related to their investments in and out of its territory. Investment-related transfers here can include current transactions and capital transactions if based on their contribution to, respectively, the current account and capital account of a country's balance-of-payments (BOP).[1] The transfers may also cover inward flows and outward flows if based on their movement to and from a country.[2] FTT was created to meet the demand of both state and foreign investors in economic cooperation. To attract foreign investments, the state must allow foreign investors to transfer funds related to their investments.[3] To invest abroad, foreign investors must acquire the right to free transfers to repatriate their capital and returns, and to make other payments (eg royalties, licence fees, technology payments and raw material purchases).[4] From the state's perspective, FTT is a treaty-based obligation and has never been a customary international rule.[5] From the foreign investor's perspective, it is a fundamental right but not a natural right.[6] The home and host states must, and would, decide the extent to which they allow the movement of payments and capital between the states and the extent to

[1] See IMF, *Balance of Payments and International Investment Position Manual* (6th ed, 2009) 9 ('*Balance of Payment*'); James Gerber, *International Economics* (Pearson International Edition, 4th ed, 2008) 178–88. Note that investment-related current transactions, which create credits or debits of a country's current account, include income, service fees associating to legal, technology or engineering; whereas, investment-related capital (financial) transactions, which create credits or debits of a country's capital transactions, include direct investment, portfolio investment (eg bond, stocks, and equity) and others (eg loans).

[2] Note that inflows refer to initial capital and additional capital for investment while outflows present earnings, income (eg dividends, and capital gains) and payments for loans, interests or royalties. See below Part III(A).

[3] See Abba Kolo and Thomas Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 205, 213.

[4] See ibid. See also Jeswald W Salacuse (ed), *The Law of Investment Treaties* (Oxford University Press, 2nd ed, 2015) 284; Andrew Newcombe and Lluís Paradell, 'Transfer Rights, Performance Requirements and Transparency' in Andrew Newcombe and Lluís Paradell (eds), *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 399, 399–40.

[5] See Abba Kolo, 'Transfer of Funds: the Interaction between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 345, 348 ('IMF and Investment Treaties'); August Reinisch and Christoph Schreuer, 'Transfer Clauses' in August Reinisch and Christoph Schreuer (eds), *International Protection of Investments: The Substantive Standards* (Cambridge University Press, 2020) 970, 978.

[6] See Reinisch and Schreuer (n 5) 978–9.

which they would like to retain monetary sovereignty rights to impose exchange restrictions and capital controls when needed.[7] Exchange restrictions here could include government-approved exchangers, fixed exchange rates and the limits on the amount of currency imported or exported,[8] while capital controls could include taxes on inflows, tariffs, volume restrictions, unremunerated reserve requirements and market-based forces.[9] Whether legislative measures are compatible with the FTT obligation depends on treaty texts, including provisions on FTT obligation and exceptions. From this perspective, the chapter investigates the extent to which FTT provisions in Vietnam's IIAs require legislative measures, in terms of substantive aspects, to be non-restrictive, and whether the provisions allow specific exceptions for restrictive legislative measures.

To define substantive requirements for legislative measures under FTT provisions, the chapter first surveys FTT provisions in Vietnam's IIAs (Part I). It finds that all 60 of the IIAs surveyed oblige Vietnam to guarantee the freedom of investment-related transfers to foreign investors. In terms of explicit or implicit exceptions to the FTT obligation, the FTT provisions in these 60 IIAs can be divided into four formulations: those without exceptions/references in 5 IIAs – A; those making reference to international agreements in two IIAs – B; those with economic safeguard exceptions in 14 IIAs – C; and those containing references to domestic laws in 19 IIAs – D.

[7] See generally Prabhash Ranjan, 'Capital-flow Management Measures and International Investment Law: Never the Twain Shall Meet? in Christian J Tams, Stephan W Schill and Rainer Hofmann (eds), *International Investment Law and the Global Financial Architecture* (Edward Elgar Publishing, 2017) 257, 262–4.

[8] See generally IMF, *Annual Report on Exchange Arrangements and Exchange Restrictions 2019* (Report, 2020) ('IMF's 2020 Annual Report') 21–8 ('*Exchange Restrictions*'); Annamaria Viterbo (ed), *International Economic Law and Monetary Measures: Limitations to States' Sovereignty and Dispute Settlement* (Edward Elgar Publishing, 2012) 153–5; Michael Waibel, 'BIT by BIT: the Silent Liberalisation of the Capital Account' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 497, 500–2.

[9] See generally *Exchange Restrictions* (n 8) 32–8; Viterbo (n 8) 156–9; Gabriel Gari, 'GATS Disciplines on Capital Transfers and Short-term Capital Inflows: Time for Change?' (2014) 17(2) *Journal of International Economic Law* 399, 404; Masahiro Kawai and Mario B Lamberte (eds), *Managing Capital Flows: The Search for a Framework* (Edward Elgar Publishing, 2010); Kevin P Gallagher, 'Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements' (Discussion Paper, UNCTAD, No 58, May 2010) 2–5 <https://unctad.org/system/files/official-document/gdsmdpg2420101_en.pdf> ('Policy Space').

Before analysing the four formulations of FTT provisions in the context of Vietnam's IIAs, this chapter briefly reviews tribunals' interpretations of FTT provisions to find (i) the objects of FTT protection, (ii) substantive requirements for non-restrictive legislative measures and (iii) justification for restrictive legislative measures (Part II). Such FTT provisions are to a certain extent similar to those in Vietnam's IIAs. Regarding the objects of FTT protection (i), this review finds that FTT provisions have been interpreted by different tribunals to protect either investment-related transfers (transfers of funds and/or transfers of physical assets), or both investment-related transfers and funds for potential transfers. As to substantive requirements for non-restrictive legislative measures (ii), the review finds that to be legitimate, measures must not cause restrictions on transfers. Regarding justification for restrictive legislative measures (iii), it also finds that tribunals have acknowledged that measures restricting transfers might be justified by exceptions under international law, or on the ground of states' monetary sovereignty. Based on the review, the section suggests four practical questions to analyse FTT provisions in the context of Vietnam's IIAs.

Considering the four practical questions in international arbitration practice and based on the VCLT interpretation rules, the chapter analyses all FTT provision formulations in Vietnam's IIAs together to look for (i) the objects of FTT protection and (ii) substantive requirements for non-restrictive legislative measures, particularly the compatible effect level (Part III). As to the objects of FTT protection (i), the chapter finds that FTT provisions in Vietnam's IIAs would be likely interpreted to protect *non-exhaustive* investment-related transfers (transfer of funds, or of both funds and physical assets) or *exhaustive* investment-related transfers (only transfers of funds). Regarding the compatible effect level (ii), it finds that measures must not cause delay/restriction/prevention to covered transfers. This effect requirement is drawn from all formulations of FTT provisions.

The chapter continues to analyse each FTT provision formulation in Vietnam's IIAs separately to look for (iii) substantive qualifications for legislative measures when their restriction effect is incompatible (Part IV). Under Formulation A, measures causing restrictions on investment-related transfers would not likely be justified by any reason. Restrictive measures could be accepted by Formulation B to a certain extent if undertaken to address BOP or external financial difficulties. Such measures could additionally be permitted by Formulation C in the cases of serious difficulties for macroeconomic

management, or serious economic or financial disturbance, and by Formulation D in protecting financial or monetary security, or other potential reasons.

The chapter concludes with different substantive requirements for non-restrictive legislative measures and substantive qualifications for restrictive legislative measures, imposed by FTT provisions with different approaches. Certain restrictive legislative measures could be accepted if undertaken for security or public interests, brought about by treaty exceptions in certain treaty contexts as analysed in Chapters 7 and 8.

I A MAP OF PROVISION FORMULATIONS – FREE TRANSFER TREATMENT PROVISIONS IN VIETNAM'S IIAS

A *Section Overview*

The FTT provisions in Vietnam's 60 IIAs share a common structure, with components including (i) a general statement on FTT obligation, (ii) types of transfers, and (iii) different guarantees for free transfers. Those in more than half of Vietnam's IIAs (35/60) also include (iv) full references to domestic/international laws, and/or economic safeguard exceptions.

In this chapter, the study takes the last of these components as a central criterion for classifying FTT provisions in Vietnam's IIAs. As a result, these FTT provisions can be divided into four formulations: those without exceptions/references in 25 IIAs – A; those with references to international agreements in two IIAs – B; those with economic safeguard exceptions in 14 IIAs – C; and those with references to domestic laws in 19 IIAs – D (Table 5.1). The formulations of FTT provisions in Vietnam's IIAs will remain the same even if the *Vietnam-EU IPA* and the *RCEP* come into force since FTT provisions in these two treaties are similar to those with Formulation C.[10]

Notably, certain FTT provisions with Formulation A/B/C/D also contain exceptions that allow state authorities to restrict/delay transfers of funds when foreign investors have not fully performed their non-monetary and monetary obligations under public laws.[11] However, this feature is not considered a criteria for provision classification because it only governs administrative measures that fall outside of the scope of this study. The non-monetary obligations of foreign investors here relate to procedures to assist law enforcement or keeping of financial reports/records. The monetary obligations are meant to include: (i) those towards creditors when foreign investors are insolvent or bankrupt, or towards stockholders; (ii) those related to society and foreign investors' employees, such as social security, public retirement, compulsory savings schemes and severance entitlements; (iii) those relating to judgments or orders in administrative or criminal proceedings; and (iv) tax obligations.

[10] See *Vietnam-EU IPA* ch 2 art 2.8, ch 4 arts 4.7, 4.10–4.11; *RCEP* ch 10 art 10.9, ch 17 art 17.15. See also app 5.

[11] See, eg, *Vietnam-Cuba BIT* (2007) art 7(4)(a)–(f); *Vietnam-Kazakhstan BIT* art 7(3); *Vietnam-Slovakia BIT* art 7(3)(c)–(i); *Vietnam-Switzerland BIT* art 4(3); *Vietnam-Thailand BIT* art 8(1); *Vietnam-Turkey BIT*

Table 5.1: Formulations of FTT Provisions in Vietnam's IIAs

FTT Provisions	Formulations	Treaty Contexts (60)	Treaty Contexts* (42)
FTT Provisions without References/Exceptions	A	25[12]	12[13]
FTT Provisions with References to International Agreements	B	2[14]	1[15]
FTT Provisions with Economic Safeguard Exceptions	C	14[16]	13[17]
FTT Provisions with References to Domestic Laws	D	19[18]	16[19]
Note: Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.			

art 7(3); *Vietnam-US BTA* ch VII art 1(6).

[12] Twelve BITs with non-EU members: see *Vietnam-Armenia BIT* art 5; *Vietnam-Iceland BIT* art 4; *Vietnam-Korea BIT (2003)* art 6; *Vietnam-Kuwait BIT* art 6; *Vietnam-Mozambique BIT* art 6; *Vietnam-Russia BIT* art 5; *Vietnam-Singapore BIT* art 8; *Vietnam-Switzerland BIT* art 4; *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-Thailand BIT* art 8; *Vietnam-Turkey BIT* art 7; *Vietnam-UK BIT* art 6. For 13 BITs with EU members: see *Vietnam-Austria BIT* art 5; *Vietnam-BLEU BIT* art 5; *Vietnam-Bulgaria BIT* art 6; *Vietnam-Czech BIT* art 6; *Vietnam-Finland BIT* art 7; *Vietnam-France BIT* art 6; *Vietnam-Germany BIT* art 5; *Vietnam-Hungary BIT* art 6; *Vietnam-Italy BIT* art 6; *Vietnam-Netherlands BIT* art 5; *Vietnam-Poland BIT* art 6; *Vietnam-Spain BIT* art 7; *Vietnam-Sweden BIT* art 5.

[13] Twelve BITs with non-EU members: see above n 12.

[14] One IIA with a non-EU member: see *Vietnam-US BTA* ch VII art 1. For one BIT with an EU member: see *Vietnam-Denmark BIT* arts 7, 4(2).

[15] One BIT with a non-EU member: see above n 14.

[16] Eleven IIAs with non-EU members: see *Vietnam-Cuba BIT (2007)* art 7; *Vietnam-Philippines BIT* art VII; *Vietnam-Japan BIT* arts 12, 16; *ACIA* arts 13, 16; *ASEAN-China IA* arts 10, 11; *ASEAN-Korea IA* arts 10, 11; *ASEAN-ANZ FTA* ch 11 art 8, ch 15 art 4; *ASEAN-Hong Kong IA* arts 12, 13; *Vietnam-Korea FTA* art 9.8, annex 9-C; *Vietnam-EAEU FTA* arts 8.37, 8.8; *CPTPP* ch 9 art 9.9, ch 29 art 29.3, annex 9-E. For three BITs with EU members: see *Vietnam-Greece BIT* art 7(4); *Vietnam-Slovakia BIT* art 7; *Vietnam-Romania BIT* art 4.

[17] Eleven IIAs with non-EU members: see above n 16. They also include the *Vietnam-EU IPA* and the *RCEP*: see above n 10.

[18] Sixteen BITs with non-EU members: see *Vietnam-Argentina BIT* art 5; *Vietnam-Belarus BIT* art 5; *Vietnam-Cambodia BIT (amended 2012)* art 6; *Vietnam-China BIT* art 5; *Vietnam-Egypt BIT* art 6; *Vietnam-Iran BIT* art 8; *Vietnam-Kazakhstan BIT* art 7; *Vietnam-Laos BIT* art 5; *Vietnam-Macedonia BIT* art 7; *Vietnam-Malaysia BIT* art 6; *Vietnam-Mongolia BIT* art 6; *Vietnam-Oman BIT* art 7; *Vietnam-Ukraine BIT* art 5; *Vietnam-Uruguay BIT* art 7; *Vietnam-Uzbekistan BIT* art 5; *Vietnam-Venezuela BIT* art 6. For three BITs with EU members: see *Vietnam-Estonia BIT* art 7; *Vietnam-Latvia BIT* art 6; *Vietnam-Lithuania BIT* art 6.

[19] Sixteen BITs with non-EU members: see above n 18.

B *FTT Provisions without Exceptions/References – Formulation A*

Of the 60 Vietnamse IIAs surveyed, 25 contain FTT provisions having no economic safeguard exceptions or 'absolute' references to domestic/international laws (Table 5.1). Those provisions start with a general obligation that '[e]ach Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer … of …'.[20] Following that general obligation is the list, exhaustive or non-exhaustive, of inflows and outflows, and specific guarantees to facilitate transfers. Those guarantees relate to transfer time, the convertibility of foreign currencies, and the exchange rate.

C *FTT Provisions with References to International Agreements – Formulation B*

In two other Vietnamese IIAs, FTT provisions do not express exceptions related to economic safeguards but do make references to other international agreements (Table 5.1). The provision in the *Vietnam-US BTA* requires FTT as being consistent with state party's obligations to the *IMF Agreement*.[21] That in the *Vietnam-Denmark BIT* recognises the right of each treaty party to take protective measures in accordance with multilateral agreements to which the party is or may become a member.[22] These references are expected to bring exceptions to FTT obligation in relevant treaty contexts, which is later canvassed in Part IV(B).

D *FTT Provisions with Economic Safeguard Exceptions – Formulation C*

FTT provisions in Vietnam's 14 IIAs mainly incorporate economic safeguard exceptions while certain of them additionally refer to international and/or domestic laws (Table 5.1). In certain IIAs, FTT obligation and economic safeguard exceptions are designed in separate articles or with an annex.[23] However, through their structural links,[24] such

[20] See, eg, *Vietnam-Singapore BIT* art 8.
[21] *Vietnam-US BTA* ch VII art 1. See also app 5.
[22] *Vietnam-Denmark BIT* art 4(2). See also app 5.
[23] *Vietnam-Japan BIT* arts 12, 16; *Vietnam-EAEU FTA* arts 8.37, 8.8; *CPTPP* ch 9 art 9.9, ch 29 art 29.3; *Vietnam-Korea FTA* art 9.8, annex 9-C; *ACIA* arts 13, 16; *ASEAN-China IA* arts 10, 11; *ASEAN-ANZ FTA* ch 11 art 8, ch 15 art 4*; ASEAN-Korea IA* arts 10, 11; *ASEAN-Hong Kong IA* arts 12, 13. See also app 5.
[24] Note that Article 16 of the *Vietnam-Japan BIT*, Article 29.3(1) in chapter 29 of the *CPTPP*, and Article 8.37(1) in chapter 8 of the *Vietnam-EAEU FTA* make direct links between FTT obligation and exceptions for economic safeguards when starting the provisions respectively with the phrases '[a] Contracting Party may adopt or maintain measures not conforming with its obligations under … [provisions on FTT and NT]', '[n]othing in this Agreement shall be construed to prevent a Party from adopting or maintaining … [safeguard measures]', and '[e]xcept under the circumstances envisaged in … [a provision on safeguard measures]'. Similarly, the footnote 7 attached to Article 9.8 in chapter 9 of the *Vietnam-Korea FTA*

exceptions are considered standard or specific exceptions to the FTT obligation. For this study, those separate articles and/or annex are viewed together as 'FTT provisions with economic safeguard exceptions'.

Based on exceptions, FTT provisions in the *ASEAN-Korea IA* and *Vietnam-Korea FTA* allow restrictive measures to address four situations: (i) serious BOP difficulties; (ii) serious external financial difficulties; (iii) serious difficulties for macroeconomic management and/or (iv) serious economic/financial disturbance caused by or threatened by capital movements.[25] FTT provisions in the *Vietnam-Japan BIT*, *ASEAN-Hong Kong IA* and *CPTPP* accept only the first three,[26] and those in the *ACIA* and *ASEAN-China IA* cover only the first two and the last.[27] Notably, safeguard exceptions for restrictive legislative measures in the *CPTPP* 'shall not apply to payments or transfers relating to foreign direct investment'.[28] In the *Vietnam-Romania BIT* and *Vietnam-Philippines BIT*, FTT provisions can refer respectively to all four situations via the phase 'the exceptional financial or economic circumstances',[29] and to the first three via the phrase 'the integrity and independence of its currency, its external financial position and balance of payments'.[30] FTT provisions in the *Vietnam-EAEU FTA* and *ASEAN-ANZ FTA* have a similar structure to those in the two IIAs first mentioned but cover only the first two situations,[31] while the provision in the *Vietnam-Slovakia BIT* has a similar structure to those in the two BITs newly mentioned but is limited to the first and third situations.[32] In the Vietnam's BITs with Greece and Cuba, FTT provisions only provide the first situation.[33]

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specifies Annex-C on safeguard measures as being applied to this FTT article. Whereas, Article 13(4) of the *ACIA*, Article 10(5) of the *ASEAN-China IA*, Article 8(4) in chapter 11 of the *ASEAN-ANZ FTA*, Article 10(3) of the *ASEAN-Korea IA*, Article 12(4) of the *ASEAN-Hong Kong IA* similarly provide:

> Nothing in this Agreement [or Chapter] shall affect the rights and obligations of the Member States as members of the IMF, under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Member State shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Agreement [or Chapter] regarding such transactions, except … [or inconsistently with the conditions provided for in paragraph … of this Article].

[25] *ASEAN-Korea IA* art 11(1)–(2); *Vietnam-Korea FTA* annex 9-C s 1. See also app 5.
[26] *Vietnam-Japan BIT* art 16(1); *ASEAN-Hong Kong IA* art 13(1); *CPTPP* ch 29 art 29.3(1)–(2). See also app 5.
[27] *ACIA* arts 13(4), 16(1); *ASEAN-China IA* arts 10(5), 11(1). See also app 5.
[28] *CPTPP* art 29.3(4).
[29] *Vietnam-Romania BIT* art 4(2). See also app 5.
[30] *Vietnam-Philippines BIT* art VII. See also app 5.
[31] *Vietnam-EAEU FTA* ch 8 art 8.8(1); *ASEAN-ANZ FTA* ch 15 art 4(1). See also app 5.
[32] *Vietnam-Slovakia BIT* art 7. See also app 5.
[33] *Vietnam-Greece BIT* art 7(4); *Vietnam-Cuba BIT* art 7(4). See also app 5.

One might notice that exceptions in the *Vietnam-Romania BIT*, *Vietnam-Philippines BIT* and *Vietnam-Slovakia BIT* respectively contain the phrases 'in accordance with its laws and regulations', 'within the scope of its laws and regulations' and 'through the application of its laws and regulations'.[34] However, since they limit permissible objectives to certain safeguard reasons, they are classified in this group rather than the following group.

E *FTT Provisions with References to Domestic Laws – Formulation D*

In the remaining 19 Vietnamese IIAs, FTT provisions have a common feature of making full reference to domestic laws (Table 5.1). To connect the FTT obligation to domestic laws, these provisions similarly comprise phrases such as 'subject to its laws and regulations',[35] 'in accordance with the laws [and/or] regulations of the contracting party',[36] and 'subject to [or in accordance with] its laws, regulations and administrative practices'.[37] FTT provision in the *Vietnam-Estonia BIT* provides another expression to link the FTT obligation to international law in addition to domestic laws – 'in accordance with its laws and regulations and international law'.[38] However, this provision is grouped here because the effects brought about by the 'in accordance with its laws and regulations' constituent cover the effect generated by the 'international law' one. These effects are clarified later in Part IV(D). For this thesis, FTT provisions in this group are called 'FTT provisions with references to domestic laws'.

[34] *Vietnam-Romania BIT* art 4(2); *Vietnam-Philippines BIT* art VII; *Vietnam-Slovakia BIT* art 7(3)(a).
[35] *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-China BIT* art 5(1); *Vietnam-Egypt BIT* art 6(1); *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1); *Vietnam-Macedonia BIT* 7(1); *Vietnam-Mongolia BIT* art 6(1); *Vietnam-Oman BIT* art 7(1); *Vietnam-Uruguay BIT* art 7(1); *Vietnam-Venezuela BIT* art 6(1).
[36] *Vietnam-Uzbekistan BIT* art 5(1); *Vietnam-Argentina BIT* art 5(2); *Vietnam-Iran BIT* art 8(1) [tr author].
[37] *Vietnam-Laos BIT* art 6(1); *Vietnam-Belarus BIT* art 5(1); *Vietnam-Malaysia BIT* art 6(1); *Vietnam-Ukraine BIT* art 5(1).
[38] *Vietnam-Estonia BIT* art 7(1).

II A FOCUSED REVIEW OF TRIBUNALS' INTERPRETATION APPROACHES – FREE TRANSFER TREATMENT PROVISIONS IN INTERNATIONAL ARBITRATION PRACTICE

A *Section Overview*

FTT provisions in Vietnam's IIAs have yet be invoked and interpreted in arbitration, so there no practical view on those provisions has been expressed. However, FTT provisions in other IIAs concluded by other countries have been mentioned in at least 38 claims,[39] and these formulate the basis of the following review.

In interpreting FTT provisions, tribunals have adopted different approaches to the objects of treatment protections (Part II(B)). FTT provisions have been interpreted by tribunals as protecting (i) investment-related transfers, and/or (ii) funds for potential transfers. The first scope of protection is divided, extending to protect transfers of funds *and* physical assets, according to one tribunal, but being limited to transfers of funds only, according to other tribunals. Where state measures govern the objects of treatment protection, to be legitimate they must not place major restrictions on transfers, or funds for potential transfers, as consistently maintained by contemporary tribunals (Part II(C)). Certain measures, despite significantly restricting transfers, could be considered exemption according to certain tribunals if they fell within the scope of international law or the state's monetary sovereignty (Part II(D)). These approaches are also discussed by other scholars to a certain extent.[40]

[39] Noted that 20 of the 38 claims have been resolved at the merits stage with four cases in favor of foreign investors. The figure is calculated by the author from the data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>. For the latest classifications of relevant cases as 'violations of transfer obligations' and 'non violation of transfer obligations', see Reinisch and Schreuer (n 5) 992-6.

[40] Viterbo (n 8) 248–9; Newcombe and Paradell (n 4) 415–6.

B *Different Objects of Treatment Protection*

1 Objects of Treatment Protection: Investment-related Transfers or Beyond?

FTT provisions in investment treaties may differ from each other in the list of types of transfers (exhaustive or non-exhaustive), the number of guarantees, the content of each guarantee and the inclusion of references or exceptions. However, the general position on FTT is quite similar: for example, '[e]ach Contracting Party shall grant [or guarantee to] investors [or nationals or companies] of the other Contracting Party the free transfer of payments relating to their investments [or in connection with an investment]'.[41] Such FTT obligation is commonly understood to protect investment-related transfers. However, FTT provisions were interpreted by tribunals in certain cases to additionally protect funds for potential transfers.

The FTT obligation to protect only investments-related transfers is clarified, for example, by the tribunal in *AES v Kazakhstan*.[42] This tribunal distinguished the right to transfer returns protected by a FTT provision from the right to receive returns that could be covered by a FET provision. In this case, the claimant argued that in requiring under a 2012 Law that all returns to be reinvested, Kazakhstan failed to assure the claimant the free transfer of returns under Article 14(1) of the *ECT* and Article IV(1) of the *Kazakhstan-US BIT*. According to the claimant, the rollover requirement prevented it from gaining returns and transferring them 'without delay'. Kazakhstan disagreed with this argument since the 2012 Law did not impose any restriction on the right to transfer of returns; it also pointed that the claimant attempted to turn a FTT provision into an 'international guarantee' for the right to receive returns. The tribunal explained that the FET provision might provide additional protection for 'the right to earn and transfer reasonable returns of its investments';[43] however, the FTT provision only established 'more specific principles concerning conditions for the transfer of such returns and other capital'.[44] According to the tribunal, the restriction violated the FET obligation to the extent that it prevented the claimant from creating reasonable returns of investments and

[41] See, eg, *Switzerland-Zimbabwe BIT* art 5; *Germany-Zimbabwe BIT* art 5.
[42] *AES Corporation and Tau Power BV v Republic of Kazakhstan (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/16, 2013, 1 November 2013) ('*AES v Kazakhstan*').
[43] Ibid [425].
[44] Ibid.

exercising its right to such as repatriation; however, such a restriction did not violate the FTT obligation to accord freedom to transfers.[45]

The tribunal in *Biwater v Tanzania*[46] also rejected an allegation of FTT violation on a similar ground. According to the tribunal, the claimant's right to 'the unrestricted transfer' of its investment and returns protected under Article 6 of the *Tanzania-UK BIT* would not be affected if the claimant had funds available for transfers,[47] or by the fact that the claimant could not sell shares or liquidate any asset in City Water until City Water was under insolvency proceedings.[48] In the tribunal's view, the FTT provision at issue was 'not a guarantee that investors will have funds to transfer',[49] and the 'free transfer principle' in general was 'aimed at measures that would restrict the possibility to transfer, such as currency control restrictions or other measures taken by the host States which effectively imprison the investor's funds'.[50]

However, certain FTT provisions have been applied to protect funds for potential transfers. In particular, the tribunal in *Achema v Slovakia (I)*[51] considered the applicable FTT provision as additional protection of the right to receive returns, and the tribunal in *Bernhard von Pezold and Others v Zimbabwe*[52] perceived the applicable FTT provision as additional protection of the right to hold foreign currency in international bank account. Those tribunals did not state the reasoning for their decisions. In *Achema v Slovakia (I)*, the claimant submitted that the FTT provision in Article 4 of the *Netherlands-Slovakia BIT* was intended to guarantee the 'completely free transfer of funds'[53] and Slovakia's regulation requiring all profits from health insurance be used for health purposes (the 'ban on profits') failed to accord such a guarantee.[54] Slovakia disagreed with this submission to the point that this regulation was 'unrelated' to 'the very different issue' addressed by

[45] Ibid [426].
[46] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008) ('*Biwater v Tanzania*'). For more relevant discussion on *Biwater v Tanzania*, see Alejandro Turyn and Facundo Perez Aznar, 'Drawing the Limits of Free Transfer Provisions' in Michael Waibel et al (ed), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 51, 54–6.
[47] See *Biwater v Tanzania* (n 46) [735].
[48] Ibid [732]
[49] Ibid [735].
[50] Ibid.
[51] *Achmea BV (formerly Eureko BV) v The Slovak Republic (I) (Final Award)* (PCA Arbitral Tribunal, Case No 2008-13, 7 December 2012) ('*Achmea v Slovakia (I)*').
[52] *Bernhard von Pezold and others v Republic of Zimbabwe (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/15, 28 July 2015) ('*Bernhard von Pezold and others v Zimbabwe*').
[53] *Achmea v Slovakia (I)* (n 51) [265].
[54] Ibid [96].

the FTT provision,[55] regardless of whether such a regulation restricted the ability of the claimant's health insurance company, Union Healthcare, to declare dividend payments. The tribunal did not thoroughly respond to this point, but rather simply put that 'the ban on profits was inconsistent with Respondent's obligations under th[e] Article [4].[56]

In *Bernhard von Pezold and Others v Zimbabwe*, the claimants challenged, inter alia, a state measure which forced the claimants (in particular, Border Estates) to sell a percentage of its US dollar export earnings for a purportedly equivalent amount of Zimbabwean dollars based on official exchange rates between 2003 and 2009 as a violation of FTT.[57] The tribunal was not reluctant to find that such a restriction on individual holdings of foreign currency violated FTT provisions in Article 5 of the *Switzerland-Zimbabwe BIT* and Article 5 of the *Germany-Zimbabwe BIT*, even without interpreting the content of these provisions.[58] It should be noted that, in the claimants' claim, financial assets in the US dollar bank accounts of the claimants, rather than transfers of those assets, were affected; however, the tribunal did not approach the issue from this direction.

2 Investment-related Transfers: Transfers of Funds or Beyond?

FTT provisions are generally understood to protect transfers of funds related to investments. Most claims under FTT provisions have concerned fund transfers.[59] However, in two recent cases where tribunals heard investors' claims for protection of physical asset-related transfers under FTT provisions, one tribunal upheld the claim.

The first case is *Rusoro Mining v Venezuela*.[60] The claimant, in this case, argued that gold fell within the definition of "returns" and the exports of gold were protected by the FTT provision in Article VIII.1 of the *Canada-Venezuela BIT* as the transfers of 'returns'.[61] However, the tribunal rejected this argument and upheld the respondent's point that gold

[55] See Ibid [268].
[56] Ibid [286].
[57] *Bernhard von Pezold and Others v Zimbabwe* (n 52) [603].
[58] Ibid [609].
[59] See, eg, *AES v Kazakhstan* (n 42); *Biwater v Tanzania* (n 46); *Bernhard von Pezold and Others v Zimbabwe* (n 52).
[60] *Rusoro Mining Ltd v Bolivarian Republic of Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/5, 22 August 2016) ('*Rusoro Mining v Venezuela*').
[61] Ibid [567].

was ‘a commodity, not a currency’[62] and it only became a currency ‘if a sovereign state decide[d] to mint it and to make it legal tender’.[63] The tribunal further emphasised that the claimant’s subsidiaries mined the gold ‘to sell it as a commodity to unrelated third parties – not distribute it to their shareholder *in lieu* of dividends’.[64] Even though in this case, the tribunal examined whether gold was considered ‘returns’, it cannot be denied that the issue was related to gold as a physical asset rather than as an amount.

In *Karkey Karadeniz v Pakistan*,[65] the claimant did not claim its physical assets as ‘returns’ but qualified them as a potential type under the non-exhaustive list of transfers. Specifically, the claimant argued that Pakistan violated the FTT provision in Article V of the *Pakistan-Turkey BIT* because it had detained three Karley’s vessels at the time of dispute and another vessel in the past.[66] The tribunal upheld this claim on two grounds. First, the FTT provision at issue could provide the claimant the right to transfer physical assets related to its investment ‘without unreasonable delay’, given that this provision included the non-exhaustive list of ‘all transfers related to investment’ and the definition of ‘investment’ in Article I(1) of the BIT covered ‘movable and immovable property’.[67] Second, Pakistan’s actions deprived the claimant of ‘the free disposal of its assets’ as part of its investment.[68]

3 Subsection Remark: Investment-Related Transfers and/or Funds for Potential Transfers

As discussed above, FTT provisions have been interpreted differently by tribunals as protecting either (i) investment-related transfers or (ii) funds for potential investment-related transfers and transfers themselves. Regarding the investment-related transfers, tribunals have interpreted FTT provisions as covering (i) only transfers of funds or (ii) both transfers of funds and physical assets.

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[62] Ibid [568], [574].
[63] Ibid.
[64] Ibid [574] (emphasis in original).
[65] *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/1, 22 August 2017) (‘*Karkey Karadeniz v Pakistan*’).
[66] Ibid [651].
[67] See ibid [654].
[68] Ibid [655].

C *Compatible Effect of Legislative Measures: No Major Restrictions on Transfers*

FTT provisions are generally understood as granting foreign investors the free transfer of payments without restrictions including delays and preventions. Certain tribunals have had no difficulty in defining state measures as having restrictive effects on transfers, probably because such measures created major restrictions.[69] One tribunal found that an additional requirement placed on the procedures of transfer, despite delaying a transfer at issue, did not constitute a restriction that was not permissible under a relevant FTT provision.

Particularly, the tribunal in *Metalpar v Argentina*[70] found no restriction violating the FTT provision in Article V of the *Argentina-Chile BIT* when Argentina, in its Presidential Decree No 1570/2001, required the prior authorisation of Central Bank for fund transfers. The claimant argued that the new requirement of prior authorisation, together with the fact it could not transfer funds abroad under a letter dated 8 May 2003, constituted restrictions on free transfers.[71] Regarding the latter fact, the claimant sought advice from BankBoston, rather than Central Bank, for distributions of USD200,000 in dividends to shareholders, and received a response stating that such transfers (remittances) were prohibited under the mentioned degree.[72] In its defence, Argentina contended that the FTT provision 'does not prevent each State party from establishing certain procedures for such transfer',[73] and that foreign investors were free to transfer any funds regardless of economic crisis. The requirement of prior authorisation, as Argentina explained, gradually became more flexible in practice and after a certain period several transfers were permitted without asking for Central Bank authorisation.[74] According to the tribunal, the claimant was aware of the new requirement and relevant procedures but did not follow them properly such as seeking an approval from Central Bank instead of BankBoston. Thus, the tribunal concluded that Argentina did not violate the FTT provision because the requirement of prior authorisation did not itself constitute a

[69] The *Bernhard von Pezold and Others v Zimbabwe* tribunal found a violation of FTT provision since Zimbabwe refused to release foreign currency for the claimant's transaction without rational reasons: see *Bernhard von Pezold v Zimbabwe* (n 52) [603]–[604], [608].
[70] *Metalpar SA and Buen Aire SA v Argentine Republic (Award on the Merits)* (ICSID Arbitral Tribunal, Case No ARB/03/5, 6 June 2008) ('*Metalpar v Argentina*').
[71] Ibid [107].
[72] Ibid.
[73] Ibid [110].
[74] Ibid [111].

restriction.[75] Notably, the FTT provision at issue clearly provided that '[t]he transfer shall be made without delay according to the procedures established in the territory of each Contracting Party';[76] therefore, the tribunal could easily consider Central Bank's prior authorisation as a part of Argentina's procedures without explicitly mentioning this ground.

D *Justification: Do Public Objectives of Legislative Measures Excuse Restrictive Effect of Legislative Measures?*

There is no clear evidence of tribunals rejecting or accepting justifications from state respondents for restrictions on transfers. However, certain tribunals have recognised exceptions to FTT obligation under international law in general or in line with states' monetary sovereignty.

FTT violations have been established in at least four ISDS cases.[77] However, it cannot be said that the tribunals in these cases found violations of FTT obligation even when state respondents had reasons for their restrictive measures. In *Achmea v Slovakia (I)* and *Karkey Karadeniz v Pakistan*, the respondents did not provide any justification. It is doubtful whether they can justify their measures, given the tribunals' reasoning. In the first case, a ban on profits was found as a FTT violation because this ban affected the claimant's right to receive returns other than its right to free transfers.[78] In the second case, the detainment of the claimant's vessels offended FTT obligation because it restricted the claimant's right to free transfer of physical assets related to its investment, which was perceived by the tribunal, as being protected under FTT provision at issue.[79]

In *Bernhard von Pezold and Others v Zimbabwe*, the respondent did not defend much apart from providing that the land reform was for public purposes, and hence sufficed to qualify 'the measure of land form and the ensuing police power decisions as a normal

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[75] Ibid [179].
[76] *Argentina-Chile BIT* art V(2).
[77] *Achmea v Slovakia (I)* (n 51); *Karkey Karadeniz v Pakistan* (n 65); *Bernhard von Pezold and Others v Zimbabwe* (n 52); *Valores Mundiales, SL and Consorcio Andino SL v Bolivarian Republic of Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/11, 25 July 2017) ('*Valores Mundiales and Consorcio Andino v Venezuela*'). Note that the *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India (Award)* (PCA Arbitral Tribunal, Case No 2016-7, 21 December 2020 ('*Cairn v India*') is not calculated here since a claim of FTT violation in this case was not addressed by the tribunal after a breach of FET was found: at [1825].
[78] See above Part II(B)(1).
[79] See above Part II(B)(2).

exercises of non-compensable police powers'.[80] The measure and decisions here were meant to include: (i) refusing to provide US dollars for claimant's (particularly, Forrester Estate) transactions on 31 December 2001; (ii) forcing the claimants (particularly, von Pezold) to be paid for their tobacco in Zimbabwe dollars between 2004 and 2008; (iii) refusing to release US dollars earned through the sale of tobacco; and (iv) forcing the claimants (particularly, Border Estates) to exchange some of their US dollar proceeds from exports in return for Zimbabwe dollars between 2003 and 2009.[81] The tribunal upheld the claimant's allegation and accepted these measures as restrictions contrary to FTT obligation, but without providing a detailed analysis. Similarly, in *Valores Mundiales and Consorcio Andino v Venezuela*, the tribunal did not face difficulty in considering Venezuela's measures related to a transfer of foreign currency of the share subscription premium as violating FET provision at issue.[82]

Among cases decided in favor of state respondents, certain tribunals perceived that state restrictions on investment-related transfers might not always lead to a violation of FTT obligation, as in *Continental Casualty v Argentina*[83] and *Rusoro Mining v Venezuela*. However, it is uncertain that the tribunals would have accepted state's justification if such restrictions had been found in these cases. In the first case, the *Continental Casualty v Argentina* tribunal was requested to examine, among others, the question of 'whether … Argentina was allowed, notwithstanding its obligations under Art V BIT [FTT provision] to introduce the exchange restrictions of Decree 1570, based on Art XI of the BIT [treaty exceptions], on the IMF Agreement or under customary international law'.[84] In expressing this question or accepting this expression from the claimant, the tribunal implicitly acknowledged that exceptions to the FTT obligation could be found in other sources of international law, including the *IMF Agreement* and CIL, rather than only in investment treaty law. Except for this implicit acknowledgement, the tribunal did not provide any suggestion for answering the question since a transfer at issue was found not related to the claimant's investments protected under the FTT provision.[85]

[80] *Bernhard von Pezold and Others v Zimbabwe* (n 52) [604].
[81] Ibid [603].
[82] *Valores Mundiales and Consorcio Andino v Venezuela* (n 77) [636]–[637].
[83] *Continental Casualty Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) ('*Continental Casualty v Argentina*'). More relevant discussion on *Continental Casualty v Argentina*, see Turyn and Aznar (n 46) 56-71.
[84] *Continental Casualty v Argentina* (n 83) [245].
[85] Ibid.

In the second case, the *Rusoro Mining v Venezuela* tribunal directly expressed its view on the relationship between FTT and exchange restrictions. As put by the tribunal, '[p]rovided that th[e] triple guarantee is complied with, the BIT does not impose restrictions on the manner in which Contracting States decide to regulate their exchange control regime'.[86] However, it is doubtful that the tribunal would accept all exchange restrictions adopted by the state respondent. This is raised from the fact that the tribunal carefully started the sentence with the 'provided that' phrase to make sure exchange restrictions not affecting the triple guarantee – transfers without delay, in a convertible currency and at the rate of exchange applicable on the date of transfer.[87] It should be noted that in this case no transfer related to the claimant's investments was found as being affected by Venezuela's 2010 regulations. The regulations here are related more to the right to hold foreign currencies acquired from, inter alia, export proceeds than to the right to purchase foreign currencies for international transactions/transfers. In particular, they required private companies, including the claimant's business, to repatriate all foreign currency from gold exports and sell it to the Central Bank at the official exchange rate in 2009 and 50% of export proceeds in 2010.[88] In the tribunal's view, even though Venezuela's regulations formed 'a stringent exchange control mechanism',[89] they were considered 'a policy decision' compatible with state's 'monetary sovereignty' and 'the guarantee offered to protected investors in the treaty'.[90]

E *Section Remark: Suggesting Four Practical Questions for an Analysis of FTT Provisions in Vietnam's IIAs*

From the above arbitral practice in the international sphere, inquiries in analysing FTT provisions in the context of Vietnam's IIAs can be suggested. The inquiries include: (i) whether FTT provisions in Vietnam's IIAs are likely interpreted to protect only investment-related transfers, or additionally protect funds for potential transfers; (ii) whether FTT provisions in Vietnam's IIAs are likely be interpreted to cover only transfers of funds, or also cover transfers of physical assets; (iii) whether FTT provisions in Vietnam's IIAs are likely to be interpreted as protecting investment-related transfers

[86] Ibid [577]. The tribunal added that '[s]tates have the choice of abolishing all exchange control restrictions, of establishing certain limits or of submitting all foreign currency transactions to administrative control'.
[87] *Venezuela-Canada BIT* art VIII.
[88] *Rusoro Mining v Venezuela* (n 60) [486]–[488].
[89] Ibid [578].
[90] Ibid.

from any interference which delays/restricts/prevents such transfers, or from only major interference; and (iv) whether FTT provisions in Vietnam's IIAs provide justification or exceptions with accompanying conditions for restrictive measures on transfers. Answers to these questions are discussed in the following sections (Parts III and IV).

III AN ANALYSIS OF FREE TRANSFER TREATMENT PROVISIONS IN VIETNAM'S IIAS: OBJECTS OF TREATMENT PROTECTION AND SUBSTANTIVE REQUIREMENTS FOR LEGISLATIVE MEASURES

A *Different Objects of Treatment Protection*

1 *Objects of Treatment Protection: Investment-related Transfers Only in all Vietnam's IIAs*

If certain FTT provisions have been interpreted by tribunals as requiring additional protections of funds for potential transfers,[91] FTT provisions in Vietnam's IIAs would be likely interpreted as protecting only investment-related transfers, not funds for such transfers.

All FTT provisions in Vietnam's IIAs have a similar statement on the FTT obligation. The statement takes the general form '[e]ach Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of'.[92] The original reading of the provision suggests that the guarantee here is for investment-related transfers rather than for transfers in general or for activities happening before investment-related transfers. In other words, once foreign investors have funds available for transfers related to their investments and wish to make international transfers, they are guaranteed to perform them.

The above reading is confirmed by the list of transfers and guarantees following the general statement on FTT obligation. This FTT obligation could not be breached if there were no real or potential transfers prevented or restricted by state measures. The *AES v Kazakhstan* and *Biwater v Tanzania* tribunals took a similar view that the FTT obligation

[91] See above Part II(B)(1).
[92] See, eg, *Vietnam-Singapore BIT* art 8.

protected only the right to transfer.[93] In *Achema v Slovakia (I)* and B*ernhard von Pezold and Others v Zimbabwe*, where the FTT obligation was interpreted by tribunals to additionally protect the right to receive profits for potential transfers and the right to hold foreign currency for potential transfers respectively,[94] tribunals did not define – indeed, could not have defined – whether there were transfers directly affected by state measures, or whether restrictions at issue were actually imposed on any transfer. This interpretation arguably goes beyond what is expressed in the texts of FTT provisions at issue that are previously mentioned and also serve as examples in Part II(B)(1). These provisions in stating FTT obligation are not dissimilar to those in Vietnam's IIAs analysed here and those invoked in the first two cases discussed in the part mentioned.

The protection of investment-related transfers rather than funds for potential transfers is also clearly shown with FTT provisions having their titles in Vietnam's IIAs. FTT provisions without titles are not considered here.[95] Such titles include 'Transfers',[96] 'Transfer of Payments [or Funds]',[97] 'Free Transfer',[98] 'Free Transfer of Funds',[99] 'Transfer[s] of Payments [or Funds] Related to Investment',[100] and 'Cross-Border Transactions and Transfers'.[101] They also comprise 'Repatriation and Transfer',[102] 'Repatriation',[103] 'Repatriation of Funds',[104] 'Repatriation of Investment',[105]

[93] See above Part II(B)(1).
[94] Ibid.
[95] See, eg, *Vietnam-China BIT* art 5; *Vietnam-Japan BIT* art 12; *Vietnam-Russia BIT* art 5; *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-Thailand BIT* art 8; *Vietnam-Bulgaria BIT* art 6; *Vietnam-France BIT* art 6; *Vietnam-Germany BIT* art 5; *Vietnam-Netherlands BIT* art 5.
[96] *Vietnam-Egypt BIT* art 6; *Vietnam-Mongolia BIT* art 6; *Vietnam-Mozambique BIT* art 6; *Vietnam-Austria BIT* art 5; *Vietnam-Czech BIT* art 6; *Vienam-Greece BIT* art 7; *Vietnam-Hungary BIT* art 6; *Vietnam-Latvia BIT art* 6; *Vietnam-Lithuania BIT* art 6; *Vietnam-Poland BIT* art 6; *Vietnam-Spain BIT* art 7; *Vietnam-Sweden BIT* art 5; *ACIA* art 13; *ASEAN-Korea IA* art 10; *ASEAN-ANZ FTA* ch 11 art 8; *ASEAN-Hong Kong FTA* art 12; *Vietnam-Korea FTA* ch 9 art 9.8; *CPTPP* ch 9 art 9.9. See also *Vietnam-Cambodia BIT (amended 2012)* art 6; *Vietnam-BLEU BIT* art 5 [tr author].
[97] See *Vietnam-EAEU FTA* ch 8 art 8.37. See also *Vietnam-Argentina BIT* art 5; *Vietnam-Slovakia BIT* art 7 [tr author].
[98] *Vietnam-Estonia BIT* art 7; *Vietnam-Finland BIT (2008)* art 7; *Vietnam-Romania BIT* art 4.
[99] *Vietnam-Cuba BIT (2007)* art 5; *Vietnam-Switzerland BIT* art 4 [tr author].
[100] See *Vietnam-Kazakhstan BIT* art 9; *Vietnam-Kuwait BIT* art 6; *Vietnam-Oman BIT* art 7; *Vietnam-Venezuela BIT* art 6. See also *Vietnam-Armenia BIT* art 5; *Vietnam-Macedonia BIT* art 7; *Vietnam-Uruguay BIT* art 7 [tr author].
[101] *Vietnam-US BTA* ch VII art 1.
[102] *Vietnam-Turkey BIT* art 7.
[103] *Vietnam-Singapore BIT* art 8.
[104] *Vietnam-Korea BIT (2003)* art 6.
[105] *Vietnam-Laos BIT* art 6; *Vietnam-Malaysia BIT* art 6; *Vietnam-Philippines BIT* art VII.

'Repatriation of Investment and Returns',[106] 'Repatriation of Capital and Returns',[107] and 'Repatriation and Transfer of Capital and Returns'.[108]

Furthermore, the rationale for having FTT provisions in investment treaty law and in Vietnam's IIAs particularly is to ensure money mobility in current or capital transactions. The protection of funds for potential transfers from arbitrary measures or expropriation should be governed by provisions on FET or expropriation, rather than by provisions on transfers.

2 *Investment-related Transfers: Non-exhaustive Transfers in 43 Vietnam's IIAs or Exhaustive Transfers in 17 Vietnam's IIAs*

The scope of FTT provisions in Vietnam's IIAs depends on their objects (investment-related transfers). The investment-related transfers are non-exhaustive in the majority of Vietnam's IIAs, and exhaustive in a smaller number of IIAs. The non-exhaustive coverage and the exhaustive coverage of transfers both appear in FTT provisions with Formulation A, B, C and D (Table 5.2).

Non-exhaustive lists of investment-related transfers are found in FTT provisions of 43 IIAs (Table 5.2). Almost all the provisions contain the word/phrase such as 'including',[109] 'include',[110] or 'include, in particular, though not exclusively [or not exclusive the following]'.[111] In certain IIAs, FTT provisions mention the word/words like 'especially',[112] 'and in particular',[113] or 'particular of'.[114] Given such expressions, the FTT obligation is not limited to transfers specified in FTT provisions.

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[106] *Vietnam-UK BIT* art 6.
[107] *Vietnam-Iceland BIT* art 4.
[108] *Vietnam-Denmark BIT* art 7.
[109] See *Vietnam-China BIT* art 5(1); *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Kuwait BIT* art 6(1); *Vietnam-Macedonia BIT* art 7(1); *Vietnam-Singapore BIT* art 8; *Vietnam-Switzerland BIT* art 4(1); *Vietnam-Venezuela BIT* art 6(1). See also *Vietnam-Cuba BIT (2007)* art 7(1); *Vietnam-Uruguay BIT* art 7(1) [tr author].
[110] See *Vietnam-Oman BIT* art 7(2); *Vietnam-Turkey BIT* art 7(1); *Vietnam-US BTA* ch VII art 1(3); *Vietnam-Korea FTA* ch 9 art 9.8(1); *CPTPP* ch 9 art 9.9(1); *ACIA* art 13(1); *ASEAN-Korea IA* art 10(1); *ASEAN-China IA* art 10(1); *ASEAN-ANZ FTA* ch 11 art 8(1); *ASEAN-Hong Kong IA* art 12(1).
[111] See *Vietnam-Korea BIT (2003)* art 6(1); *Vietnam-Japan BIT* art 12(1); *Vietnam-Mozambique BIT* art 6(1); *Vietnam-Czech BIT* art 6(1); *Vietnam-Estonia BIT* art 7(1); *Vietnam-Finland BIT* art 7(1); *Vietnam-Greece BIT* art 7(2); *Vietnam-Hungary BIT* art 6(1); *Vietnam-Netherlands BIT* art 5; *Vietnam-Poland BIT* art 6(1); *Vietnam-Spain BIT* art 7(1); *Vietnam-Egypt BIT* art 6(1). See also *Vietnam-Argentina BIT* art 5; *Vietnam-Cambodia BIT (amended 2012)* art 6; *Vietnam-Ukraine BIT* art 5(1); *Vietnam-Uzbekistan BIT* art 5(1); *Vietnam-Austria BIT* art 5(1); *Vietnam-Belarus BIT* art 5; *Vietnam-Slovakia BIT* art 7(1) [tr author].
[112] See *Vietnam-Iceland BIT* art 4(1).
[113] See *Vietnam-EAEU FTA* ch 8 art 8.37(1). See also *Vietnam-BLEU BIT* art 5(1); *Vietnam-Germany BIT*

Among the FTT provisions having the non-exhaustive lists in these 43 IIAs, those in 36 include examples of both outward and inward transfers[115] and those in seven provide examples of outward transfers only.[116] Outward transfers here refer to (i) income, (ii) proceeds from partly or totally selling or liquidating investment, (iii) loan repayments and other expenses, (iv) compensation or payments paid by the host state, and (v) earnings of foreign employees. The two first types are common outflows related to foreign investments, the second being a special type getting protected by investment treaties but not by the *IMF Agreement*.[117] Of these, income transfers can include capital gains, profit, interests, dividends, licences, and royalties or fees from intangible rights.[118] The third type relates to international payments made by foreign investors. In addition to repayment of loan, other investment-related expenses contain 'patents or license fees', 'technical assistance, technical service and management fees' and 'contracting projects'.[119] The two last types are not, by their nature, parts of investments but are associated with investments.[120] They come from the practice that during the period of their investments, foreign investors might receive host state's compensation for expropriation or losses in civil strives or payments arising from dispute settlement, and they might need different experts from other countries to work for their projects.[121]

As to inflows provided in the 36 of the 43 IIAs, they include (i) initial (or principal) investment (or capital amounts)[122] and/or (ii) additional investment to the establishment, maintenance, development, and extension of the investment (or contributions to capital).[123] Where FTT provisions in seven IIAs do not mention inflows in their non-exhaustive list, an additional investment could be possibly protected.[124] In the words of Dolzer and Schreuer, 'whenever transfers are allowed in general terms, such as "in

art 5 [tr author].
[114] See *Vietnam-Romania BIT* art 4(1).
[115] See below nn 147–53.
[116] See below nn 154–6.
[117] UNCTAD, *Transfer of Funds: UNCTAD Series on Issues in International Investment Agreements* (1999) 12 ('*Transfer of Funds*').
[118] See, eg, *Vietnam-China BIT* art 5(1)(a); *Vietnam-Korea BIT (2003)* art 6(1)(a); *Vietnam-Japan BIT* art 12(1)(b); *Vietnam-Singapore BIT* art 8(a).
[119] See, eg, *Vietnam-Singapore BIT* art 8(d)–(f).
[120] See, eg, *Vietnam-Kuwait BIT* art 6(1)(g)–(i).
[121] See, eg, *Vietnam-Japan BIT* art 12(1)(e)–(f).
[122] See below nn 147–9.
[123] See below nn 150–3.
[124] See below nn 154–6.

relation to investments," both directions of transfers are covered'.[125] However, it is unlikely that they implicitly cover initial investment because those seven IIAs only govern post-established investment, not a pre-established investment. The same effect and explanation can be found in the cases of four IIAs whose FTT provisions only specify additional investments.[126]

Exhaustive investment-related transfers can be found in FTT provisions in the remaining 17 IIAs (Table 5.2). These FTT provisions typically express 'the free transfer …',[127] 'the following transfers',[128] 'the [free/unrestricted] transfer of',[129] or 'namely'.[130] Given such expressions, the FTT obligation applies only to transfers specified in the provisions. Of the FTT provisions in the given 17 IIAs, those in 15 cover outflows only and those in the other two cover both outflows and inflows. The outflows here include five categories listed above, except in certain treaty contexts.[131] The inflows in the *Vietnam-Armenia BIT* relate to additional capital[132] and those in the *Vietnam-Bulgaria BIT* relate to both capital and additional capital.[133] Given the exhaustive list of transfers, a state (say, Vietnam) has an obligation of FTT towards such limited transfers only.

3 *Investment-related Transfers: Transfers of Funds in all Vietnam's IIAs and Transfers of Physical Assets in Three Vietnam's IIAs*

Given investment-related transfers as the objects of protection, FTT provisions under almost all of the 60 Vietnamese IIAs protect only funds transfers, with both funds and physical asset-related transfers covered under three IIAs.

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[125] Rudolf Dolzer and Christoph Schreuer (eds), *Principle of International Investment Law* (Oxford University Press, 2nd ed, 2012) 193.
[126] See below nn 150–3.
[127] See *Vietnam-Laos BIT* art 6(1); *Vietnam-Malaysia BIT* 6(1).
[128] See *Vietnam-Iran BIT* art 8(1); *Vietnam-Italy BIT* art 6(1) [tr author].
[129] See *Vietnam-Mongolia BIT* art 5(1); *Vietnam-Philippines BIT* art VII; *Vietnam-Thailand BIT* art 8(1); *Vietnam-UK BIT* art 6; *Vietnam-Bulgaria BIT* art 6(1); *Vietnam-Denmark BIT* art 7; *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1); *Vietnam-Sweden BIT* art 5(1). See also *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-France BIT* art 6 [tr author].
[130] See *Vietnam-Russia BIT* art 5; *Vietnam-Armenia BIT* art 5 [tr author].
[131] Noted that FTT provisions in six of the 17 IIAs do not list compensation amounts: *Vietnam-Laos BIT* art 6(1); *Vietnam-Malaysia BIT* 6(1); *Vietnam-Mongolia BIT* art 5(1); *Vietnam-Philippines BIT* art VII; *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1); *Vietnam-Sweden BIT* art 5(1). However, FTT provisions in three IIAs do not cover the earnings of employees: see *Vietnam-Armenia BIT* art 5; *Vietnam-Philippines BIT* art VII; *Vietnam-Russia BIT* art 5.
[132] *Vietnam-Armenia BIT* art 5.
[133] *Vietnam-Bulgaria BIT* art 6(1).

More specifically, FTT provisions in Vietnam's 57 IIAs would likely be interpreted as protecting only funds transfers. The approach to protecting transfers of physical assets taken by the *Karkey Karadeniz v Pakistan* tribunal, as analysed earlier,[134] is not practical in the context of these Vietnam's IIAs. In cases where FTT provisions list transfers exhaustively provided in the previous subsection, they do not cover any physical assets. In cases where FTT provisions list transfers non-exhaustively, almost all of them clearly express 'the transfer of payments',[135] 'the free transfer of payments',[136] 'the unrestricted transfer of all payments',[137] 'all funds [or payments] … to be freely transferred',[138] and 'the free transfer … of th[e] capital and the returns'[139] in their general statements of FTT obligation. The other provisions only mention the word 'transfers' but their full statements are followed by clauses indicating fund transfers. FTT provisions in the *Vietnam-Cambodia BIT (amended 2012)* and *Vietnam-Turkey BIT* are examples of these. Notably, they have two features similar to the FTT provision examined in the case above: (i) the non-exhaustive list of transfers (eg '[s]uch transfers shall include, in particular, but not exclusively [or include]'), and (ii) the standing alone of the word 'transfers'.[140] However, the mentioned approach of the tribunal in the case could not be applied to any of the FTT provisions in the two Vietnamse BITs. This is because the word 'transfers' occurs in a treaty context that suggests 'transfers' must be of funds. Specifically, while the first paragraph of FTT provision mentions the word 'transfers' without being accompanied by 'funds', 'payments' or similar terms, the second and third paragraphs guarantee a freely convertible currency and the market rate of exchange.[141] These clauses could not be supposed to apply to transfers of physical assets.

[134] See above Part II(B)(2).
[135] See *Vietnam-Korea (2003) BIT* art 6(1); *Vietnam-Mozambique BIT* art 6(1); *Vietnam-Uzbekistan BIT* art 5(1); *Vietnam-Czech BIT* art 6(1); *Vietnam-Poland BIT* art 6(1).
[136] See *Vietnam-Armenia BIT* art 5(1); *Vietnam-Cuba BIT* art 7(1); *Vietnam-Egypt BIT* art 6 (1); *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Kuwait BIT* art 6(1); *Vietnam-Macedonia BIT* art 7(1); *Vietnam-Oman BIT* art 7(1); *Vietnam-Ukraine BIT* art 5(1); *Vietnam-Uruguay BIT* art 7(1); *Vietnam-Venezuela BIT* art 6(1). See also *Vietnam-BLEU BIT art 5(1); Vietnam-Estonia BIT* art 7(1); *Vietnam-Finland BIT* 7(1); *Vietnam-Germany BIT* art 5; *Vietnam-Hungary BIT* art 6(1); *Vietnam-Romania BIT* art 4(1); *Vietnam-Spain BIT* art 7(1).
[137] See *Vietnam-Greece BIT* art 7(1).
[138] See *Vietnam-Iceland BIT* art 4(1); *Vietnam-Netherland BIT* art 5.
[139] See *Vietnam-China BIT* art 5(1); *Vietnam-Singapore BIT* art 8.
[140] See *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-Turkey BIT* art 7(1); *Pakistan-Turkey BIT* art IV(1).
[141] See *Vietnam-Cambodia BIT (amended 2012)* art 6(2); *Vietnam-Turkey BIT* art 7(2).

However, FTT provisions in the *Vietnam-Belarus BIT*, *Vietnam-Ukraine BIT* and *Vietnam-Uzbekistan BIT* additionally cover transfers of movable assets in their titles and lists of transfers. The titles are respectively 'Remittance of Payments, Returns and Movable Property in Connection with Investments',[142] 'Transfers of Payments, Returns and Movable Property in Connection with Investments',[143] and 'Transfer of Funds and Assets'.[144] One of the types listed in the two first provisions is 'transfers of movable properties related to investments out of country',[145] or 'moving personal property in connection with the investment'.[146] Under the term 'movable properties' and as implied by the non-exhaustive list of transfers, physical assets could be considered a type of transfers and covered by the FTT provision.

4 *Subsection Remark: Non-exhaustive or Exhaustive Investment-related Transfers*

The subsection finds that FTT provisions in Vietnam's IIAs protect (i) non-exhaustive investment-related transfers, or (ii) exhaustive investment-related transfers. Most of FTT provisions with Formulations A, B, C and D protect the former and the others protect the latter. 'Transfers' in all of Vietnam's IIAs refers to fund transfers and in Vietnam's three BITs with Belarus, Ukraine and Uzbekistan additionally refer to transfers of physical assets.

[142] *Vietnam-Belarus BIT* art 5 [tr author].
[143] *Vietnam-Ukraine BIT* art 5 [tr author].
[144] *Vietnam-Uzbekistan BIT* art 5 [tr author].
[145] *Vietnam-Belarus BIT* art 5(1)(e) [tr author]. The type of transfers in Vietnamese is 'chuyển động sản liên quan đến đầu tư ra nước ngoài'.
[146] *Vietnam-Ukraine BIT* art 5(1)(e).

Table 5.2: Types of Transfers Protected by FTT Provisions in Vietnam's IIAs

Types of Transfers	Provision Formulations				Treaty Contexts (60)	
	A (25)	B (2)	C (14)	D (19)		
Non-exhaustive Outflows and Inflows, including Initial and Additional Capital Flows	12[147]	0	11[148]	9[149]	32	43
Non-exhaustive Outflows and Inflows, including Additional Capital Flows	1[150]	1[151]	1[152]	1[153]	4	
Non-exhaustive Outflows and Inflows, possibly including Additional Capital Flows	3[154]	0	1[155]	3[156]	7	
Exhaustive Outflows, and Initial and Additional Capital Inflows	1[157]	0	0	0	1	17
Exhaustive Outflows and Additional Capital Inflows	1[158]	0	0	0	1	
Exhaustive Outflows	7[159]	1[160]	1[161]	6[162]	15	

[147] Four BITs with non-EU members: see *Vietnam-Iceland BIT* art 4(1); *Vietnam-Kuwait BIT* art 6(1); *Vietnam-Switzerland BIT* art 4(1); *Vietnam-Turkey BIT* art 7(1). For eight BITs with EU members: see *Vietnam-Austria BIT* art 5(1); *Vietnam-Czech BIT* art 6(1); *Vietnam-Finland BIT* art 6(1); *Vietnam-Germany BIT* art 5; *Vietnam-Hungary BIT* art 6(1); *Vietnam-Netherlands BIT* art 5; *Vietnam-Poland BIT* art 6(1); *Vietnam-Spain BIT* art 7(1).

[148] Ten IIAs with non-EU members: see *Vietnam-Cuba BIT* art 7(1); *Vietnam-Japan BIT* art 12(1); *ACIA* art 13(1); *ASEAN-China IA* art 10(1); *ASEAN-Korea IA* art 10(1); *ASEAN-HK IA* art 12(1); *Vietnam-Korea FTA* ch 9 art 9.8(1); *ASEAN-ANZ FTA* ch 11 art 10(1); *Vietnam-EAEU FTA* ch 8 art 8.37(1); *CPTPP* ch 9 art 9.9(1). For one BIT with an EU member: see *Vietnam-Greece BIT* art 7(1).

[149] Eight BITs with non-EU members: see *Vietnam-Argentina BIT* art 5(1); *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Macedonia BIT* art 7(1); *Vietnam-Oman BIT* art 7(1); *Vietnam-Uruguay BIT* art 7(1); *Vietnam-Uzbekistan BIT* art 5(1); *Vietnam-Venezuela BIT* art 6(1). For one BIT with an EU member: see *Vietnam-Estonia BIT* art 7(1).

[150] One BIT with a non-EU member: see *Vietnam-Korea BIT (2003)* art 6(1).

[151] One IIA with a non-EU member: see *Vietnam-US BTA* ch VII art 1(3).

[152] One BIT with an EU member: see *Vietnam-Slovakia BIT* art 7(1).

[153] One BIT with a non-EU member: see *Vietnam-Egypt BIT* art 6(1).

[154] Two BITs with non-EU members: see *Vietnam-Mozambique BIT* art 6(1); *Vietnam-Singapore BIT* art 8. For one BIT with an EU member: see *Vietnam-BLEU BIT* art 5(1).

[155] One BIT with an EU member: see *Vietnam-Romania BIT* art 4(1).

[156] Three BITs with non-EU members: see *Vietnam-Belarus BIT* art 5(1); *Vietnam-China BIT* art 5(1); *Vietnam-Ukraine BIT* art 5(1).

[157] One BIT with an EU member: see *Vietnam-Bulgaria BIT* art 6(1).

[158] One BIT with a non-EU member: see *Vietnam-Armenia BIT* art 5(1).

[159] Four IIAs with non-EU members: see *Vietnam-Russia BIT* art 5(1); *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-Thailand BIT* art 8(1); *Vietnam-UK BIT* art 6. For three BITs with EU members: see *Vietnam-France BIT* art 6; *Vietnam-Sweden BIT* art 5; *Vietnam-Italy BIT* art 6(1).

[160] One BIT with an EU member: see *Vietnam-Denmark BIT* art 7(1).

[161] One BIT with a non-EU member: see *Vietnam-Philippines BIT* art VII.

[162] Four BITs with non-EU members: see *Vietnam-Iran BIT* art 8(1); *Vietnam-Laos BIT* art 6(1); *Vietnam-Malaysia BIT* art 6(1); *Vietnam-Mongolia BIT* art 6(1). For two BITs with EU members: see *Vietnam-Latvia BIT* art 6(1) and *Vietnam-Lithuania BIT* art 6(1).

B *Substantive Requirement for Legislative Measures: Compatible Effect Level*

1 *Subsection Overview*

As previously mentioned,[163] FTT provisions generally oblige a treaty state to accord the free transfer of payments or of other transactions related foreign investments. In the context of Vietnam's IIAs, while the provisions in two treaties keep the obligation be general, those in eight, ten and fourty treaties make it specific by explicitly requiring the treaty state to provide respectively one, two and three guarantees facilitating such transfers (Table 5.3). These guarantees relate to transfer time, currency convertibility and exchange rate. From the state's perspective, they constitute the requirement of the effect of state measures. Putting it differently, as required by FTT provisions, state measures must not cause restrictive effects on the three mentioned aspects.

It should be noted that under the two treaties whose FTT provisions do not express any guarantee (Table 5.3), state measures would still be required to ensure the investor's right to 'the free tranfer'.[164] That is because international transfers of funds or payments in practice always involve issues of transferring procedures, foreign currency and exchange rate. Any state interference with these issues in a restrictive way would make the transfers being delayed or affected.

[163] See above Introduction Part.
[164] See *Vietnam-Singapore BIT* art 8; *Vietnam-Germany BIT* art 5.

Table 5.3: Guarantees Expressed by FTT Provisions in Vietnam's IIAs

Guarantees (No)	Provision Formulations				Treaty Contexts (Total)
	A	B	C	D	
Three Guarantees	12[165]	1[166]	13[167]	14[168]	40
Two Guarantees	6[169]	1[170]	0	3[171]	10
One Guarantee	5[172]	0	1[173]	2[174]	8
No Expression	2[175]	0	0	0	2
Treaty Contexts (Total)	25	2	14	19	60

2 *No Undue/Unreasonable Delay*

To be legitimate under Vietnam's IIAs, state measures must not unduly delay or restrict transfers related to foreign investments. More specifically, any limit on making payments transferred outside the expected timeline might constitute a restriction.

The above requirement is drawn from the fact that FTT provisions in 30 IIAs require a state to guarantee transfers 'without delay' and those in 18 require the guarantee to

[165] Six BITs with non-EU members: see *Vietnam-Iceland BIT* art 4(1); *Vietnam-Kuwait BIT* art 6(2); *Vietnam-Korea BIT (2003)* art 6(1); *Vietnam-Mozambique BIT* art 6(1); *Vietnam-Turkey BIT* art 7; *Vietnam-UK BIT* art 6. For six BITs with EU members: see *Vietnam-Austria BIT* art 5(1); *Vietnam-Czech BIT* art 6(1); *Vietnam-Finland BIT* art 6(2); *Vietnam-Hungary BIT* art 6(1); *Vietnam-Poland BIT* art 6(1); *Vietnam-Spain BIT* art 7(1).

[166] One BIT with an EU member: see *Vietnam-Denmark BIT* art 7(1).

[167] Eleven IIAs with non-EU members: see *Vietnam-Cuba BIT (2007)* art 6(2); *Vietnam-Philippines BIT* art VII; *Vietnam-Japan BIT* art 12(1); *Vietnam-Korea FTA* art 9.8(1); *ACIA* art 13(2); *ASEAN-ANZ FTA* art 8(1); *ASEAN-Hong Kong IA* art 12(1); *ASEAN-China IA* art 10(1); *ASEAN-Korea IA* art 10(1); *CPTPP* art 9.9(1); *Vietnam-EAEU FTA* art 8.37(2). For two BITs with EU members: see *Vietnam-Greece BIT* art 7(1); *Vietnam-Slovakia BIT* art 7(2).

[168] Eleven BITs with non-EU members: see *Vietnam-Argentina BIT* art 5(2); *Vietnam-Belarus BIT* art 5(1); *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-Egypt BIT* art 6(1); *Vietnam-Iran BIT* art 8(1); *Vietnam-Laos BIT* art 6(1); *Vietnam-Malaysia BIT* art 6(1); *Vietnam-Macedonia BIT* art 7(2); *Vietnam-Mongolia BIT* art 6(1); *Vietnam-Oman BIT* art 7(1); *Vietnam-Uzbekistan BIT* art 5(1). For three BITs with EU members: see *Vietnam-Estonia BIT* art 6(1); *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1).

[169] One BIT with a non-EU member: see *Vietnam-Thailand BIT* art 8. For five BITs with EU members: see *Vietnam-Bulgaria* BIT art 6; *Vietnam-France BIT* art 6; *Vietnam-Italy BIT* art 6; *Vietnam-Netherlands BIT* art 5; *Vietnam-Sweden BIT* art 5.

[170] One IIA with a non-EU member: see *Vietnam-US BTA* ch VII art 1(1)–(2).

[171] Three BITs with non-EU members: see *Vietnam-Kazakhstan BIT* art 7; *Vietnam-Uruguay BIT* art 7; *Vietnam-Venezuela BIT* art 6(2).

[172] Three BITs with non-EU members: see *Vietnam-Armenia BIT* art 5(2); *Vietnam-Russia BIT* art 5(1); *Vietnam-Taiwan BIT (1993)* art 6. For two BITs with EU members: see *Vietnam-BLEU BIT* art 5(3); *Vietnam-Switzerland BIT* art 4(1).

[173] One BIT with an EU member: see *Vietnam-Romania BIT* art 4(3).

[174] Two BITs with non-EU members: see *Vietnam-China BIT* art 5(1); *Vietnam-Ukraine BIT* art 5(2).

[175] One BIT with a non-EU member: *Vietnam-Singapore BIT* art 8. For one BIT with an EU member: see *Vietnam-Germany BIT* art 5.

transfers 'without undue delay' or 'without unreasonable delay' (Table 5.4). Certain of Vietnam's IIAs support a similar interpretation of those two phrases. The phrase 'without delay' is perceived as being fulfilled 'if a transfer is made within such period as is normally required by international financial custom' in the *Vietnam-Denmark BIT*.[176] This perception is similar in the *Vietnam-Italia BIT* when interpreting the phrase 'unreasonable delay', with an exception that the period must not exceed three months.[177] Likewise, the phrase 'without delay' is interpreted as 'such period as is normally required for the completion of necessary formalities for the transfer of payments, without any restriction an undue delay for such transfers'[178] in the *Vietnam-Kuwait BIT*. This interpretation is similar in FTT provisions in the *Vietnam-Cambodia BIT (amended 2012)* and *Vietnam-Czech BIT* when interpreting the phrases 'without delay'[179] and 'without any undue delay'[180] respectively. Additionally, in *Vietnam-Greece BIT*, *Vietnam-Slovakia BIT* and seven IIAs having Formulation D FTT provivions (Table 5.4), the phrase 'without delay' would be interpreted as in accordance with procedures and processes established by domestic laws.[181]

In cases where FTT provisions in 12 IIAs do not explicitly the above guarantee (Table 5.4), Vietnam would guarantee transfers without delay in accordance with its laws. Otherwise, it would be contrary to the content of FTT obligation. The FTT provisions clearly require Vietnam to 'grant [or guarantee] … investors *the free transfer of the payments* relating to these investments',[182] 'guarantee to nationals or companies of the other Contracting Party *the free transfer*',[183] or 'guarantee investors … *transfer without restrictions*'.[184]

[176] *Vietnam-Demark BIT* art 1(6).
[177] *Protocol to the Vietnam-Italy BIT* s 3.
[178] *Vietnam-Kuwait BIT* art 1(8).
[179] *Vietnam-Cambodia BIT (amended 2012)* art 1(3).
[180] *Vietnam-Czech BIT* art 6(3). It states that '[t]ransfers shall be considered to have been made 'without any undue delay' in the sense of paragraph (1) of this Article when they have been made within the period necessary for the technical completion of the transfer by the bank'.
[181] *Vietnam-Greece BIT* art 7(1); *Vietnam-Slovakia BIT* art 7(2).
[182] *Vietnam-Romania BIT* art 4(1); *Vietnam-Switzerland BIT* art 4(1); *Vietnam-Taiwan BIT (1993)* art 6(1); *Vietnam-Cuba BIT* art 6; *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Venezuela BIT* art 6(1) (emphasis added).
[183] *Vietnam-Russia BIT* art 5; *Vietnam-Singapore BIT* art 8; *Vietnam-Thailand BIT* art 8(1) (emphasis added).
[184] *Vietnam-Armenia BIT* art 5(1) (emphasis added).

Table 5.4: Delay Requirement in FTT Provisions in Vietnam's IIAs

Delay Requirement	Provision Formulations				Treaty Contexts (60)	
	A	B	C	D		
Without Undue Delay/Restriction	7[185]	0	2[186]	1[187]	10	18
Without Unreasonable Delay	1[188]	0	1[189]	6[190]	8	
Without Delay Pursuant to Normal Procedures	1[191]	1[192]	1[193]	1[194]	4	30
Without Delay/Restriction	10[195]	0	09[196]	6[197]	26	
No Expression	6[198]	1[199]	1[200]	4[201]	12	
Treaty Contexts (Total)	25	2	14	19	60	

[185] Two BITs with non-EU members: see *Vietnam-Korea BIT (2003)* art 6(2); *Vietnam-Mozambique BIT* art 6(1). For five BITs with EU members: see *Vietnam-Austria BIT* art 5(1); *Vietnam-Czech BIT* art 6(1); *Vietnam-Hungary BIT* art 6(1); *Vietnam-Poland BIT* art 6(1); *Vietnam-Netherlands BIT* art 5.
[186] Two IIAs with non-EU members: see *Vietnam-Philippines* BIT art VII; *Vietnam-EAEU FTA* ch 8 art 8.37(1).
[187] One BIT with a non-EU member: see *Vietnam-Egypt BIT* art 6(1).
[188] One BIT with an EU member: see *Vietnam-Italy BIT* art 6(1).
[189] One BIT with a non-EU member: see *Vietnam-Cuba BIT (2007)* art 7.
[190] Four BITs with non-EU members: see *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-Laos BIT* art 6(1); *Vietnam-Malaysia BIT* art 6(1); *Vietnam-Mongolia BIT* art 6(1). For two BITs with EU members: see *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1).
[191] One BIT with a non-EU member: see *Vietnam-Kuwait BIT* arts 1(8), 6(2).
[192] One BIT with an EU member: see *Vietnam-Denmark BIT* arts 1(6), 7(1).
[193] One BIT with an EU member: see *Vietnam-Slovakia BIT* art 7(2).
[194] Two BITs with non-EU members: see *Vietnam-Argentina BIT* art 5(2); *Vietnam-Macedonia BIT* art 7(2).
[195] Four BITs with non-EU members: *Vietnam-Armenia BIT* art 5(1); *Vietnam-Iceland BIT* art 4(2); *Vietnam-UK BIT* art 6; *Vietnam-Turkey BIT* art 7(1). For six BITs with EU members: see *Vietnam-Bulgaria BIT* art 6(2); *Vietnam-BLEU BIT* art 5(3*); Vietnam-France BIT* art 6(2); *Vietnam-Finland BIT (2008)* art 7(2); *Vietnam-Spain BIT* art 7(2); *Vietnam-Sweden BIT* art 5(3).
[196] Eight IIAs with non-EU members: see *Vietnam-Japan BIT* art 12(1); *Vietnam-Korea FTA* ch 9 art 9.8(1); *ASEAN-ANZ FTA* ch 11 art 8(1); *ACIA* art 13(1); *ASEAN-Hong Kong IA* art 12(1); *ASEAN-China IA* art 10(1); *ASEAN-Korea IA* art 10(1); *CPTPP* ch 9 art 9.9(1). For one BIT with an EU member: see *Vietnam-Greece BIT* art 7(1).
[197] Five BITs with non-EU members: *Vietnam-Belarus BIT* art 5(1); *Vietnam-Iran BIT* art 8(1); *Vietnam-Oman BIT* art 7(1); *Vietnam-Uzbekistan BIT* art 5(1); *Vietnam-Uruguay BIT* art 7(2). For one BIT with an EU member: see *Vietnam-Estonia BIT* art 6(1).
[198] Five BITs with non-EU members: see *Vietnam-Russia BIT* art 5; *Vietnam-Singapore BIT* art 8; *Vietnam-Switzerland BIT* art 4; *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-Thailand BIT* art 8. For one BIT with an EU member: see *Vietnam-Germany BIT* art 5.
[199] One IIA with non-EU member: see *Vietnam-US BTA* ch VII art 1.
[200] One BIT with an EU member: see *Vietnam-Romania BIT* art 4.
[201] Four BITs with non-EU members: see *Vietnam-Kazakhstan BIT* art 7(2); *Vietnam-China BIT* art 5(2); *Vietnam-Ukraine BIT* art 5; *Vietnam-Venezuela BIT* art 6(2).

3 *No Restrictions on Currency Convertibility*

In addition to not unduly delaying transfers, state measures must not prevent or restrict currency convertibility. All FTT provisions in Vietnam's IIAs require such a guarantee from treaty states.

More specifically, FTT provisions in 44 IIAs guarantee that foreign investors can freely purchase convertible currency for their covered transactions (Table 5.5). They require Vietnam to provide 'freely convertible currency', or 'freely usable currency'. The term 'freely usable currency', as provided in nine IIAs, means 'a freely usable currency as determined by the International Monetary Fund … under its Articles of Agreement and any amendments thereto'.[202] According to the *IMF Agreement*, a 'free usable currency' means a member's currency that the Fund determines (i) is widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets.[203] The Executive Board of the International Monetary Fund (the IMF) has identified four currencies that meet this standard – US dollars, Japanese yen, the British pound and the euro. In cases of three IIAs, free usable currency also includes deutschemark and French franc (both superseded by the euro).[204] In Vietnam, the US dollar is considered a strong currency; it is available if requested in commercial banks. 'Freely convertible currency' is defined in eight IIAs as 'the currency that is widely used to make payments for international transactions and widely exchanged in the principal international exchange markets',[205] which follows the definition in the *IMF Agreement*. In another five IIAs, it refers to any currency determined by the IMF from time to time.[206] In short, under Vietnam's IIAs 'freely usable currency' and 'freely convertible currency' are based on the definition in the *IMF Agreement* and could refer to four currencies suggested by the IMF.

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[202] See *Vietnam-Korea FTA* art 9.28; *Vietnam-EAEU FTA* ch 8 art 8.28(d); *CPTPP* ch 9 art 9.1; *ACIA* art 4(b); *ASEAN-China IA* art 1(1)(b); *ASEAN-Korea IA* art 1(g); *ASEAN-ANZ FTA* ch 11 art 2(b); *ASEAN-HK IA* art 1(c). See also *Vietnam-US BTA* ch VII art 1(1).

[203] *IMF Agreement* art XXX(f).

[204] See *Vietnam-Malaysia BIT* art 1(1)(e); *Vietnam-Laos BIT* art 1(1)(e); *Vietnam-Cambodia BIT (amended 2012)* art 1(6). They similarly state '"freely usable currency" means the United States Dollars, Pound Sterling, Deutschemark, French Franc, Japanese Yen or any other currency that is widely used to make payments for international principal exchange markets'.

[205] See *Vietnam-Latvia BIT* art 1(e); *Vietnam-Lithuania BIT* art 1(e); *Vietnam-Egypt BIT* art 1(5); *Vietnam-Slovakia BIT* art 1(5); *Vietnam-Korea BIT (2003)* art 1(5); *Vietnam-Mongolia BIT* art 1(e); *Vietnam-Turkey BIT* art 1(5) Similarly, the *Vietnam-Venezuela BIT* provides that '[t]he term "freely convertible currency" means the currency that is commonly used in international commerce': at art 1(6).

[206] See *Vietnam-Kuwait BIT* art 1(7); *Vietnam-Kazakhstan BIT* art 1(5); *Vietnam-Uruguay BIT* art 1(5); *Vietnam-Oman BIT* art 1(5); *Vietnam-Macedonia BIT* art 1(5).

In four IIAs (Table 5.5), foreign investors are guaranteed the ability to make transfers in 'convertible currency'. As compared to the term 'freely convertible currency' or 'freely usable currency', the term 'convertible currency' is not defined in either Vietnam's IIAs or the *IMF Agreement*. The plain meaning of 'convertible currency' in the context of finance refers to 'a type of money that can be easily exchanged into other types of money'.[207] It is thus possible that this term would not create a higher level of protection than the term 'freely convertible currency' or 'freely usable currency' could. One might notice that one of Vietnam's IIAs, the *Vietnam-UK BIT*, also guarantees foreign investors ability to buy the 'currency of original investment'. However, it should be noted that this currency will be the British pound, which is considered a freely usable currency as defined by the IMF.

In cases of the 12 IIAs that do not explicitly guarantee transfers in convertible currency (Table 5.5), Vietnam must still ensure the exchangeability of currency for foreign investors to make transactions. The FTT obligation would be meaningless if foreign investors could not buy convertible currency when requested, while currency exchange is a part of international transfers. Indeed, it is easier for Vietnam when foreign investors require freely usable/convertible currency for transfers in practice than other less usable currency.

Therefore, state measures must not create any restriction on funds in Vietnamese dong (VND) being freely converted into other currencies. Restrictions on transfers might be established if Vietnam does not release the convertible currency to make transfers. Zimbabwe's refusal to release foreign currency for the claimant's transactions was viewed as a violation of FTT provisions in *Bernhard von Pezold and Others v Zimbabwe*.[208] The control on the amount of foreign currency that foreign investors could purchase might be contrary to the guarantee and thus also constitute a restriction on transfers.

[207] *Cambridge Dictionary* (online 15 February 2021) 'convertible currency'.
[208] See above Part II(B)(1).

Table 5.5: Convertibility Guarantee in FTT Provisions in Vietnam's IIAs

Convertibility Guarantee	Provision Formulations				Treaty Contexts (Total)	
	A	B	C	D		
Freely Convertible Currency	15[209]	1[210]	5[211]	8[212]	29	44
Freely Usable Currency	0	1[213]	8[214]	6[215]	15	
Currency of the Original Investment and/or any Convertible Currency	3[216]	0	0	1[217]	4	
No Expression	7[218]	0	1[219]	4[220]	12	
Treaty Contexts (Total)	25	2	14	19	60	

[209] Six BITs with non-EU members: see *Vietnam-Kuwait BIT* art 6(2); *Vietnam-Korea BIT (2003)* art 6(2); *Vietnam-Mozambique BIT* art 6(1); *Vietnam-Russia BIT* art 5; *Vietnam-Iceland BIT* art 4(1); *Vietnam-Thailand BIT* art 8(1). For nine BITs with EU members: see *Vietnam-Austria BIT* art 5(1); *Vietnam-Czech BIT* art 6(1); *Vietnam-Hungary BIT* art 6(1); *Vietnam-Poland BIT* art 6(1); *Vietnam-Finland BIT* art 7(2); *Vietnam-Netherlands BIT* art 5; *Vietnam-Italy BIT* art 6(1); *Vietnam-Sweden BIT* art 5(1); *Vietnam-Spain BIT* art 7(2).

[210] One BIT with an EU member: *Vietnam-Denmark BIT* art 7(2).

[211] Three BITs with non-EU members: see *Vietnam-Cuba BIT (2007)* art 7(3); *Vietnam-Philippines BIT* art VII; *Vietnam-Japan BIT* art 12(2). For two BITs with EU members: see *Vietnam-Greece BIT* art 7(1); *Vietnam-Slovakia BIT* art 7(2).

[212] Seven BITs with non-EU members: see *Vietnam-Argentina BIT* art 5(2); *Vietnam-Belarus BIT* art 5(1); *Vietnam-Egypt BIT* art 6(1); *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Macedonia BIT* art 7(2); *Vietnam-Oman BIT* art 7(1); *Vietnam-Uzbekistan BIT* art 5(1). For one BIT with an EU member: see *Vietnam-Estonia BIT* art 6(1).

[213] One IIA with a non-EU member: see *Vietnam-US BTA* ch VII art 1(1).

[214] Eight IIAs with non-EU members: see *ASEAN-ANZ FTA* art 8(2); *Vietnam-EAEU FTA* art 8.37(2); *ACIA* art 13(2); *ASEAN-Hong Kong IA* art 12(2); *ASEAN-China IA* art 10(1); *ASEAN-Korea IA* art 10(1); *Vietnam-Korea FTA* art 9.8(2); *CPTPP* art 9.9(2).

[215] Four BITs with non-EU members: see *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-Laos BIT* art 6(1); *Vietnam-Malaysia BIT* art 6(1); *Vietnam-Mongolia BIT* art 6(1). For two BITs with EU members: see *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1).

[216] Three BITs with non-EU members: see *Vietnam-UK BIT* art 6; *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-Turkey BIT* art 7(2).

[217] One BIT with a non-EU member: see *Vietnam-Iran BIT* art 8(1).

[218] Three BITs with non-EU members: *Vietnam-Armenia BIT* art 5; *Vietnam-Singapore BIT* art 8; *Vietnam-Switzerland BIT* art 4. For four BITs with EU members: *Vietnam-BLEU BIT* art 5; *Vietnam-Bulgaria BIT* art 6; *Vietnam-France BIT* art 6; *Vietnam-Germany BIT* art 5.

[219] One BIT with an EU member: *Vietnam-Romania BIT* art 4.

[220] Four BITs with non-EU members: *Vietnam-China BIT* art 5; *Vietnam-Ukraine BIT* art 5; *Vietnam-Uruguay BIT* art 7; *Vietnam-Venezuela BIT* art 6.

4 *No Restrictions on Official/Market Exchange Rate*

Under Vietnam's IIAs, state measures must not restrict or prevent foreign investors from exchanging foreign currency at the official/market rate covered by FTT provisions. This is because FTT provisions guarantee that foreign investors can purchase a necessary foreign currency at 'the market rate of exchange' on the date of transfer (a), 'the prevailing rate of exchange' (b), or 'the official rate of exchange' effective for the current transactions at the date of transfer (c) (Table 5.6). Several of Vietnam's IIAs ensure both 'the prevailing rate of exchange' (b) and 'the official rate of exchange' applicable on the date of transfer (c) (Table 5.6). In cases where no guarantee related to the exchange rate is provided (Table 5.6), 'the prevailing rate of exchange' on the date of transfer would likely be applied.

In the context of Vietnam, 'the official rate of exchange' refers to the rate set by the State Bank of Vietnam (SBV) and 'the market rate of exchange' refers to the rate announced by a commercial bank. Vietnam considers itself as following a managed floating exchange rate system in which the SBV can influence the exchange rate by selling or purchasing currencies to keep the exchange rate stable.[221] The official rate (exchange anchor) of Vietnam is defined on the comparison of other currencies (basket of exchange comparison) including the US dollars (USD).[222] Currently, the spot exchange rate between VND and USD in commercial banks must not exceed +3% of the average exchange rate in the inter-bank foreign currency market announced by the SBV on the same date (official exchange rate); whereas the spot exchange rate between VND and other currencies and buying and selling rate difference are determined by commercial banks. [223] It is clear that the market rate of exchange and the official rate of exchange would create a difference in economic interests if foreign currency is exchanged.

Another difference in guaranteeing the market rate of exchange and the official rate of exchange in FTT provisions can be found when Vietnam must set an official rate

[221] Ordinance on Foreign Exchange Controls [Vietnam's National Assembly Standing Committee], No 28/2005/PL-UBTVQH11, 13 December 2005, art 30 on Exchange Rate Regime of Vietnamese Dong ('Vietnam's 2005 Ordinance on Foreign Exchange Controls'); Law on the State Bank of Vietnam [Vietnam's National Assembly], No 46/2010/QH12, 16 June 2010, art 13 on Exchange Rate.
[222] Decree Providing Guidance to Implement a Number of Articles of Vietnam's 2005 Ordinance on Foreign Exchange Controls [the Government of Vietnam], No 70/2014/NĐ-CP, 17 July 2014, art 15(2) on Exchange Rate Regime of Vietnamese Dong. See also IMF's 2020 Annual Report 6, 14.
[223] Decision Promulgating the Spot Exchange Rate between Vietnam Dong and Foreign Currency by Credit Institutions [the State Bank of Vietnam], No 1636/QĐ-NHNN, 18 August 2015, art 1.

overvaluing VND or mandate an exchange rate for all foreign exchange transactions because of financial or economic disturbances. The compulsory imposition of such an official rate on international transactions would still be consistent with FTT provisions in ten IIAs where guaranteeing transfers at the official rate of exchange (Table 5.6). Consistency is possible in FTT provisions in seven IIAs without the relevant guarantee or FTT provisions in 20 IIAs providing the prevailing rate of exchange on the date of transfer (Table 5.6). The prevailing rate of exchange in this regard would be the official exchange rate which has been set. FTT provisions in five out of the 20 IIAs do refer the guarantee of the prevailing rate of exchange to 'the exchange regulations in force',[224] or 'the legislation [or the exchange laws and regulations] in force concerning the exchange of the Contracting party whose territory the investment was made'.[225] The FTT provision in the *Vietnam-Austria BIT* also provides that the exchange rates are decided (i) according to the quotations on the stock exchanges in the treaty state, or (ii) by the respective banking system in the absence of such quotations.[226]

However, such compulsory imposition of an official rate on international transactions would be challenged when FTT provisions in 23 IIAs guarantee the market rate of exchange (Table 5.6). One might notice that the *Vietnam-Kuwait BIT* grants the treaty state flexibility in the absence of a market of foreign exchange.[227] However, the official exchange rate, if approved by the IMF, is only one option; foreign investors could choose from (i) recent rate applied to inward investments and (ii) the exchange rate for conversion of currencies into Special Drawing Rights or USD.

[224] See *Vietnam-UK BIT* art 6; *Vietnam-Armenia BIT* art 5(2).
[225] See *Vietnam-Switzerland BIT* art 4(1); *Vietnam-Romania BIT* art 4; *Vietnam-EAEU FTA* art 8.37.
[226] See *Vietnam-Austria BIT* art 5(3).
[227] See *Vietnam-Kuwait BIT* art 3(6).

Table 5.6: Exchange Rate Guarantee in FTT Provisions in Vietnam's IIAs

Exchange Rate Guarantee	Provision Formulations				Treaty Contexts (Total)	
	A	B	C	D		
Market Exchange Rate (a)	4[228]	2[229]	10[230]	7[231]	23	
Prevailing Exchange Rate on the Date of Transfer (b)	7[232]	0	3[233]	10[234]	20	
Official Exchange Rate (c)	6[235]	0	1[236]	1[237]	8	10
Both (b) and (c)	1[238]	0	0	1[239]	2	
No Guarantee	7[240]	0	0	0	7	
Treaty Contexts (Total)	25	2	14	19	60	

[228] Two BITs with non-EU members*:* see *Vietnam-Mozambique BIT* art 6(2); *Vietnam-Kuwait BIT* art 6(3). For two BITs with *EU members*: see *Vietnam-Finland BIT* 6(2); *Vietnam-Spain BIT* art 7(2).
[229] One IIA with a non-EU member: see *Vietnam-US BTA* ch VII art 1(2). For one BIT with an EU member: see *Vietnam-Denmark BIT* art 7(2).
[230] Eight IIAs with non-EU members: *Vietnam-Japan BIT* art 12(2); *ACIA* art 13(2); *ASEAN-China IA* art 10(1); *ASEAN-Korea IA* art 10(1); *Vietnam-Korea FTA* art 9.8(2); *ASEAN-ANZ FTA* art 8(2); *ASEAN-Hong Kong IA* art 12(2); *CPTPP* art 9.9(2). For two BITs with EU members: see *Vietnam-Greece BIT* art 7(1); *Vietnam-Slovakia BIT* art 7(2).
[231] Six BITs with non-EU members: see *Vietnam-Argentina BIT* art 5(2); *Vietnam-Kazakhstan BIT* art 7(1); *Vietnam-Oman BIT* art 7(1); *Vietnam-Uzbekistan BIT* art 5(1); *Vietnam-Uruguay BIT* art 7(1); *Vietnam-Venezuela BIT* art 6(2). For one BIT with an EU member: *Vietnam-Estonia BIT* art 6(1).
[232] Four BITs with non-EU members: see *Vietnam-Armenia BIT* art 5(2); *Vietnam-UK BIT* art 6; *Vietnam-Switzerland BIT* art 4(2); *Vietnam-Turkey BIT* art 7(2). For three BITs with EU members: *Vietnam-Austria BIT* art 5(1); *Vietnam-Bulgaria BIT* art 6(2); *Vietnam-Czech BIT* art 6(2).
[233] Two IIAs with non-EU members: see *Vietmam-Cuba BIT* art 7(3); *Vietnam-EAEU FTA* art 8.37(2). For one BIT with an EU member: see *Vietnam-Romania BIT* art 4(3).
[234] Seven BITs with non-EU members: see *Vietnam-Cambodia BIT (amended 2012)* art 6(1); *Vietnam-Iran BIT* art 8(1); *Vietnam-Laos BIT* art 6(1); *Vietnam-Macedonia BIT* art 7(2); *Vietnam-Malaysia BIT* art 6(1); *Vietnam-Mongolia BIT* art 6(1); *Vietnam-Ukraine BIT* art 5(2). For three BITs with EU members: see *Vietnam-Belarus BIT* art 5(1); *Vietnam-Latvia BIT* art 6(1); *Vietnam-Lithuania BIT* art 6(1).
[235] Two BITs with non-EU members: see *Vietnam-Iceland BIT* art 4(2); *Vietnam-Thailand BIT* art 8(1). For four BITs with EU members: see *Vietnam-France BIT* art 6(2); *Vietnam-Hungary BIT* art 6(2); *Vietnam-Poland BIT* art 6(2); *Vietnam-Sweden BIT* art 5(2).
[236] One BIT with a non-EU member: see *Vietnam-Philippines BIT* art VIII.
[237] One BIT with a non-EU member: see *Vietnam-China BIT* art 5(1).
[238] One BIT with a non-EU member: see *Vietnam-Korea BIT (2003)* art 6(2).
[239] One BIT with a non-EU member: see *Vietnam-Egypt BIT* art 6(1).
[240] They include three Vietnam's BITs with non-EU members: see *Vietnam-Taiwan BIT (1993)* art 6; *Vietnam-Russia BIT* art 5(1); *Vietnam-Singapore BIT* art 8. They also include four Vietnam's BITs with EU members: *Vietnam-BLEU BIT* art 5; *Vietnam-Germany BIT* art 5; *Vietnam-Italy BIT* art 6(1); *Vietnam-Netherlands BIT* art 5.

5 *Subsection Remark: No Restrictions on Transfer Time, Currency Convertibility and Official/Market Exchange Rate*

FTT provisions with Formulation A/B/C/D in Vietnam's IIAs establish different guarantees to ensure payments are freely transferred into or out of Vietnam. By designing different guarantees, they may require state measures not to cause any delay/restriction/prevention on transfer time, currency convertibility and official/market exchange rate covered by FTT provisions. If any restriction is found, it might violate the FTT obligation. However, under FTT provisions with Formulations B, C and D, certain restrictions might be justified if qualifying permissible objectives and other normative conditions. The following section explores this point.

IV AN ANALYSIS OF FREE TRANSFER TREATMENT PROVISIONS IN VIETNAM'S IIAS: SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES

A *Formulation A: Uncertain Justification for Restrictive Legislative Measures*

Under Formulation A FTT provisions, state measures might violate the FTT obligation if they unduly delay, restrict, or prevent transfers related to foreign investments, except for certain cases in the context of Vietnam's three BITs with Singapore, Czech and Turkey. These cases are related to security and/public interests, as analysed in Chapters 7 and 8.

Within the context of the remaining 22 BITs having Formulation A FTT provisions, one might argue that Vietnam and its relevant treaty partners might not imply that all restrictions on transfers are contrary to FTT obligation since they had their monetary sovereignty to resolve certain domestic affairs.[241] This argument is reasonable to the extent such restrictions are compatible with delay requirement and currency convertibility and exchange rate guarantees, as similarly pointed by the *Rusoro Mining v Venezuela* tribunal.[242] Outside this extent, exchange restrictions or capital controls in exceptional security, economic or financial circumstances would barely be justified under these IIAs. If that was the case, it is hard to explain why Vietnam and its relevant treaty partners included economic safeguard exceptions, or references to domestic/international laws in FTT provisions in the other 35 IIAs, as analysed in the following subsections, but not in the provisions in the IIAs discussed here. Given the absence of any exceptions and references, one could only explain that treaty parties at the time of treaty conclusion might not consider 'limiting transfers as the most appropriate mechanism for coping with shortages of international reverses'.[243]

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[241] This possibility is based on the point made by Turyn and Aznar that '[s]tates always retain the power to restrict transfers in the face of balance-of-payments crises because they do not waive that right to regulate in good faith in order to safeguard the public interest and the common good': see Turyn and Aznar (n 46) 72. Turyn and Aznar also adds that 'the fact that a particular BIT does not include any provision that contemplates balance-of-payments difficulties as a reason for temporarily limiting transfers' does not mean to express that 'the will of the state parties that transfer should be made freely even if any such difficulties exist'.

[242] See above Part II(D).

[243] UNCTAD, *Bilateral Investment Agreement 1995-2006: Trends in Investment Treaty Rulemaking* (2007) 63 (*'Investment Treaty Rulemaking'*).

One might also argue that Vietnam could invoke its rights under the *IMF Agreement* and the *GATS* to adopt restrictions on investment-related transfers in dealing with BOP and/or external financial difficulties.[244] The first possible reason is that Vietnam and its BIT partner are members of the IMF and/or the WTO at the time of concluding and implementing BIT, so restrictions that are legitimate under the first two regimes should be treated as acceptable under the BIT.[245] In the words of Turyn and Aznar, 'the balance-of-payments exception … is still applicable in the relevant circumstances in accordance with the provisions of other multilateral instruments and customary international law'.[246] However, this reason is not convincing. When drafting BIT, Vietnam and its BIT partner must have known well that public international law had not worked like a domestic legal system; thus, they must have harmonised their existing international commitments under the *IMF Agreements* and/or the *GATS*, and those potential under the BIT to avoid norm conflicts. They could have done so by making references or preferences in the BIT, precisely in a FTT provision, which is similar to how they proceeded with other BITs in FTT provisions with exceptions/references (Formulation B/C/D). Therefore, in the cases where Vietnam and its BIT partner do not refer to the IMF regime, it appears that they would like to keep the regime out of the BIT context, as Muchlinski points out in the general IIA context,[247] or that they would like to provide a higher level of protection for investment-related transfers than others.

The second reason supporting the above argument is possibly related to the issue of applicable law. More specifically, Vietnam's BIT as the first regime, and the *IMF Agreement* and/or the *GATS* as the second regime(s) are argubably operated according to the rule of *lex specialis derogat legi generali* (ie specific law prevails over general law)[248] or the rule of *lex posterior derogat legi priori* (ie later law prevails over earlier law).[249] However, it should be noted that these regimes have different members; particularly, all

[244] See, eg, Nguyen Thi Anh Tho, 'Comments on Cases related to the Principle of Free Transfers of Fund in International Investment Law' [2020] (10) *Journal of State and Law* 60, 72; Turyn and Aznar (n 46) 72.
[245] This reason is flexibly adopted from Nguyen Thi Anh Tho (n 244) 72.
[246] Turyn and Aznar (n 46) 72.
[247] Peter Muchlinski, 'Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate. The Issue of National Security' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2008-9* (Oxford University Press, 2009) 35, 60, cited in Ranjan (n 7) 272.
[248] Ibid 74. This reasoning is supported by Kolo's article: see generally Kolo, 'IMF and Investment Treaties' (n 5) 355–67. In the context of BITs and its relations to other sources of international law, the *lex specialis derogat legi generali* rule is firstly approached by the tribunal in *Continental v Argentina* (n 83): at [244]. More discussion on this approach of the *Continental v Argentina* tribunal, see Anna De Luca, 'Transfer Provisions of BITs in Times of Financial Crises' (2014) 23(1) *The Italian Yearbook of International Law Online* 113.
[249] See Kolo, 'IMF and Investment Treaties' (n 5) 362.

parties to the first regime can be parties to the second regime(s) but not vice versa. They also pursue separate primary objectives. The BIT aims at protecting and promoting foreign investments as analysed earlier in Chapter 2 (Part II(B)). However, the *IMF Agreement* and the *GATS* desire respectively to ensure money mobility for international commercial transactions and to facilitate international trade in services, which is mentioned in the following subsection. Under these regimes, provisions relevant to fund transfers regulate dissimilar subject matters. The FTT provision under the BIT protects transfers of payments for (i) both current and capital transactions, and related to (ii) permitted investment only. The *IMF Agreement*, especially Article VIII, covers transfers of payments for (i) only current transactions and related to (ii) both investment and non-investment. The *GATS*, especially Article XII, protects transfers of payments for (i) both current and capital transactions and related to (ii) investment only in service sector. Given these differences in treaty parties, treaty objectives and subject matters, FTT provisions in the BITs would hardly function as a special law (lex specialis) in relation to relevant provisions under the *IMF Agreement* and/or the *GATS*; in other words, the latter cannot function as a general law and thus be applicable to the subject matter fully governed by the former. To a certain extent, this point has been put forward by Viterbo.[250] Based on similar reasons, the BIT and the *IMF Agreement*, or the *GATS*, could not be applied on the basis of *lex posterior derogat legi priori* rule. Even if they were, the *IMF Agreement* or the *GATS* as the ealier treaty would, according to the *VCLT,* 'appl[y] only to the extent that its provisions are compatible with those of the later treaty [the BIT]',[251] since all the parties to the latter do not include all the parties to the former.

In another direction, one might look for the importation of exceptions under the *IMF Agreement* and/or the *GATS* into Vietnam's BITs in this group through the *VCLT*'s interpretation rules. These rules suggest a consideration of the treaty context, including 'any relevant rules of international law applicable in the relations between the parties' in Article 31(3)(c), to define the original meaning of treaty terms and thus treaty provision. However, relevant rules or provisions in the *IMF Agreement* and/or the *GATS* can be used for identifying and clarifying the meaning of the FTT provisions in the BITs, rather than for importing their normative contents into the BITs as a part of applicable laws. This

[250] As Veitor points out, 'when two sectorial treaties interact, the *lex specialis* principle is of little help and the interpreter's standpoint may greatly influence the outcome […] the first imposing a general prohibition to restrict the transfer of funds, the second containing permissible rules allowing a country to discretionally impose capital controls': see Viterbo (n 8) 269.
[251] *VCLT* art 30(3)–(4).

point has been put forward by Ranjan in the general IIA context.[252] If one invokes the *Continental Casualty v Argentina* award, it should be noted that the tribunal in the case recognised exceptions in the *IMF Agreement* and, if any, under customary international law but did not apply these exceptions in practice because transfers at issue were not found as being related to the claimant's investment.[253] Even if such transfers were, the possibility that the tribunal employed the mentioned exceptions would be thin, if not unlikely; this is because treaty exceptions for security interests in the relevant BIT, the *US-Argentina BIT*, would be priotised to get applied. Also, in *Rusoro v Venezuela* where the tribunal acknowledged state monetary sovereignty, the tribunal did not actually apply that approach because there was no transfer affected by state measures.[254]

One might also notice that the final purpose of all BITs discussed here is the country's economic development, as analysed in Chapter 2 (Part II(B)). Such purposes cannot be achieved if a country (say, Vietnam) is only concerned with economic interests of foreign investors while its own economic, financial or monetary system is in trouble, not to mention the case where capital flight or inflows might be the main cause of that trouble. Therefore, a reasonable person might perceive that, to some extent, FTT provisions without references/exceptions would leave a space for the state's restrictions on/controls of transfers. However, how much space is reasonable is not easy to quantify.

In conclusion, it is uncertain that Formulation A FTT provisions would be interpreted to accept certain restrictions on transfers as being consistent with the FTT obligation if such restrictions affected investments-related transfers. The result might be different if restrictions qualify as treaty exceptions under Vietnam's three BITs with Singapore, Czech and Turkey, as discussed in Chapters 7 and 8.

[252] Ranjan (n 7) 274.
[253] See above Part II(D).
[254] Ibid.

B *Formulation B: Exceptions for Restrictive Legislative Measures for Balance-of-Payments and/or External Financial Difficulty Reasons*

Under a FTT provision referring solely to the *IMF Agreement* in the *Vietnam-US BTA*, state measures restricting *current* transactions could be exempted if they address BOP difficulties in a non-discriminatory manner within the temporary period as approved by the IMF. Any restrictions in other circumstances would infringe the FTT obligation.

It should be noted that the primary aim of the *IMF Agreement* is to establish an international monetary framework to ensure the smooth movement of payments for international trade (in goods and services) by requiring members to eliminate exchange restrictions and providing them financial assistance.[255] Exceptions for exchange restrictions granted by the *IMF Agreement* are applied on *current* international transactions.[256] Accordingly, 'no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions'.[257] In other words, an IMF member (say, Vietnam) can only impose exchange restrictions on *current* transactions if the IMF approves them. To be approved, exchange measures must be imposed for BOP reasons and applied in a non-discriminatory manner.[258] Notably, the IMF's approval is normally granted for measures taken up to a one-year period.[259]

Regarding *capital* international transactions, these fall outside the scope of the *IMF Agreement*, so their relevant capital controls are not regulated, except in the case that IMF members use its funds.[260] This exception is outside the scope of the thesis topic which only addresses capital from foreign investors protected by Vietnam's IIAs. However, the *IMF Agreement* emphasises that capital controls, if adopted, do not affect current

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[255] *IMF Agreement* art 1.
[256] *IMF Agreement* art XXX(d). See generally Menno Broos and Sebastian Grund, 'The IMF's Jurisdiction Over The Capital Account: Reviewing the Role of Surveillance in Managing Cross-Border Capital Flows' (2018) 21(3) *Journal of International Economic Law* 489, 495–7; Viterbo (n 8) 161–2.
[257] *IMF Agreement* art VIII s 2(a).
[258] *Transfer of Funds* (n 117) 17. See also Viterbo (n 8) 171.
[259] *Transfer of Funds* (n 117) 17.
[260] *IMF Agreement* art VI(1). See also Broos and Grund (n 256) 497–500; IMF, *The Fund's Role Regarding Cross-Border Capital Flows* (Policy Papers, 15 November 2010) 51–2. See generally IMF, *Recent Experiences in Managing Capital Inflows — Cross-Cutting Themes and Possible Guidelines* (2011); IMF, *Liberalizing Capital Flows and Managing Outflows* (Policy Papers, 14 March 2012); IMF, *The Liberalization and Management of Capital Flows: An Institutional View* (Policy Papers, 14 November 2012); IMF, *The IMF's Approach to Capital Account Liberalization: Revisiting the 2005 IEO Evaluation* (Policy Papers, August 9, 2005).

transactions (underlying transactions).[261] Therefore, Vietnam has its own right to regulate capital controls in its domestic laws and other treaties, including IIAs. When Vietnam and the US decided not to conclude exceptions for capital controls under the *Vietnam-US BTA*, Vietnam could not invoke any exception for capital controls in implementing FTT obligation.

In the *Vietnam-Denmark BIT* context, FTT provision generally refers to relevant multilateral agreements to which Vietnam and Denmark are or may become members that include the *GATS* within the WTO framework, in addition to the *IMF Agreement*. The *GATS* is not an investment agreement but facilitates investment since two modes of services covered by the *GATS* – the supply of cross-border services (especially financial services) and commercial presence – are only achieved when capital freely flows among its members. According to the *GATS*, Vietnam can adopt restrictions on trade in services, which have been committed by Vietnam in its schedule, including on payments or fund transfers for commitment-related transactions when it faces BOP and/or external financial difficulties.[262] These restrictions must be consistent with the *IMF Agreement*. They must also be non-discriminatory among foreign investors (MFN), have a temporary application, avoid unnecessary damage to other party state's interests (commercial, economic and financial), and not exceed those necessary to address circumstances. These requirements have been adopted by FTT provisions with Formulation C which is analysed in the following subsection.

[261] *IMF Agreement* art VI(3).
[262] *GATS* art XII.

C *Formulation C: Exceptions for Restrictive Legislative Measures for Balance-of-Payments, External Financial Difficulty and other Economic Safeguard Reasons*

1 *Permissible Situations for Economic Safeguards*

As previously shown, Formulation C FTT provisions in Vietnam's 14 IIAs specify certain situations in which Vietnam could adopt or maintain restrictions on/controls of transfers.[263] They include (i) serious BOP difficulties, (ii) serious external financial difficulties, (iii) serious difficulties for macroeconomic management and/or (iv) serious economic or financial disturbance caused by or threatened by capital movements. These situations are not all covered by the 14 IIAs and must posses certain features to be accepted under these treaties.

As to the first feature, only when its BOP, external financial affairs, macroeconomic management, or economic/financial security face 'serious' difficulties or 'exceptional' situations is a host state (say, Vietnam) entitled to impose restrictions on/controls of transfers without violating the FTT obligation. The requirement of a 'serious' level or 'exceptional' state likely invites the state to assess its circumstances thoroughly before adopting restrictions/controls. If the restrictions/controls are challenged in front of arbitration, this requirement would be substantively reviewed by a tribunal. The 'serious' level of difficulties, on its plain meaning, is when such difficulties are 'severe in effect; bad',[264] while the 'exceptional' state of situations, on its plain meaning, is when such situations experience something 'unusual; not what happens regularly or is expected'.[265]

Concerning BOP difficulties which are recognised in all the 14 IIAs,[266] the difficulties might be only considered 'serious' when a country's BOP is experiencing large and persistent current account deficit (BOP deficit) or runs down to a very low level of reserve.[267] The FTT provisions in the *ACIA*, *ASEAN-China FTA* and *ASEAN-ANZ FTA* expressly recognise the need to 'use restrictions to ensure, inter alia, the maintenance of a

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[263] See above Part I(D).
[264] *Cambridge Dictionary* (online at 20 May 2021) 'serious' (def B1).
[265] *Cambridge Dictionary* (online at 20 May 2021) 'exceptional'.
[266] See *Vietnam-Cuba BIT (2007)* art 7; *Vietnam-Greece BIT* art 7(4); *Vietnam-Slovakia BIT* art 7; *Vietnam-EAEU FTA* arts 8.37, 8.8; *ASEAN-ANZ FTA* ch 11 art 8, ch 15 art 4; *Vietnam-Philippines BIT* art VII; *Vietnam-Japan BIT* arts 12, 16; *ASEAN-Hong Kong IA* arts 12, 13; *CPTPP* ch 9 art 9.9, ch 29 art 29.3, annex 9-E; *ASEAN-China IA* arts 10, 11; *ACIA* arts 13, 16; *Vietnam-Korea FTA* art 9.8, annex 9-C; *ASEAN-Korea IA* arts 10, 11; *Vietnam-Romania BIT* art 4.
[267] For more information on BOP deficit, see Cheol S Eun and Bruce G Resnick (eds), *International Financial Management* (McGraw-Hill Education, 7th ed, 2015) 69.

level of financial reserves adequate for the implementation of its [a contracting party's] program of economic development [and economic transition]'.[268] In the words of the IMF, with regard to the primary purpose of the *IMF Agreement* to facilitate free transfers for current transactions, BOP need possibly refers to a situation where a state 'cannot find sufficient financing on affordable terms in the capital markets to make its international payments and maintain a safe level of reserves'.[269] The BOP of a country (say, Vietnam) might face difficulty/imbalance because of the collapse of a key export, the sudden increase in the price of key commodities, the disruption of a domestic sector spreading to another sector, or the loss of investors' confidence in the domestic market. However, if the difficulties have not yet reached a serious level, Vietnam is not entirely able to adopt restrictions on transfers or invoke exceptions. Notably, in the *Vietnam-Slovakia BIT* context, restrictions on transfer can only be resorted to when serious BOP difficulties already exist,[270] while in the other treaty contexts they are permitted when BOP difficulties threaten to become severe.

As referred in 11 out of the 14 IIAs,[271] 'external financial difficulties' might also become 'serious' only when a host state (say, Vietnam) has accumulated external/public debts at high level or cannot obtain a loan from the IMF or from other countries. These 'external' difficulties are distinguished from 'internal' difficulties of a low level of official reserves or persistent and large BOP deficits. It should be noted that the external or internal financial difficulties here need not to be caused by the movement of payments and capital to trigger state's interferences. Instead, to prevent these difficulties from escalating to 'serious' level and thus damaging the domestic economy, a state can adopt restrictions on capital movements and payments as a part of macroeconomic policy. Such restrictions must obtain the IMF's prior approval if applied to current transactions, and must not affect current transactions if applied to capital transactions.[272]

[268] *ACIA* art 16(1); *ASEAN-China FTA* art 11(1); *ASEAN-ANZ FTA* art 4(3)(a).
[269] See 'Lending by the IMF' at <https://www.imf.org/external/about/lending.htm>.
[270] *Vietnam-Slovakia BIT* art 7(3)(a).
[271] See *Vietnam-EAEU FTA* arts 8.37, 8.8; *ASEAN-ANZ FTA* ch 11 art 8, ch 15 art 4; *Vietnam-Philippines BIT* art VII; *Vietnam-Japan BIT* arts 12, 16; *ASEAN-Hong Kong IA* arts 12, 13; *CPTPP* ch 9 art 9.9, ch 29 art 29.3, annex 9-E; *ASEAN-China IA* arts 10, 11; *ACIA* arts 13, 16; *Vietnam-Korea FTA* art 9.8, annex 9-C; *ASEAN-Korea IA* arts 10, 11. The situation can also be covered by the 'exceptional financial or economic circumstances' specified in the Article 4 of the *Vietnam-Romania BIT*.
[272] *IMF Agreement* art VIII s 2.

Regarding the last two situations, while 'serious economic or financial disturbance' is mentioned the same in four out of the 14 IIAs,[273] 'serious difficulties for macroeconomic management' are referred in eight IIAs by different expression. The latter appears as the term is in the *Vietnam-Slovakia BIT* and the *CPTPP*,[274] or is accompanied by the phrase 'in particular monetary and exchange rate policies' in the *ASEAN-Hong Kong IA* and *Vietnam-Japan BIT*.[275] It could be justified in *Vietnam-Romania BIT* under 'exceptional financial or economic circumstances'.[276] In a more limited sense, FTT provisions in the *ASEAN-Korea IA* and *Vietnam-Korea FTA*[277] only mention 'serious difficulties for the operation of monetary or exchange rate policies', and the provision in the *Vietnam-Philippines BIT* permits restrictions necessary for 'the integrity and independence of its [state's] currency'.[278]

The second feature can be found in relation to the situations of difficulties for macroeconomic management, and economic or financial disturbance. More specifically, only when capital movements, either inflows or outflows, cause or threaten to cause the difficulties/disturbance, a host state (say, Vietnam) is allowed to adopt capital controls. This requirement is different from situations of serious BOP or external financial difficulties, as discussed earlier, which are not necessarily caused by or threatened by capital flows. Given the requirement, difficulties in macroeconomic management, particularly for the operation of monetary or exchange rate policies, might only become 'serious' when massive capital inflows (or surge of capital outflows) overshoot exchange rate or lead to currency overvaluation (or currency depreciation), and subsequently cause, inter alia, high demand for domestic currency and then for money supply.[279] Economic disturbance might only become 'serious' when such flows, especially inflows, overheat the economy by creating price increases for exporting products, high inflation and asset

[273] *ASEAN-China IA* art 10(5); *ACIA* art 13(4); *ASEAN-Korea IA* art 11(2); *Vietnam-Korea FTA* annex 9-C [1].
[274] *Vietnam-Slovakia BIT* art 7(3)(a); *CPTPP* art 29.3(1)–(2). Note that in the *CPTPP*, restrictions on transfers are not allowed for foreign direct investment: see above Part I(D).
[275] *ASEAN-Hong Kong IA* art 13; *Vietnam-Japan BIT* art 16(1).
[276] *Vietnam-Romania BIT* art 4.
[277] *ASEAN-Korea IA* art 11; *Vietnam-Korea FTA* annex 9-C.
[278] *Vietnam-Philippines BIT* art VII.
[279] For general information about effects of capital inflows or outflows on the country's monetary or exchange rate policies, see Abba Kolo, 'Investor Protection vs Host State Regulatory Autonomy during Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties' (2007) 8(4) *The Journal of World Investment & Trade* 457, 460–1 ('Transfers and Restrictions'); Jonathan D Ostry et al, 'Capital Inflows: The Role of Controls' (IMF Staff Position Note, Research Department, IMF, February 2010) 6–8; Atish R Ghosh and Mahvash S Qureshi, 'Capital Inflow Surges and Consequences' (Working Paper Series, Asian Development Bank Institute (ADBI), No 585, July 2016) 5–9. See also Gari (n 9) 404–6; and Gallagher, 'Policy Space' (n 9) 2–3.

price bubbles, positive output gap (the overuse of human and material resources for demanding output), and/or high potential debts to foreigners including future income paid to foreign investors.[280] Financial disturbance might only become 'serious' when capital inflows, especially portfolio investment, cause a domestic credit boom and bust, and thus make the financial sector and banking system vulnerable. It can also be when capital outflows, together with a surge in money withdrawals, cause a depression for financial sector and a drop in values of banking institutions, or threaten the health of the banking system.[281]

Notably, capital controls that Vietnam can adopt to address the mentioned economic difficulties/disturbance are varied. Controls on capital inflows can be based on price or quantity. In particular, priced-based measures refer to a one-year holding period for portfolio investments, unremunerated reserve requirements at a central bank and taxes on short-term inflows. Quantity-based measures are meant to comprise a ban on transfer of derivatives, a limit on the quantity of banknotes to be exported or imported, and prohibition to invest in domestic debentures for foreign investors.[282] Regarding controls on capital outflows, they include direct controls such as the prohibition of divestment, restrictions on the repatriation of capital and foreign currency holdings. They also cover indirect controls like tax on capital flows and financial transactions.[283] Such controls, as required by FTT provisions in IIAs discussed here and the *IMF Agreement* where relevant, must not affect current transactions.

In conclusion, only when its BOP, external financial affairs, macroeconomic management, or economic/financial security face 'serious' difficulties or 'exceptional' situations can a host state (say, Vietnam) undertake restrictions on/controls of transfers without violating FTT obligation. Depending on FTT provisions, varying situations will support restrictions on transfers.

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[280] For general information about effects of capital inflows and/or outflows on the country's economic health, see Kolo, 'Transfers and Restrictions' (n 279) 460–1; Gari (n 9) 404–6; Gallagher, 'Policy Space' (n 9) 2–3.

[281] For general information about effects of capital inflows and/or outflows on the country's financial stability, see Kolo, 'Transfers and Restrictions' (n 279) 460–1; Ostry (n 279) 9; Ghosh and Qureshi (n 279) 10–3; Gari (n 9) 404–6; Gallagher, 'Policy Space' (n 9) 2–3.

[282] For general information about controls on capital inflows, see Gari (n 9) 406–10; Gallagher, 'Policy Space' (n 9) 3; Masahiro Kawai and Mario B Lamberte (eds), *Managing Capital Flows. The Search for a Framework* (Edward Elgar, 2010); Kevin P Gallagher, 'Regaining Control? Capital Controls and the Global Financial Crisis' (Working Paper Series, Political Economy Research Institute, University of Massachusetts Amherst, No 250, 2011) Table 4.

[283] For general information about controls on capital outflows, see Gallagher, 'Policy Space' (n 9) 3.

2 *Other Normative Conditions: Reasonable/Necessary, Non-discriminatory, and Temporary*

To address economic difficulties or disturbance as previously analysed, exchange restrictions and capital controls must be necessary in the ten (out of 14) treaty contexts and be rational/reasonable in the four contexts. More specifically, the FTT provisions in nine IIAs require that restrictions/controls must 'not exceed those necessary to deal with the circumstances',[284] and must 'avoid unnecessary damage to the commercial, economic and financial interests of any other Party'.[285] The FTT provision in the *Vietnam-Philippines BIT* also specifies 'such measures as may be necessary to safeguard [permissible economic interests]'.[286] The two separate requirements in the first case or the 'necessary' link requirement in the second case are/is quite stringent, as compared to the 'for' or 'directed to' link requirement of some treaty exceptions for security and public interests analysed in Chapters 7 and 8. The two separate requirements here would likely invite the examination of reasonableness and the least restrictive effects of exchange restrictions or capital controls, which are also possibly undertaken by the assessment of 'necessary' link. This 'necessary' link is not required under the remaining four IIAs,[287] but the rational link must still be necessary for restrictions/controls.

In addition to the measure-objective links, all FTT provisions in the 14 IIAs in this group require exchange restrictions and capital controls to be applied in a non-discriminatory manner. In particular, restrictions/controls to address BOP or external financial difficulties must be consistent with MFN obligations under six out of 14 IIAs covering either one or both situations,[288] and with both MFN and NT obligations in another three treaties.[289] Those dealing with serious difficulties for macroeconomic management must comply with MFN obligations under two out of eight IIAs containing these difficulties,[290]

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[284] *Vietnam-Korea FTA* annex 9-C s 2(c); *Vietnam-EAEU FTA* art 8.8(1)(d); *CPTPP* art 29.3(3)(d); *ASEAN-ANZ FTA* art 4(2)(c); *ASEAN-China FTA* art 11(2)(d); *ACIA* art 16(2)(c); *ASEAN-Korea IA* art 11(3)(c); *ASEAN-Hong Kong FTA* art 13(2)(c); *Vietnam-Japan BIT* art 16(2)(b).
[285] *Vietnam-Korea FTA* annex 9-C s 2(d); *Vietnam-EAEU FTA* art 8.8(1)(c); *CPTPP* art 29.3(3)(c); *ASEAN-ANZ FTA* art 4(2)(b); *ASEAN-China FTA* art 11(2)(c); *ACIA* art 16(2)(b); *ASEAN-Korea IA* art 11(3)(b); *ASEAN-Hong Kong FTA* art 13(2)(b).
[286] *Vietnam-Philippines BIT* art VII.
[287] *Vietnam-Cuba BIT (2007)* art 7(4)(g); *Vietnam-Greece BIT* art 7(4); *Vietnam-Romania BIT* art 4(2); *Vietnam-Slovakia BIT* art 7(3)(a);
[288] *ACIA* art 16(2)(e); *ASEAN-ANZ FTA* ch 15 art 4(2)(e); *ASEAN-Korea IA* art 11(3)(e); *ASEAN-Hong Kong IA* art 13(2)(e); *Vietnam-EAEU FTA* art 8.8(1)(a). See also *Vietnam-Japan BIT* arts 16(1), 16(2)(a), allowing exceptions inconsistent with FTT and NT obligations but consistent with MFN obligation.
[289] *ASEAN-China IA* arts 11(2)(b), (f);*Vietnam-Korea FTA* annex 9-C s 2(g); *CPTPP* art 29.3(3)(a).
[290] *ASEAN-Hong Kong IA* art 13(2)(e). See also *Vietnam-Japan BIT* art 16(1)&(2)(a), allowing exceptions inconsistent with FTT and NT obligations but consistent with MFN obligation.

and with both MFN and NT obligations in another three treaties.[291] Those responding to serious economic or financial disturbance must be compatible with both MFN and NT obligations in all four IIAs covering such a situation.[292] In *Vietnam-Slovakia BIT*, *Vietnam-Philippines BIT*, *Vietnam-Greece BIT* and *Vietnam-Cuba BIT (2007)*, any restrictive measures for permissible safeguard reasons are also required to be adopted 'fairly, equitably and in good faith', 'equitably and in good faith', 'on an equitable, non-discriminatory and in good faith basis', and 'on a non-discriminatory and in good faith basis' respectively.[293] This suggests a fair and equitable application of the measures, including non-discrimination at irrational level (rational/reasonable discrimination). A similar requirement could be found under the *Vietnam-Romania BIT* when the treaty only allows exchange restrictions in accordance with, inter alia, the *IMF Agreement*.[294]

Exchange restrictions and capital controls are further required to be taken within a temporary period. This temporary requirement is explicit in 11 out of 14 IIAs in this group.[295] The temporary nature means restrictive measures must be adopted 'within a reasonable time',[296] 'phased out progressively as the situation […] improves',[297] or 'be eliminated as soon as conditions permit'.[298] Especially in the *Vietnam-Korea FTA* and *ASEAN-Korea IA*, although restrictive measures must be phased out 'when conditions would no longer justify their institution or maintenance' or within one year,[299] they could be applied more than one year period if other conditions are qualified.[300] Similarly, restrictive measures in the *CPTPP* must be 'phased out progressively as the situation […] improve' and not exceed 18 months in duration;[301] however, they could be extended for additional period of one year in exceptional circumstances as long as no more than half parties disagree in writing.[302] In the *Vietnam-Philippines BIT* and *Vietnam-Romania BIT*,

[291] *Vietnam-Korea FTA* Annex 9-C s 2(g); *ASEAN-Korea IA* art 11(3)(e)&4(b); *CPTPP* art 29.3(3)(a).
[292] *ASEAN-China IA* art 11(2)(b)&(f); *ACIA* art 13(5)(e)&(f); *Vietnam-Korea FTA* Annex 9-C s 2(g); *ASEAN-Korea IA* art 11(3)(e)&4(b).
[293] See respectively *Vietnam-Slovakia BIT* art 7(3)(a); *Vietnam-Philippines BIT* art VII; *Vietnam-Greece BIT* art 7(4); *Vietnam-Cuba BIT (2007)* art 7(4)(g).
[294] *Vietnam-Romania BIT* art 4.
[295] *Vietnam-Cuba BIT (2007)* art 7(4)(g); *Vietnam-Japan BIT* art 16(2)(c); *ACIA* art 16(2)(d); *ASEAN-China IA* art 11(2)(e); *ASEAN-Korea IA* art 11.4(a), n 14; *ASEAN-ANZ FTA* art 4(2)(d); *ASEAN-Hong Kong IA* art 13(2)(d); *Vietnam-EAEU FTA* art 8.8(1)(e); *Vietnam-Korea FTA* Annex 9-C s 2(a) and n 29; *CPTPP* art 29.3(3)(e).
[296] *Vietnam-Slovakia BIT* art 7(3)(a).
[297] *ASEAN-China IA* art 11(2)(e); *ASEAN-Korea IA* art 11(3)(d); *ASEAN-Hong Kong IA* art 13(2)(d); *ACIA* art 16(2)(d); *Vietnam-EAEU FTA* art 8.8(1)(e); *ASEAN-ANZ FTA* art 4(2)(d).
[298] *Vietnam-Japan BIT* art 16(2)(c); *Vietnam-Slovakia BIT* art 7(4)(b).
[299] *Vietnam-Korea FTA* Annex 9-C s 2(a); *ASEAN-Korea IA* art 11.4(a).
[300] *Vietnam-Korea FTA* Annex 9-C s 2(a), n 29; *ASEAN-Korea IA* art 11.4(a), n 14.
[301] *CPTPP* art 29.3(3)(e).
[302] Ibid.

even though their FTT provisions do not impose the temporary requirement, Vietnam – as a member of the *IMF Agreement* and the *GATS* – would have to comply with, at least with regards to restrictions on current transfers, and restrictions on/controls of capital transfers related to investment in services where *GATS* obligations are applicable.[303] Regarding restrictions on other transfers, Vietnam may also wish to follow the temporary requirement as the state does not want to offend its non-discrimination obligations under MFN, NT and FET provisions.

Given the above three requirements, the scope of restrictive measures for permissible safeguard reasons is narrowed down. Restrictions and controls must be necessary, non-discriminatory, and temporary to be legitimate. Measures under the *Vietnam-Romania BIT* and *Vietnam-Slovakia BIT* could be less stringent but must still be rational/reasonable and comply with the two last conditions.

3 *Subsection Remark*

Under Formulation C FTT provisions in Vietnam's IIAs, legislative measures that delay, restrict, or prevent transfers might *not* violate the FTT obligation if they aim at addressing serious difficulties for BOP, external financial affairs or macroeconomic management, and/or exceptional economic or financial circumstances. To be qualified, they must be reasonable or necessary, non-discriminatory and temporary in terms of substantive aspects.

[303] See above Part IV(B).

D *Formulation D: Exceptions for Restrictive Legislative Measures for Economic Safeguards, Financial/Monetary Security and Other Potential Reasons*

Under FTT provisions with references to domestic laws in Vietnam's 19 IIAs (Formulation D), exchange restrictions or capital controls might not violate the FTT obligation if responding to BOP, external financial difficulty, financial/monetary security or other potential reasons (permissible reasons), and meeting certain other conditions. This reading comes from the fact that these FTT provisions contain expressions such as 'subject to its laws and regulations', 'within the scope of its laws and regulations', 'subject to its laws, regulations and administrative practices', and 'in accordance with its laws and regulations and international law'.[304]

Under Vietnam's domestic laws – currently, specifically under the 2005 Ordinance on Foreign Exchange Controls – Vietnam could impose exchange restrictions and capital controls *necessary* for the national financial and monetary security reasons.[305] Restrictions/controls here include, but are not limited to, (i) restrictions on buying, carrying foreign exchange, and transferring, making payments for current and/or capital account transactions; (ii) application of a surrender requirement on foreign currency to residents being organisations; and (iii) application of economic, financial and monetary restriction measures. It should be noted that such restrictions/controls must be necessary. They also need to qualify certain conditions if falling within the scope of the *IMF Agreement* and the *GATS*, as provided below.

Through references to domestic laws, FTT provisions in this group also allow Vietnam to adopt restrictive measures in response to BOP and external financial difficulties. This is due to the fact that (i) Vietnam is a member of the IMF and the WTO[306] and thus has obligations and rights conferred by the *IMF Agreement* and the *GATS*, including relevant

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[304] See above Part I(E).

[305] Vietnam's 2005 Ordinance on Foreign Exchange Controls art 41. This provision on Application of Measures for Security Reasons specifies that

> [i]n the necessary cases, the Government may impose, for the national financial and monetary security reasons, the restriction measures as follows: 1. Restrictions on the buying, carrying foreign exchange, and transferring, making payments for current and/or capital account transactions; 2. Application of surrender requirement on the foreign currency to residents being organizations; 3. Application of economic, financial and monetary restriction measures; 4. Other restriction measures.

[306] Note that Vietnam has been a member of the IMF since 21 September 1956 and the WTO since 11 January 2007.

exceptions for BOP and external financial difficulty reasons.[307] Another important fact is (ii) under Vietnam's legal system, treaty provisions are prioritised to get applied if they are dissimilar from what is regulated in domestic laws.[308] Following the *IMF Agreement*, Vietnam is only allowed to impose exchange restrictions on current transactions for BOP reasons in a non-discriminatory manner within the one-year period.[309] Under the *GATS*, Vietnam is entitled to adopt exchange restrictions and capital controls for BOP and external financial difficulty reasons, provided that different conditions are qualified.[310] The conditions, if substantive, require restrictive measures to be necessary, non-discriminatory and temporary, which are similar to those required by Formulation C FTT provisions as examined in the previous subsection.

The FTT provisions in this group, by referring to domestic laws, further allow Vietnam to adopt restrictive measures for reasons/situations beyond financial/economic security and BOP/external financial difficulties discussed above. In this regard, Vietnam's legislative amendments or new regulations to cope with new difficulties or challenges, if imposing restrictions on investment-related transfers, are still compatible with these FTT provisions. This effect comes from a literal reading of the words 'subject to', 'within the scope of' or 'in accordance with' used in the expressions of a 'FTT-domestic law' link in the FTT provisions as earlier mentioned. These words do not aim to freeze the FTT obligation to domestic laws at the time of treaty conclusion, but rather 'leaving the obligation with' domestic laws at the time of treaty implementation. The expressions of a 'FTT-domestic law' link can be considered a different way of recognising state's monetary sovereignty in investment treaties. It cannot be denied that domestic laws can be amended over time or legal policies have an evolving nature, as noted by certain scholars in the general IIA context.[311] However, to a relevant extent, any restrictions should still comply with the *IMF Agreement* and the *GATS* since Vietnam is a current member of the IMF and WTO.

[307] For relevant exceptions under the *IMF Agreement* and the *GATS* within the WTO framework, see respectively *IMF Agreement* art VIII s 2; *GATS* art XII. See also above Part IV(B).
[308] See Vietnam's 2005 Ordinance on Foreign Exchange Controls art 5 on Application of Regulations on Foreign Exchange, International Treaties, Foreign Laws, and International Practices; Law on Treaties 2016 (Vietnam) ch I art 6(1).
[309] See above Part IV(B).
[310] Ibid.
[311] *Investment Treaty Rulemaking* (n 243) 59. See also Dolzer and Schreuer (n 125) 215–6.

Given all of the above effects brought about by the links to domestic laws, FTT provisions in this group create a flexible space for Vietnam in regulating appropriate or necessary economic safeguards. Thus, FTT provision in the *Vietnam-Estonia BIT* does not grant a broader regulatory space although it refers to 'international law' in addition to '[domestic] laws and regulations'. This reaffirms a reason why the provision is classified and analysed in this group.

CONCLUSION

POSSIBLE SUBSTANTIVE REQUIREMENTS AND QUALIFICATIONS FOR LEGISLATIVE MEASURES

Overall, this chapter has found that FTT provisions in all the 60 Vietnamese IIA studied impose the same substantive requirement on *non-restrictive* legislative measures (the same effect level) – no restrictions on reasonable transfer time, currency convertibility and exchange rate – but impose different substantive qualifications on *restrictive* legislative measures to be considered exceptions (Table 5.7). To comply with Formulation A FTT provisions (in 25 IIAs), legislative measures must not delay, restrict or prevent investment-related transfers without any justification. *Restrictive* measures may be consistent with Formulation B FTT provisions, if undertaken for BOP and external financial difficulty reasons in a non-discriminatory manner within a temporary period as approved by the IMF (in two IIAs). In addition to these two reasons, *restrictive* measures can be compatible with Formulation C FTT provisions (in 14 IIAs), if responding to serious difficulties for macroeconomic management and/or serious economic and financial disturbance, and if they are necessary, non-discriminatory and temporary. Under FTT provisions with Formulation D (in 19 IIAs), any *restrictive* measures for any mentioned, or potential, reasons could be justifiable. Certain restrictive legislative measures may be acceptable if pursuing security or non-security interests and meeting other qualifications (Tables 7.6 and 8.6), brought about by treaty exceptions in certain treaty contexts, as analysed in Chapters 7 and 8.

It should be noted that FTT provisions in the 60 IIAs protect different objects. Specifically, FTT provisions with Formulation A/B/C/D (in 43 IIAs) protect *non-exhaustive* transfers while FTT provisions with Formulation A/C/D (in 17 IIAs) protect *exhaustive* transfers (Table 5.7).

Table 5.7: Substantive Requirements and Qualifications for Legislative Measures as Imposed by FTT Provisions in Vietnam's IIAs

Treaty Context (60)	General Obligation	Standard Exceptions		Treaty Context* (42)
	Substantive Requirements for Non-Restrictive Legislative Measures	Substantive Qualifications for Restrictive Legislative Measures		
		Legitimate Objectives (Rational Basis)	Other Qualifications	
25 IIAs	**FTT Provisions without References/Exceptions (Formulation A)**			**12 IIAs**
16 BITs[312 (NETs)]	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official/Market Exchange Rate			
9 BITs[313]				
2 IIAs	**FTT Provisions with References to International Agreements (Formulation B)**			**1 IIA**
Vietnam-US BTA(NETs)	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official/Market Exchange Rate	(i) BOP	Rational Relationship; Temporary Application; Rational Discrimination	
Vietnam-Denmark BIT		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	

[312] Seven BITs with non-EU members: *Vietnam-Iceland BIT*; *Vietnam-Kuwait BIT*; *Vietnam-Korea BIT (2003)*; *Vietnam-Mozambique BIT*; *Vietnam-Switzerland BIT*; *Vietnam-Singapore BIT*; *Vietnam-Turkey BIT*. They also include nine BITs with EU members: *Vietnam-Austria BIT*; *Vietnam-BLEU BIT*; *Vietnam-Czech BIT*; *Vietnam-Finland BIT*; *Vietnam-Germany BIT; Vietnam-Hungary BIT*; *Vietnam-Netherlands BIT*; *Vietnam-Poland BIT*; *Vietnam-Spain BIT*.

[313] Five BITs with non-EU members: *Vietnam-Armenia BIT*; *Vietnam-Russia BIT*; *Vietnam-Thailand BIT; Vietnam-Taiwan BIT (1993); Vietnam-UK BIT*. They also include four BITs with EU members: *Vietnam-Bulgaria BIT*; *Vietnam-France BIT*; *Vietnam-Italy BIT*; *Vietnam-Sweden BIT*.

14 IIAs	**FTT Provisions with Economic Safeguard Exceptions (Formulation C)**			**11 IIAs; *Vietnam-EU IPA*; *RCEP***
Vietnam-Greece BIT(NETs) *Vietnam-Cuba BIT (2007)*(NETs)	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official/Market Exchange Rate	(i) BOP	Rational Relationship; Temporary Application; Rational Discrimination	
Vietnam-Slovakia BIT(NETs)		(i) BOP (iii) Macroeconomic Management	Rational Relationship; Temporary Application; Rational Discrimination	
Vietnam-EAEU FTA(NETs) *ASEAN-ANZ FTA*(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	
Vietnam-Philippines BIT		(i) BOP (ii) External Finance (iii) Macroeconomic Management****	Necessary Relationship; Rational Discrimination	
Vietnam-Japan BIT(NETs) *ASEAN-Hong Kong IA*(NETs)		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN	
CPTPP(NETs)(*)		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN; NT	
ASEAN-China IA(NETs)		(i) BOP (ii) External Finance (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application;	

			MFN; NT	
ACIA(NETs)	Same as above	(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	
		(iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT	
Vietnam-Korea FTA(NETs)	Same as above	(i) BOP (ii) External Finance (iii) Macroeconomic Management (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT	
ASEAN-Korea IA(NETs)	Same as above	(i) BOP (ii) External Finance	Necessary Relationship, Temporary Application, MFN	
		(iii) Macroeconomic Management (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT	
Vietnam-Romania BIT(NETs)(**)	Same as above	Exceptional Financial, Economic Circumstances	Rational Relationship; Temporary Application; Rational Discrimination	

19 IIAs	**FTT Provisions with References to Domestic Laws (Formulation D)**			**16 IIAs**
13 BITs(NETs)[314] 6 BITs[315]	No Restriction on Transfer Time, Currency Convertibility and Official/Market Exchange Rate	(i) BOP (ii) External Finance	Rational, Necessary Relationship; Temporary Application; Rational Discrimination/ MFN	
		Financial, Monetary Security	Necessary Relationship	
		Potential Objectives	Potential Qualifications	
Notes: (NETs): Treaty protecting non-exhaustive transfers related to investments. (*): Exceptions shall not apply to payments or transfers relating to foreign direct investment. (**): Exceptions only include exchange restrictions. ****: Limited to the integrity and independence of its currency. Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.				

[314] Twelve BITs with non-EU members: *Vietnam-Argentina BIT*; *Vietnam-Belarus BIT*; *Vietnam-Cambodia BIT*; *Vietnam-China BIT*; *Vietnam-Egypt BIT*; *Vietnam-Kazakhstan BIT*; *Vietnam-Macedonia BIT*; *Vietnam-Oman BIT*; *Vietnam-Ukraine BIT*; *Vietnam-Uruguay BIT*; *Vietnam-Uzbekistan BIT*; *Vietnam-Venezuela BIT*. They include one BIT with an EU member: *Vietnam-Estonia BIT*.

[315] Four BITs with with non-EU members: *Vietnam-Iran BIT*; *Vietnam-Laos BIT*; *Vietnam-Malaysia BIT*; *Vietnam-Mongolia BIT*. They also include two BITs with EU members: *Vietnam-Latvia BIT*; *Vietnam-Lithuania BIT*.

Chapter 6

NATIONAL TREATMENT PROVISIONS IN VIETNAM'S INTERNATIONAL INVESTMENT AGREEMENTS: SUBSTANTIVE REQUIREMENTS AND QUALIFICATIONS FOR LEGISLATIVE MEASURES

INTRODUCTION

Generally, national treatment (NT) obligation requires a state to accord no less favourable treatment to foreign investments/investors than to domestic ones in like circumstances. The purpose of the NT obligation is to 'counte[r] and preven[t] protectionist measures by host states, intended to favour national investors over foreign competitors',[1] to 'restric[t] discrimination based on nationality between foreign investors (and/or investments) and their domestic counterparts in a host state',[2] or to 'prohibit nationality-based discrimination by the host state between the host states' investors and investments and those of another IIA party'.[3] NT is based on the comparison of treatment accorded to foreign investments/investors and domestic investments/investors, so it is a relative/contingent standard[4] or, as expressed by Newcombe and Paradell, 'an empty shell' obtaining 'substantive content in relation to the treatment afforded to someone or something else'.[5] Additionally, NT is granted by treaty law so it is a 'treaty-based obligation'.[6] It has never been – and probably will never become – a minimum obligation that a state follows or must follow,[7] even though the concept of NT has had ample time to

[1] August Reinisch and Christoph Schreuer, 'National Treatment' in August Reinisch and Christoph Schreuer (eds), *International Protection of Investments: The Substantive Standards* (Cambridge University Press, 2020) 587, 591.

[2] Manini Brar, 'National Treatment Obligation: Law and Practice of Investment Treaties' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2019) 1, 2.

[3] Andrew Newcombe and Lluís Paradell, 'National Treatment' in Andrew Newcombe and Lluís Paradell (eds), *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 147, 150.

[4] See, eg, Catharine Titi (ed), *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014) 127; Giorgio Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 19, 30; Campbell McLachlan, Laurence Shore and Matthew Weiniger (eds), *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd ed, 2017) 336; Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel (eds), *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 94.

[5] Newcombe and Paradell (n 3) 148.

[6] Ibid 149; Andrea K Bjorklund, 'National Treatment' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 29, 31 ('National Treatment (2008)').

[7] Andrea K Bjorklund, 'The National Treatment Obligation' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 411, 414 ('National Treatment (2010)'); Leïla Choukroune, 'National Treatment in International Investment Law and Arbitration: Relative Standard for Autonomous Public Regulation and Sovereign Development' in A

be put on the discussion table, with the concept of an international minimum standard of treatment emerging in the nineteenth century.[8] Whether legislative measures are compatible with the NT obligation depends on treaty texts, including NT provisions and exceptions. This chapter investigates the extent to which NT provisions in Vietnam's IIAs require legislative measures to be non-discriminatory, or reasonably discriminatory.

To define compatibility requirements for legislative measures imposed by NT provisions in Vietnam's IIAs, the chapter first surveys those provisions (Part I). It finds that more than half of Vietnam's IIAs (33/60) surveyed oblige Vietnam to accord no less favourable treatment to foreign investments/investors than that afforded to domestic investments/investors in like circumstances. In terms of whether provisions explicitly or implicitly provide exceptions to the NT obligation as a central criterion, NT provisions in Vietnam's IIAs can be divided into four formulations: NT provisions without exceptions/references in two IIAs – A; NT provisions with public interest-based exceptions in one IIA – B; NT provisions with sector/matter-based and/or economic safeguard-based exceptions in 12 IIAs – C; and NT provisions with direct/indirect references to domestic laws and/or development policies in 18 IIAs – D.

Before analysing these four formulations, the chapter briefly reviews tribunals' approaches to interpretating of NT provisions under other countries' IIAs to identify views on (i) the objects of NT provisions, particularly the existence of domestic comparators for foreign investments/investors, (ii) substantive requirements for non-discriminatory legislative measures, and (iii) justification for discriminatory legislative measures (Part II). Notably, such NT provisions are analogous to those in Vietnam's IIAs to a certain extent. To define foreign and domestic comparators for treatment comparison (i), tribunals have relied on various factors such as economic sector/industry or the type

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Kamperman Sanders (ed), *Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar Publishing, 2014) 183, 190. See also Reinisch and Schreuer (n 1) 605–6; Newcombe and Paradell (n 3) 149.

[8] Note that the concept of NT mentioned here was in the context of the Calvo Doctrine, which limits the standard of treatment foreigners to that of nationals. See Todd J Weiler, 'Treatment No Less Favorable Provisions within the Context of International Investment Law: Kindly Please Check Your International Trade Law Conceptions at the Door' (2014) 2(1) *Santa Clara Journal of International Law* 76, 82–5; Michail Risvas, 'Non-Discrimination in International Law and Sovereign Equality of States: An Historical Perspective' (2017) 39(1) *Houston Journal of International Law* 79, 87–8; Ivar Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' (2020) 31(1) *The European Journal of International Law* 289, 190. See also August Reinisch, 'National Treatment' in Meg Kinnear et al (ed), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 389, 390; Stephan Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' in Marc Bungenberg et al (eds), *International Investment Law: A Handbook* (CH Beck – Hart – Nomos, 2015) 6, 9.

of products/services provided by foreign and domestic investments/investors (driven by the objective of NT to ensure fair competition), similar market segments or contract types (driven by the objectives of the legislative measures at issue), or locations/areas (driven by legislative measures). To be compatible with NT (ii), legislative measures impacting foreign and domestic comparators must not cause any discrimination in intent and effect, as required by certain tribunals, or in intent or effect, as required by some other tribunals. Legislative measures deemed discriminatory may be exempted (iii) if having a reasonable/plausible connection with rational policies/public interests, as required by certain tribunals, or a 'necessary' connection with such polices/interests, as required by other tribunals. Based on the review, the section suggests three practical questions for analysing transfer provisions in the context of Vietnam's IIAs.

Considering the three practical questions in international arbitral practice and based on the VCLT interpretation rules, the chapter analyses all formulations of NT provisions in Vietnam's IIAs together to look for (i) the objects of NT protection, and (ii) substantive requirements for non-discriminatory legislative measures, regarding the compatible intent and effect (Part III). Regarding the objects of NT protection (i), the chapter finds that NT provisions in Vietnam's IIAs protect either (i) post-established foreign investment and/or investors in like circumstances to domestic ones, or (ii) pre- and post-established foreign investments and investors in like circumstances to domestic ones. Regarding compatible intent and effect (ii), it finds that to be legitimate under NT provisions in Vietnam's IIAs, measures must not cause any minor or major disadvantages, by discriminatory intent or effect, to foreign investments/investors.

The chapter continues to analyse each formulation of NT provisions in Vietnam's IIAs separately to look for (iii) justification or exceptions for discriminatory legislative measures (Part IV). Regarding NT provisions with Formulation A/C, it is unlikely whether measures governing protected sectors/matters and causing disadvantages to foreign investments/investors could be justified by any reason. Regarding NT provisions with Formulation B, discriminatory legislative measures could be compatible with the NT obligation if taken for public order, public safety, public health, or customary/traditional objectives. Regarding NT provisions with Formulation D, discriminatory legislative measures could also be compatible if they relate to development policies and other public interests. Discriminatory measures accepted under NT provisions with Formulation B/D must not be arbitrary or reasonable (reasonable discrimination).

The chapter concludes with substantive requirements for non-discriminatory legislative measures, and substantive qualifications for discriminatory legislative measures. Certain discriminatory legislative measures could be accepted if intended to further security interests or public interests, brought about by treaty exceptions in certain treaty contexts as analysed in Chapters 7 and 8.

I A MAP OF PROVISION FORMULATIONS – NATIONAL TREATMENT PROVISIONS IN VIETNAM'S IIAS

A *Section Overview*

Of the 60 IIAs surveyed, 33 contain NT provisions. These provisions share a common structure, containing one or two statements on NT obligations formulated from two components. The first component relates to the objects of NT protection, particularly pre- and/or post- established investments and/or relevant foreign investors (i). Regarding this component, NT provisions in 18 IIAs explicitly mention the likeness between foreign and domestic investments'/investors' circumstances. The other component relates to 'no less favourable' treatment – a state must treat foreign investments/investors no less favourably than domestic comparators (ii). In 29 out of the 33 IIAs, NT provisions additionally include specific exceptions, or references to domestic laws and/or development policies (iii).

For the purposes of this chapter, the study takes the last component – the absence or the presence of implicit/explicit exceptions to the NT obligation – as a central criterion to classify NT provisions in Vietnam's IIAs. As a result, NT provisions can be divided into four formulations: NT provisions without exceptions/references (in two IIAs) – A; NT provision with public interest-based exceptions (one IIA) – B; NT provisions with sector/matter-based and/or economic safeguard-based exceptions (12 IIAs) – C; and NT provisions with direct/indirect references to domestic laws and/or development policies (18 IIAs) – D. Notably, when the *Vietnam-EU IPA* and the *RCEP* come into force, superseding nine current BITs with EU's members having NT provisions,[9] NT provisions in Vietnam's IIAs will be limited to Formulations C and D (Table 6.1).

[9] Note that NT provisions in the *Vietnam-EU IPA* and the *RCEP* are similar to Formulation C to a certain extent. See *Vietnam-EU IPA* ch 2 art 2.3, annex 2; *RCEP* ch 10 arts 10.3, 10.8. See also app 6.

Table 6.1: Formulations of NT Provisions in Vietnam's IIAs

National Treatment Provisions		Formulations	Treaty Contexts (60)	Treaty Contexts* (42)
National Treatment Provisions	National Treatment Provisions without Exceptions/References	A	2[10]	0
	National Treatment Provisions with Public Interest-Based Exceptions	B	1[11]	0
	National Treatment Provisions with Sector/Matter-Based and/or Economic Safeguard-Based Exceptions	C	12[12]	14[13]
	National Treatment Provisions with References to Domestic Laws and/or Development Policies	D	18[14]	10[15]
No National Treatment Provisions			27[16]	18[17]
Note: Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.				

[10] Two BITs with EU members: see *Vietnam-Czech BIT* art 2; *Vietnam-France BIT* art 4. See also app 6.
[11] One BIT with an EU member: see *Vietnam-Germany BIT* art 3. See also app 6.
[12] Twelve IIAs with non-EU members: see *Vietnam-Iceland BIT* art 3; *Vietnam-Japan BIT* art 2; *Vietnam-Korea BIT (2003)* art 3; *Vietnam-Oman BIT* art 4; *Vietnam-UK BIT* art 3; *Vietnam-US BTA* art 2; *Vietnam-Korea FTA* ch 9 art 9.3; *CPTPP* ch 9 art 9.4; *ACIA* art 5; *ASEAN-Korea IA* art 3; *ASEAN-ANZ FTA* ch 11 art 4; *ASEAN-Hong Kong IA* art 3. See also app 6.
[13] Twelve IIAs with non-EU members: see above n 12. For the *Vietnam-EU IPA* and the *RCEP*, see above n 9.
[14] Ten BITs with non-EU members: see *Vietnam-Armenia BIT* art 4(4); *Protocol to the Vietnam-Cuba BIT* (2007) para 2; *Vietnam-Russia BIT* art 3; *Vietnam-Iran BIT* art 4; *Vietnam-Kuwait BIT* art 3; *Vietnam-Mozambique BIT* art 3; *Vietnam-Switzerland BIT* art 3(4); *Vietnam-Turkey BIT* art 3(2); *Vietnam-EAEU FTA* ch 8 art 8.32; *ASEAN-China IA* art 4. For eight BITs with EU members, see *Vietnam-Bulgaria BIT* art 3(4); *Vietnam-Denmark BIT* art 3; *Vietnam-Estonia BIT* art 3; *Vietnam-Finland BIT (2008)* art 3(1); *Vietnam-Greece BIT* art 4; *Vietnam-Slovakia BIT* art 4; *Vietnam-Spain BIT* art 4; *Vietnam-Netherlands BIT* art 4. See also app 6.
[15] Ten BITs with non-EU members: see above n 14.
[16] Eighteen BITs with non-EU members: see *Vietnam-Argentina BIT*; *Vietnam-Belarus BIT*; *Vietnam-Cambodia BIT*; *Vietnam-China BIT*; *Vietnam-Egypt BIT*; *Vietnam-Kazakhstan BIT*; *Vietnam-Laos BIT*; *Vietnam-Macedonia BIT*; *Vietnam-Malaysia BIT*; *Vietnam-Mongolia BIT*; *Vietnam-Philippines BIT*; *Vietnam-Singapore BIT*; *Vietnam-Taiwan BIT (1993)*; *Vietnam-Thailand BIT*; *Vietnam-Uruguay BIT*; *Vietnam-Ukraine BIT*; *Vietnam-Uzbekistan BIT*; *Vietnam-Venezuela BIT*. For nine BITs with EU members, see *Vietnam-Austria BIT*; *Vietnam-BLEU BIT*; *Vietnam-Hungary BIT*; *Vietnam-Italy BIT*; *Vietnam-Latvia BIT*; *Vietnam-Lithuania BIT*; *Vietnam-Poland BIT*; *Vietnam-Romania BIT*; *Vietnam-Sweden BIT*.
[17] Eighteen BITs with non-EU members, see above n 16.

B *NT Provisions without Exceptions/References – Formulation A*

Of the NT provisions in the 33 IIAs, those in the *Vietnam-Czech BIT* and *Vietnam-France BIT* do not provide exceptions related to public interests, economic safeguards, or sectors/matters, or references to domestic laws and/or development policies (Table 6.1). The NT provision under the *Vietnam-Czech BIT* does include exceptions related to potential advantages, preferences or privileges resulting from other existing/future agreements for economic union or area/avoidance of double taxation; however, such exceptions are not considered here.[18] This is because even though customs, economic, or monetary union, a common market or a free trade area to which Vietnam is a member might grant different levels of NT with respect to different sectors, such levels are generally lower than the level possibly accorded by NT under the BIT. Also, if any international agreement or arrangement relating wholly or mainly to taxation to which Vietnam is a member results different implementation of tax-related measures to residents and non-residents, such measures are normally more administrative than legislative. In the case of the *Vietnam-France BIT*, its *Protocol* specifies that '[c]omparable treatment is considered in a holistic manner taking into account economic and social characteristics of the country';[19] however, this specification does not qualify as an exception to NT.

C *NT Provision with Public Interest-Based Exceptions – Formulation B*

Unlike the NT provisions in the previous group, the sole NT provision in this group is accompanied by exceptions related to public interests (Table 6.1). The relevant clause, in the *Protocol* to the *Vietnam-Germany BIT*, provides that '[m]easures taken on the basis of public order and safety, the protection of public health, customs and traditions are not considered '"less favorable" treatment in the spirit of Article 3 [NT and MFN]'.[20]

[18] *Protocol of Amendment to the Vietnam-Czech BIT* art 1.
[19] *Joint Interpretation Notes on the Vietnam-France BIT* s 2.
[20] *Protocol of Amendment to Vietnam-Germany BIT* art (3).

D *NT Provisions with Sector/Matter-Based and/or Economic Safeguard-Based Exceptions – Formulation C*

NT provisions in 12 IIAs commonly have sector/matter-based exceptions. Specifically, they list sectors or matters that are not affected/governed by NT obligations – a so-called 'negative list' approach[21] – and have the effect of a 'standstill' commitment.[22] The list varies between treaties. The NT provision in the *Vietnam-Oman BIT* excepts five matters: ownership of land and real estate, obtaining grants, subsidies and soil loans, government procurement, services supplied in the exercise of governmental authority, and taxation.[23] NT provisions in the remaining 11 treaties employ an annex to cover the list of exceptional sectors and matters,[24] and two of them consider tax matters – 'any domestic legislation relating wholly or mainly to taxation' or 'tax measures' – as an exception or 'inapplicable' area for NT.[25]

Notably, NT provisions under six treaties in this group are linked to provisions on economic safeguards. Accordingly, three of them explicitly consider economic safeguards as exceptions to NT obligation,[26] and two implicitly express this through *not* requiring economic safeguards to be applied on an NT basis but instead on MFN basis.[27]

E *NT Provisions with References to Domestic Laws and/or Development Policies – Formulation D*

NT provisions in the remaining 18 IIAs share a common feature of directly/indirectly referring to domestic laws and development policies. Of these, the provisions in 15 treaties directly refer NT obligations to domestic laws through phrases such as 'in accordance with its laws',[28] 'in accordance with its laws [or its applicable laws] and

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[21] OECD, *Investment Policy Review: Vietnam 2018* (2018) 171.
[22] UNCTAD, *Preserving Flexibility in IIAs: The Use of Reservations: UNCTAD Series on International Investment Policies for Development Chapter I* (2006) 19.
[23] *Vietnam-Oman BIT* arts 4(2)(b), 4(3).
[24] *Vietnam-Iceland BIT* annex; *Vietnam-Korea BIT (2003)* annex; *Vietnam-UK BIT* annex; *Vietnam-US BTA* annex H; *Vietnam-Japan BIT* annex I, annex II; *Vietnam-Korea FTA* annex I, annex II; *ACIA* Schedule/Reservation Lists; *ASEAN-Korea IA* Schedules of Reservations; *ASEAN-Hong Kong IA* annex I; *ASEAN-ANZ FTA* Schedules to List I and II; *CPTPP* annex I, annex II.
[25] See respectively *Vietnam-Oman BIT* art 4(2); *Vietnam-Iceland BIT* art 3(5).
[26] *ASEAN-Korea IA* arts 10(3), 11; *ASEAN-Hong Kong IA* arts 12(4), 13; *Vietnam-Japan BIT* arts 16(1), 16(2)(a). See also app 6.
[27] *ACIA* arts 13(4), 16; *ASEAN-ANZ FTA* ch 11 art 8(5), ch 15 art 4. See also app 6.
[28] *Protocol of Amendment to Vietnam-Cuba BIT (2007)* [2]; *Vietnam-Iran BIT* art 4(1); *Vietnam-Russia BIT* art 3 [tr author].

regulations',[29] 'subject to its laws and regulations',[30] 'in compliance with its legislation'[31] or 'without prejudice to its laws on foreign investments'.[32] NT in one treaty is limited to 'taxes and fiscal deductions and exemptions' accorded to foreign investors, so the reference is specifically to '[domestic] taxation law and legislation'.[33] NT provisions in four of the 15 treaties additionally express the reservation of 'the right to decide on sectors and to decide which sectors and areas of activity may exclude or limit the activities of foreign investors',[34] 'the right … to apply and introduce exemptions from national treatment',[35] or 'the rights … to apply and introduce exemptions from national treatment',[36] and the provisions in four other treaties also refer to development policy through phrases including 'within the framework of its development policy'.[37] It should be noted that among NT provisions in the mentioned 15 treaties, the provisions in four specify tax measures,[38] and the provision in one other treaty indirectly considers economic safeguards as exceptions to NT;[39] however, such measures are subject to domestic laws so they are not necessarily considered separate features of NT provisions in this group.

NT provisions under the *Vietnam-Estonia BIT*, *Vietnam-Finland BIT (2008)* and *ASEAN-China IA* do not contain similar phrases to those mentioned above. However, they allow NT not to be applied to any existing or future non-conforming measures maintained or adopted within the territory or any continuation or amendment of such non-conforming measures.[40] Therefore, it could be said that such NT provisions indirectly refer to domestic laws.

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[29] *Vietnam-Spain BIT* art 4(3); *Vietnam-Denmark BIT* art 3(2); *Vietnam-EAEU FTA* ch 8 art 8.32(2); *Vietnam-Greece BIT* art 4(3); *Vietnam-Slovakia BIT* art 4(3); *Vietnam-Mozambique BIT* art 3(2); *Vietnam-Kuwait BIT* art 3(2).
[30] *Vietnam-Turkey BIT* art 3(2).
[31] *Vietnam-Bulgaria BIT* art 3(4).
[32] *Vietnam-Armenia BIT* art 4(4); *Vietnam-Switzerland BIT* art 3(4).
[33] *Vietnam-Netherlands BIT* art 4.
[34] *Vietnam-Russia BIT* art 3.
[35] *Vietnam-EAEU FTA* ch 8 art 8.32(2).
[36] *Vietnam-Mozambique BIT* art 3(2); *Vietnam-Kuwait BIT* art 3(2).
[37] *Vietnam-Greece BIT* art 4(3); *Vietnam-Slovakia BIT* art 4(3); *Vietnam-Mozambique BIT* art 3(2); *Vietnam-Kuwait BIT* art 3(2).
[38] *Vietnam-Mozambique BIT* art 3(3)(b); *Vietnam-Kuwait BIT* art 3(3)(b); *Vietnam-Denmark BIT* art 4(1)(b); *Vietnam-Greece BIT* art 4(4)(b); *Vietnam-Spain BIT* arts 4(4)(b), 4(5); *Vietnam-Slovakia BIT* art 4(4)(b).
[39] *ASEAN-China IA* arts 10(5) and 11.
[40] *Vietnam-Estonia BIT* art 3(3); *Vietnam-Finland BIT (2008)* art 3(4); *ASEAN-China IA* art 6.

II A FOCUSED REVIEW OF TRIBUNALS' INTERPRETATION APPROACHES – NATIONAL TREATMENT PROVISIONS IN INTERNATIONAL ARBITRATION PRACTICE

A *Section Overview*

Similarly to FTT provisions, NT provisions in Vietnam's IIAs have not been the subject of interpretation in any international arbitral proceeding.[41] Therefore, to obtain a practical view, NT provisions in investment treaties concluded by other countries that have been interpreted at merits stage of at least 59 of 130 cases, are reviewed below.[42]

In interpreting NT provisions more or less analogous to those in Vietnam's IIAs, tribunals have adopted different approaches to (i) the factors used to define foreign and domestic comparators for treatment comparison, (ii) compatible intent and effect, and (iii) justification for discriminatory measures. Decisions regarding the first issue, the definition of foreign and domestic comparators, or the likeness of foreign and domestic investments/investors' circumstances, have been based on different factors (Part II(B)). In certain cases, foreign and domestic investments/investors were judged comparable when working in the same economic sector/industry or providing the same products/services. Tribunals in these cases possibly relied on the NT objective of ensuring fair competition between foreign and domestic investments/investors. In other cases, foreign and domestic investments/investors were found to be non-comparable due to having different market segments, or different contract types. Tribunals in these cases possibly relied on the objectives of legislative measures to draw such differences. In some cases, foreign and domestic investments/investors were deemed non-comparable because of having different regulatory regimes governing them. Notably, these factors are reviewed for the study purpose. This study takes a perception that likeness to domestic foreign investments/investors is a condition for foreign investors to truly enjoy NT, rather than simply a part of NT analysis to find NT violations; thus, one might find the names of

[41] Note that no claim of NT provisions is raised in Vietnam's two cases currently resolved at the merits stage – *Trinh Vinh Binh and Binh Chau JSC v Vietnam (II) (Award)* (PCA Arbitral Tribunal, Case No 2015-23, 10 April 2019) ('*Trinh and Binh Chau v Vietnam (II)*') and and *Dialasie SAS v Socialist Republic of Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 17 November 2014) ('*Dialasie v Vietnam*').

[42] Note that of the 59 cases resolved at the merit stage, 50 are in favour of state respondents, and nine are in favour of foreign investors as claimants. These figures have been collected by the author from data published on the website of UNCTAD Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

factors or their corresponding case lines differs from those in certain other scholars' reviews and analyses.[43]

Regarding the second issue, to be compatible with NT, measures impacting foreign and domestic comparators must be similar or not cause any discrimination against foreign investments/investors (Part II(C)). As required by certain tribunals, NT was not violated when both discriminatory intent *and* discriminatory effect were absent. In other cases, tribunals required the absence of discriminatory intent, or the absence of discriminatory effect, to exclude the violation, regardless of whether the discriminatory effect, or the discriminatory intent respectively, was available or not. These factors are not much different from those identified in the existing literature, even though different cases for such factors might be found.[44] Regarding the last issue, certain measures, despite being discriminatory, could be justified if having reasonable/necessary connection with rational policies/objectives from the view of certain tribunals (Part II(D)), an aspect also reviewed by other scholars.[45]

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[43] See generally Mitchell, Andrew D, David Heaton and Caroline Henckels (eds), *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar Publishing, 2016) 64–88; Jürgen Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 243, 255–62 ('Comparativism'); Rudolf Dolzer, 'National Treatment: New Developments' (Conference Paper, ICSID, OECD and UNCTAD, 12 December 2005); Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *The American Journal of International Law* 48, 71–6; Federico Ortino, 'Non-Discriminatory Treatment in Investment Disputes' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 344, 354–6; Marcos Orellana, 'Investment Agreements & Sustainable Development: the Non-Discrimination Standards' (2011) 11(3) *Sustainable Development Law & Policy* 2, 6–8; Lu Wang, 'Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?' (2015) 31(1) *ICSID Review* 45, 53–5 ('Non-Discrimination'); Guiguo Wang, 'Likeness and Less Favourable Treatment in Investment Arbitration' (2016) 3(1) *Journal of International and Comparative Law* 73, 75–90; Matteo Sarzo, 'The National Treatment Obligation' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill, 2018) 378, 392–4. See also Reinisch and Schreuer (n 1) 626–53; Newcombe and Paradell (n 3) 158–71; Brar (n 2) 15–20; Choukroune (n 7) 207–13; Bjorklund, 'National Treatment (2008)' (n 6) 34–48; Bjorklund, 'National Treatment (2010)' (n 7) 419–30. For a discussion on the likeness in environment-related cases, see Jorge E Viñuales (ed), *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012) 324–30; Ying Zhu, 'Environmental Discrimination in International Investment Law' (2019) 51(2) *New York University Journal of International Law and Politics* 385, 396–9. For a discussion on the likeness in human rights-related cases, see Freya Baetens, 'Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 279, 299–307. For a discussion on the likeness in NAFTA cases, see Todd Weiler, 'Saving Oscar Chin: Non-Discrimination in International Investment Law' in Norbert Horn and Stefan Michael Kroll (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law* (Kluwer Law International, 2004) 159, 166–7, 170–3.

[44] Mitchell, Heaton and Henckels (n 43) 136–8; Reinisch and Schreuer (n 1) 616–23; Newcombe and Paradell (n 3) 171–3; Brar (n 2) 24–6; Kurtz, 'Comparativism' (n 43) 272–7.

[45] Reinisch and Schreuer (n 1) 667–72; Brar (n 2) 27–31; Newcombe and Paradell (n 3) 173–7; Choukroune (n 7) 214–7; Mitchell, Heaton and Henckels (n 43) 138–150; Ortino (n 43) 360–63; Viñuales (n 43) 332–6;

B *Different Factors to Define Foreign and Domestic Comparators*

1 *Factors Driven by Fair Competition Objective of National Treatment*

(a) Same Economic Sector/Industry

In international arbitration practice, certain tribunals identified foreign and domestic investments/investors in like circumstances when they operated in the same economic sector/industry. For example, the tribunal in *Myers v Canada*[46] relied on the same business sector to find domestic comparators. It asserted that the claimant, the United States' PCB seller/producer, was in like circumstances to Canadian PCB waste disposal companies, Chem-Security and Cintec, because they shared the sector of PCB waste remediation. In its view, 'the concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favorable treatment is in the same "sector" as the national investor',[47] and 'the word "sector" has a "wide connotation" that includes the concepts of "economic sector" and "business sector"'.[48] In two cases against Mexico, *ADM v Mexico* and *Corn Products v Mexico*,[49] the tribunals relied on the same economic sector to determine that the claimants, US's high-fructose corn syrup (HFCS) producers and distributors, were in 'like circumstances' to Mexican sugar producers.[50] According to the tribunal, they all produced sweeteners (HFCS and sugar) for the soft drink industry. Similarly, the tribunal in *Cargill v Poland*[51] concluded that the claimant, a US isoglucose producer, was in 'like circumstances' to the Polish sugar industry because they all produced sweeteners (isoglucose and sugar) for the soft drink industry.[52] Notably, domestic comparators were not specific sugar producers but the entire Polish sugar industry.

Zhu (n 43) 401–3; Orellana (n 43) 4–5; Wang, 'Non-Discrimination' (n 43) 55–7.

[46] *Myers, Inc v Government of Canada (Partial Award)* (UNCITRAL Arbitral Tribunal, 13 November 2000) ('*Myers v Canada*').

[47] Ibid [250].

[48] Ibid.

[49] *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/5, 21 November 2007) ('*ADM v Mexico*'); *Corn Products International, Inc v United Mexican States (Decision on Responsibility)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/1, 18 August 2009) ('*Corn Products v Mexico*'). Noted that the claimants, in these case, alleged that a new tax regulations adopted by Mexico in 2001, imposing 20% excise tax on soft drinks with an exception for those sweetened by sugar, aimed to protect domestic sugar producers.

[50] See *ADM v Mexico* (n 49) [198]; *Corn Products v Mexico* (n 49) [120].

[51] *Cargill, Incorporated v Republic of Poland (Final Award)* (UNCITRAL Arbitral Tribunal, 29 February 2008) ('*Cargill v Poland*').

[52] See Ibid [339].

Even though the same business/economic sector was employed by above tribunals as a factor for finding comparable domestic investments/investors for relevant claimants, the NT objective of ensuring fair competition between foreign and domestic comparators could be a hidden reason for tribunals to come up with such factor. In considering the fair competition objective, the tribunal in *Myers v Canada* defined Canadian PCB waste disposal companies, not Canadian PCB sellers/producers, as appropriate comparators of the claimant – US's PCB seller/producer. The tribunal pointed out that the claimant could be able to attract customers of Canadian operators and to take business away from Canadian operators.[53] Additionally, the tribunal in *ADM v Mexico* reasoned that 'when no identical comparators exist, the foreign investor may be compared with less like comparators, if the overall circumstances of the case suggest that they are in like circumstances'.[54] The tribunal agreed with the claimant that HFCS producers and sugar producers competed to supply sweeteners to the industry producing beverages and syrups subject to the tax – they 'compete face-to-face in the same market'.[55] As pointed by the tribunal, this competitive relationship was confirmed not only by the WTO Panel but also previously by Mexican authorities. Similarly, the tribunal in *Cargill v Poland* found that sugar and isoglucose were sweeteners for the food and beverage market, so sugar and isoglucose manufactures shared the same economic sector.[56] In its view, although isoglucose was not used for home consumption and individual use as sugar could be, this difference was unlikely to change the fact that there was a common market for both products.[57]

[53] *Myers v Canada* (n 46) [251].
[54] *ADM v Mexico* (n 49) [202].
[55] Ibid.
[56] *Cargill v Poland* (n 51) [317], [339].
[57] Ibid [317], [328].

(b) Same Products/Services Provided by Foreign and Domestic Investments/Investors

Beyond the general factor of the same economic sector/industry, certain tribunals relied on products/services provided by foreign and domestic investments/investors to define their ideal comparators. Such reliance possibly reflects the NT objective of ensuring fair competition between foreign and domestic comparators. For example, the tribunal in *Methanex v US*[58] found no similarity in circumstances of the claimant, a methanol producer, and domestic ethanol producers, as had been argued by the claimant, because they did not provide identical products (methanol) or even competitive products. In this case, the claimant alleged that US's ban on MTBE additives in gasoline paved way for the domestic ethanol industry and created a discriminatory effect against the claimant as a company, which provided the majority of methanol in the US. In the claimant's view, methanol and ethanol competed directly in the oxygenate market, so businesses producing those products shared 'like circumstances'.[59] The tribunal did not agree with this view but instead held that proper comparators first needed to be identical comparators (say, domestic methanol producers) and then 'less like comparators' (say, domestic ethanol producers) only if identical comparators were unavailable.[60]

Similarly, the tribunal in *UPS v Canada*[61] found the claimant's subsidiary, UPS Canada, as a courier company, and Canada Post, as a state-owned postal corporation, were not in like circumstances because their services – goods imported by courier services and goods imported as mail – were different. Goods shipped by UPS Canada were processed by the Courier Low-Value Shipment Program and paid customs under that program, while regular postal goods mailed by Canada Post were processed by the Customs International Mail Processing System and did not require payment of duties. UPS claimed that the treatment whereby it had to pay certain customs duties on courier packages while Canada Post could import goods through mail without paying such duties was discriminatory. The tribunal disagreed, pointing out that postal and courier services had 'different objectives, mandates and transport and deliver goods in different ways and under different circumstances'.[62] This tribunal's conclusion was also reached based on its observation

[58] *Methanex Corporation v United States of America (Final Award)* (UNCITRAL Tribunal, 3 August 2005) ('*Methanex v US*').
[59] Ibid pt IV ch B [23].
[60] Ibid [17].
[61] *United Parcel Service of America, Inc (UPS) v Government of Canada (Award on the Merits)* (ICSID Arbitral Tribunal, Case No UNCT/02/1, 24 May 2007) ('*UPS v Canada'*).
[62] Ibid [117].

that international agreements classify postal services and courier services into different categories.[63] In this case, as some academics point out, the tribunal did not 'refer to economic competition',[64] or examine the question of whether Canada Post would be able to attract customers away from UPS through delivery of packages. It seems that through distinguishing between goods imported by courier services and goods imported as mail, the tribunal implicitly aimed to point out that such services were not directly competitive ones.

2 *Factors Driven by Objectives of State Measures at Issue*

Beyond factors driven by the fair competition objective of NT, certain tribunals have defined foreign and domestic comparators based on factors that are driven by the objectives of state measures at issue, such as market segments, contract types or financial situations. If state measures in challenge were different, these factors might not have been found, or come up, by the tribunals. For example, the tribunal in *De Levi v Peru*[65] found that although the claimant's bank (BNM) and three local banks (BCP, Banco Wiese and Banco Latino) were all in the banking sector, they did not share the same market segments.[66] This finding of the tribunal was based on two factual grounds: (i) the claimant's bank had 4% of loans and 2% of deposits while the local banks such as BCP and Banco Wiese accounted for 44% of loans and 51% of deposits; and (ii) most of the clients of the claimant's bank were companies, other banks and state-owned enterprises, while most of the clients of the local banks such as Banco Latino were individuals.[67] In *Windstream Energy v Canada*,[68] the claimant's company (WWIS) and two domestic enterprises (TransCanada and Samsung) all operated in the energy industry but were in different situations because they operated under different contracts for different projects, as concluded by the tribunal.[69] The contract of the claimant's company was a Feed-in-Tariff (FIT) contract for offshore wind power with Ontario Power Authority,[70] whereas, TransCanada's contract was a non-FIT type for a gas-fired plant and Samsung's contract

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[63] Ibid [103]–[117].
[64] Mitchell, Heaton and Henckels (n 43) 85, citing Ronald A Cass, 'Separate Statement of Dean Ronald A Cass' [18]–[26] <https://www.italaw.com/sites/default/files/case-documents/ita0885.pdf>.
[65] *Renée Rose Levy de Levi v Republic of Peru (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/17, 26 February 2014) ('*De Levi v Peru*').
[66] Ibid [396].
[67] Ibid [398].
[68] *Windstream Energy LLC v The Government of Canada (Award)* (PCA Arbitral Tribunal, Case No 2013-22, 27 September 2016) ('*Windstream Energy v Canada*').
[69] Ibid [414].
[70] Ibid.

was also a non-FIT type (specifically, a Green Energy Investment Agreement) for wind and solar power.[71]

In the two above cases, the tribunals relied on market segments or contract types to distinguish between the situations of the claimants and the relevant domestic comparators; however, the underlying reasoning relates to the objectives of state measures at issue. In the first case, *De Levi v Peru*, the state measures in question were the Financial Industry Consolidation Program-PCSF and bailout schemes under Emergency Degree 2000.[72] These programs and schemes aimed to support banks or other financial institutions during financial difficulties, provided that these banks/institutions were critical to the safety of Peru's banking system as claimed by the respondent.[73] Because of this aim, the claimant's bank, with its small size and corporate client group, was not covered by the supporting program and schemes. In the second case, *Windstream Energy v Canada*, a moratorium issued by Ontario on offshore wind farms in February 2011, which led to the suspension of the claimant's wind project, was the main state measure under challenged.[74] The tribunal emphasised that the moratorium applied to 'offshore' and 'wind' farms,[75] which excluded 'onshore' and 'non-wind' farms.

In *GAMI v Mexico*,[76] the tribunal examined financial situations to distinguish between five expropriated sugar mills owned by the claimant's company (GAM) and 34 non-expropriated sugar mills owned by domestic investors, even though they worked in the same industry. The claimant, a US company, claimed that all sugar mills were in like circumstances and that Mexico's Expropriation Decree discriminated between 22 expropriated sugar mills (including five of GAMI's mills) and 34 non-expropriated sugar mills.[77] Mexico contested this claim by arguing that the expropriated mills were confiscated because they were insolvent and close to bankruptcy; the state as a public actor therefore needed to interfere to maintain the plants' operations and workforces.[78] The tribunal accepted expropriated sugar mills were not in like circumstances to non-

[71] Ibid [413]–[414].
[72] *De Levi v Peru* (n 65) [76].
[73] Ibid [225].
[74] *Windstream Energy v Canada* (n 68) [5].
[75] Ibid [414].
[76] *GAMI Investments, Inc v United Mexican States (Final Award)* (UNCITRAL Arbitral Tribunal, 15 November 2004) ('*GAMI v Mexico*').
[77] Ibid [17], [24], [112].
[78] Ibid [114].

expropriated sugar mills because of the public purpose of the expropriation.[79] Even though this tribunal did not clearly separate the analysis to compare foreign and domestic investments/investors from the analysis to compare treatments, the factor for distinguish expropriated from non-expropriated sugar mills was indeed their economic situations, as cited by some tribunals.[80] Clearly, this factor was driven by the objectives of the measures to maintain plants' operations and workforces.

3 *Factors Drawn from State Measures at Issue*

Certain tribunals distinguished the circumstances of foreign investments/investors from those of domestic ones based on the legislative measures at issue. For example, the tribunal in *Pope & Talbot v Canada*[81] found that claimant's subsidiary (Pope & Talbot Ltd), a wood company in the province of British Columbia, had no similarity to Canadian softwood lumber exporters located outside the four provinces of British Columbia, Alberta, Ontario and Quebec. In defining appropriate comparators for the claimant, the tribunal emphasised that '[a]n important element of the surrounding facts will be the character of the measures under challenge'.[82] According to the tribunal, Canada's measures related to export permits and export fees were intended to control lumber exports to the US, and eliminate the latter's threats to apply countervailing duty.[83] Lumber exported from four provinces was covered by the measures because, as provided by the respondent, it accounted for most of the export production to the US.[84] Based on these grounds, the tribunal concluded that lumber exporters located in those provinces were not in 'like circumstances' to those located in non-covered provinces.[85] Similarly, the tribunal in *Merril & Ring v Canada*[86] stated that the claimant, a US company with timber operations in British Columbia, was not in 'like circumstances' to timber companies in other provinces because the latter were not subject to the Log Export Control Regime. The regime included provincial regulations under the British Columbia Forest Act and Canadian federal regulations in Notice 102 enacted under the Export and

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[79] Ibid.
[80] *Cargill, Inc v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009) [202], [204] ('*Cargill v Mexico*'); *Corn Products v Mexico* (n 49) [140].
[81] *Pope & Talbot v Government of Canada (Interim Award)* (UNCITRAL Arbitral Tribunal, 26 June 2000) ('*Pope & Talbot v Canada*').
[82] Ibid [76].
[83] Ibid [74], [86].
[84] Ibid [86].
[85] Ibid [88].
[86] *Merrill & Ring Forestry LP v The Government of Canada (Award)* (ICSID Arbitral Tribunal, Case No UNCT/07/1, 31 March 2010) ('*Merrill & Ring v Canada*').

Import Permit Act.[87] Those provincial and federal regulations all required timber exporters in British Columbia to perform a log surplus test before obtaining authorisation for their exports. Logs were only authorised to be transported out of British Columbia when they were not purchased by any local consumer or offered with a price equivalent to or above fair market value in the local market.[88] The tribunal said that a proper comparison was between 'identically situated investors' – foreign and domestic log producers under the same regulatory measures in British Columbia – and, therefore, there was no need to identify similar log producers.[89]

One might say that the same regulatory regime – or 'the like legal requirements' in the words of the tribunal in *Grand River v US*[90] – was the factor used to define like circumstances of foreign and domestic comparators in the above cases. However, tribunals have attempted to draw differences between the legislative measures at issue and the situations of foreign and domestic foreign investments/investors, despite not being totally clear. The factor relevant to such situations can only be the locations of foreign and domestic foreign investments/investors rather than the legislative measures themselves.

[87] Ibid [27].
[88] Ibid [28].
[89] Ibid [90].
[90] *Grand River Enterprises Six Nations, Ltd et al v United States of America (Award)* (UNCITRAL Arbitral Tribunal, 12 January 2011) [166] ('*Grand River v US*').

C *Compatible Intent and Effect of Legislative Measures: No Discriminatory Intent or Discriminatory Effect?*

Tribunals are divided in their approaches to whether discriminatory intent or discriminatory effect are sufficient to find discrimination. Certain tribunals have taken the view that where either element was available, a violation of NT would be established; others have held that only one or the other was a decisive factor, with the other just an aggravating factor.

The first approach can be found in cases where the tribunals examined both discriminatory effect and intent, but considered each of them as a sufficient basis to find a discriminatory treatment. For example, the tribunal in *Corn Products v Mexico* construed that 'even if an intention to discriminate had not been shown, … the adverse effects of the tax … would be sufficient to establish that the third requirement of "less favourable treatment" was satisfied'.[91] As found by the tribunal, the adverse effects of Mexico's new tax regulation – that imposed an excise tax of 20% on any soft drink with an exception for drinks sweetened by cane sugar – 'were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned'.[92] The tribunal also stated 'where … an intention is shown, that is sufficient to satisfy the [given] third requirement'.[93] As observed by the tribunal, the new tax regulation was adopted at a time when Mexican sugar could not be exported to US, and had lost its shares of the domestic market due to competition from high-fructose corn syrup (HFCS).[94]

In other cases, tribunals favoured discriminatory effect over discriminatory intent in establishing a breach of NT (the second approach). For example, the tribunal in *Cargill v Poland* did not address the question of whether Poland imposed national and negotiated EU quotas for sugar and isoglucose with a discriminatory intent based on nationality. It stated that '[o]nly the impact or result of the quotas must be examined'.[95] Similarly, the tribunal in *Myers v Canada* stated that '[i]ntent is important, but protectionist intent is not necessarily decisive on its own'.[96] Prior to this statement, the tribunal had noted Canada's

[91] *Corn Products v Mexico* (n 49) [138].
[92] Ibid
[93] Ibid
[94] Ibid [35].
[95] *Cargill v Poland* (n 51) [345].
[96] *Myers v Canada* (n 46) [254].

intent to protect the domestic PCB disposal industry from US competition by adopting a ban on PCB exports.[97] However, the existence of the protectionist intent would not lead to a breach of NT, as perceived by the tribunal, 'if the measure in question were to produce no adverse effect on the non-national complaint'.[98] The tribunal thus considered the ban as a NT violation only after this ban was found as having the unnecessarily restrictive effect on the claimant's business. To support for this approach, the tribunal relied on the text of NT provision in Article 1102 of the NAFTA, and then interpreted the word 'treatment' contained in this provision as requiring 'practical impact' rather than referring merely to 'a motive or intent'.[99]

The final approach can be found in cases where tribunals required discriminatory intent to find a violation of NT. For example, the tribunal in *Methanex v US* required the claimant to demonstrate that California, when adopting a ban on the use or sale of the gasoline additive MTBE within the state, 'intended to favor domestic investors [as ethanol producers] by discriminating against foreign investors [as methanol producers]'.[100] However, Methanex, as the claimant in the case, failed to demonstrate such intention. The tribunal instead found that the ban was promulgated to protect groundwater from the release of gasoline containing MTBE and subsequent contamination by MTBE.[101] In this case, the ban is strongly supported by scientific evidence – findings of research projects (conducted by the University of California) on the impact of MTBE on human health and the environment, and subsequent public hearings, public testimony and scientific peer review; however, it cannot be denied that the task of demonstrating the respondent's discriminatory intent is burdensome for the claimant. Apparently, the same burden is not found in the cases discussed above where tribunals did not consider the discriminatory intent as a necessary requirement.

[97] Ibid [194].
[98] Ibid [254].
[99] Ibid.
[100] *Methanex v US* (n 58) pt IV ch B [12].
[101] Ibid pt III ch A [101]–[102].

D *Justification for Discriminatory Measures: Do Public Objectives of Legislative Measures Excuse Discriminatory Effect of Legislative Measures?*

There is an assumption that states as respondents could justify measures causing disadvantages to foreign investors/investments. In international arbitration practice, not many tribunals have expressed this but, where tribunals have done so, they took different views of the required link between state measures and justifiable objectives.[102]

In the cases where no violation of NT obligation was established, the tribunals found that foreign and domestic investments/investors were not in like circumstances. Technically, they did not need to consider justification for different treatments at issue. However, the tribunal in *Pope & Talbot Inc v Canada* did express the view that discriminatory measures could be justified by having a reasonable connection to legitimate policy goals. Indeed, these tribunals had relied on the legislative measures at issue *and* their objectives to distinguish between foreign and domestic investments/investors and, at the same time, relied on the objectives of measures to justify discriminatory measures. In this case, the tribunal accepted Canada's reasoning that circumstances between foreign softwood companies in covered provinces and domestic softwood companies in non-covered provinces were different, so treatments between them could not be similar. The tribunal reasoned that

> differences in treatment will presumptively violate Article 1102(2) unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.[103]

Based on this approach, the tribunal concluded that Canada's export limits and export fees applying to timber producers from four specific provinces were legitimate, since timber from those four provinces accounted for almost all wood exports to the US and the measure's purpose was to counter US threats to impose countervailing duties. In its view, 'the decision to implement the SLA through a regime affecting controls only against exports to the US from covered provinces was reasonably related to the rational policy of removing the threat of CVD [US countervailing duties] actions'.[104] The tribunal noted

[102] This point is also noted by other scholars: see Reinisch and Schreuer (n 1) 668; Mitchell, Heaton and Henckels (n 43) 105–15.
[103] *Pope & Talbot Inc v Canada* (n 81) [78].
[104] Ibid [87].

that treatments were the same for both domestic and foreign enterprises in the same areas (covered provinces or non-covered provinces).

Among the cases where violations of NT were established,[105] the tribunals in *Corn Products v Mexico*, *Cargill v Poland* and *Myers v Canada* found discriminatory intentions in addition to discriminatory effects. The *Myers v Canada* tribunal, in particular, examined the objectives of state measures at issue. According to the tribunal, Canada's aim of strengthening and maintaining its domestic PCB treatment industry was legitimate and consistent with the policy objectives of the Basel Convention. However, the tribunal asserted that there were legitimate ways for Canada to achieve this goal other than preventing the claimant from exporting PCBs to the US. The tribunal particularly pointed out several possible alternatives, such as setting requirements or granting subsidies for the domestic industry.[106] The tribunal noted that an 'indirect motive was understandable'[107] but that Canada's method contravened NT under the *NAFTA*. The fact that, as observed by the tribunal, Canada later reopened the export border reflected Canada's limitations in dealing effectively with the situation.[108] This approach, of requiring the least restrictive measure among options, is similar to one given by the WTO Appellate Body in interpreting a 'necessary' link requirement for general exceptions under Article XX of the *GATT* as discussed later in Chapter 8 (Part III(B)). The tribunal's approach suggests that 'necessary' measures could be justified despite causing discrimination against foreign investments/investors.

In conclusion, certain tribunals have expressed the view that respondent states could justify their prima facie cases of discrimination by referring to measures' objectives. Tribunals discussed how state measures and objectives should be connected to meet the level of justification, with the nature of the connection ranging from 'reasonable' to 'necessary'.

[105] Note that at least nine over at least 59 cases resolved at the merits stage are in favour of foreign investors. This figure is calculated by the author from data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.
[106] *Myers v Canada* (n 46) [255].
[107] Ibid.
[108] Ibid.

E *Section Remark: Suggesting Three Practical Questions for an Analysis of NT Provisions in Vietnam's IIAs*

The above review of international arbitration practice suggests three questions for analysing NT provisions in the context of Vietnam' IIAs. The first question is (i) whether NT provisions in Vietnam's IIAs would likely be interpreted to invoke different factors for defining foreign and domestic comparators: factors driven by the objective of NT to ensure fair competition (eg the same economic sector/industry or the same products/services provided by foreign investments/investors); factors driven by objectives of legislative measures at issue (eg market segments, contract types or financial situations); or the factor of like regulatory regimes or legal requirements? The two other questions are (ii) whether NT provisions in Vietnam's IIAs are likely to be interpreted as requiring the absence of both discriminatory intent and effect to be legitimate? and (iii) whether NT provisions in Vietnam's IIAs provide justification or exceptions with accompanying conditions for discriminatory measures? Answers to these questions are provided in the following parts (IV and V).

III AN ANALYSIS OF NATIONAL TREATMENT PROVISIONS IN VIETNAM'S IIAS: OBJECTS OF NATIONAL TREATMENT PROTECTION AND COMPATIBLE INTENT AND EFECT LEVEL FOR LEGISLATIVE MEASURES

A *Different Objects of National Treatment Protection*

1 *Objects of National Treatment Protection: Pre-/Post-Established Foreign Investments/Investors*

NT provisions in Vietnam's IIAs would be likely interpreted as protecting different objects: (i) foreign investment established in a host state and/or relevant investors having such investments (post-established foreign investments and/or investors); or (ii) foreign investors seeking, making or having investments in a host state and their investments (pre- and post-established foreign investments and investors). The first type could be found when NT provisions cover investment activities such as management, maintenance, use, enjoyment, conduct, operation, and/or sale/liquidation/disposition of investments[109] or mention 'investments … once established';[110] whereas, in NT provisions where investment activities such as admission, establishment, acquisition and/or expansion of investments are expressed, the second type can be found.[111]

Specifically, NT provisions with Formulations A, B, C and D in 22 IIAs protect post-established foreign investments and/or investors, and those with Formulations C and D in 11 IIAs protect pre- and post-established foreign investments and investors (Table 6.2). Among the former 22 IIAs, NT provisions with Formulations A and D in two IIAs only cover foreign investors; those with Formulation D in seven treaties only cover foreign investments; and those with Formulations A, B, C and D in the remaining 13 IIAs cover both foreign investments and investors. Among the latter 11 treaties, NT provisions with Formulations C and D in two treaties only cover investments, and NT provisions with Formulations C and D in the other eight cover both foreign investments and investors.

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[109] See, eg, *Vietnam-Czech BIT* art 2(2); *Vietnam-Korea BIT (2003)* art 3(2); *Vietnam-UK BIT* art 3(2); *Vietnam-Slovakia* art 4(1)–(2); *Vietnam-Mozambique* art 3(1); *ASEAN-China IA* art 4. For a discussion on expressions of post-established investments in NT provisions in IIAs, see J Anthony VanDuzer, Penelope Simons and Graham Mayeda (eds), *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, 2012) 121.

[110] See, eg, *Vietnam-Turkey BIT* art 3(2).

[111] See, eg, *Vietnam-Oman BIT* art 4(1); *Vietnam-US BTA* ch IV art 2(1); *Vietnam-Japan BIT* art 2(1); *Vietnam-Korea FTA* art 9.3; *ACIA* art 5(1)–(2); *ASEAN-Korea IA* art 3; *ASEAN-ANZ FTA* art 4; *CPTPP* art 9.4(1)–(2); *Vietnam-Kuwait BIT* art 3(1); *Vietnam-Estonia BIT* art 3(1). For a discussion on expressions of pre-established investments in NT provisions in IIAs, see VanDuzer, Simons and Mayeda (n 109) 123.

Table 6.2: Objects of NT Protections in Vietnam's IIAs

Objects of National Treatment Protection		Provision Formulations				Treaty Contexts (Total)	
		A	B	C	D		
Post-established Investments, Investors	Investors	1[112]	0	0	1[113]	2	22
	Investments	0	0	0	7[114]	7	
	Investors and Investments	1[115]	1[116]	04[117]	7[118]	13	
Pre- and Post-established Investments, Investors	Investors	0	0	0	0	0	11
	Investments	0	0	1[119]	1[120]	2	
	Investors and Investments	0	0	7[121]	2[122]	9	
Treaty Contexts (Total)		2	1	12	18	33	

[112] One BIT with an EU member: see *Vietnam-France BIT* art 4. See also app 6.
[113] One BIT with an EU member: see *Vietnam-Netherlands BIT* art 4. See also app 6.
[114] Six BITs with non-EU members: see *Vietnam-Armenia BIT* art 4(4); *Vietnam-Iran BIT* art 4(1); *Vietnam-Mozambique BIT* art 3(1); *Vietnam-Russia BIT* art 3; *Vietnam-Turkey BIT* art 3(2); *Vietnam-Switzerland BIT* art 3(4). For one BIT with an EU member, see *Vietnam-Spain BIT* art 4(3). See also app 6.
[115] One BIT with an EU member: see *Vietnam-Czech BIT* art 2(1)–(2). See also app 6.
[116] One BIT with an EU member: see *Vietnam-Germany BIT* art 3(1)–(2). See also app 6.
[117] Four IIAs with non-EU members: see *Vietnam-Iceland BIT* art 3(1)–(2); *Vietnam-Korea BIT (2003)* art 3(1)–(2); *Vietnam-UK BIT* art 3(1)–(2); *ASEAN-Hong Kong IA* art 3. See also app 6.
[118] Three IIAs with non-EU members: see *Protocol to the Vietnam-Cuba BIT (2007)* para 2 [tr author]; *ASEAN-China IA* art 4; *Vietnam-EAEU FTA* arts 8.29(2), 8.32(1). For four BITs with EU members, see *Vietnam-Bulgaria BIT* art 3(4); *Vietnam-Denmark BIT* art 3(2)–(3); *Vietnam-Greece BIT* art 4(1)–(2); *Vietnam-Slovakia BIT* art 4(1)–(2). See also app 6.
[119] One IIA with a non-EU member: see *Vietnam-US BTA* ch IV art 2(1). See also app 6.
[120] One BIT with a non-EU member: see *Vietnam-Kuwait BIT* art 3(1). See also app 6.
[121] Seven IIAs with non-EU members: see *Vietnam-Oman BIT* art 4(1); *Vietnam Vietnam-Japan BIT* art 2(1); *Vietnam-Korea FTA* art 9.3; *CPTPP* art 9.4(1)–(2); *ACIA* art 5(1)–(2); *ASEAN-Korea IA* art 3; *ASEAN-ANZ FTA* art 4. See also app 6.
[122] Two BITs with an EU members: see *Vietnam-Estonia BIT* art 3(1); *Vietnam-Finland BIT (2008)* art 3(1). See also app 6.

2 *Condition of Protected Foreign Investments/Investors: In Like Circumstances/Situations with Domestic Investments/Investors*

(a) A Core Basis to Define Foreign and Domestic Comparators: Like Circumstances/Situations

Among NT provisions, only those with Formulation C and D (in 18 IIAs) provide a core basis for finding domestic comparators for foreign investments/investors – namely, their *like circumstances/situation* (Table 6.3). Such a basis is expressed, for example, through a clause such as '[e]ach Contracting Party shall accord to covered investments [or investors] treatment no less favourable than that it accords, *in like circumstance [or in like situations]*, to investments in its territory of its own investors [or investors in its territory]'.[123] This example clearly indicates that to enjoy 'no less favourable treatment', foreign investments/investors must be 'in like circumstances' or 'in like situations' as domestic ones. To know whether they receive 'less favourable' or 'more favourable' treatment, foreign investments/investors must have domestic investments/investors having 'like circumstances' or being in 'like circumstances' to them (domestic comparators). In the words of Grierson-Weiler and Laird, 'the claimant [as a foreign investor] is required to identify a comparator … in receipt of better treatment than it has received from the respondent state'.[124] This means that a finding of domestic comparators for foreign investments/investors is based on the comparison of their circumstances/situations (the likeness between circumstances/situations), rather than the comparison of domestic and foreign investments/investors themselves (the likeness between investments/investors).

The question raised here is whether like circumstances/situations as a core basis for finding domestic comparators for foreign investments/investors, as mentioned above, is applicable under NT provisions lacking the phrase 'in like circumstances' or similar expressions, as they do in 15 IIAs (Table 6.3). The answer to the question is positive for several reasons. Firstly, the lack of expression does not affect the nature of comparison, particularly treatment comparison – treatments of separate objects could only be comparable when these objects are 'like' or 'similar' to certain extent. In the words of the

[123] See, eg, *Vietnam-Mozambique BIT* art 3(1) (emphasis added).
[124] Todd J Grierson-Weiler and Ian A Laird, 'Standards of Treatment' in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 259, 262.

Total v Argentina tribunal, '[t]his is inherent in the very definition of the term 'discrimination' under general international law that: … discrimination may, in general, be said to arise where those who are in all material respects the same are treated differently'.[125] To determine a discriminatory treatment, as perceived by the tribunal, 'it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation'.[126] According to the tribunal, 'the absence of the term "like" … is not decisive since this element is inherent in an evaluation of discrimination'.[127] Secondly, to be 'appropriate' or 'proper' comparators, they must be compared on their circumstances as formulated from many factors rather than from one factor, such as their products or services. This is because investments/investors are involved in many activities/projects. In international investment dispute settlement practice, tribunals have consistently agreed that the lack of the phrase 'like circumstances' does not affect the way in which to define domestic comparators.[128] From the perspective of UNCTAD, the presence or absence of the phrase might only affect the burden of proof. It states that under NT formulations without the phrase 'like circumstances' and similar expressions, 'the test will be an easier one for the investor than under formulations requiring proof of like situations, circumstances and/or functional contexts'.[129] This burden of proof does not exclude a core/inherent basis for finding domestic comparators for foreign investments/investors.

[125] *Total SA v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 2010) [210] ('*Total v Argentina*').
[126] Ibid.
[127] Ibid [213].
[128] See, eg, *De Levi v Peru* (n 65) [396]; *Georg Gavrilovic and Gavrilovic DOO v Republic of Croatia (Award)* (ICSID Arbitral Tribunal, Case No ARB/12/39, 26 July 2018) [1191] ('*Gavrilovic v Croatia*'). In *De Levi v Peru*, the tribunal particularly asserted that 'as noted by other arbitral tribunals, … discrimination only exists between groups or categories of persons who are in a similar situation, after having assessed, on case-by-case basis, the relevant circumstances' (citations omitted).
[129] UNCTAD, *National Treatment: UNCTAD Series on Issues in International Investment Agreements* (1999) 34 ('*National Treatment*').

Table 6.3: Expressions of Likeness Element in NT Provisions in Vietnam's IIAs

Element	Sub-elements	Provision Formulations				Treaty Contexts (Total)	
		A	B	C	D		
Likeness Expression	'in the same circumstances'	0	0	0	1[130]	1	18
	'in like circumstances'	0	0	7[131]	7[132]	14	
	'in like situations'	0	0	2[133]	1[134]	3	
Non-expression		2[135]	1[136]	3[137]	9[138]	15	
Treaty Contexts (Total)		2	1	12	18	33	

(b) Like Circumstances/Situations: Based on Many Similar Factors

To compare the circumstances of foreign and domestic investments/investors, NT provisions in Vietnam's IIAs suggest an examination of many factors. In the context of Vietnam's IIAs, the original meaning of the phrase 'in like circumstances', 'in like situations' or 'in the same circumstances' likely indicates that the likeness between foreign investments/investors' circumstances/situations and domestic investments/investors' circumstances/situations are based on many factors shared by foreign and domestic investments/investors. The word 'circumstances' in its dictionary meaning refers to 'an accompanying or accessory fact, event, or condition, such as a piece of evidence that indicates the probability of an action'.[139] Similarly, the word 'situation' refers to 'the set of things that are happening and the conditions that exist at a particular

[130] One BIT with an EU member: see *Vietnam-Netherlands BIT* art 4.
[131] Seven IIAs with non-EU members: see *Vietnam-Japan BIT* art 2(1); *Vietnam-Korea FTA* art 9.3; *CPTPP* art 9.4(1)–(2); *ACIA* art 5(1)–(2); *ASEAN-Korea IA* art 3; *ASEAN-ANZ FTA* art 4; *ASEAN-Hong Kong IA* art 3.
[132] Six IIAs with non-EU members: see *Protocol to the Vietnam-Cuba BIT* (2007) para 2 [tr author]; *Vietnam-Iran BIT* art 4(1); *Vietnam-Mozambique BIT* art 3(1); *Vietnam-Turkey BIT* art 3(2); *Vietnam-EAEU FTA* art 8.32(1); *ASEAN-China IA* art 4. For one BIT with an EU member: see *Vietnam-Slovakia BIT* art 4(1)–(2);
[133] Two IIAs with non-EU members: see *Vietnam-Oman BIT* art 4(1); *Vietnam-US BTA* ch IV art 2(1).
[134] One BIT with a non-EU member: see *Vietnam-Kuwait BIT* art 3(1).
[135] Two BITs with EU members: *Vietnam-Czech BIT* art 2; *Vietnam-France BIT* art 4.
[136] One BIT with an EU member: see *Vietnam-Germany BIT* art 3.
[137] Three BITs with non-EU members: see *Vietnam-Iceland BIT* art 3; *Vietnam-Korea BIT (2003)* art 3; *Vietnam-UK BIT* art 3.
[138] Three BITs with non-EU members: see *Vietnam-Armenia BIT* art 4(4); *Vietnam-Russia BIT* art 3; *Vietnam-Switzerland BIT* art 3(4). For six BITs with EU members, see *Vietnam-Bulgaria BIT* art 3(4); *Vietnam-Denmark BIT* art 3; *Vietnam-Estonia BIT* art 3; *Vietnam-Finland BIT* art 3; *Vietnam-Greece BIT* art 4; *Vietnam-Spain BIT* art 4.
[139] *Black's Law Dictionary* (11th ed, 2019) 'circumstance' (def 13c). See also *ADM v Mexico* (n 49) [197].

time and place'.[140] Therefore, the examination of foreign and domestic investments/investors' circumstances/situations would require 'evaluation of the entire fact setting surrounding … the genesis and application of [measures at issue]',[141] or 'examination of the surrounding situations in its entirety'.[142] In the words of certain scholars, such examination is 'highly fact-specific and context dependent',[143] based on 'a flexible, fact-specific approach',[144] or dependent on 'the nature of the investment and the investors'.[145] Given the term 'circumstances' or 'situations' together with the term 'like' or 'the same', the circumstances/situations of foreign and domestic investments/investors would be likely similar when many conditions, facts and surroundings of foreign and domestic investments/investors are comparable. The word 'like' has no 'precise and final definition'[146] but could range from 'similar' to 'identical'.[147] Similarly, the word 'the same' would be likely understood as 'similar' or 'very similar' when it comes together with the word 'circumstances' or 'situations' in the context of investments with many relevant activities. The circumstances/situations of foreign and domestic investments/investors can hardly be 'exactly like another or each other' as brought by the dictionary meaning of the term 'the same'.[148]

However, the phrase 'like circumstances' or similar expressions could not be interpreted without a boundary, given the context in which it appears. The first factor to examine the like circumstances/situations of foreign and domestic investments/investors would/should be the one drawn from the objective of NT. The objective of NT obligations granted in treaty law is to create fair competition between foreign and domestic comparators – 'a level playing field',[149] 'competitive equality'[150] or 'equal competitive opportunities';[151]

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[140] *Cambridge Dictionary* (online at 15 February 2021) 'situation' (def B1).
[141] *Pope & Talbot v Canada* (n 81) [75].
[142] *ADM v Mexico* (n 49) [197].
[143] Newcombe and Paradell (n 3) 162.
[144] Reinisch and Schreuer (n 1) 630.
[145] David Collins, 'National Treatment in Emerging Market Investment Treaties' in A Kamperman Sanders (ed), *Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar Publishing, 2014) 161, 163.
[146] *Cargill v Poland* (n 51) [311].
[147] *Pope & Talbot v Canada* (n 81) [75].
[148] *Cambridge Dictionary* (online at 15 February 2021) 'same' (adj, def A1).
[149] See, eg, Rudolf Dolzer and Christoph Schreuer (eds), *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 391; Jeswald W Salacuse (ed), *The Law of Investment Treaties* (Oxford University Press, 3rd ed, 2021) 332; Sabina Sacco and Mónica C Fernández-Fonseca, 'National Treatment in Investment Arbitration' in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 239, 239–40; Chong Yee Leong and Vivekananda N, 'Non-discrimination between Foreign and Domestic Investment in ASEAN' (2015) 32(4) *Journal of International Arbitration* 387, 399.
[150] Todd Weiler (ed), *Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill, 2013) 430, 447–8.

therefore, it does not make sense to compare treatments of domestic and foreign investors who do not compete against each other, either in reality or potential cases – the competitive relationship. Notably, factors driven by the fair competition objective of NT should *not* be as narrow as the one applied by the *Methanex v Canada* tribunal – the same product provided by foreign and domestic investments/investors, as previously mentioned.[152] The tribunal in that case asserted that only domestic methanol producers were 'in like circumstances' to the claimant – US methanol producers – while domestic ethanol producers were not. The reasoning offered by the tribunal was that when the 'proper comparators' – domestic methanol producers – were available, the 'less like comparators' – domestic ethanol producers – would not be used. The reference to this case is not to argue that methanol and ethanol should have been considered 'like' products and their producers should have been in 'like' circumstances; rather, it says that the tribunal should recognise the competitive relationship between foreign methanol producers and domestic ethanol producers, and find additional factors to draw differences between their circumstances. One might notice that similar input was offered by the *Myers v Canada* tribunal, as previously mentioned.[153] The tribunal rejected the respondent's argument that domestic PCB waste sellers were appropriate comparators with the US's PCB waste seller on the ground that they were in a position which could take customers away from each other.[154]

Once the like circumstances of foreign and domestic investments/investors are preliminarily defined on factors driven by the fair competition objective of NT, additional factors need to be taken into account to confirm the likeness or draw differences. Such factors might include those driven by the objectives of legislative measures such as market segments, contract types or financial situations respectively used by tribunals in *De Levi v Peru*, *Windstream v Canada* and *GAMI v Mexico*, as previously reviewed.[155] However, those factors should *not* be used to distort the final purpose of NT. In the words of *Total v Argentina* tribunal,

> in economic matters the criterion of 'like situation' or 'similarly-situated' is widely followed because it requires the existence of some competitive relation between those

[151] Jürgen Kurtz, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex, and Vital Search for State Purpose' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law and Policy, 2013-2014* (Oxford University Press, 2015) 251, 264.
[152] See above in Part II(B)(1)(b).
[153] See above Part II(B)(1)(a).
[154] *Myers v Canada* (n 46) [251].
[155] See above Part II(B)(2).

> situations compared that should not be distorted by the State's intervention against the protected foreigner.[156]

These factors could serve as examples of those implied in a clause provided by the *CPTPP* in the footnote attached to its NT provision. It clarifies that 'whether treatment is accorded in 'like circumstances' under Article 9.4 (NT) … depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives'.[157] Such public welfare objectives should not be assimilated with the same legal requirements, as discussed below.

The factor of the same regulatory regime/like legal requirements could be used to find like circumstances between foreign and domestic investments/investors when challenged measures are administrative measures implementing such regulatory regime/legal requirements. That was the case in *Apotex v US (III)*[158] and *Clayton/Bilcon v Canada*.[159] However, when the measures at issue are regulatory regime/legal requirements, it does not make sense to consider their regulatory objectives as a factor in finding a likeness between foreign and domestic investments/investors' circumstances/situations, as following analysed.

(c) Like Circumstances/Situations: Not Based on Factors Drawn from Legislative Measures at Issue

As previously mentioned, even though many factors need to be taken into account to define the like circumstances of foreign and domestic investments/investors, it is unconvincing that any factor drawn from legislative measures at issue would be among them.

When a comparison factor is directly drawn from the legislative measures at issue, domestic and foreign investment/investors that are *not* regulated by such legislation would never be 'in like circumstances' to each other. *Pope & Talbot Inc v Canada* and

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[156] *Total v Argentina* (n 125) [210] (citations omitted).
[157] *CPTPP* art 9.4, n 14.
[158] *Apotex Holdings Inc and Apotex Inc v United States of America (III) (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/1, 25 August 2014) ('*Apotex v US (III)*').
[159] *Clayton and Bilcon of Delaware Inc v Government of Canada (Award on Jurisdiction and Liability)* (PCA Arbitral Tribunal, Case No 2009-04, 17 March 2015) [440]–[441] ('*Clayton/Bilcon v Canada*').

Merril v Canada serve as good examples of the situation where tribunals concluded that domestic and foreign investors were not in like circumstances because they were not subject to the same legal regime.[160] For example, the *Pope & Talbot Inc v Canada* tribunal reasoned that the claimant, a US lumber producer/exporter, was located in British Columbia and so was governed by the 1996 US-Canada agreement and Canada's Export Control Regime. The regime imposed export limits and export taxes/fees from 1 April 1996 and 31 March 2001 respectively on softwood lumber exporters in four Canadian provinces. The purpose of the regime was to counter US threats to apply countervailing duty on softwood lumber from Canada, and the four provinces covered by the regime accounted for most lumber exports to the US.[161] As pointed out by Mitchell, Heaton and Henckels, the tribunal in this case conflated comparison analysis and discrimination treatment analysis when concluding that the claimant, located in the covered province, and domestic comparators, located in uncovered provinces, had been treated differently because they did not belong to the same regime.[162] Even if the tribunal separated comparison analysis from discrimination treatment one, it could barely find the difference in circumstances between those comparators, given its mentioned perception.

3 *Subsection Remark: Pre- and/or Post-established Foreign Investments and/or Investors having Domestic Comparators*

NT provisions in 33 of Vietnam's IIAs would protect different objects: (i) either post-established foreign investments and/or investors in like circumstances with (comparable) domestic ones, or (ii) pre- and post-established foreign investments and investors in like circumstances with domestic ones. Such foreign investments/investors must have domestic comparators to truly enjoy NT granted by a host state (say, Vietnam). Domestic comparators are defined based on their like circumstances. Like circumstances are based on many factors, with the first and foremost being the competitive relationship, derived from the objective of NT to ensure fair competition, and additional ones being market segments, economic situations, or contractual conditions between foreign and domestic investments/investors, which are driven by the objectives of legislative measures at issues. However, factors drawn from legislative measures at issue would hardly play a role in defining such likeness.

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[160] See above Part II(B)(3).
[161] *Pope & Talbot Inc v Canada* (n 81) [23].
[162] Mitchell, Heaton and Henckels (n 43) 83.

B *Compatible Intent and Effect of Legislative measures: No Minor and Major Disadvantages by Discriminatory Intent and Effect towards Foreign Investments/Investors*

1 *No 'Less Favourable Treatment': No Discriminatory Intent and Effect*

As previously analysed, tribunals in international arbitration practice, while applying NT provisions at issue, had divergent views on whether 'less favourable treatment' was defined by intent or effect.[163] Particularly, the tribunal in *Methanex v Canada* perceived the presence of discriminatory intent as a necessary factor in establishing a violation of NT, whereas tribunals in *Cargill v Poland* and *Myers v Canada* considered the presence of discriminatory effect as a 'necessary and sufficient' factor to determine such violation. It means that to be compatible with NT obligation, state's treatment towards foreign investments/investors must not be less favourable than that towards domestic comparators in practice in the first case, or by intention in the second case. The question is whether NT provisions in Vietnam's IIAs are likely understood to require Vietnam granting 'no less favourable treatment' to foreign investments/investors both by law and in practice (ie treatment without discriminatory intent and effect).

The answer to the question would likely be 'yes'. The original meaning of 'no less favourable treatment' would support that understanding. The dictionary meaning of 'treatment' is 'the way you deal with or behave towards someone or something'.[164] Accordingly, the treatment in the context of NT provisions could not be understood only as the treatment accorded to foreign investors/investment in legislation or other written documents but would also include the treatment foreign investments/investors received in practice. The treatment thus needs to be examined from the perspective of a state as an actor granting treatment, and the perspective of foreign investors as actors receiving treatment. In the words of the *Myers v Canada* tribunal in interpreting Article 1102 which also has the phrase 'no less favourable treatment', 'the word "treatment" referred to "practical impact", 'not merely a motive or intent'.[165] In the words of the *Feldman v Mexico* tribunal, 'the concept of NT as embodied in NAFTA and similar agreements are

[163] See above Part II(C).
[164] *Cambridge Dictionary* (online at 20 May 2021) 'treatment' (def B2).
[165] *Myers v Canada* (n 46) [254].

designed to prevent discrimination on the basis of nationality, or "by reason of nationality"'.[166]

Additionally, the interpretation requiring 'no less favourable treatment' by law and in practice is compatible with the purpose of NT. The purpose of NT is to ensure fair competition between foreign and domestic investors. Such a purpose could not be achieved where less favourable treatment, whether intentional or unintentional, was given by a host state. The presence of either discriminatory intent or effect, not both, can lead to a violation of the NT obligation.

2 *No 'Less Favourable Treatment': No Minor and Major Disadvantages towards Foreign Investments/Investors*

All NT provisions in Vietnam's IIAs state a general obligation that, for example, '[e]ach Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors'.[167] Such an obligation requires Vietnam to provide 'no less favourable treatment' to foreign investments/investors as compared to domestic investments/investors. The phrase 'less favourable' is not found in any dictionary; however, its synonym, 'disadvantegous', means 'causing problems, especially causing something or someone to be less successful than other things or people',[168] and its antonym, 'favourable', means 'giving you an advantage or more chance of success'.[169] Given the dictionary meaning of the word 'disadvantegous', 'favourable' and 'treatment', the phrase 'no less favourable' treatment would be likely interpreted as referring to treatment causing no disadvantages to foreign investments/investors, either minor or major. Such treatment could include 'the same favourable' treatment or 'more favourable' treatment.[170] Also, the treatment could be positive treatment benefiting foreign investors/investments, or negative treatment adversely affecting foreign investors/investments.

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[166] *Marvin Roy Feldman Karpa v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1, 2002) [181] ('*Feldman v Mexico*').
[167] See, eg, *Vietnam-Mozambique BIT* art 3(1). See also above Part I(A).
[168] *Cambridge Dictionary* (online at 20 May 2021) 'disadvantegous'.
[169] *Cambridge Dictionary* (online at 20 May 2021) 'favourable' (def C2).
[170] *National Treatment* (n 129) 37.

There is a view that in order to find 'no less favourable treatment' in practice, the total effect on a group of like imported products should be compared to that on a group of domestic products. This approach is arguably implicit in WTO cases,[171] and is called an 'aggregate comparison',[172] 'a collective approach',[173] or 'a group approach to 'less favourable treatment''[174] in literature. It was raised by Canada with the name of 'disproportionate disadvantage test' in *Pope and Talbot v Canada* when Canada as the respondent argued that '[u]nless the disadvantaged Canadian group (receiving the same treatment as the [foreign] Investor) is smaller than the advantaged [Canadian] group [arguably receiving more favourable treatment than the latter's investment], no discrimination cognizable under Article 1102 would exist'.[175] To support this proposition, Canada had relied on the statement of the *Myers v Canada* tribunal[176] that articulated 'in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: [inter alia] whether the practical effect of the measure is to create *disproportionate* benefits for *nationals* over *non-nationals*'.[177] However, the *Pope and Talbot v Canada* tribunal rejected this reliance and other reliance, submitted by Canada, on WTO/GATT and NAFTA precedents.[178] It should be noted that the tribunal in *Myers v Canad* did not actually conduct the examination of disproportionate disadvantages to find 'less favourable' treatment. The tribunal rather found 'less favourable' treatment because the challenged measure, a ban on PCB exports, was not the least restrictive option available.[179] Given this practice, it is suggested that the disproportionate disadvantage approach needs supports from treaty law or treaty parties' joint interpretation to get applied. It is doubtful that the approach of the *Myers v Canada* tribunal would be used in NT provisions in Vietnam's IIAs.

[171] See, eg, Appellate Body Report, *Dominican Republic — Import and Sale of Cigarettes*, WTO Doc WT/DS302/AB/R (25 April 2005) [96]. See also Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law (2011) 60(4) *International and Comparative Law Quarterly* 831, 842–4; Kurtz, 'Comparativism' (n 43) 269.
[172] Mitchell, Heaton and Henckels (n 43) 151.
[173] Choukroune (n 7) 204.
[174] Kurtz, 'Comparativism' (n 43) 267.
[175] *Pope & Talbot Inc v Canada* (n 81) [44].
[176] Ibid [65].
[177] *Myers v Canada* (n 46) [252] (emphasis added).
[178] *Pope & Tabot v Canada* (n 81) [66]–[67].
[179] Ibid [255].

3 *Subsection Remark: No Minor and Major Disadvantages by Discriminatory Intent and Effect towards Foreign Investments/Investors*

All NT provisions in Vietnam's IIAs oblige Vietnam to accord no less favourable treatment to foreign investments/investors than to domestic investments/investors. They suggest that to comply with the NT obligation legislative measures must not, by intent or effect, cause any disadvantage, either minor or major, to foreign investments/investors. In other words, legislative measures must meet the requirement of non-discriminatory effect and intention.

IV An Analysis of National Treatment Provisions in Vietnam's IIAs: Substantive Qualifications for Discriminatory Legislative Measures

A *Formulation A: Unlikely Justification for Discriminatory Legislative Measures*

NT provisions in the *Vietnam-Czech BIT* and *Vietnam-France BIT* do not contain exceptions for public interests, economic safeguards or sectors/matters, or references to domestic laws and/or development policies, as previously identified.[180] The question is whether legislative measures causing disadvantages but based on certain reasons could possibly be justified.

The answer to the above question is unlikely. One might argue that a reasonable person (say, a foreign investor) could not expect that a state (say, Vietnam) with a developing economy would, in all cases, provide similar treatments of him and his investments as of domestic comparators. However, it should be noted that if Vietnam and its partners wanted to design exceptions related to protected sectors/matters, they would have to do so as they did with NT provisions having Formulation B/C/D. The possibility of justifying discriminatory measures gain no support from treaty purposes and objectives, given that the two BITs in this group primarily protect and promote foreign investments/investors.[181] The treaty contexts do also not support this possibility. The *Vietnam-Czech BIT* already contains treaty exceptions for security interests that are applicable to the NT obligation. Especially when such exceptions set stringent requirements for security measures – essential security interests threatened by limited circumstances and necessary relationship, state measures that are based on 'rational grounds', as mentioned by certain scholars,[182] and reasonable (non-necessary), as accepted by certain tribunals,[183] would hardly be accepted. Under the *Vietnam-France BIT*, it does not contain treaty exceptions but designs specific exceptions for MFN obligation; this indicates that its NT provision could not be read as leaving room for justification, as no specific exceptions are attached. If the justification was possible, it would defeat the rationale of incorporating general and/or specific exceptions into those treaties. Finally, if NT provisions only guarantee reasonable discrimination, it would be pointless since FET provisions in these two BITs can do so, as analysed in Chapter 3 (Part III(C)).

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[180] See above Part I(B).
[181] See Chapter 2 Part II(B).
[182] See, eg, Dolzer and Schreuer (n 149) 207–8; Kate Miles, 'Sustainable Development, National Treatment and Like Circumstances in Investment Law' in Marie-Claire Cordonier Segger, Markus W Gehring and

B *Formulation C: Unlikely Justification for Discriminatory Legislative Measures Governing Protected Sectors/Matters, Except for Economic Safeguards in Certain Contexts*

Of the NT provisions in Vietnam's 12 IIAs covering exceptional sectors/matters to the NT obligation, those in seven do not contain any exception related to uncovered sectors/matters (ie protected sectors/matters).[184] It is unlikely that discriminatory measures governing such protected sectors/matters are justifiable under these treaties, which is similar to the situation where NT provisions include no exceptions, as discussed in the previous subsection. This is because while they already make exceptions for sectors/matters, the *Vietnam-US BTA*, *Vietnam-Korea FTA* and the *CPTPP* also comprise treaty exceptions for security and/or public interest measures and require the necessity of these measures.

Outside the above context, discriminatory measures governing protected sectors/matters could be acceptable under the remaining five IIAs if undertaken for economic safeguard reasons. Safeguard measures to address BOP difficulties are directly recognised as exceptions to the NT obligation under the *ASEAN-Korea IA*, *ASEAN-Hong Kong IA* and *Vietnam-Japan BIT*,[185] and are not required to be applied on the NT basis under the *ACIA* and *ASEAN-ANZ FTA*.[186] Similarly, those to cope with serious difficulties with macroeconomic management are directly recognised as exceptions to the NT obligation under the *Vietnam-Japan BIT* and *ASEAN-Hong Kong IA*.[187] Substantive qualifications for safeguard measures are previously analysed in Chapter 5 (Part IV(C)).

Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 265, 270–1; Kate Miles (ed), *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013) 177.

[183] See above Part II(D).

[184] *Vietnam-Oman BIT*; *Vietnam-Iceland BIT*; *Vietnam-Korea BIT (2003)*; *Vietnam-UK BIT*; *Vietnam-US BTA*; *Vietnam-Korea FTA*; *CPTPP*.

[185] See *ASEAN-Korea IA* arts 10(3), 11(1), 11(3); *ASEAN-Hong Kong IA* art 13(1)(a), 13(2); *Vietnam-Japan BIT* art 16(1)(a), 16(2).

[186] See *ACIA* arts 13(4)(b), 16; *ASEAN-ANZ FTA* ch 11 art 8(4), ch 15 art 4.

[187] *Vietnam-Japan BIT* art 16(1)(b), 16(2); *ASEAN-Hong Kong IA* art 13(1)(b), 13(2).

C *Formulation B: Exceptional Discriminatory Legislative Measures for Public Health, Public Order, Public Safety, and Customs and Traditions*

Given the NT provision with Formulation B under the *Vietnam-Germany BIT*,[188] the question is whether all discriminatory legislative measures for certain public interests are acceptable under such a provision. In other words, do they need to be (i) rational/reasonable or (ii) necessary? The answer is likely the former. The NT provision of the BIT specifies that state measures protecting public order and safety, public health, and customs and traditions do not constitute 'less favorable treatment', as provided earlier in Part I(C). The word 'for' means 'having the purpose of'.[189] Given such original meaning of the word 'for', to be acceptable, discriminatory measures must have a rational relationship with the mentioned public interests, and the protection of such interests needs to be based on rational grounds. In other words, discriminatory measures must be rational/reasonable (reasonable discrimination).

It should be noted that discriminatory measures accepted under the Formulation B NT provision are narrower than those permitted by Formulation D NT provisions, as analysed in the following section. This is because the latter additionally includes measures for other public interests and development policies.

D *Formulation D: Exceptional Discriminatory Legislative Measures for Development and Other Public Policies*

As previously identified,[190] NT provisions with Formulation D (in Vietnam's 18 IIAs) contain references to domestic laws and development policies. The question is whether *any* rational/reasonable discrimination is legitimate. Given the text of the NT provisions, the answer to this question is affirmative.

In particular, through the phrase 'in accordance with its laws and regulations'[191] or '[s]ubject to its laws and regulations',[192] NT provisions in Vietnam's five BITs with Cuba, Iran, Denmark, Spain and Turkey likely permit Vietnam to adopt any reasonably

[188] See above Part I(C).
[189] *Cambridge Dictionary* (online at 20 May 2021) 'for' (def A2).
[190] See above Part I(E).
[191] *Protocol to the Vietnam-Cuba BIT (2007)* para 2; *Vietnam-Iran BIT* art 4; *Vietnam-Denmark BIT* art 3; *Vietnam-Spain BIT* art (emphasis added).
[192] *Vietnam-Turkey BIT* art 3(2).

discriminatory legislative measures. Such permission could be accorded by a NT provision under the *Vietnam-EAEU FTA* where the provision adds that '[e]ach Party to this [investment] Chapter shall *reserve the right in accordance with its laws and regulations* to apply and introduce exemptions from national treatment'.[193] A similar outcome is likely in Vietnam's two BITs with Mozambique and Kuwait, whose NT provisions specify a link between the NT obligation and domestic applicable laws and regulations. This link has the role to '*preserv[e] the rights of the host Contracting Party to apply a different treatment* to investments of investors of the other Contracting Party than that which applies to its own investors'.[194] Through such preservation, Vietnam as a treaty party may maintain 'any economic sector or activity as reserved for its own investor' and 'any measure or special incentives granted only to its own investors', provided that these measures are 'within the framework of its development policy'.[195] NT provisions in Vietnam's two BITs with Greece and Slovakia contain a shorter clause – that Vietnam 'may apply exceptions to national treatment in accordance with its law and within the framework of its development policy'[196] – but could effect the same result. NT provisions under the *Vietnam-Estonia BIT*, *Vietnam-Finland BIT (2008)* and *ASEAN-China IA* could also consider all reasonable discrimination as legitimate because, according to them, NT obligation 'shall not apply to *existing or future [or new] non-conforming measures* maintained or adopted within the territory of the Socialist Republic of Viet Nam or *any future amendment thereto*'.[197]

As a result, NT provisions in this group allow Vietnam to adopt discriminatory measures for public interests beyond public order, public safety, public health, and customs and traditions, as specified in the NT provision with Formulation B. Such other interests should be governed by social and economic development strategies and plans (SEDSs and SEDPs),[198] and sustainable development strategy (SDS).[199] The NT provisions in this group can also permit Vietnam to protect priority industries other than fixed economic sectors/matters covered by NT provisions with Formulation C. The determination of priority industries is based on many elements. These elements include the possibility of a

[193] *Vietnam-EAEU FTA* art 8.32 (emphasis added).
[194] *Vietnam-Mozambique BIT* art 3(1)–(2) (emphasis added).
[195] Ibid (emphasis added).
[196] *Vietnam-Greece BIT* art 4; *Vietnam-Slovakia BIT* art 4.
[197] See *Vietnam-Estonia BIT* art 3(3) (emphasis added). See also *ASEAN-China IA* art 6.
[198] For Vietnam's SEDS for the 20121–2030 period, see Executive Committee of the Vietnam's Communist Party, Report at 13rd National Congress. For SEDP for 2021, see Resolution on the Socio-Economic Development Plan for 2021 [the National Assembly of Vietnam], No 2020/QH14, 11 November 2020.
[199] For Vietnam's SDS for the 2020–2030 period, see Resolution on Sustainable Development [the Government of Vietnam], No 136/NQ-CP, 25 September 2020.

country participating fully in global production networks and value chains, the degree of influence on the development of other economic sectors, the ability to use clean and environment-friendly technologies, and the possibility of creating high added value.[200] Over different stages of the Vietnam's economy, priority industries have been appropriately adjusted. For example, for the period 2018 to 2030, priority should be given, inter alia, to the development of information technology and telecommunications, digital industry, 'clean, renewable, and smart' energy, processing and manufacturing industries meeting international standards, and defence and security (military) industry integration with civilian industry.[201] In the period between 2030 and 2045, Vietnam will prioritise, inter alia, the development of new generations of information technology and telecommunications, universal access to digital technology, automation, high-end equipment, and new materials or biotechnology.[202]

It should be noted that even though Vietnam retains its right to decide exceptions to the NT obligation as analysed above, such exceptions would not be excluded from a good-faith review, if challenged in front of adjudicators. Exceptions must have a rational link to development and/or public policies, and these policies need to be based on rational grounds. In other words, any difference in treatment between foreign and domestic investments/investors must be rational/reasonable discrimination.

[200] Resolution on the Development of National Industries until 2030 with a Vision up to 2045 [Politburo of Vietnam], No 23-NQ/TW, 22 March 2018, pt III s 2.
[201] Ibid.
[202] Ibid.

CONCLUSION
POSSIBLE SUBSTANTIVE REQUIREMENTS AND QUALIFICATIONS FOR COMPATIBLE LEGISLATIVE MEASURES

This chapter finds that NT provisions, expressed in 33 out of the Vietnam's 60 IIAs, set the same substantive requirements for *non-discriminatory* legislative measures – no minor or major disadvantages by law and in practice. However, they require different substantive qualifications for *discriminatory* legislative measures to be considered exceptions (Table 6.4). Following Formulation A NT provisions, legislative measures must not cause minor or major disadvantages to foreign investments/investors, as compared to domestic comparators, without any justification. Under NT provisions with Formulation C, legislative measures governing covered sectors/matters (unprotected ones from investors' perspective) are permitted in any case; neverthelss, those governing uncovered sectors/matters (protected ones from investors' perspective), if causing disadvantages, can only be accepted in the case of safeguarding BOP, external finance and macroeconomic management, and in certain treaty contexts. Discriminatory legislative measures may be consistent with Formulation B NT provision when they protect public order, public safety, public health, or customs and traditions. They may also be appropriate under Formulation D NT provisions if pursuing other public interests and national development goals. Discriminatory legislative measures here must have a rational relationship with their objectives/interests stated. In the cases where IIAs additionally contain treaty exceptions, discriminatory legislative measures can be additionally allowed to protect certain security and/or public interests as long as they meet required conditions (Tables 7.7 and 8.7), as analysed in Chapters 7 and 8.

Notably, NT provisions with Formulation A/B/C/D in 22 out of the 33 IIAs protect post-established investments/investors and those with Formulation C in the other 11 IIAs protect both pre- and post-established ones (Table 6.4). To truly enjoy NT, foreign investments/investors must have existed domestic investments/investors in like circumstances/situations (domestic comparators). To be 'like', circumstances/situations of foreign and domestic investments/investors must be based on many similar factors. Among many others, factors drawn from legislative measures in challenge should not play a role in finding the likeness of circumstances/situations.

Table 6.4: Substantive Requirements and Qualifications for Legislative Measures as Imposed by NT Provisions Protecting Pre- and/or Post-Established Investments/Investors

Treaty Contexts (33)	General Obligation	Standard Exceptions		Treaty Contexts* (24)
	Substantive Requirements for Non-Discriminatory Measures	Substantive Qualifications for Discriminatory Measures		
		Legitimate Objectives (Rational Basis)	Other Qualifications	
2 IIAs	**NT Provisions without Exceptions/References (Formulation A)**			**0**
Vietnam-Czech BIT *Vietnam-France BIT*	No Minor or Major Disadvantages			
1 IIA	**NT Provisions with Public Interest-Based Exceptions (Formulation B)**			**0**
Vietnam-Germany BIT	No Minor or Major Disadvantages	Public health Public order Public safety Customs and Traditions	Rational Relationship	
12 IIAs	**NT Provisions with Sector/Matter-Based and/or Economic Safeguard-Based Exceptions (Formulation C)**			**12 IIAs; *Vietnam-EU IPA*; *RCEP***
Vietnam-Iceland BIT *Vietnam-Korea BIT (2003)* *Vietnam-UK BIT* *Vietnam-Oman BIT*(PPEIs) *Vietnam-US BTA*(PPEIs) *Vietnam-Korea FTA*(PPEIs) *CPTPP*(PPEIs)	No Minor or Major Disadvantages	Exceptions for Certain Sectors/Matters		
ACIA(PPEIs) *ASEAN-ANZ FTA*(PPEIs) *ASEAN-Korea IA*(PPEIs)	Same as above	Exceptions for Certain Sectors/Matters		

		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	
ASEAN-Hong Kong IA *Vietnam-Japan BIT*(PPEIs)	Same as above	Exceptions for Certain Sectors/Matters		
		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN	
18 IIAs	**NT Provisions with References to Domestic Laws and/or Development Policies (Formulation D)**			**10 IIAs**
Vietnam-Kuwait BIT(PPEIs) *Vietnam-Estonia BIT*(PPEIs) *Vietnam-Finland BIT*(PPEIs) *(2008)*	No Minor or Major Disadvantages	Any Potential Objectives	Any Potential Qualifications	
15 IIAs[203]				
Notes: (PPEIs): Treaty protecting pre- and post-established investments/investors. Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.				

[203] Nine IIAs with non-EU members: *Vietnam-Armenia BIT*; *Vietnam-Cuba BIT (2007); Vietnam-Switzerland BIT*; *Vietnam-Iran BIT*; *Vietnam-Mozambique BIT*; *Vietnam-Russia BIT*; *Vietnam-Turkey BIT*; *Vietnam-EAEU FTA*; *ASEAN-China IA*. For six BITs with EU members: *Vietnam-Bulgaria BIT*; *Vietnam-Denmark BIT*; *Vietnam-Greece BIT*; *Vietnam-Netherlands BIT*; *Vietnam-Slovakia BIT*; *Vietnam-Spain BIT*.

Chapter 7
TREATY EXCEPTION PROVISIONS ON SECURITY INTERESTS IN VIETNAM'S IIAS: SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES AND LEGAL EFFECTS

INTRODUCTION

As analysed in previous chapters, investment protection provisions on FET, expropriation, FTT and NT under Vietnam's IIAs impose different substantive requirements for legislative measures (general obligations). Certain of them also impose various substantive qualifications for state measures which are inconsistent with substantive requirements (standard or specific exceptions). State measures which do not fully meet these substantive requirements and qualifications may nonetheless be acceptable under 15 IIAs if taken for security interests ('treaty exceptions for security interests' or 'treaty security exceptions'). The practical effect of treaty security exceptions depends much on provision structure and treaty language. This chapter investigates the extent to which legislative measures for security interests are accepted in Vietnam's IIAs.

To this end, the chapter first surveys provisions on treaty security exceptions in Vietnam's IIAs. It finds that they can be categorised into two different formulations: (i) non-self-judging security exceptions in two IIAs, and (ii) self-judging security exceptions in 13 IIAs (Part I).

Before analysing these two formulations, the chapter briefly reviews tribunals' approaches when interpreting provisions on treaty security exception similar to those in Vietnam's IIAs (Part II). It finds that tribunals have adopted varying approaches in interpreting three aspects: (i) legitimate objectives, (ii) a 'necessary' link requirement, and (iii) legal effects of security exceptions. Based on the review, the section suggests three practical questions for the analysis of security exception provisions in the context of Vietnam's IIAs.

Considering the four practical questions in international arbitration practice, and based on the VCLT interpretation rules, the chapter analyses non-self-judging security exceptions (Part III) and self-judging security exceptions (Part IV) to find substantive qualifications for security measures. Under non-self-judging security exceptions, it finds that security interests must be 'essential', and include both conventional (eg national/political security) and non-conventional (eg economic/financial security) interests that may be threatened by any military or non-military circumstances (i). Legislative measures for safeguarding these security interests simply need to be non-arbitrary (ii). However, under non-self-judging security exceptions, essential security interests, either conventional or non-conventional, facing military or non-military threats (i). To protect these security interests, legislative measures must be 'necessary' (ii).

Following on from the above, the chapter examines the interactions between provisions on treaty security exceptions and investment protection provisions on FET, expropriation, FTT and NT as analysed in chapters from 3 to 6 to assess legal effects of treaty exception provisions (Part V). It finds that treaty exception provisions on security interests do not in all treaty contexts have the legal effect of excluding the application of relevant investment protection obligations.

The chapter concludes by considering the extent to which legislative measures that do not fully meet substantive requirements and qualifications under investment protection provisions, including standard exception clauses, could still be acceptable under treaty exceptions. This analysis draws on treaty contexts in which treaty security exceptions prevail over standard exceptions if any (Part V), and substantive qualifications for security measures imposed by treaty exceptions (Parts III and IV).

I A MAP OF PROVISION FORMULATIONS – TREATY EXCEPTION PROVISIONS ON SECURITY INTERESTS IN VIETNAM'S IIAS

A *Section Overview*

Among Vietnam's 60 IIAs, only 15 treaties allow Vietnam to adopt measures to protect security interests if meeting certain qualifications. Two of these do not contain self-judging language, leave the term 'essential security interests' undefined, and stipulate a rational (non-necessary) relationship between protective measures and security objectives – these are termed 'non-self-judging' security exceptions (Table 7.1).[1] The other 13 IIAs contain self-judging language, provide the list of circumstances raising security concerns (with two exceptions) and require a measure-objective relationship be 'necessary' – these are termed 'self-judging' security exceptions (Table 7.1).[2] All of these features are directly extracted from the structure of exception provisions but inspired by other scholars' approaches.[3] If the *Vietnam-EU IPA* and *RCEP* come into effect, there will still be just two formulations of security exception provisions since their security exception provisions are similar to the second formulation.[4]

[1] *Vietnam-Singapore BIT* art 11; *Vietnam-Uzbekistan BIT* art 12(2). See also app 7.
[2] *Protocol of Amendment to the Vietnam-Czech BIT* art 4; *Vietnam-Slovakia BIT* art 12; *Vietnam-Japan BIT* art 15(1); *Vietnam-Turkey BIT* art 4(2); *Vietnam-EAEU FTA* ch 1 art 1.9(2); *ASEAN-ANZ FTA* ch 5 art 2; *ASEAN-Korea IA* art 21; *ASEAN-Hong Kong IA* art 8*; Vietnam-Korea FTA* ch 16 art 16.2; *ASEAN-China IA* art 17; *ACIA* art 18; *CPTPP* art 29.2; *Vietnam-US BTA* ch VII art 2. See also app 7.
[3] William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48(2) *Virginia Journal of International Law* 307, 329–36; UNCTAD, *The Protection of National Security in IIAs: UNCTAD Series on International Investment Policies for Development* (2009) 119–34 ('*National Security*'); Prabhash Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation' (2012) 2(1) *Asian Journal of International Law* 21, 32–52 ('Non-Precluded Measures'); Amit Kumar Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries' (2017) 7(2) *Asian Journal of International Law* 227, 239–45.
[4] *Vietnam-EU IPA* ch 4 art 4.8; *RCEP* ch 17 art 17.13. See also app 7.

Table 7.1: Formulations of Treaty Exception Provisions on Security Interests in Vietnam's IIAs

Treaty Contexts (15)	Features of Provision Formulations							
	Self-judging Language		Security Interest Objectives (Rational Basis)			Measure-Objective Relationship		Application Conditions
	No	Yes	Limited List	Unlimited List	Broad Term	Non-necessary	Necessary	
2 IIAs	**Non-self-judging Security Exception Provisions**							
Vietnam-Singapore BIT	x				x	x		
Vietnam-Uzbekistan BIT	x				x	x		x
13 IIAs	**Self-judging Security Exception Provisions**							
Vietnam-Czech BIT		x	x				x	
Vietnam-Slovakia BIT		x	x				x	
Vietnam-Japan BIT		x	x				x	
Vietnam-Turkey BIT		x	x				x	
Vietnam-EAEU FTA		x	x				x	
ASEAN-ANZ FTA		x	x				x	
ASEAN-Korea IA		x	x				x	

ASEAN-Hong Kong IA		x	x				x	
Vietnam-Korea FTA		x	x				x	
ACIA		x		x			x	
ASEAN-China IA		x		x			x	
Vietnam-US BTA		x			x		x	
CPTPP		x			x		x	
*Vietnam-EU IPA**		x	x				x	
*RCEP**		x	x				x	
Note: *Vietnam-EU IPA**; *RCEP**: Treaties have not yet come into force.								

B *Non-Self-Judging Security Exception Provisions*

Security exception provisions in two IIAs have the common feature of not containing self-judging language (Table 7.1). 'Self-judging language' here refers to phrases or expressions describing the full authority of treaty states in determining security measures, such as 'that it considers' or 'what it considers'. These exception provisions are also similar in two other features: they mention the term 'essential security interests' (ESIs) without providing definitions or specific circumstances, and they require state measures be taken 'for' ESIs or 'directed to' protect ESIs (Table 7.1). This approach is described in the literature as 'a broad option'[5] or 'the open approach'.[6] The provision in the *Vietnam-Uzbekistan BIT* further articulates 'circumstances of extreme emergency' in which state measures protecting security interests are acceptable and demands all security measures be applied on a non-discriminatory basis, which is in accordance with domestic laws (application conditions) (Table 7.1).

[5] *National Security* (n 3) 122.
[6] Catharine Titi (ed), *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014) 207.

C *Self-Judging Security Exceptions Provisions*

Unlike the first formulation, security exception provisions in the remaining 13 IIAs contain self-judging language such as 'that it considers'[7] or 'what it considers'[8] (Table 7.1). Almost all provisions in this group specify 'essential security interests', and all of them require state measures be *necessary* to protect security interests (Table 7.1). They adopt different ways of clarifying ESIs. Nine treaties provide an *exhaustive* list of potential circumstances threatening security interests,[9] which could be considered a 'finite, closed-list approach'[10] or 'a comprehensive listing approach'.[11] A security exception provision in the *Vietnam-EAEU FTA* does not provide an exhaustive list but has a similar effect in referring to Article XXI of the *GATT* and Article XIV bis of the *GATS*.[12] Security exception provisions in another two treaties – the *ACIA* and *ASEAN-China IA* – set a *non-exhaustive list* through the phrase 'including but not limited to',[13] which is considered an 'open approach or a non-finite approach'.[14] Security exception provisions in the last two treaties, the *Vietnam-US BTA* and the *CPTPP*, do not specify ESIs in any way.[15]

Notably, security exception provisions under two treaties consider ESIs as a broad concept covering an interest in maintaining international peace and security,[16] while the other treaties separate ESIs from the latter.[17] In the study, the maintenance of international peace and security is discussed as part of ESIs.

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[7] *Protocol of Amendment to the Vietnam-Czech BIT* art 4(1); *Vietnam-Slovakia BIT* art 12(1); *Vietnam-Turkey BIT* art 4(2)(b); *Vietnam-US BTA* ch VII art 2.
[8] *Vietnam-Japan BIT* art 15(1)(a); *Vietnam-EAEU FTA* ch 1 art 1.9(2), referring to GATT 1994 art XXI and GATS art XIV bis, *ASEAN-ANZ FTA* ch 15 art 2(1)(b); *ASEAN-Korea IA* art 21(1)(b); *ASEAN-Hong Kong IA* art 8(1)(b); *Vietnam-Korea FTA* ch 16 art 16.2(1)(b); *ACIA* art 18(b); *ASEAN-China IA* art 17(b); *CPTPP* art 29.2(b).
[9] *Protocol of Amendment to the Vietnam-Czech BIT* art 4(1); *Vietnam-Slovakia BIT* art 12(1); *Vietnam-Japan BIT* art 15(1); *Vietnam-Turkey BIT* art 4(2)(b); *Vietnam-EAEU FTA* ch 1 art 1.9(2), referring to GATT 1994 art XXI and GATS art XIV bis*; ASEAN-ANZ FTA* ch 15 art 2(1); *ASEAN-Korea IA* art 21(1); *ASEAN-Hong Kong IA* art 8(1); *Vietnam-Korea FTA* ch 16 art 16.2(1). See also app 7.
[10] Titi (n 6) 208.
[11] *National Security* (n 3) 88.
[12] *Vietnam-EAEU FTA* ch 1 art 1.9(2). See also app 7.
[13] *ASEAN-China IA* art 17(b); *ACIA* art 18(b). See also app 7.
[14] Titi (n 6) 207.
[15] *CPTPP* art 29.2(b*); Vietnam-US BTA* ch VII art 2. See also app 7.
[16] *Protocol of Amendment to the Vietnam-Czech BIT* art 4(1)(e); *Vietnam-Slovakia BIT* art 12(1)(e). See also app 7.
[17] *Vietnam-Japan BIT* art 15(1)(a)–(b); *Vietnam-Turkey BIT* art 4(2)(b)–(c); *Vietnam-EAEU FTA* ch 1 art 1.9(2); *ASEAN-ANZ FTA* ch 15 art 2(1)(b)–(c); *ASEAN-Korea IA* art 21(1)(b)–(c); *ASEAN-Hong Kong IA* art 8(1)(b)–(c); *Vietnam-Korea FTA* ch 16 art 16.2(b)–(c); *ASEAN-China IA* art 17; *ACIA* art 18; *CPTPP* art 29.2. See also app 7.

II A Focused Review of Tribunals' Interpretation Approaches – Treaty Exception Provisions on Security Interests in International Arbitration Practice

A *Section Overview*

To date, no exception provisions on security interests in Vietnam's IIAs have been interpreted in any case. Some of Vietnam's IIAs – namely, the *Vietnam-Netherlands BIT* and *Vietnam-France BIT* – were discussed, at the merit stage, in *Trinh and Binh Chau v Viet Nam (II)*[18] and *Dialasie v Viet Nam*[19] respectively, but these do not contain security exceptions. Security exceptions under other countries' IIAs, however, have been interpreted in international arbitration practice.

A security exception in the *Argentina-US BIT* was frequently invoked in cases against Argentinian measures responding to its economic crisis during 2001 and 2002, such as in *CMS v Argentina*,[20] *Sempra v Argentina*,[21] *Enron v Argentina*,[22] *El Paso v Argentina*,[23] *LG&E v Argentina*[24] and *Continental Casualty v Argentina*.[25] Recently, security exception provisions in the *India-Mauritius BIT* and *India-Germany BIT* were examined in *Devas v India*[26] and *Deutsche Telekom v India* respectively.[27] These exception provisions resemble non-self-judging security exception provisions in Vietnam's IIAs in that they do not use self-judging language and leave the term 'essential security interests' undefined.[28] The provision in the *India-Mauritius BIT* similarly contains a 'directed to' nexus between state measures and security objectives; however, the provisions in the *Argentina-US BIT* and the *India-Germany BIT* require a 'necessary' link.[29]

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[18] *Trinh Vinh Binh and Binh Chau JSC v Vietnam (II) (Award)* (PCA Arbitral Tribunal, Case No 2015-23, 10 April 2019) ('*Trinh and Binh Chau v Vietnam (II)*').

[19] *Dialasie SAS v Socialist Republic of Vietnam (Award)* (UNCITRAL Arbitral Tribunal, 17 November 2014) ('*Dialasie v Vietnam*').

[20] *CMS Gas Transmission Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005) ('*CMS v Argentina*'). For relevant case summary and analysis, see generally Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20(3) *Leiden Journal of International Law* 637; August Reinisch, 'Necessity in International Investment Arbitration – An Unnecessary Split of Opinion in Recent ICSID Cases? Comments on *CMS v Argentina* and *LG&E v Argentina'* (2007) 8(2) *The Journal of World Investment & Trade* 191 ('CMS and LG&E'); Tarcisio Gazzini, 'Necessity in International Investment Law: Some Critical Remarks on *CMS v Argentina'* (2008) 26(3) *Journal of Energy & Natural Resources Law* 450; Diane A Desierto, 'Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties' (2010) 31(3) *University of Pennsylvania Journal of International Law* 827, 853–64.

[21] *Sempra Energy International v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) ('*Sempra v Argentina*'). For relevant case summary and analysis, see generally Federica Cristani, 'The Sempra Annulment Decision of 29 June 2010 and Subsequent Developments in Investment Arbitration Dealing with the Necessity Defence' (2013) 15(2) *International*

In interpreting security exception provisions, tribunals have adopted different approaches in relation to three aspects: (i) whether an economic crisis (in Argentina) was sufficiently serious to threaten ESIs and trigger state protections – this approach is about rational grounds of security measures (legitimate objectives); (ii) how state measures were to be deemed 'necessary' to pursue security interests (a 'necessary' link requirement); and (iii) whether security exceptions excluded the duty of/liability for compensation (legal effect of security exceptions).

Community Law Review 237; Desierto (n 20) 836–45.

[22] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP. v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) ('*Enron v Argentina*').

[23] *El Paso Energy International Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) ('*El Paso v Argentina*').

[24] *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) ('*LG&E v Argentina*'). For relevant case summary and analysis, see generally Reinisch, 'CMS and LG&E' (n 20); Peter Tomka, 'Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties' in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 477; Waibel (n 20); Desierto (n 20) 845–53.

[25] *Continental Casualty Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) ('*Continental Casualty v Argentina*'). For relevant case summary and analysis, see generally José E Alvarez and Tegan Brink, 'Revisiting the Necessity Defense: *Continental Casualty v Argentina'* (Working Paper, International Law and Justice, Institute for International Law and Justice, New York University School of Law, No 2010/3, 2010); Desierto (n 20) 864–74.

[26] *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India (Award on Jurisdiction and Merits)* (PCA Arbitral Tribunal, Case No 2013-09, 25 July 2016) ('*Devas v India*'). For relevant case summary and analysis, see generally Ridhi Kabra, 'Return of the Inconsistent Application of the "Essential Security Interest" Clause in Investment Treaty Arbitration: *CC/Devas v India* and *Deutsche Telekom v Indi*a' (2019) 34(3) *ICSID Review—Foreign Investment Law Journal* 723; Prabhash Ranjan, 'Essential Security Interests in International Investment Law: A Tale of Two ISDS Claims Against India' in Julien Chaisse, Sufian Jusoh and Leïla Choukroune (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020) ('Claims against India').

[27] *Deutsche Telekom AG v The Republic of India (Interim Award)* (PCA Arbitral Tribunal, Case No 2014-10, 13 December 2017) ('*Deutsche Telekom v India*'). For relevant case summary and analysis, see generally Kabra (n 26); Ranjan, 'Claims against India' (n 26).

[28] See *India-Mauritius BIT* art 11(3); *Argentina-US BIT* art XI; *India-Germany BIT* art 12.

[29] Ibid.

B *Legitimate Security Objectives: Essential Security Interests and Economic Crisis*

In dealing with security exceptions, Argentina's tribunals had to address the question of whether Argentina's economic crisis during 2001 and 2002 threatened Argentina's ESIs. All tribunals agreed that ESIs encompassed economic security, but they differed on how to assess the severity of the crisis. Such convergence and divergence have been noted by many scholars.[30]

More specifically, Argentina's tribunals accepted that security interests under the security exception provision of the *Argentina-US BIT* could be linked to the economic crisis. According to tribunals in *Enron v Argentina* and *Sempra v Argentina*, there was 'nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI'.[31] Standing in a similar position, the tribunal in *CMS v Argentina* asserted that 'the text of the Article [security exception] does not refer to economic crisis or difficulties of that particular kind'.[32] Those tribunals also emphasised that leaving economic security out of the security concept was inconsistent with treaty objectives and purposes[33] and resulted in 'an unbalanced understanding' of the security exception.[34]

However, Argentina's tribunals had different views on whether the economic difficulties/crisis in Argentina were sufficiently serious to threaten ESIs and trigger state protections. Tribunals in *Enron v Argentina*, *Sempra v Argentina* and *CMS v Argentina* similarly required an extreme level of severity.[35] For example, the *CMS v Argentina*

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[30] See, eg, Andrew Newcombe and Lluís Paradell, 'Defences, VI. Fundamental Change of Circumstances' in Andrew Paul Newcombe and Lluís Paradell (eds), *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 1st ed, 2009) 281, 496–7; Jeswald W Salacuse (ed), *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, 2013) 476–9; William J Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15(2) *Journal of International Economic Law* 481, 484–9; Stephan W Schill, 'International Investment Law and the Host State's Power to Handle Economic Crises' (2007) 24(3) *Journal of International Arbitration* 265, 279.

[31] *Enron v Argentina* (n 22) [322]; *Sempra v Argentina* (n 21) [374].

[32] *CMS v Argentina* (n 20) [359]. The tribunal additionally provided that 'there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI': at [359].

[33] *Enron v Argentina* (n 22) [331]; *Sempra v Argentina* (n 21) [373]; *CMS v Argentina* (n 20) [360].

[34] *CMS v Argentina* (n 20) [360].

[35] *Enron v Argentina* (n 22) [306]; *Sempra v Argentina* (n 21) [348]; *CMS v Argentina* (n 20) [354]–[355]. The *Enron v Argentina* and *Sempra v Argentina* tribunals similarly stated that

> [t]he Tribunal has no doubt that there was a severe crisis and that in such context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing. Questions of public order and social unrest could be handled

tribunal asserted that the economic downturn 'was severe' but 'did not result in total economic and social collapse'.[36] In its view, such difficulties had not invited 'catastrophic conditions' regarding the 'disruption and disintegration of society', nor had they led to the 'total breakdown of the economy'.[37]

Conversely, tribunals in *Continental Casualty v Argentina* and *LG&E v Argentina* did not demand the same level of severity. According to the *Continental Casualty v Argentina* tribunal, measures to protect ESIs did not require the country's 'total collapse' or that a 'catastrophic situation' become manifest;[38] the tribunal, quite reasonably, commented that '[t]here is no point in having such protection if there is nothing left to protect'.[39] It should be noted that the tribunal also considered 'the maintenance of public order' to be covered by a security exception, apart from 'national security', so it might have been more comfortable concluding that the economic situation in Argentina was sufficiently severe.

The *LG&E v Argentina* tribunal did not clearly stipulate the severity level but its analysis likewise implies that there was no need to reach a point of 'total economic and social collapse'. In its view, Argentina's situation was not simply an 'economic problem' or a 'business cycle fluctuation', as the claimant argued, but rather, was an 'extremely severe crisis in the economic, political, and social sector' which threatened 'total collapse'.[40] Before reaching that conclusion, the tribunal had undertaken a comprehensive review of the crisis's effect on Argentina's economy, society and politics.[41]

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as in fact they were, just as questions of political stabilisation were handled under the constitutional arrangements in force.

[36] *CMS v Argentina* (n 20) [355].

[37] Ibid. Given the assessment of *CMS v Argentina* tribunals, Sornarajah makes a notable comment that '[i]t is difficult to understand why a situation that led to widespread hunger in the country, a situation of public emergency resulting in army shootings and the fall of give successive governments within a short span of time could not amount to a national security situation': see M Sornarajah (ed), *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 308.

[38] *Continental Casualty v Argentina* (n 25) [180].

[39] Ibid.

[40] *LG&E v Argentina* (n 24) [231].

[41] Ibid [228].

C ‘*Necessary’ Nexus: Invitation to ‘Only Means’ Test or ‘Least Restrictive Means’ Test?*

The ‘necessary’ requirement under treaty security exceptions was interpreted as requiring the ‘only means’ test by certain tribunals, such as in *CMS v Argentina*, *Enron v Argentina* and *Sempra v Argentina* or as being close to ‘inevitable’/‘indispensable’ by the *LG&E v Argentina* tribunal. On the other hand, the requirement was perceived as needing to meet the ‘least restrictive means’ test by the tribunal in *Continental Casualty v Argentina*.

The *CMS v Argentina*, *Enron v Argentina* and *Sempra v Argentina* tribunals linked the ‘necessary’ link condition under a security exception provision in Article XI of the *Argentina-US BIT* to the ‘only way’ requirement of the necessity defence under customary international law (CIL) as codified in Article 25 of the Draft Articles on State Responsibility.[42] As a result, a ‘necessary’ measure needed to be the ‘only means’ in order to qualify as an exception. The *CMS v Argentina* tribunal did not outline any reasoning;[43] however, the *Enron v Argentina* and *Sempra v Argentina* tribunals reasoned that as the *Argentina-US BIT* had no clarification of ESIs, ‘the specific meaning of these concepts and the conditions for their application must be searched for elsewhere’.[44] The place the tribunals searched was CIL, and the necessity defence happened to be as ‘a specific chair’ on which tribunals could lean. Whether or not such an interpretation was correct received no discussion in *Enron v Argentina (Annulment*) [45] since, as acknowledged by the annulment committee, the tribunal had already stated ‘sufficiently

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[42] International Law Commission, United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) art 25 (‘Draft Articles on State Responsibility’). This provision on Necessity states:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) *is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
>
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) the international obligation in question excludes the possibility of invoking necessity; or
>
> (b) the State has contributed to the situation of necessity.

[43] This point was identified by the committee in *CMS v Argentina (Annulment)*: *CMS Gas Transmission Company v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/8, 25 September 2007) [123] (‘*CMS v Argentina (Annulment)*’).

[44] *Enron v Argentina* (n 22) [333]; *Sempra v Argentina* (n 21) [375].

[45] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic (Decision on the Application for Annulment of the Argentine Republic)* (ICSID Annulment Committee, Case No ARB/01/3, 30 July 2010) (‘*Enron v Argentina (Annulment)*’).

clear' reasons in reaching its conclusion.[46] However, the interpretative approach has been criticised by many scholars.[47]

In *LG&E v Argentina*, the tribunal did not explicitly require Argentina's measures be the only means. In its view, the treaty exception referred to 'situations in which a State has no choice but to act' and a state might have 'several responses at its disposal' to protect ESIs, which seems close to the only means approach.[48] However, the tribunal ultimately determined only that Emergency Law was enacted as 'a necessary and legitimate measure' on the part of Argentina.[49] To reach this determination, it did examine the duration and the need for the law to be drafted, considered the reasonableness of specific provisions under such a law,[50] and appeared to find appropriate and effective measures. It could be said that the tribunal in this case approached the necessary measures as being close, but not exactly equivalent, to 'inevitable'/'indispensible' measures.

However, a 'necessary' link requirement under Article XI of the *Argentina-US BIT* was approached differently by the *Continental Casualty v Argentina* tribunal. The tribunal relied upon the interpretation of WTO case law on Article XX of the *GATT* to invite the 'least restrictive means' test in defining the necessity of state measures. This approach has been widely reviewed in the literature.[51] The tribunal offered two reasons for referring to the GATT/WTO's interpretation approach rather than to the plea of necessity under CIL: (i) the text of the treaty exception derived from the parallel model clause of the US-FCN [Friendship, Commerce and Navigation] treaties, which were formulated based on Article XX of the *GATT (1947)*;[52] and (ii) the GATT/WTO case law 'extensively dealt with the concept and requirements of necessity' with regard to economic measures.[53] On that basis, the tribunal acknowledged 'a process of weighing and balancing a series of factors' taken by the GATT/WTO case law to find the necessity of measures.[54] The factors here

[46] Ibid [403].
[47] See, eg, Andrew D Mitchell and Caroline Henckels, 'Variations on a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law' (2013) 14(1) *Chicago Journal of International Law* 93, 110; M Sornarajah (ed), *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 462–3; Kabra (n 27) 729.
[48] *LG&E v Argentina* (n 24) [238].
[49] Ibid [240]–[241].
[50] Ibid. Note that the specific provisions here included suspension of the calculation of tariffs in US dollars and suspension of the Producer Price Index adjustment of tariffs.
[51] See, eg, Mitchell and Henckels (n 47), 114–5; Kabra (n 27) 729.
[52] *Continental Casualty v Argentina* (n 25) [192].
[53] Ibid.
[54] *Continental Casualty v Argentina* (n 25) [194], citing Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R (12 June 2007, adopted 17 December 2007) [7.104] ('*Brazil — Retreaded Tyres*').

included importance of the objective pursued, contribution of the measures to the objective and trade/investment-restrictiveness of the measure.[55] From the last factor, the process further examined whether alternative measures more consistent – or less inconsistent – with the treaty were available (less restrictive alternatives) and whether such alternatives were realistic options for achieving the same ends (reasonably available alternatives).[56] Applying this approach,[57] the tribunal found the measures at issue were necessary.

D *Legal Effects of Security Exceptions*

Whether security exceptions have the legal effect of exempting states from liability for compensation has also been considered in international arbitration practice. Tribunals have expressed opposing views on this issue, as has been widely discussed in the literature.[58]

The tribunals in *CMS v Argentina*, *Enron v Argentina* and *Sempra v Argentina* held that the security exception under the *Argentina-US BIT* could excuse otherwise wrongful state measures but could not exempt the state from compensation liability in relation to aggrieved foreign investors. This view was drawn from two lines of reasoning: first, even in the case of necessity a state was still required to pay compensation for damages caused by its measures under CIL, as articulated in Article 27 of the Draft Articles on State Responsibility,[59] so the case would not be different under treaty law;[60] and, second, the treaty security exception did not address the issue of compensation.[61] For example, the *Enron v Argentina* and *Sempra v Argentina* tribunals asserted that the treaty provision did

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[55] Ibid.
[56] Ibid [195], citing Panel Report, *Brazil — Retreaded Tyres,* WTO Doc WT/DS332/R (n 54) [7.211] and Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005, adopted 20 April 2005) [308] ('*US — Gambling (AB)*').
[57] *Continental Casualty v Argentina* (n 25) [196]–[199].
[58] See, eg, José E Alvarez, 'Lessons From the Argentine Crisis Case' in José E Alvarez (ed), *The Public International Law Regime Governing International Investment* (Brill, 2011) 247, 282–4.
[59] The provision on Consequences of Invoking a Circumstance Precluding Wrongfulness in Article 27 of the Draft Articles on State Responsibility (n 42) states that

> [t]he invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
>
> (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
>
> (b) the question of compensation for any material loss caused by the act in question.

[60] *CMS v Argentina* (n 20) [383], [390]; *Enron v Argentina* (n 22) [344]–[345]; *Sempra v Argentina* (n 21) [393], [394].
[61] *CMS v Argentina* (n 20) [391], [394]; *Enron v Argentina* (n 22) [345].

not 'specify the circumstances in which compensation should be payable'[62] so the payment was considered 'a matter to be agreed with the affected party'.[63] The tribunals thus found the treaty security exception and customary necessity defence inapplicable, and Argentina had to pay compensation for violating treaty obligations.

The committee/tribunals in *CMS v Argentina (Annulment)*,[64] *LG&E v Argentina*, *Continental Casualty v Argentina* and *Devas v India* took the opposite position. In their view, treaty exceptions aimed to exclude the application of treaty obligations (non-violation) so the issue of compensation did not arise (non-compensation).[65] For instance, the committee in *CMS v Argentina (Annulment)*, while pointing out an error of the *CMS v Argentina* tribunal, emphasised that the treaty exception was 'a threshold requirement', meaning that when it applied, the treaty obligation did not apply.[66] The *Devas v India* tribunal also reasoned that 'if a State properly invokes a national security exception under an investment treaty, it cannot be liable for compensation of damages going forward'.[67] Another possible ground suggested by certain tribunals was that treaty exceptions implied the circumstances in which compensation was not payable.[68] The *LG&E v Argentina* tribunal reasoned that the treaty exception was 'appropriate only in emergency situations' and a state was 'no longer exempted from responsibility for any violation of its obligation under international law' when its situations somehow recovered.[69] It thus decided Argentina did not have to pay compensation for the claimant's damages caused by its emergency measures during the state of necessity.[70] In *Continental Casualty v Argentina*, Argentina was not required to compensate damages caused by its security measures during and after crisis,[71] except for those caused by its Treasury Bills which offended FET.[72]

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[62] *Enron v Argentina* (n 22) [345] and *Sempra v Argentina* (n 21) [394], citing James Crawford (ed), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 190.
[63] Ibid.
[64] *CMS Gas Transmission Company v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/8, 25 September 2007) ('*CMS v Argentina (Annulment)*'). For relevant case summary and analysis, see generally Federica Cristani, 'The Sempra Annulment Decision of 29 June 2010 and Subsequent Developments in Investment Arbitration Dealing with the Necessity Defence' (2013) 15(2) *International Community Law Review* 237.
[65] *CMS v Argentina (Annulment)* (n 64) [129], [146]; *Continental Casualty v Argentina* (n 25) [164]; *Devas v India* (n 26) [293].
[66] *CMS v Argentina (Annulment)* (n 64) [129].
[67] *Devas v India* (n 26) [293].
[68] *LG&E v Argentina* (n 24) [260]–[261].
[69] Ibid [261].
[70] Ibid [264].
[71] *Continental Casualty v Argentina* (n 25) [304].
[72] Note that the certain extent here refers to Argentina' liability for FET violation concerning the restructure

E *Section Remark: Suggesting Three Practical Questions for an Analysis of Security Exception Provisions in the Context of Vietnam's IIAs*

Based on tribunals' differing approaches to the substantive qualifications of security measures and the legal effect of security exceptions as reviewed above, this section proposes three specific inquiries for analysing security exception provisions under Vietnam's IIAs. First, whether security exception provisions in Vietnam's IIAs could be interpreted as covering other security interests (eg social/economic/financial security), apart from national/military/political security. Second, whether the 'necessary' link under security exception provisions in Vietnam's IIAs could be interpreted as requiring the 'least restriction' test. And, last, whether security exception provisions in Vietnam's IIAs have the legal effect of excluding the operation of treaty obligations.

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of LETEs (Treasury Bills contracts) in December 2004: *Continental Casualty v Argentina* (n 25) [264].

III AN ANALYSIS OF NON-SELF-JUDGING SECURITY EXCEPTION PROVISIONS: SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES

A *Absence of Self-Judging Language: Invitation to Judicial Reviews of Permissible Objectives, Nexus Link Requirements and Good Faith*

As previously mentioned, security exceptions in the *Vietnam-Singapore BIT* and *Vietnam-Uzbekistan BIT* do not include self-judging language such as 'which it considers', 'if the state considers', 'in the state's opinion' or 'if the state determines'.[73] The absence of such language suggests that these provisions do not grant Vietnam a full discretion to interpret the meaning of exception provisions and decide the legitimacy of its security measures accordingly. If the measures are challenged, adjudicators would review their substantive features, possibly including (i) whether security interests pursued by state measures qualify as permissible objectives under exception provisions (legitimacy of objectives pursued); (ii) whether security interests were at stake to trigger state protection (rational basis, or objective foundation, of challenged measures); and (iii) whether state measures were suitable/appropriate to protect security interests (rational relationship between challenged measures and objectives pursued). Similar substantive review has been undertaken by many tribunals[74] and reinforced by numerous scholars[75] examining non-self-judging exception provisions outside the context of Vietnam's IIAs. It normally refers to 'full arbitral review'[76] or 'de novo review'[77] in literature. Full arbitral review does not, however, mean that 'the tribunal will supplant the state's evaluation of the situation with its own'.[78] Tribunals as adjudicators should give a certain level of respect to Vietnam' authorities as primary decision-makers in examining their measures – appropriate degree of deference or 'margin of appreciation'[79] – although it has been acknowledged that the extent to which deference has been granted in international arbitration practice is not always clear.[80]

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[73] See above Part I(B).
[74] *CMS v Argentina* (n 20) [374].
[75] See, eg, Titi (n 6) 202.
[76] Ibid.
[77] Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel (eds), *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 119, citing Andrew T Guzman, 'Determining the Appropriate Standard of Review in WTO Dispute Resolution' (2009) 42(1) *Cornell International Law Journal* 42, 45–76.
[78] Titi (n 6) 202.
[79] Note that the 'margin of appreciation' concept is used by the ECtHR in the context of human right law and referred in the context of international investment law: see, eg, *Bear Creek Mining Corporation v Republic of Peru (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/21, 30 November 2017) [467] ('*Bear Creek Mining v Peru*'); Caroline Henckels, 'The Role of the Standard of Review and the Importance of

Given the lack of non-self-judging language, one might question that whether Vietnam and its treaty partner – Singapore or Uzbekistan – had an implicit intention of self-judging at the time of the treaty conclusion.[81] This is unlikely, for two reasons. Firstly, arbitrators/adjudicators as treaty interpreters, following interpretative rules of the *VCLT*, rarely read self-judging intention into security exception provisions having no indication or expression of such intention.[82] This is because treaty interpreters, working within their mandates, only look for the ordinary meaning of what has been worded, rather than what has been hidden, in treaty texts, including treaty terms, treaty terms' context, and treaty object and purpose. If the reading of self-judging meaning – which affects investors' interests in providing broader opportunity for Vietnam to escape its compensation responsibility – is available, it would be contrary to the primary object and purpose of the BITs – investment protection and promotion. In investment dispute settlement practice, the *Sempra v Argentina* tribunal, while dealing with the non-self-judging feature of security exceptions under the *Argentina-US BIT*, pointed out that '[self-judging] determination would definitely be inconsistent with the [treaty] object and purpose',[83] and expressed a concern that '[the] Treaty would be deprived of any substantive meaning'[84] were this the case.

Secondly, it would be difficult for Vietnam to prove its treaty partner – Singapore or Uzbekistan – had an implicit intention of including a self-judging meaning at the time of concluding the BIT with Vietnam. Singapore's IIAs signed before or around the time when the *Vietnam-Singapore BIT* (1992) was concluded do not include any self-judging

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Deference in Investor–State Arbitration' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standards of Review and Margin of Appreciation* (Oxford University Press, 2014) 113; Julian Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54(3) *Virginia Journal of International Law* 545.

[80] *National Security* (n 3) 41–2; Burke-White and von Staden (n 3) 370–6. See also Antoine Martin, 'Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law' (2012) 29(1) *Journal of International Arbitration* 49, 65–7; Dominik Eisenhut, 'Sovereignty, National Security and International Treaty Law: The Standard of Review of International Courts and Tribunals with Regard to "Security Exceptions"' (2010) 48(4) *Archiv Des Völkerrechts* 431, 440–3.

[81] This possibility is drawn from the practice that Argentina argued that US implied self-judging when concluding a security exception provision in the *Argentina-US BIT*: see, eg, *CMS v Argentina* (n 20) [368]; *LG&E v Argentina* (n 24) [209]; *Sempra v Argentina* (n 21) [368]–[369].

[82] The tribunal *Sempra v Argentina* (n 21) pointed that 'interpreting non-self-judging provisions as self-judging ones would not qualify strict rules of interpretation under Article 31 and 32 of *VCLT*': at [380]. The tribunal in *Devas v India* (n 26) similarly asserted that Article 11(3) of the *India-Mauritius BIT* 'plainly does not contain any explicit language that the Tribunal would regard as granting discretion of that nature to the State': at [220].

[83] *Sempra v Argentina* (n 21) [374].

[84] Ibid.

language in their provisions (if any) concerning security exceptions.[85] And given that security exceptions in Uzbekistan's IIAs – specifically, the *Uzbekistan-US BIT* (1994) – contain self-judging phrasing (namely, 'it regards as'), Vietnam would struggle to convince adjudicators that Uzbekistan intended the same meaning when concluding its BIT with Vietnam in 1996. To the contrary, the fact that the phrase 'it regards as' occurs in the *Uzbekistan-US BIT* but not in the *Vietnam-Uzbekistan BIT* might suggest that Uzbekistan decided not to include similar language in its BIT with Vietnam. A similar analogy/reasoning has been put forward by various tribunals in Argentina's cases.[86]

B *Permissible Objectives: Unlimited Essential Security Interests*

Security exceptions in the *Vietnam-Singapore BIT* and *Vietnam-Uzbekistan BIT* only mention 'essential security interests' as legitimate objectives, without providing specific types of security interests or circumstances triggering the protection of security interests, provided previously in Part I(B). The first question is thus whether ESIs also cover social/economic/financial security, the protection of critical public infrastructure/strategic industry, or the security of other interests apart from national/military/political security.

The dictionary meaning of the term 'essential security interests' does not limit the type of security. The noun 'security' is defined as 'freedom from risk and the threat of change for the worse', 'freedom from danger; safety' or 'the protection of people, organisations, countries, etc against a possible attack or other crime'.[87] The adjective 'essential' is defined as 'completely necessary, extremely important in a particular situation or not for a particular activity; connected with the most important aspect or basic nature of somebody/something',[88] or 'necessary or needed; relating to something's or someone's basic or most important qualities'.[89] In the view of the *Devas v India* tribunal, the term also means 'necessary' or 'indispensable'; the tribunal put those words together to indicate permissible security interests covered by security exceptions in Article 11(3) of the *India-Mauritius BIT*.[90] Given the meaning of 'essential' and the plural form of

[85] Note that two of Singapore's IIAs contain security exceptions but non-self-judging ones: see *Singapore-China BIT* (1985) art 11; *Singapore-Poland BIT* (1993) art 11.
[86] *Enron v Argentina* (n 22) [332], [335]–[336], [339]; *Sempra v Argentina* (n 21) [374], [379]–[381], [383]–[385]; *CMS v Argentina* (n 20) [368]–[373]; *LG&E v Argentina* (n 24) [207]–[214]; *Continental Casualty v Argentina* (n 25) [182]–[188].
[87] *Cambridge Dictionary* (online at 20 May 2021) 'security'.
[88] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'essential' (def 1, 2).
[89] *Cambridge Dictionary* (online at 20 May 2021) 'essential'.
[90] *Devas v India* (n 26) [243].

'interests', 'essential security interests' indicate vital ones rather than ordinary ones.[91] If someone relies on the term 'national security' – which means, in its dictionary meaning, 'the safety of a country and its governmental secrets, together with the strength and integrity of its military, seen as being necessary to the protection of its citizens'[92] – to limit the concept of 'security' to 'the safety of a nation and its people', it seems they are ignoring the evolution of the concept.[93] In contemporary times and outside the context of wartime, a state's concerns extend beyond the core security interests present in war or armed conflict – the safety of the nation and its people – to include such concerns as the health/wellness of its population, the wealth/prosperity of society, and the health/strength of the general political, economic and financial system (including domestic infrastructure and cultural traditions). The term 'essential security interests' would thus be not limited to conventional security interests such as national/military/political security but, instead, also covers non-conventional security interests such as social/economic/financial security, the protection of critical public infrastructure/strategic industry, energy/food security, or biosecurity.[94]

Among these non-conventional interests, economic/financial security interests are perhaps more readily accepted as 'essential' 'security interests' than the others. This is because the object and purpose of Vietnam's treaties containing security exceptions is not only to promote and protect foreign investment but also to strengthen treaty parties' economies and prosperity – including protecting the national interests of all beneficiaries in difficult economic situations. Therefore, excluding economic security from the meaning of the term 'security' is inconsistent with the object/purpose of those IIAs and with the rationale for those security exceptions. It would not make sense for a treaty to

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[91] In the words of the WTO Panel in *Russia — Traffic in Transit*, '"[e]ssential security interests", which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population form external threats, and the maintenance of law and public order internally': see Panel Report, *Russia — Measures Concerning Traffic in Transit,* WTO Doc WT/DS512 (5 April 2019, adopted 26 April 2019) [7.130] ('*Russia — Traffic in Transit'*).

[92] *Black's Law Dictionary* (11th ed, 2019) 'national security' (def 18c).

[93] For the evolving feature of ESIs, see Sinha (n 3) 247; Kabra (n 26) 740; Titi (n 6) 79–80; *National Security* (n 3) 7. See also Carlos Esplugues, 'National Security as a Limit to International Trade and Foreign Investment' in Carlos Esplugues (ed), *Foreign Investment, Strategic Assets and National Security* (Intersentia, 2018) 63, 76; Moon (n 30) 500; Ji Ma, 'International Investment and National Security Review' (2019) 52(4) *Vanderbilt Journal of Transnational* Law 899, 907.

[94] This point is viewed by many scholars: see, eg, Sinha (n 3) 248; Kabra (n 26) 740. See generally Prabhash Ranjan, 'Protecting Security Interests in International Investment Law' in Mary E Footer et al (eds), *Security and International Law* (Hart Publishing, 2016) 273, 276–80. For energy security, see Esplugues (n 93) 93; L Guruswamy, 'Energy and the Environment: Confronting Common Threats to Security' (1991) 16(2) *North Carolina Journal of International Law and Commercial Regulation* 255, 255. For the protection of critical public infrastructure/strategic industry: Kabra (n 26) 739–40; OECD, *Security-Related Terms in International Investment Law and in National Security Strategies* (2009) 11–4.

require a state to wholly respect the economic interests of foreign investors when the state is in a situation of economic crisis. Secondly, it is reasonable to suggest that in the contemporary era, characterised by a high degree of economic integration and globalisation, the health/wealth of a state's economy is as important as the safety of the country and its citizens, since 'the economy can wreak [havoc] on the lives of an entire population and the ability of the [g]overnment to lead'.[95] Apart from economic security, however, it might be difficult for Vietnam to prove other interests (such as environmental security, energy security, resource security and food security) are constituents of ESIs, and even more challenging to prove that current foreign control over domestic sectors and industries such as airports, banks, finance and natural resource exploitation raise security concerns.

The second concern that could be raised in the context of non-self-judging security exceptions is whether security exceptions would be possibly interpreted as protecting ESIs against both military and non-military threats. The dictionary meaning of the term 'security', as mentioned above, does not specify what sources of 'danger or attack' threaten 'the quality, state, or condition of being secure'. Security interests, whether conventional or non-conventional, need to be protected from both military threats (espionage, terrorism, war or armed conflict) and non-military threats (emergencies, turmoil/crisis, disease, natural disaster, civil strife, severe economic crises, external pollution, and food/water shortages).[96] The interpretation that security exceptions allow measures to protect ESIs threatened by any source (internal or external, military or non-military) is also compatible with the treaty objectives/purposes – protection and promotion of investment for economic development.[97] Such objectives and purposes could not be achieved were Vietnam to sacrifice its economic security or relevant security interests for the benefit of foreign investors. As stated by the *LG&E v Argentina* tribunal, '[w]hen a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion'.[98] The interpretation is also consistent with CIL; in

[95] *LG&E v Argentina* (n 24) [238].
[96] See generally Ranjan, 'Non-Precluded Measures' (n 3) 37–9; Kabra (n 26) 735–6; Burke-White and von Staden (n 3) 349–55; Jurgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59(2) *International and Comparative Law Quarterly* 325, 361–5.
[97] For the objectives/purposes of *Vietnam-Singapore BIT* and *Vietnam-Uzbekistan BIT*, see Chapter 2 Part II(B).
[98] Ibid.

the words of the *Sempra v Argentina* tribunal, 'situations other than the traditional military threats for which the institution found its origins in customary law'.[99]

However, it should be noted that military or non-military threats need to be at a high level of severity or serious to trigger a security alarm. The level of severity might not be required to reach a peak of 'total social and economic collapse' or equivalence, but must be at a certain point such as being potential or tentative to 'total collapse' if not being prevented. This interpretation is compatible with the context of Vietnam's BITs examined. More specifically, the exception provision in the *Vietnam-Uzbekistan BIT* listed the term 'essential security interests' in addition to 'circumstances of extreme emergency,'[100] which suggests that circumstances raising security concerns (the former) must be more serious than the latter. The exception provision in the *Vietnam-Singapore BIT* allows a state to 'apply prohibitions or restrictions of any kind or take any other actions' to protect ESIs.[101] It implies that Vietnam as a host state does not have to wait until ESIs nearly destroyed to be entitled to resort any of these protective measures.

In conclusion, by leaving the term 'essential security interests' undefined, security exceptions under the *Vietnam-Singapore BIT* and *Vietnam-Uzbekistan BIT* could be interpreted as covering security interests other than national/political/social security interests, and as addressing both military and non-military threats – in other words, unlimited ESIs.

[99] *Sempra v Argentina* (n 21) [374]. The *CMS v Argentina* (n 20) tribunal similarly state that 'there is nothing in the context of customary international law or the objective and purpose of the Treaty that could on its own exclude major economic crisis from the scope of [security exception]': at [359].
[100] *Vietnam-Uzbekistan BIT* art 12(2).
[101] *Vietnam-Singapore BIT* art 12(2).

C *Permissible Objectives: Security Interests Threatened by Extreme Emergency*

The exception provision under the *Vietnam-Uzbekistan BIT* additionally refers to 'circumstances of extreme emergency' that might allow Vietnam to adopt legislative measures to protect security interests other than ESIs. A similar point is made by Sinha in the context of South Asian countries' BITs[102] and by Ranjan in the context of India's IIAs.[103] However, it should be noted that these security interests must be exposed to extreme emergency circumstances (limited ESIs). This provision, on the one hand, 'appears to be relatively broad in scope – covering all kinds of emergencies'[104] but, on the other hand, 'would presumably have a relatively high threshold for invocation – the emergency must be extreme'.[105] The extreme emergency circumstances would possibly refer to 'very serious, dangerous and sudden' situations, given the dictionary meanings of 'emergency'[106] and 'extreme'.[107] Economic, financial, food or energy crises, natural disasters or a pandemic such as COVID-19, if raising security concerns, could be such situations.

D *'Directed to' Relationship between Objectives and Measures: A Rational Relationship*

Non-self-judging security exceptions in the *Vietnam-Singapore BIT* or *Vietnam-Uzbekistan BIT* require that state measures are 'directed to', or 'to' secure, protected security interests, as mentioned earlier in Part I(B). The phrase 'directed to', in the view of Burke-White and von Staden, suggests that 'actions are permissible as long as they are intended by the government to further a legitimate end';[108] the word 'to' implies that 'states only have to show that the measures taken were under the scope of one of the permissible objectives',[109] as pointed out by Sinha. Given the less stringent requirement of the 'directed to'/'to' link or similar kinds, certain scholars have argued that '[non-self-judging] provisions resemble self-judging clauses'[110] or 'their practical effect comes very

[102] Sinha (n 3) 229.
[103] Ranjan, 'Non-Precluded Measures' (n 3) 43.
[104] Burke-White and von Staden (n 3) 367.
[105] Ibid.
[106] The word 'emergency' means 'a sudden serious and dangerous event or situations which needs immediate action to deal with it': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'emergency'.
[107] The word 'extreme' means 'not ordinary or usual; serious or severe': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'extreme' (def 2).
[108] Burke-White and von Staden (n 3) 342.
[109] Sinha (n 3) 261.
[110] Titi (n 6) 204, citing *National Security* (n 3) 95.

close to a self-judging clause'.[111] The view is reasonable if considering the practical effect of non-self-judging and self-judging provisions on state discretion. In this regard, the state has to decide which measures are suitable/appropriate to address situations raising security concerns. However, from the theoretical perspective, the substantive review of the 'directed to'/'to' link here is more similar to that of the 'rational relationship' aspect of non-arbitrary measures.[112] Once measures are considered non-arbitrary, they would meet the 'directed to' nexus link in this regard.

One might argue that even though exception provisions contain the words 'directed to' or 'to', a state still needs to adopt only those measures necessary for security protection. However, this reading is inappropriate in the context of Vietnam's IIAs, for similar reasons to those invoked by the *Devas v India* tribunal. In *Devas v India*, the claimant ignored the phrase 'directed to' of the exception clause to argue that an essential security interest exception 'could only be triggered when the State measures are "necessary" for the protection of the State's national security'.[113] The tribunal rejected that argument on two grounds. Firstly, the tribunal explained that the exception clause was designed to give considerable freedom to treaty parties through, inter alia, the use of the 'directed to' test, and concluded that 'measures that would not actually be directed to the protection of the essential security interests would not qualify'.[114] Secondly, the tribunal pointed out that exception clauses without any expression of 'necessary' link requirement should not be read as if they had it. According to the tribunal, UNCTAD's approach was of significance in this regard; under this approach, when security exception provisions contain no reference to 'necessity', '[o]nly in extreme cases will an arbitral tribunal conclude that the host country measure has no relation whatsoever to the national security interests of a party'.[115] Such an approach, in the tribunal's view, 'would caution against imposing a requirement of necessity in ESI clause unless it can be clearly inferred from the terms of the clause'.[116]

However, the exception provision in the *Vietnam-Uzbekistan BIT* does not articulate the relationship between measures and security interests other than ESIs. It simply provides that a state is not restricted from '*taking measures* to secure its essential security interests

[111] *National Security* (n 3) 95.
[112] For two aspects of non-arbitrariness (rational basis and rational relationship), see Chapter 3 Part III(C).
[113] *India-Mauritius BIT* art 11(3).
[114] *Devas v India* (n 26) [235].
[115] *National Security* (n 3) 95, quoted in *Devas v India* (n 26) [241].
[116] Ibid.

or *in circumstances of extreme emergency*'.[117] The exception provision, it could be explained, does not mention other security interests so no relationship requirement between measures and such interests has been found; this explanation makes more sense when one compares it to a situation where 'essential security interests' are explicitly listed and the 'to' link requirement has been expressed. Despite this, state measures aiming to protect security interests threatened by extreme emergency circumstances must have a reasonable or rational connection with such aims.

E *Application Condition: No Arbitrary or Unjustifiable Discrimination*

The *Vietnam-Uzbekistan BIT* additionally demands security measures be applied on a non-discriminatory basis, as provided earlier in Part I(B). This condition deals with the application of the measures. In the words of Titi, it offers foreign investors 'a guarantee that the state shall respect the "basic rule of law"'.[118] Thus, state measures to protect security interests must not discriminate, de jure or de facto, between different foreign investors/investments, or between foreign investors/investments and domestic investors/investments. They must also not treat one group of investors/enterprises or one classification of investments/investment activities less favourably than other groups or other classifications. However, the condition of non-discrimination here in the context of security protection hardly means to require an absolute non-discrimination. As commented by UNCTAD, 'this condition still leaves ample regulatory freedom' for a host state.[119] In this regard, 'foreign investors can at least be sure that the host country must be able to give an explanation and justification for an investment restriction imposed for security reasons, and that its application is independent of the nationality of the investor.'[120] Under the BIT, the exception provision does expressly allow a state party to take security measures in accordance with its domestic laws that can include future amendments of existing laws.

In fact, the above condition is, in terms of its normative aspect, covered by the requirement of 'non-arbitrariness' and satisfied by that of good faith – which are 'minimum' substantive requirements for any legitimate measures. To be considered an exception, security measures must at a minimum possess the features of good faith and

[117] *Vietnam-Uzbekistan BIT* art 12(2) (emphasis added).
[118] Titi (n 6) 210.
[119] *Expropriation* (n 3) 83.
[120] Ibid.

non-arbitrariness. It means that they must in any case treat foreign investments/investors on rational/reasonable basis, regardless of causing discrimination or having any adverse effect. Given this, security measures under the *Vietnam-Singapore BIT* must also follow the condition of non-arbitrary discrimination even when the treaty exception provision does not express this explicitly.

F *Remark: Substantive Qualifications for Exceptional Legislative Measures*

Security exception provisions under the *Vietnam-Singapore BIT* and *Vietnam-Uzbekistan BIT* with distinguished features would likely be interpreted as imposing different substantive qualifications on legislative measures (Table 7.2). Regarding ESIs as permissible objectives, they would likely be understood as covering both conventional (eg military/political security) and non-conventional security interests (eg social/economic/financial security), threatened by either military or non-military sources – unlimited ESIs. Under the *Vietnam-Uzbekistan BIT*, any security interests threatened by extreme emergencies, in either domestic or international relations, could be protected under security exceptions – limited SIs. In terms of the nexus, the 'directed to' or 'for' requirement means state measures must be rationally linked to security objectives, which is equivalent to the 'rational relationship' requirement of non-arbitrary measures. The applicability condition – 'normally and reasonably applied on non-discriminatory basis' – additionally requires discrimination, if any, to be on reasonable/rational grounds, which is covered by the 'rational basis' requirement of non-arbitrary measures. These substantive qualifications would potentially be reviewed under judicial procedures if state measures were challenged (reviewable), as brought about by the lack of self-judging language in the exception provisions.

Table 7.2: Substantive Qualifications for Exceptional Legislative Measures as Imposed by Provisions on Non-Self-Judging Security Exceptions in Vietnam's IIAs

Treaty Contexts (2)	**Substantive Qualifications (Reviewable/R)**		
	Permissible Security Objectives		Other Qualifications
Vietnam-Singapore BIT	(ii)	Unlimited ESIs – ESIs Threatened by Military/Non-Military Sources	Non-arbitrariness (Rational Basis and Rational Relationship)
Vietnam-Uzbekistan BIT	(ii)	Unlimited ESIs	
	(iii)[(a)]	Limited SIs – SIs Threatened by Extreme Emergency	

IV AN ANALYSIS OF SEL-JUDGING SECURITY EXCEPTION PROVISIONS: SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES

A *Presence of Self-Judging Language: Invitation to Judicial Reviews of Good Faith*

Security exceptions in Vietnam's 13 IIAs contain self-judging language, such as 'that it considers' and 'which it considers', as previously mentioned in Part I(C). This language would likely be interpreted as suggesting that Vietnam as a host state has full discretion to decide its legitimate security objectives and measure-objective links. In the words of Titi, it 'authorizes the state to bear the exclusive judgment of the presence or absence of circumstances prescribed in an exception'.[121] The language can prevent potential adjudicators from reviewing measures' substantive aspects. However, it would hardly exclude them from reviewing measures' good faith aspect. The adjudicators would possibly perceive that a state must, in any case, observe the obligation to implement treaty commitments in good faith under CIL, as codified in Article 26 on 'Pacta sunt servanda' of the *VCLT*.[122] Indeed, certain tribunals have confirmed the good faith review if security exceptions at issue were self-judging.[123] For example, the *Continental Casualty v Argentina* tribunal asserted that '[i]f Article XI [exception provision] granted unfettered discretion to a party to invoke it', this discretion would be subject to 'good faith' while preventing a tribunal 'from entering further into merits'.[124] Many scholars also hold the same view when discussing self-judging exceptions in a general context.[125] If Vietnam and its partners did not want their measures to be adjudicated at all, they should have designed a non-justificable clause.[126]

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[121] Titi (n 6) 195, citing, *inter alia*, *National Security* (n 3) 91; Katia Yannaca-Small, 'Essential Security Interests under International Investment Law' in OECD, *International Investment Perspective 2007: Freedom of Investment in a Changing World* (2007) 93, 94; Stephan Schill and Robyn Bries, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13(1) *Max Planck Yearbook of United Nations Law Online* 61, 67–8.

[122] *VCLT* art 26. See also International Law Commission, United Nations, Draft Declaration on Rights and Duties of States (1949) art 13; it similarly states that '[e]very State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty'.

[123] *CMS v Argentina* (n 20) [374]; *Enron v Argentina* (n 22) [339]; *Sempra v Argentina* (n 21) [388]; *Continental Casualty v Argentina* (n 25) [182]. However, the tribunal in *LG&E v Argentina* (n 24) made a different perception that '[w]ere the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway, which does not significantly different from a substantive analysis': at [214]. This perception has been criticised by certain scholars: Newcombe and Paradell (n 30) 493.

[124] *Continental Casualty v Argentina* (n 25) [182].

[125] Burke-White and von Staden (n 3) 376; Titi (n 6) 195–6, 201; Newcombe and Paradell (n 30) 493. See also Jeswald W Salacuse (ed), *The Law of Investment Treaties* (Oxford University Press, 3rd ed, 2021) 475 ('Law of Investment Treaties'); Jure Zrilič, 'Host State's Defences against Conflict-Related Investment Claims' in Jure Zrilič (ed), *The Protection of Foreign Investment in Times of Armed Conflict* (Oxford

Under a good faith review, Vietnam might have to show that it genuinely believes that security interests are at stake and then adopt measures necessary to protect such interests (honesty/genuineness). Such a belief must be based on objective grounds rather than mere subjective opinions (a subjective judgment based on objective evidence). State measures would not be considered good faith if evidence shows that there were concealed motivations or disguised forms of protectionism, or that a state made judgements not based on any objective foundation. One might note that Burke-White and von Staden suggest a good faith test based on two inquiries: 'first, whether the state has engaged in honest and fair dealing and, second, whether there is a rational basis for the assertation of the national security exception'.[127] These two inquiries have been reaffirmed by other scholars[128] and could be rephrased as (i) 'honesty' and (ii) 'rational basis'/'reasonableness' elements. The WTO Panel in *Russia — Traffic in Transit* proposed a good faith test with similar elements.[129] However, the purpose of scrutinising rational basis under the good faith review should not, in principle, be conflated/assimilated with that of rational basis under the substantive review of non-arbitrariness, although those reviews likely consider the same facts/evidence. The former should focus only on whether evidence shows that a state relied on objective grounds in adopting security measures at the time of decision making to crystallise the argument of honesty.

University Press, 2019) 113, 143–4.

[126] For an example of a non-justificable clause, see the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (2005) art 16.12(4). The clause states that '[t]his Article shall be interpreted in accordance with the understanding of the Parties on non-justifiability of security exceptions as set out in their exchange of letters, which shall form an integral of this Agreement'.

[127] Burke-White and von Staden (n 3) 379.

[128] Zrilič (n 125) 144; Titi (n 6) 201. The *National Security* (n 3) published by the UNCTAD further adds that 'for a national security exception to be invoked in good faith, the question a tribunal must ask is whether a reasonable person in the State's position could have concluded that there was a threat to national security sufficient to justify the measures taken': at 40.

[129] Panel Report, *Russia — Traffic in Transit,* WTO Doc WT/DS512 (n 91) [7.138]. The WTO Panel in the case articulated that '[t]he obligation of good faith […] applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue'.

B *Permissible Objectives: Limited Essential Security Interests*

As previously mentioned, the self-judging security provisions under nine of Vietnam's IIAs exhaustively list circumstances triggering the protection of ESIs.[130] The lists commonly include circumstances related to military threats: (i) traffic in arms, (ii) war and other emergency in international relations, and (iii) nuclear weapons and devices.[131] In two treaties they also cover (v) criminal or penal offences situation.[132] The exhaustive list additionally encompasses circumstances related to non-military threats, such as (vi) other emergency in domestic relations in five treaties[133] and/or (vii) critical public infrastructures being disabled or degraded by deliberate attempts in five treaties.[134] The last circumstance is extracted from one specific security interest covered by relevant exception provisions – 'the protection of critical public infrastructures including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure'.[135] Other emergencies in international relations as listed above could also refer to non-military situations.

Given the exhaustive list, Vietnam could only protect security interests/concerns raised by covered circumstances and vice versa – limited ESIs. State measures to protect critical public infrastructures would likely not be protected by self-judging security exceptions under the four treaties that do not express this intent.[136] State measures to protect ESIs threatened by domestic emergencies such as economic/financial crisis would also likely fall outside the scope of self-judging security exceptions under three treaties without mentioning this.[137] One might notice that these three treaties do list the circumstance of 'other emergency'; however, 'other emergency' here is accompanied by the phrase 'in international relations', so domestic emergencies, or 'emergencies with purely local

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[130] See above Part I(C).
[131] *Protocol of Amendment to the Vietnam-Czech BIT* art 4(1)(b)–(d); *Vietnam-Slovakia BIT* art 12(1)(b)–(d); *Vietnam-EAEU FTA* ch 1 art 1.9(2), referring to *GATT* art XXI and *GATS* art XIV bis; *Vietnam-Japan BIT* art 15(1)(a)(i)–(ii); *Vietnam-Turkey BIT* art 4(2)(b)(i)–(ii), (iv); *ASEAN-ANZ FTA* art 2(1)(b)(i)–(ii), (iv); *ASEAN-Korea IA* art 21(1)(b)(i)–(iii); *ASEAN-Hong Kong IA* art 8(1)(b)(i)–(iii); *Vietnam-Korea FTA* ch 16 art 16.2(1)(b)(i)–(iii).
[132] *Protocol of Amendment to the Vietnam-Czech BIT* art 4(1)(a); *Vietnam-Slovakia BIT* art 12(1)(a).
[133] *Vietnam-Japan BIT* art 15(1)(1)(i) ('other emergency in that Contracting Party'); *ASEAN-Korea IA* art 21(1)(b)(ii) ('other emergency in domestic … relations'); *ASEAN-ANZ FTA* ch 15 art 2(1)(b)(iv) ('national emergency'); *ASEAN-Hong Kong IA* art 8(1)(b)(ii) ('other emergency in domestic … relations'); *Vietnam-Korea FTA* ch 16 art 16.2(1)(a)(iv) ('domestic emergency').
[134] *Vietnam-Turkey BIT* art 4(2)(b)(iii); *ASEAN-Korea IA* art 21(1)(iv); *ASEAN-ANZ FTA* ch 15 art 2(1)(iii); *ASEAN-Hong Kong IA* art 8(1)(iv); *Vietnam-Korea FTA* ch 16 art 16.2(1)(iii).
[135] Ibid.
[136] *Vietnam-Czech BIT*; *Vietnam-Slovakia BIT*; *Vietnam-Japan BIT*; *Vietnam-EAEU FTA*.
[137] *Vietnam-Czech BIT*; *Vietnam-Slovakia BIT*; *Vietnam-EAEU FTA*.

effects' in the words of Newcombe and Paradell,[138] would not qualify. The exhaustive list would thus limit Vietnam's regulatory autonomy to pursue security interests, although Vietnam is expected under self-judging clauses to have full discretion to decide its security measures. The 'interpretative space' regarding the ESIs term would be diminished, and the 'considerable degree of flexibility' that a state could maintain mainly rests on deciding 'how to respond to the threat', as noted by UNCTAD.[139] Tribunals would potentially have discretion to examine whether circumstances triggering state protections fall within or outside of the exhaustive list (the scope of security exceptions). To a certain extent, it is not an exaggeration to argue that, in the words of Titi, '[s]uch a provision then in all but name robs the exception of its self-judging nature'.[140]

C *Permissible Objectives: Unlimited Essential Security Interests*

Unlike the nine Vietnam's IIAs previously analysed,[141] security provisions in the *ACIA* and *ASEAN-China IA* provide lists of circumstances as examples triggering the protection of ESIs in a non-exhaustive way. They share the same structure as '[n]othing in this Agreement shall be construed […] to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests, *including but not limited to* […]'.[142] The provisions use the phrase 'including but not limited to' before listing examples. Examples here include both military-related and non-military-related circumstances such as domestic emergency and the potential degradation of critical public infrastructures.[143] Under the *Vietnam-US BTA* and the *CPTPP*, security exceptions do not provide lists of examples but leave the ESIs undefined. This design under self-judging clauses would likely have a similar effect to security exceptions containing the non-exhaustive list. As a result, Vietnam could adopt measures to protect any ESIs facing military or non-military threats under four treaties – that is, unlimited ESIs – provided that such measures are taken in good faith.

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[138] As pointed by Newcombe and Paradell (n 30), '[t]he reference to "other emergency" arguably permits the broadening of essential security to catastrophic events beyond those associated with war or insurgency. However, the term is modified by the requirement that it be an emergency in "international relation". Emergencies with purely local effects would not appear to meet this requirement': at 496.
[139] *National Security* (n 3) 89.
[140] Titi (n 6) 197.
[141] See above Part IV(B).
[142] *ACIA* art 18(b); *ASEAN-China IA* art 17(b) (emphasis added).
[143] Ibid.

D *'Necessary' Relationship Between Objectives and Measures: Between 'Reasonable' Relationship and 'Inevitable' Relationship*

As previously identified, all self-judging security exceptions in the 13 IIAs require state measures to be necessary for security objectives.[144] Given the legal effect of self-judging language, those exceptions grant Vietnam full discretion to decide the necessity of measures. However, Vietnam could not claim its measures as necessary if it did not genuinely believe that such measures at the time of adoption were necessary to tackle circumstances potentially threatening ESIs.

To be genuine, the perception of necessity must at least respect the original meaning of the word 'necessary' which would commonly be understood as more than 'reasonable' and less than 'inevitable'. According to dictionaries, 'necessary' is defined as being 'needed for a purpose or a reason; that must exist or happen and cannot be avoided',[145] or being 'needed in order to achieve a particular result'.[146] These definitions commonly suggest that the adjective 'necessary' refers to the higher level of necessity than the adjective 'reasonable' could offer. The meaning of 'necessary', clarified by WTO Appellate Body in *Korea — Various Measures on Beef*,[147] and reaffirmed by the *Continental Casualty v Argentina* tribunal, could range from the lowest level of 'making a contribution to' to the highest level of 'indispensable'; however, 'necessary' measures in the context of treaty exceptions would be those located significantly closer the latter than the former.[148] The word 'necessary' could be perceived to refer to a level below 'indispensable' and above 'useful' in the context of the European Convention on Human Rights and Fundamental Freedoms.[149] The European Court of Human Rights (ECtHR) in *Handyside v The United Kingdom* emphasised that the adjective 'necessary' was not synonymous with the words/phrases 'indispensable', 'absolutely necessary', 'strictly necessary' or 'to the extent strictly required by the exigencies of the situation'; nor was it as flexible as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.[150]

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[144] See above Part I(C).
[145] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'necessary' (def 1, def 2).
[146] *Cambridge Dictionary* (online at 20 May 2021) 'necessary' (def B1).
[147] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (11 December 2000, adopted 10 January 2001) ('*Korea — Various Measures on Beef*").
[148] *Continental Casualty v Argentina* (n 25) [193], citing Appellate Body Report, *Korea — Various Measures on Beef,* WTO Doc WT/DS161/AB/R (n 147) [161]. The WTO Appellate Body in this report stated:

> the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable.' As used in Article XX(d), the term 'necessary' refers in our view to a

'Necessary' state measures have been approached in three different ways in international investment arbitration practice: the only means, the least restrictive means and the means close to 'inevitable', noting that such different interpretative approaches were born in the context of non-self-judging security exceptions. In the context of self-judging security exceptions, Vietnam does not need to deal with the issue of which approach it should follow. However, it is worth mentioning that the 'only means' approach faces a problem in narrowing treaty security exceptions to the state of necessity under CIL, which is discussed in the next chapter.[151] The adjective 'necessary' should not, at least from its dictionary meaning, refer to the level of necessity as high as the adjective 'inevitable'.

E *Section Remark: Substantive Qualifications for Exceptional Legislative Measures*

Self-judging security exception provisions in Vietnam's 13 IIAs would likely be interpreted as imposing different substantive qualifications on legislative measures (Table 7.3). The exhaustive list of circumstances designed by exception provisions suggest that only ESIs threatened by certain military and/or non-military sources are permissible under nine IIAs (limited ESIs). The non-exhaustive list of circumstances and the undefined ESIs term under four IIAs, however, suggest unlimited ESIs. In addition to the requirement of security objectives, the 'necessary' nexus in exception provisions requires measures to be more than 'reasonable' and less than 'inevitable' in relation to the objectives pursued. These requirements would not be reviewed under judicial procedures from a substantive perspective but would be from a good faith perspective.

> range of degrees of necessity. At a one end of this continuum lies 'necessary' understood as 'indispensable'; at the other, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.

[149] Burke-White and von Staden (n 3) 346.

[150] *Handyside v The United Kingdom* (European Court of Human Rights, 5493/72, 7 December 1976) 17–8 [48]. The Court originally stated:

> whilst the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable' (cf., in Articles 2 para. 2…and 6 para. 1, the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 para. 1, the phrase 'to the extent strictly required by the exigencies of the situation'), neither has it the flexibility of such expressions as 'admissible', 'ordinary' (cf. Article 4 para. 3), 'useful' (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), 'reasonable' (cf. Articles 5 para. 3 and 6 para. 1) or 'desirable'.

[151] See Chapter 8 Part III(B).

Table 7.3: Substantive Qualifications for Exceptional Legislative Measures as Imposed by Provisions on Self-Judging Security Exceptions in Vietnam's IIAs

Treaty Contexts (13)	Substantive Qualifications		
	Permissible Objectives (Rational Basis)		Other Qualifications
Vietnam-Czech BIT *Vietnam-Slovakia BIT* *Vietnam-EAEU FTA*	(i)[(b)]	Limited ESIs Threatened by Certain Military Sources, and Emergency in International Relations	Necessary Relationship
Vietnam-Japan BIT	(i)[(c)]	Limited ESIs Threatened by Certain Military Sources, and Emergency in International and Domestic Relations	
Vietnam-Turkey BIT	(i)[(d)]	Limited ESIs Threatened by Certain Military Sources, Emergency in International Relations and Deliberate Attempts to Disable/Degrade Critical Public Infrastructures	
ASEAN-ANZ FTA *ASEAN-Korea IA* *ASEAN-Hong Kong IA* *Vietnam-Korea FTA*	(i)[(e)]	Limited ESIs Threatened by Certain Military Sources, Emergency in International and Domestic Relations, and Deliberate Attempts to Disable/Degrade Critical Public Infrastructures	
*Vietnam-EU IPA** *RCEP**			
ACIA *ASEAN-China IA* *Vietnam-US BTA* *CPTPP*	(ii)	Unlimited ESIs Threatened by Military or Non-Military Sources	
Note: *Vietnam-EU IPA**; *RCEP**: Treaties have not yet come into force.			

V INTERACTIONS BETWEEN TREATY EXCEPTION PROVISIONS ON SECURITY INTERESTS AND INVESTMENT PROTECTION PROVISIONS: LEGAL EFFECTS OF TREATY EXCEPTIONS

A *Role of Treaty Exceptions*

Tribunals in international arbitration practice have differently approached treaty exceptions as limitation on treaty obligations and justification for treaty violations.[152] Many scholars argue that treaty exceptions should be understood as limiting the scope of treaty obligations to make treaty obligations inapplicable to qualified exceptional measures (limitation), rather than justifying measures inconsistent with treaty obligations (justification).[153] In their views, the first approach is more compatible with the interpretation rules, especially in the case that exceptions provisions take the form of non-precluded measures provisions.[154] Additionally, treaty exceptions could not function similarly to the plea of necessity under CIL; the former, if being classified, must be considered rules of conducts (primary rules) that creates the state's rights and narrows the state's treaty obligations, rather than the others (secondary rules) that do not have any influence on the scope of these rights and obligations, like the latter.[155] From this perspective, a discussion on whether exceptions in treaty law are *lex specialis* expressions of a necessity defence in CIL, or whether treaty exceptions or a necessity defence are/is applicable rule(s) among secondary rules, would be excluded.[156] They can be applied concurrently as primary and secondary rules.[157] The burden of proof regarding treaty exceptions as limitation would thus reasonably be allocated to foreign investors as the claimant rather than rested on a state as the respondent.[158]

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[152] For tribunals taking the approach to consider treaty exceptions as limitations, see, eg, *CMS v Argentina (Annulment)* (n 64) [129], [131]; *Continental Casualty v Argentina* (n 25) [164]–[165], [168]; *Devas v India* (n 26) [146]; *Deutsche Telekom v India* (n 27) [227]. *Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentine Republic (Decision on Jurisdiction and Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/16, 10 April 2013) [1028] ('*Mobil v Argentina*'). For tribunals taking the approach to consider treaty exceptions justifications, see, eg, *Enron v Argentina* (n 22) [334[, [339]; *Sempra v Argentina* (n 21) [376], [388].

[153] See, eg, Caroline Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford University Press, 2020) 363, 364 ('Purpose and Role'); Caroline Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69(3) *International and Comparative Law Quarterly* 557, 557, 584 ('Legal Character'); Zrilič (n 125) 147; Newcombe and Paradell (n 3) 482–3. See also Lars Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States' in Marc Bungenberg, Steffen Hindelang and Joern Griebel (eds), *International Investment Law and EU Law* (Springer, 2011) 145, 164; Giorgio Sacerdoti, 'The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law' in Giorgio Sacerdoti (ed), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) 3, 11;

[154] Zrilič (n 125) 147, citing Burke-White and von Staden (n 3) 388; Newcombe and Paradell (n 30) 483. The term 'non-precluded measures provisions' has been used by many scholars: see, eg, Carlos Esplugues,

However, two points should be noted here. First, considering exceptions as limitations does not mean state measures qualifying as treaty exceptions failed to satisfy substantive requirements of treaty obligations. The measures could meet all substantive requirements of treaty obligations and substantive qualifications for treaty exceptions. For example, bona fide measures taken on a reasonably discriminatory basis and being reasonable/necessary to pursue security objectives (qualified exceptional measures) would not amount to expropriation in any case if not severely interfering with foreign investments (qualified non-expropriation).[159] Following this approach, Vietnam as a host state could counter the argument that its security measures must be standardised as exceptions to remain compliant with treaty obligations, or that regulatory power equals what is accorded by treaty exceptions.[160]

Second, understanding exceptions as limitations does not automatically allow state measures falling within the scope of exception provisions to be excluded from the application of treaty obligations. The measures could satisfy substantive qualifications of treaty exceptions but fail to meet 'must' requirements under CIL, which are embedded/recognised in treaty law. For example, bona fide measures taken on reasonably discriminatory basis and being reasonable/necessary to pursue security objectives (qualified exceptional measures) would hardly be exempted from compensation duty if they involved directly confiscating foreign investments (direct expropriation).[161] This perception precludes any argument that, at least regarding direct expropriation, all

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'Extrapolating from International Trade Law to International Investment Law' in Carlos Esplugues (ed), *Foreign Investment, Strategic Assets and National Security* (Intersentia, 2018) 135, 137.

[155] Zrilič (n 125) 147, 149. The concepts of 'primary rules' and 'secondary rules' are adopted from Hart's two concepts of rules: see generally Michael Payne, 'Hart's Concept of a Legal System' (1976) 18(2) *William & Mary Law Review* 287.

[156] A discussion on whether treaty exceptions are *lex specialis* expressions of necessity defence has emerged in arbitral practice and academic field: see, eg, *LG&E v Argentina* (n 24) [92]; *El Paso v Argentina* (n 23) [552]; Philippe Sands QC, 'Partial Dissenting Opinion of Philippe Sands QC' to the *Bear Creek Mining v Peru* award, *italaw* (2017) [41] <https://www.italaw.com/cases/documents/6322>; Andrea K Bjorklund, 'Emergency Exceptions' in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 459, 494–8; August Reinisch, 'Necessity in Investment Arbitration' (2010) 41 *Netherlands Yearbook of International Law* 137, 148–52; Alvarez (n 58) 268–71, 315–39; Martin (n 80) 52–5.

[157] See, eg, Zrilič (n 125) 148; Jorge E Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 329, 357.

[158] Henckels, 'Purpose and Role' (n 153) 371–3.

[159] See Chapter 4 Part III(A) and Part IV(A).

[160] This similar point is made by Zrilič but in commenting the approach to consider treaty exceptions as justifications rather than as limitations: see Zrilič (n 125) 147.

[161] See below Part V(C).

exceptional measures would be acceptable, or that qualified exceptional measures equal non-compensable measures.

In the context of Vietnam's IIAs, security exception provisions start with the phrase '[n]othing in th[e] Agreement shall be construed',[162] '[the] Agreement shall not preclude a Party',[163] '[n]otwithstanding any other provisions in th[e] Agreement'[164] or '[t]he provision of th[e] Agreement shall not in any way'.[165] All these phrases invite a consideration of treaty exceptions as primary rules rather than secondary rules. Having said that, this study takes the role of treaty exceptions so as to *consider* state measures for security interests which are *inconsistent* with treaty obligations but *consistent* with treaty exceptions as *compatible/legitimate* measures (non-violation). It accepts 'limitation' and 'justification' as interchangeable terms if they function in such a role. The following analyses attempt to identify the extent to which security measures that do not meet substantive requirements imposed by FET, expropriation, FTT and/or NT provisions as discussed in previous chapters, but that do satisfy substantive qualifications for security exception provisions as discussed in this chapter, could be accepted under Vietnam's IIAs.

[162] *Protocol of Amendment to the Vietnam-Czech BIT* art 4(1); *Vietnam-Slovakia BIT* art 12(1); *ASEAN-Korea IA* art 21(1); *ASEAN-ANZ FTA* ch 15 art 2(1); *ASEAN-Hong Kong IA* art 8; *Vietnam-Korea FTA* ch 16 art 16.2(1); *ACIA* art 18; *ASEAN-China IA* art 17; *CPTPP* ch 29 art 29.2.
[163] *Vietnam-US BTA* ch VII art 2.
[164] *Vietnam-Japan BIT* art 15(1).
[165] *Vietnam-Singapore BIT* art 11. The provision in *Vietnam-Uzbekistan BIT* similarly starts with the phrase '[t]he provision in paragraph 1 of th[e] Article do not restrict the Contracting Part from taking measures': at art 12(2).

B *Treaty Exception Provisions on Security Interests and Fair and Equitable Treatment Provisions*

Treaty security exceptions under Vietnam's IIAs would likely play no role in excluding unfair and inequitable measures caused by bad faith, arbitrariness and/or unreasonable discrimination from the application of FET provisions without/with limitation to CIL (Formulations A and B) (Table 7.4).[166] First, good faith, arbitrariness and reasonable discrimination are perceived as minimum requirements under CIL, so the only case which might justify arbitrariness and unreasonable discrimination (but not bad faith) under CIL is when state measures were taken in a state of necessity.[167] Second, security measures qualifying treaty exceptions (non-disguised restriction, reasonable discrimination and rational/necessary relationship to security objectives) would not offend FET in this regard.[168]

However, in nine treaty contexts (Table 7.4) treaty security exceptions can justify unfair and inequitable measures caused by the reversal of the state's prior legitimate specific commitments previously granted to foreign investors.[169] The requirement for a state to respect prior commitments is imposed by treaty law, particularly FET provisions without limitation to CIL (Formulation A), rather than customary law, so state measures failing to observe such requirement could be reasonably accepted, to a certain extent, as treaty security exceptions.

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[166] But see Yosra Abid, 'The Quest for Domestic Regulatory Space in the Investment Chapter of the Comprehensive and Progressive Trans Pacific Partnership' (2020) 27(1–2) *Willamette Journal of International Law and Dispute Resolution* 28, 49. This article particularly views in the context of the *CPTPP* that 'these exceptions infer that the application of investment standards, such as the FET and non-discrimination treatment, as well as expropriation protections can be removed from disputes involving … security measures' (citations omitted). For substantive requirements for legislative measures possibly imposed by FET provisions, see also above Chapter 3 Parts III and IV.

[167] For state defences under CIL regarding foreign investments, see generally Alexis Martinez, 'Invoking State Defenses in Investment Treaty Arbitration' in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 315.

[168] This point is held by Titi (n 6) when discussing the legal effect of exceptions for public interests in a general investment treaty context: see Chapter 8 Part V(A).

[169] For the requirement to respect specific commitments previously granted to foreign investors under Formulation A FET provisions in Vietnam's IIAs, see Chapter 3 Part III(D).

Table 7.4: Interactions between FET Provisions and Treaty Exception Provisions on Security Interests in Vietnam's IIAs

Treaty Contexts (15)	**FET Obligation (Table 3.2)**	**Treaty Exception Provisions on Security Interests**		**Treaty Contexts* (15)**
		Permissible Objectives (Rational Basis)	Other Qualifications	
9 IIAs	**FET Provisions without Limitation to CIL (A) (1) – (3)**	**Non-Self-Judging/Self-judging Security Exception Provisions** (Inapplicable Effect)		**7 IIAs; *Vietnam-EU IPA***
Vietnam-Czech BIT *Vietnam-Slovakia BIT* *Vietnam-EAEU FTA*	(1) In Good faith (bona fide) (2) Non-Arbitrariness (Rational Level) (3) Rational, Reasonable Discrimination	(i)[(b)] Limited ESIs	Necessary Relationship	
Vietnam-Japan BIT		(i)[(c)] Limited ESIs		
Vietnam-Turkey BIT		(i)[(d)] Limited ESIs		
ACIA *ASEAN-China IA*		(ii) Unlimited ESIs		
Vietnam-Singapore BIT		(ii) Unlimited ESIs (R)	Rational Relationship	
Vietnam-Uzbekistan BIT		(ii) Unlimited ESIs (iii)[(a)] Limited SISs (R)	(R)	
(Same as above)	**(4)**	**Non-Self-Judging/Self-judging Security Exception Provisions** (Applicable Effect)		**(Same as above)**
Vietnam-Czech BIT *Vietnam-Slovakia BIT* *Vietnam-EAEU FTA*	(4) No Reverse Effects on State's Granted Specific Commitments without Proportionality	(i)[(b)] Limited ESIs	Necessary Relationship	
Vietnam-Japan BIT		(i)[(c)] Limited ESIs		
Vietnam-Turkey BIT		(i)[(d)] Limited ESIs		
ACIA *ASEAN-China IA*		(ii) Unlimited ESIs		

Vietnam-Singapore BIT		(ii) Unlimited ESIs (R)	Rational Relationship (R)	
Vietnam-Uzbekistan BIT		(ii) Unlimited ESIs (iii)[a] Limited SISs (R)		
6 IIAs	**FET Provisions with Limitation to CIL (B)**	**Self-judging Security Exception Provisions** Inapplicable Effect)		**6 IIAs; *RCEP***
Vietnam-Korea FTA *ASEAN-Korea IA* *ASEAN-ANZ FTA* *ASEAN-Hong Kong IA*	(1) In Good faith (bona fide) (2) Non-Arbitrariness (Rational Level) (3) Rational, Reasonable Discrimination	(i)[e] Limited ESIs	Necessary Relationship	
Vietnam-US BTA *CPTPP*		(ii) Unlimited ESIs	Necessary Relationship	

Notes:

[a]: Security interests threatened by extreme emergency.

[b]: Security interests threatened by certain military sources, and emergency in international relations.

[c]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[d]: Security interests threatened by certain military sources, emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[e]: Security interests threatened by certain military sources, emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.

C *Treaty Exception Provisions on Security Interests and Expropriation Provisions*

One might argue that treaty security exceptions have only the legal effect of making unlawful expropriation (with compensation liability) lawful expropriation (with compensation duty), rather than turning lawful expropriation into non-expropriation (with non-compensation). This reading probably arises from the structure of expropriation provisions in which a state has an obligation not to expropriate foreign investments, except for lawful expropriation.[170] The structure might suggest that if the main obligation is not to take expropriation, lawful expropriation would be an exception to that obligation. Following this logic, treaty security exceptions would have a similar role to lawful expropriation – ie as exceptions to non-expropriation obligations. If that were the case, the incorporation of security exception provisions into Vietnam's IIAs would become meaningless. Firstly, good faith and non-discriminatory measures to protect security interests would, if severely affecting foreign investments, potentially be treated as lawful expropriation without the support of exceptions provisions.[171] Secondly, bad faith, arbitrary and unreasonably discriminatory measures could not qualify as police power measures and thus would be deemed as unlawful expropriation if having severe effects on foreign investments, which is beyond the reach of exceptions provisions.

To have effect, security exception provisions would function as a limitation to lawful expropriation, at least in the case of indirect expropriation. One might argue that compensation for expropriation is recognised under CIL, so exemptions from compensation should likewise rest only on CIL (in particular, the plea of necessity) rather than on treaty exceptions. This argument is quite reasonable with regard to direct expropriation because direct expropriation is easily identifiable and its definition is undisputed.[172] However, there is no consensus on how indirect expropriation is defined[173] and how police power measures are circumscribed.[174] Once treaty states proactively clarify these aspects in treaty law (in particular, in expropriation provisions), they could be reasonably expected to compose treaty exceptions so as to restrict the application of such clarification.

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[170] For structure of expropriation provisions in Vietnam's IIAs, see Chapter 4 Part I(A).
[171] For conditions of lawful expropriation in Vietnam's IIAs, see Chapter 4 Part I(A).
[172] See Chapter 4 Introduction Part.
[173] Ibid.
[174] See Chapter 4 Part III(B).

From the above, it appears treaty security exceptions can preclude severe measures for security interests from the application of undefined expropriation provisions (Formulation A) in nine treaty contexts (Table 7.5).[175] They may play a similar role to exclude measures which have severe effects on foreign investments, reverse the state's prior binding written commitments (or breach of distinct, reasonable investment-backed expectations), and lack proportionality to their public objectives from the application of defined expropriation provisions (Formulation B) in six treaty contexts (Table 7.5).[176] The lack of proportionality here are only be caused by the lack of cost–benefit balance, not by the lack of suitability and/or necessity;[177] this is because unsuitable and unnecessary measures will not satisfy the 'necessary' link requirement of self-judging exception provisions under Vietnam's IIAs, even considered from a good faith perspective.[178]

[175] For substantive requirements for legislative measures imposed by undefined expropriation provisions (Formulation A) in Vietnam's IIAs, see Chapter 4 Part III.
[176] For substantive requirements for legislative measures imposed by defined expropriation provisions (Formulation B) in Vietnam's IIAs, see Chapter 4 Part IV.
[177] For three components of proportionality possibly adopted in expropriation provisions in Vietnam's IIAs, see Chapter 4 Parts IV(C).
[178] For good faith examination of 'necessary' link, see above Part IV(D).

Table 7.5: Interactions between Expropriation Provisions and Treaty Exception Provisions on Security Interests in Vietnam's IIAs

<table>
<tr><th rowspan="2">Treaty Contexts (15)</th><th rowspan="2">Non-Expropriation (Table 4.3)</th><th colspan="2">Treaty Exceptions for Security Interests</th><th rowspan="2">Treaty Contexts* (15)</th></tr>
<tr><th>Permissible Objectives (Rational Basis)</th><th>Other Qualifications</th></tr>
<tr><td>9 IIAs</td><td>Undefined Expropriation Provisions (Formulation A)</td><td colspan="2">Non-Self-Judging/Self-judging Security Exception Provisions (Applicable Effect)</td><td>7 IIAs</td></tr>
<tr><td>Vietnam-Czech BIT
Vietnam-Slovakia BIT</td><td rowspan="8">(i) No Severe Effects on Foreign Investments</td><td>(i)[b] Limited ESIs</td><td>Necessary Relationship</td><td rowspan="8"></td></tr>
<tr><td>Vietnam-Japan BIT</td><td>(i)[c] Limited ESIs</td></tr>
<tr><td>Vietnam-Turkey BIT</td><td>(i)[d] Limited ESIs</td></tr>
<tr><td>ASEAN-Korea IA</td><td>(i)[e] Limited ESIs</td></tr>
<tr><td>ASEAN-China IA
Vietnam-US BTA</td><td>(ii) Unlimited ESIs</td></tr>
<tr><td>Vietnam-Singapore BIT</td><td>(ii) Unlimited ESIs (R)</td><td>Rational Relationship (R)</td></tr>
<tr><td>Vietnam-Uzbekistan BIT</td><td>(ii) Unlimited ESIs
(iii)[a] Limited SISs (R)</td></tr>
<tr><td>6 IIAs</td><td>Defined Expropriation Provisions (Formulation B)</td><td colspan="2">Self-judging Security Exception Provisions (Applicable Effect)</td><td rowspan="2">6 IIAs; Vietnam-EU IPA; RCEP</td></tr>
<tr><td>Vietnam-EAEU FTA</td><td>(i) No Severe Effects on Foreign Investments; or</td><td>(i)[b] Limited ESIs</td><td>Necessary Relationship</td></tr>
</table>

ASEAN-ANZ FTA *ASEAN-Hong Kong IA* *Vietnam-Korea FTA*	(ii) Severe Effects and No Reverse Effects on State's Prior Binding Written Commitments (or No Breach of Distinct, Reasonable Investment-Backed Expectations); Proportionate Measure-Objective Relationship; and Characteristics of Police Power Measures (Good Faith, Public Purposes, Non-Arbitrariness, Reasonable Discrimination)	(i)[e] Limited ESIs		
ACIA *CPTPP*		(ii) Unlimited ESIs		

Notes:

[a]: Security interests threatened by extreme emergency.

[b]: Security interests threatened by certain military sources, and emergency in international relations.

[c]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[d]: Security interests threatened by certain military sources, emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[e]: Security interests threatened by certain military sources, emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.

D *Treaty Exception Provisions on Security Interests and Free Transfer Treatment Provisions*

Treaty security exceptions can limit the application of FTT provisions without references/exceptions (Formulation A) to security measures causing restrictions on investment-related transfers in two treaty contexts (Table 7.6). They can similarly function as limitations on FTT provisions with reference to international agreements (Formulation B) in one treaty context and FTT provisions with economic safeguard exceptions (Formulation C) in ten treaty contexts since their scope, at least in terms of permissible objectives, does not overlap with the scope of relevant specific exceptions imposed by the latter (Table 7.6).[179]

Treaty security exceptions may accept certain exchange restrictions and capital controls that fall outside the scope of FTT provision with reference to domestic law (Formulation D) under the *Vietnam-Uzbekistan BIT* (Table 7.6). Exchange restrictions and capital controls protecting other ESIs or SIs than financial and monetary security, which are not currently allowed under the FTT provision,[180] can be permitted by the treaty security exceptions. Those having a rational relationship, rather than a necessary one, with financial/monetary security objectives can also be accepted by the latter.[181] These legal effects of the treaty security exceptions will be changed when the scope of the FTT provision become broader or narrower. This scope depends on how Vietnam's current legislation (domestic law) get amended, noting that the link between domestic law and the FTT obligation is explicitly provided by the FTT provision as analysed in Chapter 5.

[179] For substantive qualifications for safeguard measures imposed by specific exceptions under FTT provisions with reference to international agreements (Formulation B), see Chapter 5 Part IV(B). For substantive qualifications for safeguard measures imposed by specific exceptions under FTT provisions with economic safeguard exceptions (Formulation C), see Chapter 5 Part IV(C).
[180] For substantive qualifications for restrictions/controls safeguarding financial and monetary security under Vietnam's contemporary legislation that is linked to the FTT obligation (Formulation D), see Chapter 5 Part IV(D).
[181] Ibid.

Table 7.6: Interactions between FTT Provisions and Treaty Exception Provisions on Security Interests in Vietnam's IIAs

<table>
<tr><th rowspan="2">Treaty Contexts (15)</th><th rowspan="2">FTT Obligation (Table 5.7)</th><th colspan="2">Standard Exceptions (Table 5.7)</th><th colspan="2">Treaty Exceptions for Security Interests</th><th rowspan="2">Treaty Contexts * (15)</th></tr>
<tr><td>Legitimate Objectives (Rational Basis) (R)</td><td>Other Qualifications (R)</td><td>Legitimate Objectives (Rational Basis)</td><td>Oher Qualifications</td></tr>
<tr><td>3 IIAs</td><td colspan="3">FTT Provisions without Exceptions/References (Formulation A)</td><td colspan="2">Non-Self-Judging Security Exception Provisions (Applicable Effect)</td><td>2 IIAs</td></tr>
<tr><td>Vietnam-Czech BIT(NETs)</td><td rowspan="3">No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market Exchange Rate</td><td rowspan="3"></td><td rowspan="3"></td><td>(i)[b] Limited EISs</td><td rowspan="2">Necessary Relationship</td><td rowspan="3"></td></tr>
<tr><td>Vietnam-Turkey BIT(NETs)</td><td>(i)[d] Limited EISs</td></tr>
<tr><td>Vietnam-Singapore BIT(NETs)</td><td>(ii) Unlimited EISs (R)</td><td>Rational Relationship (R)</td></tr>
<tr><td>1 IIA</td><td colspan="3">FTT Provision with Reference to International Agreement (Formulation B)</td><td colspan="2">Self-Judging Security Exception Provisions (Applicable Effect)</td><td>1 IIA</td></tr>
<tr><td>Vietnam-US BTA(NETs)</td><td>No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market Exchange Rate</td><td>(i) BOP</td><td>Rational Relationship; Temporary Application</td><td>(ii) Unlimited EISs</td><td>Necessary Relationship</td><td></td></tr>
</table>

10 IIAs	**FTT Provisions with Economic Safeguard-Based Exceptions (Formulation C)**			**Self-Judging Security Exception Provisions** (Applicable Effect)		**9 IIAs; *Vietnam-EU IPA*; *RCEP***
Vietnam-Slovakia BIT(NETs)	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market Exchange Rate	(i) BOP (iii) Macroeconomic Management	Rational Relationship; Temporary Application	(i)[(b)] Limited ESIs	Necessary Relationship	
Vietnam-EAEU FTA(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(i)[(b)] Limited ESIs	Necessary Relationship	
ASEAN-ANZ FTA(NETs)				(i)[(e)] Limited ESIs		
Vietnam-Japan BIT(NETs)		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN	(i)[(c)] Limited ESIs	Necessary Relationship	
ASEAN-Hong Kong IA(NETs)				(i)[(e)] Limited ESIs		
CPTPP (NETs) (*)		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN; NT	(ii) Limited ESIs	Necessary Relationship	
ASEAN-China IA(NETs)		(i) BOP (ii) External Finance (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT	(ii) Unlimited ESIs	Necessary Relationship	
ACIA(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(ii) Unlimited ESIs	Necessary Relationship	

		(iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT			
Vietnam-Korea FTA(NETs)		(i) BOP (ii) External Finance (iii) Macroeconomic Management (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT	(i)[e] Limited ESIs	Necessary Relationship	
ASEAN-Korea IA(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(i)[e] Limited ESIs	Necessary Relationship	
		(iii) Macroeconomic Management (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT			
1 IIA	**FTT Provision with Reference to Domestic Law (Formulation D)**			**Non-Self-Judging Security Exception Provisions** (Applicable Effect)		**01 IIA**
Vietnam-Uzbekistan BIT(NETs)	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market	(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(ii) Unlimited ESIs (iii)[a] Limited SISs (R)	Rational Relationship (R)	
		Financial, Monetary Security	Necessary Relationship			

	Exchange Rate	Potential Rational Grounds	Potential Qualifications			

Notes:

[(a)]: Security interests threatened by extreme emergency.

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[(c)]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[(d)]: Security interests threatened by certain military sources, emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(e)]: Security interests threatened by certain military sources, emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(NETs)]: Treaty protecting non-exhaustive transfers related to investment.

CPTPP[(*)]: Exceptions shall not apply to payments or transfers relating to foreign direct investment.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.

This study takes a view that NT provisions in Vietnam's IIAs set a limitation on nationality-based discrimination. In particular, while the basic requirement of reasonable discrimination, imposed by FET and CIL, accepts different treatments in any case if based on rational grounds, NT provisions only permit such rational differences between foreign and domestic comparators in certain cases. Given this, treaty security exceptions with self-judging language can be effective in excluding discriminatory security measures from the operation of NT provisions without exceptions/references (Formulation A) in one treaty context (Table 7.7). They have a similar effect with regard to NT provisions with sectors/matters-based and economic safeguard-based exceptions (Formulation C) in eight treaty contexts (Table 7.7). Notably, NT provisions in five treaties protect pre- and post-established investments/investors, so the application of treaty security exceptions in these contexts will be expanded accordingly;[182] this application are broader than that of similar security exceptions in the other treaty contexts, which have NT provisions only protecting post-established investments.[183]

However, treaty security exceptions without self-judging language in the *Vietnam-Uzbekistan BIT* and *Vietnam-Singapore BIT* play no role in exempting discriminatory measures from the NT obligation because these treaties do not include NT provisions (Table 7.7).[184] Similarly, treaty security exceptions with self-judging language have no effect on NT provisions with references to domestic laws (Formulation D) in four treaty contexts (Table 7.7). This is because NT provisions with Formulation D contain specific exceptions that create a scope broader than that of treaty security exceptions. In particular, specific exceptions accept reasonably discriminatory measures for any development policies and other rational policies, including security interests, and require a rational relationship between such measures and security objectives,[185] whereas treaty security exceptions only accept ESIs and require a necessary relationship.[186]

[182] For NT provisions protecting pre- and post-established investments/investors, see Chapter 6 Part III(A)(1).
[183] For NT provisions protecting post-established investments/investors, see Chapter 6 Part III(A)(1).
[184] For the absence of NT provisions in the *Vietnam-Uzbekistan BIT* and *Vietnam-Singapore BIT*, see Chapter 6 Part I(A).
[185] For substantive qualifications imposed by specific exceptions under NT provisions with references to domestic laws and development policies (Formulation D), see Chapter 6 Part IV(D).
[186] For substantive qualifications imposed by self-judging security exceptions, see above Part IV.

Table 7.7: Interactions between NT Provisions and Treaty Exception Provisions on Security Interests in Vietnam's IIAs

<table>
<tr><th rowspan="2">Treaty Contexts (15)</th><th rowspan="2">NT Obligation (Table 6.4)</th><th colspan="2">Standard Exceptions (Table 6.4)</th><th colspan="2">Treaty Exceptions for Security Interests</th><th rowspan="2">Treaty Contexts * (15)</th></tr>
<tr><th>Legitimate Objectives (Rational Basis)</th><th>Other Qualifications</th><th>Legitimate Objectives (Rational Basis)</th><th>Other Qualifications</th></tr>
<tr><td>2 IIAs</td><td colspan="3">None</td><td colspan="2">Non-Self-Judging/Self-Judging Security Exception Provisions (Inapplicable Effect)</td><td>2 IIAs</td></tr>
<tr><td>Vietnam-Singapore BIT</td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td><td>(ii) Unlimited ESIs (R)</td><td rowspan="2">Rational Relationship (R)</td><td rowspan="2"></td></tr>
<tr><td>Vietnam-Uzbekistan BIT</td><td>(ii) Unlimited ESIs (iii)[a] Limited SISs (R)</td></tr>
<tr><td>1 IIA</td><td colspan="3">NT Provision without Exceptions/References (Formulation A)</td><td colspan="2">Self-Judging Security Exception Provisions (Applicable Effect)</td><td>0</td></tr>
<tr><td>Vietnam-Czech BIT</td><td>No Minor or Major Disadvan--tages</td><td></td><td></td><td>(i)[b] Limited ESIs</td><td>Necessary Relationship</td><td></td></tr>
</table>

8 IIAs	**NT Provisions with Sector/Matter-Based and/or Economic Safeguard-Based Exceptions (Formulation C)**			**Self-Judging Security Exception Provisions** (Applicable Effect)		**8 IIAs; *Vietnam-EU IPA*; *RCEP***
Vietnam-Korea FTA	No Minor or Major Disadvan--tages	Certain Sectors/Matters		(i)[(e)] Limited ESIs	Necessary Relationship	
Vietnam-Japan BIT(PPEIs)	Same as above	Certain Sectors/Matters		(i)[(c)] Limited ESIs	Necessary Relationship	
		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN			
ASEAN-Hong Kong IA	Same as above	Certain Sectors/Matters		(i)[(e)] Limited ESIs	Necessary Relationship	
		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN			
ASEAN-ANZ FTA(PPEIs) *ASEAN-Korea IA*	Same as above	Certain Sectors/Matters		(i)[(e)] Limited ESIs	Necessary Relationship	
		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN			
Vietnam-US BTA(PPEIs) *CPTPP* (PPEIs)	Same as above	Certain Sectors/Matters		(ii) Unlimited ESIs	Necessary Relationship	

ACIA[(PPEIs)]	Same as above	Certain Sectors/Matters		(ii) Unlimited ESIs	Necessary Relationship	
		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN			
4 IIAs	**NT Provisions with References to Domestic Laws and/or Development Policies (Formulation D)**			**Self-Judging Security Exception Provisions** (No Prevailing Effect)		**3 IIAs**
Vietnam-Slovakia BIT *Vietnam-EAEU FTA*	No Minor or Major Disadvan--tages	Potential Rational Grounds	Potential Qualifications	(i)[(b)] Limited ESIs	Necessary Relationship	
Vietnam-Turkey BIT				(i)[(b)] Limited ESIs		
ASEAN-China IA				(ii) Unlimited ESIs		

Notes:

[(a)]: Security interests threatened by extreme emergency.

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[(c)]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[(d)]: Security interests threatened by certain military sources, emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(e)]: Security interests threatened by certain military sources, emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(PPEIs)]: Treaty having NT provision protecting pre- and post-established investments/investors.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Contexts*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and the *RCEP* come into force.

CONCLUSION

SUBSTANTIVE QUALIFICATIONS FOR SECURITY MEASURES IN TREATY CONTEXTS

From the above analysis, the chapter finds that legislative measures to protect security interests could be accepted to a certain extent under 15 of Vietnam's IIAs, even when they do not meet the substantive requirements and qualifications of investment protection provisions and specific exceptions as analysed in chapters from 3 to 6. In nine treaty contexts, security measures with adverse effects on specific commitments previously granted to foreign investors can be compatible with FET (Table 7.4). Those causing severe effects on foreign investments may also be accepted as non-expropriation in nine treaty contexts (Table 7.5); and those severely affecting foreign investments, reversing specific commitments previously granted to foreign investors (or breaching reasonable investment-backed expectations) and/or lacking the cost–benefit balance can be considered non-expropriation in six treaty contexts (Table 7.5). If security measures restrict investments-related transfers, they may not breach FTT under all Vietnam's IIAs having treaty security exceptions (Table 7.6). In nine treaty contexts, those with discriminatory effects on foreign investments/investors can be consistent with NT (Table 7.7). Notably, different substantive requirements imposed by such treaty security exceptions in different treaty contexts will generate differences in the extent to which security measures can be accepted.

Chapter 8

TREATY EXCEPTION PROVISIONS ON PUBLIC INTERESTS IN VIETNAM'S IIAS: SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES AND LEGAL EFFECTS

INTRODUCTION

Investment protection provisions in Vietnam's 60 IIAs, as analysed in chapters from 3 to 6, impose different substantive requirements for legislative measures to be compatible with FET, non-expropriation, FTT and NT (general obligations). To some extent, certain of the provisions accept legislative measures that might not fully meet these requirements (standard or specific exceptions). Treaty exception provisions on security interests in 15 IIAs also permit security measures even when the measures fall outside the scopes of general obligations and standard exceptions (treaty security exceptions), as discussed in Chapter 7. Beyond this context, treaty exception provisions on public interests in 12 IIAs accept certain legislative measures for public interests ('treaty exceptions for public interests' or 'general exceptions'). Normally, the inclusion of general exceptions into IIAs is considered a policy tool to reconcile investment protection obligations and the state's right to regulate for public interests.[1] However, the practical effect of exceptions depends much on provision design and language.[2] From that perspective, this chapter investigates the extent to which legislative measures for public interests are accepted under Vietnam's IIAs in addition to those permitted by standard exceptions and treaty security exceptions.

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[1] See generally Kenneth J Vandevelde, 'Rebalancing through Exceptions' (2013) 17(2) *Lewis & Clark Law Review* 449, 449–51; Wei Wang, 'The Non-Precluded Measure Type Clause in International Investment Agreements: Significances, Challenges, and Reactions' (2017) 32(2) *ICSID Review* 447, 449–53; Julie Kim, 'Balancing Regulatory Interests through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements' (2018) 50(2) *George Washington International Law Review* 289; Camille Martini, 'Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved, and How' (2018) 59(8) *Boston College Law Review* 2877, 2879–84 ('Avoiding Planned Obsolescence'); Dilini Pathirana and Mark McLaughlin, 'Non-Precluded Measures Clauses: Regime, Trends, and Practice' in Julien Chaisse, Sufian Jusoh and Leïla Choukroune (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore, 2020) 1, 4–7; Crina Baltag and Ylli Dautaj, 'Investors, States, and Arbitrators in the Crosshairs of International Investment Law and Environmental Protection' (2019) 3(1) *International Investment Law and Arbitration* 1, 69.

[2] General exceptions are arguably interpreted in different ways to narrow or broaden states' right to regulate: see Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' (Working Paper, Ottawa Faculty of Law, No 2018-22, 2018) 8–16; Andrew Newcombe, 'The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?' in Armand de Mestral and Céline Lévesque (eds) *Improving International Investment Agreements* (Routledge, 2013) 267, 272–6 ('Use of General Exceptions').

To this end, the chapter first surveys treaty exception provisions on public interests in Vietnam's IIAs. It finds that they can be classified into two different formulations: (i) traditional general exceptions in two IIAs; and (ii) GATT/GATS-like general exceptions in ten IIAs (Part I).

Before analysing the above two formulations, the chapter briefly reviews tribunals' approaches to interpreting treaty exception provisions on public interests that resemble these formulations (Part II). It finds that tribunals have differently approached to three aspects: (i) the severity of threats to public interest objectives; (ii) a 'necessary' link between state measures and objectives; and (iii) legal effects of general exceptions. Based on this review, the section proposes three practical questions for the analysis of treaty exception provisions on public interests in the context of Vietnam's IIAs.

Considering the three practical questions in international arbitration practice, and based on the VCLT interpretation rules, the chapter analyses traditional general exceptions (Part III) and GATT/GATS-like general exceptions (Part IV) to find substantive qualifications for public interest measures. Under traditional general exceptions, it finds that public interests are limited to those involving 'human life and health', 'animal or plant life or health' and 'public order' in two treaties, and to those threatened by extreme emergencies in one treaty (i). Legislative measures to pursue such public interests must be necessary or not be arbitrary, depending on individual treaty contexts (ii). Under GATT/GATS-like general exceptions, it finds that public interests are limited to those involving 'human life and health', 'animal or plant life or health', 'public order', 'public morality', 'national treasures', 'exhaustible natural resources' and 'the environment' (i). Legislative measures to pursue such public interests must be necessary or not be arbitrary, depending on individual public interests (ii).

Based on the above, the chapter examines the interactions between treaty exception provisions on public interests and investment protection provisions on FET, expropriation, FTT and NT as analysed in chapters from 3 to 6 to assess the former's legal effects (Part V). It finds that treaty exception provisions on public interests do *not* in all cases have the applicable effects of excluding the operation of treaty obligations.

The chapter concludes with the extent to which legislative measures could be accepted under treaty exceptions, although the measures do not satisfy substantive requirements and qualifications under investment protection provisions. This finding is grounded on treaty contexts in which treaty exceptions for public interests prevail over standard exceptions if any (Part V), and substantive qualifications for legislative measures imposed by treaty exception provisions (Parts III and IV).

I A MAP OF PROVISION FORMULATIONS – TREATY EXCEPTION PROVISIONS ON PUBLIC INTERESTS IN VIETNAM'S IIAS

A *Section Overview*

Treaty exception provisions on public interests are found in Vietnam's 12 IIAs. Of these, the provisions in two treaties provide (i) minimal lists of public interest objectives and require (ii) a link – either non-necessary or necessary – between measures and the objectives covered – traditional general exceptions. The provisions in the other ten treaties have certain features that are similar to features of general exceptions in Article XX of the *GATT* and Article XIV of the *GATS* – GATT/GATS-like general exceptions. Those in eight out of the ten treaties provide (i) more extensive lists of public interest objectives and require (ii) measure-objective links, both non-necessary and necessary, and (iii) the application of state measures on a non-arbitrary discrimination basis. Those in the remaining two treaties contain several of these features. When the *Vietnam-EU IPA* and the *RCEP* come into effect, the two formulations of treaty exception provisions on public interests remain the same, since their relevant exception provisions resemble GATT/GATS-like general exceptions.[3] However, the exceptions in the *Vietnam-EU IPA* would be classified as specific exceptions rather than treaty exceptions as they are only applicable to NT and MFN provisions.

Notably, neither formulation contains self-judging language (iii)/(iv). The effect of lacking self-judging language in exception provisions has been analysed in Chapter 7 in the context of treaty security exceptions.[4] This effect is acknowledged in the current chapter. Accordingly, state measures conducted by Vietnam, if challenged, would be subject to a substantive review, including the legality of public interest objectives pursued and the nexus between those measures and the intended objectives (reviewable).

One might argue that exceptions for safeguard reasons under eight out of the 12 IIAs could be applied to all obligations as treaty exceptions through the phrase 'nothing in this agreement shall affect the rights and obligations of a Party […]',[5] although the given

[3] *Vietnam-EU IPA* art 4.6; *RCEP* ch 17 art 17.12.
[4] See Chapter 7 Part III(A).
[5] *ACIA* art 13(4); *ASEAN-China IA* art 10(5); *ASEAN-Korea IA* art 10(3); *ASEAN-Hong Kong IA* art 12(4); *ASEAN-ANZ FTA* ch 11 art 8(4); *Vietnam-Korea FTA* annex 9-C; *Vietnam-EAEU FTA* ch 8 art 8.8(4);

phrase is located in a clause within FTT provisions instead of an independent provision in a treaty. However, the current study considers them as specific exceptions to FTT and/or NT provisions, as mentioned in Chapters 5 and 6 respectively, rather than treaty exceptions. This is because safeguard exceptions under five treaties link specifically to FTT and/or NT provisions.[6] Those under the three remaining treaties do not require safeguard measures to be compatible with FTT provisions (which is obvious) but expressly demand that they meet certain requirements. These requirements are subject to FET and non-expropriation, such as (i) avoiding unnecessary damage to the commercial, economic and financial interests of the other state(s), (ii) not exceeding those measures necessary to deal with situations triggering safeguard purposes, and (iii) being temporary and phased out progressively once the situation improves.[7] Certain of them additionally require safeguard measures to be consistent with NT provisions.[8] As a possible result, legislative measures qualifying safeguard exceptions under Vietnam's IIAs would comply with FET, non-expropriation and NT in relevant treaty contexts.

CPTPP ch 29 art 29.3(1)–(2). See app 5.

[6] *ASEAN-Korea IA* art 11(1)–(2); *ASEAN-Hong Kong IA* art 13(1)–(2); *Vietnam-Korea FTA* ch 9 art 9.8; *Vietnam-EAEU FTA* ch 8 art 8.8(1); *CPTPP* ch 29 art 29.3(3). See above also Chapter 5 Part I(D); Chapter 6 Part I(D).

[7] *ACIA* arts 13(5)(b)–(c), (g), 16(2)(b) – (d); *ASEAN-China IA* art 11(2)(c)–(e); *ASEAN-ANZ FTA* ch 15 art 4(2)(b)–(d). See also above Chapter 5 Part IV(C)(2).

[8] *ACIA* art 13(5)(f); ASEAN-*China IA* art 11(2)(b). See also above Chapter 5 Part IV(C)(2).

Table 8.1: Formulations of Treaty Exception Provisions on Public Interests in Vietnam's IIAs

Treaty Contexts (12)	Features of Provision Formulations						
	Self-judging Language		Permissible Objectives		Measure-Objective Relationship		Application Condition
	No	Yes			Non-necessary	Necessary	
2 IIAs	**Traditional General Exceptions**						
Vietnam-Singapore BIT	x		(i)*	Human Life or Health	x		
			(ii)**	Animal, Plant Life or Health	x		
Vietnam-Japan BIT	x		(i)	Human Life or Health		x	
			(ii)	Animal, Plant Life or Health		x	
			(iii)***	Public Order		x	
10 IIAs	**GATT/GATS-like General Exceptions**						
Vietnam-Slovakia BIT	x		(iii)	Public Order		x	x
Vietnam-Korea FTA	x		(i)	Human Life or Health		x	x
			(ii)	Animal, Plant Life or Health		x	x
			(iii)***	Public Order		x	x
			(iv)	Public Morality		x	x
ASEAN-ANZ FTA	x		(i)	Human Life or Health		x	x
			(ii)	Animal, Plant Life or Health		x	x
			(iii)***	Public Order		x	x
			(iv)	Public Morality		x	x
			(v)	National Treasures		x	x

ACIA *ASEAN-China IA* *ASEAN-Korea IA* *Vietnam-EAEU FTA* *ASEAN-Hong Kong IA* *RCEP**	x		(i)	Human Life or Health		x	x
			(ii)	Animal, Plant Life or Health		x	x
			(iii)***	Public Order		x	x
			(iv)	Public Morality		x	x
			(v)	National Treasures	x		x
			(vi)	Exhaustible Natural Resources	x		x
Vietnam-Turkey BIT	x		(i)	Human Life or Health	x		x
			(ii)	Animal, Plant Life or Health	x		x
			(v)	National Treasures	x		x
			(vi)	Exhaustible Natural Resources	x		x
			(vii)	The Environment	x		x
Vietnam-Uzbekistan BIT	x			Any Public Interests Threatened by Extreme Emergency	x		x

Notes:

*: Limited to the protection of public health.

**: Limited to the prevention of diseases and pests in animals or plants.

***: Limited to the preservation of fundamental interests of society.

*RCEP**: Treaty has not yet come into force.

B *Traditional General Exceptions*

Treaty exception provisions on public interests under two IIAs – *Vietnam-Singapore BIT* and *Vietnam-Japan BIT* – are quite different from those under the other ten IIAs which modelled after GATT/GATS general exceptions.[9] They were drafted within the 1990–2007 period and so are grouped in the current chapter as traditional general exceptions.

Treaty exception provisions in this group have three common features (Table 8.1). First, they list certain public interests from among the protection of (i) human life or health, and (ii) animal, or plant life or health, and the maintenance of (iii) public order. Second, they require the same nexus, either necessary or non-necessary, between state measures and each covered public interest. And, last, they contain no self-judging language, such as 'which it considers' or 'that it considers'. Notably, the given provisions do not express any application condition.

C *GATT/GATS-like General Exceptions*

Under ten IIAs, treaty exception provisions on public interests share certain similar features to those of general exceptions under the *GATT* and *GATS* (Table 8.1). They are thus classed as GATT/GATS-like general exceptions.

Of the above exception provisions, those in eight IIAs have four common features. First, they list four to six public interests related to the protection of (i) human life or health, (ii) animal or plant life or health, (iii) public order, (iv) public morality, (v) national treasures, (vi) exhaustible natural resources and (vii) the environment. Such a list is broader than the list in the traditional exceptions. Second, almost all the exceptions require state measures to be 'necessary' with regards to the first four public interests but not to be 'necessary' with regards to the last three. As the third feature, they all explicitly exclude state measures that form disguised restrictions on investment and/or that are arbitrary or unjustifiably discriminatory in their application. Finally, they do not contain self-judging language such as 'which it considers' to grant full discretion for Vietnam to decide its public interest measures.

[9] *Vietnam-Singapore BIT* art 11; *Vietnam-Japan BIT* art 15. See also app 8.

The exception provisions in the remaining two IIAs – *Vietnam-Slovakia BIT* and *Vietnam-Uzbekistan BIT* – only share several of the above features.[10] The provision in the first context similarly has the last three features while that in the second context posseses the last two. Regarding permissible public objectives, the former only allows the maintenance of public order, and the latter mentions 'circumstances of extreme emergency' in which a state could adopt measures to protect public interests rather than list the public interests themselves. As to the measure-objective link, the latter only require state measures be rational/reasonable (non-necessary) for any public interests exposed to emergency circumstances.

It should be noted that the exception provisions in the first eight IIAs directly model the GATT/GATS general exceptions in three ways. The first approach – which selectively copies clauses of Article XX of the *GATT* and Article XIV of the *GATS* – can be found in the *ACIA*, *ASEAN-China IA*,[11] *ASEAN-Korea IA*,[12] *ASEAN-Hong Kong IA*,[13] and *Vietnam-Turkey BIT*.[14] The second approach – which incorporates Article XX of the *GATT* and Article XIV of the *GATS* in a *mutatis mutandis* manner – is found in two of IIAs. The *Vietnam-EAEU FTA* expresses that 'Article XX of *GATT 1994* and Article XIV of *GATS* are incorporated into and form part of this Agreement, mutatis mutandis'.[15] The *Vietnam-Korea FTA* refers only to Article XIV of the *GATS*; it states '[f]or the purposes of Chapters … 9 (Investment), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis'.[16] The exception provision in the *ASEAN-ANZ FTA* combines two approaches.[17] It follows the first design to select a part of Article XX of the *GATT*[18] and the second design to incorporate Article XIV of the *GATS* in the statement that '[f]or the purposes of … Chapter 11 (Investment), Article XIV of *GATS* including its footnotes shall be incorporated into and shall form part of this Agreement, *mutatis mutandis*'.[19]

[10] *Vietnam-Slovakia BIT* art 12(2); *Vietnam-Uzbekistan BIT* art 12(2). See also app 8.
[11] *ASEAN-China IA* art 16. See also app 8.
[12] *ASEAN-Korea IA* art 20. See also app 8.
[13] *ASEAN-Hong Kong IA* art 9. See also app 8.
[14] *Vietnam-Turkey BIT* art 4. See also app 8.
[15] *Vietnam-EAEU FTA* ch 1 art 1.9. See also app 8.
[16] *Vietnam-Korea FTA* ch 16 art 16.1. See also app 8.
[17] *ASEAN-ANZ FTA* ch 15 art 1. See also app 8.
[18] Ibid ch 15 art 1(3).
[19] Ibid ch 15 art 1(2).

II A FOCUSED REVIEW OF TRIBUNALS' INTERPRETATION APPROACHES – TREATY EXCEPTION PROVISIONS ON PUBLIC INTERESTS IN INTERNATIONAL ARBITRATION PRACTICE

A *Section Overview*

In international arbitration practice, only a small number of treaty exceptions for public interests have been invoked by state respondents and interpreted by tribunals. Many treaties at issue did not contain treaty exceptions for public interests, and in certain cases where treaties had exceptions, state respondents did not employ those exceptions.[20] The public order exception in the *Argentina-US BIT*, having several common features with traditional general exceptions in Vietnam's IIAs,[21] has been interpreted in cases against Argentina's 2001/2002 measures responding to its economic crisis, such as in *Enron v Argentina*,[22] *El Paso v Argentina*,[23] *LG&E v Argentina*[24] and *Continental Casualty v Argentina*.[25] GATT/GATS-like general exceptions – for example, in the *Canada-Peru FTA* and *Canada-Ecuador BIT*[26] – have recently examined respectively in *Bear Creek Mining v Peru*[27] and *Copper Mesa v Ecuador*.[28]

In interpreting treaty exceptions for public interests as mentioned above, tribunals have adopted different approaches to three issues: (i) whether public interest objectives were at stake and triggered state protections; (ii) whether state measures were necessary to

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[20] Note that traditional exceptions were available in at least 40 IIAs challenged but not invoked by state respondents, including exceptions for the protection of public order (in 30 IIAs), exceptions for the protection of public morality (in five IIAs), and exceptions for the protection of life and health, public health, and/or the prevention of diseases or pests in animals and plants (in five IIAs). Similarly, GATT/GATS-like general exceptions were available in at least 10 IIAs challenged but not invoked by state respondents. These figures are collected by the author from data published by UNCTAD's Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

[21] These common features refer to the limited list of public objectives, the same measure-objective link, the lack of self-judging language: see above Part I(B); *Argentina-US BIT* art XI.

[22] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) ('*Enron v Argentina*').

[23] *El Paso Energy International Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) ('*El Paso v Argentina*').

[24] *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) ('*LG&E v Argentina*').

[25] *Continental Casualty Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) ('*Continental Casualty v Argentina*'). For relevant case summary and analysis, see Zena Prodromou (ed), *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes* (Kluwer Law International, 2020) 61–70.

[26] See *Canada-Peru FTA* art 2201; *Canada-Ecuador BIT* art XVII.

[27] *Bear Creek Mining Corporation v Republic of Peru (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/21, 30 November 2017) *('Bear Creek Mining v Peru').*

[28] *Copper Mesa Mining Corporation v Republic of Ecuador (Award)* (PCA Arbitral Tribunal, PCA Case No 2012-2, 15 March 2016) ('*Copper Mesa v Ecuador*').

achieve such objectives; and (iii) whether treaty exceptions could exclude the operation of treaty obligations. On the second issue, tribunals have variously approached 'necessary' measures as the 'only means', the 'close-to-inevitable means' and the 'least restrictive means', as discussed in the previous chapter in the context of security exceptions.[29] The current section focuses only on the first and third issues.

B *Permissible Objectives: Public Interests Threatened by Severe Threats*

The public order exception in the *Argentina-US BIT* has been the subject of different applications in different cases. Tribunals in various cases have not uniformly agreed that the 2001/2002 economic crisis in Argentina was severe enough to threaten public order. According to the *Enron v Argentina* tribunal, '[q]uestions of *public order* and *social unrest could be handled* as in fact *they were*, just as questions of *political stabilization were handled* under the constitutional arrangements in force';[30] by this it meant that public order in Argentina was still in control and had not become unmanageable. The tribunal did observe that 'there was a severe crisis' and 'it was unlikely that business could have continued as usual' in such a context.[31] However, the tribunal was not convinced that 'such a situation compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State'.[32] This finding may be explained by the tribunal's intention to assimilate exceptions under treaty law, including public order, with the plea of necessity under customary international law (CIL),[33] thus requiring Argentina's emergency measures to meet stringent conditions of state necessity.

Other tribunals have taken a different position.[34] For instance, the *Continental Casualty v Argentina* tribunal found that Argentina's 2001/2002 economic crisis caused various disturbances and chaos in its economy, society and politics.[35] Such disturbances, in its view, had shaken 'public peace' or 'civil peace' in Argentina and undoubtedly qualified

[29] See Chapter 7 Part II(C). Note that the tribunals, particularly in the Argentina cases, addressed the issue of public order and security exceptions at the same time since they were designed in the same provision, Article XI of the *Argentina-US BIT*, and invoked by Argentina.
[30] *Enron v Argentina* (n 22) [306] (emphasis added).
[31] Ibid.
[32] Ibid.
[33] Prodromou (n 25) 71–2.
[34] See, eg, *Continental Casualty v Argentina* (n 25) [180]; *LG&E v Argentina* (n 24) [226], [240].
[35] *Continental Casualty v Argentina* (n 25) [180].

as ‘a situation where the maintenance of public order … was vitally at stake’.[36] This finding is different from that above because the tribunal separated treaty exceptions from the plea of necessity, and examined the former as a limitation on the application of treaty obligations rather than as a justification for treaty violations. As a result, the ‘public order’ concept was interpreted as ‘a broad synonym for “public peace”’,[37] which could be threatened by ‘actual or potential insurrections, riots and violent disturbances of the peace’.[38] This interpretation approach produced a difference in the finding.

C *Legal Effects of Treaty Exceptions for Public Interests*

Among treaty exceptions for public interests, the public order exception in the *Argentina-US BIT* has been variously perceived by tribunals in terms of excluding the state duty of or liability for compensation. According to the tribunals in *Enron v Argentina* and *El Paso v Argentina,* as a state was still required to pay compensation for damages caused by its measures in the case of necessity under CIL, so it was under treaty law.[39] This reasoning was strengthened by tribunals pointing out that the exception provision at issue did not address the question of compensation. On the other hand, the tribunals in *LG&E v Argentina* and *Continental Casualty v Argentina* did not find the compensation question necessary once state measures qualified treaty exceptions. In their view, qualified exceptional measures were not considered a treaty violation or expropriation.[40] The different perceptions among tribunals could be explained by the difference in their positions. The former tribunals equated treaty exceptions to the plea of necessity and then equalised their legal consequences.[41] This issue was not even about *lex specialis* application of treaty exceptions, or *lex generalis* application of necessity defence, as a secondary rule (application of rules), but rather about the injection of necessity as a secondary rule into treaty exceptions as a primary rule (interpretation of normative content). However, the latter tribunals considered treaty exceptions as a primary rule and then inevitably concluded with non-compensation for non-violation and non-expropriation.

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[36] Ibid.
[37] Ibid [174].
[38] Ibid.
[39] See Chapter 7 Part II(D).
[40] Ibid.
[41] This point is similarly viewed by Prodromou (n 25) 73.

The GATT/GATS-like general exceptions in the *Peru-Canada FTA* have been interpreted in *Bear Creek Mining v Peru*¸ and this interpretation was not clear regarding their legal effect on expropriation cases. The tribunal, on the one hand, accepted general exceptions as applying to the entire treaty (including expropriation provisions) but, on the other hand, required Peru to justify why compensation for expropriation was not offered to the claimant as an affected foreign investor. In particular, the tribunal perceived that the title of Article 2201, 'General Exceptions', showed that otherwise 'Chapter Eight (investment) remains applicable including its Articles 812 [on Expropriation] and, by the express footnote to the title of Article 812, as well as Article 812.1 [on lawful expropriation]'.[42] However, when it came to the compensation issue, the tribunal asserted that even if state measures suspending all new mining concession requests in Puno qualified under general exceptions (which was indeed found as a disqualification),[43] Peru failed to justify other requirements set by expropriation provisions, including duty of compensation.[44] The tribunal reasoned that 'the exception in Article 2201 does not offer any waiver from the obligation in Article 812 to compensate for the expropriation'; thus, Peru needed, but had failed, to 'explain why it was necessary for the protection of human life not to offer compensation to Claimant for the derogation of Supreme Decree 083 [as a result of the application of challenged measures]'.[45]

[42] *Bear Creek Mining v Peru* (n 27) [473].
[43] Note that Pere's measures in *Bear Creek Mining v Peru* (n 27) disqualified general exceptions because they made no mention of any public purposes listed in the exceptions (eg the protection of human life or health) despite aiming to stop protests, strikes and violence (social unrest) that had paralysed the region: at [475]. It was also because they were arbitrary and unreasonable discrimination: at [476].
[44] *Bear Creek Mining v Peru* (n 27) [473].
[45] Ibid.

D *Section Remark: Suggesting Three Practical Questions for an Analysis of Treaty Exception Provisions on Public Interests in Vietnam's IIAs*

From the above discussion, the section proposes three specific inquiries for analysing treaty exception provisions on public interests under Vietnam's IIAs. First, whether these provisions could be interpreted as allowing any covered public interests that Vietnam claimed were at risk. Second, whether a 'necessary' link between state measures and public interests pursued, provided by these provisions, could be interpreted as requiring the measures be the 'least restrictive means'. And, last, whether the treaty exception provisions have applicable effects to exclude the application of treaty obligations. Of these, the second inquiry is adopted from the discussion in the previous chapter in the context of security exceptions, as mentioned earlier.

III AN ANALYSIS OF TRADITIONAL GENERAL EXCEPTIONS: POSSIBLE SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES

A *Permissible Objectives: Limited Public Interests*

1 *Exhaustive List of Public Interests*

Given the first feature of traditional general exceptions as previously mentioned,[46] state measures taken by Vietnam would only be excepted when pursuing certain public objectives covered by the exceptions and where threats to such objectives were evident (limited public interests) in two treaty contexts. Specifically, the objectives include the protection of (i) human life or health, (ii) animal or plant life or health, and (iii) public order under the *Vietnam-Japan BIT* (Table 8.1). The exception provision under the *Vietnam-Singapore BIT* limits the first two objectives to the protection of public health and the prevention of diseases and pests in animals or plants (Table 8.1). Notably, the list of given objectives here is exhaustive. Before listing them the traditional general exceptions do not provide any expression to widen the application of exceptions to other possible, or new, public interests, such as 'including', 'not limited to', or similar kinds.[47] Borrowing the words of the *Bear Creek Mining v Peru* tribunal, 'the list is not introduced by any wording (eg, "such as") which could be understood that it is only exemplary[;] [i]t must therefore be understood to be an exclusive list'.[48]

2 *Maintenance of Public Order: A Narrow Scope*

The exceptions to maintain 'public order' under the *Vietnam-Japan BIT* would have a narrow scope, compared to those under *Vietnam-Slovakia BIT* as later analysed.[49] This is because one clause in the exception provision clarifies that '[t]he public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the

[46] See above Parts I(A)–(B).
[47] The security exception in Article 15 of the *Vietnam-Japan BIT* simply states '[n]otwithstanding any other provisions in this Agreement other than provisions of Article 10 (Compensation for Losses), each Contracting Party may: [list of interests]'. Similarly, the security exception in Article 11 of the *Vietnam-Singapore BIT* specifies '[t]he provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other actions where such prohibition, restriction or action are directed to: [list of interests]'.
[48] *Bear Creek Mining v Peru* (n 27) [473].
[49] See below Part IV(A).

fundamental interests of society'.[50] This clause limits the objective 'maintenance of public order' to (i) preservation of society's fundamental interests and to (ii) a situation in which such fundamental interests are genuinely and seriously threatened by military or non-military sources. The word 'fundamental' here, in its dictionary meaning, means 'serious and very important; affecting the central and most important parts of something'.[51] The concept 'fundamental interests of society', as perceived by the WTO Panel in *US — Gambling*,[52] could relate, inter alia, to 'standards of law, security, and morality' reflected in public policy and law.[53] Given those terms, only when the most important or basic interests of Vietnam's society (eg standards of law, security and morality) face 'a genuine and sufficiently serious threat' or are close to the state of disorder, is Vietnam as a host state entitled to ring the alarm of state protection. It has been acknowledged that the concepts of 'public order' or 'fundamental interests' might 'vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'.[54] Certain measures, such as anti-terrorist measures or moneylaundering regulations, might enjoy more consensus among countries as falling within the scope of public order exceptions than other.[55] Despite these, Vietnam must provide evidence to prove that fundamental interests were existed and at stake, which formulates the objectivity of protective legislation.[56]

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[50] *Vietnam-Japan BIT* art 15.

[51] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'fundamental' (def 1).

[52] Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WTO Doc WT/DS285/R (10 November 2004, adopted 20 April 2005) ('*US – Gambling*').

[53] Ibid [6.467]. See also Jurgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59(2) *International and Comparative Law Quarterly* 325, 360–1; Barnali Choudhury, 'Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreement' (2011) 49(3) *Columbia Journal of Transnational Law* 670, 690–2.

[54] Panel Report, *US — Gambling,* WTO Doc WT/DS285/R (n 52) [6.461]. See also WTO, *Analytical Index: GATS – Article XIV (Jurisprudence)* (2020) [13].

[55] See William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48(2) *Virginia Journal of International Law* 307, 359. Specifically, the article observes that '[t]here appears to have been consensus that the application of a state's criminal laws, anti-terrorist measures, and moneylaundering regulations would fall under the "public order" heading, but there was no agreement as to how much broader the exception should be' (citations omitted).

[56] This point is derived from WTO case law: see, eg, Nicolas F Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2007) 11(1) *Journal of International Economic Law* 43, 59–66.

Exceptions to protect human, animal or plant life or health under the *Vietnam-Japan BIT* would have a broader scope than those to protect public health and to prevent diseases and pests in animals or plants under the *Vietnam-Singapore BIT*. It is quite clear that the concept of the protection of animal or plant life or health covers the concepts of the protection of public health and the prevention of diseases and pests in animals or plants, which is similarly viewed by several scholars in a broader context than Vietnam's IIAs.[57] The term 'health' would refer to those relating to physical and mental health,[58] while the term 'life and health' would additionally include issues such as the living environment and reproduction of humans, animals or plants.[59] To protect life and health, the prevention of diseases or health problems might not be sufficient; the promotion of life and health quality are needed.[60]

In any case, Vietnam might have to show scientific evidence, or credible studies or risk assessments supporting the presence of threats to the life or health of humans, animals or plants and that these interests were suffering, or would be seriously affected, due to such threats/causes. Only circumstances in which the life or health of human beings, animals or plants are scientifically proven to be at risk would qualify as triggering state protection.[61] The adoption of state measures relevant to human, animal or plant life or health could be considered objective, or reasonably be accepted from a third party's (such as tribunals') perspective, only if (i) there is evidence, or at least an appropriate risk

[57] Amit Kumar Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries' (2017) 7(2) *Asian Journal of International Law* 227, 253–4.

[58] The word 'health' is defined as '[t]he quality, state, or condition of being sound or whole in body, mind, or soul; esp., freedom from pain or sickness'; or '[t]he relative quality, state, or condition of one's physical or mental well-being, whether good or bad': see *Black's Law Dictionary* (11th ed, 2019) 'health' (def 12c). The word 'public health' is defined as '[t]he health of the community at large', or '[t]he healthful or sanitary condition of the general body of people or the community en masse; esp, the methods of maintaining the health of the community, as by preventive medicine and organized care for the sick': see *Black's Law Dictionary* (11th ed, 2019) 'public health' (def 17c).

[59] *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'life' and 'health'.

[60] The term 'protection' refers to 'the act of protecting somebody or something; the state of being protected': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'protection'. The word 'protect' is defined as 'to make sure that somebody or something is not harmed, injured, damaged, etc': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'protect'.

[61] See Tania Voon, 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18(4) *Journal of International Economic Law* 795, 804–7; Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standards of Review and Margin of Appreciation* (Oxford University Press, 2014) 152.

assessment, to prove life or health is threatened by particular sources, and (ii) the adopted measure is rationally derived from the scientific evidence or risk assessment.[62] The requirement of scientific evidence or risk assessment to qualify the objective character of life- or health-related measures, particularly sanitary or phytosanitary (SPS) measures, has been specified by the *SPS Agreement*. Accordingly, SPS measures are required to be 'based on scientific principles' and 'not maintained without sufficient evidence'; in the event that 'sufficient scientific evidence is lacking', provisional measures as a result of appropriate risk assessment could be permitted in light of 'the precautionary principle'.[63] Such measures must have a 'rational', 'reasonable' or 'objective' relationship with relevant scientific evidence or risk assessments. The risk assessment in this respect need not 'necessarily reflect majority views within the relevant scientific community' but can be based on 'minority views'.[64]

In international arbitration practice, certain tribunals have required scientific evidence for, or the wide recognition of, life and health-related threats. The tribunal in *Methanex v US* accepted a ban on the use of MTBE as gasoline additive because the US had scientific evidence, in the form of research conducted by the University of California, that MTBE contaminated surface water and groundwater and was difficult and expensive to clean up.[65] Similarly, the tribunal in *Chemtura v Canada* accepted Canada's measures to terminate the claimant's licences for pesticides containing lindane because Canada's Pest Management Regulatory Agency had already conducted a special review of lindane-based pesticides from 1999 to 2001 and a re-evaluation of lindane from 2004 to 2005. Both reviews presented health risks caused by lindane and suggested that products containing this chemical should be banned. In addition, the tribunal in *Chemtura v Canada* observed that 'lindane has raised increasingly serious concerns both in other countries and at the

[62] Ibid.
[63] *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (enterered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary or Phytosanitary Measures*) arts 2(2), 3(1), 5(7) ('*SPS Agreement*'). See also Burke-White and von Staden (n 55) 361-3. For more information, see WTO, *Analytical Index: SPS Agreement – Article 2 (Jurisprudence)* (2020).
[64] Burke-White and von Staden (n 55) 363; citing Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones),* WTO Doc WT/DS48/AB/R (16 January 1998, adopted 13 February 1998) [194] ('*EC — Hormones (Canada)*') and Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001, adopted 5 April 2001) [178] ('*EC — Asbestos'*).
[65] *Methanex Corporation v United States of America (Final Award)* (UNCITRAL Arbitral Tribunal, 3 August 2005) [102] ('*Methanex v US*').

international level since the 1970s'.[66] It provided the list of 22 countries that had at some stage banned the use of lindane, and the Stockholm Convention on Persistent Organic Pollutants listing lindane as a chemical for elimination.[67] Likewise, in *Philips Morris v Uruguay*, the tribunal accepted Uruguay's measures on tobacco control adopted in 2010 because the adverse effect of smoking on public health had been globally recognised. According to the tribunal, the Framework Convention of Tobacco Control, developed by the WHO, already required Uruguay as a WHO member to prevent in accordance with its national law 'the false impression that a particular tobacco product is less harmful than other tobacco products',[68] and to call for more than 50% of cigarette packaging to display warnings. The tribunal also observed that more than 20 countries across the world required warning images covering 50% of cigarette packaging, and many countries required warning images covering more than 80% of packaging, such as Australia, which required 75% of the front and 90% of the back.[69]

4 *Subsection Remark: Limited Public Interests with Narrow and Broad Scopes*

Under the *Vietnam-Singapore BIT* and *Vietnam-Japan BIT*, state measures could only be excepted when taken for several limited public interests, if adversely affecting foreign investors/investments. In the *Vietnam-Japan BIT*, such public interests must fall within the realm of the protection of human, animal or plant life or health (i)–(ii), and public order (iii). The maintenance of public order here refers to the preservation of fundamental interests of society (a narrow scope). The protection of human life or health is limited to the protection of public health (a narrow scope) and the protection of animal or plant life or health is also limited to the prevention of diseases and pests in animals or plants (a narrow scope) under the *Vietnam-Singapore BIT*. In any case, notably, Vietnam would likely need objective assessments of whether public interests are at risk.

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[66] *Crompton (Chemtura) Corp v Government of Canada (Award)* (UNCITRAL Arbitral Tribunal, 2 August 2010) [135] ('*Chemtura v Canada'*).
[67] Ibid [135]–[136].
[68] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 2016) [404] (*Philip Morris v Uruguay*).
[69] Ibid [372]–[373], [418].

B *'Necessary' or Non-necessary Relationship: Non-Arbitrary or Least Restrictive Character*

Depending on individual treaties, traditional general exceptions set different nexus requirements between state measures and pursued objectives.

General exceptions in the *Vietnam-Japan BIT* require state measures to be 'necessary' to protect human, animal or plant life or health and public order, which is similar to security exceptions as discussed in the previous chapter.[70] However, Vietnam must qualify the necessity of public interest measures from the perspective of a reasonable person rather than based on its own genuine belief; this is a consequence of the absence of self-judging language in the general exceptions. In international arbitration practice, tribunals as reasonable persons have approached 'necessary' link requirements in different ways: (i) the 'only means', (ii) the 'close-to-inevitable' means and (iii) the 'least restrictive' means.[71] In the *Vietnam-Japan BIT* context, it is unlikely that general exceptions require 'necessary' measures be 'the only means', given the original meaning of 'necessary'.[72]

First, while the word 'necessary' has a range of degrees, the 'only means' reflects the highest degree of necessity – indispensability. Therefore, indispensable measures are necessary measures, but necessary measures are not always indispensable measures. In the words of WTO Appellate Body in *Korea — Various Measures on Beef*,[73] '[m]easures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX (d)[;] [b]ut other measures, too, may fall within the ambit of this exception'.[74] If Vietnam and Japan intended to require the 'only means', they would have used the adjective 'indispensable' rather than 'necessary'.

[70] See Chapter 7 Part IV(D).
[71] Ibid.
[72] Ibid.
[73] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (11 December 2000, adopted 10 January 2001) ('*Korea — Various Measures on Beef*").
[74] Ibid [161].

Second, the purpose of concluding the treaty in general is to require a higher degree of state obligations than that under CIL and the purpose of designing exceptions is, by its nature, to create greater latitude for deviation/exemption from such obligations than the plea of necessity under CIL; however, equating the 'necessary' link requirement under the treaty exception provision to the plea of necessity – 'the only way for the State to safeguard an essential interest against a grave an imminent peril' – would make the level of exemption under the treaty the same as that available under CIL. If Vietnam and Japan did not intend to create more latitude for deviation/exemption from obligations, they should not have drafted the exception provision. In the words of Burke-White and von Staden, 'if states merely intended the exception clause to refer to the necessity defence in customary law, the exception clause would not have been necessary in the first place',[75] since 'the customary defence of necessity would have been available to the state parties in any event'.[76] Therefore, the interpretation of the word 'necessary' as implying the 'only means' test would be contrary to the purpose of including exception clauses.

The 'necessary' link requirement under the *Vietnam-Japan BIT* could, instead, involve the 'least restrictive means'. This approach has been widely used in WTO jurisprudence and adopted by certain investment arbitral tribunals.[77] The process of defining 'necessary' measures would involve the questions of whether measures contributed to their ends; and, if so, whether alternative measures that are less restrictive and more consistent with the treaty were available to achieve the same ends; and, if so, whether such alternatives could be reasonably and effectively used by a state, as discussed in the previous chapter.[78] Under the BIT, the ordinary meaning of 'necessary' likely invites an assessment of the measures' contribution to the objective to answer the first question. Additionally, given that the BIT has the main objective of protecting and promoting investment, the 'least restrictive' character of state measures needed to achieve those objectives would be possibly examined. One might notice that the treaty also recognises that 'those objectives can be achieved without relaxing health, safety and environmental measures of general application'.[79] However, this recognition hardly supports a loose interpretation. It does

[75] Burke-White and von Staden (n 55) 344.
[76] Ibid 344 (citations omitted).
[77] *Continental Casualty v Argentina* (n 25) [194]–[195]; citing Panel Report, *Brazil — Retreaded Tyres,* WTO Doc WT/DS332/R (n 54) [7.104], [7.211] ('*Brazil — Retreaded Tyres*') and Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, 7 April 2005, adopted 20 April 2005) [308] ('*US — Gambling*').
[78] See Chapter 7 Part IV(D).
[79] *Vietnam-Japan BIT* Preamble.

not aim to encourage Vietnam to increase health, safety and environmental standards, even if the increase causes harm to foreign investments, as pointed out in Chapter 2.[80] Rather, it only means that Vietnam should not lower such standards to attract foreign investments.

General exceptions under the *Vietnam-Singapore BIT* do not require state measures to be necessary. They allow Vietnam to apply prohibitions, restrictions or other actions that are 'directed to' the protection of public health or the prevention of diseases and pests in animals or plants.[81] The 'directed to' link here likely invites a substantive review similar to the examination of 'rational relationship' – a part of non-arbitrariness requirement of FET, as discussed in the previous chapter.[82]

In short, general exceptions under the *Vietnam-Japan BIT* require a 'necessary' relationship between state measures and pursued objectives, which could invite the application of the 'least restrictive means' test. In contrast, those under the *Vietnam-Singapore BIT* express a 'directed to' link requirement, which possibly refers to a rational relationship. Given such difference, certain state measures to protect human, animal or plant health might not qualify under general exceptions in the former context but might do so in the latter context.

C *Section Remark: Substantive Qualifications for Exceptional Legislative Measures*

To be accepted under traditional general exceptions, measures must be non-arbitrarily undertaken to protect public health and to prevent diseases and pests in animals or plants in the *Vietnam-Singapore BIT*, and necessarily undertaken to protect human, animal or plant life or health, and maintain public order in the *Vietnam-Japan BIT* (Table 8.2). Notably, these qualifications would be reviewed by judicial bodies if challenged by a home state or its foreign investors.

[80] See Chapter 2 Part II(C).
[81] *Vietnam-Singapore BIT* art 11.
[82] See Chapter 7 Part III(D).

Table 8.2: Substantive Qualifications for Exceptional Legislative Measures as Imposed by Traditional General Exceptions in Vietnam's IIAs

Treaty Contexts (2)	**Substantive Qualifications (R)**		
	Legitimate Objectives (Rational Basis)		Other Qualifications
Vietnam-Singapore BIT	(i)* (ii)**	Human Life or Health Animal, Plant Life or Health	Rational Relationship
Vietnam-Japan BIT	(i) (ii) (iii)***	Human Life or Health Animal, Plant Life or Health Public Order	Necessary Relationship
Notes: *: Limited to the protection of public health. **: Limited to the prevention of diseases and pests in animals or plants. ***: Limited to the preservation of fundamental interests of society. (R): Measures being substantively reviewed by adjudicators if challenged.			

IV AN ANALYSIS OF GATT/GATS-LIKE GENERAL EXCEPTIONS: SUBSTANTIVE QUALIFICATIONS FOR EXCEPTIONAL LEGISLATIVE MEASURES

A *Permissible Objectives: Limited Public Interests*

1 *Exhaustive List of Public Interests*

GATT/GATS-like general exceptions, except those under the *Vietnam-Slovakia BIT*, list more permissible public interests than traditional general exceptions do, but still in an exhaustive way. The exhaustive list additionally covers the protection of (iv) public morality, (v) national treasures and (iv) non-renewable natural resources in addition to protection of (i) human life or health, (ii) animal and plant life or health, and (iii) public order in five treaty contexts – *ACIA*, *ASEAN-China IA*, *ASEAN-Hong Kong IA*, *ASEAN-Korea IA* and *Vietnam-EAEU FTA* (Table 8.1). The list is narrowed to the first five objectives under the *ASEAN-ANZ FTA*, to the first four under the *Vietnam-Korea FTA* and to the third under the *Vietnam-Slovakia BIT* (Table 8.1). In the *Vietnam-Turkey BIT*, exception provision specially contains the first two, the last two objectives and the protection of the environment (vii) (Table 8.1).

2 *Maintenance of Public Order: A Narrow or Broad Scope?*

Regarding 'public order' exceptions (iii), those under seven of Vietnam's IIAs are limited to the preservation of fundamental interests of society and invoked only when such interests face a genuine and sufficiently serious threat (public order with a narrow scope), which is similar to those under the *Vietnam-Japan BIT* as previously discussed.[83] The exception provisions in the *ACIA*, *ASEAN-China IA*, *ASEAN-Korea IA* and *ASEAN-Hong Kong IA* provide this limitation in their footnotes.[84] Those under the *ASEAN-ANZ FTA*, *Vietnam-EAEU FTA* and *Vietnam-Korea FTA* have the same limitation through *mutatis mutandis* incorporation of Article XIV(a) and its accompanying foonote of the *GATS*.[85]

[83] See above Part III(A).
[84] *ACIA* art 17(1)(a), n 12; *ASEAN-China IA* art 16(1)(a), n 10; *ASEAN-Korea IA* art 20(1)(a), n 22; *ASEAN-Hong Kong IA* art 9(1)(a), n 5.
[85] *ASEAN-ANZ FTA* ch 15 art 1(2); *Vietnam-EAEU FTA* ch 1 art 1.9(1); *Vietnam-Korea FTA* ch 16 art 16.1(2).

However, 'public order' exceptions (iii) under the *Vietnam-Slovakia BIT* could enjoy a broader scope through mentioning 'public order' as the term is. Given dictionary definitions of 'public' and 'order',[86] and 'disorder',[87] the term 'public order' might refer to a state where laws, rules, authority, fundamental interests or other values of the society are observed and maintained, or 'can be ascertained as the absence of disorder'.[88] In international arbitration practice, the tribunal in *Continental Casualty v Argentina* linked 'public order' to 'public peace', which may be threatened by actual or potential insurrections, riots and other violent disturbances of the peace.[89] A reading to limit 'public order' to fundamental societal values such as morality was, as it perceived, 'a narrow interpretation'.[90] According to the tribunal, state actions – which were properly necessary 'to preserve and to restore civil peace and the normal life of society',[91] or 'to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order' – would possibly fall within the scope of 'public order' exceptions.[92] Vietnam can adopt measures in cases of health, economic, and environmental exigencies if they pose threat to public peace.[93]

[86] The adjective 'public' is defined as 'connected with ordinary people in society in general': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'public'; and the noun 'order' is defined as 'the way in which people or things are placed or arranged in relation to each other; the state that exists when people obey laws, rules, or authority': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'order'.
[87] *Black's Law Dictionary* does not define 'public order' but 'disorder' which means 'a public disturbance; a riot': see *Black's Law Dictionary* (11th ed, 2019) 'disorder' (def 3).
[88] Sinha (n 57) 251.
[89] *Continental Casualty v Argentina* (n 25) [174].
[90] Ibid [173]–[174].
[91] Ibid [174].
[92] Ibid.
[93] The point is adopted from Rajan to a certain extent: see Prabhash Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation' (2012) 2(1) *Asian Journal of International Law* 21, 45.

Public morals or morality exceptions (iv) under GATT/GATS-like general exceptions in seven IIAs[94] may invite a broad application. The concept of 'public morals' is listed by the exceptions without any limitations or clarifications. The dictionary meanings of 'moral',[95] 'morality'[96] and 'public morality'[97] would possibly suggest that the concept of 'public morals' refers to all standards of right and wrong in human behaviours or general moral beliefs of a society. The meaning of public morality is also clarified by the WTO Panel in *US-Gambling* as comprising 'standards of right and wrong conduct maintained by or on behalf of a community or nation'.[98] Vietnam, as a host state, would have an appropriate deference to define what are considered to be 'standards of right or wrong conduct'. There is no common understanding among countries on this issue. Different political, social, cultural traditions and religions set different standards of morality, and similarly create different public order interests.[99] Another party, or a tribunal, thus cannot impose its own understanding of 'standards of right or wrong conduct' on another culture. As put by Burke-White and von Staden, 'it would clearly do injustice to the concept if a tribunal were to try to squeeze the public morality notions prevailing in … [two countries] into a uniform meaning of the term'.[100] However, Vietnam must still provide objective evidence for its measures.[101]

[94] *ACIA* art 17(1)(a); *ASEAN-China IA* art 16(1)(a); *ASEAN-Korea IA* art 20(1)(a); *ASEAN-Hong Kong IA* art 9(1)(a); *ASEAN-ANZ FTA* ch 15 art 1(2). In the *Vietnam-EAEU FTA* and *Vietnam-Korea FTA*, the mentioned objective is incorporated from Article XX(a) of the *GATT* and Article XIV(a) of the *GATS*: see *Vietnam-EAEU FTA* ch 1 art 1.9(1); *Vietnam-Korea FTA* ch 16 art 16.1(2).

[95] The word 'moral' refers to 'relating to, or involving the study or doctrine of human conduct, of right and wrong behavior, of virtues and vices, of good and evil, and of the universal principles of what it means to live a good life; dealing with principles of good and bad conduct; establishing or disseminating principles of right and wrong behavior': see *Black's Law Dictionary* (11th ed, 2019) 'moral'.

[96] The word 'morality' refers to 'the doctrine of right and wrong in human conduct; ethics; moral philosophy; conformity with recognized rules of correct conduct; behavior that accords with what is true and honorable': see *Black's Law Dictionary* (11th ed, 2019) 'morality'.

[97] The phrase 'public morality' refers to 'the ideas or general moral beliefs of a society', or 'the ideals or actions of an individual to the extent that they affect others': see *Black's Law Dictionary* (11th ed, 2019) 'public morality'.

[98] Panel Report*, US — Gambling*, WTO Doc WT/DS285/R (n 77) [6.465]. See also Panagiotis Delimatsis, 'Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US-Gambling and China-Publications and Audiovisual products' (2011) 14(2) *Journal of International Economic Law* 257, 276–9.

[99] Panel Report*, US — Gambling*, WTO Doc WT/DS285/R (n 77) [6.461].

[100] Burke-White and von Staden (n 55) 364.

[101] This point is adopted by Burke-White and von Staden (n 55): at 366. They views that 'a state invoking the public morality exception would need to adduce evidence that the adopted measures reflect or respond to prevailing moral views within its own polity and indeed are intended to protect them'.

Exceptions to protect 'national treasures of artistic, historic and archaeological values' in six IIAs,[102] or to protect 'national treasures or specific sites of historical and archaeological values' and support 'creative arts of national value' in one IIA[103] (v) narrow their scope to two aspects. First, treasures protected must be 'national' treasures of a country and its society rather than treasures of a region or local community. The phrase 'national treasures', in its dictionary meaning, refers to 'very valuable things' or 'a highly valued object' relating to/typical of 'a whole country and its people rather than to part of that country'.[104] World or national heritages/properties would fall within the realm of this concept but local properties such as landscapes of indigenous peoples/tribes or sacred mountains respected by certain religions or groups of people might not be considered 'national treasures'. Second, such treasures must have 'artistic, historic or archaeological values'. The phrase 'artistic, historic or archaeological' would limit the values to those created by or relevant to humanity or society. This is one reason why exceptions to protect such treasures could be subject to cultural protections. Cultural heritage, old buildings/monuments/sites or old towns would have such value, whereas natural heritage (as 'national treasures') such as countryside, natural environment, biodiversity, geodiversity, ecosystems or geological structures might not have cultural attributes or archaeological values. As a result, state measures taken by Vietnam to protect the conservation of coastlines, rivers, spring valleys, forests and mountains might not be considered an exception.

[102] *ACIA* art 17(e*); ASEAN-China IA* art 16(1)(e); *ASEAN-Korea IA* art 20(1)(e); *ASEAN-Hong Kong IA* art 9(1)(e); *Vietnam-Turkey BIT* art 4(1)(c). In the *Vietnam-EAEU FTA*, the objective is incorporated from Article XX(f) of the *GATT*: see *Vietnam-EAEU FTA* ch 1 art 1.9(1).
[103] *ASEAN-ANZ FTA* ch 15 art 1(3).
[104] The word 'national treasure' is defined as 'something of which a particular country is very proud': see *Cambridge Dictionary* (online at 20 May 2021) 'national treasure'. The two words 'national' and 'treasure' are defined respectively as 'relating to or typical of a whole country and its people, rather than to part of that country or to other countries' and 'very valuable things, usually in the form of a store of precious metals, precious stones, or money': see *Cambridge Dictionary* (online at 20 May 2021) 'national', 'treasure'. Similarly, the two words 'national' and 'treasure' are defined respectively as 'connected with a particular nation, shared by a whole nation' and 'a highly valued object': see *Oxford Advanced Learner's Dictionary* (8th ed, 2010) 'national', 'treasure'.

Exceptions to conserve 'exhaustible natural resources' in six IIAs[105] (iv) might also have a narrow application, although the concept of 'exhaustible natural resources' would be broadly interpreted to cover both non-living and living natural resources. As to the concept, the word 'natural resources', in its dictionary meaning, refers to 'materials or substances occurring in nature which can be exploited for economic gain'.[106] Such materials include not only non-organic (non-living) materials but also organic (living) materials, which create biotic and abiotic resources.[107] Either living or non-living sources would face the risk of depletion, exhaustion and extinction, frequently because of human activities, if their rate of consumption exceeds the rate of replenishment.[108] The interpretation of 'natural resources' to include living and non-living resources is compatible with sustainable development objectives under the *ACIA*, *ASEAN-China IA* and *ASEAN-Korea IA*. Sustainable development objectives, including environmental protection, are globally perceived as concerning not only the existence of non-living natural resources but also the life of living natural resources.[109] In fact, the exception in the *Vietnam-Turkey BIT* fully expresses 'living or non-living exhaustible natural resources'.[110]

However, state measures, in aiming to conserve non-renewable natural resources, must be 'made effective in conjunction with restrictions on domestic production or consumption'. One might argue that the phrase 'made effective' requires an examination of the effectiveness of legislative restrictions on domestic production and consumption to define whether legislative restrictions on foreign investment are legitimate. However, it would be possibly understood as 'enforced' in Vietnam's IIAs. In this regard, the description by the WTO Appellate Body in interpreting GATT/GATS general exceptions serves as a

[105] *ACIA* art 17(f); *ASEAN-China IA* art 16(1)(f); *ASEAN-Korea IA* art 20(1)(f); *ASEAN-Hong Kong IA* art 9(1)(f); *Vietnam-Turkey BIT* art 4(1)(b). In the *Vietnam-EAEU FTA*, the objective is incorporated from Article XX(g) of the *GATT*: see *Vietnam-EAEU FTA* ch 1 art 1.9(1).
[106] The term 'natural resources' is defined as 'oil, minerals, forests, etc. that exist in a place and that have economic value to a country': see *Cambridge Dictionary* (online at 20 May 2021)'natural resources'.
[107] There is a general understanding that natural resources, if based on their origin, may include biotic resources are obtained from the biosphere (living and organic material) and abiotic resources are those that come from non-living, non-organic material.
[108] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58/AB/R (12 October 1998, adopted 6 November 1998) [128] ('*US — Shrimp*').
[128] ('*US — Shrimp*'). See also WTO, *Analytical Index: GATT – Article XX (Jurisprudence) (2020)* [143].
[109] Appellate Body Report, *US — Shrimp,* WTO Doc WT/DS58/AB/R (n 108) [130]; WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* [143].
[110] *Vietnam-Turkey BIT* art 4(1)(b).

good reference. According to the WTO Appellate Body in *China – Raw Materials*, the phrase 'made effective' when used in connection with a state measure as a legal instrument might be seen to refer to such a measure being 'brought into operation, adopted, or applied'; and the phrase 'in conjunction with' plainly meant 'together with' or 'jointly with'.[111] Following the WTO Appellate Body, when the word 'restriction' comes together with the phrase 'made effective', they suggest that a restriction, such as on exported gasolines, must work together with restrictions on domestic production or consumption.[112] The WTO Appellate Body also provided reasons why the reading to require an examination of measures' effectiveness was not reasonable. That is because defining the causation between restrictive measures and their effect on the environment is always a difficult one, in both domestic and international law, and it takes a long time to establish the effectiveness of state measures on preservation or conservation of natural resources.[113] In fact, if state measures to conserve non-renewable natural resources only regulate relevant exports or imports but not domestic production or consumption, they would hardly satisfy the requirement of good faith, including a consideration of non-disguised restrictions, as a prerequisite of any legitimate measures.

6 *Protection of the Environment: A Broad Scope*

The exception in the *Vietnam-Turkey BIT* is only one providing 'the protection of the environment' (vii).[114] This objective is broad to cover the protection of local, national, and world natural heritage, such as countryside, natural environment, biodiversity, geodiversity, ecosystems and geological structures. This coverage cannot be found in the context of treaty general exceptions only protecting national treasures of artistic, historic and archaeological values. The objective is also expected to cover renewable natural resources that fall outside the scope of objective to conserve 'exhaustible natural resources'.

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[111] Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials,* WTO Doc WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R (30 January 2012, adopted 22 February 2012) [356] ('*China — Raw Materials*'). See also WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* [151]; Ehab S Abu-Gosh and Rafael Leal-Arcas, 'The Conservation of Exhaustible Natural Resources in the GATT and WTO: Implications for the Conservation of Oil Resources' (2013) 14(3) *Journal of World Investment & Trade* 480, 514–20.
[112] Ibid.
[113] Ibid.
[114] *Vietnam-Turkey BIT* art 4(1)(a). See also app 8.

7 *Subsection Remark: Limited Public Interests with Broad and Narrow Scopes*

The GATT/GATS-like general exceptions allow Vietnam to take measures otherwise inconsistent with treaty obligations in order to pursue certain public interests. Such interests must fall within the concept of the protection of (i)–(ii) human, animal or plant life or health, (iii) public order, (iv) public morality, (v) national treasures, (vi) non-renewable national resources, and (vii) the environment – limited public interests. Among these, the concept of 'public order' in almost all Vietnam's IIAs is limited to the preservation of society's fundamental interests (a narrow scope). Additionally, the protection of 'natural treasures' is limited to treasures having artistic, historic and archaeological values (a narrow scope). Notably, to justify a claim that public interests were at risk and required state protections, Vietnam would likely need to show objective evidence/assessments.

B *Permissible Objectives: Public Interests Threatened by Extreme Emergency*

The exception provision under the *Vietnam-Uzbekistan BIT* does not list any public interests but refers to 'circumstances of extreme emergency' that might allow Vietnam to adopt legislative measures to protect any public interests exposed to extreme emergency circumstances (limited public interests). If Vietnam's legislative measures are adopted to protect public health or public order threatened by situations such as natural disasters or pandemics (eg COVID-19), they might fall with the scope of the exception provision.

C *'Necessary' and Non-necessary Relationships: Non-Arbitrary and Least Restrictive Characters*

Depending on public interests, the GATT/GATS-like general exceptions set different measure–objective relationship requirements. Almost all exceptions require state measures be necessary to protect (i)–(ii) human, animal or plant life or health, (iii) public order and (iv) public morality (Table 8.1). The general exceptions under the *ASEAN-ANZ FTA* also require state measures to be necessary for protecting national treasures (v). To qualify as necessary, legislative measures may need to have a reasonable relationship with pursued objectives and cause the least restriction to foreign investors/investments, as previously discussed in the context of traditional general exceptions.[115]

However, the general exceptions in the *Vietnam-Turkey BIT* accept legislative measures that are 'designed and applied for' the protection of human, animal or plant life or health, or the environment, and those in six treaty contexts – *ACIA*, *ASEAN-China IA*, *ASEAN-Korea IA*, *ASEAN-Hong Kong IA*, *Vietnam-EAEU FTA* and *Vietnam-Turkey BIT* – similarly permit state measures 'imposed for' the protection of national treasures and 'relating to', or 'related to', the conservation of non-renewable natural resources. The word 'for' here, in its original meaning, suggests 'a relatively thin nexus, under which measures would appear to be permissible as long as they merely further a permissible objective', as observed by Burke-White and von Staden.[116] Similarly, 'relating to', in its original meaning, means being 'connected with something'.[117] Given their original meanings, 'for' and 'relating to' nexus requirements only need state measures to rationally/reasonably connect with the given objectives (rational relationship). This effect is similar to that imposed by the 'directed to' or 'to' link requirement under traditional general exceptions, as previously analysed.[118]

[115] See above Part III(B).
[116] Burke-White and von Staden (n 55) 342. The word 'for' is defined as 'intended to be given to' or 'having the purpose of': see *Cambridge Dictionary* (online at 20 May 2021) 'for' (def A1, def A2).
[117] *Cambridge Dictionary* (online at 20 May 2021) 'relating to'.
[118] See above Part III(B).

D *Application Conditions: Non-Arbitrary Discrimination and Good Faith*

As previously mentioned, all GATT/GATS-like general exceptions explicitly require state measures not to be applied in an arbitrary or unjustifiably discriminatory manner.[119] Almost all of the exceptions additionally require those measures not to create disguised restriction.[120]

Given the first condition, state measures must not be arbitrary. If they result in discrimination, such discrimination must be reasonable as well. The interpretation in the context of GATT/GATS general exceptions relating to this condition can serve as a good reference. The term 'arbitrary' or 'unjustifiable' means 'not based on reasons/analysing'.[121] The analysis of whether discrimination is 'arbitrary' or 'unjustifiable' would usually involve the causes of, or rationale for, discrimination. In the words of the WTO Appellate Body in *US — Tuna II (Article 21.5 — Mexico)*, the discrimination would be arbitrary or unjustifiable when 'the reasons given for the discrimination "bear no rational connection to the objective" or "would go against that objective"'.[122] Such a rational relationship would be examined with respect to separate objectives covered by the GATT/GATS-like general exceptions.[123]

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[119] *Vietnam-Slovakia BIT* art 12(2); *ACIA* art 17; ASEAN-China IA art 16(1*); ASEAN-Korea IA* art 20(1); *ASEAN-Hong Kong IA* art 9(1); *ASEAN-ANZ FTA* ch 15 art 1(4); *Vietnam-Turkey BIT* art 4. In the *ASEAN-*ANZ *FTA*, *Vietnam-Korea FTA* and *Vietnam-EAEU FTA*, the condition is also incorporated from Article XX of *GATT* and Article XIV of *GATS*: see *ASEAN-ANZ FTA* ch 15 art 1(2)&(3); *Vietnam-Korea FTA* ch 16 art 16.1(2); *Vietnam-EAEU FTA* ch 1 art 1.9(1). See also app 8.

[120] *ACIA* art 17; *ASEAN-China IA* art 16(1); *ASEAN-Korea IA* art 20(1); *ASEAN-Hong Kong IA* art 9(1); *ASEAN-ANZ FTA* ch 15 art 1(4). In the *ASEAN-ANZ FTA, Vietnam-Korea FTA* and *Vietnam-EAEU FTA*, the condition is also incorporated from Article XX of *GATT* and Article XIV of *GATS*: *see ASEAN-ANZ FTA* ch 15 art 1(2)–(3); *Vietnam-Korea FTA* ch 16 art 16.1(2); *Vietnam-EAEU FTA* ch 1 art 1.9(1). See also app 8.

[121] The word 'arbitrary' is defined as 'depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures', or 'founded on prejudice or preference rather than on reason or fact': see *Black's Law Dictionary* (11th ed, 2019) 'arbitrary'. The word 'unjustificable' is defined as 'legally or morally unacceptable; devoid of any good reason that would provide an excuse or defense': see *Black's Law Dictionary* (11th ed, 2019) 'unjustificable'.

[122] Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Resources to Article 21.5 of the DSU by Mexico,* WTO Doc WT/DS381/AB/RW (20 November 2015, adopted 3 December 2015) [7.316] ('*US — Tuna II (Article 21.5 — Mexico)*'). See also WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* (2020) [182]; Robert Brew, 'Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection' (2019) 25 *Canterbury Law Review* 205, 233; Weihuan Zhou, '*US – Clove Cigarettes* and *US – Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose under Article III:4 of the GATT' (2012) 15(4) *Journal of International Economic Law* 1075, 1105–9.

[123] Appellate Body Report, *US — Tuna II (Article 21.5 — Mexico)*, WTO Doc WT/DS381/AB/RW (n 122) [7.347]. See also WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* (2020) [193].

One might argue that the requirement of non-arbitrary or justifiable discrimination invites an examination of the effectiveness of a discriminatory measure at issue, which refers to the quantitative impact of this discrimination on achieving public objective.[124] However, considering the context of GATT/GATS-like general exceptions where the requirement appears, it is unlikely it would be interpreted in that way. More specifically, provisions on these exceptions compose the requirement in their chapeau to deal with the application manner of state measures rather than to examine the effectiveness of state measures.[125] If they requested that examination, they would do so with the requirement of measure-objective relationship but would not do so here with the condition of non-discriminatory application.

Regarding the second condition, non-disguised restriction, state measures must be genuinely based on reasons claimed by a state rather being a pretext – good-faith. The term 'disguised' means 'having an appearance that hides the true form', similar to 'concealed or unannounced restriction' and antonym of 'truth', 'honesty', 'reality'.[126] It should be noted that 'arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' impart meaning to one another.[127] More specifically, 'disguised restriction' may amount to arbitrary and unjustifiable discrimination, or the analysis of 'arbitrary discrimination' and 'unjustifiable discrimination' may consider whether there is 'disguised restriction'. Similarly to the condition of justifiably discriminatory application, the condition of non-disguised restriction would be examined with respect to individual permissible objectives. For example, to conserve non-renewable natural resources, restrictions on foreign investment-related activities such as wood extraction and exportation need to be adopted alongside measures to restrict domestic wood consumption and production.

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[124] The view of the WTO Panel in Panel Report, *Brazil — Retreaded Tyres,* WTO Doc WT/DS332/R (n 77) [229]–[230]; and WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* (2020) [181]. See also Zhou (n 122) 1098–1100.

[125] WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* (2020) [147]–156].

[126] The noun and the verb 'disguise' are defined respectively as 'the application of a façade to misrepresent the true nature of a thing; the act of concealment or misrepresentation' and 'to hide something or change it, so that it cannot be recognized': see *Black's Law Dictionary* (11th ed, 2019). The adjective 'disguised' is defined as 'having an appearance that hides the true form': see *Cambridge Dictionary* (online at 20 May 2021) 'disguised'.

[127] Appellate Body Report*, United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996, adopted 20 May 1996) 25 ('*US — Gasoline*'). See also WTO, *Analytical Index: GATT – Article XX (Jurisprudence)* (2020) [200]; Brew (n 122) 233–5.

The two conditions mentioned above would indeed, to certain extent, be examined when adjudicator(s) undertook a substantive review of public interest objectives pursued by state measures at issue and the requirement of measure-objective relationship. If state measures, for example, arbitrarily discriminated between foreign and domestic investors and disguisedly restricted foreign investment, they would hardly fulfil the 'rational basis' requirement for any legitimate measures and the rational, or necessary, relationship between such measures and the objectives pursued. The two conditions would be also examined when adjudicator(s) undertook a good faith review of state measures.

E *Section Remark: Substantive Qualifications for Exceptional Legislative Measures*

Legislative measures as qualified exceptions must be necessary to protect (i)–(ii) human, animal, or plant life or health, (iii) public order and (iv) public morality in seven treaty contexts (*Vietnam-Korea FTA*, *ASEAN-ANZ FTA*, *ACIA*, *ASEAN-China IA*, *ASEAN-Hong Kong IA*, *ASEAN-Korea IA, Vietnam-EAEU FTA*). Those pursuing the first two public interests in the *Vietnam-Turkey BIT* context and those pursuing the four interests in the *Vietnam-Uzbekistan BIT* context must be rational/reasonable. Legislative measures to protect national treasures only need to be rational/reasonable in seven treaty contexts (*ACIA*, *ASEAN-China IA*, *ASEAN-Hong Kong IA*, *ASEAN-Korea IA*, *Vietnam-EAEU FTA, Vietnam-Turkey BIT and Vietnam-Uzbekistan BIT)* but must be necessary in one treaty context (*ASEAN-ANZ FTA*). Those to conserve non-renewable natural resources in the former contexts and those to protect the environment in the *Vietnam-Turkey BIT* context are required to be rational/reasonable. Under the *Vietnam-Slovakia BIT*, legislative measures could only be excepted if necessary to maintain public order. These substantive qualifications for legislative measures would be reviewed by adjudicators if the measures are disputed by foreign investors or their home state.

Table 8.3: Substantive Qualifications for Exceptional Legislative Measures as Imposed by GATT/GATS-like General Exceptions in Vietnam's IIAs

Treaty Contexts (10)	Substantive Requirements (R)		
	Legitimate Objectives (Rational Basis)		Other Qualifications
Vietnam-Slovakia BIT	(iii)	Public order	Necessary Relationship
Vietnam-Korea FTA	(i) (ii) (iii)*** (iv)	Human Life or Health Animal, Plant Life or Health Public Order Public Morality	Necessary Relationship
ASEAN-ANZ FTA	(i) (ii) (iii)*** (iv) (v)	Human Life or Health Animal, Plant Life or Health Public Order Public Morality National Treasures	Necessary Relationship
ACIA *ASEAN-China IA* *ASEAN-Hong Kong IA* *ASEAN-Korea IA*	(i) (ii) (iii)*** (iv)	Human Life or Health Animal, Plant Life or Health Public Order Public Morality	Necessary Relationship
Vietnam-EAEU FTA *RCEP**	(v) (vi)	National Treasures Exhaustive Resources	Rational Relationship
Vietnam-Turkey BIT	(i) (ii)	Human Life or Health Animal, Plant Life or Health	Rational Relationship
	(v) (vi) (vii)	National Treasures Exhaustive Resources The Environment	
Vietnam-Uzbekistan BIT	(i)[(a)]–(vii)[(a)]		Rational Relationship
	(viii)[(a)]	Other Public Interests	

Notes:

[(a)]: Public interests threatened by extreme emergency.

***: Limited to the preservation of fundamental interests of society.

(R): Measures being substantively reviewed by adjudicators if challenged.

*RCEP**: Treaty has not yet come into force.

V INTERACTIONS BETWEEN TREATY EXCEPTION PROVISIONS ON PUBLIC INTERESTS AND INVESTMENT PROTECTION PROVISIONS: LEGAL EFFECTS OF TREATY EXCEPTIONS

A *Treaty Exception Provisions on Public Interests and Fair and Equitable Treatment Provisions*

As discussed in the previous chapter, the study takes a perception that treaty exceptions would render treaty obligations inapplicable to legislative measures which potentially come within the scope of such obligations (non-violation).[128] From this perception, it is reasonable to say that general exceptions can exclude legislative measures from the application of FET provisions without limitation to CIL (Formulation A) in eight treaty contexts, if the measures (being good faith, not arbitrary and reasonably discriminatory) revoke specific commitments previously granted to foreign investors (Table 8.4).[129] This is possibly when, in the words of Brew, measures 'entirely change[d] the legal position and/or assurances on which an investor(s) based on their investment(s)',[130] but 'simultaneously represent[ed] the least investment-restrictive means of achieving a state's desired level of protection of a legitimate objective and not being motivated by any ulterior protectionist purpose'.[131]

However, GATT/GATS-like general exceptions play no role with regard to FET provisions with limitation to CIL (Formulation B) in four treaty contexts (Table 8.4). This is because three requirements imposed by these FET provisions are *minimum* standard of treatment (MST) constituting 'a floor'[132] or 'an absolute base line standard of protection',[133] and Vietnam as a host state needs to observe them in any case. These reasons are similarly analysed in the context of treaty security exceptions.[134] In the view of several scholars, a state measure failing to satisfy these requirements 'would not

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[128] See Chapter 7 Part V(A).
[129] This point is similarly held by certain scholars in the general IIA context: see, eg, Catharine Titi (ed), *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014) 185; Martini, 'Avoiding Planned Obsolescence' (n 1), 2886–7; Brew (n 122) 239, citing Barton Legum and Joana Petculescu, 'GATT Article XX and international investment law' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) 340, 361.
[130] Brew (n 122) 239.
[131] Ibid.
[132] *Azurix Corp v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 14 July 2006) [361].
[133] Newcombe, 'Use of General Exceptions' (n 2) 281.
[134] See Chapter 7 Part V(B).

deserve justification anyway',[135] or general exceptions would not be 'desirable or achievable' to permit conduct which violated MST under CIL.[136] It should be noted that once legislative measures for public interests meet substantive qualifications, including non-disguised restriction, reasonable discrimination and reasonableness/necessity, explicitly expressed by GATT/GATS-like general exceptions,[137] they would hardly be contrary to substantive requirements, such as good faith, non-arbitrariness and rational/reasonable discrimination, imposed by Formulation B FET provisions. This point is similarly viewed by several scholars when analysing general exceptions in a broader context than Vietnam's IIAs.[138]

[135] Brew (n 122) 239.
[136] Martini, 'Avoiding Planned Obsolescence' (n 1) 2886.
[137] See above Parts IV(C)–(D).
[138] See, eg, Andrew Paul Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Paul Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2010) 354, 369 ('General Exceptions'); Newcombe, 'Use of General Exceptions' (n 2) 281 (stating that '[i]f a measure could be justified under the stringent requirements of a general exception provision, it is difficult to envisage a situation in which it would have violated minimum standards of treatment in the first place'); Vandevelde (n 1) 455 (stating that 'it is hard to see how a bona fide measure would ever violate the obligation of reasonableness embodied by FET'); Titi (n 129) 184–5.

Table 8.4: Interactions between FET Provisions and Treaty Exception Provisions on Public Interests in Vietnam's IIAs

<table>
<tr><td rowspan="2">Treaty Context (12)</td><td rowspan="2">FET Obligation (Table 3.2)</td><td colspan="2">Treaty Exceptions for Public Interests (R)</td><td rowspan="2">Treaty Context * (12)</td></tr>
<tr><td>Legitimate Objectives (Rational Basis)</td><td>Other Qualifications</td></tr>
<tr><td>8 IIAs</td><td>FET Provisions without Limitation to CIL (A) (1)-(3)</td><td colspan="2">Traditional General Exceptions or GATT/GATS-like General Exceptions (Inapplicable Effects)</td><td>7 IIAs</td></tr>
<tr><td>Vietnam-Singapore BIT
Vietnam-Slovakia BIT
Vietnam-Japan BIT
ACIA
ASEAN-China IA
Vietnam-EAEU FTA
Vietnam-Turkey BIT
Vietnam-Uzbekistan BIT</td><td>(1) In Good faith (bona fide)
(2) Non-Arbitrariness (Rational Level)
(3) Rational Discrimination</td><td></td><td></td><td></td></tr>
<tr><td>(Same as above)</td><td>(A) (4)</td><td colspan="2">Traditional General Exceptions or GATT/GATS-like General Exceptions (Applicable Effects)</td><td>(Same as above)</td></tr>
<tr><td>Vietnam-Singapore BIT</td><td rowspan="3">(4) No Reverse Effects on State's Granted Specific Commitments without Proportionality</td><td>(i)* Human Life or Health
(ii)** Animal, Plant Life or Health</td><td>Rational Relationship</td><td rowspan="3"></td></tr>
<tr><td>Vietnam-Slovakia BIT</td><td>(iii) Public Order</td><td>Necessary Relationship</td></tr>
<tr><td>Vietnam-Japan BIT</td><td>(i) Human Life/Health
(ii) Animal, Plant Life or Health
(iii)*** Public Order</td><td>Necessary Relationship</td></tr>
</table>

ACIA *ASEAN-China IA* *Vietnam-EAEU FTA*	Same as above	(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality	Necessary Relationship	
		(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relationship	
Vietnam-Turkey BIT	Same as above	(i) Human Life or Health (ii) Animal, Plant Life or Health (v) National Treasures (vi) Exhaustive Natural Resources (vii) The Environment	Rational Relationship	
Vietnam-Uzbekistan BIT	Same as above	(i)[(a)]–(vi)[(a)] (vii)[(a)] Others	Rational Relationship	
4 IIAs	**FET Provisions with Limitation to CIL (B)**	**GATT/GATS-like General Exceptions** (Inapplicable Effect)		**4 IIAs;** ***RCEP***
Vietnam-Korea FTA *ASEAN-ANZ FTA* *ASEAN-Korea IA* *ASEAN-Hong Kong IA*	(1) In Good faith (bona fide) (2) Non-Arbitrariness (Rational Level) (3) Rational Discrimination			

Notes:

[(a)]: Public interests threatened by extreme emergency.

*: Limited to the protection of public health.

**: Limited to the prevention of diseases and pests in animals or plants.

***: Limited to the preservation of fundamental interests of society.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and *RCEP* come into force.

B *Treaty Exception Provisions on Public Interests and Expropriation Provisions*

The effect of general exceptions on expropriation provisions is similar to that of treaty security exceptions.[139] A reading that general exceptions aim to turn unlawful expropriation into lawful is not supported at least by a reason – that is, severe measures falling within the scope of general exceptions are even fewer than those falling within the purview of lawful expropriation conferred by expropriation provisions, so general exceptions would become unnecessary if designed for that aim.[140] More specifically, all permissible objectives listed by general exceptions are covered by public purposes under expropriation provisions. The requirement of 'for'/'relating to', or 'necessary', relationship expressed by the former is respectively similar to, or more stringent than, that of rational relationship imposed by the latter. This requirement can prevent bad faith intention (including disguised restriction) and arbitrariness (including unreasonable discrimination). Notably, the reasonably discriminatory application of GATT/GATS-like general exceptions is not different from the non-discrimination condition of lawful expropriation. One might point out that general exceptions can still have the role in justifying expropriatory measures undertaken without due process as lawful expropriation. This reading seems to be reluctant and less appropriate to relevant treaty contexts than the below reading. In the words of Martini, general exceptions are 'ill-adapted to provide a carve-out in case of expropriation measures that violate the due process requirement of a lawful expropriation' as illustrated in *Copper Mesa Mining v Ecuador*.[141]

On the contrary, there is a ground for a reading that general exceptions could make lawful expropriation, to a certain extent, non-expropriation or non-compensable. In particular, expropriation provisions do not 'prevent an expropriation in the first place'[142] but rather 'require compensation to be paid if a right or property is expropriated',[143] so general exceptions to expropriation provisions possibly attempt to exclude compensation duty for

[139] See Chapter 7 Part V(C).
[140] This point is similarly held by several scholars in the general IIA context: see, eg, Martini, 'Avoiding Planned Obsolescence' (n 1) 2889–90; Camille Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration' (2017) 50(3) *The International Lawyer* 529, 574–6.
[141] Martini, 'Avoiding Planned Obsolescence' (n 1) 2889.
[142] Howard Mann, 'Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments?' (Forum Paper, International Institute for Sustainable Development (IISD) and Centre on Asia and Globalisation (CAG), October 2007) 12.
[143] Ibid.

lawful expropriation.[144] One might concern that such a reading brings about the lower level of investment protection than what is accorded by CIL,[145] and thus erodes 'the very principles of investment protection'.[146] However, this concern might not take into account other treaty guarantees than a general right to compensation for expropriation (eg investor-state dispute settlements for compensation and adequate/full compensation standard), as somehow pointed out by Titi and Brew.[147] Such a concern is considerable in the context of direct expropriation but is not with regard to indirect taking.[148] The state's duty to pay compensation for indirect expropriation and the state's right to undertake police power measures without compensation have been recognised, or arguably recognised, in CIL. Thus, no one can answer a general question – to what extent should bona fide, non-discriminatory measures severely damaging foreign investments trigger a state duty for compensation? – if this is not clarified and circumscribed in IIAs by treaty parties. This point is similarly analysed in the treaty security exception context.[149]

From the above, legislative measures, if severely affecting foreign investments but qualifying general exceptions, can be considered non-expropriation (rather than lawful indirect expropriation) under undefined expropriation provisions (Formulation A) in seven treaty contexts (Table 8.5).[150] In another five treaty contexts, legislative measures satisfying general exceptions may be accepted under defined expropriation provisions (Formulation B), if causing severe effects and reversing a state's prior binding written commitments (or breaking distinct, reasonable investment-backed expectations), and/or lacking proportionate relationship between the measures and public objectives pursued (Table 8.5).[151] The lack of proportionality here, in almost all cases, is caused by the

[144] But Mann views that 'if the consequence of an expropriation is payment of compensation under the IIA, it is not clear that the requirement to pay compensation would constitute a legal barrier to the adoption of the measure so as to permit the invocation of this article [on general exceptions]': see Mann (n 142) 12.
[145] Newcombe, 'General Exceptions' (n 138) 368 (stating that '[i]t would be surprising if, by effect of general exceptions, parties to IIAs intended to provide less protection to foreign investors than that accorded under customary international law; thus, if the exception does not prevent a finding of expropriation (because the measure is a direct expropriation) presumably it cannot exclude payment of compensation'); Andrew Newcombe and Lluís Paradell, 'Defences, VI. Fundamental Change of Circumstances' in Andrew Paul Newcombe and Lluís Paradell (eds), *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 1st ed, 2009) 281, 504–5.
[146] The phrase is adopted from Titi (n 129) 181.
[147] Ibid; Brew (n 122) 239.
[148] This point is similarly viewed by other scholar: see Titi (n 129) 181.
[149] See Chapter 7 Part V(C).
[150] For substantive requirements suggested by undefined expropriation provisions (Formulation A) in Vietnam's IIAs, see Chapter 4 Part III.
[151] For substantive requirements suggested by defined expropriation provisions (Formulation B) in Vietnam's IIAs, see Chapter 4 Part IV.

absence of a balance between foreign investors' interests damaged and public interests achieved by state measures (cost-benefit balance), rather than by the unsuitability and unnecessity,[152] since the measures must be suitable and necessary to be qualified as relevant GATT/GATS-like general exceptions (Table 8.5).[153] In the cases of protecting national treasures and conserving non-renewable natural resources in three treaty contexts, exceptional legislative measures only need to be rational or suitable, so the lack of proportionality mentioned is brought about by the absence of cost-benefit balance and/or necessity (Table 8.5).[154] These points, to a certain extent, have been shared by several scholars.[155]

One might cast doubt on the applicable effect of general exceptions on expropriation provisions which contain clauses on public welfare measures, particularly in the *ACIA*, *ASEAN-ANZ FTA* and *ASEAN-Hong Kong IA*. However, the latter clauses potentially cover all lawful expropriation so they are hardly considered specific exceptions,[156] and thus cannot prevail over general exceptions. This effect would exclude a concern that general exceptions become redundant or meaningless in these contexts.

[152] For proportionality under defined expropriation provisions (Formulation B) in Vietnam's IIAs, see Chapter 4 Part IV(A)(3).
[153] For a necessary relationship imposed by GATT/GATS-like general exceptions, see above Part IV(C).
[154] For a rational relationship imposed by GATT/GATS-like general exceptions, see above Part IV(C).
[155] See, eg, Brew (n 122) 238. This article particularly provides that '[a] measure could conceivably satisfy the necessity test and be undertaken without a protectionist ulterior motive, thus fulfilling the recommended clause' requirements, despite what a tribunal may perceive as a severely disproportionate treatment of interests'.
[156] See Chapter 4 Part IV(B).

Table 8.5: Interactions between Expropriation Provisions and Treaty Exception Provisions on Public Interests in Vietnam's IIAs

Treaty Context (12)	**Non-Expropriation (Table 4.3)**	**Treaty Exceptions for Public Interests (R)**		**Treaty Contexts* (12)**
		Legitimate Objectives (Rational Basis)	Other Qualifications	
7 IIAs	**Undefined Expropriation Provisions (A)**	**Traditional General Exceptions or GATT/GATS-like General Exceptions** (Applicable Effects)		**6 IIAs**
Vietnam-Singapore BIT	(i) No Severe Effects on ForeignInvestments	(i)* Human Life or Health (ii)** Animal, Plant Life or Health	Rational Relationship	
Vietnam-Slovakia BIT	Same as above	(iii) Public Order	Necessary Relationship	
Vietnam-Japan BIT	Same as above	(i) Human Life/Health (ii) Animal, Plant Life or Health (iii)*** Public Order	Necessary Relationship	
ASEAN-China IA *ASEAN-Korea IA*	Same as above	(i) Human Life/Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality	Necessary Relationship	
		(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relationship	
Vietnam-Turkey BIT	Same as above	(i) Human Life/Health (ii) Animal, Plant Life or Health (v) National Treasures (vi) Exhaustive Natural Resources (vii) The Environment	Rational Relationship	

Vietnam-Uzbekistan BIT	Same as above	(i)[(a)]–(vi)[(a)] (vii)[(a)] Others	Rational Relationship	
5 IIAs	**Defined Expropriation Provisions (B)**	**GATT/GATS-like General Exceptions** (Applicable Effects)		**5 IIAs; *RCEP***
Vietnam-Korea FTA	(i) No Severe Effects on ForeignInvestments; or (ii) Severe Effects and No Reverse Effects on State's Prior Binding Written Commitments (or No Breach of Distinct, Reasonable Investment-Backed Expectations); Proportionate Measure-Objective Relationship; and Characteristics of Police Power Measures (Good Faith, Public Purposes, Non-Arbitrariness, Reasonable Discrimination)	(i) Human Life/Health (ii) Animal, Plant Life or Health (iii)[***] Public Order (iv) Public Morality	Necessary Relationship	
ASEAN-ANZ FTA		(i) Human Life/Health (ii) Animal, Plant Life or Health (iii)[***] Public Order (iv) Public Morality (v) National Treasures		
ACIA ASEAN-Hong Kong IA Vietnam-EAEU FTA		(i) Human Life/Health (ii) Animal, Plant Life or Health (iii)[***] Public Order (iv) Public Morality	Necessary Relationship	
		(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relationship	

Notes:

[(a)]: Public interests threatened by extreme emergency.

[*]: Limited to the protection of public health.

[**]: Limited to the prevention of diseases and pests in animals or plants.

[***]: Limited to the preservation of fundamental interests of society.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and *RCEP* come into force.

C *Treaty Exception Provisions on Public Interests and Free Transfer Treatment Provisions*

General exceptions under the *Vietnam-Singapore BIT* and *Vietnam-Turkey BIT* are mute on relevant FTT provisions without exceptions/references (Formulation A) (Table 8.6). This is because public interests protected under the exceptions – human, animal, or plant life or health, national treasures, exhaustible natural resources, or environmental protection – would be unlikely to have rational relationships with measures restricting investment-related transfers.[157]

However, traditional general exceptions under the *Vietnam-Japan BIT* and GATT/GATS-like general exceptions in eight treaty contexts could exclude, to a certain extent, exchange restrictions and/or capital controls from the application of FTT provisions with economic safeguard-based exceptions (Formulation C) (Table 8.6). That is when such restrictions/controls are necessary to maintain public order. Public order could be threatened directly by economic chaos and social unrest, and indirectly by the vulnerability of banking and financial systems, imbalance of payments and inflation of currency, which could be caused by surges in capital inflows and/or outflows.[158] General exceptions would hardly be invoked for reasons that capital flows threatened life or health of human, animal or plant, public morality, national treasures or exhaustible natural resources as mentioned above.[159]

Under the *Vietnam-Uzbekistan BIT*, general exceptions allow Vietnam as a host state to adopt legislative measures in circumstances of extreme emergency. If such measures cause restrictions on investment-related transfers but are necessary to protect or safeguard financial/monetary security, BOP or external finances, they might be protected under specific exceptions accorded by FTT provision with reference to domestic laws (Formulation D).[160] This protection might be expanded or limited in the future if

[157] For interpretation of these concepts, see above Parts III(A) and IV(A). For common types of exchange restrictions and capital controls, see Chapter 5 Introduction.
[158] For interpretation of 'public order' concept, see above Parts III(A) and IV(A).
[159] For interpretation of these concepts, see above Parts III(A) and IV(A). In the general context, Titi points out that 'Article XX GATT-like general exceptions would become relevant … in the case of a state measure freezing the funds of an investor engaged in illicit drug-trafficking in order to protect human health, where the underlying obligation does not contain a specific exception for criminal offences': see Titi (n 129) 186; however, state measures mentioned here relate to administrative decisions than legislation.
[160] For relevant exceptions in Vietnam's contemporary laws, see Chapter 5 Part IV(D).

Vietnam's contemporary laws go through relevant changes.[161] However, if restrictive measures are not necessary, but reasonable, to protect given public interests or to address difficulties of macroeconomic management, they may only be covered by general exceptions (Table 8.6).

Table 8.6: Interactions between FTT Provisions and Treaty Exception Provisions on Public Interests in Vietnam's IIAs

<table>
<tr><td rowspan="2">Treaty Context (12)</td><td rowspan="2">FTT Obligation (Table 5.7)</td><td colspan="2">Standard Exceptions (R) (Table 5.7)</td><td colspan="2">Treaty Exceptions for Public Interests (R)</td><td rowspan="2">Treaty Context* (12)</td></tr>
<tr><td>Legitimate Objectives (Rational Basis)</td><td>Other Qualifications</td><td>Legitimate Objectives (Rational Basis)</td><td>Other Qualifications</td></tr>
<tr><td>2 IIAs</td><td colspan="3">FTT Provisions without Exceptions/References (A)</td><td colspan="2">Traditional General Exceptions/ GATT/GATS-like General Exceptions (Inapplicable Effect)</td><td>2 IIAs</td></tr>
<tr><td>Vietnam-Singapore BIT(NETs)</td><td rowspan="3">No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market Exchange Rate</td><td></td><td></td><td></td><td></td><td rowspan="3"></td></tr>
<tr><td>Vietnam-Turkey BIT(NETs)</td><td></td><td></td><td></td><td></td></tr>
<tr><td>9 IIAs</td><td colspan="3">FTT Provisions with Economic Safeguard-Based Exceptions (C)</td><td colspan="2">Traditional General Exceptions/ GATT/GATS-like General Exceptions (Applicable Effects)</td><td>8 IIAs; RCEP</td></tr>
</table>

[161] See Chapter 5 Part IV(D).

Vietnam-Slovakia BIT(NETs)	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market Exchange Rate	(i) BOP (iii) Macroeconomic Management	Rational Relationship; Temporary Application	(iii) Public Order	Necessary Relationship	
Vietnam-EAEU FTA(NETs) *ASEAN-ANZ FTA*(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(iii)*** Public Order	Necessary Relationship	
Vietnam-Japan BIT(NETs) *ASEAN-Hong Kong IA*(NETs)		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN	(iii)*** Public Order	Necessary Relationship	
ASEAN-China IA(NETs)		(i) BOP (ii) External Finance (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT	(iii)*** Public Order	Necessary Relationship	
ACIA(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(iii)*** Public Order	Necessary Relationship	
		(iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT			
Vietnam-Korea FTA(NETs)		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN; NT	(iii)*** Public Order	Necessary Relationship	

		(iv) Economic, Financial Disturbance				
ASEAN-Korea IA(NETs)		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(iii)*** Public Order	Necessary Relationship	
		(iii) Macroeconomic Management (iv) Economic, Financial Disturbance	Necessary Relationship; Temporary Application; MFN; NT			
1 IIA	**FTT Provision with Reference to Domestic Laws (D)**			**Traditional General Exceptions** (Applicable Effects)		**1 IIA**
Vietnam-Uzbekistan BIT(NETs)	No Restriction on Reasonable Transfer Time, Currency Convertibility and Official, Market Exchange Rate	(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(iii)(a) Public Order (vii)(a) Others	Rational Relationship	
		Financial, Monetary Security	Necessary Relationship			
		Potential Rational Grounds	Potential Qualifications			

Notes:

(a): Public interests threatened by extreme emergency.

***: Limited to the preservation of fundamental interests of society.

(NETs): Treaty protecting non-exhaustive transfers related to investment.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and *RCEP* come into force.

D *Treaty Exception Provisions on Public Interests and National Treatment Provisions*

Traditional general exceptions have no role in the context of the *Vietnam-Singapore BIT* and *Vietnam-Uzbekistan BIT* with regard to NT obligation (Table 8.7); this is because these treaties do not contain NT provisions.[162] Other general exceptions under the *Vietnam-Slovakia BIT*, *Vietnam-EAEU FTA* and *Vietnam-Turkey BIT* also have no application to NT provisions (Table 8.7). The NT provisions here make reference to domestic laws (Formulation D) and thus contain relevant standard exceptions accorded by Vietnam's contemporary legislation and future changes.[163] The standard exceptions accept discriminatory measures for any rational public interests according to national development policies,[164] which generates a broader scope than the scope of general exceptions in relevant treaties. General exceptions can only protect discriminatory measures necessary or reasonable for certain listed public interests.[165]

However, general exceptions could, to a certain extent, limit the application of NT provisions with sectors/matters-based exclusions and/or economic safeguard-based exceptions (Formulation C) in seven treaty contexts. For discriminatory measures governing excluded sectors/matters (unprotected ones from the investor's perspective), the exceptions play no necessary role (Table 8.7). For those governing non-excluded sectors/matters (protected ones from the investor's perspective), the exceptions have a definitive influence (Table 8.7). In the context of five treaties whose NT provisions also allow standard exceptions for safeguard reasons, these standard exceptions and general exceptions for certain public interests do not overlap each other, at least in terms of public objectives covered.[166] Therefore, they could take effect in parallel (Table 8.7).

[162] For IIAs having no NT provisions, see also Chapter 6 Part I(A), Table 6.1.
[163] See Chapter 6 Parts I(E) and IV(D).
[164] See Chapter 6 Part IV(D).
[165] See above Parts III(A) and IV(A).
[166] For substantive qualifications imposed by economic safeguard exceptions, see Chapter 6 Part IV(B). For substantive qualifications imposed by general exceptions in summary, see above Parts III(C) and IV(E).

One might view that GATT/GATS-like general exceptions do not have a practical effect on NT provisions, since 'non-arbitrary and justifiable discrimination [only] arises where investors find themselves in dissimilar circumstances',[167] and 'it is questionable whether such differential treatment [to foreign and domestic investments not in like circumstances] even qualifies as discrimination'.[168] However, factors to define the likeness of circumstances between foreign and domestic comparators should not involve the same legal framework, especially when challenged measures are legislative ones, as discussed in Chapter 6;[169] hence, non-arbitrary and justifiable discrimination could happen when circumstances are alike/similar. Actually, if legislative measures are not applied in a reasonably discriminatory manner, they would not qualify the basis requirement of non-arbitrariness (including rational discrimination basis) as similarly explained in the previous subsection.[170]

The effect of general exceptions on NT obligation in a general IIA context has been criticised by many scholars.[171] In their views, the exhaustive list of public objectives covered by the exceptions will narrow the scope of discriminatory measures that can be justified. In the cases where the tribunals only required 'a reasonable nexus to rational government policies'[172] or 'plausibl[e] connect[ion] with a legitimate goal of policy',[173] as observed by these scholars, such a scope is much greater. However, while not all tribunals held the same perception,[174] almost all NT provisions in Vietnam's IIAs already contain standard exceptions and will not depend on such an interpretative perception.[175] General exceptions under Vietnam's IIAs can still play a role in excluding the application of Formulation C NT provisions to a significant extent as provided above.

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[167] Titi (n 129) 183. Titi additionally provides that 'it is difficult to find examples of non-arbitrary and justifiable discrimination beyond these situations'.
[168] Ibid.
[169] See Chapter 6 Part III(A)(2)(c).
[170] See above Part V(A).
[171] Jürgen Kurtz, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex, and Vital Search for State Purpose' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law and Policy, 2013-2014* (Oxford University Press, 2015) 251, 270, 271–2; Newcombe, 'General Exceptions' (n 138) 365–6; Brew (n 122) 236–7.
[172] *Pope & Talbot v Government of Canada (Interim Award)* (UNCITRAL Arbitral Tribunal, 26 June 2000) [78] ('*Pope & Talbot v Canada*'). See also Chapter 6 Part II(D).
[173] *GAMI Investments, Inc v United Mexican States (Final Award)* (UNCITRAL Arbitral Tribunal, 15 November 2004) [114] ('*GAMI v Mexico*').
[174] The tribunal in *Myers v Canada* additionally required a necessary relationship between a ban on PCB exports and its objective to protect the environment claimed by Canada: see *SD Myers, Inc v Government of Canada (Partial Award)* (UNCITRAL Arbitral Tribunal, 13 November 2000) [255] ('*Myers v Canada*'); see also Chapter 6 Part II(D).
[175] See Chapter 6 Part I(A).

Table 8.7: Interactions between NT Provisions and Treaty Exception Provisions on Public Interests in Vietnam's IIAs

Treaty Context (12)	**Non-Discrimi--nation Obligation (Table 6.4)**	**Standard Exceptions (R) (Table 6.4)**		**Treaty Exceptions for Discriminatory Measures (R)**		**Treaty Context * (12)**
		Legitimate Objectives (Rational basis)	Other Qualifications	Legitimate Objectives (Rational basis)	Other Qualifi--cations	
2 IIAs	**None**			**Traditional General Exceptions or GATT/GATS-like General Exceptions** (Inapplicable Effect)		**2 IIAs**
Vietnam-Singapore BIT				(i)* Human Life or Health (ii)** Animal, Plant Life or Health	Rational Relation--ship	
Vietnam-Uzbekistan BIT				(i)[(a)]–(vi)[(a)] (vii)[(a)] Others	Rational Relation--ship	
7 IIAs	**NT Provisions with Sector/Matter-Based and/or Economic Safeguard-Based Exceptions (C)**			**Traditional General Exceptions or GATT/GATS-like General Exceptions** (Applicable Effects)		**7 IIAs; *RCEP***
Vietnam-Korea FTA	No Minor or Major Disadvan--tages	Certain Sectors, Matters				
				(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality	Necessary Relation--ship	

ASEAN-China IA	Same as above	Certain Sectors, Matters				
				(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality (v) National Treasures	Necessary Relation--ship	
				(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relation--ship	
Vietnam-Japan BIT(PPEIs)	Same as above	Certain Sectors, Matters				
		(i) BOP (ii) External Finance (iii) Macroeconomic Management	Necessary Relationship; Temporary Application; MFN	(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order	Necessary Relation--ship	
ASEAN-ANZ FTA(PPEIs)	Same as above	Certain Sectors, Matters				
		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality (v) National Treasures	Necessary Relation--ship	

ASEAN-Korea IA	Same as above	Certain Sectors, Matters				
		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality (v) National Treasures	Necessary Relation--ship	
				(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relation--ship	
ACIA(PPEIs)	Same as above	Certain Sectors, Matters				
		(i) BOP (ii) External Finance	Necessary Relationship; Temporary Application; MFN	(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality (v) National Treasures	Necessary Relation--ship	
				(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relation--ship	
ASEAN-Hong Kong IA	Same as above	Certain Sectors, Matters				
		(i) BOP (ii) External	Necessary Relationship;	(i) Human Life or Health	Necessary Relation-	

		Finance (iii) Macroeconomic Management	Temporary Application; MFN	(ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality (v) National Treasures	-ship	
				(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relation--ship	
3 IIAs	**NT Provisions with References to Domestic Laws and/or Development Policies (D)**			**GATT/GATS-like General Exceptions** (Inapplicable Effects)		**2 IIAs**
Vietnam-Slovakia BIT	No Minor or Major Disadvan--tages	Potential Rational Grounds	Potential Qualifications	(iii) Public Order	Necessary Relation--ship	
Vietnam-EAEU FTA	Same as above	Same as above	Same as above	(i) Human Life or Health (ii) Animal, Plant Life or Health (iii)*** Public Order (iv) Public Morality	Necessary Relation--ship	
				(v) National Treasures (vi) Exhaustive Natural Resources	Rational Relation--ship	
Vietnam-Turkey BIT	Same as above	Same as above	Same as above	(i) Human Life or Health (ii) Animal, Plant Life or Health (v) National Treasures	Rational Relation--ship	

				(vi) Exhaustive Natural Resources (vii) The Environment		

Notes:

[a)]: Public interests threatened by extreme emergency.

[*]: Limited to the protection of public health.

[**]: Limited to the prevention of diseases and pests in animals or plants.

[***]: Only limited to the preservation of fundamental interests of society.

[(PPEIs)]: Treaty having NT provision protecting pre- and post-established investments/investors.

(R): Measures being substantively reviewed by adjudicators if challenged.

Treaty Context*: Number of Vietnam's IIAs if the *Vietnam-EU IPA* and *RCEP* come into force.

CONCLUSION
SUBSTANTIVE QUALIFICATIONS FOR MEASURES FOR PUBLIC INTERESTS IN TREATY CONTEXTS

This chapter finds that legislative measures may be accepted to a certain extent, even if they fail to meet substantive requirements, imposed by investment protection provisions, and fall outside the scope of relevant standard exceptions as analysed in chapters from 3 to 6. First, legislative measures that reverse specific commitments previously granted to foreign investors can be consistent with Formulation A FET provisions when they meet qualifications for general exceptions in eight treaty contexts (Table 8.4). Second, legislative measures having severe effects on foreign investments may be considered non-expropriation under undefined expropriation provisions (Formulation A) if satisfying general exceptions in seven contexts (Table 8.5). Severe legislative measures that reverse specific commitments previously granted to foreign investors (or break reasonable investment-backed expectations), and/or lack measure–objective proportionality can also be permitted as non-expropriation under defined expropriation provisions (Formulation B) in five treaty contexts, provided that they meet qualifications imposed by relevant GATT/GATS-like general exceptions (Table 8.5). Third, legislative measures with restrictive effects on investment-related transfers may be compatible with FTT provisions (Formulation C/D) in ten treaty contexts if they fall within the scope of relevant general exceptions (Table 8.6). Finally, legislative measures that have discriminatory effects on foreign investments/investors but qualify general exceptions can be consistent with Formulation C NT provisions in seven treaty contexts (Table 8.7).

Chapter 9
THESIS CONCLUSION AND IMPLICATIONS

I THESIS FINDINGS

A *The Overall Statement: Various Substantive Compatibility Thresholds for Legislative Measures under Vietnam's IIAs*

This thesis sets out an investigation into the extent to which contemporary IIAs require Vietnam's legislative measures be compatible with their substantive aspects. It finds that there is no simple or even singular answer to that question. First, Vietnam's IIAs currently formulate various thresholds of different substantive requirements and qualifications for legislative measures to be compatible with individual investment treaty obligations – fair and equitable treatment (FET), non-expropriation, free transfer treatment (FTT) and national treatment (NT) (Part I(B)). This means that to comply with one obligation in the Vietnam's IIA context, legislative measures undertaken by Vietnam's authorities must in theory meet all thresholds. Second, Vietnam's IIAs also impose various thresholds for legislative measures to be substantively consistent with each individual treaty line – Vietnam's IIAs having 'AAx', 'AAxy', 'ABCy', 'BAxC', or 'BBCC' formula (Part I(C)). This in turn means that legislative measures might be compatible with one treaty line but might not be so with others. In other words, constraints on Vietnam's legislative measures are complex, nuanced and various.

B *As to Individual Investment Protection Obligation*

1 *Fair and Equitable Treatment Obligation*

FET provisions found in 59 out of Vietnam's 60 IIAs and their relevant treaty exception provisions impose different substantive requirements and qualifications on legislative measures. As analysed in Chapter 3, FET provisions without/with limitation to customary international law (CIL) (Formulation A/B) are possibly interpreted to require legislative measures to be in good faith (bona fide) (1), not arbitrary (2), and any discrimination to be rational/reasonable (3) (Table 3.2). These requirements have been well recognised as minimum standard of treatment (MST) under CIL and have become the basis requirements for any legitimate measures. In addition, Formulation A FET provisions potentially require legislative measures not to reverse specific commitments previously granted to foreign investments, or where they do cause such reversal reflect a proportionate balancing of interests (4) (Table 3.2). Legislative measures having reverse effects can be excluded from the scope of Formulation A FET provisions if they qualify for treaty exceptions as discussed in Chapters 7 and 8 (Tables 7.4 and 8.4).

Notably, substantive qualifications for exceptional measures are those related to permissible objectives and relationships between these measures and objectives pursued. Such permissible objectives cover security interests (SIs) including essential security interests (ESIs) (a), and public interests (PIs) (b). These SIs refer to (i) ESIs threatened by certain military/non-military sources – limited ESIs, (ii) ESIs threatened by any military/non-military sources – unlimited ESIs, and (iii) SIs threatened by extreme emergencies – limited SIs. The PIs here refer to the protection of (i) human life or health, (ii) animal or plant life or health, (iii) public order, (iv) public morality, (v) national treasures, and/or (vi) exhaustible natural resources. The measure-objective relationships include 'necessary' and 'rational' ones. However, only the 'necessary' relationship (N) is presented here as an additional qualification. The rational relationship is not mentioned because it is in any event required for legitimate measures, which is analysed in Chapters 7 and 8. Similarly, the application conditions imposed by GATT/GATs-style general exceptions – non-disguised restriction and non-arbitrary or reasonable discrimination – are not presented as being additional since they are fulfilled by the basic requirements of good faith and rational/reasonable discrimination as discussed in Chapter 8. It should be

noted that ESIs/SIs- and PIs-related measures in certain treaty contexts can be substantively reviewed by adjudicators (R) if being challenged by foreign investors or their home state; this effect is brought about by exception provisions without self-judging language.

Given their different substantive requirements and qualifications, FET provisions and relevant treaty exceptions in the 59 IIAs establish five main thresholds for legislative measures (Table 9.1). At the strictest level, legislative measures must follow the four requirements as mentioned earlier without any justification in 44 treaty contexts (Threshold I). Measures contrary to the fourth – having reverse effects on granted specific commitments – can be permitted when they are necessary for the protection of limited ESIs under the *Vietnam-Czech BIT* (Threshold II), or rational/necessary to safeguard limited/unlimited ESIs and/or limited PIs in other seven contexts – Vietnam's five IIAs with Slovakia, Singapore, Japan, EAEU and Turkey, the *ACIA* and *ASEAN-China IA* (Thresholds III.A–F). Such measures can also be acceptable under the *Vietnam-Uzbekistan BIT* to pursue unlimited ESIs and/or limited SIs/PIs (Threshold IV). At the least strict level, legislative measures must qualify the first three requirements as mentioned earlier – good faith, non-arbitrariness (rational level) and rational/reasonable discrimination – in the remaining six contexts – Vietnam's BTA/FTA with US and Korea, ASEAN's three IIAs with Korea, ANZ and Hong Kong and the *CPTPP* (Threshold V).

Notably, the *Vietnam-Iceland BIT* is the only treaty that does not contain a FET provision. However, legislative measures still need to follow the mentioned basic requirements under CIL, which is not different from the last threshold.

2 *Non-Expropriation*

Expropriation provisions and relevant treaty exception provisions in all Vietnam's 60 IIAs also generate various substantive requirements and qualifications to legislative measures. As analysed in Chapter 4, undefined expropriation provisions (Formulation A) are possibly interpreted to suggest that legislative measures must not cause severe effects on foreign investments (5) (Table 4.3). Severe measures can be considered non-expropriation if satisfying treaty exceptions discussed in Chapters 7 and 8 (Tables 7.5 and 8.5). On the other hand, defined expropriation provisions (Formulation B) require

that legislative measures must not affect foreign investments severely without respecting state's prior written commitments (or distinct, reasonable investment-back expectations), and having proportionate relationships with public objectives pursued (5*) (Table 4.3). Legislative measures having severe and reverse effects and a disproportionate character can be accepted to some extent under certain treaties as discussed in Chapters 7 and 8 (Tables 7.5 and 8.5). Substantive qualifications for exceptional measures for SIs and PIs are similar to those previously mentioned in the context of FET.

There are six main thresholds for legislative measures that are considered non-expropriation according to expropriation provisions and relevant treaty exception provisions in the 60 IIAs (Tables 9.2 and 9.3). First, legislative measures must not cause severe effects on foreign investments in any case in 45 treaty contexts (Table 9.2 Threshold I). Severe measures can be accepted as non-expropriation if they are necessary to safeguard limited/unlimited ESIs under the *Vietnam-Czech BIT* and *Vietnam-US BTA* (Table 9.2 Threshold II.A–B), or rational/necessary to protect limited/unlimited ESIs and/or limited PIs in another six contexts – Vietnam's three BITs with Slovakia, Singapore, Japan and Turkey, and ASEAN's two IIAs with Korea and China (Table 9.2 Thresholds III.A–F). In addition to unlimited ESIs, severe measures under the *Vietnam-Uzbekistan BIT* may be permitted to pursue limited SIs/PIs (Table 9.2 Threshold IV). At the second least and the least strict levels, legislative measures must not have reverse effects and a disproportionate feature where they impact foreign investments severely, except for certain cases in which these measures necessarily protect unlimited ESIs under the *CPTPP* (Table 9.3 Threshold V), or rationally/necessarily safeguard limited/unlimited ESIs and/or limited PIs in the remaining five contexts – Vietnam's two FTAs with Korea and EAEU, ASEAN's two IAs with ANZ and Hong Kong and the *ACIA* (Table 9.3 Thresholds VI.A–D).

FTT provisions (Formulations A, B, C and D) in all Vietnam's 60 IIAs protecting either non-exhaustive transfers (NETs) or exhaustive transfers (ETs), as analysed in Chapter 5, are possibly interpreted as requiring legislative measures not to restrict investment-related transfers, regarding transfer time, currency convertibility and official/market exchange rate (6) (Tables 5.7). Restrictive measures can be compatible with FTT obligation in certain treaty contexts, which is brought about by standard exceptions discussed in Chapter 5 (Tables 5.7) and/or by treaty exceptions discussed in Chapters 7 and 8 (Tables 7.6 and 8.6). These qualifications for exceptional measures are similar to those previously mentioned in the context of FET, except the following features. First, the objectives to protect PIs (b) in this regard only refer to (iii) the maintenance of public order, rather than the protection of human, animal or plant life or health, public morality, national treasures and exhaustible natural resources as discussed in Chapter 8. That is because exchange restrictions and capital controls would hardly be justified by the latter objectives. Second, in addition to SIs and PIs, economic safeguards (EcSs) (c) are also permitted as grounds for exceptional restrictions/controls. They are related to (i) balance-of-payments (BOP), (ii) external financial stability or (iii) macroeconomic management, (iv) economic or financial disturbance, and (v) others potential. And, last, substantive qualifications for EcSs-related measures also include 'temporary' application – T, most-favoured-nation – MFN, and national treatment – NT, in addition to rational/necessary relationships between those measures and EcSs pursued.

There are five main thresholds for legislative measures compatible with the FTT obligation; these are generated from FTT provisions, including standard exceptions, and relevant treaty exception provisions in the 60 IIAs (Table 9.4). Legislative measures must not restrict investment-related transfers, regarding the three aspects as above mentioned, with no justification in 22 treaties (Threshold I). Restrictive measures can comply with FTT provisions if they rationally/necessarily safeguard limited/unlimited ESIs in the Vietnam's three BITs with Czech, Turkey and Singapore (Thresholds II.A), or rationally aim at limited EcSs in the Vietnam's five BITs with Greece, Cuba, Denmark, Phillipines and Romania (Thresholds II.B). Restrictive measures that are rational/necessary to protect unlimited ESIs and/or limited EcSs can enjoy a similar effect under the *Vietnam-US BTA* and the *CPTPP* (Thresholds III.A-B). At the second least and least strict levels, restrictive

measures can be consistent with FTT obligation when they are necessary to pursue limited/unlimited ESIs, PIs (public order) and/or limited EcSs in nine treaty contexts – Vietnam's four IIAs with Slovakia, Japan, EAEU and Korea, ASEAN's four IIAs with ANZ, China, Korea and Hong Kong, and the *ACIA* (Thresholds IV.A–D) – or safeguard any public interests, including those mentioned, in the remaining of 19 treaties (Threshold V). Whether EcSs-related measures are required to be consistent with MFN, or both MFN and NT, depends on individual type(s) of safeguards in relevant treaty context(s).

4 *National Treatment Obligation*

NT provisions (Formulations A, B, C and D) are found in 33 out of Vietnam's 60 IIAs to protect pre-and/or post-established investments (PPEIs or PEIs). As analysed in Chapter 6, these provisions possibly require legislative measures not to cause minor or major disadvantages to foreign investments/investors (3 plus) (Table 6.4). Given this, NT provisions do impose a limitation on the third basis requirement for legislative measures – rational/reasonable discrimination – to the extent that reasonable discrimination, if based on nationality, are not always treated as legitimate. It rather needs to meet certain requirements provided by standard exceptions as analysed in Chapter 6 (Tables 6.4) and/or by treaty exceptions as analysed in Chapters 7 and 8 (Tables 7.7 and 8.7).

Given different substantive requirements and qualifications, NT provisions and relevant treaty exception provisions in the 33 IIAs form five main compatibility thresholds for legislative measures (Table 9.5). At the strictest level, legislative measures under the *Vietnam-France BIT* must not cause discrimination, even if reasonable, to foreign investments/investors (Threshold I). Discriminatory measures under the *Vietnam-Germany BIT* and *Vietnam-Czech BIT* must be based reasonably on limited PIs and necessarily on limited ESIs respectively (Threshold II.A–B); and, those in Vietnam's four BITs with Iceland, Korea, Oman and the UK must be adopted to regulate certain exceptional sectors/matters covered by their NT provisions (Threshold II.A–C). Under the *Vietnam-US BTA* and the *CPTPP*, discriminatory measures governing uncovered sectors/matters must be necessary to pursue unlimited ESIs (Threshold III). Such measures also need to be necessary for the protection of limited ESIs/PIs under the *Vietnam-Korea FTA* (Threshold IV.A), or reasonable/necessary to safeguard limited/unlimited ESIs/PIs and/or limited EcSs in the *Vietnam-Japan BIT*, the *ACIA* and

ASEAN's three IIAs with ANZ, Korea and Hong Kong (Threshold IV.B–C). In the remaining 18 treaties, including the *Vietnam-EAEU FTA* and *ASEAN-China IA*, discriminatory measures could be accepted on any rational grounds (Threshold V). This last threshold does not create any additional requirement for reasonable nationality-based discrimiation so legislative measures only have to fulfill the third basic requirement for legislative measures (rational/reasonable discrimination).

5 *Concluding Point*

As analysed in chapters from 3 to 8, investment protection provisions and treaty exception provisions with different formulations in Vietnam's IIA are possibly interpreted to impose various substantive requirements and qualifications on legislative measures. Those requirements and qualifications, as above synthesised, have generated numerous main compatibility thresholds for legislative measures: separate three groups of five main thresholds compatible with FET (Table 9.1), FTT (Table 9.4) and NT (Table 9.5), and six main thresholds consistent with non-expropriation (Tables 9.2 and 9.3).

Table 9.1: Substantive Requirements and Qualifications for Legislative Measures to Be Compatible with FET Obligation in Vietnam's IIAs – Five Main Compatibility Thresholds

Main Thresholds (I-V)	**Substantive Requirements and Qualifications for Legislative Measures to Be Compatible with Fair and Equitable Treatment** (1), (2), (3), (4)											**Treaty Contexts (59)**
	(1) In Good faith (bona fide)	(2) Non-Arbitrariness (Rational Level)	(3) Rational, Reasonable Discrimination	(4) No Reverse Effects on State's Granted Specific Commitments (Independent Requirement) with Exceptions								
				(4A) No Reverse Effects without Proportionality	(4B) Reverse Effects and Disproportionality But for the Protection of							
					(a) Security Interests (SIs)		(b) Public Interests (PIs)					
					(i) Limited ESIs	(ii) Unlimited ESIs	(i) Human Life or Health	(ii) Plant, Animal Life or Health	(iii) Public Order	(iv) Public Morality	(v) National Treasures	(vi) Exhaustible Natural Resources

I	x	x	x	x									44 BITs[1]
II	x	x	x	x	x[(b)]								*Vietnam-Czech BIT* (1997)
III.A	x	x	x	x	x[(b)] N				x N (R)				*Vietnam-Slovakia BIT* (2009)
III.B	x	x	x	x		x (R)	x[*] (R)	x[**] (R)					*Vietnam-Singapore BIT* (1992)
III.C	x	x	x	x	x[(c)]		x N (R)	x N (R)	x[***] N (R)				*Vietnam-Japan BIT* (2003)

[1] They include Vietnam's 26 BITs with non-EU members: see *Vietnam-Thailand BIT* (1991); *Vietnam-Armenia BIT* (1992); *Vietnam-Belarus BIT* (1992); *Vietnam-China BIT* (1992); *Vietnam-Malaysia BIT* (1992); *Vietnam-Philippines BIT* (1992); *Vietnam-Switzerland BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Russia BIT* (1994); *Vietnam-Ukraine BIT* (1994); *Vietnam-Argentina BIT* (1996); *Vietnam-Egypt BIT* (1997); *Vietnam-Laos BIT* (1996); *Vietnam-Mongolia BIT* (2000); *Vietnam-Cambodia BIT* (2001, amended 2012); *Vietnam-UK BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-Cuba BIT (2007)*; *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT* (2007); *Vietnam-Venezuela BIT* (2008); *Vietnam-Kazakhstan BIT* (2009); *Vietnam-Iran BIT* (2009); *Vietnam-Uruguay BIT* (2009); *Vietnam-Oman BIT* (2011); *Vietnam-Macedonia BIT* (2014). They also include Vietnam's 18 BITs with EU members: *Vietnam-Italy BIT* (1990); *Vietnam-BLEU BIT* (1991); *Vietnam-France BIT* (1992); *Vietnam-Denmark BIT* (1993); *Vietnam-Germany BIT* (1993); *Vietnam-Sweden BIT* (1993); *Vietnam-Hungary BIT* (1994); *Vietnam-Netherlands BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Romania BIT* (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Latvia BIT* (1995); *Vietnam-Lithuania BIT* (1995); *Vietnam-Bulgaria BIT* (1996); *Vietnam-Estonia BIT* (2000); *Vietnam-Spain BIT* (2006); *Vietnam-Finland BIT* (2008); *Vietnam-Greece BIT* (2008).

III.D	x	x	x	x	x[(b)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x (R)	x (R)	*Vietnam-EAEU FTA* (2015)
III.E	x	x	x	x	x[(d)] N		x (R)	x (R)			x (R)	x (R) (vii) Environment (R)	*Vietnam-Turkey BIT*
III.F	x	x	x	x		x N	x N (R)	x N (R)	x[***] N (R)	x N (R)	x (R)	x (R)	*ACIA* (2009); *ASEAN-China IA* (2009)
IV	x	x	x	x		x (R) (iii) Limited SIs[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R) (ix)[(a)] Others (R)	*Vietnam-Uzbekistan BIT* (1996)

V	x	x	x										6 IIAs[2]
	x’	x’	x’										*Vietnam-Iceland BIT* (2002)*

Notes:

(a): Security/Public interests threatened by extreme emergency.

(b): Security interests threatened by certain military sources, and emergency in international relations.

(c): Security interests threatened by certain military sources, and emergency in international and domestic relations.

(d): Security interests threatened by certain military sources, and emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

*: Limited to the protection of public health.

**: Limited to the prevention of diseases and pests in animals or plants.

***: Limited to the preservation of fundamental interests of society.

x’: Substantive requirement as imposed by MST under CIL.

Vietnam-Iceland BIT (2002)*: Treaty does not have a FET provision.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

[2] *Vietnam-US BTA* (2000); *Vietnam-Korea FTA* (2015); *ASEAN-Korea IA* (2009); *ASEAN-ANZ FTA* (2009); *ASEAN-Hong Kong IA* (2017); *CPTPP* (2018).

Table 9.2: Substantive Requirements and Qualifications for Legislative Measures to Be Non-Expropriation in Vietnam's IIAs – Six Main Compatibility Thresholds (I-IV)

Main Thresholds (I-VI)	Substantive Requirements and Qualifications for Legislative Measures to Be Non-Expropriation (5)									Treaty Contexts (54)
	(A) No Severe Effects on Foreign Investments	(B) Severe Effects But for the Protection of								
		(a) Security Interests (SIs)		(b) Public Interests (PIs)						
		(i) Limited ESIs	(ii) Unlimited ESIs	(i) Human Life or Health	(ii) Plant, Animal Life or Health	(iii) Public Order	(iv) Public Morality	(v) National Treasures	(vi) Exhaustible Natural Resources	
I	x									45 BITs[3]

[3] They include Vietnam's 27 BITs with non-EU members: *Vietnam-Thailand BIT* (1991); *Vietnam-Malaysia BIT* (1992); *Vietnam-Philippines BIT* (1992); *Vietnam-Switzerland BIT* (1992); *Vietnam-Belarus BIT* (1992); *Vietnam-China BIT* (1992); *Vietnam-Armenia BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Russia BIT* (1994); *Vietnam-Ukraine BIT* (1994); *Vietnam-Argentina BIT* (1996); *Vietnam-Egypt BIT* (1997); *Vietnam-Laos BIT* (1996); *Vietnam-Mongolia BIT* (2000); *Vietnam-Cambodia BIT* (2001, amended in 2012); *Vietnam-Iceland BIT* (2002); *Vietnam-UK BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-Cuba BIT* (2007); *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT*(MEx) (2007); *Vietnam-Venezuela BIT* (2008); *Vietnam-Iran BIT* (2009); *Vietnam-Kazakhstan BIT*(MEx) (2009); *Vietnam-Uruguay BIT* (2009); *Vietnam-Oman BIT*(MEx) (2011); *Vietnam-Macedonia BIT*(MEx) (2014). They also include Vietnam's 18 BITs with EU members*: Vietnam-Italy BIT* (1990); *Vietnam-BLEU BIT* (1991); *Vietnam-France BIT* (1992); *Vietnam-Denmark BIT* (1993); *Vietnam-Germany BIT* (1993); *Vietnam-Sweden BIT* (1993); *Vietnam-Hungary BIT* (1994); *Vietnam-Netherlands BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Romania BI*T (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Latvia BIT* (1995); *Vietnam-Lithuania BIT* (1995); *Vietnam-Bulgaria BIT* (1996); *Vietnam-Estonia BIT* (2000); *Vietnam-Spain BIT* (2006); *Vietnam-Finland BIT* (2008); *Vietnam-Greece BIT*(MEx) (2008).

II.A	x	x[(b)] N								*Vietnam-Czech BIT* (1997)
II.B	x		x N							*Vietnam-US BTA* (2000)
III.A	x	x[(b)] N				x N (R)				*Vietnam-Slovakia BIT*[(MEx)] (2009)
III.B	x		x (R)	x[*] (R)	x[**] (R)					*Vietnam-Singapore BIT* (1992)
III.C	x	x[(c)] N		x N (R)	x N (R)	x[***] N (R)				*Vietnam-Japan BIT* (2003)
III.D	x	x[(e)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x (R)	x (R)	*ASEAN-Korea IA*[(MEx)] (2009)
III.E	x	x[(d)] N		x (R)	x (R)			x (R)	x (R) (vii) Environment (R)	*Vietnam-Turkey BIT* (1994)

III.F	x		x N	x N (R)	x N (R)	x[***] N (R)	x N (R)	x (R)	x (R)	*ASEAN-China IA*[(MEx)] (2009)
IV	x		x (R) (iii) Limited SIs[(a)]; (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	x[(a)] (R)	*Vietnam-Uzbekistan BIT* (1996)

Notes:

[(a)]: Security/Public interests threatened by extreme emergency.

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[(c)]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[(d)]: Security interests threatened by certain military sources, and emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(e)]: Security interests threatened by certain military sources, and emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[*]: Limited to the protection of public health.

[**]: Limited to the prevention of diseases and pests in animals or plants.

[***]: Limited to the preservation of fundamental interests of society.

[(MEx)]: Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

Table 9.3: Substantive Requirements and Qualifications for Legislative Measures to Be Non-Expropriation in Vietnam's IIAs – Six Main Compatibility Thresholds (V-VI)

Main Thresholds (I-VI)	**Substantive Requirements and Qualifications for Legislative Measures to Be Non-Expropriation (5*)**									**Treaty Contexts (06)**
	(A*) No Severe Effects on Foreign Investments without Respect for Granted Specific Commitments (or Distinct, Reasonable Investment-Backed Expectations) and Proportionality	(B*) Severe Effects, Reverse Effects and Disproportionality But for the Protection of								
		(a) Security Interests (SIs)		(b) Public Interests (PIs)						
		(i) Limited ESIs	(ii) Unlimited ESIs	(i) Human Life or Health	(ii) Plant, Animal Life or Health	(iii) Public Order	(iv) Public Morality	(v) National Treasures	(vi) Exhaustible Natural Resources	
V	x		x N							*CPTPP*(MEx) (2018)
VI.A	x	x(e) N		x N (R)	x N (R)	x*** N (R)	x N (R)			*Vietnam-Korea FTA*(MEx) (2015)

VI.B	x	x[(e)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x N (R)		*ASEAN-ANZ FTA*[(MEx)] (2009)
VI.C	x	x[(e)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x	x	*ASEAN-Hong Kong IA*[(MEx)] (2017)
VI.D	x	x[(b)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x	x	*Vietnam-EAEU FTA*[(MEx)] (2015)
VI.E	x		x N	x N (R)	x N (R)	x[***] N (R)	x N (R)	x	x	*ACIA*[(MEx)] (2009)

Notes:

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[(e)]: Security interests threatened by certain military sources, and emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[***]: Limited to the preservation of fundamental interests of society.

[(MEx)]: Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

Table 9.4: Substantive Requirements and Qualifications for Legislative Measures to Be Compatible with FTT Obligation in Vietnam's IIAs – Five Main Compatibility Thresholds

Main Thresholds (I-V)	**Substantive Requirements and Qualifications for Legislative Measures to Be Compatible with Free Transfer Treatment** (6)									**Treaty Contexts (60)**
	(A) No Restrictive Effects on Reasonable Transfer Time, Currency Convertibility, Exchange Rate	(B) Restrictive Effects But for the Protection of								
		(a) Security Interests (SIs)		(b) Public Interests (PIs)	(c) Economic Safeguards (EcSs)				(d) Others	
		(i) Limited ESIs	(ii) Unlimited ESIs	(iii) Public Order	(i) BOP	(ii) External Finance	(iii) Macroeconomic Management	(iv) Economic, Financial Disturbance		
I	x									15 BITs[4(NETs)]

[4] They include Vietnam's seven BITs with non-EU members: *Vietnam-Switzerland BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Iceland BIT* (2002); *Vietnam-UK BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT* (2007). They also include Vietnam's eight BITs with EU members: *Vietnam-BLEU BIT* (1991); *Vietnam-Germany BIT* (1993); *Vietnam-Hungary BIT* (1994); *Vietnam-Netherlands BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Spain BIT* (2006); *Vietnam-Finland BIT* (2008).

	x									7 BITs[5]
II.A.1	x	x[(b)] N								*Vietnam-Czech BIT*[(NETs)] (1997)
II.A.2	x	x[(d)] N								*Vietam-Turkey BIT*
II.A.3	x		x (R)							*Vietnam-Singapore BIT*[(NETs)] (1992)
II.B.1	x				x T (R)					*Vietnam-Greece BIT*[(NETs)] (2008); *Vietnam-Cuba BIT*[(NETs)] (2007)

[5] They include Vietnam's three BITs with non-EU members: *Vietnam-Thailand BIT* (1991); *Vietnam-Armenia BIT* (1992); *Vietnam-Russia BIT* (1994). They also include Vietnam's four BITs with EU members: *Vietnam-Italy BIT* (1990); *Vietnam-France BIT* (1992); *Vietnam-Sweden BIT* (1993); *Vietnam-Bulgaria BIT* (1996).

II.B.2	x				x N; T MFN (R)	x N; T MFN (R)				*Vietnam-Denmark BIT* (1993)
II.B.3					x N (R)	x N (R)	x[****] N (R)			*Vietnam-Philippines BIT* (1992)
II.B.4					x[(**)] (R)	x[(**)] (R)	x[(**)] (R)	x[(**)] (R)	x[(**)] (R)	*Vietnam-Romania BIT* (1994)
III.A	x		x N		x T (R)					*Vietnam-US BTA*[(NETs)] (2000)
III.B	x		x N		x[(*)] N; T MFN; NT (R)	x[(*)] N; T MFN; NT (R)	x[(*)] N; T MFN; NT (R)			*CPTPP*[(NETs)] (2018)
IV.A	x	x[(b)] N		x T (R)	x T (R)		x T (R)			*Vietnam-Slovakia BIT*[(NETs)] (2009)

IV.B.1	x	x[(b)] N		x[***] N (R)	x N; T MFN (R)	x N; T MFN (R)				*Vietnam-EAEU FTA*[(NETs)] (2015)
IV.B.2	x	x[(e)] N		x[***] N (R)	x N; T MFN (R)	x N; T MFN (R)				*ASEAN-ANZ FTA*[(NETs)] (2009)
IV.B.3	x	x[(c)] N		x[***] N (R)	x N; T MFN (R)	x N; T MFN (R)	x N; T MFN (R)			*Vietnam-Japan BIT*[(NETs)] (2002)
IV.B.4	x	x[(e)] N		x[***] N (R)	x N; T MFN (R)	x N; T MFN (R)	x N, T MFN (R)			*ASEAN-Hong Kong IA*[(NETs)] (2017)
IV.C.1	x	x[(e)] N		x[***] N (R)	x N; T MFN; NT (R)	x N; T MFN; NT (R)	x N, T MFN, NT (R)	x N; T MFN; NT (R)		*Vietnam-Korea FTA*[(NETs)] (2015)

IV.C.2	x	x[(e)] N		x[***] N (R)	x N; T MFN (R)	x N; T MFN (R)	x N; T MFN, NT (R)	x N; T MFN; NT (R)		*ASEAN-Korea IA*[(NETs)] (2009)
IV.D.1	x		x N	x[***] N (R)	x N; T MFN; NT (R)	x N; T MFN; NT (R)		x N; T MFN; NT (R)		*ASEAN-China IA*[(NETs)] (2009)
IV.D.2	x		x N	x[***] N (R)	x N; T MFN (R)	x N; T MFN (R)		x N; T MFN; NT (R)		*ACIA*[(NETs)] (2009)
V	x		x (R)	x (R)	x (R)	x (R)	x (R)	x (R)	x (R)	13 BITs[6(NETs)] 6 BITs[7]

[6] They include Vietnam's 12 BITs with non-EU members: *Vietnam-Belarus BIT* (1992); *Vietnam-China BIT* (1992); *Vietnam-Ukraine BIT* (1994); *Vietnam-Uzbekistan BIT* (1996); *Vietnam-Argentina BIT* (1996); *Vietnam-Egypt BIT* (1997); *Vietnam-Cambodia BIT* (2001, amended 2012); *Vietnam-Venezuela BIT* (2008); *Vietnam-Kazakhstan BIT* (2009); *Vietnam-Uruguay BIT* (2009); *Vietnam-Oman BIT* (2011); *Vietnam-Macedonia BIT* (2014). They also include one BIT with an EU member: *Vietnam-Estonia BIT* (2009).

[7] They include Vietnam's four BITs with non-EU members: *Vietnam-Malaysia BIT* (1992); *Vietnam-Laos BIT* (1996); *Vietnam-Mongolia BIT* (2000); *Vietnam-Iran BIT* (2009). They also include Vietnam's two BITs with EU members: *Vietnam-Latvia BIT* (1995); *Vietnam-Lithuania BIT* (1995).

Notes:

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[(c)]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[(d)]: Security interests threatened by certain military sources, and emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(e)]: Security interests threatened by certain military sources, and emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[***]: Limited to the preservation of fundamental interests of society.

[****]: Limited to the integrity and independence of its currency.

[(*)]: Exceptions shall not apply to payments or transfers relating to foreign direct investment.

[(**)]: Exceptions only include exchange restrictions.

[(NETs)]: Treaty protecting non-exhausive transfers related to investments.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

Table 9.5: Substantive Requirements and Qualifications for Legislative Measures to Be Compatible with NT Obligation in Vietnam's IIAs – Five Main Compatibility Thresholds

Main Thresholds (I-V)	**Substantive Requirements and Qualifications for Legislative Measures to Be Compatible with National Treatment** (3 plus)										**Treaty Contexts (33)**
	(A) No Minor, Major Disadvantages to Foreign Investments/ Investors	(B) Reasonable Nationality-based Discrimination for the Protection of								(c) Economic Safeguards (EcSs)*	(d) Sectors, Matters	
		(a) Security Interests (SIs)		(b) Public Interests (PIs)								
		(i) Limited ESIs	(ii) Unlimited ESIs	(i) Human Life or Health	(ii) Plant, Animal Life or Health	(iii) Public Order	(iv) Public Morality	(v) National Treasures	(vi) Exhaustible Natural Resources			
I	x											*Vietnam-France BIT* (1992)

II.A	x	x[(b)] N										*Vietnam-Czech BIT* (1997)
II.B	x			x* (R)		x (R)			(viii) Public Safety; Custom and Traditions			*Vietnam-Germany BIT* (1993)
II.C	x										x	*Vietnam-Oman BIT* [(PPEIs)]; and 3 BITs[8]
III	x		x N								x	*Vietnam-US BTA*[(PPEIs)] (2000)
	x		x N								x	*CPTPP*[(PPEIs)] (2018)

[8] They include Vietnam's three BITs with non-EU members: *Vietnam-Iceland BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-UK BIT* (2002).

IV.A	x	x[(e)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)				x	*Vietnam-Korea FTA* (2015)
IV.B.1	x	x[(c)] N		x N (R)	x N (R)	x[***] N (R)				x (i); (ii) (iii) N; T MFN (R)	x	*Vietnam-Japan BIT*[((PPEIs)] (2002)
IV.B.2	x	x[(e)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x N (R)		x (i); (ii) N; T MFN (R)	x	*ASEAN-ANZ FTA*[(PPEIs)] (2009)
IV.B.3	x	x[(e)] N		x N (R)	x N (R)	x[***] N (R)	x N (R)	x (R)	x (R)	x (i); (ii) N; T MFN (R)	x	*ASEAN-Korea IA*[(PPEIs)] (2009)
IV.B.4	x	x[(e)] N		x N	x N	x[***] N	x N	x (R)	x (R)	x (i); (ii)	x	*ASEAN-Hong Kong*

				(R)	(R)	(R)	(R)			(iii) N; T; MFN; (R)		*IA* (2017)
IV.C	x		x N	x N (R)	x N (R)	x*** N (R)	x N (R)	x (R)	x (R)	x (i); (ii) N; T MFN; (R)	x	*ACIA*(PPEIs) (2009)
V	x		x (R)	x (R)	x (R)	x (R)	x (R)	x (R)	x (R)	x (R)	x (R) (e) Others	4 BITs9(PPEIs); and 14 IIAs10
												27 BITs*11

[9] They include Vietnam's two BITs with non-EU members: *Vietnam-Kuwait BIT* (2007); *Vietnam-Turkey BIT* (2014). They also include Vietnam's two BITs with EU members: *Vietnam-Finland BIT* (2008); *Vietnam-Estonia BIT* (2009).

[10] They include Vietnam's eight IIAs with non-EU members: *Vietnam-Armenia BIT* (1992); *Vietnam-Switzerland BIT* (1992); *Vietnam-Russia BIT* (1994); *Vietnam-Cuba BIT* 2007); *Vietnam-Mozambique BIT* (2007); *Vietnam-Iran BIT* (2009); *ASEAN-China IA* (2009); *Vietnam–EAEU FTA* (2015). They also include Vietnam's six BITs with EU members: *Vietnam-Denmark BIT* (1993); *Vietnam-Netherlands BIT* (1994); *Vietnam-Bulgaria BIT* (1996); *Vietnam-Spain BIT* (2006); *Vietnam-Greece BIT* (2008); *Vietnam-Slovakia BIT* (2009).

[11] They include Vietnam's 18 BITs with non-EU membes: *Vietnam-Thailand BIT* (1991); *Vietnam-China BIT* (1992); *Vietnam-Belarus BIT* (1992); *Vietnam-Malaysia BIT* (1992); *Vietnam-Philippines BIT* (1992); *Vietnam-Singapore BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Ukraine BIT* (1994); *Vietnam-Argentina BIT* (1996); *Vietnam-Laos BIT* (1996); *Vietnam-Uzbekistan BIT* (1996); *Vietnam-Egypt BIT* (1997); *Vietnam-Mongolia BIT* (2000); *Vietnam-Cambodia BIT* (2001, amended 2012); *Vietnam-Venezuela BIT* (2008); *Vietnam-Kazakhstan BIT* (2009); *Vietnam-Uruguay BIT* (2009); *Vietnam-Macedonia BIT* (2014). They also include Vietnam's nine BITs with EU members: *Vietnam-Italy BIT* (1990); *Vietnam-BLEU BIT* (1991); *Vietnam-Sweden BIT* (1993); *Vietnam-Hungary BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Romania BIT* (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Latvia BIT* (1995); *Vietnam-Lithuania BIT* (1995).

Notes:

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[(c)]: Security interests threatened by certain military sources, and emergency in international and domestic relations.

[(d)]: Security interests threatened by certain military sources, and emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

[(e)]: Security interests threatened by certain military sources, and emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[*]: Limited to the protection of public health.

[**]: Limited to the prevention of diseases and pests in animals or plants.

[***]: Limited to the preservation of fundamental interests of society.

(EcSs)*: Economic safeguard-based exceptions are viewed with reference to Table 9.4.

[(PPEIs)]: Treaty having NT provision protecting pre- and post-established investments/investors.

27 BITs*: Treaties do not have NT provisions.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

T: Temporary Application.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

C *As to Individual Treaty Line*

1 *IIAs with 'AAx' Formula*

As identified in chapters from 3 to 6, 27 out of Vietnam's 60 IIAs do not articulate provisions on NT but contain provisions on FET, expropriation and FTT which respectively have A, A and x (A/B/C/D) formulations – 'AAx' formula. The letter 'x' here refers to the relevant FTT provision formulation in individual treaty context.

To comply with Vietnam's IIAs having 'AAx' formula, legislative measures must, first and foremost, be in good faith (bona fide) (1), not be arbitrary (2) and involve rational/reasonable discrimination (3) (Table 9.6). They must also not reverse specific commitments previously granted to foreign investors or where they do cause such a reversal, the reverse effect must be balanced with benefits for the public achieved (4). Furthermore, legislative measures must not have severe effects on foreign investments (5) and restrictive effects on investment-related transfers (6) (Table 9.6). These requirements are synthesised from the findings of all analyses set out in chapters from 3 to 8. Measures having such those effects could be accepted in certain cases if meeting substantive qualifications for exceptions.

There are five main compatibility thresholds for legislative measures imposed by Vietnam's IIAs having 'AAx' formula (Table 9.6). Legislative measures must meet all substantive requirements, as mentioned above, without any justification in nine treaty contexts (Threshold I-AAA). Restrictive measures can be permitted when they are necessary or reasonable to pursue limited EcSs under the *Vietnam-Philippines BIT* or *Vietnam-Romania BIT* respectively (Threshold II-AAC), or to protect any other public interests in 14 treaty contexts (Threshold III-AAD). Restrictive measures having reverse and/or severe effects are also allowed to safeguard unlimited ESIs and/or limited PIs under the *Vietnam-Singapore BIT* (Threshold IV-AAA with SIs and PIs) and the *Vietnam-Uzbekistan BIT* (Threshold V-AAD with SIs and PIs). In the last context, such restrictive, reverse and/or severe measures can additionally get accepted if protecting limited SIs, and so can restrictive measures if having rational reasons.

2 *IIAs with 'AAxy' Formula*

Of Vietnam's 33 IIAs fully having provisions on FET, expropriation, FTT and NT, 24 IIAs similarly formulate these provisions as A, A, x (A/B/C/D) and y (A/B/C/D) – 'AAxy' formula. The letter 'x' and 'y' here refer to respectively relevant FTT and NT provision formulations in an individual reaty context.

To be compatible with Vietnam's IIAs having 'AAxy' formula, legislative measures must follow six requirements as previously mentioned in the 'AAx' treaty context, except the following features (Table 9.7). At the strictest level, discriminatory measures based on nationality, even if reasonable, are not accepted under the *Vietnam-France BIT* (Threshold I-AAAA). Discriminatory measures permitted in the *Vietnam-Germany BIT* must aim at protecting limited PIs (Threshold II-AAAB) and those in the *Vietnam-UK BIT* and *Vietnam-Korea BIT (2003)* can only be allowed in regulating certain exceptional sectors/matters covered by their NT provisions (Threshold II-AAAC). However, nationality-based discrimination is accepted on any rational grounds in other nine treaty contexts since their NT provisions refer NT to domestic laws and national development policies (Threshold II-AAAD). These NT provisions do not create any limitation on, but rather are consistent with, the third basis requirement for any legitimate measures – rational/reasonable discrimination.

At the lower level, while reasonable nationality-based discrimination in the Vietnam's three BITs with Cuba, Greece and Denmark are permitted in all cases, restrictive measures are only allowed in certain cases for pursuing EcSs in these contexts (Threshold III-AACD/AABD). In the opposite direction, the first type of measures in the *Vietnam-Oman BIT* can only be accepted in governing certain exceptional sectors/matters covered by its NT provision while the second type of measures are all permitted if based on rational grounds (Threshold III-AADC). Reasonable discriminatory and restrictive measures in the *Vietnam-Iran BIT* and *Vietnam-Estonia BIT* are acceptable in any case (Threshold III-AADD).

In addition to discriminatory and/or restrictive ones, legislative measures having reverse and/or severe effects on foreign investments/investors can be legitimate when they are necessary to protect limited ESIs under the *Czech-Vietnam BIT* (Threshold IV-AAAA

with SIs), and necessary/reasonable to safeguard limited ESIs/PIs in the *Vietnam-Turkey BIT* (Threshold IV-AAAD with SIs and PIs), the *Vietnam-Japan BIT* (Threshold IV-AACC with SIs and PIs) and the *Vietnam-Slovakia BIT* (Threshold IV-AACD with SIs and PIs). Under the *ASEAN-China IA*, they must be necessary for the protection of unlimited ESIs and necessary/reasonable for the protection of limited PIs (Threshold IV-AACD with SIs and PIs). Restrictive measures in the last three contexts are also acceptable in certain cases to pursue limited EcSs while discriminatory measures in the last two contexts enjoy a similar effect in all cases if based on rational grounds.

3 *IIAs with 'ABCy' Formula*

Besides the above 24 IIAs, two other treaties – the *ACIA* and *Vietnam-EAEU FTA* – similarly compose their FET, expropriation, FTT and NT provisions: A, B, C and y (A/B/C/D) – 'ABCy' formula. To comply with these treaties, legislative measures must satisfy the first four and the last requirements as imposed by the 'AAx' treaty line – (1), (2), (3), (4) and (6) – and must not severely affect foreign investments or where they do cause severe effects respect state's prior written commitments previously granted to foregn investors (or distinct, reasonable investment-backed expectations) and have a proportionate relationship with public objectives pursued (5*), except for certain cases (Table 9.8). In cases where bona fide, non-arbitrary legislative measures are inconsistent with the last four requirements – having severe, reverse, restrictive and/or discriminatory effects on foreign investments/investors, they can be accepted when necessarily/rationally protecting unlimited/limited ESIs and/or limited PIs. Restrictive and/or discriminatory measures are also permissible if they pursue limited EcSs. Discriminatory measures under the *ACIA* can additionally be allowed in regulating certain exceptional sectors/matters covered by its NT provision (Threshold I-ABCC with SIs and PIs) while those in the *Vietnam-EAEU FTA* can be accepted in all cases as long as they are based on rational grounds (Threshold II-ABCD with SIs and PIs). When the *Vietnam-EU IPA* with 'ABCC' formula comes into effect, it will be classified in this group. However, the fourth requirement – no reversal of specific commitments previously granted to foreign investors – will not be an independent requirement for legislative measures, since a FET provision in the IPA views it as a relevant factor to the FET analysis.

4 *IIAs with 'BAxC' Formula*

Three treaties – the *Vietnam-Iceland BIT*, *Vietnam-US BTA*, and *ASEAN-Korea IA* – could be considered to have 'BAxC' formula: B, A, x (A/B/C/D) and C. The first treaty context does not actually contain a provision on FET while the last two fully encompass provisions on FET, expropriation, FTT and NT. However, the three requirements imposed by FET provisions with limitation to CIL (Formulation B) in the last two contexts – good faith, non-arbitrariness and reasonable discrimination – are still applicable to legislative measures in the first context since they are the basic requirements for any legitimate measures as required by MST under CIL (x'). Therefore, the first treaty could be grouped in this treaty line.

Legislative measures must meet the first three and the last two requirements as provided in the 'AAx' context – (1), (2), (3), (5) and (6) (Table 9.9). At the strictest level, discrimination based on nationality (either reasonable or unreasonable) are not accepted in any case under the *Vietnam-Iceland BIT* (Threshold I-B'AAC). However, in addition to discriminatory ones, legislative measures having severe effects on foreign investments and/or restrictions on investment-related transfers could be accepted, if they are necessary to protect unlimited ESIs under the *Vietnam-US BTA* (Threshold II-BABC with SIs) or necessary/reasonable to safeguard limited ESIs/PIs under the *ASEAN-Korea IA* (Threshold III-BACC with SIs and PIs). In these two contexts, discriminatory and/or restrictive measures could be additionally accepted for certain EcSs, and the former could be adopted within certain exceptional sectors/matters.

5 *IIAs with BBCC Formula*

The remaining four of Vietnam's IIAs – the *CPTPP*, *Vietnam-Korea FTA*, *ASEAN-ANZ FTA* and *ASEAN-Hong Kong IA* – exactly have an 'BBCC' formula – B, B, C and C formulations for respective FET, expropriation, FTT and NT provisions. To be legitimate, legislative measures need to satisfy the first three and the last two requirements as imposed by the 'ABCy' treaty line – (1), (2), (3), (5*) and (6) with certain exceptions (Table 9.10). If bonda fide, non-arbitrary legislative measures are contrary to certain of these requirement(s), they are only accepted when being necessary for the protection of unlimited ESIs in the first context (Threshold I-BBCC with SIs) or being

necessary/reasonable to safeguard limited ESIs/PIs in the last three contexts (Threshold II-BBCC with SIs and PIs). Restrictive and/or discriminatory measures can further be permitted when they necessarily pursue limited EcSs in all contexts; and discriminatory measures regulating exceptional sectors/matters are not be governed by these treaties. When the *RCEP* comes into effect, they will have this 'BBCC' formula.

6 *Concluding Point*

Based on formulations of FET, expropriation, FTT and NT provisions as discussed in chapters from 3 to 6, there are five different treaty lines in Vietnam's IIA system: 'AAx' (27 IIAs), 'AAxy' (24 IIAs), 'ABCy' (two IIAs), 'BAxC' (three IIAs) and 'BBCC' (four IIAs). Within individual treaty line(s), legislative measures are required to meet different main thresholds: five, four, two, three and two respectively. Within each threshold, substantive qualifications for exceptional measures could be dissimilar among treaty contexts, which are more specifically described in tables from 9.6 to 9.10.

Table 9.6: Substantive Requirements and Qualifications for Legislative Measures in Vietnam's IIAs with 'AAx' Formula – Five Main Compatibility Thresholds

<table>
<tr><td rowspan="11">Main Thresholds
(I-V)</td><td colspan="11">Substantive Requirements and Qualifications for Legislative Measures
(1) In Good Faith (bona fide)
(2) Non-Arbitrariness (Rational Basis and Rational Relationship)
(3) Rational/Reasonable Discrimination to Foreign Investments/Investors
(4) No Reverse Effects on State's Granted Specific Commitments (Independent Requirement) with Exceptions
(5) No Severe Effects on Foreign Investments with Exceptions
(6) No Restrictive Effects on Investment-related Transfers with Exceptions</td><td rowspan="11">Treaty Contexts (27)</td></tr>
<tr><td>(1)</td><td>(2)</td><td>(3)</td><td colspan="3">4)
(A) No Reverse Effects without Proportionality
(B) Reverse Effects and Disproportionality
But for the Protection of</td><td colspan="3">(5)
(A) No Severe Effects
(B) Severe Effects
But for the Protection of</td><td colspan="3">(6)
(A) No Restrictive Effects
(B) Restrictive Effects
But for the Protection of</td></tr>
<tr><td></td><td></td><td></td><td>(A)</td><td colspan="2">(B)</td><td>(A)</td><td colspan="2">(B)</td><td>(A)</td><td colspan="3">(B)</td></tr>
<tr><td></td><td></td><td></td><td></td><td>(a)
SIs</td><td>(b)
PIs</td><td></td><td>(a)
SIs</td><td>(b)
PIs</td><td></td><td>(a)
SIs</td><td>(b)
PIs</td><td>(c)
EcSs</td></tr>
</table>

I- AAA	x	x	x	x			x			x				7 BITs[1(NETs)]; and 2 BITs[2]
II- AAC	x	x	x	x			x			x			x (i); (ii) (iii)[****] N; T (R)	*Vietnam-Philippines BIT* (1992)
	x	x	x	x			x			x			x[(**)] (i); (ii); (iii) (iv); (v); (vi) T (R)	*Vietnam-Romania BIT*[(NETs)] (1994)
III- AAD	x	x	x	x			x			x	x (R)	x	x (R)	9 BITs[3(NETs)]; and 5 BITs[4]
IV- AAA with SIs and PIs	x	x	x	x	x (ii) (R)	x (i)[*]; (ii)[**] (R)	x	x (ii) (R)	x (i)[*]; (ii)[**] (R)	x	x (ii) (R)			*Vietnam-Singapore BIT*[(NETs)] (1992)

[1] They include Vietnam's three BITs with non-EU members: *Vietnam-Thailand BIT* (1991); *Vietnam-Taiwan BIT* (1993); *Vietnam-Macedonia BIT*[(MEx)] (2014). Also, they include Vietnam's four BITs with EU members: *Vietnam-BLEU BIT* (1991); *Vietnam-Hungary BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Austria BIT* (1995).

[2] They all include Vietnam's two BITs with EU members: *Vietnam-Italy BIT* (1990); *Vietnam-Sweden BIT* (1993).

[3] They all include Vietnam's nine BITs with non-EU members: *Vietnam-Belarus BIT* (1992); *Vietnam-Argentina BIT* (1996); *Vietnam-China BIT* (1992); *Vietnam-Ukraine BIT* (1994); *Vietnam-Egypt BIT* (1997); *Vietnam-Cambodia BIT* (2001, amended 2012); *Vietnam-Venezuela BIT* (2008); *Vietnam-Kazakhstan BIT*[(MEx)] (2009); *Vietnam-Uruguay BIT*[(MEx)] (2009).

[4] They include Vietnam's three BITs with non-EU members: *Vietnam-Laos BIT* (1996); *Vietnam-Malaysia BIT* (1992); *Vietnam-Mongolia BIT* (2000). Also, they include Vietnam's two BITs with EU members: *Vietnam-Latvia BIT* (1995); *Vietnam-Lithuania BIT* (1995).

V- AAD with SIs and PIs	x	x	x	x	x (i); (iii)[(a)] (R)	x (i)[(a)]; (ii)[(a)] (iii)[(a)]; (iv)[(a)] (v)[(a)]; (vii)[(a)] (R)	x	x (i); (iii)[(a)] (R)	x x (i)[(a)]; (ii)[(a)] (iii)[(a)]; (iv)[(a)] (v)[(a)]; (vii)[(a)] (R)	x	x (R)	x (R)	x (R)	*Vietnam-Uzbekistan BIT*[(NETs)] (1996)

Notes:

[(a)]: Security/Public interests threatened by extreme emergency.

[*]: Limited to the protection of public health.

[**]: Limited to the prevention of diseases and pests in animals or plants.

[****]: Limited to the integrity and independence of its currency.

[(**)]: Exceptional measures only include exchange restrictions.

[(NETs)]: Treaty protecting non-exhausive transfers related to investments.

[(MEx)]: Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

T: Temporary Application.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

Table 9.7: Substantive Requirements and Qualifications for Legislative Measures in Vietnam's IIAs with 'AAxy' Formula – Four Main Compatibility Thresholds

<table>
<tr><td rowspan="4">Main Thresholds
(I-IV)</td><td colspan="12">Substantive Requirements and Qualifications for Legislative Measures
(1) In Good Faith (bona fide)
(2) Non-Arbitrariness (Rational Basis and Rational Relationship)
(3) Rational/Reasonable Discrimination to Foreign Investments/Investors
(4) No Reverse Effects on State's Granted Specific Commitments (Independent Requirement) with Exceptions
(5) No Severe Effects on Foreign Investments with Exceptions
(6) No Restrictive Effects on Investment-related Transfers with Exceptions</td><td>Treaty Context (24)</td></tr>
<tr><td>(1)</td><td>(2)</td><td colspan="5">(3)
(A) Reasonable Nationality-based Discrimination for the Protection of
(B) Discrimination Based on Other Reasons</td><td colspan="3">(4)
(A) No Reverse Effects without Proportionality
(B) Reverse Effects and Disproportionality
But for the Protection of</td><td colspan="2">(5)
(A) No Severe Effects
(B) Severe Effects
But for the Protection of</td><td colspan="3">(6)
(A) No Restrictive Effects
(B) Restrictive Effects
But for the Protection of</td><td></td></tr>
<tr><td></td><td colspan="4">(A)</td><td>(B)</td><td>(A)</td><td colspan="2">(B)</td><td>(A)</td><td colspan="2">(B)</td><td>(A)</td><td colspan="3">(B)</td><td></td></tr>
<tr><td></td><td>(a) SIs</td><td>(b) PIs</td><td>(c) EcSs</td><td>(d) Sector, Matters</td><td></td><td></td><td>(a) SIs</td><td>(b) PIs</td><td></td><td>(a) SIs</td><td>(b) PIs</td><td></td><td>(a) SIs</td><td>(b) PIs</td><td>(c) EcSs</td><td></td></tr>
</table>

I-AAAA	x	x					x	x			x			x				*Vietnam-France BIT* (1992)
II-AAAB	x	x		x (i)*; (iii) (viii) (R)			x	x			x			x				*Vietnam-Germany BIT*(NETs) (1993)
II-AAAC	x	x				x	x	x			x			x				*Vietnam-UK BIT*(NETs)(MEx) (2002); *Vietnam-Korea BIT*(NETs)(MEx) (2003)
II-AAAD	x	x	x	x	x	x	x	x			x			x				*Vietnam-Finland BIT*

						(e) Others												(2008)[(PPEIs)(NETs)]; 5 BITs[5] [(NETs)]; and 3 BITs[6]
III-AACD	x	x	x	x	x	x (e) Others	x	x			x			x			x (i) T (R)	*Vietnam-Greece BIT*[(NETs)(MEx)] (2008); *Vietnam-Cuba BIT (2007*[(NETs)]
III-AABD	x	x	x	x	x	x (e) Others	x	x			x			x			(i); (ii) N (R)	*Vietnam-Denmark BIT* (1993)

[5] They include Vietnam's three BITs with non-EU members: *Vietnam-Switzerland BIT* (1992); *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT*[(MEx)] (2007). They also include Vietnam's two BITs with EU-members: *Vietnam-Netherlands BIT* (1994)[(NETs)]; *Vietnam-Spain BIT* (2006)[(NETs)].

[6] They include Vietnam's two BITs with non-EU members: *Vietnam-Armenia BIT* (1992); *Vietnam-Russia BIT* (1994). They also include Vietnam's one BIT with an EU member: *Vietnam-Bulgaria BIT* (1996).

III-AADC	x	x				x	x	x			x			x	x (R)	x (R)	x (R) (d) Others	*Vietnam-Oman BIT*[(NETs)(MEx)] (2011)
III-AADD	x	x	x	x	x	x (e) Others	x	x			x			x	x (R)	x (R)	x (R) (d) Others	*Vietnam-Iran BIT*[(NETs)] (2009); *Vietnam-Estonia BIT*[(PPEIs)] (2000)
IV-AAAA with SIs	x	x	x (i)[(b)] N				x	x	x (i)[(b)] N		x	x (i)[(b)] N		x	x (i)[(b)] N			*Vietnam-Czech BIT*[(NETs)] (1997)
IV-AAAD with SIs and PIs	x	x	x (i)[(d)] N	x (R)	x (R)	x (R)	x	x	x (i)[(d)] N	x (i); (ii); (v); (vi); (vii) (R)	x	x (i)[(d)] N	x (i); (ii) (v); (vi); (vii) (R)	x	x (i)[(d)] N			*Vietnam-Turkey BIT* (2014)[(NETs)]

IV-AACC with SIs and PIs	x	x	x (i)[(c)] N	x (i); (ii) (iii)[***] N (R)	x (i); (ii) (iii) N; T MFN (R)	x	x	x	x (i)[(c)] N	x (i); (ii) (iii)[***] N (R)	x	x (i)[(c)] N	x (i); (ii) (iii)[***] N (R)	x	x (i)[(c)] N	x (iii)[***] N (R)	x (i); (ii) (iii) N; T MFN (R)	*Vietnam-Japan BIT*[(PPEIs)(MEx)] (2003)
IV-AACD with SIs and PIs	x	x	x (R)	x (R)	x (R)	x (R)	x	x	x (i)[(b)] N	x (iii) N (R)	x	x (i)[(b)] N	x (iii) N (R)	x	x (i)[(b)] N	x (iii)[***] N (R)	x (i); (iii) N (R)	*Vietnam-Slovakia BIT*[(NETs)(MEx)] (2009)
	x	x	x (R)	x (R)	x (R)	x (R)	x (R)	x	x (ii) (R)	x (i); (ii) (iii)[***] (iv) N (R) (v); (vi) (R)	x	x (ii) (R)	x (i); (ii) (iii)[***] (iv) N (R) (v); (vi) (R)	x	x (ii) (R)	x (iii)[***] N (R)	x (i); (ii) (iv) N; T MFN NT (R)	*ASEAN-China IA*[(MEx)] (2009)

Notes:

(b): Security interests threatened by certain military sources, and emergency in international relations.

(c): Security interests threatened by certain military sources, and emergency in international and domestic relations.

(d): Security interests threatened by certain military sources, and emergency in international relations, and deliberate attempts to disable/degrade critical public infrastructures.

*: Limited to the protection of public health.

***: Limited to the preservation of fundamental interests of society.

(NETs): Treaty protecting non-exhausive transfers related to investments.

(PPEIs): Treaty having NT provision protecting pre-and post-established investments.

(MEx): Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

T: Temporary Application.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

Table 9.8: Substantive Requirements and Qualifications for Legislative Measures in Vietnam's IIAs with 'ABCy' Formula – Two Main Compatibility Thresholds

<table>
<tr><td rowspan="2">Main Thresholds
(I-II)</td><td colspan="6">Substantive Requirements and Qualifications for Legislative Measures
(1) In Good Faith (bona fide)
(2) Non-Arbitrariness (Rational Basis and Rational Relationship)
(3) Rational/Reasonable Discrimination to Foreign Investments/Investors
(4) No Reverse Effects on State's Granted Specific Commitments (Independent Requirement) with Exceptions
(5*) No Severe Effects, Reverse Effects and Disproportionality with Exceptions
(6) No Restrictive Effects on Investment-related Transfers with Exceptions</td><td>Treaty Contexts (2)</td></tr>
<tr><td>(1)</td><td>(2)</td><td>(3)
(A) Reasonable Nationality-based Discrimination for the Protection of
(B) Discrimination Based on Other Reasons</td><td>(4)
(A) No Reverse Effects without Proportionality
(B) Reverse Effects and Disproportionality But for the Protection of</td><td>(5*)
(A*) No Severe Effects without Respect for Granted Specific Commitments (or Distinct, Reasonable Investment-Backed Expectations) and Proportionality
(B*) Severe Effects, Reverse Effects and Disproportionality But for the Protection of</td><td>(6)
(A) No Restrictive Effects
(B) Restrictive Effects But for the Protection of</td></tr>
</table>

			(A)				(B)	(A)	(B)		(A*)	(B*)		(A)	(B)			
			(a) SIs	(b) PIs	(c) Sectors, Matters	(d) EcSs			(a) SIs	(b) PIs		(a) SIs	(b) PIs		(a) SIs	(b) PIs	(c) EcSs	
I-ABCC with SIs and PIs	x	x	x (ii) N	x (i); (ii) (iii)*** (iv) N (R)	x	x (i); (ii) N; T MFN (R)	x	x	x (ii) N	x (i); (ii) (iii)*** (iv) N (R)	x	x (ii) N	x (i); (ii) (iii)*** (iv) N (R)	x	x (ii) N	x (iii)*** N (R)	x (i); (ii) N; T MFN (R)	*ACIA* (NETs) (PPEIs) (MEx) (2009)
				(v) (vi) (R)						(v); (vi) (R)			(v); (vi) (R)				(iv) N; T MFN; NT (R)	
II-ABCD with SIs and PIs	x	x	x (i)[(b)] (R)	x (R)	x (R)	x (R)	x	x	x (i)[(b)] (R)	x (i); (ii) (iii)*** (iv) N (R)	x	x (i)[(b)] (R)	x (i); (ii) (iii)*** (iv) N (R)	x	x (i)[(b)] (R)	x (iii)*** N (R)	x (i); (ii) N; T MFN (R)	*Vietnam-EAEU FTA* (NETs) (MEx) (2015)

										(v); (vi) (R)			(v); (vi) (R)					
ABCC with SIs	x	x	x (i)[(b)] (R)	x (i); (ii) (iii)[***] (iv); (v) (vii) Public security N; (R)	x (R)	x (i); (ii) N; T MFN (R)	x				x	x (i)[(b)] (R)		x	x (i)[(b)] (R)		x (i); (ii) N; T MFN (R)	*Vietnam-EU IPA* (2020) (not yet in force)
				(vi) (R)														

Notes:

[(b)]: Security interests threatened by certain military sources, and emergency in international relations.

[***]: Limited to the preservation of fundamental interests of society.

[(NETs)]: Treaty protecting non-exhausive transfers related to investments.

[(PPEIs)]: Treaty having NT provision protecting pre-and post-established investments.

[(MEx)]: Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

T: Temporary Application.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

Table 9.9: Substantive Requirements and Qualifications for Legislative Measures in Vietnam's IIAs with 'BAxC' Formula – Three Main Compatibility Thresholds

Main Thresholds (I-III)	**Substantive Requirements and Qualifications for Legislative Measures** (1) In Good Faith (bona fide) (2) Non-Arbitrariness (Rational Basis and Rational Relationship) (3) Rational/Reasonable Discrimination to Foreign Investments/Investors (4) No Reverse Effects on State's Granted Specific Commitments (Independent Requirement): No Application (5) No Severe Effects on Foreign Investments with Exceptions (6) No Restrictive Effects on Investment-related Transfers with Exceptions														**Treaty Contexts (3)**
	(1)	(2)	(3) (A) Reasonable Nationality-based Discrimination for the Protection of (B) Discrimination Based on Other Reasons					(4)	(5) (A) No Severe Effects (B) Severe Effects But for the Protection of			(6) (A) No Restrictive Effects (B) Restrictive Effects But for the Protection of				
			(A)				(B)		(A)	(B)		(A)	(B)			
			(a) SIs	(b) PIs	(c) EcSs	(d) Sectors, Matters				(a) SIs	(b) PIs		(a) SIs	(b) PIs	(c) EcSs	
I-B'AAC	x	x				x	x		x			x				*Vietnam-Iceland BIT*(MEx) (2002)

II- BABC with SIs	x	x	x (ii) N		x (i) T (R)	x	x		x	x (ii) N		x	x (ii) N		x (i) T (R)	*Vietnam-US BTA*[(NETs)(PPEIs)(MEx)] (2000)
III- BACC with SIs and PIs	x	x	x (i)[(e)] N	x (i); (ii) (iii)[***] (iv) N (R)	x (i); (ii) N; T MFN (R)	x	x		x	x (i)[(e)] N	x (i); (ii) (iii)[***] (iv) N (R)	x	x (i)[(e)] N	x (iii)[***] N (R)	x (i); (ii) N; T; MFN (R)	*ASEAN-Korea IA*[(NETs)(PPEIs)(MEx)] (2009)
				(v); (vi) (R)							(v); (vi) (R)				(iii); (iv) N; T MFN; NT (R)	

Notes:

[(e)]: Security interests threatened by certain military sources, and emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[***]: Limited to the preservation of fundamental interests of society.

[(NETs)]: Treaty protecting non-exhausive transfers related to investments.

[(PPEIs)]: Treaty having NT provision protecting pre-and post-established investments.

(MEx): Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

T: Temporary Application.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

Table 9.10: Substantive Requirements and Qualifications for Legislative Measures in Vietnam's IIAs with 'BBCC' Formula – Two Main Compatibility Thresholds

<table>
<tr><td rowspan="2">Main Thresholds
(I-II)</td><td colspan="6">Substantive Requirements and Qualifications for Legislative Measures
(1) In Good Faith (bona fide)
(2) Non-Arbitrariness (Rational Basis and Rational Relationship)
(3) Rational/Reasonable Discrimination to Foreign Investments/Investors
(4) No Reverse Effects on State's Granted Specific Commitments (Independent Requirement): No Application
(5*) No Severe Effects, Reverse Effects and Disproportionality with Exceptions
(6) No Restrictive Effects on Investment-related Transfers with Exceptions</td><td>Treaty Contexts
(4)</td></tr>
<tr><td>(1)</td><td>(2)</td><td>(3)
(A) Reasonable Nationality-based Discrimination for the Protection of
(B) Discrimination Based on Other Reasons</td><td>(4)</td><td>(5*)
(A*) No Severe Effects without Respect for Granted Specific Commitments (or Distinct, Reasonable Investment-Backed Expectations) and Proportionality
(B*) Severe Effects, Reverse Effects and Disproportionality But for the Protection of</td><td>(6)
(A) No Restrictive Effects
(B) Restrictive Effects But for the Protection of</td></tr>
</table>

			(A)				(B)		(A*)	(B*)		(A)	(B)			
			(a) SIs	(b) PIs	(c) EcSs	(c) Sectors, Matters				(a) SIs	(b) PIs		(a) SIs	(b) PIs	(b) EcSs	
I- BBCC with SIs	x	x	x (ii) N			x	x		x	x (ii) N		x	x (ii) N		x (i); (ii); (iii) N; T MFN; NT (R)	*CPTPP*$^{(NETs)(PPEIs)(MEx)}$ (2018)
II- BBCC with SIs and PIs	x	x	x (i)$^{(e)}$ N	x (i); (ii) (iii)***; (iv) N (R)		x	x		x	x (i)$^{(e)}$ N	x (i); (ii) (iii)***; (iv) N (R)	x	x (i)$^{(e)}$ N	x (iii)*** N	x (i); (ii); (iii) (iv) N; T MFN; NT (R)	*Vietnam-Korea FTA*$^{(NETs)(PPEIs)(MEx)}$ (2015)
	x	x	x (i)$^{(e)}$ N	x (i); (ii); (iii)*** (iv); (v) N (R)	x (i); (ii) N; T MFN (R)	x	x		x	x (i)$^{(e)}$ N	x (i); (ii) (iii)*** (iv); (v); N (R)	x	x (i)$^{(e)}$ N	x (iii)*** N	x (i); (ii) N; T MFN (R)	*ASEAN-ANZ FTA*$^{(NETs)(PPEIs)(MEx)}$ (2009)

	x	x	x (i)[(e)] N	x (i); (ii) (iii)[***]; (iv) N (R) (v); (vi) (R)	x (i); (ii) (iii) N; T; MFN (R)	x	x		x	x (i)[(e)] N	x (i); (ii) (iii)[***]; (iv) N (R) (v); (vi) (R)	x	x (i)[(e)] N	x (iii)[***] N	x (i); (ii); (iii) N; T MFN (R)	*ASEAN-Hong Kong IA*[(NETs)(MEx)] (2017) *RCEP* (2020) (not yet in force)

Notes:

[(e)]: Security interests threatened by certain military sources, and emergency in international and domestic relations, and deliberate attempts to disable/degrade critical public infrastructures.

[***]: Limited to the preservation of fundamental interests of society.

[(NETs)]: Treaty protecting non-exhausive transfers related to investments.

[(PPEIs)]: Treaty having NT provision protecting pre-and post-established investments.

[(MEx)]: Treaty having measure exclusions specified in appendix 2.2.

(R): Measures being substantively reviewed by adjudicators, if challenged.

N: Necessary Relationship Requirement.

T: Temporary Application.

MFN and/or NT: Application on Most-Favoured-Nation and/or National Treatment Basis.

II IMPLICATIONS

A *As to the Academic Discussion on the Relationship between IIAs and the Host State's Right to Regulate*

1 *Study's Findings in the Academic Field*

It has been acknowledged that treaties inherently limit the state's right to regulate since they require treaty parties in certain cases to follow mutual rules rather than their own rules. In fact, in participating in a treaty, a state party has agreed to exchange a part of its regulatory powers/freedom (sovereignty) to get involved in economic relationships with other state parties and gain benefits from such cooperation. The specific concern is whether a treaty or a system of treaties causes undue limitation on the host state's right to regulate or hurdles sustainable development goals (SDGs).

In the context of Vietnam, an answer can come from the comparison between two kinds of policy spaces that are (i) existing policy spaces in Vietnam's IIAs and (ii) actual policy spaces that Vietnam needs. The answer can also be based on (i) the calculation of policy costs, including actual costs, concessions and rearrangements given for foreign investors adversely affected by legislative measures, and/or (ii) actual adjustments of drafts of legislative measures to comply with any international obligation from the perspective of central/local authorities. Empirical studies have not yet published nor, it seems, undertaken to search for (i) how much space Vietnam currently needs for its national policy, and (ii) whether contemporary IIAs limit Vietnam's central/local authorities in practice such as in the form of 'regulatory chill' or paying policy costs for regulatory changes. However, the study undertaken for this thesis addresses the academic question of the extent of the host state's right to regulate under IIAs to the following point.

As found by the study, Vietnam's IIAs generate various compatibility thresholds for legislative measures. This parallel existence of the strictest-and-rigid and the least-strict-and flexible compatibility thresholds could 'speak for itself' that Vietnam's IIAs as a whole system potentially cause undue limitation on the state's right to regulate. A policy space drawn from the former is apparently narrower than a policy space drawn from the latter. The second space here reflects the broadest policy space that Vietnam has had for

its national policy in its IIAs. Therefore, the strictest thresholds would restrict governmental/local authorities, in one way or the other, from adopting legislative measures that meet the least strict thresholds. This point is more clarified in the following subsections.

2 *Vietnam's Extensive and Long Adoption of Rigid Thresholds*

Among the different compatibility thresholds for legislative measures as mapped previously in Part I(B), all the strictest thresholds are rigid. Nevertheless, they have been adopted by Vietnam over a long period of time.

In particular, legislative measures must follow numerous strict substantive requirements without any exception in many treaty contexts. Vietnam's measures pursuing public interests or SDGs would hardly be excluded from the application of Formulation A FET provisions in 44 contexts if reversing specific commitments previously granted to foreign investments without possessing a proportionate feature,[1] and from the application of Formulation A expropriation provisions in 45 contexts if severely damaging foreign investments.[2] They would also face difficulty in getting exempted from the operation of Formulation A FTT provisions in 22 contexts if imposing exchange restrictions and capital controls on transfers related to foreign investments,[3] and the operation of a Formulation A NT provision in one treaty context if causing disadvantages to foreign investments/investors as compared to domestic comparators.[4] It is worth mentioning that these 44 (or 45) and 22 treaties (BITs) individually protect nearly 57.8% and 45.2% of the total FDI projects, equivalent to about 45.3% and 37 % of the total FDI registered in Vietnam.[5]

The strictest threshold for legislative measures imposed by one BIT with 'AAxy' formula, found by this study in Part I(C) (Table 9.6, Threshold I), is also a rigid one. That is because legislative measures having reverse, severe, restrictive and/or discriminatory

[1] See above Part I Table 9.1 Threshold I.
[2] See above Part I Table 9.2 Threshold I.
[3] See above Part I Table 9.4 Threshold I.
[4] See above Part I Table 9.5 Threshold I.
[5] The mentioned 44 (or 45) BITs govern 19,226 (or 19,229) out of 33,294 FDI projects in Vietnam that individually register USD179,340.16 million (or USD179,360.48 million) out of USD393,325.49 million; and, the mentioned 22 BITs govern 15,063 FDI projects that register USD145,599.84 million. For relevant figures with respect to individual treaty, see app 1.3.

effects on foreign investments/investors would hardly be justified in this treaty context.[6] The stringent thresholds can further be found in another 12 'AAxy' BITs (the second threshold),[7] and in the first nine 'AAx' BITs (the first threshold).[8] No justification and exception are granted for legislative measures with reverse, severe and/or restrictive features in these contexts,[9] and a significant limitation is found for nationality-based discrimination, even if reasonable, in three of these.[10] It should be noted that these nine 'AAx' BITs and 13 'AAxy' BITs currently protect around 13.3% and 31.9% of the total FDI protects respectively, contributing to about 14% and 23% of the total FDI registered in Vietnam.[11]

3 *Vietnam's Broadest Policy Space in IIAs*

All compatibility thresholds for legislative measures, as found by this study, can contribute to finding existing policy spaces for national policy, including SDGs, in a treaty or a group of treaties. Of these, the least strict thresholds are used to map the broadest policy space.[12] This broadest policy space, on the one hand, indicates what Vietnam has successfully achieved in certain treaties and, on the other hand, implies what Vietnam wished for in the other treaties. This space also reflects what Vietnam needs for its national policy while providing investment protections.

The broadest policy space in Vietnam's IIA system is currently drawn from the following border lines. First, legislative measures must be in good faith (1), not be arbitrary (2), and be reasonably discriminatory (3) to comply with FET obligation. It should be noted that in IIAs whose NT provisions accept reasonable nationality-based discrimination for development and other public policies, they make no additional requirement to the third one. Second, legislative measures do not affect foreign investments severely or where they do cause such effects, they must have a proportionate relationship with their objectives pursued and respect state's granted written commitments, or foreign investor's

[6] See above Part I Table 9.7 Threshold I-AAAA.
[7] See above Part I Table 9.7 Thresholds II-AAAB/AAAC/AAAD.
[8] See above Part I Table 9.6 Threshold I-AAA.
[9] See above Part I Table 9.7 Thresholds II-AAAB/AAAC/AAAD; Table 9.6 Threshold I-AAA.
[10] See above Part I Table 9.7 Thresholds II-AAAB/AAAC.
[11] The mentioned nine and 13 BITs respectively govern 4,440 and 10,620 out of 33,294 FDI projects that register USD54,659.61 million and USD90,919.91 million out of USD 393,325.49 million correspondingly. For relevant figures with respect to individual treaty, see app 1.3.
[12] See above Part I Table 9.1 Threshold V (six IIAs); Table 9.3 Threshold VI (five IIAs); Table 9.4 Threshold V (19 IIAs); Table 9.5 Threshold V (18 IIAs).

distinct, reasonable investment-backed expectations, to be considered non-expropriation, except for certain cases where the measures are reasonable/necessary to protect unlimited ESIs and limited PIs (5*). Finally, legislative measures must not cause restrictive effects on investment-related transfers to be compatible with FTT obligation, except for those based on rational grounds (6)(B). These lines can be visualised by the (1), (2) and (3) columns in Table 9.1, the (5*) column in Table 9.3, and the (6)(B) column in Table 9.4. If these lines were employed by one treaty, they would constitute 'BBDD' formula.

4 *Potential Undue Limitation on the Host State's Right to Regulate*

From the above two observations, it can be said that the existence of various compatibility thresholds reveals that the system of Vietnam's IIAs has not suited Vietnam's demands for policy space. The least and second least strict compatibility thresholds reflect what Vietnam demanded and has demanded so far, regardless of whether they are 'preferable/desirable' or not. The fact that the least and second least strict thresholds were concluded at the same time with other stricter thresholds indicates that the latter went below Vietnam's demands for policy space in IIAs at least at the time of treaty conclusions. Currently, any treaty which does not fulfill a part of Vietnam's broadest policy space, as mapped previously,[13] would limit the state's right to regulate.

In addition, the extensive existence of the strictest thresholds would likely tie Vietnam's central and provincial authorities' hands in implementing all treaties by the reason of treaty compliance. Given the current situation, any option to implement all Vietnam's IIAs, or comply with all thresholds, would limit the state's right to regulate in one way or another. If prioritising treaty compliance, Vietnam's authorities probably restrain its right to the extent of adjusting draft legislation to fit all thresholds (five for FET, FTT or NT, and/or six for non-expropriation). Such a phenomenon is so-called 'regulatory chill'. Or else, they consider imposing legislative measures consistent with the least strict thresholds and taking administrative actions, including granting concessions, offering rearrangements and paying compensations, to restore economic balance for aggrieved foreign investors – policy costs. If prioritising domestic needs, Vietnam has likely to follow similar administrative actions so as to adopt desired legislative measures that might not comply with all the thresholds. In practice, local and central authorities in

[13] See above Part II(A)(3).

Vietnam have dealt with numerous complaints and/or disputes initiated by foreign investors which are, inter alia, relevant to legislative measures.[14]

One might say that Vietnam could adopt legislative measures complying with individual thresholds. However, this implementation option is unrealistic, since legislative measures have a general application to all relevant actors and foreign investments in all sectors or a specific sector, in a whole country or an administrative division. Currently, FDI in Vietnam from one country is not distributed in one industry or one region/province. If there were any chance to do it, the adoption of unwanted legislative measures to comply with any threshold would be considered a 'regulatory chill'.

One might also argue that Vietnam could enact legislative measures that have a proportionate relationship with their objectives pursued. However, it should be noted that the presence or the absence of proportionality itself does not make legislative measures respectively consistent with or contrary to a treaty. There is no guarantee that proportionate legislative measures would always be compatible with treaty obligations in all cases, such as non-expropriation in 45 treaty contexts.[15] In cases where treaties in its provisions on standard exceptions and/or treaty exceptions only require legislative measures be suitable and/or necessary, the (continuous) issuance of proportionate legislative measures (suitable, necessary and non-excessive) can result in an undue limitation on the state's right to regulate.

[14] This practice is provided by the interviewers from 1 to 7. See also Department of Planning and Investment of Ho Chi Minh City (Vietnam), 'Problems, Difficulties and Exprience in Preventing and Minimizing Foreign Investment-related Grievances and Disputes' (Conference Presentation, International Finance Corporation (World Bank), Ministry of Planning and Investment and Ministry of Justice (Vietnam), 22 June 2018).

[15] See above Part I Table 9.2 Threshold I.

B *Options for Implementing, Negotiating and Reforming Vietnam's IIAs*

1 *For Treaty Implementation*

Ideally, the adoption of legislative measures comes from domestic practical requests, needs, or urges. However, such adoption must comply with international investment obligations if a state is bound by an investment treaty. In Vietnam, competent central authorities who got involved in treaty negotiation and conclusion do pay attention to the treaty compliance when enacting legislative measures.[16] Other central authorities and local authorities do not often practice the same, but rather rely on domestic needs to adopt their legislation.[17] The local authorities have recently been alerted by the competent central authorities through various training sessions so as to take due attention to foreign investors affected, or potentially affected, by their current or potential measures.[18] Given difficulties in resolving investor-state conflicts or disputes,[19] the local authorities are also encouraged to proactively consult the competent central authorities in addition to following the formal cooperation procedures, if they face with complex complaints and grievances by foreign investors.[20] However, knowing whether the drafts of legislative measures comply with international obligation(s) is a challenge for any central or local authorities. Materials for the training sessions provided by the competent central authorities only cover an overall understanding of general obligations including FET, expropriation with compensation, FTT and NT.[21] Certain obligations have been discussed in detail in different training sessions and other forums but merely in the context of *CPTPP* and the newly-concluded *Vietnam-EU IPA*.[22]

[16] This practice is provided by the interviewers 2, 3 and 4.
[17] This practice is provided by the interviewers 3 and 5.
[18] Vu Thi Chau Quynh, 'Guideline to Implement Vietnamese Laws in accordance with International Investment Commitments' (Conference Presentation, United States Agency for International Development (USAID) and Vietnam's Ministry of Justice, 26 August 2016).
[19] See Nguyen Thanh Tu and Le Thi Ngoc Ha, 'International Investment Dispute Prevention and Management, Implications from Other Countries' in Tran Viet Dung and Nguyen Thi Lan Huong (eds), *International Investment Dispute Settlements* (National University Publisher, 2018) 187, 190–6.
[20] Vu Thi Chau Quynh (n 18). For the formal cooperation procedures, see Decision on Promulgating the Regulation on Coordination in Settlement of International Investment Disputes [Prime Minister of Vietnam], No 14/2020/QĐ-TTg, 08 April 2020 (replacing Decision on Promulgating the Regulation on Coordination in Settlement of International Investment Disputes [Prime Minister of Vietnam], No 04/2014/QĐ-TTg, 14 October 2014).
[21] See Chapter I Part I.
[22] Ibid.

After drafting legislative measures, Vietnam's central or local authorities can rely on substantive requirements and qualifications, as found by this study, to assess the compatibility of these measures from the substantive perspective (i). They can also rely on such requirements and qualifications to identify which foreign investments/investors would potentially be affected by the drafts of legislative measures (ii). If the result of the assessment comes out that the drafts do not meet all of the compatibility thresholds, the central or local authorities are prepared to negotiate with all aggrieved foreign investors who are protected by investment treaties. As another option, they can adjust the drafts to meet certain compatibility thresholds, preferably the least strict thresholds. At the same time, they prepare negotiation plans/strategies for individual foreign investors, or individual groups of foreign investors – those who have been enjoying protections under treaties that require stricter compatibility thresholds but would possibly receive a lower level of protection brought about by the drafts. If the result of the assessment shows differently to the extent that the drafts meet only certain compatibility thresholds, the central or local authorities are suggested not to adjust the drafts to meet stricter compatibility thresholds. Any option going close to the 'regulatory chill' state has never been evaluated, considering the idea of development. Rather, the central or local authorities remain the drafts and proceed with the negotiation plans or strategies for aggrieved foreign investors as similar to the above scenario. Options for 'making a deal' with foreign investors who are affected by regulatory changes have, in fact, been addressed in domestic laws as mentioned in the Chapter 3.[23]

In preparation for negotiation plans or strategies, substantive requirements and qualifications provided by this study will help central or local authorities formulate appropriate concessions, rearrangements, or economic restoration options for individual aggrieved foreign investor, or individual groups of aggrieved foreign investors. Based on such requirements and qualifications, they roughly identify the distance between the compatibility thresholds to which the drafted measures had skipped and the compatibility thresholds to which the drafted measures have met. This distance will suggest a gap between the level of investment protection at which foreign investors have been enjoying, and the lower level of investment protection at which the drafted measures are 'offering'. From the gap between the two levels, the central or local authorities could crystalise or concretise their options for negotiation.

[23] See Chapter 3 Part IV(B).

Beyond the above context, policymakers can use substantive requirements and qualifications, as mapped previously in Part I, as references to facilitate the internalisation of international investment law into Vietnamese laws. This process has been considered an important solution for treaty implementation in Vietnam,[24] and thus requires the extensive and comprehensive examination of state's international obligations and rights. All of the findings in this study can play a significant role in this process.

2 *For Future Treaty Negotiation*

A treaty text does not always reflect a state party's desire for its domestic developments. Treaty negotiation might be influenced by various factors. Vietnam's treaty policymakers and negotiators have been experienced different influencing factors during negotiations. The first notable one relates to Vietnam's policy priorities at the time of the treaty negotiation. Many of Vietnam's IIAs concluded between 1990 and 2007 aimed at establishing diplomatic relations so their treaty terms were adopted without being discussed in detail.[25] The initial perception of whether Vietnam was a capital-exporting or -importing country among policymakers/negotiators did affect the determination of what policies got prioritised.[26] Another factor is related to mutual priorities of Vietnam's treaty partners at the time of the treaty negotiation. Depending on treaty partners, different issues had been negotiated and different extents of non-economic issues had been addressed in economic or investment treaties. While treaty negotiations in practice have these influencing factors, Vietnam's competent central authorities involved in treaty negotiation and conclusion show no intention of/interest in establishing a BIT model.[27] That is possibly because the BIT model would restrict them from taking proactive negotiations and adjusting policy preferences accordingly. The competent central authorities, including the Ministry of Planning and Investment, must seek the approvals of other relevant central authorities, including the Ministry of Foreign Affairs, if they are in

[24] See Resolution on Strategy for the Development and Improvement of Vietnam's Legal System to the Year 2010 and Direction for the Period up to 2020 [Vietnam's Politburo], No 48-NQ/TW, pts II(6), III(2); Law on Treaties 2016 (Vietnam), ch I art 6(2), ch VIII.
[25] This practice is provided by the interviewer 2.
[26] This perception is provided by the interviewer 2.
[27] This point is provided by the interviewer 2.

need of negotiating different terms from those in the BIT model, given the current treaty negotiation process in Vietnam.[28]

Based on the existing compatibility thresholds, Vietnam's treaty policymakers/negotiators can define or redefine 'preferable/desirable', 'negotiable' and 'non-negotiable' compatibility thresholds for future treaty negotiations. To do so, they must compare policy spaces drawn from the existing compatibility thresholds and desired policy spaces for domestic current and future needs and see whether the former covers or overlaps the latter. The question of domestic current and future needs is not addressed in this study. The study assumes that Vietnam's treaty policymakers/negotiators know well these needs or at least have different credible sources to identify them. Vietnam's socio-economic development plans/strategies and its development plans/visions for individual industries/matters/sectors in different time periods can be examples of these sources.

Regardless of what results are found, treaty policymakers/negotiators can consider four following points. First, the least strict thresholds should be 'negotiable' rather than 'preferable/desirable'. That is because Vietnam already achieved these thresholds in the past and has achieved them recently through negotiations, regardless of whether its treaty partners suggested or not. These thresholds are contemporary and will support domestic SDGs. Second, the strictest thresholds should not be on the list as they are rigid and will not facilitate sustainable development. And, third, the other thresholds should be considered 'non-negotiable' ones since legislative measures for security interests, economic interests, and development policies must be accepted to a certain extent. Finally, 'preferable/desirable' thresholds should meet what Vietnam needs currently or in near future.

From the existing compatibility thresholds, treaty policymakers/negotiators can also consider whether to have new compatibility threshold(s). It should be noted that adding new threshold(s), either 'preferable' or close to 'preferable', into the current system of Vietnam's IIAs just increases the variety of compatibility thresholds. The pressure to meet all thresholds, including rigid thresholds, together with the question of either taking 'regulatory chill' or paying policy costs will not disappear.

[28] See app 9.

Options for implementing current IIAs and negotiating new IIAs do not eliminate the variety of compatibility thresholds and their undue limitation on the state's right to regulate. That is because when implementing all IIAs, Vietnam could not, in any direction, pass the situation in which it needs to 'make a deal' with aggrieved foreign investors or offer them due compensations/indemnifications. Any costs or concessions given to aggrieved foreign investors in exchanging the compatibility of legislative measures is another expression of the state's right to regulate being unduly limited. When concluding new IIAs, Vietnam has increased its international obligations to comply with. Even if existing or new compatibility thresholds adopted in new treaty contexts are more coherent with domestic current and future demands for SDGs, Vietnam must continue to pay proper attention to aggrieved foreign investors protected by treaties that require the stricter compatibility thresholds.

The only way to reduce differences between/among existing compatibility thresholds and narrow potential undue limitations on the state's right to regulate caused by these thresholds is to reform the current system of Vietnam's IIAs. In fact, Vietnam has taken certain ways to improve its IIA system such as replacing Vietnam's two BITs with Korea (Republic) and Finland respectively in 2003 and 2008, signing protocols of amendment to the *Vietnam-Germany BIT* in 1993, the *Vietnam-Czech BIT* in 1997, the *Vietnam-Cuba BIT (2007)* in 2007 and the *Vietnam-Cambodia BIT* in 2012, and terminating Vietnam's three BITs with Australia, India and Indonesia between 2018 and 2019. However, these ways are occasionally adopted rather than designed in a systematic way by Vietnam to reform its IIA regime substantively.

When Vietnam's treaty policymakers decide to take a treaty reform, this study can be of significance. The study helps to identify treaties that should get reformed first, namely nine BITs having 'AAx' formula and 13 BITs having 'AAxy' formula that generate respectively the strictest and second strictest compatibility thresholds.[29] These 22 BITs require almost all rigid thresholds for legislative measures to comply with separate investment protection obligations. They currently apply to 45.2% of the total FDI projects

[29] See Table 9.6 Threshold I-AAA (nine BITs); Table 9.7 Threshold I-AAAA (one BIT); Table 9.7 Threshold II-AAAB/AAAC/AAAD (12 BITs).

with 37% of the total FDI registered in Vietnam.[30] Given their rigid thresholds and extensive application, the BITs would not possibly facilitate domestic SDGs or could get in the way of sustainable development.

Of the above 22 BITs, Vietnam's 12 BITs with EU members[31] will be replaced by the *Vietnam-EU IPA* when the latter comes into effect. Only should the remaining Vietnam's ten BITs with non-EU members[32] be considered to get renegotiated or amended. Treaty renegotiations and amendments are most preferrable among other reform options. They will help Vietnam's policymakers bring their contemporary perspective to new treaty drafts while continuing to provide investment protections. Jointly interpreting these BITs with Vietnam's partners should not be prioritised because a joint interpretation aims to clarify or concretise current obligations, such as Formulation A FET provisions and Formulation A expropriation provisions, rather than to increase or decrease the degree of obligations. Terminating the BITs should also not be optimal since established foreign investors will keep enjoying the same level of protection within 10 or 15 years from the date of treaty termination, brought about by sunset clauses. Erasing the protection of foreign investments is also not a way forward, considering that Vietnam's IIAs has contributed to attracting FDI in Vietnam during the last decades.

One might concern that the above two reform options take time and cost a lot. However, the concern may be phased out when answers to the following investigations are positive. The first inquiry is whether Vietnam's central and local authorities have not paid any costs, such as expenses of public interests in case of 'regulatory chill' and compensation/concessions for affected foreign investors, from the time of treaty conclusion until now. The second one is whether they have not taken a lot of time to reconsider their legislative measures, (re)negotiate with affected foreign investors, and resolve relevant grievances, conflicts and disputes.

[30] The mentioned 22 BITs totally govern 15,060 out of 33,294 FDI projects that register USD145,579.52 million out of USD393,325.49 million. For relevant figures with respect to individual treaties, see app 1.3.
[31] *Vietnam-Italy BIT* (1990); *Vietnam-BLEU BIT* (1991); *Vietnam-France BIT* (1992); *Vietnam-Germany BIT* (1993); *Vietnam-Sweden BIT* (1993); *Vietnam-Hungary BIT* (1994); *Vietnam-Netherlands BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Bulgaria BIT* (1996); *Vietnam-Spain BIT* (2006); *Vietnam-Finland BIT* (2008).
[32] *Vietnam-Thailand BIT* (1991); *Vietnam-Armenia BIT* (1992); *Vietnam-Switzerland BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Russia BIT* (1994); *Vietnam-UK BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT* (2007); *Vietnam-Macedonia BIT* (2014).

As another significance, this study helps Vietnam's policymakers identify which provisions in particular treaty contexts should be improved first. They are Formulation A FET provisions in 44 BITs, Formulation A expropriation provisions in 45 BITs, Formulation A FTT provisions in 22 BITs and Formulation A NT provision in one BIT.[33] These respectively impose the strictest thresholds for legislative measures to comply with FET, non-expropriation, FTT and NT obligations. Of the 45 treaty contexts in total, Vietnam's 18 BITs with EU members[34] will be replaced by the *Vietnam-EU IPA*. As to the remaining 27 BITs with non-EU members,[35] the reasons and options to reform are similar to those as specified above. When it comes to a normative aspect, the relevant least and second least strict compatibility thresholds could serve as a reference for Vietnam's treaty policymakers to picture how far the reform would and should go. Accordingly, the BITs could be reformed to the extent of clarifying provision terms, adding a limitation to respective provisions, adding treaty exceptions for security and/or public interests, or more than one of them.

C *How to Map the Policy Space and Decide Relevant Ways Forward*

This study provides an approach for policymakers in general, not just in Vietnam, to draw a space for national development policy, including SDGs, and a space for investment protections. This refers to an extraction of substantive requirements and qualifications for legislative measures from a treaty, or a group of treaties having a similar set of provisions (a treaty line).

A visible map of policy space, drawn from substantive requirements and qualifications, will serve as a foundation for policymakers in composing ways forward. These ways may

[33] See Table 9.1 Threshold I (44 BITs); Table 9.2 Threshold I (45 BITs); Table 9.4 Threshold I (22 BITs); Table 9.5 Threshold I (one BIT).

[34] *Vietnam-Italy BIT* (1990); *Vietnam-BLEU BIT* (1991); *Vietnam-France BIT* (1992); *Vietnam-Denmark BIT* (1993); *Vietnam-Germany BIT* (1993); *Vietnam-Sweden BIT* (1993); *Vietnam-Hungary BIT* (1994); *Vietnam-Netherlands BIT* (1994); *Vietnam-Poland BIT* (1994); *Vietnam-Romania BI*T (1994); *Vietnam-Austria BIT* (1995); *Vietnam-Latvia BIT* (1995); *Vietnam-Lithuania BIT* (1995); *Vietnam-Bulgaria BIT* (1996); *Vietnam-Estonia BIT* (2000); *Vietnam-Spain BIT* (2006); *Vietnam-Finland BIT* (2008); *Vietnam-Greece BIT*(MEx) (2008).

[35] *Vietnam-Thailand BIT* (1991); *Vietnam-Armenia BIT* (1992); *Vietnam-Belarus BIT* (1992); *Vietnam-China BIT* (1992); *Vietnam-Malaysia BIT* (1992); *Vietnam-Philippines BIT* (1992); *Vietnam-Switzerland BIT* (1992); *Vietnam-Taiwan BIT* (1993); *Vietnam-Russia BIT* (1994); *Vietnam-Ukraine BIT* (1994); *Vietnam-Argentina BIT* (1996); *Vietnam-Egypt BIT* (1997); *Vietnam-Laos BIT* (1996); *Vietnam-Mongolia BIT* (2000); *Vietnam-Cambodia BIT* (2001, amended 2012); *Vietnam-Iceland BIT* (2002); *Vietnam-UK BIT* (2002); *Vietnam-Korea BIT* (2003); *Vietnam-Cuba BIT (2007)*; *Vietnam-Kuwait BIT* (2007); *Vietnam-Mozambique BIT* (2007); *Vietnam-Venezuela BIT* (2008); *Vietnam-Kazakhstan BIT* (2009); *Vietnam-Iran BIT* (2009); *Vietnam-Uruguay BIT* (2009); *Vietnam-Oman BIT* (2011); *Vietnam-Macedonia BIT* (2014).

relate to treaty implementation, negotiation and reform, as similarly provided in the previous section in the context of Vietnam. If policymakers follow different steps of the IIA reform suggested by the UNCTAD, the map can also provide a clear view for them in deciding on which policy options are appropriate with their IIA system to start with.

Pursuing the metaphor of the map, a map of policy space could be bold or coloured in the following lines/areas. A policy space would be first circumscribed by characteristics of any 'police power' legislative measures – good faith, non-arbitrariness, and reasonable discrimination and public objectives.

The limitation on policy space would then depend on the effect factor – whether legislative measures are required not to (i) reverse specific commitments previously granted to foreign investors, (ii) have severe effects on foreign investments with, or without, breaching foreign investors' reasonable expectations and exceeding public interests achieved, (iii) cause minor, or major, discrimination to foreign investments and/or investors, and (iv) impose minor, or major, restrictions on investment-related transfers. This effect factor distinguishes between the scope of potential compatible legislative measures and that of potential incompatible ones (a 'green area' versus a 'red area' with 'yellow dots').

The policy space would also be determined by the list of permissible public objectives and, if any, explicit limitation on their scopes – security, public, safeguard and/or development interests – and the relationship between legislative measures and these public objectives – rational/reasonable, necessary or proportionate. The public objectives and measure-objective link requirements decide whether legislative measures that have severe, reverse, restrictive and/or discriminatory effects inconsistent with the above requirements ('yellow dots') could be transferred from the scope of potential incompatible measures (a 'red area') to the scope of compatible ones (a 'green area'). This decision is partly, or wholly, subject to the host state's discretion if treaty parties compose self-judging language or non-justiciability clause in their IIAs to exclude respectively a substantive review or a full review from future adjudicators. Any 'police power' legislative measures possessing compatible effects are safe in a 'green area'.

D *Last Words*

As the last words of this thesis yet the commencement of a further journey extending the study to all aspects of IIAs, any discussion of policy options to implement, (re)negotiate or reform the IIA system, including safeguarding the state's right to regulate for public interests while providing investment protection, should be directed at one goal only. This is one that many countries in the world and Vietnam have perceived and chosen: real, fair and substantial sustainable development. Borrowing the words of UNCTAD, this study reaffirms that '[t]he overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development'.[36] This thesis represents one small step towards a more rational and transparent approach to the attainment of this goal.

[36] UNCTAD, *Reform Package for International Investment Regime* (2018) 20.

APPENDIX 1.1: LIST OF VIETNAM'S BITS

No	Vietnam's BITs Concluded in the 1990-2007 Period	Signed	Enforced	Unenforced	Terminated
01	*Vietnam-Italy BIT* (1990)	18/5/1990	06/5/1994		
02	*Vietnam-BLEU BIT* (1991)	24/01/1991	11/6/1999		
03	*Vietnam-Australia BIT* (1991)	05/3/1991	11/9/1991		Terminated
04	*Vietnam-Indonesia BIT* (1991)	25/10/1991	03/04/1994		Terminated on 07/01/2016 Applied to established investments until 07/01/2026 (sunset clause)
05	*Vietnam-Thailand BIT* (1991)	30/10/1991	07/02/1992		
06	*Vietnam-Malaysia BIT* (1992)	21/01/1992	09/10/1992		
07	*Vietnam-Philippines BIT* (1992)	27/02/1992	29/01/1993		
08	*Vietnam-France BIT* (1992) (attached by the Interpretation Notes)	26/5/1992	10/8/1994		
09	*Vietnam-Switzerland BIT* (1992)	03/7/1992	03/12/1992		
10	*Vietnam-Belarus BIT* (1992)	08/7/1992	24/11/1994		
11	*Vietnam-Singapore BIT* (1992)	29/10/1992	25/12/1992		
12	*Vietnam-China BIT* (1992)	02/12/1992	01/9/1993		
13	*Vietnam-Armenia BIT* (1992)	01/02/1992	28/4/1993		
14	*Vietnam-Germany BIT* (1993) (attached by the Protocol)	03/04/1993	19/9/1998		
15	*Vietnam-Taiwan (Province of China) BIT* (1993)	21/4/1993	23/4/1993		
16	*Vietnam-Korea BIT* (1993)	13/5/1993	04/9/1993		Replaced by *Vietnam-Korea BIT* (2003)
17	*Vietnam-Denmark BIT* (1993)	23/7/1993	07/8/1994		
18	*Vietnam-Sweden BIT* (1993)	08/9/1993	02/8/1994		

19	*Vietnam-Finland BIT* (1993)	10/9/1993	02/5/1996		Replaced by *Vietnam-Finland BIT* (2008)
20	*Vietnam-Netherlands BIT* (1994)	10/3/1994	01/12/1995		
21	*Vietnam-Ukraine BIT* (1994)	08/7/1994	08/12/1994		
22	*Vietnam-Russia BIT* (1994)	16/6/1994	03/7/1996		
23	*Vietnam-Hungary BIT* (1994)	26/8/1994	16/6/1995		
24	*Vietnam-Poland BIT* (1994)	31/8/1994	24/11/1994		
25	*Vietnam-Romania BIT* (1994)	15/9/1994	16/8/1995		
26	*Vietnam-Austria BIT* (1995)	27/3/1995	01/10/1996		
27	*Vietnam-Lithuania BIT* (1995)	27/9/1995	24/4/2003		
28	*Vietnam-Cuba BIT*(1995)	12/11/1995	01/10/1996		Replaced by *Vietnam-Cuba BIT*(2007)
29	*Vietnam-Latvia BIT* (1995)	06/11/1995	20/02/1996		
30	*Vietnam-Laos BIT* (1996)	14/01/1996	02/01/1998		
31	*Vietnam-Uzbekistan BIT* (1996)	28/3/1996	06/3/1998		
32	*Vietnam-Argentina BIT* (1996)	03/6/1996	01/6/1997		
33	*Vietnam-Bulgaria BIT* (1996)	19/9/1996	15/5/1998		
34	*Vietnam-Algeria BIT* (1996)	21/10/1996		x	
35	*Vietnam-India BIT* (1997)	08/5/1997	01/12/1999		Terminated on 23/7/ 2017 Applied to established investments until 23/7/2032 (sunset clause)
36	*Vietnam-Egypt BIT* (1997)	06/9/1997	04/3/2002		
37	*Vietnam-Czech BIT* (1997) (attached by the Protocol)	25/11/1997	09/7/1998		
38	*Vietnam-Tajikistan BIT* (1999)	19/01/1999		x	
39	*Vietnam-Chile BIT* (1999)	16/9/1999		x	
40	*Vietnam-Myanmar BIT* (2000)	15/02/2000		x	
41	*Vietnam-Mongolia BIT* (2000)	17/4/2000	13/12/2001		

42	*Vietnam-Cambodia BIT* (2001) (amended 24/6/2012)	26/11/2001	01/4/2015		
43	*Vietnam-Korea (Democratic) BIT* (2002)	02/5/2002		x	
44	*Vietnam-UK BIT* (2002)	01/8/2002	01/8/2002		
45	*Vietnam-Iceland BIT* (2002)	20/9/2002	10/7/2003		
46	*Vietnam-Namibia BIT* (2003)	30/5/2003		x	
47	*Vietnam-Korea BIT* (2003)	15/9/2003	05/6/2004		
48	*Vietnam-Japan BIT* (2003)	14/11/2003	19/12/2004		
49	*Vietnam-Bangladesh BIT* (2005)	01/5/2005		x	
50	*Vietnam-Spain BIT* (2006)	20/2/2006	29/7/2011		
51	*Vietnam-Mozambique BIT* (2007)	16/01/2007	29/5/2007		
52	*Vietnam-Kuwait BIT* (2007)	23/5/2007	16/3/2011		
53	*Vietnam-Cuba BIT*(2007) (attached by the Protocol)	28/9/2007	22/01/2009		
	Vietnam's BITs Concluded in the 2008-today Period				
54	*Vietnam-Finland BIT* (2008)	21/2/2008	04/06/2009		
55	*Vietnam-Greece BIT* (2008)	13/10/2008	08/12/2011		
56	*Vietnam-Venezuela BIT* (2008)	20/11/2008	17/6/2009		
57	*Vietnam-UAE BIT* (2009)	16/02/2009		x	
58	*Vietnam-Iran BIT* (2009)	23/12/2009	19/3/2011		
59	*Vietnam-Qatar BIT* (2009)	08/3/2009		x	
60	*Vietnam-Uruguay BIT* (2009)	12/5/2009	09/9/2011		
61	*Vietnam-Kazakhstan BIT* (2009)	15/9/2009	07/4/2014		
62	*Vietnam-Estonia BIT* (2009)	24/9/2009	11/02/2012		
63	*Vietnam-Sri Lanka BIT* (2009)	22/10/2009		x	
64	*Vietnam-Slovakia BIT* (2009)	17/12/2009	18/8/2011		

65	*Vietnam-Oman BIT* (2011)	10/01/2011	23/6/2011		
66	*Vietnam-Morocco BIT* (2012)	15/6/2012		x	
67	*Vietnam-Palestine BIT* (2013)	21/11/2013		x	
68	*Vietnam-Turkey BIT* (2014)	15/01/2014	19/06/2017		
69	*Vietnam-Macedonia BIT* (2014)	15/10/2014	11/01/2016		
70	*Vietnam-Taiwan (Province of China) BIT* (2019)	18/12/2019		x	

APPENDIX 1.2: LIST OF VIETNAM'S OTHER IIAS

(REGIONAL INVESTMENT AGREEMENTS AND TRADE AGREEMENTS WITH INVESTMENT CHAPTERS)

No	Vietnam's Other IIAs Concluded in the 1990-2007 Period	Signed	Enforced	Unenforced	Terminated
01	*ASEAN Agreement for the Promotion and Protection of Investments* (1987)	5/12/1987	02/08/1988		x
02	*Vietnam-US BTA* (2000)	13/07/2000	13/07/2000		
03	*ACIA* (2009)	26/02/2009	24/02/2012		
	Vietnam's Other IIAs Concluded in the 2008-today Period				
04	*ASEAN-ANZ FTA* (2009)	27/02/2009	10/01/2010		
05	*ASEAN-Korea IA* (2009)	02/06/2009	01/09/2009		
06	*ASEAN-China IA* (2009)	15/08/2009	01/01/2010		
07	*ASEAN-India IA* (2014)	12/11/2014		x	
08	*Vietnam-Korea FTA* (2015)	05/05/2015	20/12/2015		
09	*Vietnam-EAEU FTA* (2015)	29/05/2015	05/10/2016		
10	*TPP* (2016)	04/02/2016		x	
11	*ASEAN-Hong Kong IA* (2017)	12/11/2017	17/06/2019		
12	*CPTPP* (2018)	08/03/2018	30/12/2018		
13	*Vietnam-EU IPA* (2019)	30/06/2019		x	
14	*RCEP* (2020)	15/11/2020		x	
15	*Vietnam-UK FTA* (2020)	29/12/2020		x	

APPENDIX 1.3: NETWORK OF STATE PARTIES HAVING TREATIES WITH VIETNAM AND/OR DIRECT INVESTMENT IN VIETNAM

No	Vietnam's State Parties	Existing Applicable BITs	Existing Applicable other IIAs	Unenforced BITs	Unenforced other IIAs	FDI in Vietnam (Existed on 20/03/2021)	
						Projects (No)	Registered Capital (million USD)
GROUP I		**HAVING ENFORCED TREATY/TREATIES WITH VIETNAM AND DIRECT INVESTMENT IN VIETNAM**					
1	Korea	*Vietnam-Korea BIT* (2003)	*ASEAN-Korea IA* (2009) *Vietnam-Korea FTA* (2015)		*RCEP* (2020)	9,019	71,508.56
2	Japan	*Vietnam-Japan BIT* (2003)	*CPTPP* (2018)		*RCEP* (2020)	4,666	62,512.42
3	Singapore	*Vietnam-Singapore BIT* (1992)			*RCEP* (2020)	2,660	61,263.07
4	Taiwan	*Vietnam-Taiwan BIT* (1993)		*Vietnam-Taiwan BIT* (2019)		2,802	33,776.34
5	Hong Kong		*ASEAN-Hong Kong BIT* (2019)			1,956	26,243.45
6	China	*Vietnam-China BIT* (1992)	*ASEAN-China* (2009)		*RCEP* (2020)	3,170	19,540.0
7	Malaysia	*Vietnam-Malaysia BIT* (1992)	*ACIA* (2009)		*RCEP* (2020)	645	12,937.93
8	Thailand	*Vietnam-Thailand BIT* (1991)	*ACIA* (2009)		*RCEP* (2020)	607	12,677.32

9	Netherlands	*Vietnam-Netherlands BIT* (1994)				372	10,367.05
10	US	*Vietnam-US BTA* (2000)				1,088	9,569.53
11	Canada		*CPTPP*			217	5,055.92
12	UK	*Vietnam-UK BIT* (2002)			*Vietnam-UK FTA* (2020)	411	3,871.37
13	France	*Vietnam-France BIT* (1992)			*Vietnam-EU IPA* (2019), replacing BIT	617	3,615.55
14	Germany	*Vietnam-Germany BIT* (1993)			*Vietnam-EU IPA* (2019), replacing BIT	380	2,273.66
15	Luxembourg	*Vietnam-BLEU BIT* (1991)			*Vietnam-EU IPA* (2019), replacing BIT	54	2,103.06
16	Australia		*ASEAN-ANZ FTA* (2009) *CPTPP* (2018)		*RCEP* (2020)	518	1,935.73
17	Switzerland	*Vietnam-Switzerland BIT* (1992)				174	1,772.62
18	Belgium	*Vietnam-BLEU BIT* (1991)			*Vietnam-EU IPA* (2019), replacing BIT	78	1,096.50
19	Brunei		*ACIA* (2009) *CPTPP* (2018)		*RCEP* (2020)	161	978.38
20	Russia	*Vietnam-Russia BIT* (1994)	*Vietnam-EAEU FTA* (2015)			144	943.77
21	India	*Vietnam-India BIT** (1997)				295	907.14
22	Turkey	*Vietnam-Turkey BIT* (2014)				26	708.46
23	Philippines	*Vietnam-Philippines BIT* (1992)	*ACIA* (2009)		*RCEP* (2020)	82	615.10

25	Indonesia	*Vietnam-Indonesia BIT** (1991)	*ACIA* (2009)		*RCEP* (2020)	99	608.15
25	Denmark	*Vietnam-Denmark BIT* (1993)			*Vietnam-EU IPA* (2019), replacing BIT	140	430.82
26	Poland	*Vietnam-Poland BIT* (1994)			*Vietnam-EU IPA* (2019), replacing BIT	25	400.36
27	Italy	*Vietnam-Italy BIT* (1990)			*Vietnam-EU IPA* (2019), replacing BIT	117	395.80
28	Sweden	*Vietnam-Sweden BIT* (1992)			*Vietnam-EU IPA* (2019), replacing BIT	85	380.23
29	New Zealand		*ASEAN-ANZ FTA* (2009) *CPTPP* (2018)		*RCEP* (2020)	45	209.69
30	Austria	*Vietnam-Austria BIT* (1995)			*Vietnam-EU IPA* (2019), replacing BIT	36	147.51
31	Slovakia	*Vietnam-Slovakia BIT* (2011)			*Vietnam-EU IPA* (2019), replacing BIT	12	140.81
31	Spain	*Vietnam-Spain BIT* (2006)			*Vietnam-EU IPA* (2019), replacing BIT	79	113.79
33	Czech	*Vietnam-Czech BIT* (1997)			*Vietnam-EU IPA* (2019), replacing BIT	38	91.23
34	Laos	*Vietnam-Laos BIT* (1998)	*ACIA* (2009)		*RCEP* (2020)	9	70.96
35	Cambodia	*Vietnam-Cambodia BIT* (2001, amended 2012)	*ACIA* (2009)		*RCEP* (2020)	28	70.77
36	Hungary	*Vietnam-Hungary BIT* (1994)			*Vietnam-EU IPA* (2019), replacing BIT	19	66.94
37	Bulgaria	*Vietnam-Bulgaria BIT* (1996)			*Vietnam-EU IPA* (2019), replacing BIT	9	31.10
38	Ukraine	*Vietnam-Ukraine BIT*				26	30.03

		(1994)					
39	Finland	*Vietnam-Finland* BIT (2008)			*Vietnam-EU IPA* (2019), replacing BIT	27	23.61
40	Oman	*Vietnam-Oman BIT* (2011)				3	20.77
41	Iceland	*Vietnam-Iceland BIT* (2002)				3	20.32
42	Belarus	*Vietnam-Belarus BIT* (1992)	*Vietnam-EAEU FTA* (2015)			4	16.30
43	Lithuania	*Vietnam-Lithuania BIT* (1995)			*Vietnam-EU IPA* (2019), replacing BIT	6	21.00
44	Armenia	*Vietnam-Armenia BIT* (1992)	*Vietnam-EAEU FTA* (2015)			2	12.98
45	Cuba	*Vietnam-Cuba BIT* (2007)		*Vietnam-Cuba BIT*(1995)		3	6.90
46	Egypt	*Vietnam-Egypt BIT* (1997)				17	2.62
47	Kuwait	*Vietnam-Kuwait BIT* (2007)				3	1.40
48	Romania	*Vietnam-Romania BIT* (1994)			*Vietnam-EU IPA* (2019), replacing BIT	3	1.25
49	Mongolia	*Vietnam-Mongolia BIT* (2000)				3	1.10
50	Myanmar		*ACIA* (2009)	*Vietnam-Myanmar BIT* (2000)	*RCEP* (2020)	1	0.80
51	Kazakhstan	*Vietnam-Kazakhstan BIT* (2009)	*Vietnam-EAEU FTA* (2015)			4	0.51
52	Venezuela	*Vietnam-Venezuela BIT* (2008)				2	0.51
53	Chile		*CPTPP* (2018)	*Vietnam-Chile BIT* (1999)		4	0.30

54	Estonia	*Vietnam-Estonia BIT* (2009)			*Vietnam-EU IPA* (2019), replacing BIT	5	0.28
55	Latvia	*Vietnam-Latvia BIT* (1995)			*Vietnam-EU IPA* (2019), replacing BIT	3	0.17
56	Mexico		*CPTPP* (2018)			4	0.17
57	Argentina	*Vietnam-Argentina BIT* (1996)				5	0.16
58	Uruguay	*Vietnam-Uruguay BIT* (2009)				1	0.10
59	Iran	*Vietnam-Iran BIT* (2009)				5	0.08
60	Greece	*Vietnam-Greece BIT* (2008)			*Vietnam-EU IPA* (2019), replacing BIT	3	0.06
GROUP II		**HAVING ENFORCED TREATY WITH VIETNAM AND NO DIRECT INVESTMENT IN VIETNAM**					
1	Macedonia	*Vietnam-Macedonia BIT* (2014)					
2	Mozambique	*Vietnam-Mozambique BIT* (2007)					
3	Kyrgyzstan		*Vietnam-EAEU FTA* (2015)				
4	Peru		*CPTPP* (2018)				
5	Uzbekistan	*Vietnam-Uzbekistan BIT* (1996)					
GROUP III		**HAVING UNENFORCED TREATY WITH VIETNAM AND DIRECT INVESTMENT IN VIETNAM**					
1	Cyprus				*Vietnam-EU IPA* (2019)	21	478.68
2	UAE			*Vietnam-UAE BIT*		28	69.31

				(2009)			
3	Ireland				*Vietnam-EU IPA* (2019)	25	42.00
4	Sri Lanka			*Vietnam-Sri Lanka BIT* (2009)		24	41.76
5	Slovenia				*Vietnam-EU IPA* (2019)	3	2.27
6	Korea (Democratic People's Republic of)			*Vietnam-Korea (Democratic) BIT* (2002)		5	1.20
7	Morocco			*Vietnam-Morocco BIT* (2012)		2	1.05
8	Bangladesh			*Vietnam-Bangladesh BIT* (2005)		15	0.83
9	Malta				*Vietnam-EU IPA* (2019)	1	0.60
10	Portugal				*Vietnam-EU IPA* (2019)	3	0.11
GROUP IV		**HAVING UNENFORCED TREATY WITH VIETNAM AND NO DIRECT INVESTMENT IN VIETNAM**					
1	Algeria			*Vietnam-Algeria BIT* (1996)			
2	Croatia				*Vietnam-EU IPA* (2019)		
3	Namibia			*Vietnam-Namibia BIT* (2013)			
4	Palestine			*Vietnam-Palestine BIT* (2013)			
5	Qatar			*Vietnam-Qatar BIT* (2009)			
6	Tajikistan			*Vietnam-Tajikistan BIT*			

				(1999)			
GROUP V		**HAVING NO TREATY WITH VIETNAM AND DIRECT INVESTMENT IN VIETNAM**					
1	British Virgin Islands					871	22,262.35
2	Samoa					388	8,174.60
3	Cayman Islands					118	7,027.42
4	Seychelles					247	1,795.43
5	British West Indies					20	975.66
6	Mauritius					57	394.29
7	Bermuda					11	357.36
8	Marshall Islands					12	299.15
9	Belize					33	297.46
10	Norway					47	192.03
11	Cook Islands					2	172.00
12	Anguilla					24	171.29
13	Macau					17	175.60
14	Bahamas					9	109.31
15	Angola					4	82.80
16	Israel					33	93.34
17	Ecuador					4	56.70
18	Panama					14	51.16
19	Saint Vincent and the Grenadines					5	48.90
20	Swaziland					1	45.00
21	Kenya					1	40.77

22	Saint Kitts and Nevis					4	39.91
23	Channel Islands					9	38.08
25	Isle of Man					1	35.00
25	Pakistan					60	33.78
26	Iraq					7	27.29
27	El Salvador					2	22.50
28	Costa Rica					5	16.67
29	Island of Nevis					2	10.28
30	Dominica					2	8.04
31	United States Virgin Islands					2	7.60
31	Brazil					5	3.81
33	Andorra					1	3.80
34	Nigeria					37	3.74
35	Guatemala					4	3.22
36	Turks & Caicos Islands					2	3.10
37	Barbados					2	2.75
38	Saudi Arabic					6	2.37
39	Serbia					2	1.58
40	Syrian Arab Republic					6	1.28
41	Guinea Bissau					1	1.19
42	Ghana					2	1.02
43	Jordan					3	0.95
44	Lebanon					5	0.53
45	South Africa					16	0.52
46	Guam					1	0.50

47	Afghanistan					4	0.44
48	Mali					2	0.32
49	Nepal					4	0.32
50	Sudan					3	0.31
51	Maldives					1	0.23
52	Monaco					1	0.21
53	Cameroon					4	0.20
54	Antigua and Barbuda					2	0.17
55	Palestine					2	0.13
56	Libya					2	0.12
57	Honduras					1	0.10
58	British Isles					1	0.10
59	Yemen					4	0.08
60	Turkmenistan					1	0.07
61	Uganda					2	0.04
62	Sierra Leone					1	0.03
63	Djibouti					1	0.02
64	Colombia					2	0.02
65	Liechtenstein					1	0.01
66	Lesotho					1	0.01
67	Guinea					1	0.01
68	Ethiopia					1	0.01
						Total: 33,070	Total: USD384,044.21 million

Note:
*: Treaty is terminated but still takes effect on established investments within a fixed period after the date of termination.
Source:
The statistics on FDI and FDI projects are collected from data published by Vietnam's Ministry of Planning and Invesment at <http://www.mpi.gov.vn/Pages/tinbai.aspx?idTin=49568&idcm=208>

APPENDIX 2.1: POPULARITY OF SELECTED PROVISIONS IN VIETNAM'S IIAS CONCLUDED IN THE 1990-2007 AND 2008-TODAY PERIODS

Treaty Provisions, Formulations		**Vietnam's IIAs Concluded in the 1990-2007 Period**		**Vietnam's IIAs Concluded in the 2008-today Period**	
		Vietnam's IIAs with non-EU members	Vietnam's IIAs with EU members	Vietnam's IIAs with non-EU members	Vietnam's IIAs with EU members
FET (59)	A (53)	*Vietnam-Thailand BIT* (1991) *Vietnam-Armenia BIT* (1992) *Vietnam-China BIT* (1992) *Vietnam-Malaysia BIT* (1992) *Vietnam-Philippines BIT* (1992) *Vietnam-Singapore BIT* (1992) *Vietnam-Belarus BIT* (1992) *Vietnam-Switzerland BIT* (1992) *Vietnam-Taiwan BIT* (1993) *Vietnam-Russia BIT* (1994) *Vietnam-Ukraine BIT* (1994) *Vietnam-Argentina BIT* (1996) *Vietnam-Uzbekistan BIT* (1996) *Vietnam-Egypt BIT* (1997) *Vietnam-Laos BIT* (1996) *Vietnam-Mongolia BIT* (2000) *Vietnam-Cambodia BIT* (2001, amended 2012) *Vietnam-UK BIT* (2002) *Vietnam-Korea BIT* (2003) *Vietnam-Japan BIT* (2003) *Vietnam-Cuba BIT* (2007) *Vietnam-Kuwait BIT* (2007)	*Vietnam-Italy BIT* (1990) *Vietnam-BLEU BIT* (1991) *Vietnam-Denmark BIT* (1993) *Vietnam-Germany BIT* (1993) *Vietnam-Sweden BIT* (1993) *Vietnam-France BIT* (1992) *Vietnam-Austria BIT* (1995) *Vietnam-Hungary BIT* (1994) *Vietnam-Netherlands BIT* (1994) *Vietnam-Romania BIT* (1994) *Vietnam-Poland BIT* (1994) *Vietnam-Latvia BIT* (1995) *Vietnam-Lithuania BIT* (1995) *Vietnam-Bulgaria BIT* (1996) *Vietnam-Czech BIT* (1997) *Vietnam-Spain BIT* (2006) (Total: 16)	*Vietnam-Venezuela BIT* (2008) *Vietnam-Iran BIT* (2009) *Vietnam-Kazakhstan BIT* (2009) *Vietnam-Uruguay BIT* (2009) *Vietnam-Oman BIT* (2011) *ACIA* (2009) *ASEAN-China IA* (2009) *Vietnam-Macedonia BIT* (2014) *Vietnam-Turkey BIT* (2014) *Vietnam-EAEU FTA* (2015) (Total: 10)	*Vietnam-Finland BIT* (2008) *Vietnam-Greece BIT* (2008) *Vietnam-Slovakia BIT* (2009) *Vietnam-Estonia BIT* (2009) (Total: 4)

		Vietnam-Mozambique BIT (2007) (Total: 23)			
	B (06)	*Vietnam-US BTA* (2000)		*ASEAN-Korea IA* (2009) *ASEAN-ANZ FTA* (2009) *Vietnam-Korea FTA* (2015) *CPTPP* (2018) *ASEAN-Hong Kong IA* (2017) (Total: 5)	
Expropriation (60)	A (54)	*Vietnam-Thailand BIT* (1991) *Vietnam-Armenia BIT* (1992) *Vietnam-China BIT* (1992) *Vietnam-Malaysia BIT* (1992) *Vietnam-Philippines BIT* (1992) *Vietnam-Singapore BIT* (1992) *Vietnam-Belarus BIT* (1992) *Vietnam-Switzerland BIT* (1992) *Vietnam-Taiwan BIT* (1993) *Vietnam-Russia BIT* (1994) *Vietnam-Ukraine BIT* (1994) *Vietnam-Argentina BIT* (1996) *Vietnam-Uzbekistan BIT* (1996) *Vietnam-Egypt BIT* (1997) *Vietnam-Laos BIT* (1998) *Vietnam-Mongolia BIT* (2000) *Vietnam-Cambodia BIT* (2001, amended in 2012) *Vietnam-Iceland* BIT (2002) *Vietnam-UK BIT* (2002) *Vietnam-Korea BIT* (2003) *Vietnam-Japan BIT* (2003) *Vietnam-Cuba BIT* (2007) *Vietnam-Kuwait BIT* (2007)	*Vietnam-Italy BIT* (1990) *Vietnam-BLEU BIT* (1991) *Vietnam-Denmark BIT* (1993) *Vietnam-Germany BIT* (1993) *Vietnam-Sweden BIT* (1993) *Vietnam-France BIT* (1992) *Vietnam-Austria BIT* (1995) *Vietnam-Hungary BIT* (1994) *Vietnam-Netherlands BIT* (1994) *Vietnam-Romania BIT* (1994) *Vietnam-Poland BIT* (1994) *Vietnam-Latvia BIT* (1995) *Vietnam-Lithuania BIT* (1995) *Vietnam-Bulgaria BIT* (1996) *Vietnam-Czech BIT* (1997) *Vietnam-Spain BIT* (2006) (Total: 16)	*Vietnam-Venezuela BIT* (2008) *Vietnam-Iran BIT* (2009) *Vietnam-Kazakhstan BIT* (2009) *Vietnam-Uruguay BIT* (2009) *Vietnam-Oman BIT* (2011) *ACIA* (2009) *ASEAN-China IA* (2009) *Vietnam-Macedonia BIT* (2014) *Vietnam-Turkey BIT* (2014) *Vietnam-EAEU FTA* (2015) (Total: 10)	*Vietnam-Finland BIT* (2008) *Vietnam-Greece BIT* (2008) *Vietnam-Slovakia BIT* (2009) *Vietnam-Estonia BIT* (2009) (Total: 4)

		Vietnam-Mozambique BIT (2007) (Total: 24)			
	B (06)			*ACIA* (2009) *ASEAN-ANZ FTA* (2009) *Vietnam-Korea FTA* (2015) *Vietnam-EAEU FTA* (2015) *CPTPP* (2018) *ASEAN-Hong Kong IA* (2017) (Total: 6)	
FTT (60)	A (25)	*Vietnam-Thailand BIT* (1991) *Vietnam-Armenia BIT* (1992) *Vietnam-Singapore BIT* (1992) *Vietnam-Switzerland BIT* (1992) *Vietnam-Taiwan BIT* (1993) *Vietnam-Russia BIT* (1994) *Vietnam-Iceland BIT* (2002) *Vietnam-UK BIT* (2002) *Vietnam-Korea BIT* (2003) *Vietnam-Kuwait BIT* (2007) *Vietnam-Mozambique BIT* (2007) (Total: 11)	*Vietnam-Italy BIT* (1990) *Vietnam-BLEU BIT* (1991) *Vietnam-France BIT* (1992) *Vietnam-Germany BIT* (1993) *Vietnam-Sweden BIT* (1993) *Vietnam-Austria BIT* (1995) *Vietnam-Hungary BIT* (1994) *Vietnam-Netherlands BIT* (1994) *Vietnam-Poland BIT* (1994) *Vietnam-Bulgaria BIT* (1996) *Vietnam-Czech BIT* (1997) *Vietnam-Spain BIT* (2006) (Total: 12)	*Vietnam-Turkey BIT* (2014) (Total: 1)	*Vietnam-Finland BIT* (2008) (Total: 1)
	B (02)	*Vietnam-US BTA* (2000) (Total: 1)	*Vietnam-Denmark BIT* (1993) (Total: 01)		
	C (14)	*Vietnam-Philippines BIT* (1992) *Vietnam-Japan BIT* (2002) *Vietnam-Cuba BIT* (2007) (Total: 3)	*Vietnam-Romania BIT* (1994) (Total: 1)	*ACIA* (2009) *ASEAN-ANZ FTA* (2009) *ASEAN-China IA* (2009) *ASEAN-Korea IA* (2009) *Vietnam-Korea FTA* (2015) *Vietnam-EAEU FTA* (2015) *CPTPP* (2018)	*Vietnam-Greece BIT* (2008) *Vietnam-Slovakia BIT* (2009) (Total: 2)

				ASEAN-Hong Kong IA (2017) (Total: 8)	
	D (19)	*Vietnam-Belarus BIT* (1992) *Vietnam-China BIT* (1992) *Vietnam-Malaysia BIT* (1992) *Vietnam-Ukraine BIT* (1994) *Vietnam-Uzbekistan BIT* (1996) *Vietnam-Argentina BIT* (1996) *Vietnam-Egypt BIT* (1997) *Vietnam-Laos BIT* (1996) *Vietnam-Mongolia BIT* (2000) *Vietnam-Cambodia BIT* (2001, amended 2012) (Total: 10)	*Vietnam-Latvia BIT* (1995) *Vietnam-Lithuania BIT* (1995) (Total: 2)	*Vietnam-Venezuela BIT* (2008) *Vietnam-Iran BIT* (2009) *Vietnam-Kazakhstan BIT* (2009) *Vietnam-Uruguay BIT* (2009) *Vietnam-Oman BIT* (2011) *Vietnam-Macedonia BIT* (2014) (Total: 6)	*Vietnam-Estonia BIT* (2009) (Total: 1)
NT (31)	A (02)	*Vietnam-US BTA* (2000) (Total: 1)	*Vietnam-France BIT* (1992) (Total: 1)		
	B (01)		*Vietnam-Germany BIT* (1993) (Total: 1)		
	C (12)	*Vietnam-US BIT* (2000) *Vietnam-Iceland BIT* (2002) *Vietnam-Japan BIT* (2002) *Vietnam-UK BIT* (2002) *Vietnam-Korea BIT* (2003) (Total: 5)		*ACIA* (2009) *ASEAN-Korea IA* (2009) *ASEAN-ANZ FTA* (2009) *Vietnam-Oman BIT* (2011) *Vietnam-Korea FTA* (2015) *CPTPP* (2018) *ASEAN-Hong Kong IA* (2017) (Total: 7)	
	D (16)	*Vietnam-Armenia BIT* (1992) *Vietnam-Switzerland BIT* (1992) *Vietnam-Russia BIT* (1994) *Vietnam-Kuwait BIT* (2007)	*Vietnam-Bulgaria BIT* (1996) *Vietnam-Denmark BIT* (1993) *Vietnam-Netherlands BIT* (1994)	*Vietnam-Iran BIT* (2009) *ASEAN-China IA* (2009) *Vietnam-Turkey BIT* (2014) *Vietnam-EAEU FTA* (2015)	*Vietnam-Greece BIT* (2008) *Vietnam-Slovakia BIT* (2009) *Vietnam-Estonia BIT* (2009)

		Vietnam-Mozambique BIT (2007) (Total: 5)	*Vietnam-Spain BIT* (2006) (Total: 4)	(Total: 4)	(Total: 3)
Non-UDM/UM/DM Clauses	(25)	*Vietnam-Armenia BIT* (1992) *Vietnam-Switzerland BIT* (1992) *Vietnam-Argentina BIT* (1996) *Vietnam-Egypt BIT* (1997) *Vietnam-US BTA* (2000) *Vietnam-UK BIT* (2002) *Vietnam-Spain BIT* (2006) *Vietnam-Cuba BIT* (2007) *Vietnam-Kuwait BIT* (2007) *Vietnam-Mozambique BIT* (2007) *Vietnam-Cambodia BIT* (2001, amended 2012) (Total: 10)	*Vietnam-Italy BIT* (1990) *Vietnam-BLEU BIT* (1991) *Vietnam-Denmark BIT* (1993) *Vietnam-Germany BIT* (1993) *Vietnam-Sweden BIT* (1993) *Vietnam-Romania BIT* (1994) *Vietnam-Netherland BIT* (1994) (Total: 7)	*Vietnam-Venezuela BIT* (2008) *Vietnam-Kazakhstan BIT* (2009) *Vietnam-Slovakia BIT* (2009) *Vietnam-Oman BIT* (2011) *Vietnam-Turkey BIT* (2014) (Total: 5)	*Vietnam-Finland BIT* (2008) *Vietnam-Greece BIT* (2008) *Vietnam-Estonia BIT* (2009) (Total: 3)
Umbrella Clauses	(19)	*Vietnam-Thailand BIT* (1991) *Vietnam-Singapore BIT* (1992) *Vietnam-Korea BIT* (2003) *Vietnam-UK BIT* (2002) *Vietnam-Iceland BIT* (2002) *Vietnam-Armenia BIT* (1992) *Vietnam-Switzerland BIT* (1992) *Vietnam-Mozambique BIT* (2007) (Total: 8)	*Vietnam-Austria BIT* (1995) *Vietnam-Germany BIT* (1993) *Vietnam-BLEU BIT* (1991) *Vietnam-Netherlands BIT* (1994) *Vietnam-Romania BIT* (1994) *Vietnam-Spain BIT* (2006) (Total: 6)	*Vietnam-Iran BIT* (2009) *ASEAN-China IA* (2009) (Total: 2)	*Vietnam-Finland BIT* (2008) *Vietnam-Greece BIT* (2008) *Vietnam-Estonia BIT* (2009) (Total: 3)

APPENDIX 2.2: SCOPE OF APPLICATION – MEASURES WITH/WITHOUT SECTOR/MATTER EXCLUSIONS

Vietnam's IIAs	**Explicit FET Exclusions**	**Explicit Expropriation Exclusions**	**Explicit FTT Exclusions (Inapplicable)**	**Explicit NT Exclusions**
22 Vietnam's BITs with non-EU members*				
18 Vietnam's BITs with EU members**				
Vietnam-Mozambique BIT		IPRs-related Measures		
Vietnam-Greece BIT		Land-related Expropriation		
Vietnam-Iceland BIT *Vietnam-Korea BIT (2003)* *Vietnam-UK BIT*				Sectors/Matters in Annex
Vietnam-Oman BIT		Land-related Expropriation		Sectors/Matters in Annex
Vietnam-Japan BIT			Taxation	
				Sectors/Matters in Annex
Vietnam-US BTA	Taxation		Taxation	Taxation
				Sectors/Matters in Annex
Vietnam-Macedonia BIT *Vietnam-Uruguay BIT*	Taxation	Taxation	Taxation	Taxation
	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants
Vietnam-Kazakhstan BIT *Vietnam-Slovakia BIT*	Taxation	Taxation	Taxation	Taxation
	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants
		Land-related Expropriation		
Vietnam-EAEU FTA *ASEAN-ANZ FTA*	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies (or Grants)

Vietnam-Korea FTA		IPRs-related Measures Land-related Expropriation		Sectors/Matters in Annex
ASEAN-China IA	Taxation			Taxation
	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants
		IPRs-related Measures Land-related Expropriation		
ACIA *ASEAN-Korea IA* *ASEAN-Hong Kong IA*	Taxation			Taxation
	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants	Governmental Subsidies/Grants
		IPRs-related Measures Land-related Expropriation	Governmental Subsidies/Grants	Sectors/Matters in Annex
CPTPP	Taxation		Taxation	Taxation in accordance with Article 29.4(6)
		IPRs-related Measures Land-related Expropriation		Governmental Subsidies/Grants
				Sectors/Matters in Annex

Notes:

IPRs: Intellectual property rights.

*: *Vietnam-Argentina BIT*; *Vietnam-Armenia BIT*; *Vietnam-Belarus BIT*; *Vietnam-Cambodia BIT*; *Vietnam-China BIT*; *Vietnam-Cuba BIT*; *Vietnam-Egypt BIT*; *Vietnam-Iran BIT; Vietnam-Kuwait BIT*; *Vietnam-Laos BIT*; *Vietnam-Malaysia BIT; Vietnam-Mongolia BIT*; *Vietnam-Philippines BIT*; *Vietnam-Russia BIT*; *Vietnam-Singapore BIT*; *Vietnam-Switzerland BIT*; *Vietnam-Taiwan BIT (1993)*; *Vietnam-Thailand BIT*; *Vietnam-Turkey BIT*; *Vietnam-Ukraine BIT*; *Vietnam-Uzbekistan BIT*; *Vietnam-Venezuela BIT*.

**: *Vietnam-Austria BIT*; *Vietnam-BLEU BIT*; *Vietnam-Bulgaria BIT*; *Vietnam-Czech BIT*; *Vietnam-Denmark BIT*; *Vietnam-Estonia BIT*; *Vietnam-Finland BIT* (2008); *Vietnam-France BIT*; *Vietnam-Germany BIT*; *Vietnam-Hungary BIT*; *Vietnam-Italy BIT*; *Vietnam-Latvia BIT*; *Vietnam-Lithuania BIT*; *Vietnam-Netherlands BIT*; *Vietnam-Poland BIT*; *Vietnam-Romania BIT*; *Vietnam-Spain BIT*; *Vietnam-Sweden BIT*.

APPENDIX 3: FET PROVISIONS IN VIETNAM'S IIAS – EXAMPLES

Treaties	Articles	Contents (emphasis added)	Formulations
Vietnam-Mozambique BIT	Article 2	2. Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting party and shall not impair the management, maintenance, use, enjoyment or disposal thereof through unreasonable or discriminatory measures.	FET Provisions without Limitation to CIL (A)
Vietnam-Japan BIT	Article 9	1. Each Contracting Party shall accord to investments in its Area of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.	
Vietnam-Macedonia BIT	Article 3: Investment Encouragement and Protection	1. Each Contracting Party shall encourage and facilitate investors of the other Contracting Party to make investments in its territory and, to receive such investments in accordance with the authority set out in the laws of the country. 2. Investments by investors of each Contracting Party shall always enjoy fair and equal treatment and full and safe protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way adopt unreasonable or discriminatory measures that prejudice the use, management, operation, operation, sale or other disposition of investment in that territory of an investor of the other Contracting Party. 3. For more clarity: (a) fair and equitable treatment requires each Contracting Party not to deny justice in any judicial and administrative proceedings; and … 4. The determination that there has been a breach of another provision of this Agreement, or a separate international agreement, does not imply any violation of paragraph 2 of this Article.	A
ACIA	Article 11: Treatment of Investment	1. *Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment* and full protection and security. 2. For greater certainty: (a) *fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process*; and … 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.	A

ASEAN-China IA	Article 7: Treatment of Investment	1. *Each Party shall accord to covered investments of investors of another Party fair and equitable treatment* and full protection and security. 2. For greater certainty: (a) *fair and equitable treatment refers to the obligation of each Party not to deny justice in any legal or administrative proceedings;* … 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, shall not establish that there has been a breach of this Article.	A
Vietnam-EAEU FTA	Chapter 8: Trade in Services, Investment and Movement of Natural Persons Section V: Investment Article 8.31: Fair and Equitable Treatment and Full Protection and Security	1. *Each Party to this Chapter shall accord to investments of investors of the other Party to this Chapter fair and equitable treatment* and full protection and security. 2. *"Fair and equitable treatment" referred to in paragraph 1 of this Article requires, in particular, each Party to this Chapter not to deny justice in any judicial or administrative proceedings*. … 4. With respect to investments of an investor of the other Party to this Chapter in the territory of the former Party, "fair and equitable treatment" and "full protection and security" referred to in paragraph 1 of this Article do not require treatment more favourable than that accorded to the former Party's own investors and/or investors of any third country in accordance with its laws and regulations. 5. A determination that there has been a breach of another provision of this Agreement or of a separate international agreement does not establish that there has been a breach of this Article.	A
Vietnam-US BTA	Chapter IV: Development of Investment Relations Article 3: General Standard of Treatment	1. *Each Party shall at all times accord to covered investments fair and equitable treatment* and full protection and security, and *shall in no case accord treatment less favorable than that required by applicable rules of customary international law*. 2. Each Party shall in no way impair by unreasonable and discriminatory measures the management, conduct, operation and sale or other disposition of covered investments.	FET Provisions with Limitation to CIL (B)

ASEAN-Korea IA	Article 5: General Treatment of Investment	1. *Each Party shall accord to covered investments of investors of any other Party fair and equitable treatment* and full protection and security. 2. For greater certainty: (a) *fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings*; … (c) *the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is provided under the customary international law and do not create additional substantive rights*.[9] 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. *Footnote:* [9] In the case of the Republic of Indonesia. paragraph 2(c) does not apply.	B
ASEAN-ANZ FTA	Chapter 11: Investment Section A Article 6: Treatment of Investment	1. *Each Party shall accord to covered investments fair and equitable treatment* and full protection and security. 2. For greater certainty[6]: (a) *fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings*; … (c) *the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.* 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. *Footnote:* [6] In the case of Indonesia, only Paragraph 2(a) and (b) shall apply where Indonesia is the Party according treatment under this Article.	B
ASEAN-Hong Kong IA	Article 5: Treatment of Investment	1. *Each Party shall accord to covered investments fair and equitable treatment* and full protection and security. (a) "*fair and equitable treatment" requires each Party not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law*; …	

		(c) *the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.* 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.	
Vietnam-Korea FTA	Chapter 9: Investment Article 9.5 : Standard of Treatment[5]	1. *Each Party shall accord to covered investments fair and equitable treatment* and full protection and security *in accordance with customary international law.* 2. *The concepts of "fair and equitable treatment" and "full protection and security" in this Article do not require treatment in addition to or beyond that which is required by the applicable rules of customary international law and do not create additional substantive rights*. For greater certainty: (a) "*fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process*; and … 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. *Footnote:* [5] This Article shall be interpreted in accordance with Annex 9-A.	B
	Annex 9-A: Customary International Law	The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 9.5 and Annex 9-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 9.5, the applicable rules of customary international law refer to all customary international law principles that protect the economic rights and interests of aliens.	
CPTPP	Chapter 9: Investment Article 9.6: Minimum Standard of Treatment[15]	1. *Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment* and full protection and security. 2. *For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.* The obligations in paragraph 1 to provide: (a) *"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*; and …	B

		3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. 4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. 5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. *Footnote:* [15] Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law).	
	Annex 9-A: Customary International Law	The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.	
Vietnam-EU IPA (not yet in force)	Chapter 2: Investment Protection Article 2.5: Treatment of Investment	1. *Each Party shall accord fair and equitable treatment* and full protection and security to investors of the other Party and covered investments in accordance with paragraphs 2 to 7 and Annex 3 (Understanding on the Treatment of Investments). 2. *A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes*: (a) a denial of justice in criminal, civil or administrative proceedings; (b) a fundamental breach of due process in judicial and administrative proceedings; (c) *manifest arbitrariness*; (d) *targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief*; (e) *abusive treatment such as coercion, abuse of power or similar bad faith conduct*; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3. 3. Treatment not listed in paragraph 2 may constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided for in Article 4.3 (Amendments). 4. *When applying paragraphs 1 to 3, a dispute settlement body under Chapter 3 (Dispute Settlement) may take into account whether a Party made a specific representation to an investor of the other Party to induce*	A

		a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated. … 6. *Where a Party has entered into a written agreement with investors of the other Party or covered investments that satisfies all of the following conditions, that Party shall not breach that agreement through the exercise of governmental authority. The conditions are:* *(a) the written agreement is concluded and takes effect after the date of entry into force of this Agreement;*[1] *(b) the investor relies on the written agreement in deciding to make or maintain the covered investment other than the written agreement itself and the breach causes actual damages to that investment;* *(c) the written agreement [footnote 1] creates an exchange of rights and obligations in connection to the said investment, binding on both parties;* *(d) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration.* 7. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. *Footnote:* [1] For greater certainty, a written agreement that is concluded and takes effect after the date of entry into force of this Agreement does not include the renewal or extension of an agreement in accordance with the provisions of the original agreement, and on the same or substantially the same terms and conditions as the original agreement, which has been concluded and entered into force before the date of entry into force of this Agreement.	
	Annex 3: Understanding on the Treatment of Investments	The Parties confirm their common understanding on the application of paragraph 6 of Article 2.5 (Treatment of Investment): 1. Notwithstanding the condition set out in subparagraph 6(a) of Article 2.5 (Treatment of Investment), an investor which has a dispute that falls within the scope of Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Disputes Settlement) with the Party with which it has entered into a written agreement that is concluded and has taken effect before the date of entry into force of this Agreement may claim the benefit of paragraph 6 of Article 2.5 (Treatment of Investment) in accordance with the procedures and conditions set out in this Annex. 2. Written agreements that are concluded and have taken effect before the date of entry into force of this Agreement and that fulfil the conditions set out in this paragraph may be notified within one year from the	

		date of entry into force of this Agreement. Such written agreements shall: (a) satisfy all conditions set out in subparagraphs 6(b) to (d) of Article 2.5 (Treatment of Investment); and (b) have been entered into either: (i) by Viet Nam with investors of the Member States of the Union, referred to in paragraph 8 of this Annex, or their covered investments; or (ii) by one of the Member States of the Union referred to in paragraph 8 of this Annex with investors of Viet Nam or their covered investments. 3. The procedure for notifying the written agreements referred to in paragraph 1 shall be as follows: (a) the notification shall include: (i) the name, nationality and address of the investor which is a party to the written agreement being notified, the nature of the covered investment of that investor and, where the written agreement is entered into by the covered investment of that investor, the name, address and place of incorporation of the investment; and (ii) a copy of the written agreement, including all of its instruments; and (b) the written agreements shall be notified in writing to the following competent authority: (i) in the case of Viet Nam, the Ministry of Planning and Investment; and (ii) in the case of EU Party, the European Commission. 4. The notification referred to in paragraphs 2 and 3 does not create any substantive rights of the investor which is a party to that notified written agreement or its investment. 5. The competent authorities referred to in subparagraph 3(b) shall compile a list of the written agreements that have been notified in accordance with paragraphs 2 and 3. 6. Should a dispute arise in connection with one of the notified written agreements, the relevant competent authority shall verify if the agreement satisfies all conditions set out in subparagraphs 6(b) to (d) of Article 2.5 (Treatment of Investment) and the procedures set out in this Annex. 7. An investor shall not claim that paragraph 6 of Article 2.5 (Treatment of Investment) applies to the written agreement if the verification in accordance with paragraph 6 of this Annex concludes that the requirements referred to in that paragraph are not met. 8. The Member States of the Union referred to in subparagraph 2(b) of this Annex are Germany, Spain, the Netherlands, Austria, Romania, and the United Kingdom.	

RCEP (not yet in force)	Chapter 10: Investment Article 10.5: Treatment of Investments[20]	1. *Each Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.* 2. For greater certainty: (a) *fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings*; … (c) *the concepts of fair and equitable treatment and full protection and security do not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights*. 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. *Footnote:* [20] This Article shall be interpreted in accordance with Annex 10A (Customary International Law).	B
	Annex 9-A: Customary International Law	The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 (Treatment of Investment), including in relation to the customary international law minimum standard of treatment of aliens, results from a general and consistent practice of States that they follow from a sense of legal obligation.	

APPENDIX 4: EXPROPRIATION PROVISIONS IN VIETNAM'S IIAS – EXAMPLES

Treaties	Articles	Contents (emphasis added)	Formulations
Vietnam-Singapore BIT	Article 6: Expropriation	1. Neither Contracting Party shall take any measure of expropriation, nationalization or other measure having effect equivalent to nationalization or expropriation against the investment of nationals or companies of the other Contracting Party unless the measures are taken for any purpose authorized by law, on a non-discriminatory basis, in accordance with its laws and against payment of compensation which shall be effectively realizable and which shall be made without unreasonable delay. Such compensation shall, subject to the laws of each Contracting Party, be the value immediately before the expropriation, nationalization or measure having effect equivalent to nationalization or expropriation. The compensation shall be freely convertible and transferable. 2. Where a Contracting Party expropriates, nationalizes or takes measures having effect equivalent to nationalization or expropriation against the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee composition as specified therein to such nationals or companies of the other Contracting Party who are owners of those shares.	Undefined Expropriation Provision (A)
Vietnam-China BIT	Article 4	1. Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting State in its territory, unless the following conditions are met: (a) in the public interest; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation. 2. The compensation mentioned in Paragraph 1, (d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay. 3. Investors of one Contracting State who suffer losses in respect of their investments in the territory of the other Contracting State owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting State, if it takes relevant measures, treatment no less favourable than that accorded to investors of a third State.	A

ASEAN-China IA	Article 8: Expropriation	1. *A Party shall not expropriate, nationalise or take other similar measures ("expropriation") against investments of investors of another Party, unless the following conditions are met:* (a) for a public purpose; (b) in accordance with applicable domestic laws, including legal procedures; (c) carried out in a non-discriminatory manner; and (d) on payment of compensation in accordance with Paragraph 2. 2. Such compensation shall amount to the fair market value of the expropriated investment at the time when expropriation was publicly announced or when expropriation occurred, whichever is earlier, and it shall be freely transferable in freely usable currencies from the host country. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier. 3. The compensation shall be settled and paid without unreasonable delay. In the event of delay, the compensation shall include interest at the prevailing commercial interest rate from the date of expropriation until the date of payment[6]. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency. 4. Notwithstanding Paragraph 1, Paragraph 2 and Paragraph 3, any measure of expropriation relating to land shall be as defined in the expropriating Party's existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations. 5. Where a Party expropriates the assets of a juridical person which is incorporated or constituted under its laws and regulations, and in which investors of another Party own shares, it shall apply the provisions of the preceding Paragraphs so as to ensure that compensation is paid to such investors to the extent of their interest in the assets expropriated. 6. This Article shall not apply to the issuance of compulsory licences granted to intellectual property rights in accordance with the Agreement on Trade- Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement. *Footnote:* [6] For Malaysia, Myanmar, Philippines, Thailand and Viet Nam, in the event of delay, the rate and payment of interest of compensation for expropriation of investments of investors of another Party shall be determined in accordance with their laws, regulations and policies provided that such laws, regulations and policies are applied on a non-discriminatory basis to investments of investors of another Party or a non-Party.	A

ASEAN-Korea IA	Article 12: Expropriation and Compensation	1. *A Party shall not nationalise or expropriate covered investments of an investor of any other Party, either directly or through measures equivalent to expropriation or nationalisation (referred hereto as "expropriation"), except:* (a) for public purpose;[15] (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) upon payment of prompt, adequate and effective compensation. 2. For the purpose of paragraph 1(d), compensation shall: (a) be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced[16], or when the expropriation occurred, whichever is applicable; (b) not reflect any change in value occurring because the intended expropriation had become known earlier; (c) be settled and paid without undue delay[17]; and (d) be effectively realisable and freely transferable between the territories of the Parties. 3. The compensation referred to in paragraph 1(d) shall include appropriate interest. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency. 4. Notwithstanding paragraphs 1, 2 and 3, in the case of the Republic of Singapore and the Socialist Republic of Viet Nam, any measure of expropriation relating to land shall be as defined in their respective domestic laws, regulations and any amendment thereto and shall be, for the purposes of and upon payment of compensation, in accordance with the aforesaid laws and regulations. 5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights under the T R IPS Agreement. *Footnotes:* [15] For the avoidance of doubt, where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in the domestic laws and regulations relating to land acquisition. [16] In the case of the Republic of the Philippines, the time when or immediately before the expropriation was publicly announced refers to the date of filing of the Petition for Expropriation. [17] The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.	A

ACIA	Article 14: Expropriation and Compensation[9]	1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation[10] ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. 2. The compensation referred to in sub-paragraph 1(c) shall: (a) be paid without delay;[11] (b) be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable; (c) not reflect any change in value because the intended expropriation had become known earlier; and (d) be fully realisable and freely transferable in accordance with Article 13 (Transfers) between the territories of the Member States. 3. In the event of delay, the compensation shall include an appropriate interest in accordance with the laws and regulations of the Member State making the expropriation. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency. 4. If an investor requests payment in a freely useable currency, the compensation referred to in sub-paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement. *Footnotes:* [9] This Article shall be read with Annex 2 (Expropriation and Compensation). [10] For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States' respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations. [11] Member States understand that there may be legal and administrative processes that need to be observed before payment can be made.	Defined Expropriation Provision (B)

	Annex 2: Expropriation and Compensation	1. *An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.* 2. Article 14(1) addresses two situations: (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) *the second situation is where an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.* 3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub- paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors: (a) *the economic impact of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;* (b) *whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and* (c) *the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).* 4. *Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).*	
ASEAN-ANZ FTA	Article 9: Expropriation and Compensation[7]	1. *A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:* (a) for a public purpose[8]; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. 2. The compensation referred to in Paragraph 1(c) shall: (a) be paid without delay[9]; (b) be equivalent to the fair market value of the expropriated investment at the time when or immediately before the expropriation was publicly announced[10], or when the expropriation occurred, whichever is applicable. (c) not reflect any change in value because the intended expropriation had become known earlier;	B

		and (d) be effectively realisable and freely transferable between the territories of the Parties. 3. The compensation referred to in Paragraph 1(c) shall include appropriate interest. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency. 4. If an investor requests payment in a freely useable currency, the compensation referred to in Paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment. 5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement. 6. Notwithstanding Paragraphs 1 to 4, in the case where Singapore or Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation made in accordance with the aforesaid legislation. Such compensation shall be subject to any subsequent amendments to the aforesaid legislation relating to the amount of compensation where such amendments follow the general trends in the market value of the land. *Footnotes:* [7] This Article shall be interpreted in accordance with this Chapter's Annex on Expropriation and Compensation. [8] For the avoidance of doubt, where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in the domestic laws and regulations relating to land acquisition. [9] The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made. [10] In the case of the Philippines, the time when or immediately before the expropriation was publicly announced refers to the date of filing of the Petition for Expropriation.	
	Annex on Expropriation and Compensation	1. *An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.* 2. Article 9.1 (Expropriation and Compensation) of Chapter 11 (Investment) addresses two situations: (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) *the second situation is where an action or series of related actions by a Party has an effect*	

		equivalent to direct expropriation without formal transfer of title or outright seizure. 3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in Paragraph 2(b) requires a case-by-case, fact-based inquiry that considers, among other factors: (a) *the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;* (b) *whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and* (c) *the character of the government action, including, its objective and whether the action is disproportionate to the public purpose*[1]. 4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b). *Footnote:* [1] "Public purpose" shall be read with reference to Article 9.1(a) and Article 9.6 (Expropriation and Compensation) of Chapter 11 (Investment).	
ASEAN-Hong Kong IA	Article 10: Expropriation and Compensation[7]	1. *A Party shall not expropriate covered investments of an investor of any other Party, either directly or through measures equivalent to expropriation ("expropriation"), except:* (a) for a public purpose; (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) upon payment of compensation in accordance with the requirements of this Article. 2. For the purpose of subparagraph 1 (d), compensation shall: (a) be equivalent to the fair market value (if the expropriating Party is an ASEAN Member State) or real value (if the expropriating Party is the Hong Kong Special Administrative Region) of the expropriated investment at the time when the expropriation was publicly announced[8], or when the expropriation occurred, whichever is applicable; (b) not reflect any change in value occurring because the intended expropriation had become known earlier; (c) be settled and paid without undue delay[9]; and (d) be effectively realisable and freely transferable between the Areas of the Parties.	B

		3. In the event of delay, the compensation referred to in subparagraph 1 (d) shall include appropriate interest[10] at the prevailing commercial rate. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency. 4. Notwithstanding paragraphs 1, 2, and 3, any measure of expropriation relating to land shall be as defined in the existing laws and regulations of the expropriating Party on the date of entry into force of this Agreement, and shall be, for the purposes of and upon payment of compensation, in accordance with the aforesaid laws and regulations. Such compensation shall be subject to any subsequent amendments to the aforesaid laws and regulations relating to the amount of compensation where such amendments follow the general trends in the market value of the land. 5. For greater certainty, this Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with TRIPS Agreement.[11] *Footnotes:* [7] This Article is subject to Annex 2 (Expropriation and Compensation). [8] ln the case of the Philippines, the time when or immediately before the expropriation was publicly announced refers to the date of filing of the Petition for Expropriation. [9] The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made. [10] For Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Viet Nam, in the event of delay, the rate and procedure for payment of interest of compensation for expropriation of covered investments of investors of another Party shall be determined in accordance with their laws, regulations and policies provided that such laws, regulations and policies are applied on a non-discriminatory basis. [11] The Parties recognise that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of such rights, and the term "limitation" of intellectual property rights includes exceptions to such rights.	
	Annex 2: Expropriation and Compensation	*1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest[12] under the laws or regulations of that Party, in a covered investment.* 2. Paragraph 1 of Article 10 (Expropriation and Compensation) addresses two situations: (a) the first situation is direct expropriation, where a covered investment is directly expropriated through formal transfer of title or outright seizure; and	

		(b) *the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.* 3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in subparagraph 2 (b) requires a case-by-case and fact-based inquiry that considers, among other factors: (a) *the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of a covered investment, standing alone, does not establish that such an expropriation has occurred;* (b) *whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and* (c) *the character of the government action, including its objective and whether the action is disproportionate to the public purpose.* 4. *Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute expropriation of the type referred to in subparagraph 2 (b*). *Footnote:* [12] For greater certainty, "property interest" refers to such property interest as may be applicable under the law of that Party.	
Vietnam-Korea FTA	Article 9.7 : Expropriation and Compensation[6]	1. *Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (hereinafter referred to as "expropriation"), except:* (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. 2. The compensation referred to in subparagraph 1(c) shall: (a) be paid without undue delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred, or at the time when the expropriation was publicly announced, whichever is applicable; (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and	B

		(d) be fully realizable and freely transferable. 3. The compensation referred to in subparagraph 1(c) shall include appropriate interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency. 4. If an investor requests payment in a freely usable currency, the compensation referred to in subparagraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment. 5. Notwithstanding paragraphs 1 through 4, in the case where Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in its existing domestic laws and regulations on the date of entry into force of this Agreement, shall be, for a purpose, and upon payment, of compensation, made in accordance with the aforesaid laws and regulations. Such compensation shall be subject to any subsequent amendment to the aforesaid laws and regulations relating to the amount of compensation where such amendment follows the general trends in the market value of the land. 6. This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, in accordance with the TRIPS Agreement. *Footnote:* [6] This Article shall be interpreted in accordance with Annex 9-B.	
	Annex 9-B on Expropriation	The Parties confirm their shared understanding that: (a) *an action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment;* (b) paragraph 1 of Article 9.7 addresses two situations. The first is direct expropriation, where a covered investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; (c) *the second situation addressed by paragraph 1 of Article 9.7 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure:* (i) the determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including: (A) *the economic impact of the government action, although the fact that an action or a*	

		series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (B) *the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and* (C) *the character of the government action, including its objectives and context.*[26] (ii) except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, do not constitute indirect expropriations.[27, 28] *Footnotes:* [26] For greater certainty, for Korea, relevant considerations may include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest. [27] For greater certainty, this subparagraph includes the right of the Party to exercise its regulatory actions in accordance with its Constitution. [28] For greater certainty, the list of "legitimate public welfare objectives" in this subparagraph is not exhaustive. It may include measures such as the real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households).	
CPTPP	Article 9.8: Expropriation and Compensation[16]	1. *No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:* (a) for a public purpose;[17, 18] (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law. 2. Compensation shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation); (c) not reflect any change in value occurring because the intended expropriation had become known	B

		earlier; and (d) be fully realisable and freely transferable. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. 5. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement.[19] 6. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant, (a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant, standing alone, does not constitute an expropriation. *Footnotes:* [16] Article 9.8 (Expropriation and Compensation) shall be interpreted in accordance with Annex 9- B (Expropriation) and is subject to Annex 9-C (Expropriation Relating to Land). [17] For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use". [18] For the avoidance of doubt: (i) if Brunei Darussalam is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the Land Code (Cap. 40) and the Land Acquisition Act (Cap. 41), as of the date of entry into force of the Agreement for it; and (ii) if Malaysia is	

		the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the Land Acquisitions Act 1960, Land Acquisition Ordinance 1950 of the State of Sabah and the Land Code 1958 of the State of Sarawak, as of the date of entry into force of the Agreement for it. [19] For greater certainty, the Parties recognise that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of those rights, and the term "limitation" of intellectual property rights includes exceptions to those rights.	
	Annex 9-B on Expropriation	The Parties confirm their shared understanding that: 1. *An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment*. 2. Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. 3. *The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.* (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) *the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;* (ii) *the extent to which the government action interferes with distinct, reasonable investment-backed expectations;*[36] *and* (iii) *the character of the government action.* (b) *Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,*[37] *safety and the environment, do not constitute indirect expropriations, except in rare circumstances.* *Foonotes:* [36] For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.	

		[37] For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.	
	Annex 9-C Expropriation Relating to Land	1. Notwithstanding the obligations under Article 9.8 (Expropriation and Compensation), where Singapore is the expropriating Party, any measure of direct expropriation relating to land shall be for a purpose and upon payment of compensation at market value, in accordance with the applicable domestic legislation[38] and any subsequent amendments thereto relating to the amount of compensation where such amendments provide for the method of determination of the compensation which is no less favourable to the investor for its expropriated investment than such method of determination in the applicable domestic legislation as at the time of entry into force of this Agreement for Singapore. 2. Notwithstanding the obligations under Article 9.8 (Expropriation and Compensation), where Viet Nam is the expropriating Party, any measure of direct expropriation relating to land shall be: (i) for a purpose in accordance with the applicable domestic legislation;[39] and (ii) upon payment of compensation equivalent to the market value, while recognising the applicable domestic legislation. *Footnotes:* [38] The applicable domestic legislation is the Land Acquisition Act (Cap. 152) as at the date of entry into force of this Agreement for Singapore. [39] The applicable domestic legislation is Viet Nam's Land Law, Law No. 45/2013/QH13 and Decree 44/2014/ND-CP Regulating Land Prices, as at the date of entry into force of this Agreement for Viet Nam.	
Vietnam-EAEU FTA	Article 8.35: Expropriation and Compensation	1. *Neither Party to this Chapter shall nationalise, expropriate or subject to measures equivalent in effect to nationalisation or expropriation an investment of the investor of the other Party to this Chapter (hereinafter referred to as "expropriation"), except:* a) for a public purpose; b) in accordance with the procedure established by the laws and regulations of the former Party; c) in a non-discriminatory manner; and d) on payment of prompt, adequate and effective compensation in accordance with paragraph 3 of this Article. 2. *The determination of whether a measure or series of such measures of either Party to this Chapter have an effect equivalent to nationalisation or expropriation shall require a case-by- case, fact-based inquiry to consider, inter alia:*	B

		a) *the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of either Party to this Chapter has an adverse effect on the economic value of investments does not establish that an expropriation has occurred;* b) *the character of the measure or series of measures of either Party to this Chapter.* 3. The compensation referred to in subparagraph d) of paragraph 1 of this Article shall: a) be paid without undue delay; b) be equivalent to the fair market value of the expropriated investment calculated on date when the actual or impending expropriation has become publicly announced whichever is earlier; and c) be paid in a freely usable currency or, if agreed by the investor, in the currency of the expropriating Party to this Chapter and be freely transferable subject to the provisions of Article 8.37 of this Agreement. From the date of expropriation until the date of payment the amount of compensation shall be subject to accrued interest at a commercial rate established on a market basis. 4. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement. 5. *Notwithstanding paragraphs 1 through 4 of this Article, expropriation relating to land within the territory of either Party to this Chapter shall be carried out in accordance with the laws and regulations of that Party for a purpose established in accordance with such laws and regulations, and upon payment of compensation, which shall be assessed with due consideration to market value and paid without undue delay, in accordance with the laws and regulations of that Party.*	
Vietnam-EU IPA (not yet in force)	Article 2.7 Expropriation	1. *A Party shall not nationalise or expropriate the covered investments of investors of the other Party either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation"), except:* (a) for a public purpose; (b) under due process of law; (c) on a non-discriminatory basis; and (d) against payment of prompt, adequate and effective compensation. 2. The compensation referred to in paragraph 1 shall amount to the fair market value of the covered investment at the time immediately before the expropriation or the impending expropriation became public knowledge, whichever is earlier, plus interest at a reasonable rate established on a commercial basis, from the date of expropriation until the date of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article 2.8 (Transfer) and made without delay. 3. Notwithstanding paragraphs 1 and 2, in the case that Viet Nam is the expropriating Party, any measure of	B

		direct expropriation relating to land shall be: (a) for a purpose in accordance with the applicable domestic laws and regulations[1]; and (b) upon payment of compensation equivalent to the market value, while recognising the applicable domestic laws and regulations. 4. The issuance of compulsory licences in relation to intellectual property rights does not constitute an expropriation within the meaning of paragraph 1, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights contained in Annex 1C of the WTO Agreement (hereinafter referred to as "TRIPS Agreement"). 5. An investor affected by an expropriation shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party. 6. This Article shall be interpreted in accordance with Annex 4 (Understanding on Expropriation). *Footnote:* [1] The applicable domestic laws and regulations is Viet Nam's Land Law No. 45/2013/QH13 and Decree No. 44/2014/ND-CP Regulating Land Prices, as at the date of entry into force of this Agreement.	
	Annex on Understanding on Expropriation	The Parties confirm their common understanding on expropriation: 1. Expropriation as referred to in paragraph 1 of Article 2.7 (Expropriation) may be either direct or indirect as follows: (a) direct expropriation occurs if an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; (b) indirect expropriation occurs if a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. 2. The determination of whether a measure or series of measures by a Party, in a specific factual situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, inter alia: (a) the economic impact of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) the duration of the measure or series of measures or of its effects; and (c) the character of the measure or series of measures, in particular its object, context and intent. 3. Non-discriminatory measures or series of measures by a Party that are designed to protect legitimate	

		public policy objectives do not constitute indirect expropriation, except in the rare circumstances where the impact of such measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.	
RCEP (not yet in force)	Article 10.13 Expropriation[25]	1. *No Party shall expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation" in this Chapter), except:* (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of compensation in accordance with paragraphs 2 and 3; and (d) in accordance with due process of law. 2. The compensation referred to in subparagraph 1(c) shall: (a) be paid without delay;[26] (b) be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced,[27] or when the expropriation occurred, whichever is earlier (hereinafter referred to as the "date of expropriation" in this Chapter);[28, 29, 30] (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be effectively realisable and freely transferable. 3. In the event of delay, the compensation shall include an appropriate interest in accordance with the expropriating Party's laws, regulations, and policies provided that such laws, regulations, and policies are applied on a non-discriminatory basis. 4. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 11 (Intellectual Property) and the TRIPS Agreement.[31] 5. Notwithstanding paragraphs 1 through 3, any measure of expropriation relating to land shall be as defined in the existing laws and regulations of the expropriating Party, and shall be, for the purposes of and on payment of compensation, in accordance with the aforesaid laws and regulations. Such compensation shall be subject to any subsequent amendments to the aforesaid laws and regulations relating to the amount of compensation where such amendments follow the general trends in the market value of the land. *Footnotes:*	B

		[25] This Article shall be interpreted in accordance with Annex 10B (Expropriation). [26] The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made. [27] For the Philippines, the time when the expropriation was publicly announced for the purpose of calculating the fair market value of the expropriated investment refers to the date of filing of the Petition for Expropriation. [28] For Australia, Brunei Darussalam, Korea, Malaysia, New Zealand, and Singapore, the date of expropriation for the purpose of calculating the fair market value of the expropriated investment means the date immediately before the expropriation occurs. [29] For Cambodia, Lao PDR, Myanmar, and Viet Nam, the date of expropriation for the purpose of calculating the fair market value of the expropriated investment means the date when the expropriation decision is issued by the competent authority. [30] For Thailand, the date of expropriation for the purpose of calculating the fair market value of the expropriated investment means the date when the expropriation occurs.	
	Annex 10B on Expropriation	The Parties confirm their shared understanding that: 1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest[1] in a covered investment. 2. Article 10.13 (Expropriation) addresses two situations: (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) *the second situation is where an action or a series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.* 3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in subparagraph 2(b) requires a case-bycase, fact based inquiry that considers, among other factors: (a) *the economic impact of the government action, although the fact that an action or a series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;* (b) *whether the government action breaches the government's prior binding written commitment to the investor, whether by contract, licence, or other legal document; and* (c) *the character of the government action, including its objective and context*.[2] 4. *Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate*	

		public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilisation, do not constitute expropriation of the type referred to in subparagraph 2(b). *Footnotes:* [1] For the purposes of this Annex, "property interest" refers to such property interest as may be recognised under the laws and regulations of that Party. [2] For Korea, a relevant consideration could include whether the investor bears a disproportionate burden, such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest. This footnote does not prejudice the determination of the character of the government action of any other Party.	

APPENDIX 5: FTT PROVISIONS IN VIETNAM'S IIAS – EXAMPLES

Treaties	Articles	Contents (emphasis added)	Formulations
Vietnam-Singapore BIT	Article 8: Repatriation	Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer, on a non-discriminatory basis, of their capital and the returns from any investments, including: (a) Profits, capital gain, dividends, royalties, interests and other current income accruing from any investments; (b) the proceeds of the total or partial liquidation of any investment; (c) repayments made pursuant to a loan agreement in connection with investments; (d) license fees in relation to the matters in Article 1(1)(d); (e) payments in respect of technical assistance, technical service and management fees; (f) payments in connection with contracting projects; (g) earnings of nationals of the other Contracting Party who work in connection with an investment in the territory of the former Contracting Party.	FTT Provisions without Exceptions or References (A)
Vietnam-US BTA	Chapter VII: General Articles Article 1: Cross-Border Transactions and Transfers	1. Unless otherwise agreed between the parties to such transactions, all cross-border commercial transactions, and all transfers of currencies relating to a covered investment, shall be made in United States dollars or any other currency may be designed from time to time by the International Monetary Fund as being a freely usable currency. 2. In connection with trade in products and services, each Party shall grant to nationals and companies of the other Party the better of most-favored-nation or national treatment with respect to: A. opening and maintaining accounts, in both local and foreign currency, and having access to funds deposited in financial institutions located in the territory of the Party; B. payments, remittances and transfers of currencies convertible into freely usable currency at a market rate of exchange or financial instruments representative thereof, between the territories of the two Parties, as well as between territory of that Party and that of any third country; C. rates of exchange and related matters, including access to freely usable currencies. 3. Each Party shall grant to covered investments of the other Party the better of national or most favored national treatment with respect to all transfers into and out of each Party's territory. Such transfers include: A. contributions to capital; B. profits, dividends, capital gains and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;	FTT Provisions with References to International Law (B)

		C. interest, royalty payments, management fees, and technical assistance and other fees; D. payments made under contract, including a loan agreement; E. compensation pursuant to Article 10 of Chapter IV and payments arising out of an investment dispute. 4. In all cases, treatment cross-border transactions and transfers will be consistent with reach Party's obligations to the International Monetary Fund. 5. Each Party shall permit returns in kind to be made as authorized or specified in an investment authorization, investment agreement, or other written agreement between the Party and a covered investment or a national or company of the other Party. 6. Notwithstanding paragraphs 1 through 5, a Party may prevent a transfer through the equitable, non-discriminatory and good faith applications (including the seeking of preliminary relief, such judicial injunction and temporary restraining orders) of its law relating to: A. bankruptcy, insolvency or the protection of the rights of creditors; B. issuing, trading or dealing in securities, futures, options, or derivatives; C. reports or records of transfers; D. criminal or penal offenses; or E. ensuring compliance with orders or judgments in judicial or administrative proceedings. 7. The provisions of this Article relating to financial transfers shall not preclude: A. a requirement that a national or company (or its covered investment) comply with customary banking procedures and regulations, provided that they do not impair the substance of the rights granted under this Article; B. prudential measures in order to protect the interests of creditors and to ensure the stability and integrity of the national financial system.	
Vietnam-Denmark BIT	Article 7: Repatriation and Transfer of Capital and Returns	(1) Each Contracting Party shall without delay allow the transfer of: (a) the invested capital or the proceed of total or partial liquidation or alienation of the investment; (b) the returns realized; (c) the payments made for the reimbursement of the credits for investments and interests due; (d) an approved portion of the earnings of the expatriates who are allowed to work in an investment made in the territory of the other Contracting Party. (2) Transfers of currency pursuant to Article 5, 6 and section (1) of this Article shall be made in the convertible currency in which the investment has been made or in any convertible currency if so agreed by the investor, at the official rate of exchange in force at the date of transfer.	B

	Article 4: Exceptions	(2) The provisions of article 7, section 1 of this Agreement shall be without prejudice to the right of one Contracting Party to take protective measures in respect of capital movements of an investor of the other Contracting Party provided such measures are taken *in accordance with multilateral agreements* to which either of the Contracting Parties is or may become a party.	
Vietnam-Greece BIT	Article 7	1. Each Contracting Party shall permit, in respect of investments of investors of the other Contracting Party, the unrestricted transfer of all payments relating to an investment. The transfers shall be effected without delay, in a freely convertible currency, at the market rate of exchange applicable on the date of transfer, and in accordance with any procedures or formalities applicable in the host Contracting Party. 2. Such transfers shall include in particular, though not exclusively: a) capital and additional amounts to maintain or increase the investment; b) returns; c) funds in repayment of loans; d) proceeds of sales or liquidation of the whole or any part of the investment; e) compensation under Articles 5 and 6; f) payments arising out of the settlement of a dispute. 3. Notwithstanding Paragraphs 1 and 2, a Contracting Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading or dealing in securities, futures, options, or derivatives; (c) criminal or penal offenses and the recovery of the proceeds of crime; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; (f) taxation; (g) social security, public retirement, or compulsory savings schemes; and (h) severance entitlements of employees. 4. In case of *serious balance of payments difficulties or the threat thereof*, each Contracting Party may temporarily restrict transfers, provided that such a Contracting Party implements measures or a programme in accordance with the International Monetary Fund standards. These restrictions would be imposed on an equitable, non-discriminatory and in good faith basis.	FTT Provisions with Economic Safeguard-Based Exceptions (C)

Vietnam-Slovakia BIT	Article 7(3)(a)	Notwithstanding paragraphs 1 and 2 [FTT obligation], a Contracting Party may issue or maintain measures relating to capital transactions and cross-border payments through the application of its laws and regulations fairly, equitably and in good faith relating to […] the adoption of safeguard measures within a reasonable time in special circumstances when the Party faces *serious difficulties for macroeconomic or balance of payments.* [tr author]	C
Vietnam-EAEU FTA	Chapter 8: Trade in Services, Investment and Movement of Natural Persons Section Article 8.37: Transfer of Payments	1. Except under the circumstances envisaged in Article 8.8 of this Agreement each Party to this Chapter shall guarantee to investors of the other Party to this Chapter, upon fulfilment by them of all tax and other obligations in accordance with the laws and regulations of the former Party, a free transfer abroad of payments related to their investments, and in particular: a) returns; b) funds in repayment of loans and credits recognised by each Party to this Chapter as investments, as well as accrued interest; c) proceeds from sale or full or partial liquidation of investments; d) compensation, stipulated in the Articles 8.34 and 8.35 of this Agreement; e) wages and other remunerations received by investors and natural persons of the other Party to this Chapter authorised to work in connection with investments in the territory of the former Party. 2. Transfer of payments shall be made without undue delay in a freely usable currency at the rate of exchange applicable on the date of the transfer pursuant to the exchange laws and regulations of the Party to this Chapter in which territory the investments were made.	
	Article 8.8: Restrictions to Safeguard the Balance of Payments	1. Notwithstanding the provisions of Articles 8.18 and 8.37 of this Agreement each Party to this Chapter may adopt and maintain restrictions on trade in services, establishment and investments in respect of which commitments were undertaken by such Party in accordance with this Chapter, including on payments or transfers for transactions related to such commitments referred to in Articles 8.18 and 8.37 of this Agreement in the event of *serious balance of payments* and *external financial difficulties* and threat thereof and subject to the condition that such restrictions: a) shall be applied on a most-favoured-nation basis; b) shall be consistent with the Articles of Agreement of the International Monetary Fund; c) shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party to this Chapter; d) shall not exceed those necessary to deal with circumstances described in this paragraph; e) shall be temporary and be phased out progressively as the situation specified in this paragraph improve.	

		2. The Party to this Chapter introducing a restriction under paragraph 1 of this Article shall promptly notify the other Party to this Chapter of such measure. 3. In determining the incidence of such restrictions, the Parties to this Chapter may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector. 4. Nothing in this Agreement shall affect the rights and obligations of a Party to this Chapter which is a member of the International Monetary Fund under the Articles of Agreement of the International Monetary Fund, including the use of exchange actions which are in conformity with the Articles of Agreement of the International Monetary Fund, provided that such Party to this Chapter shall not impose restrictions inconsistently with the conditions provided for in paragraph 1 of this Article. 5. This Article shall not be subject to the dispute settlement procedures stipulated by the Article 8.38 of this Agreement.	
ASEAN-ANZ FTA	Chapter 11: Investment Article 8: Transfers	1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital, including the initial contribution; (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment; (c) proceeds from the total or partial sale or liquidation of any covered investment; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Article 7 (Compensation for Losses) and Article 9 (Expropriation and Compensation); (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment. 2. Each Party shall allow such transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Notwithstanding Paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and Regulations relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives;	C

		(c) criminal or penal offences and the recovery of the proceeds of crime; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; (f) taxation; (g) social security, public retirement, or compulsory savings schemes; and (h) severance entitlements of employees. 4. Nothing in this Chapter shall affect the rights and obligations of each Party as a member of the International Monetary Fund under the IMF Articles of Agreement, including the use of exchange actions which are in conformity with the IMF Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Chapter regarding such transactions, except under Article 4 (Measures to Safeguard the Balance of Payments) of Chapter 15 (General Provisions and Exceptions) or at the request of the International Monetary Fund.	
	Chapter 15: General Provisions and Exceptions Article 4: Measures to Safeguard the Balance of Payments	1. Where a Party is in serious *balance of payments* and *external financial difficulties* or under threat thereof, it may: (a) in the case of trade in goods, in accordance with GATT 1994 and the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 in Annex 1A to the WTO Agreement, adopt restrictive import measures; (b) in the case of trade in services, adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments; (c) in the case of investments, adopt or maintain restrictions on payments or transfers related to covered investments as defined in Article 2(a) (Definitions) of Chapter 11 (Investment) 2. Restrictions adopted or maintained under Paragraph 1(b) or (c) shall: (a) be consistent with the IMF Articles of Agreement; (b) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; (c) not exceed those necessary to deal with the circumstances described in Paragraph 1; (d) be temporary and be phased out progressively as the situation specified in Paragraph 1 improves; and (e) be applied on a non-discriminatory basis such that no Party is treated less favourably than any other Party or non-Party. 3. With respect to trade in services and investment,	

		(a) it is recognised that particular pressures on the balance of payments of a Party in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition; (b) in determining the incidence of such restrictions, a Party may give priority to economic sectors which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular sector. 4. Any restrictions adopted or maintained by a Party under Paragraph 1, or any changes therein, shall be notified promptly to the other Parties. 5. A Party adopting or maintaining any restrictions under Paragraph 1 shall: (a) in the case of investment, respond to any other Party that requests consultations in relation to the restrictions adopted by it, if such consultations are not otherwise taking place outside this Agreement; (b) in the case of trade in services, if consultations in relation to the restrictions adopted by it are not taking place at the WTO, a Party, if requested, shall promptly commence consultations with any interested Party.	
Vietnam-Japan BIT	Article 12	1. Each Contracting Party shall ensure that all payments relating to investments in its Area of an investor of the other Contracting Party may be freely transferred into and out of its Area without delay. Such transfers shall include, in particular, though not exclusively: (a) the initial capital and additional amounts to maintain or increase investments; (b) profits, interest, capital gains, dividends, royalties and fees; (c) payments made under a contract including a loan agreement; (d) proceeds of the total or partial sale or liquidation of investments; (e) payments made in accordance with Articles 9 and 10; (f) payments arising out of the settlement of a dispute under Article 14; and (g)earnings and remuneration of personnel engaged from the other Contracting Party in connection with investments. 2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies at the market rate of exchange existing on the date of the transfer. 3. Notwithstanding paragraphs 1 and 2 above, a Contracting Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offenses; or	C

		(d) ensuring compliance with orders or judgments in adjudicatory proceedings.	
	Article 16	1. A Contracting Party may adopt or maintain measures not conforming with its obligations under paragraph 1 of Article 2 relating to cross-border capital transactions and Article 12: (a) in the event of *serious balance-of-payments* and *external financial difficulties* or threat thereof; or (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause *serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.* 2. Measures referred to in paragraph 1 above: (a)shall be consistent with the Articles of Agreement of the International Monetary Fund so long as the Contracting Party taking the measures is a party to the said Articles; (b)shall not exceed those necessary to deal with the circumstances set out in paragraph 1 above; (c) shall be temporary and shall be eliminated as soon as conditions permit; and (d)shall be promptly notified to the other Contracting Party. 3. Nothing in this Agreement shall be regarded as altering the rights enjoyed and obligations undertaken by a Contracting Party as a party to the Articles of Agreement of the International Monetary Fund.	
ASEAN-Hong Kong IA	Article 12 Transfers	1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its Area. Such transfers include: (a) contributions to capital, including the initial contribution; (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment; (c) proceeds from the total or partial sale or liquidation of any covered investment; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Article 10 (Expropriation and Compensation) and Article 11 (Compensation for Losses or Damages); (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and (g) earnings and other remuneration of personnel engaged from abroad in connection with that covered investment. 2. Each Party shall allow such transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to any of the following:	C

		(a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offences and the recovery of the proceeds of crime; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; (f) taxation; (g) social security, public retirement, or compulsory savings schemes; (h) severance entitlements of employees; and (i) requirement to register and satisfy other transfer formalities imposed by the Central Bank or other relevant authorities of a Party. 4. Nothing in this Agreement shall affect the rights and obligations that apply to the Parties under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 13 (Temporary Safeguard Measures) or at the request of the IMF.	
	Article 13 Temporary Safeguard Measures	1. A Party may adopt or maintain measures not conforming with its obligations under Article 3 (National Treatment) relating to cross-border capital transactions and Article 12 (Transfers): (a) in the event of *serious balance of payments* and *external financial difficulties or threat thereof*; or (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause *serious difficulties for macroeconomic management, in particular monetary and exchange rate policies.* 2. The measures referred to in paragraph 1 shall: (a) be consistent with the Articles of Agreement of the IMF; (b) avoid unnecessary damage to the commercial, economic and financial interests of another Party; (c) not exceed those necessary to deal with the circumstances described in paragraph 1; (d) be temporary and phased out progressively as the situation specified in paragraph 1 improves; and (e) be applied such that any one of the other Parties is treated no less favourably than any other Party or non-Party. 3. Any measures adopted or maintained under paragraph 1 or any changes therein shall be promptly notified	

		to the other Parties.	
CPTPP	Article 9.9: Transfers[20]	1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital;[21] (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees; (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Article 9.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 9.8 (Expropriation and Compensation); and (f) payments arising out of a dispute. 2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of another Party. 4. Notwithstanding paragraphs 1, 2 and 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its laws[22] relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities, futures, options or derivatives; (c) criminal or penal offences; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or (e) ensuring compliance with orders or judgments in judicial or administrative proceedings. 5. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4. *Footnotes:* [20] For greater certainty, this Article is subject to Annex 9-E (Transfers). [21] For greater certainty, contributions to capital include the initial contribution. [22] For greater certainty, this Article does not preclude the equitable, non-discriminatory and good faith application of a Party's laws relating to its social security, public retirement or compulsory savings programmes.	C

	Article 29.3: Temporary Safeguard Measures	1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers for current account transactions in the event of *serious balance of payments* and *external financial difficulties* or threats thereof. 2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers relating to the movements of capital: (a) in the event of serious balance of payments and external financial difficulties or threats thereof; or (b) if, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause *serious difficulties for macroeconomic management*. 3. Any measure adopted or maintained under paragraph 1 or 2 shall: (a) not be inconsistent with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 11.3 (National Treatment) and Article 11.4 (Most- Favoured-Nation Treatment);[4] (b) be consistent with the Articles of Agreement of the International Monetary Fund; (c) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; (d) not exceed those necessary to deal with the circumstances described in paragraph 1 or 2; (e) be temporary and be phased out progressively as the situations specified in paragraph 1 or 2 improve, and shall not exceed 18 months in duration; however, in exceptional circumstances, a Party may extend such measure for additional periods of one year, by notifying the other Parties in writing within 30 days of the extension, unless after consultations more than one-half of the Parties advise, in writing, within 30 days of receiving the notification that they do not agree that the extended measure is designed and applied to satisfy subparagraphs (c), (d) and (h), in which case the Party imposing the measure shall remove the measure, or otherwise modify the measure to bring it into conformity with subparagraphs (c), (d) and (h), taking into account the views of the other Parties, within 90 days of receiving notification that more than one half of the Parties do not agree; (f) not be inconsistent with Article 9.8 (Expropriation and Compensation);[5] (g) in the case of restrictions on capital outflows, not interfere with investors' ability to earn a market rate of return in the territory of the restricting Party on any restricted assets;[6] and (h) not be used to avoid necessary macroeconomic adjustment. 4. Measures referred to in paragraphs 1 and 2 shall not apply to payments or transfers relating to foreign direct investment.[7] 5. A Party shall endeavour to provide that any measures adopted or maintained under paragraph 1 or 2 be price-based, and if such measures are not price-based, the Party shall explain the rationale for using	

		quantitative restrictions when it notifies the other Parties of the measure. 6. In the case of trade in goods, Article XII of GATT 1994 and the Understanding on the Balance of Payments Provisions of the GATT 1994 are incorporated into and made part of this Agreement, mutatis mutandis. Any measures adopted or maintained under this paragraph shall not impair the relative benefits accorded to the other Parties under this Agreement as compared to the treatment of a non-Party. 7. A Party adopting or maintaining measures under paragraph 1, 2 or 6 shall: (a) notify, in writing, the other Parties of the measures, including any changes therein, along with the rationale for their imposition, within 30 days of their adoption; (b) present, as soon as possible, either a time schedule or the conditions necessary for their removal; (c) promptly publish the measures; and (d) promptly commence consultations with the other Parties in order to review the measures adopted or maintained by it. (i) In the case of capital movements, promptly respond to any other Party that requests consultations in relation to the measures adopted by it, provided that such consultations are not otherwise taking place outside of this Agreement. (ii) In the case of current account restrictions, if consultations in relation to the measures adopted by it are not taking place under the framework of the WTO Agreement, a Party, if requested, shall promptly commence consultations with any interested Party. *Footnotes:* [4] Without prejudice to the general interpretation of Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment), Article 10.4 (Most- Favoured-Nation Treatment), Article 11.3 (National Treatment) and Article 11.4 (Most-Favoured- Nation Treatment), the fact that a measure adopted or maintained pursuant to paragraph 1 or 2 differentiates between investors on the basis of residency does not necessarily mean that the measure is inconsistent with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 11.3 (National Treatment) and Article 11.4 (Most-Favoured-Nation Treatment). [5] For greater certainty, measures referred to in paragraph 1 or 2 may be non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives as referred to in Annex 9-B(3)(b) (Expropriation). [6] The term “restricted assets” in this subparagraph refers only to assets invested in the territory of the restricting Party by an investor of a Party that are restricted from being transferred out of the territory of the	

		restricting Party. [7] For the purposes of this Article, "foreign direct investment" means a type of investment by an investor of a Party in the territory of another Party, through which the investor exercises ownership or control over, or a significant degree of influence on the management of, an enterprise or other direct investment, and tends to be undertaken in order to establish a lasting relationship. For example, ownership of at least 10 per cent of the voting power of an enterprise over a period of at least 12 months generally would be considered foreign direct investment.	
ASEAN-China IA	Article 10 Transfers and Repatriation of Profits	1. Each Party shall allow all transfers in respect of investments in its territory of an investor of any other Party to be made in any freely usable currency at the prevailing market rate of exchange on the date of transfer, and allow such transfers to be freely transferred into and out of its territory without delay. Such transfers shall include: (a) the initial capital, plus any additional capital used to maintain or expand the investments[7]; (b) net profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any investment of the investors of any other Party; (c) proceeds from the total or partial sale or liquidation of any investment made by investors of any other Party; (d) funds in repayment of borrowings or loans given by investors of a Party to the investors of any other Party which the respective Parties have recognised as investment; (e) net earnings and other compensations of natural persons of any other Party, who are employed and allowed to work in connection with an investment in its territory; (f) payments made under a contract entered into by the investors of any other Party, or their investments including payments made pursuant to a loan transaction; and (g) payments made pursuant to Article 8 (Expropriation) and Article 9 (Compensation for Losses). 2. Each Party undertakes to accord to the transfer referred to in Paragraph 1, treatment as favourable as that accorded, in like circumstances, to the transfer originating from investments made by investors of any other Party or third country. 3. Notwithstanding Paragraph 1 and Paragraph 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its laws and regulations relating to: (a) bankruptcy, loss of ability or capacity to make payments, or protection of the right of creditors; (b) non-fulfilment of the host Party's transfer requirements in respect of trading or dealing in securities, futures, options or derivatives;	C

		(c) non-fulfilment of tax obligations; (d) criminal or penal offences and the recovery of the proceeds of crime; (e) social security, public retirement or compulsory saving schemes; (f) compliance with judgements in judicial or administrative proceedings; (g) workers' retrenchment benefits in relation to labour compensation relating to, amongst others, foreign investment projects that are closed down; and (h) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities. 4. For greater certainty, the transfers referred to in the preceding Paragraphs shall comply with relevant formalities stipulated by the host Party's domestic laws and regulations relating to exchange administration, insofar as such laws and regulations are not to be used as a means of avoiding a Party's obligations under this Agreement. 5. Nothing in this Agreement shall affect the rights and obligations of the Parties as members of the IMF under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Agreement regarding such transactions, except: (a) under Article 11 (Measures to Safeguard the Balance of Payments); or (b) at the request of the IMF; or (c) where, in exceptional circumstances, movements of capital cause, or threaten to cause, *serious economic or financial disturbance* in the Party concerned, provided such restrictions do not affect the rights and obligations of the Parties as members of the WTO under Paragraph 1 of Article XI of GATS, and the measures are taken in accordance with paragraph 2 of Article 11 of this Agreement, mutatis mutandis. *Footnote:* [7] The Parties understand that the reference to "the initial capital, plus any additional capital used to maintain or expand the investments" only applies following the successful completion of the approval procedures for inward investment.	
	Article 11 Measures to Safeguard the Balance	1. In the event of *serious balance of payments* and *external financial difficulties* or threat thereof, a Party may adopt or maintain restrictions on investments, including payments or transfers related to such investments. It is recognised that particular pressures on the balance of payments of a Party in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of	

	of Payments	financial reserves adequate for the implementation of its programme of economic development. 2. The restrictions referred to in Paragraph 1 shall: (a) be consistent with the Articles of Agreement of the IMF; (b) *not discriminate among the Parties;* (c) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; (d) not exceed those necessary to deal with the circumstances described in Paragraph 1; (e) be temporary and be phased out progressively as the situation specified in Paragraph 1 improves; and (f) *be applied such that any other Party is treated no less favourably than any third country.* 3. Any restrictions adopted or maintained by a Party under Paragraph 1 or any changes therein, shall be promptly notified to the other Parties.	
ACIA	Article 13: Transfers	1. Each Member State shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital, including the initial contribution; (b) profits, capital gains, dividends, royalties, license fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment; (c) proceeds from the total or partial sale or liquidation of any covered investment; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Articles 12 (Compensation in Cases of Strife) and 14 (Expropriation and Compensation); (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the Member States to the dispute; and (g) earnings and other remuneration of personnel employed and allowed to work in connection with that covered investment in its territory. 2. Each Member State shall allow transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Notwithstanding paragraphs 1 and 2, a Member State may prevent or delay a transfer through the equitable, non- discriminatory, and good faith application of its laws and regulations relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offences and the recovery of the proceeds of crime;(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory	C

		authorities; (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; (f) taxation; (g) social security, public retirement, or compulsory savings schemes; (h) severance entitlements of employees; and (i) the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Member State. 4. Nothing in this Agreement shall affect the rights and obligations of the Member States as members of the IMF, under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Member State shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Agreement regarding such transactions, except: (a) at the request of the IMF; (b) under Article 16 (Measures to Safeguard the Balance-of-Payments); or (c) where, in exceptional circumstances, movements of capital cause, or threaten to cause, *serious economic or financial disturbance* in the Member State concerned. 5. The measures taken in accordance with sub-paragraph 4(c)8: (a) shall be consistent with the Articles of Agreement of the IMF; (b) shall not exceed those necessary to deal with the circumstances described in sub-paragraph 4(c); (c) shall be temporary and shall be eliminated as soon as conditions no longer justify their institution or maintenance; (d) shall promptly be notified to the other Member States; (e) *shall be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State*; (f) *shall be applied on a national treatment basis;* and (g) shall avoid unnecessary damage to investors and covered investments, and the commercial, economic and financial interests of the other Member State(s). *Footnote:* [8] For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for the purpose of protecting a particular sector.	

	Article 16: Measures to Safeguard the Balance-of-Payments	1. In the event of *serious balance-of-payments* and *external financial difficulties* or threat thereof, a Member State may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance-of-payments of a Member State in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development. 2. The restrictions referred to in paragraph 1 shall: (a) be consistent with the Articles of Agreement of the IMF; (b) avoid unnecessary damage to the commercial, economic and financial interests of another Member State; (c) not exceed those necessary to deal with the circumstances described in paragraph 1; (d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves; (e) be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State. 3. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Member States. 4. To the extent that it does not duplicate the process under WTO, IMF, or any other similar processes, the Member State adopting any restrictions under paragraph 1 shall commence consultations with any other Member State that requests such consultations in order to review the restrictions adopted by it.	
Vietnam-Korea FTA	Chapter 9: Investment Article 9.8: Transfers[7]	1. Each Party shall permit all transfers relating to a covered investment to be made freely, and without delay, into and out of its territory. Such transfers include: (a) the initial capital and additional amounts to maintain or increase the investment; (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment; (c) interest, royalty payments, management fees, and technical assistance and other fees; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Articles 9.6 and 9.7; and (f) payments arising out of the settlement of a dispute. 2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party. 4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-	C

		discriminatory, and good faith application of its domestic laws and regulations relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offenses; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; (f) social security, public retirement or compulsory savings scheme; (g) severance entitlement of employees; and (h) taxation. *Footnote:* [7] For greater certainty, Annex 9-C applies to this Article.	
		Annex 9-C Transfers 1. Nothing in this Chapter or Chapter 8 (Trade in Services) shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures with regard to payments and capital movements: (a) in the event of *serious balance of payments* or *external financial difficulties* or threat thereof; or (b) where, in exceptional circumstances, payments and capital movements cause or threaten to cause *serious economic or financial disturbance* or *serious difficulties for the operation of monetary policy or exchange rate policy* in either Party. 2. The measures referred to in paragraph 1: (a) shall be phased out within one year or when conditions would no longer justify their institution or maintenance;[29] (b) shall be consistent with the Articles of Agreement of the International Monetary Fund (hereinafter referred to as "Articles of Agreement"), as may be amended; (c) shall not exceed those necessary to deal with the circumstances described in paragraph 1; (d) shall avoid unnecessary damage to the commercial, economic, or financial interests of the other Party; (e) shall be temporary and phased out progressively as the situation calling for imposition of such measures improves; (f) shall promptly be notified to the other Party; and (g) *shall be applied in a manner consistent with Articles 9.3 and 8.2 (National Treatment) and Articles 9.4 and 8.3 (Most-Favored-Nation Treatment) subject to the Schedules set out in Annexes I and II*[30]	

		and Annex 8-D (Schedule of Specific Commitments)[31]. 3. Nothing in this Chapter or Chapter 8 (Trade in Services) shall be regarded to affect the rights enjoyed and obligations undertaken by a Party as party to the Articles of Agreement, including the use of exchange actions which are in conformity with the Articles of Agreement. *Footnotes:* [29] For greater certainty, the measures may be extended beyond the one year period should conditions warrant. [30] This subparagraph shall not apply until the Parties' Schedules to Annexes I and II have entered into force. [31] For greater certainty, the measures referred to in paragraph 1 which are within the scope of this Chapter shall be applied in a manner consistent with Articles 9.3 and 9.4 subject to the Schedules set out in Annexes I and II, and the measures referred to in paragraph 1 which are within the scope of Chapter 8 shall be applied in a manner consistent with Articles 8.2 and 8.3 subject to the Schedules set out in Annex 8-D(Schedule of Specific Commitments), respectively.	
ASEAN-Korea IA	Article 10 Transfers	1. Each Party shall allow transfers relating to a covered investment to be made freely and without delay into and out of its territory in any freely usable currency at the prevailing market rate of exchange in its territory on the date of transfer. Such transfers shall include: (a) the initial capital and additional amounts to maintain or increase the investment; (b) profits, dividends, interest, capital gains, royalty payments, licence fees, technical assistance fees, management fees and other current income accruing from any covered investment; (c) proceeds from the sale or liquidation of all or any part of the investment; (d) payments made under a contract including payments made pursuant to a loan agreement; (e) payments made in accordance with Article 12 (Expropriation and Compensation) and Article 13 (Compensation for Losses); and (f) payments arising out of the settlement of a dispute under this Agreement. 2. Notwithstanding paragraph 1, a Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws and regulations relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities, futures, options or derivatives; criminal or penal offences; (d) social security, public retirement or compulsory savings scheme; (e) ensuring compliance with the judgments in judicial or administrative proceedings; (f) severance entitlement of employees; (g) financial reporting or record keeping of transfers when necessary to assist law enforcement or	C

		financial regulatory authorities; and (h) taxation. 3. Nothing in this Agreement shall affect the rights and obligations of the Parties as members of the International Monetary Fund (IMF) under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 11 (Temporary Safeguard Measures) or at the request of the Fund.	
	Article 11 Temporary Safeguard Measures	1. A Party may adopt or maintain measures not conforming with its obligations under Article 3 (National Treatment) relating to cross-border capital transactions or Article 10 (Transfers) in the event of *serious balance of payments* and *external financial difficulties* or under threat thereof. 2. A Party may adopt or maintain measures not conforming with its obligations under Article 10 (Transfers) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause *serious economic or financial disturbance* or *serious difficulties for the operation of monetary or exchange rate policies* in the Party concerned[13]. 3. The measures referred t o i n paragraphs 1 and 2 shall: (a) be consistent with the Articles of Agreement of the IMF, as may be amended; (b) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; (c) not exceed those necessary to deal with the circumstances described in paragraph 1 or 2; (d) be temporary and phased out progressively as the situation specified in paragraph 1 improves; and (e) *be applied such that any one of the other Parties is treated no less favourably than any other Party or non-Party.* 4. Measures adopted or maintained pursuant to paragraph 2 shall, in addition to paragraphs 3(a) to (e): (a) be phased out within one year or when conditions would no longer justify their institution or maintenance[14]; (b) *be applied on a national treatment basis*; and (c) avoid unnecessary damage to investors and covered investments of any other Party. 5. Any restrictions adopted or maintained under paragraphs 1 and 2 or any changes therein, shall be promptly notified to the other Parties. *Footnotes:* [13] For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for the purpose of protecting a particular sector. [14] For greater certainty, the measures may be extended beyond the one year period should conditions warrant.	

Vietnam-Philippines BIT	Article VII: Repatriation of Investment	Each Contracting Party shall *within the scope of its laws and regulations*, ensure the free transfer of investments, the returns thereof as well as the total or partial liquidation of investments of investors of the other Contracting Party subject, however, to the right of the former Contracting Party to *impose equitably and in good faith* such measures as may be *necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments.*	C
Vietnam-Romania BIT	Article 4: Free Transfer	Notwithstanding the provisions of paragraph (1) of the present Article [Free Transfer], either Contracting party may, *in the exceptional financial or economic circumstances, impose such exchange restrictions in accordance with its laws and regulations (and in conformity with the Articles of Agreement of the International Monetary Fund).*	C
Vietnam-Kazakhstan BIT	Article 7: Transfer of Payments	Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through *the equitable, non-discriminatory, and good faith application of its laws and regulations* relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offenses and the recovery of the proceeds of crime; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; and (f) taxation; (g) social security, public retirement, or compulsory savings schemes; and (h) severance entitlements of employees.	FTT Provisions with References to Domestic Laws (D)
Vietnam-Lao BIT	Article 6	Each Contracting Party shall, *subject to its laws, regulations and administrative practices* allow without unreasonable delay the transfer in any freely usable currency: (a) the net profits, dividends, technical assistance and technical fees, interest and other current income, accruing from any investment of the investors of the other Contracting Party; (b) the proceeds from the total or partial liquidation of any investment made by investors of the other Contracting Party; (c) funds in repayment of loans related to an investment, and (d) the earnings of citizens and permanent residents of the other Contracting Party who are employed and allowed to work in connection with an investment in its territory. […].	D
Vietnam-Estonia BIT	Article 7	1. *In accordance with its laws and regulations* and international law, each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and payments related to investments.	D

Vietnam-EU IPA (not yet in force)	Chapter 2 Article 2.8: Transfer	Each Party shall permit all transfers relating to covered investments to be made in a freely convertible currency, without restriction or delay and at the market rate of exchange applicable on the date of transfer. Such transfers include: (a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment; (b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment; (c) payments of interest, royalties, management fees, and technical assistance and other fees; (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement; (e) earnings and other remuneration of personnel engaged from abroad and working in connection with the investment; (f) payments made pursuant to Article 2.6 (Compensation for Losses) and Article 2.7 (Expropriation); and (g) payments of damages pursuant to an award issued under Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Settlement).	C
	Chapter 4: Article 4.7: Specific Exceptions	Nothing in Chapter 2 (Investment Protection) shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary policy or exchange rate policy. This Article shall not affect a Party's obligations under Article 2.8 (Transfer).	
	Article 4.10: Temporary Safeguard Measures	In exceptional circumstances of serious difficulties for the operation of the Union's economic and monetary union, or, in the case of Viet Nam, for the operation of the monetary and exchange rate policy, or a threat thereof, the Party concerned may take safeguard measures that are strictly necessary with regard to transfers for a period not exceeding one year.	
	Article 4.11: Restrictions in Case of Balance of Payments or External Financial Difficulties	1. Where a Party experiences serious balance of payments or external financial difficulties, or a threat thereof, it may adopt or maintain safeguard measures with regard to transfers, which shall: (a) be non-discriminatory compared to third countries in like situations; (b) not go beyond what is necessary to remedy the balance of payments or external financial difficulties; (c) be consistent with the Articles of Agreement of the International Monetary Fund as applicable; (d) avoid unnecessary damage to the commercial, economic and financial interests of the other Party; and	

		(e) be temporary and phased out progressively as the situation improves. 2. A Party having adopted or maintaining the measures referred to in paragraph 1 shall promptly notify the other Party of them and present, as soon as possible, a time schedule for their removal. 3. Where restrictions are adopted or maintained under paragraph 1, consultations shall be held promptly in the Committee unless consultations are held in other fora. The consultations shall assess the balance of payments or external financial difficulty that led to the respective measures, taking into account, inter alia, such factors as: (a) the nature and extent of the difficulties; (b) the external economic and trading environment; or (c) alternative corrective measures which may be available. The consultations shall address the compliance of any restrictive measures with paragraph 1. All relevant findings of statistical or factual nature presented by the International Monetary Fund shall be accepted and conclusions shall take into account the assessment by the International Monetary Fund of the balance of payments and the external financial situation of the Party concerned	
RCEP (not yet in force)	Chapter 10 Article 10.9: Transfers	1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital, including the initial contribution; (b) profits, capital gains, dividends, interest, royalty payments, technical assistance and technical and management fees, licence fees, and other current income accruing from the covered investment; (c) proceeds from the sale or liquidation of all or any part of the covered investment;(d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Article 10.11 (Compensation for Losses) and Article 10.13 (Expropriation); (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration, or the agreement of the parties to the dispute; and (g) earnings and other remuneration of personnel engaged from abroad in connection with the covered investment. 2. Each Party shall allow such transfers relating to a covered investment to be made in any freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors including employees;	C

		(b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offences and the recovery of the proceeds of crime; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring compliance with awards or orders or judgments in judicial or administrative proceedings; (f) taxation;[24] (g) social security, public retirement, superannuation, compulsory savings schemes, or other arrangements to provide pension or similar retirement benefits; (h) severance entitlement of employees; and (i) requirements to register and satisfy other formalities imposed by the central bank and other relevant authorities of that Party. 4. Nothing in this Chapter shall affect the rights and obligations of a Party as a member of the IMF under the IMF Articles of Agreement as may be amended, including the use of exchange actions which are in conformity with the IMF Articles of Agreement as may be amended, provided that the Party shall not impose restrictions on any capital transactions inconsistently with the obligations under this Chapter regarding such transactions, except under Article 17.15 (Measures to Safeguard the Balance of Payments) or on request of the IMF. *Footnote:* [24] For greater certainty, this also includes the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes including any taxation measure that differentiates between persons based on their place of residence or incorporation.	
	Article 17.15: Measures to Safeguard the Balance of Payments	1. Where a Party is in serious balance of payments and external financial difficulties or under threat thereof, it may: (a) in the case of trade in goods, adopt or maintain restrictive import measures in accordance with GATT 1994 and the Understanding on the Balance-of-Payments Provisions; (b) in the case of trade in services, adopt or maintain restrictions on trade in services on which it has undertaken commitments, including on payments or transfers for transactions related to such commitments. 2. In the case of investments, where a Party is in serious balance of payments and external financial difficulties or under threat thereof, or where, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management, it may adopt or maintain restrictions on payments or transfers related to covered investments as defined in Article	

		10.1 (Definitions). 3. Restrictions adopted or maintained under subparagraph 1(b) or paragraph 2 shall: (a) be consistent with the IMF Articles of Agreement as may be amended; (b) avoid unnecessary damage to the commercial, economic, and financial interests of any other Party; (c) not exceed those necessary to deal with the circumstances described in subparagraph 1(b) or paragraph 2; (d) be temporary and be phased out progressively as the situation specified in subparagraph 1(b) or paragraph 2 improves; and (e) be applied on a non-discriminatory basis such that no Party is treated less favourably than any other Party or a non- Party. 4. With respect to trade in services and investment: (a) it is recognised that particular pressures on the balance of payments of a Party in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition; (b) in determining the incidence of such restrictions, a Party may give priority to economic sectors which are more essential to its economic or development programmes. However, such restrictions shall not be adopted or maintained for the purposes of protecting a particular sector. 5. Any restriction adopted or maintained by a Party under paragraph 1 or 2, or any change thereto, shall be notified promptly to the other Parties. 6. A Party adopting or maintaining any restriction under paragraph 1 or 2 shall: (a) in the case of investments, respond to any other Party that requests consultations in relation to the restrictions adopted by it, if such consultations are not otherwise taking place outside this Agreement; (b) in the case of trade in services, promptly commence consultations with any other Party that requests consultations in relation to the restrictions adopted by it, if such consultations are not taking place at the WTO.	

APPENDIX 6: NT PROVISIONS IN VIETNAM'S IIAS – EXAMPLES

Treaties	Articles	Contents (emphasis added)	Formulations
Vietnam-Czech BIT	Article 2	1. Each Contracting Party shall in its territory accord to *investments and returns of investors of the other Contracting Party* treatment which is fair and equitable and not less favorable than that which it accords to *investments and returns of its own investors* or to investments and returns of investors of any third State, whichever is more favorable. 2. Each Contracting Party shall in its territory accord to *investors of the other Contracting Party*, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favorable than that which it accords to *its own investors* or investors of any third State, whichever is more favorable. 3. The provisions of paragraphs 1 and 2 shall not prevent either Contracting Party from setting forth, while admitting an investment of an investor of the other Contracting Party in accordance with its laws and regulations and policies, conditions which deviate from those applied to investments of its own investors.	NT Provisions without Exceptions, References (A)
	Vietnam-Czech BIT's Protocol of Amendment Article 1	Paragraph 4 of Article 3 of the Agreement is deleted and replaced by new paragraphs 4 to 6: "4. The National Treatment and Most-Favoured-Nation Treatment provisions of this Article shall not apply to advantages accorded by a Contracting Party pursuant to its obligations as a member of a customs, economic, or monetary union, a common market or a free trade area. 5. The Contracting Party understands the obligations of the other Contracting Party as a member of a customs, economic, or monetary union, a common market or a free trade area to include obligations arising out of an international agreement or reciprocity agreement of that customs, economic, or monetary union, common market or free trade area. 6. The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party, or to the investments or returns of such investors, the benefit of any treatment, preference or privilege which may be extended by the Contracting Party by virtue of any international agreement or arrangement relating wholly or mainly to taxation."	
Vietnam-France BIT	Article 4	Each Contracting Party shall apply, in its territory and and maritime zones, to *nationals or companies of the other Contracting Party* as regards their investments and activities associated with these investments, treatment comparable to which it accords to nationals or companies of *its own country* and no less favorable than which it accords to nationals or companies of the most favored nation. In this regard, nationals who are	A

		permitted to work in the territory and maritime zones of a Contracting Party shall enjoy appropriate material advantages to carry out their professional activities. [tr author]	
	Vietnam-France BIT's *Joint Interpretation Notes* Section 2	2. With regard to Article 4: Comparable treatment is considered in a holistic manner taking into account economic and social characteristics of the country. [tr author]	
Vietnam-Germany BIT	Article 3	(1) Each Contracting Party shall treat *investments owned or controlled by nationals or companies of the other Contracting Party* no less favorable than which it accords to investments of *its own nationals or companies* or to investments of the third party. (2) With respect to activities related to investments in its territory, each Contracting Party shall treat *nationals or companies of the other Contracting Party* no less favorable than which it accords to *its own nationals or companies* or to nationals or companies of the third party. (3) Only cases stated in the Protocol to this Agreement are exceptional to the principles in paragraphs 1 and 2. [tr author]	NT Provisions with Public Interest-Based Exceptions (B)
	Vietnam-Germany BIT's Protocol Section (3)	(3) Regarding Article 3 a) In particular "Activity" in the spirit of Article 3, paragraph 2 is recognized as, but not merely, management and use of investment. Where investment is granted to nationals or companies of the other Contracting Party, a Contracting Party may provide conditions different from those applicable to its nationals or companies. These conditions, particularly restrictions on purchases, on consumptions or similar measures, once adopted, shall not be altered to be detrimental to nationals or companies of the other Contracting Party. *Measures taken on the basis of public order and safety, the protection of public health, customs and traditions are not considered "less favorable" treatment in the spirit of Article 3.* [tr author]	
Vietnam-Oman BIT	Article 4: Treatment of Investments	l. With respect to the use, management, conduct, operation. expansion and sale or other disposition of investments, each Contracting Party shall, *subject to its laws and regulations*, accord to *investors of the other Contracting Party and their investments* in its territory, treatment no less favorable than that it accords, in like situations, to *its own investors* or to investors of any third state and *their investments and returns*. 2. The provision of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:	NT Provisions with Sector/Matter-Based Exceptions (C(1))

		(a) any customs union, economic union, free trade area, monetary union, or other form of regional or bilateral economic agreement or other similar international agreements, to which either of the Contracting Parties is or may become a party; (b) any Agreement on the Avoidance of Double Taxation or international, regional or bilateral agreements or other similar arrangements or any domestic legislation relating wholly or mainly to taxation. 3. For greater certainty, the provision of paragraph (l) of this Article *shall not* oblige either Contracting Party to accord investors of the other Contracting Party the same treatment that it accords to its own investors with regard to *ownership of land and real estates; obtaining grants, subsidies and soil loans; government procurement; and services supplied in the exercise of governmental authority.*	
Vietnam-Iceland BIT	Article 3: National Treatment and Most-Favored-Nation Provisions	1. Neither Contracting Party shall in its territory subject *investments or returns of nationals or companies of the other Contracting Party* to treatment less favourable than that which it accords to *its own nationals or companies* or to nationals or companies of any third State. 2. Neither Contracting Party shall in its territory subject *nationals or companies of the other Contracting Party*, as regards their management, to treatment less favourable than that which it accords to *its own nationals or companies* or to nationals or companies of any third State. 3. Notwithstanding paragraphs (1) and (2) of this Article, the Government of the Socialist Republic of Vietnam may *maintain* in force those measures, provided for in Vietnamese law at the date of signature of this Agreement and set out in the *Annex to this Agreement*, as exceptions to the grant of treatment not less favourable than that accorded to its own companies or nationals. The Government of the Socialist Republic of Viet Nam may remove any such exception listed in the *Annex to this Agreement* by notifying the Government of the Socialist Republic of Iceland in writing. Accordingly, any such written notification by the Government of the Socialist Republic of Vietnam shall have the immediate effect of amending the Annex to this Agreement. … 5. The provisions of paragraphs 1 and 2 of this Article shall not be applicable to tax measures. Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any tax convention. In the event of any inconsistency between the provisions of this Agreement and any tax convention, the provisions of the latter shall prevail.	C(1)
Vietnam-Korea BIT (2003)	Article 3: Investment Treatment	(1) Each Contracting Party shall in its territory accord to *investments and returns of investors of the other Contracting Party* treatment no less favourable than that which it accords to *investments and returns of its own investors* or to investments and returns of investors of any third State, whichever is more favourable to	C(1)

		investors. (2) Each Contracting Party shall in its territory accord to *investors of the other Contracting Party*, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords to *its own investors* or to the investors of any third State, whichever is more favourable to investors. (3) Notwithstanding paragraphs (1) and (2) of this Article, the Government of the Socialist Republic of Vietnam may *maintain* in force those measures, provided for in Vietnamese law at the date on which this Agreement was signed and, at the same time, set out in the *Annex to this Agreement*, as exceptions to the grant of treatment no less favourable than that accorded to its own investors. Those exceptions shall be removed from the Annex automatically as soon as the Vietnamese law which provided for such exceptions is amended or repealed, enabling such a removal. The Government of the Socialist Republic of Vietnam shall notify the Government of the Republic of Korea such amendment or repeal in writing. (4) The provisions of paragraphs (1) and (2) of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation.	
Vietnam-UK BIT	Article 3: National Treatment and Most-Favoured-Nation Provisions	(1) Neither Contracting Party shall in its territory subject *investments or returns of nationals or companies of the other Contracting Party* to treatment less favourable than that which it accords to *its own nationals or companies* or to nationals or companies of any third State. (2) Neither Contracting Party shall in its territory subject *nationals or companies of the other Contracting Party*, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to *its own nationals or companies* or to nationals or companies of any third State. (3) Notwithstanding paragraphs (1) and (2) of this Article, the Government of Vietnam may *maintain* in force those measures, provided for in Vietnamese Law at the date on which this Agreement was signed and set out in the *Annex to this Agreement*, as exceptions to the grant of treatment not less favourable than that accorded to its own companies or nationals. The Government of Vietnam may remove any such exception listed in the Annex to this Agreement by notifying the Government of the United Kingdom in writing. Accordingly, any such written notification by the Government of Vietnam shall have the immediate effect of amending the Annex to this Agreement.	C(1)

Vietnam-US BTA	Chapter IV: Development of Investment Relations Article 2: National Treatment and Most-Favored Nation Treatment	1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to *investments in its territory of its own nationals or companies* (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment"). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments, subject to the provisions of paragraph 4.3 of Annex H. 2. A. A Party may *adopt* or *maintain* exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in *Annex H to this Agreement*. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective. B. The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.	C(1)
Vietnam-Korea FTA	Article 9.3: National Treatment	Each Party shall accord to *investors of the other Party*, and to *their covered investments*, treatment no less favorable than that it accords, *in like circumstances*, to *its own investors and investments in its territory of its own investors* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.	C(1)
	Article 9.12: Non-Conforming Measures	1. Articles 9.3, 9.4, 9.9, and 9.10 *shall not* apply to: (a) any existing non-conforming measure that is maintained by a Party at (i) the central level of government, as set out by that Party in *Annex I*; or (ii) a local level of government;[8] (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed at the date of entry into force of Annex I, with Articles 9.3, 9.4, 9.9, and 9.10. 2. Articles 9.3, 9.4, 9.9, and 9.10 *shall not* apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in *Annex II*. 3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and	

		covered by *Annex II*, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective. 4. Nothing in this Chapter shall be construed to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which the Parties are party, including the TRIPS Agreement and other treaties concluded under the auspices of the World Intellectual Property Organization. 5. The Parties shall begin negotiations on Annexes I and II immediately after the entry into force of this Agreement with a view to concluding them within one year from the date of entry into force of this Agreement: (a) Articles 9.3, 9.4, 9.9, and 9.10 shall not apply until Annexes I and II have entered into force; and (b) The Parties shall make best endeavor to reflect the most advanced level of liberalization commitments in the Schedules of their agreements on investment at the time of the negotiations to ensure the overall balance of benefits of the Parties.	
CPTPP	Article 9.4: National Treatment[14]	1. Each Party shall accord to *investors of another Party* treatment no less favourable than that it accords, in like circumstances, to *its own investors* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to *covered investments* treatment no less favourable than that it accords, in like circumstances, to investments in its territory of *its own investors* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. For greater certainty, the treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part. *Footnote:* [14] For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.	C(1)
	Article 9.12: Non-Conforming Measures	1. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) *shall not apply* to: (a) any existing non-conforming measure that is maintained by a Party at:	

		(i) the central level of government, as set out by that Party in its Schedule to Annex I; (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or (iii) a local level of government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors).[29] 2. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out by that Party in its Schedule to Annex II. 3. If a Party considers that a non-conforming measure applied by a regional level of government of another Party, as referred to in paragraph 1(a)(ii), creates a material impediment to investment in relation to the former Party, it may request consultations with regard to that measure. These Parties shall enter into consultations with a view to exchanging information on the operation of the measure and to considering whether further steps are necessary and appropriate.[30] 4. No Party shall, under any measure adopted after the date of entry into force of this Agreement for that Party and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective. 5. (a) Article 9.4 (National Treatment) shall not apply to any measure that falls within an exception to, or derogation from, the obligations which are imposed by: (i) Article 18.8 (National Treatment); or (ii) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 18 (Intellectual Property). (b) Article 9.5 (Most-Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, the obligations which are imposed by: (i) Article 18.8 (National Treatment); or	

		(ii) Article 4 of the TRIPS Agreement. 6. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to: (a) government procurement; or (b) subsidies or grants provided by a Party, including governmentsupported loans, guarantees and insurance. 7. For greater certainty, any amendments or modifications to a Party's Schedules to Annex I or Annex II, pursuant to this Article, shall be made in accordance with Article 30.2 (Amendments). *Footnotes:* [29] With respect to Viet Nam, Annex 9-I (Non-Conforming Measures Ratchet Mechanism) applies. [30] For greater certainty, any Party may request consultations with another Party regarding a nonconforming measure applied by a central level of government, as referred to in paragraph 1(a)(i).	
ACIA	Article 5: National Treatment	1. Each Member State shall accord to *investors of any other Member State treatment* no less favourable than that it accords, in like circumstances, to *its own investors* with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Member State shall accord to *investments of investors of any other Member State* treatment no less favourable than that it accords, in like circumstances, to *investments in its territory of its own investors* with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.	NT Provisions with Sector/Matter-Based and Economic Safeguard-Based Exceptions (C(2))
	Article 9: Reservations	1. Articles 5 (National Treatment) and 8 (Senior Management and Board of Directors) *shall not* apply to: (a) any existing measure that is maintained by a Member State at: (i) the central level of government, as set out by that Member State in its reservation list in the *Schedule* referred to in paragraph 2; (ii) the regional level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2; and (iii) a local level of government; (b) the continuation or prompt renewal of any reservations referred to sub-paragraph (a). 2. Each Member State shall submit its reservation list to the ASEAN Secretariat for the endorsement of the AIA Council within 6 months after the date of signing of this Agreement. This list shall form a *Schedule to this Agreement*. 3. Any amendment or modification to any reservations contained in the Schedule referred to in paragraph 2 shall be in accordance with Article 10 (Modification of Commitments). 4. Each Member State shall reduce or eliminate the reservations specified in the Schedule in accordance with	

		the three phases of the Strategic Schedule of the AEC Blueprint and Article 46 (Amendments). 5. Articles 5 (National Treatment) and 6 (Most-Favoured-Nation Treatment) shall not apply to any measure covered by an exception to, or derogation from, the obligations under Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement, as may be amended ("TRIPS Agreement"), as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.	
	Article 13: Transfers	4. Nothing in this Agreement shall affect the rights and obligations of the Member States as members of the IMF, under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Member State shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Agreement regarding such transactions, except: (a) at the request of the IMF; (b) under Article 16 (Measures to Safeguard the Balance-of-Payments); …	
	Article 16: Measures to Safeguard the Balance-of-Payments	1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member State may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance-of-payments of a Member State in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development. 2. The restrictions referred to in paragraph 1 shall: (a) be consistent with the Articles of Agreement of the IMF; (b) avoid unnecessary damage to the commercial, economic and financial interests of another Member State; (c) not exceed those necessary to deal with the circumstances described in paragraph 1; (d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves; *(e) be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State.* 3. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Member States. 4. To the extent that it does not duplicate the process under WTO, IMF, or any other similar processes, the Member State adopting any restrictions under paragraph 1 shall commence consultations with any other Member State that requests such consultations in order to review the restrictions adopted by it.	

ASEAN-ANZ FTA	Article 4: National Treatment[5]	Each Party shall accord to *investors of another Party*, and to *covered investments*, in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer or other disposition of investments, treatment no less favourable than that it accords, in like circumstances, to *its own investors and their investments.* *Footnote:* [5] The application of this Article is subject to Article 16 (Work Programme).	C(2)
	Article 12: Reservations[11]	1. Article 4 (National Treatment), and in the case of Lao PDR Article 5 (Prohibition of Performance Requirements), *do not apply* to: (a) *any existing measure* that does not conform to those Articles maintained by a Party at: (i) the central level of government, as set out by that Party in its *Schedule to List I*; (ii) a regional level of government, as set out by that Party in its *Schedule to List I*; or (iii) a local level of government; (b) the continuation or prompt renewal of any measure referred to in Subparagraph (a); or (c) an amendment to any measure referred to in Subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure as it existed at the date of entry into force of the Party's Schedule to List I, with Article 4 (National Treatment), and, in the case of Lao PDR Article 5 (Prohibition of Performance Requirements). 2. Article 4 (National Treatment), and in the case of Lao PDR Article 5 (Prohibition of Performance Requirements), *do not apply* to any measure that a Party *adopts* or *maintains* with respect to sectors, sub-sectors, or activities, as set out in its *Schedule to List II*. 3. Other than pursuant to any procedures for the modification of schedules of reservations, a Party may not, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to List II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective. *Footnote:* [11] The application of this Article is subject to Article 16 (Work Programme).	
	Chapter 11: Investment Article 8: Transfers	4. Nothing in this Chapter shall affect the rights and obligations of each Party as a member of the International Monetary Fund under the IMF Articles of Agreement, including the use of exchange actions which are in conformity with the IMF Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Chapter regarding such transactions, except under Article 4 (Measures to Safeguard the Balance of Payments) of Chapter 15 (General Provisions and Exceptions) or at the request of the International Monetary Fund.	

	Chapter 15: General Provisions and Exceptions Article 4: Measures to Safeguard the Balance of Payments	1. Where a Party is in serious balance of payments and external financial difficulties or under threat thereof, it may: … (c) in the case of investments, adopt or maintain restrictions on payments or transfers related to covered investments as defined in Article 2(a) (Definitions) of Chapter 11 (Investment) 2. Restrictions adopted or maintained under Paragraph 1(b) or (c) shall: (a) be consistent with the IMF Articles of Agreement; (b) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; (c) not exceed those necessary to deal with the circumstances described in Paragraph 1; (d) be temporary and be phased out progressively as the situation specified in Paragraph 1 improves; and (e) *be applied on a non-discriminatory basis such that no Party is treated less favourably than any other Party or non-Party.* 3. With respect to trade in services and investment, (a) it is recognised that particular pressures on the balance of payments of a Party in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition; (b) in determining the incidence of such restrictions, a Party may give priority to economic sectors which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular sector. 4. Any restrictions adopted or maintained by a Party under Paragraph 1, or any changes therein, shall be notified promptly to the other Parties. 5. A Party adopting or maintaining any restrictions under Paragraph 1 shall: (a) in the case of investment, respond to any other Party that requests consultations in relation to the restrictions adopted by it, if such consultations are not otherwise taking place outside this Agreement; (b) in the case of trade in services, if consultations in relation to the restrictions adopted by it are not taking place at the WTO, a Party, if requested, shall promptly commence consultations with any interested Party.	
ASEAN-Korea IA	Article 3: National Treatment[7]	Each Party shall accord to *investors of any other Party*, and to *covered investments of investors of any other Party*, treatment no less favourable than that it accords through its measures, in like circumstances, to *its own investors and investments* with respect to admission, establishment, acquisition, expansion, management,	C(2)

		conduct, operation and sale or other disposition of investments in its territory. *Footnote:* [7] The application of this Article is subject to Article 27 (Work Programme)	
	Article 9: Reservations[12]	1. Article 3 (National Treatment), Article 4 (Most Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements), *shall not apply* to: (a) any existing non-conforming measure that is maintained by a Party at: (i) the central level of government as set out by the Party in its Schedule of Reservations in List 1; (ii) the regional level of government as set out by the Party in its Schedule of Reservations in List 1; or (iii) the local level of government. (b) the continuation or prompt renewal of any nonconforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed at the date of entry into force of the Party's Schedule of Reservations in List 1, with Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements). 2. Article 3 (National Treatment), Article 4 (Most Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements), shall not apply to any reservation for measures that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in List 2. 3. Other than pursuant to any procedures for the modification of Schedules of Reservations, a Party may not, under any measure adopted after the date of entry into force of this Agreement and covered by List 2, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective. 4. Procedures for the modification of the Schedules of Reservations referred to in paragraph 3 are to be pursuant to Article 27 (Work Programme). 5. Nothing in this Agreement shall be construed so as to derogate from rights and obligations under international agreements in respect of protection of intellectual property rights to which the Parties are party, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other	

		treaties concluded under the auspices of the World Intellectual Property Organization. *Footnote:* [12] The application of this Article is subject to Article 27 (Work Programme)	
	Article 10 Transfers	3. Nothing in this Agreement shall affect the rights and obligations of the Parties as members of the International Monetary Fund (IMF) under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 11 (Temporary Safeguard Measures) or at the request of the Fund.	
	Article 11 Temporary Safeguard Measures	1. A Party may adopt or maintain measures *not* conforming with its obligations under *Article 3 (National Treatment) relating to cross-border capital transactions* […] in the event of serious balance of payments and external financial difficulties or under threat thereof. 2. A Party may adopt or maintain measures not conforming with its obligations under Article 10 (Transfers) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious economic or financial disturbance or serious difficulties for the operation of monetary or exchange rate policies in the Party concerned[13]. 3. The measures referred to in paragraphs 1 and 2 shall: (a) be consistent with the Articles of Agreement of the IMF, as may be amended; (b) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; (c) not exceed those necessary to deal with the circumstances described in paragraph 1 or 2; (d) be temporary and phased out progressively as the situation specified in paragraph 1 improves; and (e) *be applied such that any one of the other Parties is treated no less favourably than any other Party or non-Party. …* 5. Any restrictions adopted or maintained under paragraphs 1 and 2 or any changes therein, shall be promptly notified to the other Parties. *Footnotes:* [13] For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for the purpose of protecting a particular sector.	
ASEAN-Hong Kong IA	Article 3: National Treatment[3]	Each Party shall accord to *investors of any other Party*, and to *covered investments of investors of any other Party*, treatment no less favourable than that it accords, in like circumstances, to *its own investors and to investments of its own investors* with respect to the management, conduct, operation, use, and sale or other disposition of investments in its Area. *Footnote:*	C(2)

		[3] For greater certainty, the titles of Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment), and references to the same in this Agreement, have no implication on the status of the Hong Kong Special Administrative Region as a part of the People's Republic of China.	
	Article 6: Non-Conforming Measures[4]	1. Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment) *shall not apply* to: (a) any existing non-conforming measure maintained by a Party: (i) in the case of an ASEAN Member State, at the central or regional levels of government, as set out by that Party in its *Schedule to List 1 under Annex 1* (Schedules of Reservations), or at the local level of government; and (ii) in the case of the Hong Kong Special Administrative Region, as set out in its *Schedule to List 1 under Annex 1* (Schedules of Reservations); (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph 1 (a); or (c) an amendment to any non-conforming measure referred to in subparagraph 1 (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed as of the date of entry into force of that Party's *Schedule to List 1 under Annex 1* (Schedules of Reservations), with Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment). 2. Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment) *shall not apply* to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities as set out in its *Schedule to List 2 under Annex 1* (Schedules of Reservations). 3. Procedures for the modification of the Schedules are to be agreed pursuant to Article 22 (Work Programme). 4. Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment) *shall not apply* to any measure that falls within Article 5 of the TRIPS Agreement, and any measure that is covered by an exception to, or derogation from, the obligations under Article 3 or Article 4 of the TRIPS Agreement. *Footnote:* [4] This Article is subject to Article 22 (Work Programme).	
	Article 12 Transfers	4. Nothing in this Agreement shall affect the rights and obligations that apply to the Parties under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 13 (Temporary Safeguard Measures) or at the request of the IMF.	

	Article 13 Temporary Safeguard Measures	1. A Party may adopt or maintain measures *not* conforming with its obligations under *Article 3 (National Treatment) relating to cross-border capital transactions* […]: (a) in the event of serious balance of payments and external financial difficulties or threat thereof; or (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular monetary and exchange rate policies. 2. The measures referred to in paragraph 1 shall: (a) be consistent with the Articles of Agreement of the IMF; (b) avoid unnecessary damage to the commercial, economic and financial interests of another Party; (c) not exceed those necessary to deal with the circumstances described in paragraph 1; (d) be temporary and phased out progressively as the situation specified in paragraph 1 improves; and (e) *be applied such that any one of the other Parties is treated no less favourably than any other Party or non-Party.* 3. Any measures adopted or maintained under paragraph 1 or any changes therein shall be promptly notified to the other Parties.	
Vietnam-Japan BIT	Article 2	1. Each Contracting Party shall in its Area accord to *investors of the other Contracting Party* and to *their investments treatment* no less favorable than the treatment it accords in like circumstances to *its own investors and their investments* with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as 'investment activities').	C(2)
	Article 5	1. Notwithstanding the provisions of Article 2 or 4, each Contracting Party may *adopt* or *maintain* any measure not conforming with the obligations imposed by Article 2 or 4 (hereinafter referred to as an "exceptional measure") in the sectors or with respect to the matters specified in *Annex 1 to this Agreement*. 2. Each Contracting Party shall, on the date on which this Agreement comes into force, notify the other Contracting Party of all existing exceptional measures in the sectors or with respect to the matters specified in Annex 1. Such notification shall include information on the following elements of each exceptional measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the exceptional measure; (c) legal source of the exceptional measure; (d) succinct description of the exceptional measure; and (e) purpose of the exceptional measure. 3. In cases where a Contracting Party adopts any new exceptional measure in the sectors or with respect to the matters specified in Annex 1 after the entry into force of this Agreement, such Contracting Party shall, prior	

		to the entry into force of the exceptional measure or, in exceptional circumstances, as soon thereafter as possible: (a) notify the other Contracting Party of the elements of the exceptional measure as set out in paragraph 2 above; and (b) hold, upon request by that other Contracting Party, consultations in good faith with that other Contracting Party with a view to achieving mutual satisfaction.	
	Article 6	1. Notwithstanding the provisions of Article 2 or 4, each Contracting Party may *maintain* any exceptional measure, which exists on the date on which this Agreement comes into force, in the sectors or with respect to the matters specified in *Annex II to this Agreement*. 2. Each Contracting Party shall, on the date on which this Agreement comes into force, notify the other Contracting Party of all existing exceptional measures in the sectors or with respect to the matters specified in Annex II. Such notification shall include information on the following elements of each exceptional measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the exceptional measure; (c) legal source of the exceptional measure; (d) succinct description of the exceptional measure; and (e) purpose of the exceptional measure. 3. Each Contracting Party shall endeavor to progressively reduce or eliminate the exceptional measures notified pursuant to paragraph 2 above. 4. Neither Contracting Party shall, after the entry into force of this Agreement, adopt any new exceptional measure in the sectors or with respect to the matters specified in Annex II. 5. The provisions of paragraph 4 above shall not be construed so as to prevent a Contracting Party from amending or modifying any existing exceptional measure, provided that such amendment or modification does not decrease the conformity of the exceptional measure, as it existed immediately before the amendment or modification, with the provisions of Article 2 or 4. 6. In cases where a Contracting Party makes such amendment or modification, the Contracting Party shall, prior to the entry into force of the exceptional measure or, in exceptional circumstances, as soon thereafter as possible: (a) notify the other Contracting Party of the elements of the exceptional measure as set out in paragraph 2 of this Article; and (b) provide, upon request by that other Contracting Party, particulars of the exceptional measure to that other Contracting Party. 7. Notwithstanding the provisions of paragraph 4 of this Article, each Contracting Party may, in exceptional financial, economic or industrial circumstances, adopt any exceptional measure in the sectors or with respect	

		to the matters specified in Annex II, provided that such Contracting Party shall, prior to the entry into force of the exceptional measure: (a) notify the other Contracting Party of the elements of the exceptional measure as set out in paragraph 2 of this Article; (b) provide, upon request by that other Contracting Party, particulars of the exceptional measure to that other Contracting Party; (c) allow that other Contracting Party reasonable time to make comments in writing; (d) hold, upon request by that other Contracting Party, consultations in good faith with that other Contracting Party with a view to achieving mutual satisfaction; and (e) take an appropriate action based upon the written comments made pursuant to sub-paragraph (c) of this paragraph or the results of the consultations held pursuant to sub-paragraph (d) above.	
	Article 16	1. A Contracting Party may adopt or maintain measures *not* conforming with its obligations under paragraph 1 of *Article 2 relating to cross-border capital transactions* […]: (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies. 2. Measures referred to in paragraph 1 above: (a)shall be consistent with the Articles of Agreement of the International Monetary Fund so long as the Contracting Party taking the measures is a party to the said Articles; (b)shall not exceed those necessary to deal with the circumstances set out in paragraph 1 above; (c) shall be temporary and shall be eliminated as soon as conditions permit; and (d)shall be promptly notified to the other Contracting Party. 3. Nothing in this Agreement shall be regarded as altering the rights enjoyed and obligations undertaken by a Contracting Party as a party to the Articles of Agreement of the International Monetary Fund.	
Vietnam-Netherlands BIT	Article 4	With respect to taxes and fiscal deductions and exemptions, each Contracting Party, *in accordance with its taxation law and legislation*, shall accord to *nationals of the other Contracting Party* who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to nationals of any third State or to its own nationals that are in the same circumstances. For this purpose, however, there shall not be taken into account any fiscal advantages accorded by that Party: (a) under an agreement for the avoidance of double taxation; or (b) by virtue of its participation in a customs union, economic union or similar institution; or	NT Provisions with References to Domestic Laws and/or Development Policies

		(c) on the basis of reciprocity with a third State.	(D)
Vietnam-Armenia BIT	Article 4: Investment Treatment	4. Without prejudice to its law on matters concerning foreign investments In order not to prejudice its law on foreign investment matters during the execution phase of the investment and not prejudice the investment conditions resulting from such law, each Contracting Party shall refrain from prejudice to restrain the application of any discriminatory measures against investment by investors of the other Contracting Party, including joint venture enterprises involving investors of both Contracting Parties. Such measures include unlawful restrictions and restrictions relating to the use of means of production, or purchase, sale, transportation, marketing, or sale of goods and services. [tr author]	D
Vietnam-Bulgaria BIT	Article 3	4. In addition to the provisions of paragraphs 1 and 2 of this Article each Contracting Party shall accord, *in compliance with its legislation*, treatment to *the investors of the other Contracting Party and their investments* no less favourable than that accorded to *its own investors and their investments.*	D
Vietnam-Switzerland BIT	Article 3: Investment Treatment and Protection	4. Without prejudice to its law on foreign investment in effect at the time the investment is made and the investment conditions under such law, each Contracting Party shall not apply measures of a discriminatory nature to investments of investors of the other Party or to joint venture enterprises with the participation of investors of the two Contracting Parties. In particular, such measures are understood as unjustifiable restrictions or barriers relating to access to production materials or the purchase, sale, transport or commercialization of products and services. [tr author]	D
Vietnam-Iran BIT	Article 4: Investment Protection	1. *Investments* made by an investor of each Contracting Party in the territory of the other Contracting Party shall be fully legally protected and treated with no less favorable treatment than treatment accorded to its own *investors* or investors of any third country is in the same situation, *in accordance with the law* of the host Contracting Party. [tr author]	D
Vietnam-Spain BIT	Article 4	3. Each Contracting Party shall in its territory accord, *in accordance with its applicable laws and regulations*, treatment to the *investments of investors of the other Contracting Party* as its accords to the *investments of its own investors*. 4. The treatment granted under paragraphs 1, 2 and 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefit of any treatment, preference or privilege resulting from: a) its membership of, or association with, any existing or future free trade area, customs, economic or monetary union or other similar international agreements including other forms of regional economic	D

		organisation, or b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation. 5. For greater certainty, the Contracting Parties consider that provisions of this Article shall be without prejudice to the right of either Contracting Party to apply a different tax treatment to different taxpayers with regard to their tax residence.	
Vietnam-Denmark BIT	Article 3: Protection of Investment	(2) Neither Contracting Party shall in its territory *in accordance with its laws and regulations* subject *investments made by investors of the other Contracting Party or returns of such investments* to treatment less favourable than that which it accords to *investments or returns of its own investors* or any third State (whichever of these standards is more favourable from the point of view of the investor). (3) Neither Contracting Party shall in its territory *in accordance with its laws and regulations* subject *investors of the other Contracting Party*, as regards their management, maintenance, use, enjoyment or disposal of their investment or returns, to treatment less favourable than that which it accords to *its own investors* or to investors of any third State (whichever of these standards is the more favourable from the point of view of the investor).	D
	Article 4: Exceptions	(1) The provisions of this Agreement relative to the granting of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: (a) any existing or future customs union, regional economic organizations, or similar international agreement to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.	D
Vietnam-Russia BIT	Article 3	Article 3 Each contracting party shall, *in accordance with its law* with respect to *investments of the other Contracting Party's investors and activities related to the investment*, a fair and satisfactory regime, excluding the application of discriminatory properties that can impede the management and performance of investments. The regime referred to in paragraph 1 of this article shall be no less favorable than that accorded to investment and investment-related activities of its investors *in accordance with the law* of the Contracting Party which is investment in the territory of that Contracting Party in relation to or against any third country investor. Each contracting party gives itself *the right to decide on sectors and to decide which sectors and areas of*	D

		activity may exclude or limit the activities of foreign investors. [tr author]	
Vietnam-EAEU FTA	Article 8.32: National Treatment	1. Each Party to this Chapter shall accord to *investors of the other Party to this Chapter and investments of an investor of the other Party* to this Chapter treatment no less favourable than that it accords, in like circumstances, to *its own investors and their investments* in its territory. 2. Each Party to this Chapter [investment] shall *reserve the right in accordance with its laws and regulations* to apply and introduce exemptions from national treatment, referred to in paragraph 1 of this Article, to foreign investors and their investments including reinvestment.	D
Vietnam-Greece BIT	Article 4: Treatment of Investments	1. Each Contracting Party shall accord to *investments, including returns, by investors of the other Contracting Party*, once established in its territory, treatment not less favourable than that which it accords to investments of *its own investors* or to investments of investors of any third State, whichever is more favourable. 2. Each Contracting Party shall accord to *investors of the other Contracting Party,* as regards the management, maintenance, use, enjoyment or disposal of their investments in its territory, treatment not less favourable than that which it accords to *its own investors* or to investors of any third State, whichever is more favourable. 3. Notwithstanding paragraphs 1 and 2 of this Article, the Government of the Socialist Republic of Viet Nam may apply exceptions to the principle of national treatment, *in accordance with its legislation and within the framework of its development policy.* 4. The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: a) its participation in any existing or future customs union, economic union, regional economic integration agreement or similar international agreement; or b) any international agreement or arrangement or any domestic legislation relating wholly or mainly to taxation.	D
Vietnam-Slovakia BIT	Article 4: National and Most Favoured Nation Treatment of Investments	1. Each Party shall accord to investments of *investors of another Party,* as regards management, maintenance, use, enjoyment or disposal of their investments in its territory, treatment no less favourable than that it accords, in like circumstances, to *investments of its own investors* or investors of any third Party, whichever is more favorable. 2. Each Contracting Party shall accord to *investors of the other Contracting Party*, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment not less favorable than that which it accords, in like circumstances, to *its own investors* or investors of any third State, whichever is more favorable.	D

		3. Notwithstanding paragraphs 1 and 2 of this Article, the Government of the Socialist Republic of Viet Nam may apply exceptions to the principle of national treatment, *in accordance with its legislation and within the framework of its development policy*. [English translation] 4. The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: a) its participation in any existing or future customs union, economic union, regional economic integration agreement or similar international agreement; or b) any international agreement or arrangement or any domestic legislation relating wholly or mainly to taxation. c) An investment treaty or multilateral treaty to which one of the Contracting Parties is or may become a party. [tr author]	
Vietnam-Mozambique BIT	Article 3: National and Most Favoured Nation Treatment of Investments	(1) Each Contracting Party shall accord to *covered investments* treatment no less favourable than that it accords, in like circumstance, to *investments in its territory of its own investors* ("national treatment") or of investors of any third state ("most-favoured nation treatment), whichever is more favourable, with respect to the use, management, conduct, operation, and sale or other disposition of investments. (2) The national treatment, as provided for in paragraph (1) above, shall be accorded *in accordance with the applicable laws and regulations* of the host Contracting Party. The linking of national treatment to the applicable laws and regulations of the host Contracting Party preserves the rights of the host Contracting Party to apply a different treatment to investments of investors of the other Contracting Party than that which applies to its own investors. In this way each Contracting Party may maintain any economic sector or activity as reserved for its own investor and any measure or special incentives granted only to its own investors within the framework of its development policy. (3) The provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: (a) any customs union, economic union, free trade area, monetary union, or other form of international, regional and bilateral economic agreement or other similar international agreement, to which either of the Contracting Parties is or may become a party; (b) any international, regional or bilateral agreement or other similar arrangement, to which either of the Contracting Parties is or may become a party, or any domestic legislation relating wholly or mainly to taxation.	D

		(4) For greater certainty, the Contracting Parties consider that provisions of this Article shall be without prejudice to the right of either Contracting Party to apply a different tax treatment to different taxpayers with regard to their tax residence.	
Vietnam-Kuwait BIT	Article 3: Treatment of Investments	1. With respect to the use, management, conduct, operation, expansion and sale or other disposition of *investments made in its territory by investors of the other Contracting Party*, each Contracting Party shall accord treatment no less favorable than that it accords, in like situations, to *investments of its own investors* ("national treatment") or investors of any third state ("most favored nation treatment"), whichever is more favorable to those investments. 2. Without prejudice to the provisions of Article 11 and subject to any other agreement, to which both Contracting Parties are parties, the national treatment, as provided for in paragraph 1 above shall be accorded *in accordance with the applicable laws and the regulations of the host Contracting Party*. The linking of the national treatment to the applicable laws and regulations of the host Contracting Party preserves the right to the host Contracting Party to apply a different treatment to investments of investors of the other Contracting Party than that which applies to its own investor. In this way each Contracting Party may maintain any economic sector or activity as reserved for its own investor or any measure or special incentives granted only to its own investors within the framework of its development policy. 3. The provision of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: (a) any customs union, economic union, free trade area, monetary union, or other form of regional or bilateral economic agreement or other similar international agreement, to which either of the Contracting Parties is or may become a party; (b) any international, regional or bilateral agreement or other similar arrangement or any domestic legislation relating wholly or mainly to taxation.	D
Vietnam-Estonia BIT	Article 3: Treatment of Investments	1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to *its own investors* and to *their investments* with respect to the acquisition, expansion, operation, management, maintenance, use and sale or other disposal of investments. 3. The provisions of paragraph 1 of this Article *shall not* apply to existing or future non-conforming measures *maintained* or *adopted* within the territory of the Socialist Republic of Viet Nam or any future amendment thereto provided that the amendment shall be made in conformity with the provisions on the Most Favoured Nation Treatment provided for in this Agreement. Treatment granted to investments once admitted, shall in no case be worse than the treatment granted in accordance with the provisions of this Article at the time when	D

		the original investment was made. The Government of the Socialist Republic of Viet Nam will take appropriate measures to progressively remove such non-conforming measures.	
	Article 4 Exemptions	The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and to their investments the benefit of any treatment, preference or privilege by virtue of any existing or future: a) free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements, to which one of the Contracting Parties is or may become a party, or b) agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation, or c) multilateral or regional agreement relating wholly or mainly to investments.	
ASEAN-China IA	Article 4: National Treatment	Each Party shall, in its territory, accord to *investors of another Party and their investments* treatment no less favourable than it accords, in like circumstances, to *its own investors and their investments* with respect to management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments.	D
	Article 6: Non-Conforming Measures	1. Article 4 (National Treatment) and Article 5 (Most Favoured-Nation Treatment) *shall not apply* to: (a) any existing or new non-conforming measures maintained or adopted within its territory; (b) the continuation or amendment of any nonconforming measures referred to in Subparagraph (a). 2. The Parties will endeavour to progressively remove the non-conforming measures. 3. The Parties shall enter into discussions pursuant to Article 24 (Review) with a view to furthering the objectives in Article 2(a) and Article 2(e). The Parties will endeavour to achieve the objectives to be overseen by the institution under Article 22 (Institutional Arrangement).	
Vietnam-EU IPA (not yet in force)	Article 2.3: National Treatment	1. Each Party shall accord to *investors of the other Party and to covered investments*, with respect to the operation of the covered investments, treatment no less favourable than that it accords, in like situations, to *its own investors and to their investments.* 2. Notwithstanding paragraph 1 and, in the case of Viet Nam subject to Annex 2 (Exemption for Viet Nam on National Treatment), a Party may *adopt* or *maintain any measure* with respect to the operation of a covered investment provided that such measure is not inconsistent with the commitments set out in Annex 8-A (The Union's Schedule of Specific Commitments) or *Annex 8-B* (Viet Nam's Schedule of Specific Commitments) of the Free Trade Agreement, respectively, where such measure is: (a) a measure that is adopted on or before the date of entry into force of this Agreement; (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the	B

		date of entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after it is continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or (c) a measure not falling within subparagraph (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage1 to, investments made in the territory of the Party before the date of entry into force of such measure.	
RCEP (not yet in force)	Article 10.3: National Treatment[17]	1. Each Party shall accord to *investors of another Party*, and to *covered investments*, treatment no less favourable than that it accords, in like circumstances, to *its own investors and their investments* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. For greater certainty, the treatment to be accorded by a Party under paragraph 1 means, with respect to a government other than at the central level, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that government to investors, and to the investments of investors, of the Party of which it forms a part. *Footnote:* [17] For greater certainty, whether the treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.	B
	Article 10.8: Reservations and Non-Conforming Measures	1. Article 10.3 (National Treatment), Article 10.4 (Most-Favoured Nation Treatment), Article 10.6 (Prohibition of Performance Requirements), and Article 10.7 (Senior Management and Board of Directors) *shall not apply* to: (a) any *existing non-conforming measure* that is maintained by a Party at: (i) the central level of government, as set out by that Party in List A of its *Schedule in Annex III* (Schedules of Reservations and Non-Conforming Measures for Services and Investment); (ii) a regional level of government, as set out by that Party in List A of its *Schedule in Annex III* (Schedules of Reservations and Non-Conforming Measures for Services and Investment); or (iii) a local level of government; (b) *the continuation or prompt renewal of any non-conforming measure* referred to in subparagraph (a); and (c) *an amendment to any non-conforming measure* referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure: (i) for Cambodia, Indonesia, Lao PDR, Myanmar, and the Philippines, as it existed at the date of	

		entry into force of this Agreement; and (ii) for Australia, Brunei, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand, and Viet Nam, as it existed immediately before the amendment, with Article 10.3 (National Treatment), Article 10.4 (MostFavoured-Nation Treatment), Article 10.6 (Prohibition of Performance Requirements), and Article 10.7 (Senior Management and Board of Directors). 2. Article 10.3 (National Treatment), Article 10.4 (Most-Favoured Nation Treatment), Article 10.6 (Prohibition of Performance Requirements), and Article 10.7 (Senior Management and Board of Directors) *shall not* apply to *any measure* that a Party *adopts or maintains* with respect to sectors, subsectors, or activities, as set out by that Party in List B of its *Schedule in Annex III* (Schedules of Reservations and Non-Conforming Measures for Services and Investment). 3. Notwithstanding subparagraph 1(c)(ii), for five years after the date of entry into force of this Agreement, Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.6 (Prohibition of Performance Requirements), and Article 10.7 (Senior Management and Board of Directors) *shall not* apply to *an amendment to any non-conforming measure* referred to in subparagraph 1(a) to the extent that the amendment does not decrease the conformity of the measure as it existed at the date of entry into force of this Agreement with Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.6 (Prohibition of Performance Requirements), and Article 10.7 (Senior Management and Board of Directors). 4. No Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by List B of its Schedule in Annex III (Schedules of Reservations and Non-Conforming Measures for Services and Investment), require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time the measure becomes effective, unless otherwise specified in the initial approval by the relevant authorities. 5. Article 10.3 (National Treatment) and Article 10.4 (Most Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, and any measure that is covered by an exception to, or derogation from, the obligations imposed by Article 11.7 (National Treatment), or imposed by Article 3 or 4 of the TRIPS Agreement.	

APPENDIX 7: TREATY EXCEPTION PROVISIONS ON SECURITY INTERESTS IN VIETNAM'S IIAS

Treaties	Articles	Contents (emphasis added)	Formulations
Vietnam-Uzbekistan BIT	Article 12: Applicable Laws	2. The provision in paragraph 1 of this Article do not restrict the Contracting Part from taking measures *to* secure its *essential security interests* or *in circumstances of extreme emergency in accordance with its laws and applied on a non-discriminatory basis.* [tr author]	Non-self-judging Security Exceptions
Vietnam-Singapore BIT	Article 11: Prohibitions and Restrictions	The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other actions where such prohibitions, restrictions or actions are *directed to*: (a) the protection of its *essential security interests*; …	Same as above
Vietnam-Czech BIT's Protocol of Amendment	Article 4: Essential Security Interests	1. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any actions *that it considers necessary for* the protection of its *essential security interests*, (a) relating to criminal or penal offences; (b) relating to traffic in arms, ammunition and implements of war and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment; (c) taken in time of war or other emergency in international relations, or (d) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or (e) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. 2. A Contracting Party's essential security interests may include interests deriving from its membership in a customs, economic, or monetary union, a common market or a free trade area.	Self-judging Security Exceptions (Limited ESI)
Vietnam-Slovakia BIT	Article 12: Essential Security Interests	1. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any actions *that it considered necessary for* the protection if its essential security interests, (a) relating to criminal or penal offences (b) relating to traffic in arms, ammunition and implements of war and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment;	Same as above

		(c) taken in time of war or other emergency in international relations, or (d) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or (e) in pursuance of its obligations under the United National Charter for the maintenance of international peace and security.	
Vietnam-EAEU FTA	Chapter 1: General Provisions Article 1.9: General and Security Exceptions	2. Article XXI of GATT 1994 and Article XIV bis of GATS are incorporated into and form part of this Agreement, mutatis mutandis. 3. The Joint Committee shall be informed to the fullest extent possible of measures taken under paragraph 2 of this Article and of their termination.	
Vietnam-Japan BIT	Article 15	1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Party may: (a) take any measure *which it considers necessary for* the protection of its essential security interests; (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; (b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;	Same as above
ASEAN-Korea IA	Article 21: Security Exceptions	1. Nothing in this Agreement shall be construed: (a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or (b) to prevent a Party from taking any actions *which it considers necessary for* the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials or relating to the supply of seNices as carried on, directly or indirectly, for the purpose of supplying or provisioning a military establishment; (ii) taken in time of war or other emergency in domestic or international relations; (iii) relating to fissionable and fusionable materials or the materials from which they are	Same as above

		derived; (iv) taken to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures; or (c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. 2. The Implementing Committee shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.	
ASEAN-ANZ FTA	Chapter 15: General Provisions and Exceptions Article 2: Security Exceptions	1. Nothing in this Agreement shall be construed: (a) to require any Party to furnish any information the disclosure of which it considers contrary to its essential security interests; (b) to prevent any Party from taking any action *which it considers necessary for* the protection of its essential security interests: (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment; (iii) taken so as to protect critical public infrastructures 3 including communications, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructures; (iv) taken in time of national emergency or war or other emergency in international relations; or (c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. 2. The FTA Joint Committee shall be informed to the fullest extent possible of measures taken under Paragraph 1(b) and (c) and of their termination.	Same as above
ASEAN-Hong Kong IA	Article 8: Security Exceptions	1. Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to any information, the disclosure of which it considers contrary to its essential security interests; (b) prevent a Party from taking any actions *which it considers necessary for* the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic	Same as above

		in other goods and materials or relating to the supply of services as carried on, directly or indirectly, for the purpose of supplying or provisioning any military establishments; (ii) taken in time of war or other emergency in domestic or international relations; (iii) relating to fissionable and fusionable materials or the materials from which they are derived; (iv) taken to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures; or (c) prevent a Party from taking any action in pursuance of the obligations that apply to it under the United Nations Charter for the maintenance of international peace and security. 2. The ASEAN-Hong Kong, China Free Trade Area Joint Committee ("AHKFTA Joint Committee") established pursuant to Article 1 (AHKFTA Joint Committee) of Chapter 12 (Institutional Provisions) of the ASEAN - Hong Kong, China Free Trade Agreement shall be informed to the fullest extent possible of measures taken under subparagraphs 1 (b) and 1 (c) and of their termination.	
Vietnam-Korea FTA	Chapter 16: Exceptions Article 16.2: Security Exceptions	1. Nothing in this Agreement shall be construed to: (a) require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; (b) prevent a Party from taking any action *which it considers necessary for* the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials or relating to the supply of services as carried on, directly or indirectly, for the purposes of supplying or provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived; (iii) taken so as to protect critical public infrastructure, including communications, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or (iv) taken in time of domestic emergency, or war or other emergency in international relations; or (c) prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. 2. The Joint Committee shall be informed to the fullest extent possible of measures taken under	Same as above

		subparagraphs 1(b) and (c) and of their termination.	
ACIA	Article 18: Security Exceptions	Nothing in this Agreement shall be construed: (a) to require any Member State to furnish any information, the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any Member State from taking any action *which it considers necessary for* the protection of its essential security interests, including *but not limited to*: (i) action relating to fissionable and fusionable materials or the materials from which they derived; (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) action taken in time of war or other emergency in domestic or international relations; (iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or (c) to prevent any Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.	Self-judging Security Exceptions (Unlimited ESI)
ASEAN-China IA	Article 17: Security Exceptions	Nothing in this Agreement shall be construed: (a) to require any Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to: (i) action relating to fissionable and fusionable materials or the materials from which they derived; (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) action taken so as to protect critical public infrastructure from deliberate attempts intended to disable or degrade such infrastructure; (iv) action taken in time of war or other emergency in domestic or international relations;	Same as above

		or (c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.	
Vietnam-US BTA	Chapter VII: General Articles Article 2: National Security	This Agreement shall not preclude a Party from applying measures *that it considers to be necessary for* the protection of its own essential security interests. Nothing in this Agreement shall be construed to require either Party to furnish any information, the disclosure of which it considers contrary to its essential security interests.	Same as above
CPTPP	Chapter 29: Exceptions and General Provisions Article 29.2: Security Exceptions	Nothing in the Agreement shall be construed to […] preclude a Party from applying measures *that it considers necessary for* the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	Same as above
Vietnam-EU IPA (not yet in force)	Chapter 4: Institutional, General and Final Provisions Article 4.8: Security Exceptions	Nothing in this Agreement shall be construed as: (a) requiring a Party to furnish information, the disclosure of which it considers contrary to its essential security interests; (b) preventing a Party from taking any action *which it considers necessary for* the protection of its essential security interests: (i) connected with the production of or trade in arms, munitions and war materials and relating to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to the supply of services carried out directly or indirectly for the purpose of provisioning a military establishment; (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or (iv) taken in time of war or other emergency in international relations; (c) preventing a Party from taking any action in pursuance of its obligations under the Charter of the United Nations, done at San Francisco on 26 June 1945, for the purpose of maintaining international peace and security.	Self-judging Security Exceptions (Limited ESI)

RCEP (not yet in force)	Chapter 17: General Provisions and Exceptions Article 17.13: Security Exceptions	Nothing in this Agreement shall be construed: (a) to require any Party to furnish any information the disclosure of which it considers contrary to its essential security interests; (b) to prevent any Party from taking any action *which it considers necessary for* the protection of its essential security interests: (i) relating to fissionable and fusionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment; (iii) taken so as to protect critical public infrastructures[7] including communications, power, and water infrastructures; (iv) taken in time of national emergency or war or other emergency in international relations; or (c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. *Footnote:* [7] For greater certainty, this includes critical public infrastructures whether publicly or privately owned.	Same as above

APPENDIX 8: TREATY EXCEPTION PROVISIONS ON PUBLIC INTERESTS IN VIETNAM'S IIAS

Treaties	Articles	Contents (emphasis added)	Formulations
Vietnam-Singapore BIT (1992)	Article 11: Prohibitions and restrictions	The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other actions where such prohibitions, restrictions or actions are directed to: … (b) The protection of public health; or (c) The prevention of diseases and pests in animals or plants.	Traditional General Exceptions
Vietnam-Japan BIT (2002)	Article 15	1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10 (Compensation for Losses), each Contracting Party may: … (c) take any measure necessary to protect human, animal or plant life or health; or (d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.	Same as above
Vietnam-Slovakia BIT (2009)	Article 12: Essential Security Interests	2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, their investors or their investments where like conditions prevail, or a disguised restriction on investors of any Party or their investments made by investors of any Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures necessary for public order. [tr author]	GATT/GATS-like General Exceptions
ACIA (2009)	Article 17: General Exceptions	Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: (a) necessary to protect public morals or to maintain public order;[12] (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to: (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a	Same as above

		contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) aimed at ensuring the equitable or effective[13] imposition or collection of direct taxes in respect of investments or investors of any Member State; (e) imposed for the protection of national treasures of artistic, historic or archaeological value; or (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. *Footnotes:* [12] The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. [13] For the purpose of this sub-paragraph, footnote 6 of Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (GATS) is incorporated into and forms an integral part of this Agreement, mutatis mutandis.	
ASEAN-China IA (2009)	Article 16: General Exceptions	1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, their investors or their investments where like conditions prevail, or a disguised restriction on investors of any Party or their investments made by investors of any Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public morals or to maintain public order[10]; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and (iii) safety; (d) aimed at ensuring the equitable or effective[11] imposition or collection of direct taxes in respect of investments or investors of any Party; (e) imposed for the protection of national treasures of artistic, historic or archaeological value; or	Same as above

		(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. *Footnotes:* [10] For the purpose of this Sub-paragraph, footnote 5 of Article XIV of the GATS is incorporated into and forms part of this Agreement, mutatis mutandis. [11] For the purpose of this Sub-paragraph, footnote 6 of Article XIV of the GATS is incorporated into and forms part of this Agreement, mutatis mutandis	
ASEAN-Korea IA (2009)	Article 20: General Exceptions	1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or their investors where like conditions prevail, or a disguised restriction on investors or investments made by investors of any other Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public morals or to maintain public order[22] (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and (iii) safety; (d) inconsistent with Article 3 (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective[23] imposition or collection of direct taxes in respect of investments or investors of any other Party; (e) imposed for the protection of national treasures of artistic, historic or archaeological value; or (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. *Footnotes:* [22] The public order exception may be invoked by a Party only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. [23] For the purpose of this subparagraph, footnote 6 of Article XIV of the GATS is incorporated into and forms an integral part of this Agreement, mutatis mutandis.	Same as above

ASEAN-Hong Kong IA (2017)	Article 9: General Exceptions	1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or their investors where like conditions prevail, or a disguised restriction on investors of another Party or their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public morals or to maintain public order[5]; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or (iii) safety; (d) inconsistent with Article 3 (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investors of any other Party or their investments[6]; (e) imposed for the protection of national treasures of artistic, historic or archaeological value; or (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. *Footnotes:* [5] The public order exception may be invoked by a Party only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. [6] For the purpose of this subparagraph, footnote 6 of Article XIV of GATS is incorporated into and shall form part of this Agreement, mutatis mutandis.	Same as above
Vietnam-Turkey BIT (2014)	Article 4. Right to Regulate	1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory measures: (a) designed and applied for the protection of human, animal or plant life or health, or the environment; (b) related to the conservation of living or non-living exhaustible natural resources; (c) imposed for the protection of national treasures of artistic, historic, archaeological value.	Same as above

ASEAN-ANZ FTA (2009)	Chapter 15: General Provisions and Exceptions Article 1: General Exceptions	2. For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, mutatis mutandis. 3. For the purposes of this Agreement, the Parties understand that measures referred to in Article XX(f) of GATT 1994 include measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value.[1] 4. For the purposes of Chapter 8 (Trade in Services) and Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services or investment, nothing in these Chapters shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value.[2] 5. A Party shall hold consultations with a view to reaching agreement on any necessary adjustment required to maintain the overall balance of commitments undertaken by the Parties under Chapter 8 (Trade in Services) and Chapter 11 (Investment) if requested by a Party affected by the measures referred to in Paragraph 4. *Footnotes:* [1 & 2]: "Creative arts" include the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities.	Same as above
Vietnam-Korea FTA (2015)	Chapter 16: Exceptions Article 16.1: General Exceptions	2. For the purposes of Chapters 8 (Trade in Services) and 9 (Investment), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis.	Same as above
Vietnam-EAEU FTA (2015)	Chapter 1: General Provisions	1. Article XX of GATT 1994 and Article XIV of GATS are incorporated into and form part of this Agreement, mutatis mutandis.	Same as above

	Article 1.9: General and Security Exceptions		
Vietnam-Uzbekistan BIT (1997)	Article 12: Applicable Laws	2. The provision in paragraph 1 of this Article do not restrict the Contracting Part from taking measures to secure its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis. [tr author]	Same as above
Vietnam-EU IPA (not yet in force)	Chapter 4: Institutional, General and Final Provisions Article 4.6: General Exceptions	Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on covered investment, nothing in Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) shall be construed as preventing the adoption or enforcement by any Party of measures: (a) necessary to protect public security or public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services; (d) necessary for the protection of national treasures of artistic, historic or archaeological value; (e) necessary to secure compliance with laws or regulations which are not inconsistent with Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or (iii) safety; (f) inconsistent with paragraph 1 of Article 2.3 (National Treatment) provided that the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of economic activities or investors of the other Party.	Same as above

RCEP (not yet in force)	Chapter 17: General Provisions and Exceptions Article 17.12: General Exceptions	1. For the purposes of Chapter 2 (Trade in Goods), Chapter 3 (Rules of Origin), Chapter 4 (Customs Procedures and Trade Facilitation), Chapter 5 (Sanitary and Phytosanitary Measures), Chapter 6 (Standards, Technical Regulations, and Conformity Assessment Procedures), Chapter 10 (Investment), and Chapter 12 (Electronic Commerce), Article XX of GATT 1994 is incorporated into and made part of this Agreement, mutatis mutandis.[5] 2. For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Temporary Movement of Natural Persons), Chapter 10 (Investment), and Chapter 12 (Electronic Commerce), Article XIV of GATS including its footnotes is incorporated into and made part of this Agreement, mutatis mutandis.[6] *Footnotes:* [5] The Parties understand that the measures referred to in subparagraph (b) of Article XX of GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that subparagraph (g) of Article XX of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. [6] The Parties understand that the measures referred to in subparagraph (b) of Article XIV of GATS include environmental measures necessary to protect human, animal or plant life or health.	Same as above

APPENDIX 9: STEPS FOR IIA NEGOTIATION AND CONCLUSION ON THE PART OF VIETNAM

Steps		Authoritative Body	Main Tasks
1	Proposal for Treaty Negotiation	Ministry of Planning and Investment (MPI)	- preparing a proposal for negotiating an investment treaty or an investment chapter in an/a economic or trade treaty ('the treaty'); - sending the proposal to Prime Minister.
2	Negotiation Preparation	MPI	- taking a preliminary assessment of the impact of the treaty on Vietnam's politics, national defence, national security, society, economy and others; - taking a preliminary review of current laws and other treaties in the same field; - consulting with the Ministry of Foreign Affairs (MFA), the Ministry of Justice (MOJ) and other relevant agencies and organisations.
3	Decision on Negotiation	Prime Minister	- deciding on treaty negotiation.
4	Negotiation Plan	MPI	- preparing a negotiation plan and a draft treaty on the part of Vietnam; - sending the negotiation plan and proposing a negotiating team to Prime Minister.
5	Proposal for Signing Treaty	MPI	- collecting opinions from the relevant agencies and organisations, examination opinions from the MFA and appraisal opinions from the MOJ; - seeking opinions from National Assembly Standing Committee in certain cases; - submitting all collected opinions to Prime Minister.
6	Decision on Signing Treaty	The Government	- deciding on signing the treaty.
7	Formal Signature	The Government	- signing the treaty after the MIP, the MFA and relevant agencies and organisations fully checked its texts in Vietnamese and other languages.
8	Ratification (if required)	National Assembly	- ratifying the treaty if the treaty requires a ratification procedure, or has contents inconsistent, to a certain extent, with existing codes/laws and/or resolutions adopted by the National Assembly.
9	Exchange of Diplomatic Notes	Ministry of Foreign Affairs (MFA)	- notifying foreign counterpart(s) with diplomatic note(s) of the fact that Vietnam has fulfilled the domestic legal procedures for the treaty.
10	Entry into Force Notification	MFA	- notifying entry in force of the treaty, given that the treaty enters into force within a certain time after the exchange of notes, depending on the treaty provisions.
Source: Law on Treaties 2016 (Vietnam)			

APPENDIX 10: THESIS FLOW

Thesis Flow	**Chapter 3** (*FET*)	**Chapter 4** (*Expropriation*)	**Chapter 5** (*FTT*)	**Chapter 6** (*NT*)	**Chapter 7** (*Security Interests*)	**Chapter 8** (*Public Interests*)
Step 1 – A Classification of Treaty Provisions on Investment Protection Obligation and Treaty Exceptions through a Comparative Analysis Comparing texts of studied treaty provisions from the perspective of substantive requirements/qualifications for legislative measures to define provision formulations	Part I Table 3.1	Part I Tables 4.1 & 4.2	Part I Table 5.1	Part I Table 6.1	Part I Table 7.1	Part I Table 8.1
	(A) FET Provisions without Limitation to CIL	(A) Undefined Expropriation Provisions	(A) FTT provisions without exceptions, references	(A) NT provision without exceptions, references	Non-self-judging Security Exception	Traditional General Exceptions
	(B) FET Provisions with Limitation to CIL	(B) Defined Expropriation Provisions	(B) FTT provisions with references to international agreements	(B) NT provisions with sector/matter-based exceptions	Self-judging Security Exceptions	GATT/GATS-like General Exceptions
			(C) FTT provisions with economic exceptions	(C) NT provision with public interest-based exceptions		
			(D) FTT provisions with references to domestic laws	(D) NT provisions with references to domestic laws and development policy		

Step 2 – An Extraction of Practical Questions through a Focused Review of Interpretation Approaches to Similar Treaty Provisions in International Arbitration Practice Reviewing tribunals' interpretation approaches to similar treaty provisions to classified formulations in international arbitration practice so as to suggest specific, practical questions for the main analysis, given no public access to cases against Vietnam	Part II	Part II	Part II	Part II	Part II	Part II
Step 3 – An Extraction of Substantive Requirements and Qualifications for Legislative Measures through the VCLT-driven Analysis of Treaty Provisions Analysing individual formulation(s) of treaty provisions on the basis of the VCLT interpretation rules and with reference to practical questions to find possible substantive requirements and qualifications for legislative measures, including	Part III Part IV	Part III Part IV	Part III Part IV	Part III Part IV	Part III Part IV	Part III Part IV

(i) Measures' effects: severe, reverse, restrictive and/or discriminatory (ii) Measures' objectives: public interests, security interests, economic safeguards and/or national development interests (iii) Measure-objective relationship: rational, necessary or proportionate (iv) Application conditions: temporary, MFN and/or NT (v) Characteristics of police power measures: good faith, non-arbitrariness and rational/reasonable discrimination						
Step 4 – A Synthesis of Extracted Substantive Requirements and Qualifications Synthesising all Substantive Requirements and Qualifications for Legislative Measures Extracted from all Formulations of Treaty Provisions on Investment Protection Obligation and Treaty Exceptions	Conclusion Table 3.2	Conclusion Table 4.3	Conclusion Table 5.7	Conclusion Table 6.4	Part III(F) Table 7.2 Part IV(E) Table 7.3	Part III(C) Table 8.2 Part IV(E) Table 8.3

Step 4 Plus – An Examination of Legal Effects of Treaty Exceptions	Interaction between Treaty Provisions on Investment Protection (Chapters 3 to 6) and Treaty Exception Provisions on Security or Public Interests (Chapters 7 and 8)					
Examining the Interaction between Treaty Provisions on Investment Protection Obligation and Treaty Exception Provisions on Security or Public Interests to Find the Extent to which Treaty Exceptions are Applicable	Chapter 7 Part V(B) Table 7.4 Chapter 8 Part V(A) Table 8.4	Chapter 7 Part V(C) Table 7.5 Chapter 8 Part V(B) Table 8.5	Chapter 7 Part V(D) (Table 7.6) Chapter 8 Part V(C) Table 8.6	Chapter 7 Part V(E) (Table 7.7) Chapter 8 Part V(D) (Table 8.7)		
Step 5 – A Map of Various Substantive Compatibility Thresholds for Legislative Measures (5.1) Synthesising all Relevant Substantive Requirements and Qualifications to Identify Main Thresholds for Legislative Measures Compatible with Investment Protection Obligation	Chapter 9 Part II(B)(1) Five Thresholds Table 9.1 = Table 3.2 + Table 7.4 + Table 8.4	Chapter 9 Part II(B)(2) Six Thresholds Table 9.2 & Table 9.3 = Table 4.3 + Table 7.5 + Table 8.5	Chapter 9 Part II(B)(3) Five Thresholds Table 9.4 = Table 5.7 + Table 7.6 + Table 8.6	Chapter 9 Part II(B)(4) Five Thresholds Table 9.5 = Table 6.4 + Table 7.7 + Table 8.7		
(5.2) Synthesising all Relevant Substantive Requirements and Qualifications to Identify Main Thresholds for Legislative Measures Compatible with Treaty Line	Part II(C)(1) – 'AAx' Formula: Five Thresholds; Table 9.6 = Table 9.1 + Table 9.2 + Table 9.4. Part II(C)(2) – 'AAxy' Formula: Four Thresholds; Table 9.7 = Table 9.1 + Table 9.2 + Table 9.4 + Table 9.5. Part II(C)(3) – 'ABCy' Formula: Two Thresholds; Table 9.8 = Table 9.1 + Table 9.3 + Table 9.4 + Table 9.5. Part II(C)(4) – 'BAxC' Formula: Three Thresholds; Table 9.8 = Table 9.1 + Table 9.2 + Table 9.4 + Table 9.5. Part II(C)(5) – 'BBCC' Formula: Two Thresholds; Table 9.8 = Table 9.1 + Table 9.3 + Table 9.4 + Table 9.5.					
Notes: The history of individual treaty provisions needs to be referred to Chapter 2 Part I. The purposes and objectives of individual IIAs, including treaty provisions, need to be referred to Chapter 2 Part II (Table 2.1). Scopes of individual IIAs, including treaty provisions, need to be referred to Chapter 2 Part III (Table 2.2).						

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