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The External Effects of the Energy Union Strategy on Trade and Investment in Renewable Energy from the EU to Vietnam: an Initial Assessment

Ha T. Nguyen & Umut Turksen***

Abstract

The EU's energy policies aim to ensure that EU citizens can access secure, affordable and sustainable energy supplies, as well as an environmentally friendly economy, putting the EU at the forefront of renewable energy production, clean and efficient energy technologies, and the efforts to counter global warming. Accordingly, the EU Commission has put forward not only internal (EU Single Market) strategy, but also initiatives and agreements beyond the EU to build modern, interconnected and sustainable energy systems.

Energy trade relations between Vietnam and the EU will greatly intensify and develop, especially with the signing of the EU-Vietnam Trade Agreement (EVFTA) on 02 December 2015. A chapter in this agreement is dedicated to sustainable development which expects from the EU firms to transfer new technologies and techniques to Vietnam whereby Vietnam's energy strategy can be developed. This initiative is in line with the National Energy Development Strategy of Vietnam that sets out several ambitious goals, including improving efficiency in the exploitation and preservation of energy resources and increasing the ratio of consumption of renewable and clean sources.

In the coming few years we are destined to witness whether the EU's energy policies will positively influence the sustainable energy development in Vietnam, through the EVFTA which is envisaged to come into force in 2019. Against this contemporary background, this paper aims to provide the current state of affairs of EU's Energy Strategy and its external dimension. It then critically assesses the impact of EVFTA's provisions on energy trade and investment flows from the EU to Vietnam, particularly in relation to renewable energy. As a result, both the prospects and constraints which the EU investors may face in Vietnam are highlighted and based on this analysis, suggestions for reform are provided.

1. Introduction

Energy trade is fundamental to the security[1] and competitiveness of the European Union (EU) economy, represented by a major ratio of energy with more than 20 percent of the total EU imports, covering 54 percent of all the energy this region consumes, at a cost of more than €1 billion a day.[2] There is also a challenging issue whereby the EU Member States are predominantly dependent on imported energy sources, e.g., fossil fuels such as crude oil and

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[1] Turksen U., 'EU Energy Relations with Russia: Solidarity and the Rule of Law', (Routledge, 2018).
[2] Sforza L. & Botella L., 'Shaping the future of European energy and climate policies for the next decades', (MSL Group, 28 Feb 2018) https://mslgroup.com/blog/2018-landmark-year-eu-energy-policy accessed 27 October 2018.

natural gas, from a few key suppliers (namely, the Russian Federation, Norway and Algeria).[3] Therefore, the EU energy and environmental policies aim to establish a transition to a low-carbon economy which reduces the use of fossil fuels, increases energy efficiency[4] and moderates energy demands by exploiting potentials of renewables and other indigenous sources.[5]

Since the 1990s, the gradual evolution of energy trade regulation in the EU was driven by the goal of building the Single Market for Energy.[6] The Treaty on the Functioning of the European Union (TFEU) introduced shared competences on energy matters, whereby the EU could provide the measures in the area of energy informed by three main goals: competitiveness, security and sustainability of the energy sector.[7] The Energy Union strategy launched in February 2015 has impacted both internal and external aspects of the EU energy policy and is comprised of five interlinked aims: energy security, a fully integrated internal energy market, energy efficiency, decarbonising the economy, and boosting the competitiveness through incentivising research and innovation activities.[8]

Given the contentious and inherent geopolitical issues around energy trade and security,[9] and the serious challenges in interconnecting regional and national energy grids and/or transfer of surplus energy supplies in the EU, the external dimension of energy policy emerges as an important factor for coping with such challenges and supply demands, notably in view of the EU as a net importer of energy.[10] Even though various EU Member States have concluded bilateral energy trade agreements with third countries, neither the lack of common action nor direction in global environmental governance and climate diplomacy forums may reduce the EU's important role in the emerging geopolitics of energy, consumer behaviours, energy-mix, and renewable energy technologies and investment.[11]

Whilst the national governments across the EU enjoy significant autonomy in their respective energy policies, the EU has actually started to speak with one voice to its commercial partners and the rest of the world when it comes to international energy trade in general and renewable energy in particular.[12] The EU Commission is working on a number of areas, not only through packages for internal (EU single market) strategy, but also through initiatives and agreements

[3] EU Parliament - Directorate-General for External policies, 'Trade and investments in energy in the context of the EU common commercial policy', EP/EXPO/B/INTA/FWC/2013-08/Lot7/05 (European Union, Oct 2015), 10-12 http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535001/EXPO_STU(2015)535001_EN.pdf accessed 27 October 2018.

[4] Turksen U., 'EU Law on Energy Resource Efficiency - Energy resource efficiency in the EU: Major legislative initiatives', in Mouraviev N and Koulouri A., (Eds.), 'Energy Security: Policy Challenges and Solutions for Resource Efficiency', (Palgrave, 2018).

[5] EU Parliament - Directorate-General for External policies (n 3) p. 13.

[6] Talus K., 'EU Energy Law and Policy', (Oxford University Press, 2013).

[7] For instance, Arts. 194 and 122 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 47-199.

[8] European Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', COM(2015)80 of 25 February 2015.

[9] Turksen U. and Antto V., 'The Geo-economics of the Russian – EU Gas Trade: Drawing Lessons from the South Stream Pipeline Project', CEEPR WP 2015-014 (MIT CEEPR, December 2015) http://ceepr.mit.edu/files/papers/2015-014.pdf accessed 27 October 2018

[10] Delimatsis P., 'Services of General Interest and the External Dimension of the EU Energy Policy' (2013) TILEC Discussion Paper No. 2013-025, p. 8 https://ssrn.com/abstract=2375588. accessed 27 October 2018.

[11] Sforza L. & Botella L. (n 2).

[12] EU Parliament - Directorate-General for External policies (n 9) p. 18. For a summary of the EU's role in International agreements and the EU's external competences see, Articles 3, 4, 207 and 216 TFEU, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0034.

beyond the EU to build modern, interconnected and sustainable energy systems. Currently, there are 82 preferential agreements in place; 22 agreed but not yet in force instruments; and 26 other agreements which are being negotiated with other countries.[13] Such instruments focus not only on the tariff barriers to trade in goods, but also a wide range of sectors, such as non-tariff barriers, trade in services, cross-border investment, public procurement, intellectual property rights protection, energy sector and the investor-state dispute settlement (ISDS) mechanism.[14]

Among such initiatives are the EU-Vietnam Free Trade Agreement (EVFTA) and the EU-Vietnam Investment Protection Agreement (IPA) which the EU and Vietnam have agreed on in July 2018.[15] The impact of the EVFTA is likely to be significant in terms of boosting trade; broadening market access for EU investors; and strengthening the regulation of important and strategic industries, including the field of energy. For example, a chapter of this agreement, titled 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation', will help Vietnam to enhance the quality of its economic governance, in line with the sustainable development commitments embedded in this instrument.[16]

In addition to the EVFTA and IPA between the EU and Vietnam, both parties have mutually launched an initiative called the EU – Vietnam Energy Facility in February 2018 to implement the European Union's Energy Sector Policy Support Programme worth 108 million euros. This technical assistance programme aims to enhance access to sustainable energy in rural areas in Vietnam and contribute to a more sustainable energy sector by promoting efficient, clean and renewable energy available to all citizens.[17] The initiative is in accordance with the National Energy Development Strategy of Vietnam, which, with an outlook to 2050, sets out several ambitious goals, including improving efficiency in the exploitation and preservation of energy resources and increasing the ratio of consumption of renewable and clean sources.[18]

Meanwhile, Vietnam has witnessed a significant growth in renewable energy projects to meet the nation's future energy demand, particularly after the government scrapped its plan to build a nuclear power plant and support alternative energy generation methods. Following the Prime Minister's Decision No. 11/2017/QD-TTg,[19] there have been 332 solar power projects proposed in total, which are envisaged to reach a capacity of 26,290 MWp by 2030, and 121 of these projects (which will reach the capacity of 7,234 MWp) have been approved to

[13] European Commission, 'Negotiations and agreements' http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated accessed 27 October 2018.
[14] EU Parliament - Directorate-General for External policies (n 3) p. 31.
[15] European Commission, 'Countries and regions: Vietnam' http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/ accessed 27 October 2018.
[16] Oxford Business Group, 'The Report: Vietnam 2017', Chapter 'Vietnam-EU trade agreement to be signed in 2018' https://oxfordbusinessgroup.com/analysis/landmark-deal-trade-agreement-eu-set-be-signed-2018 accessed 27 October 2018.
[17] Delegation of the European Union to Vietnam, 'The European Union supports sustainable energy development in Vietnam', Press Release (Hanoi, 27 February 2018) https://eeas.europa.eu/delegations/vietnam/40434/european-union-supports-sustainable-energy-development-vietnam_en accessed 19 October 2018.
[18] The Decision No.1855/QD-TTg on Approving Vietnam's National Energy Development Strategy up to 2020, with the Outlook to 2050 (Vietnam Prime Minister, 27 December 2007).
[19] Vietnam Prime Minister's Decision for providing the Feed-in Tariff for solar power as 9.35 US cent/kWh.

contribute to the new master power plan, and other 211 projects (capacity of 13,069 MWp) are in the queue for approval.[20]

It is thus timely to question whether the EU's energy policies - through the trade and investment in energy pursuant to the EVFTA - would positively influence the sustainable energy development in Vietnam. Firstly, this paper aims to provide the current state of affairs of EU's Energy Strategy and its external dimension. It then critically assesses the impact of EVFTA's provisions on energy trade and investment flows from the EU to Vietnam, particularly in relation to renewable energy. As a result, both the prospects and constraints which the EU investors may face in Vietnam are highlighted. Based on this analysis, suggestions for reform are provided.

2. The External Dimensions of the EU Energy Policy

2.1. Overview of the EU's Energy Policies

Production of primary energy in the EU totalled 755 million tonnes of oil equivalent (MTOE) in 2016 which was lower than those in previous years and continued a generally downward trend.[21] The reduction in the EU's primary energy production may partly be attributed to inter alia the fall in nuclear energy production (a result of nuclear phase-out in some Member States); some of the gas fields becoming depleted; and inefficient production of limited resources. As a result, the downturn in primary production of energy sources, such as coal, petroleum resources and more recently nuclear power, has resulted in a situation whereby the EU has become increasingly reliant on primary energy imports to satisfy the demands.[22]

More than half of the EU's energy derives from countries outside the EU's Single Market and this ratio has been generally rising over decades. The EU energy security may be threatened while a high proportion of imports have the origins of a relatively few key partners. Particularly, a three quarter (77.1 percent) of natural gas imported to the EU by 2016 came from Russia, Norway and Algeria. The similar circumstance is that a two third (68.2 percent) of solid fuel originated from Russia, Columbia and Australia while the imports of crude oil were slightly less concentrated on the principal suppliers, accounting for 52.6 percent of the EU's imports.[23]

In addition, the majority of energy imported into the EU comes from the Russian Federation, whose disputes with key transit countries (e.g. Ukraine) have threatened to disrupt supplies in recent years. As a result, new measures for oil and gas markets have been designed to ensure that each country takes necessary actions to mitigate the consequences of potential disruptions of supplies and create the foundation for EU Member States to collaborate effectively in emergency cases.[24]

The EU's dependence on energy imports thus forms the backdrop for policies regarding energy security. In November 2010, an initiative called 'the Energy 2020: a strategy for competitive,

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[20] Dau Tu Newspaper, '26,000-MWp solar power projects are in the queue for approval' (02 December 2018) https://baodautu.vn/cho-xep-cho-26000-mwp-dien-mat-troi-d91811.html accessed 17 December 2018.
[21] European Commission, 'Energy production and imports', Eurostat (Statistics explained) (July 2018) https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1216.pdf accessed 14 February 2019.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid*.

sustainable and secure energy' was adopted by the EU Commission,[25] which defined particular priorities for a period of ten years to tackle a variety of challenges including advancement of energy efficiency, building an integrated energy market with competitive prices and secure supplies, boosting technological leadership, and strengthening the external dimension of the EU energy market through cooperation with international partners.[26] In line with its priorities, the EU has been a major driving force behind global efforts in this area. For example, the sectors focusing on enhancing energy efficiency have seen a steady increase in investment globally: in 2016, global investment in energy efficiency increased by 9 percent to $231 billion, 30 percent of which (the largest share) came from the EU.[27]

This vision and targets have been established in the 2030 strategy agreed by the European Council in October 2014[28] which were further adjusted pursuant to the EU's Clean Energy Package.[29] The targets therein aim to help the EU in obtaining a more competitive, secure and sustainable energy system and meeting the targets of 2050 greenhouse gas reduction.[30] To achieve the ambitious goals of reducing the EU's greenhouse gas emissions by 80 – 95 percent by 2050,[31] the 2050 Energy Roadmap and the 2050 Long Term Strategy (2018)[32] set out four main routes: energy efficiency, renewable energy, nuclear energy, and carbon capture and storage. Therefore, the significant investment in new low-carbon technologies, renewable energy, energy efficiency and grid connection infrastructure needs to be implemented as soon as possible.[33]

Furthermore, building reliable partnerships with supplier, transit and consumer countries is seen to reduce the risks associated with the EU's energy dependency. The EU Commission's Communication, 'The EU energy policy: engaging with partners beyond our borders' in 2011,[34] emphasised the role of multilateral solutions in energy sector.[35] In relation to developing and least developed countries, it was noted that the EU could provide a positive contribution to economic development and poverty alleviation by producing sustainable energy and access thereto.[36] This initiative has eventually been realised in the European Union's Energy Sector Policy Support Programme which aims to facilitate access to sustainable energy in rural areas in Vietnam and contribute to a more sustainable energy sector by promoting efficient, clean and renewable energy available to all citizens.[37]

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[25] Energy 2020: A strategy for competitive, sustainable and secure energy (2010) COM/2010/0639 final.
[26] *Ibid*. pp. 5-6.
[27] International Energy Agency, 'Energy Efficiency Report – 2017', https://www.iea.org/publications/freepublications/publication/Energy_Efficiency_2017.pdf accessed 31 October 2018.
[28] The European Commission's communication on a policy framework for climate and energy from 2020 to 2030 (2014) COM/2014/0015.
[29] Revised targets can be found in several legal instruments. See European Commission, Clean energy for all Europeans, https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans.
[30] European Commission, 2030 Energy Strategy https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/2030-energy-strategy accessed 31 October 2018.
[31] The European Commission's communication on the 'Energy roadmap 2050' COM/2011/0885 final.
[32] The European Commission, 2050 Long Term Strategy, 28 November 2018, https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/2050-long-term-strategy.
[33] European Commission, 2050 Energy Strategy https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/2050-energy-strategy accessed 31 October 2018.
[34] On security of energy supply and international cooperation – 'The EU Energy Policy: Engaging with Partners beyond Our Borders' (2011) COM/2011/0539 final.
[35] *Ibid*. Introduction, para. 4, p. 2.
[36] *Ibid.* Introduction, para. 9, p. 3.
[37] Delegation of the European Union to Vietnam (n 17).

In tandem with its position as a major energy consumer, importer and an advanced technology supplier, the EU has some of the highest standards of market transparency and regulation. As such, it could help other countries to raise their standards.[38] Additionally, key principles for trade and investment, such as non-discrimination, market access and effective dispute resolution are embedded in the EU's energy agenda, bilaterally as well as multilaterally, to address the increasing number of trade and investment barriers. In turn, reduction and removal of such barriers are important for developing countries (e.g. Vietnam) to promote a level playing field for investment in sustainable energy, to increase the affordability of the technologies and incentivise long-term investments so as to render technology transfer, whilst respecting their sovereign legislative powers.[39]

2.2. External Dimension of the EU Energy Policies

Between the 1960s and the 1990s, energy policy was essentially decided at the national level until the Lisbon Treaty 2007, which formally conferred shared competence for energy trade and confirmed the jurisdiction of EU institutions in energy law and policy. Particularly, Article 4 TFEU provides that '*The Union shall share competence with the Member States… in the following principal areas [such as] (i) energy*';[40] the Title XXI of Part Three hereof details the contents of such shared competence over energy. Moreover, Article 194 of TFEU explicitly states five objectives that, 'the Union policy on energy shall aim to: 1) ensure the functioning of the energy market; 2) ensure security of energy supply in the Union; 3) ensure energy efficiency and energy saving; 4) promote the development of new and renewable forms of energy; and 5) ensure interconnection of energy networks'.[41]

It can be asserted that the EU's external energy policy has three distinct dimensions, namely diversification, speaking with one voice and a stronger internal energy system. In one of the dimensions the EU is acting[42] as two distinct entities:

- as a single economic block with its internal (regional) law-making powers and external law-making powers within the international/supranational organisations;[43] and
- as an intergovernmental organisation expressing the geopolitical security preferences of individual Member States.[44]

The treaty provisions confer a degree of competence to the EU in energy related areas (e.g. trade, competition, safety and security) and require that the EU 'policy on energy shall aim, in a spirit of solidarity between Member States, to: a) ensure the functioning of the energy market; and b) ensure security of energy supply in the Union' (Art. 194 (1) TFEU). However, in practice, the competence of the EU in energy matters has been exercised on few occasions in the context of external energy relations. Arguably, this trend derives from the second part of

[38] On security of energy supply and international cooperation – 'The EU Energy Policy: Engaging with Partners beyond Our Borders' (n 38), Section 2 (Strengthening partnerships for secure, safe, sustainable and competitive energy)'s preamble, p. 9
[39] *Ibid*. pp. 12-13.
[40] Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C326, P.0001 – 0390, Art. 4.
[41] *Ibid*. Art. 194 (1).
[42] Bretherton C. and Vogler J., 'The European Union as a Global Actor', (Routledge, 2006).
[43] On this level EU's acting under the European Union competence and is externally represented by the EU Commission.
[44] On this level EU's actions fall under Common Foreign Security Policy (CFSP) with its international representation by the High Representative for the CFSP.

Article 194 of TFEU which states that measures taken under Article 194 '*shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply*'.[45] As a result, while the common external energy trade policy is still underdeveloped and the EU has rarely spoken with a single voice on such issues, there could be counterbalanced internally by the exclusive competence of the EU institutions on trade policy (into which energy is included), including market liberalisation,[46] and the common commercial interests and objectives of the Union.[47]

In addition to its energy security policy, the EU's influence in energy related matters is particularly amplified in standardisation and externalisation of energy trade. In the former area, the EU tends to apply its regulatory standards globally.[48] In this realm, the EU focuses on combating climate change and aims to limit the vulnerability to and dependence on imported hydrocarbon. In tandem with these aims, the EU also aims to ensure market transparency, better control of market volatility and supply disruptions.[49] As such, two legal instruments have been created in order to provide a framework for international cooperation, namely the Energy Community Treaty,[50] and the Energy Charter.[51] The Energy Community Treaty was established in 2006 between the EU and a number of Southeast European countries, in relation to energy efficiency, renewable energy and competition with third countries. The earlier legal instrument, the Energy Charter Treaty, was entered into force in April 1998 which is legally binding agreement with significant provisions on the protection and promotion of energy-specific investment and detailed obligations on energy transit.[52]

The parallel trend is the externalisation of the EU energy rules and regulations in energy trade with third countries through international multilateral, regional and bilateral agreements.[53] Trade in energy is regarded as the trade in goods, combined with services as an ancillary element to enable such trade. The EU agreements thus take into account the relevant World Trade Organisation (WTO) Covered Agreements, particularly the General Agreement on Trade in Services (GATS) framework. For instance, Article VIII GATS which relates to monopolies and exclusive services suppliers, is relevant for energy services as well. By virtue of this provision, monopoly suppliers are not allowed to act in a manner inconsistent with the WTO Member's obligations under the Most Favoured Nation (MFN) principle and their specific commitments under their respective schedules of commitments. Furthermore, Article VI GATS stipulates, in part, that domestic measures imposing particular licensing requirements, technical standards or specificities for energy service providers must be applied without discrimination.[54]

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[45] Art. 194 (2) of TFEU.
[46] Art. 206 TFEU.
[47] Art. 207 (1) TFEU. For a detailed analysis of the potential interpretation and implications of Art. 194 (2) see, Turksen U., 'EU Energy Relations with Russia: Solidarity and the Rule of Law', (Routledge, 2018), Chapter 2.
[48] Masashiro I., 'The EU in Global Energy Governance' UACES Graduate Forum Conference 2018 (12-13 July 2018), p. 4 https://www.uaces.org/documents/papers/1840/ishii.pdf accessed 03 November 2018.
[49] Delimatsis P. (n 10) p. 9.
[50] The Energy Community Treaty (2006) OJ L 198. See, Buschle D. & Talus K. (Eds.), The Energy Community: A New Energy Governance System, Intersentia (2015).
[51] The International Energy Charter - Consolidated Energy Charter Treaty (20 May 2015). See, Leal-Arcas R., (Ed.), Commentary on the Energy Charter Treaty, Elgar Commentaries (2018).
[52] The Energy Charter Treaty, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_/energy_charter_en.pdf.
[53] Masashiro I. (n 48) pp. 4-5.
[54] *Ibid*. pp. 16-17.

With the limited prospect for achieving the ambitions of the EU under the large multilateral WTO regime swiftly, the EU trade policy has gradually shifted towards bilateral and regional trade agreements. In this context, the EU trade policy is characterised by the emergence of so-called 'new generation FTAs' whereby their significance to the energy sector can be found in three main areas: First, the climate change-related policies which facilitate the removal or reduction of barriers to trade and investment in energy and ensure energy security; second, increasing the use of renewables and developing renewable energy infrastructures to reconcile energy needs and environmental protection; and third, using trade and investment measures to foster sustainable development.[55]

2.3. EU and Vietnam Trade and Investment Agreements

The EU and Vietnam established formal diplomatic relations in October 1990, and Vietnam has eventually become the EU's second-most important trading partner in Southeast Asia, after Singapore. The main EU exports to Vietnam are high-tech products, including electrical machinery and equipment, aircraft, vehicles and pharmaceutical products while Vietnam's main exports to the EU relies on footwear, textiles and clothing, and agricultural products. In addition, the EU is one of the largest foreign investors in Vietnam whereby investors from the EU have committed €1.6 billion in Foreign Direct Investment, reaching a total investment stock of €19.2 billion, mostly in the industrial processing and manufacturing sectors (€6.66 billion) by 2017.[56]

The EU initially launched negotiations with the Association of Southeast Asian Nations (ASEAN),[57] of which Vietnam is a member, in July 2007; however, such inter-regional negotiations were postponed in March 2009 due to the divergent levels of economic, social and political development between the ASEAN Member States. As an alternative, the EU started bilateral negotiations with these countries with a view of signing bilateral FTAs. Thus, the EU – Vietnam trade negotiations had commenced in June 2012, until the formal conclusion on 02 December 2015 was reached.[58] After the final texts for the EU-Vietnam trade agreement and EU-Vietnam Investment Protection Agreement were agreed by representatives of both sides, they concluded the formal legal review in June 2018 and the EU Commission will translate the agreement texts into the 24 official languages of the EU, paving the way towards the signature of such agreements and aiming for the entry into force in 2019.[59]

These instruments primarily aim to reduce and/or eliminate tariffs on industrial and agricultural products, except a limited number of goods which the parties have agreed a partial liberalisation through zero-duty Tariff Rate Quotas (TRQs). Particularly, at the entry into force of the agreement, Vietnam will liberalise 65 percent of import duties on goods from the EU, with the rest of the duties being gradually eliminated over a 10-year period. On the other hand, EU duties on goods from Vietnam will be removed over a 7-year period.[60] Moreover, non-tariff barriers to trade (NTBs) have also been considered with the commitments to strengthen

[55] Leal-Arcas R., Caruso V. & Leupuscek R., 'Renewables, Preferential Trade Agreements and EU Energy Policy', *LAWS* (2015) Vol. 4, 472-514.
[56] European Commission (n 15).
[57] ASEAN, https://asean.org.
[58] European Commission, 'Overview of FTA and Other Trade Negotiations' (October 2018) http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf accessed 05 November 2018.
[59] European Commission, 'EU and Vietnam finalise trade and investment discussions', Press Release (26 June 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1875 accessed 05 November 2018.
[60] EVFTA, Chapter 2, Art. 2.7 (1).

disciplines under the WTO Technical Barriers to Trade agreement. In this regard, Vietnam has pledged to use relevant international standards when assessing and drafting technical regulations.[61]

These commitments will not only benefit trade in goods but also enable market access for EU businesses and investors, giving them an opportunity to consolidate their presence in one of the most dynamic and fast-growing economies in the world.[62] Furthermore, this trade deal between Vietnam and the EU will go beyond the WTO commitments, as well as those in other trade agreements Vietnam has concluded; as a result, allowing EU enterprises to gain a better position in the Vietnamese market.[63]

These agreements have continued to move toward the sustainable development agenda, by including significant and detailed provisions on important issues, such as human rights protection, application of high labour and environment standards pursuant to fundamental international treaties.[64] For instance, Chapter 7 of the EVFTA is titled 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation' and aims to share the objectives of the EU regarding the development of energy sector, with more use of renewable and sustainable energy sources, through facilitating trade and investment flows.[65] Within these provisions, there is an expectation from the EU firms to transfer new technologies and techniques to Vietnam whereby Vietnam's energy strategy can be equally developed.[66]

The EVFTA is a significant stepping stone for the EU as the most ambitious and modern trade and investment terms negotiated so far with a developing country.[67] It sets out a clear and transparent legal framework to govern trade and investment relations, acknowledging that a rule-based trade regime is vital for businesses as it provides stability and predictability and allows them to make long-term plans. The EVFTA and IPA are expected to support Vietnam's efforts to enhance economic growth and development for its people in the years to come.[68]

3. The Effects of the Energy Union Strategy on Trade and Investment in Renewable Energy

3.1. The General Overview of Vietnamese Energy Sector and Renewable Energy

Vietnam has experienced rapid economic development with liberalisation, industrialisation and modernisation of its economy, which has been fuelled by the consecutive increase of energy production and consumption. The rate of annual energy demand has risen by 4.1 percent on

[61] *Ibid*. Chapter 5, Art. 5.4 (Technical Regulations), para. (b).
[62] *Ibid.* Chapter 8, Art. 8.12.
[63] *Ibid.* Chapter 8, Art. 8.1 (1).
[64] *Ibid*. Chapter 13, Art. 13.1 (2).
[65] *Ibid.* Chapter 7, Art. 7.1.
[66] Massmann O., 'Vietnam – Power and Energy – Outlook on the European Union Vietnam Free Trade Agreement (EVFTA)', Duane Morris Blogs (18 January 2017) https://blogs.duanemorris.com/vietnam/2017/01/18/vietnam-power-and-energy-outlook-on-the-european-union-vietnam-free-trade-agreement-evfta/ accessed 11 October 2018.
[67] European Commission, 'EU and Vietnam reach agreement on free trade deal', Press Release (04 August 2015) http://europa.eu/rapid/press-release_IP-15-5467_en.htm accessed 06 November 2018.
[68] Delegation of the European Union to Vietnam, 'Guide to the EU-Vietnam Free Trade Agreement', p. 23 http://eeas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/evfta_guide.pdf, accessed 06 November 2018.

average, from 273.3 kgOE/person in 2006 to 454.8 kgOE/person in 2015.[69] Moreover, the primary energy sources have significantly changed with the transformation of an agriculture-based biomass to modern mixed sources, including crude oil, natural gas, coal and hydropower. Among others, natural gas had the highest growth rate with 13.4 percent annually, while the rates of coal, oil and hydropower were of 12.2 percent, 6.2 percent and 27.6 percent respectively.[70]

Despite the ongoing growth, this sector is facing tough challenges:

Firstly, the growth in energy demand, particularly the rapid growth of electricity demand, has resulted in great pressure on production whereby the total output of main domestic energy sources has not increased.[71] Consequently, Vietnam has become a net energy importer, with the outstanding rate of about 5 percent of total supply since 2015, which is forecasted to rise to 37.5 percent in 2025 and 58.5 percent in 2035.[72]

Secondly, with the increase in energy consumption, energy resources are being depleted faster than anticipated. Most of the potential for large and medium hydropower plants will be fully exploited when the capacity is expected to slightly increase from 18 GW to 21.6 GW in 2020. Meanwhile, the domestic coal is currently insufficient to supply for coal-fired power plants, and petroleum resources will be reduced and depleted in around next 60 years' time. Ultimately, there will be no other option for Vietnam but to find alternative energy sources[73] and improve its energy efficiency.

Thirdly, the significant shift to and reliance on fossil fuels have raised concerns about the environmental pollution and damage these can cause. Since the 1960s, Vietnam has had the highest greenhouse gas (GHG) emissions in the ASEAN, whereby the GHG emissions (metric tons per capita) had increased roughly five times between 1986 and 2014.[74] In compliance with international commitments, such as the United Nations Framework Convention on Climate Change (UNFCCC) 2015 (the Paris Agreement, 2015), recently, Vietnam committed to minimising environmental pollution by stricter regulation and enforcement.[75] Accordingly, there are three core elements of Vietnam's reform agenda to sustain the environment: protecting the quality of natural resources; building climate resilience in economic planning, sectoral policies and infrastructure investment; and finding solutions to tap cleaner energy sources. The agenda calls for strong policies and institutions to coordinate actions, with private participation.[76]

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[69] Vietnam Ministry of Industry and Trade (MOIT) & Danish Energy Agency, 'Vietnam Energy Outlook Report 2017', p. 12 https://ens.dk/sites/ens.dk/files/Globalcooperation/Official_docs/Vietnam/vietnam-energy-outlook-report-2017-eng.pdf accessed 05 January 2019

[70] *Ibid*. p. 13.

[71] *Ibid*. p. 17.

[72] Vietnam News, 'Challenges facing Vietnam in ensuring energy security' (7 August 2018) https://vietnamnews.vn/society/463256/challenges-facing-viet-nam-in-ensuring-energy-security.html#tV8B5w5aK8DWhwpj.97 accessed 05 January 2019

[73] MOIT & Danish Energy Agency (n 69) p. 17.

[74] The World Bank, 'Vietnam: CO2 emissions data' (1960 – 2014) https://data.worldbank.org/indicator/EN.ATM.CO2E.PC?locations=VN&view=chart accessed 6 January 2019

[75] The Vietnam Business Council for Sustainable Development, 'Sustainable Energy: Challenges and opportunities for Vietnamese businesses', Vietnam Business Forum 2018, http://en.vbcsd.vn/detail.asp?id=448 accessed 05 January 2019.

[76] The World Bank & Vietnamese Ministry of Planning and Investment, 'The 2035 Vietnam Report: Toward Prosperity, Creativity, Equity, and Democracy', (Hanoi, 2016), p. xxvii

In the power generation sector of Vietnam, the main sources have derived from the large and medium hydropower plants, estimated to provide approximately 40 percent of the total installed power generation capacity. There has also been significant development in coal-fired power plants in the North and central regions of Vietnam, and gas-fired thermal plants in the South, which account for roughly 33 percent and 19 percent of total capacity respectively. Being aware of its dependence on imported energy sources, environmental concerns of large hydropower plant projects, the relatively slow development of the natural gas industry, as well as the government's decision to suspend nuclear power development, the renewable energy is generally viewed as a logical and viable alternative to meet Vietnam's future power needs. However, the current contribution of renewable energy in Vietnam's energy mix is very limited: it is estimated to be less than 1 percent of the total capacity.[77]

Given the fact that the development of renewable energy in Vietnam is at its infancy, it has a great potential to develop and include different renewable energy sources, including wind, solar, biomass and geothermal energy.[78] Vietnamese government has promulgated many important policies and solutions to attract investment from varied economic sectors into the field of energy, which have encompassed mobilization of the state budget, and encouraging private and foreign investors to participate directly in the construction, ownership and operation of energy infrastructure.[79]

The Revised National Power Development Plan for the period 2011-2020 with the vision extended to 2030 (revised PDP 7)[80] and the Renewable Energy Development Strategy[81] in particular set relatively concrete targets for the development of renewable energy, with the ambitious goal to increase the total production of renewable energy sources to 138 MTOE and achieving 44 percent share in total primary energy consumption in 2050.[82] As such, a large quantity of renewable energy projects, especially wind and solar power, have been launched recently that could play an important role in energy supply for medium and long terms.

Meanwhile, there is the great need for continued implementation of energy efficiency programmes, with the support from international institutions. For example, in March 2018, a joint project between the World Bank and the Ministry of Industry and Trade launched a $102-million investment to support the efforts of industrial enterprises to adopt energy-efficiency technologies and practices.[83]

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http://vids.mpi.gov.vn/Includes/NewsDetail/12_2016/dt_11220161028_vn2035english.pdf accessed 05 January 2019.

[77] Campbell S., Musch R. & Huynh L., 'Renewable Energy in Vietnam', Hogan Lovells (2018), p. 7 https://www.hoganlovells.com/~/media/hogan-lovells--renewable-energy-in-vietnam-jan-2018.pdf accessed 05 January 2019.

[78] Cattelaens P., Limbacher E., Reinke F., Stegmueller F. F., Brohm R., 'Overview of the Vietnamese Power Market – A Renewable Energy Perspective', GIZ Energy Support Programme (2015), p. 15 http://gizenergy.org.vn/media/app/media/PDF-Docs/Publications/GIZ_Vietnam%20Power%20Market%20Overview_2015-10-26_small.pdf accessed 05 January 2019.

[79] *Ibid*. p. 18.

[80] The Prime Minister's Decision No. 428/QD-TTg dated 18 March 2016.

[81] The Prime Minister's Decision No. 2068/QD-TTg dated 25 November 2015.

[82] *Ibid*. Art.1, Chapter II.2.

[83] Vietnam Investment Review, '$102-million project to help Vietnam improve energy efficiency' (6 March 2018) https://www.vir.com.vn/102-million-project-to-help-vietnam-improve-energy-efficiency-56853.html accessed 13 November 2018.

The future success of such initiatives rests on attracting new waves of investments from non-state sectors and private companies, backed by government guarantee. It is advisable for the Vietnamese government to continue the momentum of legal reforms and financial incentives for levelling the playing field, and encouraging the application of advanced technologies to meet high standards on environmental protection and energy security.[84] Besides, the trade agreement with key trading partners, such as the EU, liberalising and easing the market access and facilitating investment in energy infrastructure, would certainly motivate and mobilise potential investors.

3.2. The Effects of EVFTA for Vietnamese Regulations on Renewable Energy Development

3.2.1. Local Content Requirements (LCRs)

There is no doubt that Vietnamese government has embedded its policies in relevant legal instruments to build and develop domestic industrial sectors as well as to enhance the capacity of local businesses in competing with foreign rivals. In particular, the initial Bidding Law of Vietnam, 2005 which was repealed by a new law in 2013,[85] has provided the essential legal basis for the management of public procurement in many important sectors including energy infrastructure projects. Together with the supplementary legal documents,[86] the Bidding Law is aimed to ensure transparency, legal certainty and fair competition in public procurement in accordance with international practices, and as a basis for project owners to select qualified and experienced contractors.[87]

Accordingly, projects which are financed by the State or State-owned enterprises (whereby the State has over 30 percent stake of the total capital) shall fall within the governing scope of this law.[88] Foreign contractors are not eligible to participate in project bids unless two key conditions are met: Firstly, there must be international bids as detailed under the provisions of bidding law, including the situations where goods or services are not yet manufactured domestically or able to be manufactured domestically but fail to meet technical, quality or price requirements.[89] Secondly, foreign contractors must have partnerships with domestic contractors, or subcontract a part of project works to local businesses.[90]

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[84] MOIT & Danish Energy Agency (n 69) p. 18.

[85] The Bidding Law No. 43/2013/QH13 dated 26 November 2013.

[86] Decree No.111/2006/ND-CP dated 29 September 2006; the Prime Minister's Decision No.49/2007/QD-TTg dated 11 April 2007; the Decree No.58/2008/ND-CP dated 5 May 2008; the Decree No.85/2009/ND-CP dated 15 October 2009 guiding the Bidding Law and the Selection of Construction Contractors under the Construction Law.

[87] Turksen U. & Nguyen H. T., Competition and Procurement in Energy Projects in Vietnam: Risks, Opportunities and Future Prospects, *International Energy Law Review* (June 2018), p. 120.

[88] The Bidding Law 2013, Art. 1 – Scope of regulation.

"*1. Selection of tenderers to supply the advisory services, non-advisory services, goods, construction and installation for: Projects on development investment of state-owned enterprises; and Projects on development investment other than cases defined at point a) and point b) of this Clause which are financed by state, state-owned enterprises with level equal to 30% or more or less than 30% but more than VND 500 billion in total invested capital of project.*"

[89] *Ibid*., Art. 15 – International bidding.

[90] *Ibid*. Art. 5 stipulates the eligibility criteria of tenderers, investors, para. (h) states that foreign investor/tenderer "*must have a partnership with domestic contractors or use sub-contractors when participating in international bid in Vietnam, unless domestic contractors have not full capability to participate in any part of bidding package*".

Moreover, the Bidding Law 2013 confers preferential treatment to bidders who can supply goods containing at least 25 percent of value produced locally,[91] or supply of services (advisory or non-advisory services, construction and installation works) where the minimum portion of services rendered by domestic contractors is a quarter as per the whole package price.[92] The preferential treatment is detailed by scoring and ranking methods set forth in Decree No. 63/2014/ND-CP which also allows the project owners or consultants to determine additional scores so as to prioritise certain contractors who meet such requirements above.[93]

These provisions represent one of most common measures known as 'local content requirements (LCRs)' which typically require a certain percentage of intermediate goods used in the production processes to be sourced from domestic manufacturers.[94] In the context of renewable energy, such policy may be of use under two forms: a precondition to receive government support, such as tariff rebates; and an eligibility requirement for government procurement in renewable energy projects.[95]

It is clear that the public financing for low-carbon energy has been squeezed after the financial crisis of 2008. And while the governments need to address the pressing concerns of climate change and environmental degradation to achieve sustainable economic development, without the adequate international policy momentum on agreed policies, both developed and developing countries have had to turn to local content requirements as a measure to encourage green growth.[96]

On the one hand, the proponents argue that LCRs can be used to address valid environmental objectives where there are limited financial resources, allowing firms the breathing space to reach a sustainable scale of green energy output and providing for the creation of green jobs.[97] They also claim that LCRs will spur innovation in the renewable energy sector in the medium term and consequently lower green technology costs.[98] However, the opponents point out that using LCRs in renewable energy policies may lead to inefficient allocation of resources, higher retail power prices, a potential distorting effects on trade and investment to question; thus they question the ability of LCRs to bring advantages for countries which choose to apply them.[99]

Despite the contrasting opinions on benefits and drawbacks of LCRs, the EVFTA provides a specific chapter addressing the non-tariff barriers to trade and investment in renewable energy generation.[100] The content of this chapter indicates that the EU's intention is to reduce the GHG by promoting the generation of energy from renewable and sustainable sources through the

[91] *Ibid*. Art. 14 (1).
[92] *Ibid.*, Art.14 (2).
[93] Decree No. 63/2014/ND-CP, Arts. 3-5.
[94] Stephenson S., 'Addressing Local Content Requirements in a Sustainable Energy Trade Agreement', International Centre for Trade and Sustainable Development (Geneva, Switzerland; June, 2013), p. 1 https://www.ictsd.org/sites/default/files/downloads/2013/06/addressing-local-content-requirements_opt.pdf accessed 24 November 2018.
[95] *Ibid*., p. 2
[96] *Ibid*.
[97] *Ibid*. p. 4.
[98] *Ibid*. p. 5.
[99] *Ibid*. pp. 5-6.
[100] EVFTA, Chapter 7 – '*Non-tariff barriers to trade and investment in renewable energy generation*'.

trade deal, as well as pressing the needs of multilateral cooperation and application of higher standards globally.[101]

It is clear that both parties have agreed to refrain from adopting measures which provide LCRs[102] and/or any other offsets[103] which may affect the other Party's investors to provide products and services related to renewables.[104] Vietnam and the EU are also obliged to refrain from adopting any requirements to form partnerships with local enterprises unless a Party could evidence that those partnerships are justifiable for technical inquiries upon request of the other Party.[105] Importantly, these provisions are in line with the rules of the WTO Government Procurement Agreement, 2012[106] to achieve a degree of transparency and procedural fairness, compared to other trade agreements concluded by the EU recently.[107] For example, any measures concerning the authorisation, certification and licensing procedures applicable to any equipment, plants and associated transmission network infrastructures shall be objective, transparent, non-arbitrary and shall not discriminate amongst applicants from the Parties.[108]

The commitments in the EVFTA are likely to benefit businesses from the EU whereby they are allowed to engage in bids for renewable energy projects sponsored by Vietnamese authorities or State-owned enterprises (e.g., the Electricity of Vietnam group – EVN).[109] Furthermore, provisions of this trade agreement shall have precedence over the domestic regulations[110] and diminish the preferential treatment which local contractors are currently enjoying, and to a certain extent, put the pressure on local contractors to upgrade their existing facilities and improve service quality (in order to compete with the EU companies).[111]

3.2.2. Power Purchase Agreement ('PPA') and Direct Corporate Power Purchase Agreement ('DPPA')

Since 2017, there has been a surge of solar and wind power projects approved by the Vietnamese government after the promulgation of new feed-in-tariffs ('FITs') for solar power and other reforming policies to attract foreign and local investment for green economy.[112] Among other schemes, FIT is defined as a policy supporting the development of new renewable energy projects by offering long-term purchase agreements for the sale of electricity. Such agreements provide a specified price for every kilowatt-hour (kWh) of electricity generated

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[101] *Ibid*., Chapter 7, Art. 7.1 – Objectives.
[102] *Ibid.* Art.7.2 (a) – Definitions.
[103] *Ibid.* Art. 7.2 (c) "offset" means any undertaking that imposes the use of a local content requirement, local suppliers, technology transfer, investment, counter-trade or similar actions to encourage local development
[104] *Ibid*. Art.7.1 (a).
[105] *Ibid*. Art.7.4 (b).
[106] WTO - Revised Agreement on Government Procurement, 2012, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm accessed 24 November 2018.
[107] Nhan Dan Newspaper, EVFTA set to benefit EU investors in public procurement (20 October 2018) http://en.nhandan.org.vn/business/item/6742502-evfta-set-to-benefit-eu-investors-in-public-procurement.html accessed 24 November 2018.
[108] EVFTA, Chapter 7, Art. 7.4 (c).
[109] Nhan Dan Newspaper (n 107).
[110] The Bidding Law 2013, Art. 3 (4) states that "*If International treaties to which the Socialist Republic of Vietnam is a contracting party have provisions on selection of tenderers and investors different from this Law, such International treaties shall prevail*".
[111] *Ibid.*, Art.15 (5): "*Entities and content or preferential treatment in selection of tenderer specified in this Article shall not apply in case where International treaties in which the Socialist Republic of Vietnam is a contracting party or international agreements between Vietnam and donors otherwise provides for preferential treatment in selection of tenderer*."
[112] The Prime Minister's Decision No. 11/2017/QD-TTg dated 11 April 2017.

and structured with a specific contract period and differentiated based on technology, project size and location.[113] Particularly, the Decision 11/2017/QD-TTg set forth the FIT for on-grid solar projects as equal to USD 9.35 cents/kWh,[114] while the Decision 39/2018/QD-TTg (Decision 39) (amending the Decision 37/2011/QD-TTg) provides that since 01 November 2018 the FIT for wind power will rise from USD 7.8 cents/kWh to (i) USD 8.5 cents/kWh for onshore generation; and (ii) USD 9.8 cents/kWh for offshore power generation.[115]

Within the ASEAN, FITs are provided in five Member States, namely Indonesia, Malaysia, Philippines, Thailand and Vietnam whereby the applied rates of FIT in Vietnam are much lower than those in other countries.[116] For instance, since the adjustment in Thailand by 2014, the applied rate for wind power is USD 19.29 cents/kWh, and for solar power it ranges from USD 13.13 to 18.02 cents/kWh. These base FITs could be increased by FIT premium, which are purposed to encourage the development of renewable energy in rural or remote areas.[117] Another example is the Philippines where the FIT was firstly issued under the Energy Regulatory Commission's Resolution No. 10 series 2012 in November 2012. Since then, the FITs have been adjusted several times for certain renewable sources, such as USD 15.12 cents/kWh for wind and USD 16.71 cents/kWh for solar power.[118]

Besides the low FIT scheme, there are significant concerns about the sustainability of such FITs which could have been amended frequently by the Prime Minister's Decisions. Particularly, the FIT applicable to solar power projects under Decision No. 11/2017/QD-TTg came into effect on 1 June 2017 which is effective until 30 June 2019.[119] Although the Ministry of Industry and Trade is responsible to offer a new mechanism for incentivising the development of solar power projects in next period[120] such as competitive bidding, and the 'self-consumption plan' mechanism for distributed power derived from renewable energy sources, there has been no clear answer as to whether an attractive FIT can be provided.[121] Consequently, it is challenging for investors to determine their project schedule and business plans due to the lack of stable price of electricity sale.

Apart from that, the question arises in relation to ability of EVN to purchase the power produced by all solar power projects (including registered projects but not constructed yet). For example, the current capacity of transmission line in Phu Lac station is 100 MW only whereas the registered production capacity of power plants within this area has reached 400 – 500 MW. As a result, the EVN might not honour their obligations to off-take the power unless it must proceed the upgrade programme for the existing transmission line shortly.[122] It is thus inevitable that disputes between foreign investors and Vietnamese government may arise with

[113] The ASEAN Centre for Energy (ACE) and the China Renewable Energy Engineering Institute (CREEI), 'ASEAN Feed-in-Tariff Mechanism Report', (June 2018), pp. 03-04 http://www.aseanenergy.org/resources/reports/asean-feed-in-tariff-mechanism-report/ accessed 05 January 2019
[114] The Prime Minister's Decision No. 11/2017/QD-TTg dated 11 April 2017, Art. 12.
[115] The Prime Minister's Decision No. 39/2018/QD-TTg dated 10 September 2018, Art. 1(7).
[116] ACE and CREEI (n 118), pp. 03-04.
[117] *Ibid*. pp. 15-16.
[118] *Ibid*. pp. 13-14.
[119] The Decision No. 11/2017/QD-TTg, Art. 16 (1).
[120] The Decision No. 11/2017/QD-TTg, Art. 13 (1) (e).
[121] The Saigon Times, 'Seeking new mechanism for solar power' (05 January 2019) https://www.thesaigontimes.vn/283778/Tim-co-che-moi-cho-dien-mat-troi.html accessed 05 January 2019.
[122] *Ibid*.

regard to the change of applied FIT or refusal of the single off-taker (the EVN), which diminishes or threatens to reduce the legitimate interest of investors.

At this juncture, it is worth noting the recent case of *Eiser Infrastructure Ltd. v. Spain*,[123] the first ICSID case to reach a final award related to the measures Spain had applied to roll-back certain incentives and benefits offered to promote investment in the Concentrated Solar Power ('CSP') sector. The tribunal found that the change of law (RDL 9/2013) completely derogated from the former regime (RD 661/2007), significantly reducing the subsidies granted to the existing solar plants.[124] In particular, the new standards did not take into account the real characteristics of the plants installed in the early times of RD 661/2007. The RDL 9/2013 retroactively established standards of design and investment that were supposed to be incorporated by investors under the regime of RD 661/2007.[125] Consequently, it established that Spain breached the fair and equitable treatment standard by implementing new regulations, which eliminated the foundations where the core of Eiser's investment in Spanish CSP sector has taken place.[126]

Moreover, Vietnam has enacted legislation including the Agreement for Electricity Sale and Purchase for Grid-Connected Wind Projects (Wind PPA) and the Circular on Implementation of Wind Power Projects Development in 2012 (Circular 32),[127] published by the MOIT, in collaboration with Deutsche Gesellschaft für International Zusammenarbeit (GIZ) GmbH under the MOIT/GIZ Energy Support Programme.[128] The Circular 32 only permits investment in wind projects if they have been approved by the MOIT first.[129] In parallel, the MOIT issued the Circular for Implementation of Solar Power Projects ('Circular 16') in September 2017,[130] which includes detailed guidelines in regards to the formulation and approval of national and provincial solar power development plans, technical requirements, and tariff structure for both grid-connected projects and rooftop projects. In addition, Circular 16 offers a set of three templates of model power purchase agreements for grid-connected projects ('Solar PPA'), residential rooftop and commercial/industrial rooftop projects.[131]

The parties can agree to include additional provisions to the standard PPAs, yet they cannot vary its 'basic contents'. While these model PPAs provide a degree of guidance and assurance to the stakeholders, there remain numerous issues which reduce the bankability of investment. For example, the seller (project developer) must bear the costs and risks of connecting the plant to the transmission grid especially where the project is located in a remote area or the connection line will need to run through lands which are owned by a variety of owners. Additionally, there is no commissioning clause to protect the seller when the plant is able to generate power but the purchaser (the EVN) fails to accept nor is there a stabilisation clause to expressly protect the seller against any changes in the law. Furthermore, in a case of termination

[123] ICSID Case No. ARB/13/36 https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf accessed 06 January 2019.
[124] *Ibid*. para 390-91.
[125] *Ibid*. para 413-14.
[126] de Souza Fleury R. P., '*Eiser Infrastructure v. Spain*: Could the tide be turning in favor of photovoltaic foreign investors in Spain?', Kluwer Arbitration Blog (20 June 2017) http://arbitrationblog.kluwerarbitration.com/2017/06/20/eiser-infrastructure-v-spain-tide-turning-favor-photovoltaic-foreign-investors-spain/ accessed 18 December 2018.
[127] The MOIT's Circular No. 32/2012/TT-BCT.
[128] MOIT/GIZ Energy Support Programme, http://gizenergy.org.vn/en/ accessed 18 December 2018.
[129] The MOIT's Circular No. 32/2012/TT-BCT, Art. 4 (4).
[130] The MOIT's Circular No. 16/2017/TT-BCT.
[131] Campbell S. *et al* (n 77) p. 11.

by default of the purchaser, the compensation for the seller is limited to the value of generated electricity for the previous year. Last but not least, the law governing the PPAs is automatically Vietnamese law.[132] These issues need to be addressed so as to align the standard PPAs in Vietnam with international market practice and to attract FDI.

A paper drafted by the World Bank Group Energy MFD Team (**Vietnam: Maximizing Finance for Development (MFD))**[133] demonstrates that Vietnam has experienced double digit growth in energy demand and calls for continued high levels of investment in the energy sector. Nonetheless, foreign and domestic private sectors are facing significant constraints, including the inappropriate public-private partnership structures, and the underdeveloped local capital market.[134]

In order to pave the way for much needed larger funding sources in energy infrastructure investment in general and building renewable energy capability in particular, a major coordinated policy is well over due. Firstly, the State is responsible for harmonising and integrating legal instruments for investment under the form of public-private partnerships (PPPs) thus the government needs to deliver this without delay.[135] Secondly, building a more competitive energy market calls for a concerted effort to facilitate the engagement of domestic and international private businesses, with the necessary support mechanisms in place, such as preferable commercial loans and building a corporate bond market.[136]

The Prime Minister had issued the Decision 63/2013/QD-TTg on 8 November 2013 regulating the conditions and setting a blueprint for competitive electricity market in Vietnam whereby the MOIT was delegated to materialise three crucial milestones: competitive power generation market; competitive power wholesale market; and competitive power retail market accordingly.[137] The result, six years after the implementation, have been relatively positive but not enough to make a significant change. The competitive power generation market commenced in July 2012 whereby the private power generators have been allowed to develop their respective projects and sell electricity to the single off-taker – the EVN. This was then followed by the establishment of a pilot power wholesale market at the beginning of 2018.[138] Nonetheless, the share of investment from State-owned enterprises in power market still dominates while the contribution from private sector is very limited.[139] Market barriers and a

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[132] Allens Linklaters (law firm company), 'Renewables in Vietnam – Opportunities for investment' (17 August 2017) https://www.allens.com.au/pubs/pdf/asia/Vietnam-RenewableEnergy-170817.pdf accessed 18 December 2018.

[133] The World Bank Group Energy MFD Team (WBG MFD), Vietnam: Maximizing Finance for Development (MFD), Energy Infrastructure Assessment Program (Vietnam Energy Infra-SAP) (drafted 13 February 2018) https://auschamvn.org/wp-content/uploads/2018/05/2.-WB_March-2018-Vietnam-Energy-Sector-Assessment.pdf accessed 22 February 2019

[134] *Ibid*., pp. 6-7

[135] The Decree No. 63/2018/ND-CP dated 4 May 2018 providing Public-Private Partnerships which replaces Decree No. 15/2015/ND-CP and deregulates some provisions of Decree No. 136/2015/ND-CP on Public fund investment

[136] WBG MFD (n 139) pp. 7-8

[137] The Decision No. 63/2013/QD-TTg dated 8 November 2013, Art. 4. See further in PM's Decision No. 168/QD-TTg dated 7 February 2017 approving the reforming power market in the period of 2016-2020, with a vision toward 2025; PM's Decision No. 852/QD9-TTg dated 14 June 2017 approving the General Plan of restructuring subsidiaries of the EVN in the period of 2017-2020.

[138] Nang luong Journal, Competitive power market and restructuring power market (5 September 2018) http://nangluongvietnam.vn/news/vn/nhan-dinh-phan-bien-kien-nghi/thi-truong-dien-canh-tranh-va-ta-i-co-ca-u-nga-nh-die-n.html accessed 22 February 2019

[139] International Renewable Energy Agency (IRENA), Unlocking Renewable Energy Investment: The role of risk mitigation and structured finance (Abu Dhabi, June 2016), p. 12

perception of high investment risks are preventing the development of renewable energy; thus it restated the responsibility of the State for levelling playing field, ensuring the stable and predictable business environment, as well as providing appropriate incentivising programs.[140]

Even if the challenges pertaining to investment and market access were resolved, there remains a number of issues which need to tackled also. These can be summarised as follows:

- Predictability and navigation of the legal instruments for investors at provincial level in particular;
- Education of the consumers/public on the benefits of renewables; and
- Interconnectivity of the national grid which enables surplus renewable energy transfer.

Another important point to raise is that there is no restriction concerning the foreign ownership of electricity companies or assets that are involved in electricity generation in Vietnam under domestic laws or Vietnam's international commitments. A foreign investor may choose among permitted investment forms: a wholly foreign-invested company, a joint venture or a public-private partnership (PPP). However, transmission and distribution of electricity are not yet open to foreign investors, rather the EVN and its subsidiaries continue to play a monopolistic role in these sectors.[141] Currently, the Electricity Regulatory Authority of Vietnam (the ERAV) has disclosed information on draft regulations for implementation of a pilot programme for Direct Corporate Power Purchase Agreement ('DPPA'). The DPPA model refers to an arrangement whereby instead of buying electricity directly from the State utility off-taker, private businesses will purchase electricity under long-term PPAs directly from independent power developers, as well as investing in power generation assets themselves.[142] This presents yet another opportunity for investors from the EU to enter the energy sector in Vietnam.

It can be concluded that the recent conclusion of the EVFTA and legal developments in Vietnam have further opened the market to investors from the EU. They can now bring their technology and know-how, especially from those countries with advanced level of technical expertise and developed renewable energy sectors such as Spain, Sweden, Germany and Denmark, to Vietnam with minimal market access barriers and risks. In particular, the EVFTA makes it possible for foreign investors to seek redress via legal proceedings against Vietnamese government or representative entities authorised by the government to enter into PPAs according to the new dispute settlement mechanism, without any interference from the local courts regarding its validity. This is an advantage for investors considering the fact that the percentage of annulled foreign arbitral awards in Vietnam remains relatively high.[143]

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http://www.irena.org/publications/2016/Jun/Unlocking-Renewable-Energy-Investment-The-role-of-risk-mitigation-and-structured-finance accessed 22 February 2019

[140] *Ibid*., pp. 12-13

[141] Nguyen Q. V. and Trinh N. T., 'Electricity regulation in Vietnam: Overview', Practical Law https://uk.practicallaw.thomsonreuters.com/4-628-5349?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 accessed 18 December 2018.

[142] Burke F. R., Dang L. C., 'Vietnam's High Level Meeting on Corporate DPPA Mechanism for Renewable Energy', Baker McKenzie (06 December 2018) https://www.bakermckenzie.com/en/insight/publications/2018/12/vietnam-high-level-meeting-dppa accessed 18 December 2018.

[143] Massmann O., 'Direct Corporate Power Purchase Agreement (DPPA) to be piloted in Vietnam in 2019 in Vietnam – Opportunities for producers of renewable energy and foreign firms as buyers – how best to use the CPTPP and the EVFTA to make it work', Duane Morris Blogs (06 August 2018)

3.2.3. The New Investor-State Dispute Settlement Mechanism

In PPAs for both wind and solar power, a dispute should be initially settled by amicable negotiation. If the negotiation fails, although there is no indication as to which order to be followed, such a dispute could be referred to the Department of Electricity and Renewable Energy for assistance in consultation, or submitted to the Electricity Regulatory Authority of Vietnam (the ERAV) in accordance with the Circular No. 40/2010/TT-BCT (Circular 40).[144] Either party who does not agree with the conclusion of the ERAV has the right to initiate a lawsuit before the national courts.[145] Although the Circular No. 27/2013/TT-BCT (Circular 27) was issued later which allows the party in disagreement to refer the dispute to commercial arbitration,[146] the same procedure of dispute resolution is also stipulated in the solar PPA. Given the alternative avenue for referring the case to the ERAV under Circular 40, the parties may agree to select a dispute settlement agency to settle the dispute in accordance with relevant laws directly.

Vietnam's increasing involvement in bilateral and multilateral trade and investment agreements has helped to attract foreign investment capital into the country and to grow the volume and number of international trade activities. In tandem with this positive trend and increased number of commercial transactions, it is inevitable that disputes between foreign investors and Vietnamese government may arise. While the international expectation is that commercial disputes are resolved via independent and impartial mechanisms and platforms which can be determined by the parties to a dispute, recourse to dispute resolution by the Vietnamese authorities or state agencies may not be viewed as an impartial mechanism, particularly in view of EVN being a state-owned entity, related to the regulator. The ability to refer a dispute to Vietnamese courts might also not provide adequate comfort as to impartiality from the perspective of foreign investors.[147]

As a result, these disputes would be resolved by different mechanisms according to the provisions of the Foreign Investment Protection and Promotion in bilateral investment treaties (BITs), FTAs or other multilateral arrangements, provided that such procedures are agreed on in relevant agreements and contracts. In fact, investors often choose arbitration tribunals to resolve disputes because this method has many advantages, *inter alia*: de-politicisation of disputes to allow for a rule-based settlement of disputes and to avoid engagement in geopolitical dialogues; the ability for parties to a dispute to have their claim heard by an independent and qualified tribunal, enhanced further by the choice and determination of the seat of arbitration and hearing locations; the perception that (in a number of jurisdictions) international arbitration is faster, cheaper and more flexible, as well as being more familiar to states and foreign investors; the control it offers to disputants over the adjudication process, in enabling the parties to determine key elements of the dispute settlement process, such as the

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https://blogs.duanemorris.com/vietnam/2018/08/06/direct-corporate-power-purchase-agreement-dppa-to-be-piloted-in-vietnam-in-2019-in-vietnam-opportunities-for-producers-of-renewable-energy-and-foreign-firms-as-buyers-how-best-to-use-the-cptpp-a/ accessed 18 December 2018. For a critical analysis of enforcement of arbitration awards in Vietnam see Turksen U., Blanco E. and Tran A. D., 'Evolving to perfection? Enforcement of international arbitral awards in Vietnam' (2010) Journal of world investment and trade, Vol. 11(6) 965

[144] The Circular No. 40/2010/TT-BCT dated 13 December 2018 providing settlement mechanism for disputes in the electricity market.

[145] *Ibid*., Art. 29.

[146] The Circular No. 27/2013/TT-BCT, Art. 5.

[147] Campbell S. *et al.* (n 77) pp. 18-19.

seat of arbitration, the arbitrators, the language and the hearing location; and recognition and enforceability of the arbitration awards by operation of multilateral agreements.[148]

In regard to the energy sectors, traditional Investor-State Dispute Settlement (ISDS) mechanisms set forth in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) or the Energy Charter Treaty, are modelled on commercial arbitration, and allow private investors to initiate disputes against the Contracting State that hosts the investment before an international tribunal.[149] There are many criticisms concerning the alleged lack of independence and impartiality of party-appointed arbitrators, expertise in international law and an ethical code for arbitrators, consistency and coherence of arbitral awards, and transparency.[150] Vietnam thus has sought for a new regime of ISDS with the hope that the standing body under the EVFTA would remedy the problems present in the current model of ad-hoc investment arbitration.[151] This can provide a further reassurance and incentive for potential investors.

Prior to the conclusion of the EVFTA, on 14 January 2014, the Prime Minister of Vietnam had issued the Decision No. 04/2014/QD-TTg on Promulgation of the Regulation on Coordination in Resolution of International Investment Disputes ('2014 Regulation'). The regulation splits the mechanism to settle investor-state disputes into three stages, namely conflict management, dispute resolution and award enforcement. In addition, it explicitly states the duties, powers and process of coordination among state agencies and relevant authorities before international arbitration or competent tribunals.[152] Particularly, the representative of Vietnamese government who entered into agreement with foreign investors, for instance the EVN as the off-taker in power purchase agreement with investors, would be the entity in charge of dispute settlement.[153]

The 2014 Regulation was merely the first step taken by the Vietnamese government to manage and resolve investment disputes in preparation for the international investment agreement reform. Through such efforts, the drawbacks of traditional investment arbitration and the risk of claims by investors are revealed; *inter alia*, the "forum shopping" which means foreign investors may generally choose among a wide range of options and available tribunals against

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[148] Nguyen M. D. and Dang V. M. H., 'Investor-State dispute settlement (ISDS) under new-generation free trade agreements' <http://dzungsrt.com/wp-content/uploads/2015/03/INVESTOR-STATE-DISPUTE-SETTLEMENT-ISDS-UNDER-NEW-GENERATION-FREE-TRADE-AGREEMENTS.pdf>, accessed 06 December 2018; UNCTAD, 'Investor-State Disputes: Prevention and Alternative to Arbitration', UNCTAD Series on International Investment Policies for Development (2010), pp. 13 – 15; and Braddock R., USAID, 'Advantages and Disadvantages of Joining the ICSID Convention: Utilization of ICSID in the Trans-Pacific Partnership and other international investment agreements' (2017), workshop by USAID.

[149] Lenk H. 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016), European Papers (European Forum, 14 August 2016) Vol 1(2) 665, p. 666.

[150] Sardinha E. (2017) 'The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement' ICSID Review 32(3) 625, p. 628.

[151] Nguyen M. D. and Dang V. M. H., 'ISDS reform & the EU–Vietnam free trade agreement: Challenge accepted!'
https://www.academia.edu/36350091/ISDS_REFORM_and_THE_EU_VIETNAM_FREE_TRADE_AGREEMENT_CHALLENGE_ACCEPTED_accessed 06 December 2018.

[152] The Regulation on Coordination in Resolution of International Investment Disputes (attached with the Decision No. 04/2014/QD-TTg), Art.1 Governing Scope.

[153] *Ibid*. Art. 5(3).

the governments.[154] In addition, investor claims in ISDS can create high fiscal exposures, with claimed compensation amounting to hundreds of millions or billions of dollars, which can seriously affect public budgets in respondent countries.[155]

Given such risks and exposures both investors and government face, the EVFTA establishes a two-tiered tribunal system which is comprised of a Permanent Tribunal[156] and an Appellate Tribunal,[157] and contains rules on ethics for Members of these tribunals;[158] transparency in the proceedings;[159] and investors' disclosure obligations with regard to third-party funding.[160] The stated aim of the establishment of a 'novel two-tier settlement resolution for investment disputes, combining elements of traditional ISDS with judicial features'[161] in the trade deal is to provide a modern and reformed mechanism which does not only guarantee the respect of the substantive investment protection rules applicable to the EU and Vietnamese investors, but also safeguards the right of States to regulate.[162] Despite these good intentions, it is too early to comment and critique the effectiveness of this new mechanism set out in the EVFTA.

4. Conclusion

This article has demonstrated that there has been a need to diversify EU's energy mix, and ensure energy security and efficiency, as well as offer opportunities for its companies to invest and provide their energy related goods and services beyond the EU in general and to developing and emerging economies in particular. These requirements have led to a number of substantive and legal developments in the region (within the EU Single Market)[163] and internationally (beyond the EU) including the EVFTA. Such bilateral and multilateral agreements in the energy field are envisaged to externalise the EU's energy trade law and policies *inter alia* its climate change and environmental protection policies; and energy efficiency policies and principles therein. By doing so, it is expected that the international reach and impact of EU policies will be optimised whilst also benefiting the recipient countries. In the case of Vietnam, if the EVFTA is put into practice effectively, there is clearly a wide spectrum of opportunities *inter alia*, technology transfer and development, growth in FDI in renewable energy sector, predictable and rule-based energy trade environment to attract more investors from the EU and beyond.

Having outlined the key priority issues and areas for growth both for the EU and Vietnam, this article has critically analysed the relevant legal instruments in Vietnam and identified a number of challenges therein. Accordingly, it has put forward several suggestions as to what needs to be done to improve the renewable energy production and use in Vietnam. It is recommended

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[154] OECD, 'Government perspectives on investor-state dispute settlement: a progress report', Freedom of Investment Roundtable (Paris, 14 December 2012), pp. 9-10 https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf accessed 06 December 2018.
[155] *Ibid.* p. 4.
[156] The EU-Vietnam Investment Protection Agreement, Chapter 3 – Dispute Settlement, Section B – Resolution of Disputes between Investors and Parties, Art.3.38 (Tribunal).
[157] *Ibid*. Art. 3.39 (Appellate Tribunal).
[158] *Ibid*. Art. 3.40 (Ethics).
[159] *Ibid*. sub-section 5 (Conduct of Proceedings).
[160] *Ibid*. Art. 3.37 (Third-Party Funding).
[161] Reinisch A. and Stifter L., 'CETA's New Take on ISDS: Toward an International Investment Court', CIGI Investor-State Arbitration Commentary Series No 8 (2016), www.cigionline.org/publications/cetas-new-take-isds-toward-international-investment-court accessed 06 December 2018.
[162] Delegation of the European Union to Vietnam (n 68) p. 54.
[163] Turksen U. (n 4)

that the Vietnamese government continues with the momentum of legal reforms and financial incentives for levelling the playing field, and encouraging the application of advanced technologies to meet high standards on environmental protection and energy security. This recommendation comes with the warning that incentives to attract FDI need to be evaluated diligently in order to avoid a conflict with the pre-existing investment-trade treaties and Vietnam's commitments under international trade law (e.g. under the WTO Covered Agreements).[164] An infringement of such commitments can lead to a long and expensive litigation which are not conducive to economic prospects and development of Vietnam.

Whilst putting in place legal and administrative mechanisms for investment, a consistent and predictable policies pertaining to price stability, tendering processes, financing practices and international commercial dispute settlement principles need to be implemented in the relevant legal instruments. For example, the standard PPAs in Vietnam are in urgent need of alignment with international market practices.

Finally, some of the key and arguably most attractive energy sectors in Vietnam are not open to competition including the transmission and distribution of electricity. Rather than allowing the EVN and its subsidiaries to play a monopolistic role in these sectors, Vietnam can open these sectors to competition with, of course, appropriate safeguards and control mechanisms, so that technology transfer, efficiency, value and quality for consumers may be improved.

[164] WTO, 'Vietnam and the WTO' https://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm, accessed on 07 February 2019.

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