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INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

New Era of Global Collaboration

17 April 2019

Hong Kong Convention
and Exhibition Centre

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Session 3: State-to-State Dispute Resolution and Investor-State Dispute Resolution

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State-to-State Dispute Resolution and Investor-State Dispute Resolution

Investment Mediation Mechanisms under International Commitments of Vietnam: Practice & Reforms

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Topics to be Covered

1. Legal framework for mediation in Vietnam
2. Investment Mediation and Vietnam's International Commitments
3. Investors-State Dispute Settlement (ISDS) Practice
4. Reforms

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Legal Framework

Different types of mediation

1. Community Mediation: Law on grassroots mediation 2013
2. Court Annexed Mediation: CPC 2015 – Draft Law on court annexed mediation 2019
3. Employment Mediation: Labour Code 2012
4. Land law disputes' mediation: Land Law 2013
5. Commercial Mediation: Decree No. 22/CP 2017
6. Investment Mediation: Investment Law 2014

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Law on Investment 2014

Article 14 - Settlement of Disputes over Business and Investment

1. Disputes over business investments in Vietnam shall be settled through negotiation and conciliation. If the dispute settlement cannot be reached through negotiation and conciliation, the dispute shall be resolved by arbitration or by the court in accordance with Clauses 2, 3, and 4 of this Article.

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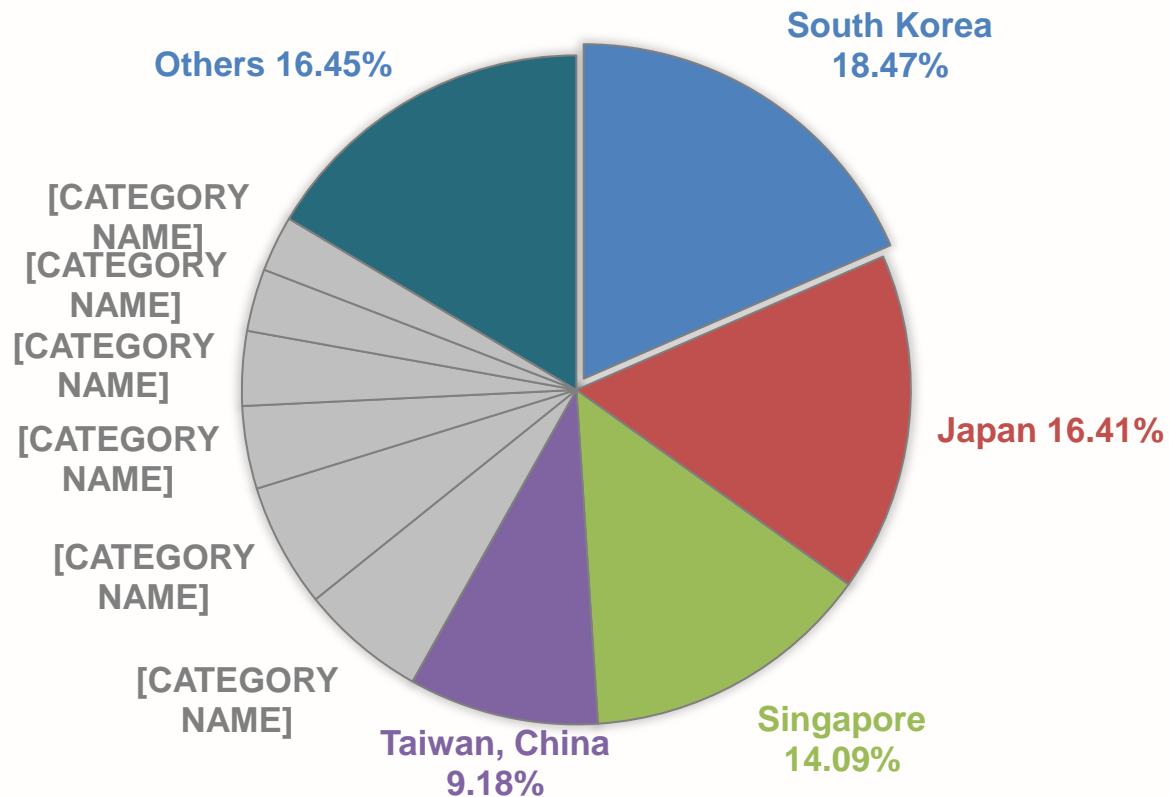


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Investment Climate

Foreign direct investment to Vietnam by country as of 20 March 2019



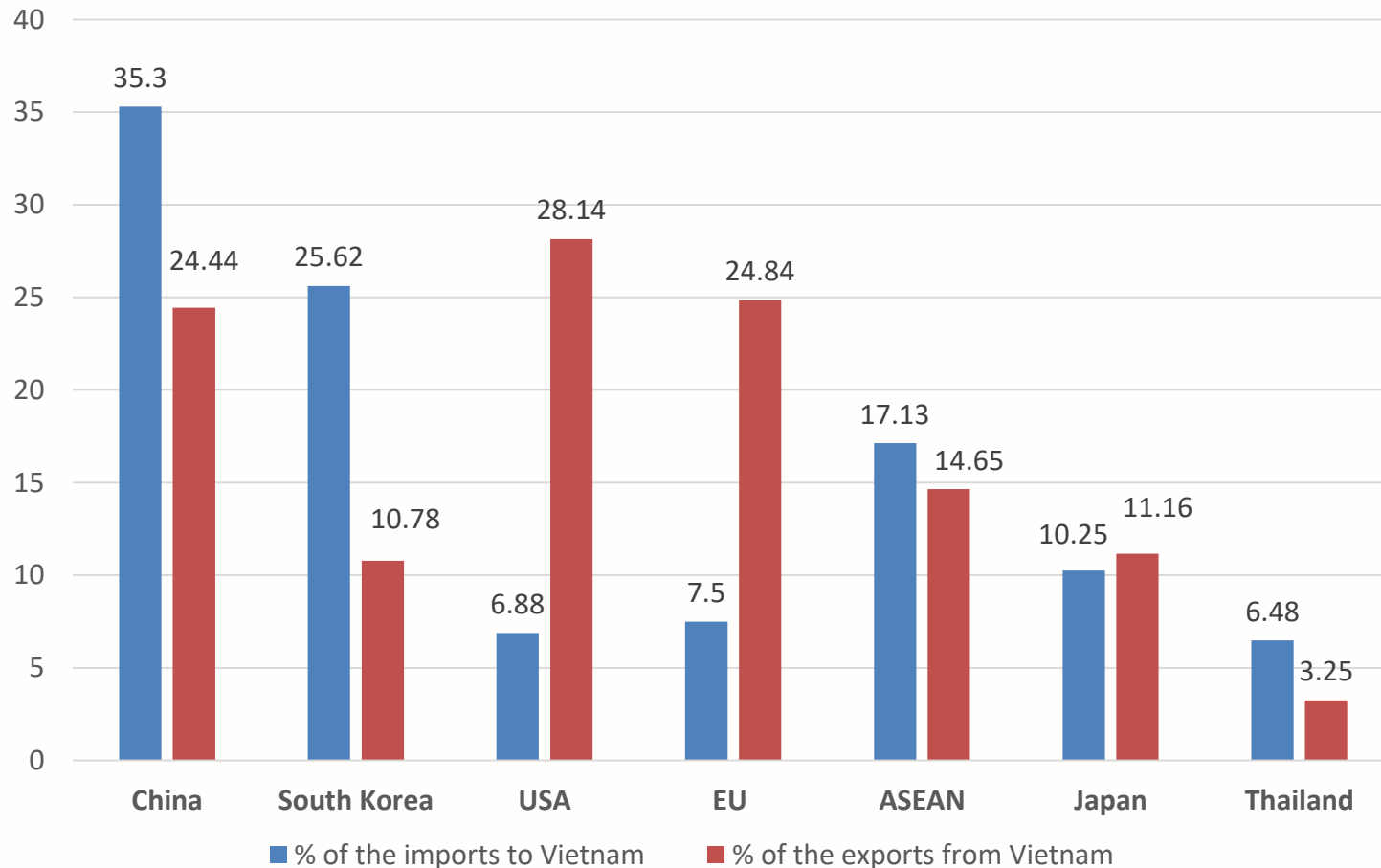
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TOP TRADING PARTNERS OF VIETNAM IN 2018



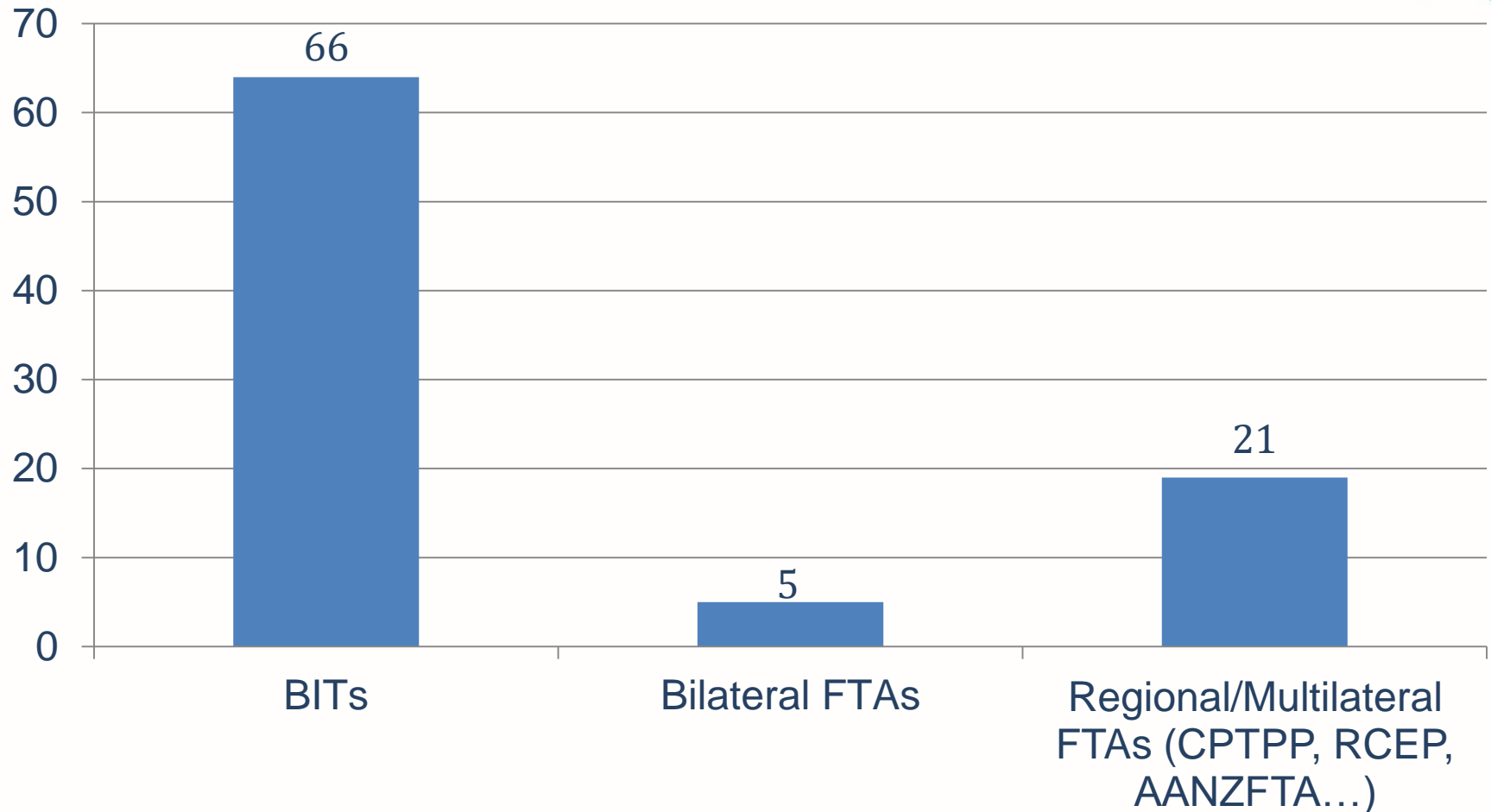
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BITs, FTAs signed by Vietnam



Source: <https://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/229#iialInnerMenu>

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US - Vietnam Trade Relations Agreement 2000

Article 4 - Dispute Settlement

2. In the event of an investment dispute, the parties to the dispute should attempt to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures.

Japan - Vietnam BIT 2004

Article 14

2. Any investment dispute shall, as far as possible, be settled amicably through consultation between the parties to the investment dispute.

3. If any investment dispute cannot be settled through such consultation within three months from the date on which the investor requested the consultation in writing, the investment dispute shall at the request of the investor concerned be submitted to either:

(1) conciliation or arbitration in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington, March 18, 1965 so long as the Convention is in force between the Contracting Parties, or conciliation or arbitration under the Additional Facility Rules of the International Center for Settlement of Investment Disputes so long as the Convention is not in force between the Contracting Parties; or

4. A Contracting Party which is a party to an investment dispute shall give its consent to the submission of the investment dispute to international conciliation or arbitration referred to in paragraph 3 above in accordance with the provisions of this Article.

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Korea - Vietnam FTA 2015

Article 9.16

In the event of an investment dispute, the disputing investor and the disputing Party shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures. Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties agree otherwise.

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Comprehensive and Progressive Agreement for Trans-Pacific Partnership – ISDS

Article 9.18: Consultation and Negotiation

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.

Comprehensive and Progressive Agreement For Trans-pacific Partnership – State To State Dispute Resolution

Article 28.6: Good Offices, Conciliation and Mediation

- 1. Parties may at any time agree to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation or mediation.*
- 2. Proceedings that involve good offices, conciliation or mediation shall be confidential and without prejudice to the rights of the Parties in any other proceedings.*
- 3. Parties participating in proceedings under this Article may suspend or terminate those proceedings at any time.*
- 4. If the disputing Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before a panel established under Article 28.7 (Establishment of a Panel).*

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EU – Vietnam IPA

Resolution of Disputes between Parties

Article 3.4: Mediation Mechanism

The Parties may at any time agree to enter into a mediation procedure pursuant to Annex 9 (Mediation Mechanism) with respect to any measure adversely affecting investment between the Parties.

EU - Vietnam IPA

Article 3.31: Mediation Mechanism for the Resolution of Disputes between Investors and Parties

- 1. The disputing parties may at any time agree to have recourse to mediation.*
- 2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.*
- 3. Recourse to mediation may be governed by the rules set out in Annex 10 (Mediation Mechanism for Disputes between Investors and Parties). Any time limit mentioned in Annex 10 (Mediation Mechanism for Disputes between Investors and Parties) may be modified by mutual agreement between the disputing parties.*
- 4...*

(ISDS) Practice

Escalation from Contractual Disputes

- *Trinh Vinh Binh 1 (Netherlands) vs. Vietnam [2003 – amicably settled];*
- *DialAsie (French) vs. Vietnam [2011 – claims dismissed];*
- *Cockrell (USA) vs. Vietnam [2014- ceased]*
- *Trinh Vinh Binh 2 (Netherlands) vs. Vietnam [2014 – claims accepted at US\$37,581,596];*

Purely Disputes related to IIAS

- *McKenzie (USA) vs. Vietnam [2010- jurisdiction declined];*
- *Recofi (French) vs. Vietnam [2013- jurisdiction declined];*
- *ConocoPhillips (UK) and Perenco v. Viet Nam [2017- Pending]*
- *Shin Dong Baig (Korea) v. Socialist Republic of Vietnam (ICSID Case No. ARB(AF)/18/2) [2018 - pending]*

Source:

<http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2>

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Reforms

1. Active participation in UNCITRAL's Working Group III
2. Nominating candidates on the Panelists under Article 28.11 of CP TPP
3. Training on investment mediation is essential
4. Developing commercial mediation practice and expanding court annexed mediation regime to create a foundation
5. Internationalising dispute resolution practitioners in Vietnam

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THANK YOU FOR YOUR ATTENTION!



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