

*Hanoi, August 6, 2004*

**A WORKSHOP ON SETTLEMENT OF  
INTERNATIONAL INVESTMENT DISPUTES BY ARBITRATION**

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**REPORT**

**To: Minister Uong Chu Luu.**

As approved by the Minister of Justice, the International Legislative Department in cooperation with the U.S.-Vietnam Trade Council held a one day workshop on Arbitration Settlement of International Investment Disputes (on August 6<sup>th</sup> 2004) at the head office of Ministry of Justice. The International Legislative Department would like to report to you the result of the workshop as below:

**1. PARTICIPANTS :**

On the Vietnamese side, there are representatives coming from the various ministries and agencies including: the Ministry of Industry, Ministry of Foreign Affairs, the People's Supreme Court, the Ministry of Post and Telecommunications, the People's Supreme Procuracy, the Ministry of Finance, the State Bank of Vietnam, the Ministry of Trade, the International Arbitration Center in Vietnam, the Office of the Government and other relevant department of the Ministry of Justice.

There is Ms.... from the U.S.-Vietnam Trade Council.

**2. CONTENTS:**

**a. Speech of Ministry of Justice representative:**

Mr. Hoang Phuoc Hiep, Head of International Legislation Department, introduced the representatives, and a short biography of Professor David A. Gantz. Professor Gantz has had many years of experience in disputes settlement by arbitration such as UNCITRAL, ICSID, the ICSID Additional Facility, etc.

Vice Minister Hoang The Lien made an opening speech emphasizing the important role of settlement of international investment disputes by arbitration, especially the ICSID, UNCITRAL in the current circumstances of Vietnam is one side of the procedure???

**b. Presentation of Professor David A. Gantz:**

Nowadays, there are many different international arbitration centers in the world with different procedures covering international trade and investment disputes settlement. Therefore, it's

difficult to give a general assessment of the settlement of international trade and investment disputes. Dispute settlement by arbitration between governments and foreign investors has just become a common occurrence for 40 years (the ICSID Convention). For the past 40 years, about 100 cases were ruled out. There have been over 2,000 international investment treaties in the world so far, many of which have the same clause on trade and investment dispute settlement by arbitration, for instance, Chapter 4, the U.S.-Vietnam Bilateral Trade Agreement. At present, arbitrators often use international law and customs to settle disputes. In terms of implementation of international awards including the UNCITRAL model law of arbitration, many countries have to domesticate international rules. Below are some arbitration rules and procedures:

### **ICSID CONVENTION:**

The ICSID Convention, concluded in 1966, now has over 150 members. The convention covers international responsibilities and arbitration rules and a reviewing system whereby petitions are reviewed before deciding whether the case will be accepted. The convention does not create any arbitration agreement which is given in other documents, for example, Chapter IV, the U.S.-Vietnam Bilateral Trade Agreement. The ICSID Convention's members include developed and developing countries, as such there's a harmonization of rights among those countries.

### **NEW YORK CONVENTION 1958:**

The New York Convention has a mechanism requiring that a member recognize and enforce arbitral awards of other parties. According to the convention, there are a few reasons to refuse the enforcement of an award (Article IV). However, there are lots of arguments about these exceptions as the countries always want to claim for their judicial immunity, especially when the dispute relates to States' assets. Almost all countries are willing to recognize and enforce arbitration awards.

### **INTERNATIONAL BILATERAL INVESTMENT AGREEMENTS:**

Chapter IV, The U.S.-Vietnam Bilateral Trade Agreement has the same contents as 40 other investment agreements between the U.S. and other countries, the Investment Chapter of NAFTA, Investment Agreement between Vietnam and Japan, Korea. The reason here is that all these countries are members of OECD and OECD has passed a model investment agreement so the member countries often incorporate this model agreement into their respective agreements.

An investment agreement often provides for general definitions such as: What is investment? Who are the investors? Definition of national treatment (NT), most favor nations (MFN), foreign exchange, nationalization, reimbursement, etc. or some certain limitations such as local labor, export requirement. When interpreting NT issues in dispute settlement, arbitrators often refer to the WTO NT rules.

An investment agreement often has arbitration clauses under which the relevant State recognizes dispute settlement by arbitration. It often offers some settlement alternatives: domestic court, arbitrator or investment agreement. The relevant parties will have 3 or 4 choices to settle a dispute:

- Using ICSID arbitration rules if all the parties are Convention's member.
- Using ICSID Additional Facility in case where only one party is the ICSID member (according to its' own procedure).

- Settling under UNCITRAL arbitration rule of the United Nation. UNCITRAL which is different from ICSID doesn't have any secretary committee to follow the case so it's necessary to establish the same or asking other arbitration center to act as the secretary committee for the case in question. UNCITRAL is often used by plaintiffs' rather than the [host] Governments to settle disputes.

## QUESTIONS AND ANSWERS:

**Question 1:** How can we define investment disputes (on what grounds), and investment-related disputes?

**Answer 1:** OECD's model agreement on investment has a broad definition on investment and investment disputes, which are similar to that of NAFTA. In the Investment Agreement between Vietnam and Korea, investment is defined broadly, including: investment-related disputes, investment-originated disputes. ICSID has a detailed definition, which states that investment disputes are disputes that arise directly from investment (Clause 25, article 1). The General Secretary is entitled to decide whether a case is an investment dispute to proceed or reject that case. If the General Secretary fails to define whether a dispute is an investment dispute, he will delegate that case to the Arbitration Center.

**Question 2:** In case an individual is admitted to two citizenships and he is a party of the dispute, what is the role of citizenship? How can we define it?

**Answer 2:** Article 2, Clause 25 of ICSID Convention forbids the status of one individual admitting to two citizenships. ICSID Convention and its supplementary mechanism do not allow aliens to sue governments. However, VBTA allows overseas Vietnamese to sue Vietnamese government (in Chapter IV and other chapters). If a citizen admits to two citizenships, the effective citizenship will be defined. However, we can use UNCITRAL arbitration rules in case citizens sue governments. The citizenship of a firm is not regulated clearly in ICSID.

**Question 3:** When Vietnamese government is sued by a Vietnamese overseas before the UNCITRAL arbitration, what does the Government need to react before setting up an arbitration panel?

**Answer 3:** The Government needs to define whether that Vietnamese overseas is taking advantage of his Vietnamese overseas status to enjoy the preferences granted to Vietnamese.

**Question 4:** If UNCITRAL arbitration rule is selected, and Vietnamese Government is sued, before the Arbitration Committee is set up, if Vietnamese Government believes that case is not under the jurisdiction of the Arbitration, how and in what way can Vietnamese Government refute the jurisdiction of the Arbitration? What action does Vietnamese Government need to take (e.g. sending a documentary to the Arbitration) to show his will?

**Answer 4:** Under UNCITRAL's mechanism, in order to sue, the plaintiff only needs to submit a document to the defendant. BTA has no regulation on the Vietnamese agency to receive such documents. Also under UNCITRAL, there are regulations on the objection order. Objection can only be made when an Arbitration committee is set up. Arbitration litigation under UNCITRAL will be implemented automatically despite Vietnam take actions or not. The Vietnamese Government and the plaintiff can agree on the chairman of the Arbitration Council, the procedure and place of litigation. If Vietnam does not make no such agreement, Arbitration in La Hay will point that out and decide on the litigation process without Vietnam's participation. Normally, the Government often objects to the Arbitration's jurisdiction, basing on such grounds as: The case

has been resolved by the court, there is investment item or not...The Arbitration Committee may open a section to decide on the Arbitration's jurisdiction. The place of arbitration is also usually a issue that receives much debate. If both parties cannot agree on the place of arbitration, the Arbitration Council will decide on it. (Source: NAFTA Chapter 11-see reference on Arbitration's jurisdiction, including objection documents on arbitration's jurisdiction, argument pattern...)

**Question 5:** After the Arbitration Council has been set up, may the defendant send objection document against the Arbitration's jurisdiction immediately or after the Council has decided on the Arbitration's Jurisdiction?

**Answer 5:** Most issues on jurisdiction are decided before considering the case content. However, there are cases when arbitration's jurisdiction is objected after the case has been considered. However, the Government often hesitate if arbitration's jurisdiction is not decided before considering the content, however as the arbitration is independent from the Government, this issue depends on the Arbitration Council's jurisdiction. When a government is sued, it prefers to define arbitration's jurisdiction before the content is considered.

**Question 6:** In the case of Trinh Vinh Binh, what does Vietnam need to do so that the Arbitration Council will define the Arbitration's jurisdiction?

**Answer 6:** The Government needs to give convincing argument on the illegality of the plaintiff's investment and define the jurisdiction issue right from the beginning. However, the Arbitration Council rarely considers penal issue to define the arbitration's jurisdiction but define arbitration's jurisdiction after considering the whole issue. In reality, the Arbitration Council usually does not believe on the arguments that the Government gives out on the investment's penal violation.

The tribunal accepts arguments of the Government only if it sees the case was tried in a fair and unbiased manner. If the case relates to a change to the law after the investment is carried out the tribunal tends to reject the Government's arguments. Normally, the tribunal does not believe in the host governments, perhaps the host governments' arguments are not persuasive. In short, there need to be plain evidence of the governmental measures to hold that an investment is illegal. Therefore, it is difficult to determine whether it is illegal at the outset.

**Question 7:** in consideration of jurisdiction, is the status of the plaintiff considered, for example, if the plaintiff is a convicted pending the judgment enforcement process?

**Answer 7:** In case where a person is subject to a criminal sentence in the host country and the sentence is held by the tribunal to be fair and unbiased, then the status of plaintiff may be rejected. In practice, in some civil cases involving criminal elements, the tribunal may determine taking into account the court's decision.

**Question 7:** In case of a dual citizenship Vietnamese overseas who initiates a lawsuit against the Vietnamese government, can the principle of effective citizenship in order to determine the jurisdiction of the tribunal?

**Answer 7:** Historically, there are series of cases involving effective citizenship. Bilateral investment agreements do not mention about how to handling this matter.

**Question 8:** On what basis the tribunal assumes jurisdiction over a case that has been tried by a domestic court?

**Answer 8:** Any country member of ICSID or party to an investment agreement waives part of its sovereignty in respect of thereof. Normally, in the agreements, the tribunal may take into account decisions of administrative bodies, courts, and other relevant bodies. Under the U.S. Trade Promotion Act, there are many concerns from the Congress that the tribunal established under the auspice of NAFTA... may reconsider U.S. courts' decisions, so do other countries. Procedurally, UNCITRAL notices are essential to Vietnam and are of procedural standards such as names of the parties, the arbitrators, the relevant contract as well as the nature of the case, whether to select one or three arbitrators and optional provisions. There are two types of agreements under NAFTA. NAFTA allows the parties to have their own opinions, time and many contents that are similar to that of the UNCITRAL. I do not know why there are two types but I think they are similar. Article 36 of ICSID Document includes the notice to the host country, the plaintiff, legal basis for a counterclaim and procedures for the host country's information. A notice may be either short or long. The ICSID General Secretary may approach to the host country to assess whether it is actionable. If the host country finds the information is not clear it can discuss with the ICSID permanent tribunal in order to determine whether it accepts. Many peoples tend to use UNCITRAL and dislike the ICSID General Secretary rejecting the petition.

**Question 9:** How long is the period from the arbitration notice until the notice of a lawsuit and what is the relationship between an arbitration notice and a court notice?

**Answer 9:** Under the UNCITRAL, the plaintiff must provide the arbitrators with very detailed bases and grounds for the lawsuit in order for the respondent to be aware of the reasons of the lawsuit. The time to render a notice of the lawsuit is after the arbitration panel has been established. Article 18 provides for the contents and methods to lodge a petition. Any amendment to the petition by the plaintiff after the respondent receives the notice of petition will not be accepted by the tribunal.

**Question 10:** Is the fact that the plaintiff has a petition and has notified the host country seen as whether the arbitration panel has been established? How can the respondent inform the plaintiff?

**Answer 10:** Reference is made to Chapter 11 of NAFTA ([www.naftalaw.com](http://www.naftalaw.com)). According to UNCITRAL, the arbitration panel is established once the host country receives the petition. Each party selects an arbitrator and then chairman of the arbitration panel. The host country directly informs the plaintiff before the establishment of the arbitration panel. After the establishment of the arbitration panel, copies of the communications between the parties will be sent to the arbitration panel. The parties will agree to the procedures, place of arbitration, etc. which are to be approved by the arbitration panel.

**Question 11:** Under UNCITRAL, before establishing an arbitration panel, how can the respondent object the petition or does it have to wait until the arbitration panel is established?

**Answer 11:** Before the arbitration panel is established, the Government can only communicate with the plaintiff. However, they do not have much time to do that as the parties have to select arbitrators for on their own (about 30 days – Article 7) from the Government informs the plaintiff that it has received the arbitration notice. The respondent has to discuss about this within 30 days if it so desires and if the respondent fails to appoint an arbitrator, then the relevant body will do.

**Question 12:** If the respondent fails to appoint an arbitrator upon expiry of the 30 day time limit, the relevant body will appoint an arbitrator and the respondent will be at disadvantage since it will not have any implication on the establishment of the arbitration panel. If the Government

does not participate in the litigation processes, then the arbitration panel will only take into account the plaintiff's claims.

**Question 12:** Whether an arbitration panel will be established if the respondent denies that it has not received any arbitration notice and the plaintiff insists that the same has been sent in accordance with the arbitration procedures?

**Answer 12:** If there is evidence proving that the respondent has received the arbitration notice (e.g. signature of the recipient) then the arbitration panel will be established.

**Question 13:** Who has the power to appoint arbitrators in cases where no parties appoint arbitrators on their own?

**Answer 13:** The permanent arbitration tribunal at La Hay will appoint the body that has the power to appoint arbitrators. There is no specific regulation as to what body will be the arbitrator appointing body; such a body may be any agency. It should be noted that the respondent needs to select the right person to be its appointed arbitrator. This is a very essential matter as there needs to be a person who sympathizes with the respondent and who is willing to listen to the respondent's arguments. That person needs to have not only relevant expertise and the contents of the case but also the capability to persuade other members of the arbitration panel. The selection is very important as yet the time limit is short, as such the respondent needs to look for its arbitrator upon receiving an arbitration notice.

**Question 14:** Is the plaintiff obliged to inform the respondent of its arbitrator appointment? In case where the Government fails to appoint an arbitrator and a third body appoints arbitrators, can the Government employ Articles 9-12 in order to object the appointment of its arbitrator or the third one?

**Answer 14:** In reality, the plaintiff gives an arbitrator appointment notice very quickly in the arbitration notice or shortly thereafter. The Government may use the right to object the appointment of the second or the third arbitrator if there are grounds set out in Articles 10 and 11.

**Question 15:** The parties appointing arbitrators have the obligation to inform each other. If the Government fails to inform, does the arbitration court at La Hay have that obligation?

**Answer 15:** The answer is yes. The name of the arbitrator must be informed to both parties. There is a strict notice requirement.

**Question 16:** An arbitration panel consists of three arbitrators if the Government does not participate, if there is a sole arbitrator, who will represent the Government to participate?

**Answer 16:** According to the principles of the litigation procedures there are normally three arbitrators. In case where the Government agrees that it is a sole arbitrator, then it is automatically that arbitrator. Article 3.6 provides for consultation between the parties.

**Question 17:** According to Article 18, the arbitration panel determine [the case] within a specific period of time. Must such a period of time be informed to the Government?

**Answer 17:** It must be informed to the Government regardless of whether the Government participates in the litigation processes. In case where no notice is given, the UNCITRAL principles allow the Government not to comply with the arbitration award since the arbitration procedures have not been complied with. Under the trade agreements between Vietnam and US

and Vietnam and Korea, the UNCITRAL procedures are not the only option and there is the ICSID Additional Facility and ICSID in case where Vietnam is a member. In some cases the plaintiff can discuss with the Government. It is beneficial to Vietnam if it is an ICSID member while some other big countries are not. The ICSID General Secretary reviews the petition to ascertain whether it is appropriate, and may reject in case of a dual citizenship plaintiff. ICSID is an institution with the General Secretary with many authorities standing between the State and the investor which normally is the body appointing the trade arbitration body. The General Secretary is concerned upon appointing arbitrators. ICSID sympathizes with the Government in selecting arbitrators. The General Secretary consults with the lawyers of the parties in order not to have a surprising decision. An arbitration decision may be reviewed by a domestic court in case where that award is of manifest errors. Many ICSID members and investors elect ICSID which means an advantage to Vietnam once it becomes a member. International agreements to which Vietnam is a party also provide for recourse to ICSID.

**Question 18:** To inform the host country via lawyers, what are the Government most beneficial acts?

**Answer 18:** In case of the plaintiff's notice, the first step of notice complies with Article 3. The second step complies with Article 7. If within such time limit, the arbitration body will inform if the Government fails to do so and if the plaintiff resolves not to pursue step 2, the litigation process is not considered as being commenced. The time to determine the time limit is counted from the time the respondent receives the arbitration notice. The parties may negotiate or discuss in order to come to a conciliation arrangement. No arbitrator appointing body panel is established during this period. The selection of an arbitrator appointing body will be made by the permanent court of arbitration at La Hay upon request by the plaintiff. The plaintiff may set the time limit at its discretion in this case.

**Question 19:** What is the validity of a UNCITRAL arbitration award? Can it be reviewed? Under what procedures? By whom?

**Answer 19:** The final arbitration award is of validity and enforceable according to the domestic law of the New York Convention country member.