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Governance for Inclusive Growth Program

INVESTOR STATE DISPUTE SETTLEMENT AND CAPACITY BUILDING

POST VISIT COMMENTS AND RECOMMENDATIONS

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EXECUTIVE SUMMARY

The Terms of Reference (TOR) include the following post-visit deliverables[1]: Provide written comments on the draft ISDS handbook and case studies that were developed in 2016; and Develop post-training and post-technical meeting report.to be submitted to USAID GIG and Ministry of Justice. This language reflects the fact that educating officials regarding the major aspects of ISDS is an ongoing process. It is a critically important process for attracting desired foreign investment to Vietnam, and it can be hoped that GIG, the World Bank, MOJ, MPI and other players will make this a continuing process.

After discussions with GIG and MOJ officials during my visit to Vietnam during the period July 30-August 4, and in particular during the Nha Trang workshop, it became apparent that it might be useful, in addition to addressing the Handbook and Case Studies, to address the possible next steps for the ISDS/Capacity Building project, including but not limited to a series of recommendations for consideration by GIG and MOJ, as well a broader recommendations for the future in terms of Vietnam's efforts to improve it response to ISDS (most of which were incorporated in my presentation to the workshop).

Accordingly, this memorandum is divided into the following sections:

- Part I discusses the Handbook, an excellent document reflecting the efforts of GIG and MOJ officials and a number of national consultants over a several years, focusing on Mr. Perezcano's comments on the earlier draft;

- Part II discusses (briefly) the Case Studies and possible additions;

- Part III summarizes my assessment of the Nha Trang workshop (and of several earlier workshops in which I participated in 2015);

- Part IV attempts to answer the question, "How should capacity building be undertaken most effectively, given the resources available, during the remaining year of the GIG Project?"

- Part V addresses a number of longer-term objectives with regard to improvement of Vietnam's court and arbitral systems as they affect foreign investors, and its participation in international agreements affecting ISDS. I note that many of these have been addressed in earlier workshops and/or GIG/MOJ/World Bank projects.

[1] Should an additional report on work performed be desired I can provide one, but the work specified in the TOR prior to and including the visit has already been formally reported to GIG and Chemonics (and payment has been made).

I. COMMENTS ON THE ISDS HANDBOOK (latest draft)

The Handbook has been under development and revision for more than two years. It has benefitted from the advice of a wide range of Vietnamese and international consultants (including some modest input of my own). GIG and MOJ officials and many provincial officials as well, have spent hundreds of hours reviewing the materials and discussing them in multiple workshops over the past several years. Given this experience, my additional suggestions are limited in number beyond those raised by Mr. Perezcano's in his comments (discussed below). These I believe would be worth incorporating if further revisions are made. Still, the Handbook is well-organized, generally well-written and thoroughly discusses the relevant issues. Anyone, lawyers, provincial officials, government officials who are not experts in ISDS, who read the Handbook carefully will understand the issues and many of the challenges of dealing with foreign investors and foreign investment disputes. The priority in my view is to determine how best to disseminate the information in the Handbook to stakeholders, including provincial government officials, lawyers, judges and national arbitrators.

Should the Handbook be further reviewed and revised, it would also be appropriate to reflect the fact that the TPP is not at the present time moving toward ratification, because the United States has withdrawn. Still, the TPP investment Chapter 9 clearly reflects the most advanced legal approach to ISDS of any such chapter or investment agreement, and therefore deserves discussion in the Handbook. My suggestion would be to incorporate a second "Note" at the end of Question 1 responses, but to leave intact the several examples of TPP, Chapter 9, that are included in responses to other questions. For example,

> **Additional Note**: Chapter 9 of the Trans-Pacific Partnership (TPP) signed February 4, 2016, remains the most advanced legal text concerning investment protection, establishing a desirable balance between investor rights and the right of the host state to enact reasonable regulations in the public interest. Accordingly, various articles in Chapter 9 are quoted in this Handbook. These provisions are important as indicators of future investment agreements even though the withdrawal from the TPP by the United States has stalled the ratification process. In the event that the other 11 TPP Parties eventually decide to conclude the TPP without the United States it is likely that the investment chapter will be incorporated without major modification. The TPP language may also be important as a basis for Vietnam to conclude new bilateral investment treaties in the future.

I have considered whether to recommend the inclusion of a short section on the EVFTA's chapter 8 provisions providing for an investment "court" and appellate body. I decided against it because a) these provisions are unique to EU proposed trade agreements; b) they have not been put into force for any trade or investment agreement; and c) it is more likely than not that if the EVFTA is put into force (provisionally or permanently) the investment provisions will be omitted (as is the case with CETA), or treated as a separate agreement.

The challenges and opportunities as I see them with regard to next steps are three. First, the Handbook should probably be reviewed and updated every couple of years

to reflect any new and relevant developments in international investment law and Vietnamese domestic law, including new agreements that have been concluded by the Vietnamese Government. The second challenge is more significant: how can the MOJ and aid agencies assure that provincial officials in provinces where foreign investment is taking place today or is likely to take place in the future, are aware of the risks as well as the rewards of encouraging such investment? This issue is discussed more fully in Part IV of this Report.

Finally, Vietnamese agencies may wish to consider facilitating the use of the Handbook by Vietnamese courts that are responsible for interpreting and enforcing foreign arbitral awards, and by those officials who are responsible for court administration. My sense is that because many judges do not possess extensive expertise in this subject matter; the Handbook could be of significant utility for such judges. Similarly, administrators and arbitrators appointed under the VIAC might also benefit from the Handbook's discussion of various international legal issues and Vietnam's obligations under international investment agreements.

Should time and funds be available, workshops for such judicial officials similar to those held in recent years for provincial government officials would be worth considering. (My recollection is that past workshops have included a few judges and several VIAC officials as participants.) Whether providing the Handbook to judges and arbitrators could be facilitated by MOJ alone or with the cooperation of other federal ministries is a question best left to Vietnamese officials. Those officials responsible for providing such workshops should be experts in the Vietnamese judicial and arbitral system, either from within MOJ or national consultants (some of whom have already provided papers on court and arbitration issues beginning in 2015).

I have also been requested to provide my views on several issues raised by Mr. Perezcano regarding certain questions. These are relatively minor points that in my view do not detract from the high quality of the Handbook.

Question 1: What is an International Investment Dispute?

I share Mr. Perezcano's view that the last paragraph under this question includes several areas that could be clarified, particularly the term "state agencies." It presumably would include SOEs that are established to be under the direction of the state (while excluding the majority of such SOEs that act independently). It is also unclear whether the term "state agencies" covers sub-national governments; I assume that it does not. Also, the phrase "through Vietnamese arbitration" could be improved although I believe the meaning is clear. It might be better to say, "through arbitration in Vietnam through VIAC or other available arbitral mechanisms." It seems clear to me that "international investment treaty" means exactly that. The term as normally used does not include investment agreements or contracts.

Question 8: Which types of violations usually lead to a lawsuit?

I agree generally that in a document such as the Handbook it is preferable for the Government of Vietnam not to include its own legal interpretation of "fair and equitable treatment" because of the possibility that a) it could be used by an investor in an ISD, and b) the concept is still under development (and sometimes expansion)

by ICSID and other tribunals. Reliance on the broader fair and equitable treatment language in TPP, Article 9, as Mr. Perezcano suggested and was done in the revised Handbook, is a sensible way of dealing with the issue for the readers of the Handbook without creating any risks of its adverse use by a foreign investor in litigation. While the Waste Management language is frequently cited by more in more recent arbitral awards, that case is now more than 12 years old and despite its citation is in my view not really followed by some tribunals. (See, e.g., Bilcon v. Canada). That being said, citing the language is perfectly safe since it reflect the views of a very well respected jurist, James Crawford (now a judge on the International Court of Justice).

As for the note on the Vienna Convention on the Law of Treaties, I believe the formula that MOJ has used is accurate as a general proposition. As in many situations a breach can be determined definitively only by a competent tribunal, but in the international area as we are all aware in many situations no such tribunal has jurisdiction. A determination as to the existence or absence of a breach by a national tribunal would not be binding as a matter of international law. This seems to me to be clear from the language in the Note in the revised Handbook.

Question 9: What are available dispute settlement mechanisms according to Vietnamese law and international investment treaties to which Vietnam is a signatory member?

The initial paragraph of the response to this question was eliminated at the suggestion of Mr. Perezcano: "The acts of all State agencies at the national or local level, as well as organizations and other bodies that are assigned State management functions or are authorized to perform them, may engage the international responsibility of the State." I probably would have left it in since in my view it states a very clear international law rule, and it doesn't hurt to emphasize to the audience—provincial officials—that their actions may lead to international responsibility on the part of the Government of Vietnam.

Question 15: What types of international arbitration are available to resolve International Investment Disputes? [Question 14 in the revised Handbook]

The paragraph on ad hoc arbitration seems fine to me. In terms of ISDS, the most common arbitral rules used for ad hoc arbitration are the UNCITRAL Rules, and it is accurate to note that when using those rules the tribunal and the parties must decide on an administering agency, formal (such as the ICC, SAIC or ICSID) or informal (such as a law firm).

Question 19: What are upstream preventative measures? [Question 18 in the revised Handbook]

I believe "capacity" is a reasonable term to describe foreign investors that have the financing and skills to implement investment projects.

I agree with Mr. Perezcano that paragraph b) could be a cause of confusion. I assume that the point is to assure that either the treaty or contact is consistent with Vietnamese law or that Vietnam is prepared to change its laws so that they are consistent with treaty obligations. It appears that the paragraph refers to existing

treaties or other agreements but the review process is equally needed when Vietnam is considering entering into new agreements.

I do not share the objections cited to paragraph c). I am aware that the problem of sub-national units offering commitments to foreign investors that go beyond the scope

Question 22: What are the sectors where disputes with foreign investors are most likely to occur? [Question 21 in the revised Handbook]

I believe the second part under paragraph c) simply states the fact that sometimes national laws are changed to encourage foreign investment, and in some cases to adversely affect foreign investment. Such changes may be discriminatory, particularly where foreign investors are favored over domestic interests. Or the reverse may be true. This happens in other nations as well. For example, when the automobile/battery firm Tesla decided to invest in a plant in the US state of Nevada, it did so because of massive subsidies offered by the state government, subsidies that were not offered to other Nevada enterprises.

Question 23: What can be done to foster and maintain the two-way communication channel between foreign investors and the State's foreign investment management agencies? [Question 22 of the revised Handbook]

I do not share Mr. Perezcano's concerns with regard to the responses to this question. I also believe it is useful for everyone, including provincial officials, to understand the importance of a single government agency such as MOJ being appointed as a focal point. That being said the revised version is easier to read and understand.

Question 25: What needs to be done to raise awareness on international commitments and enhance the capacity to implement national legislation on foreign investment among State agencies for the purpose of dispute prevention? [Question 24 of the revised Handbook]

The "enforcement" capacity addition seems to me to take care of the problem.

Question 27: Why is it necessary to select and to evaluate foreign investors based on their capacity, and to determine and implement incentives by investment sectors in accordance with the law to prevent disputes? [Question 26 in the revised Handbook]

Mr. Perezcano suggested revisions to the third paragraph which in my view were appropriate. The existing first sentence is confusing. I would be inclined to rewrite it along the following lines: "Many foreign investment projects are still provided an investment registration certificate by provincial authorities even though the authorities do not have the necessary operational capacity and financial resources to participate in and manage the project." (This issue relates to Part IV of this memorandum, addressing the need for better education with regard to the initial negotiation and conclusion of investment agreements.)

Question 28: Why is it necessary to improve the drafting quality of investment registration certificates or contracts with foreign investors to prevent disputes? [Question 27 in revised Handbook]

A "more positive spin" as suggested by Mr. Perezcano is worth considering, but it isn't a major issue.

Question 35: In which documents is the International Investment Dispute Resolution process stipulated and how many stages does it contain? [Question 33 of the revised Handbook]

I don't see any major problems with this response. It might be useful, however, to add a sentence to the second paragraph along the following lines: "Enforcement normally takes place in the national courts of the respondent government but it may also occur in the courts of other countries in which the respondent has assets, as provided under the New York Convention on the Enforcement of Arbitral Awards."

Question 38: What are the obligations of State agencies during the pre-arbitration stage? [Question 35 in the revised Handbook]

This version is improved over the previous version. As to the consultation language, the revised version on consultation seems clear to me. I am assuming, as did Mr. Perezcano, that "consultation" is being used here in the formal sense, the mandatory consultation (usually a six month period) found in most BITs and investment chapters, which constitutes a condition precedent to arbitration. However, there is a question always as to whether it is likely that "an international dispute might arise." In this respect, MOJ should have an opportunity to share in this decision; it should not be left to the other affected state agencies to decide. (A determination by the agency that there is no likelihood of an international dispute could be an excuse for not reporting the matter to MOJ.)

Question 41: What must State agencies do to effectively resolve an international investment dispute? [Question 38 of the revised Handbook]

Mr. Perezcano's comment is well taken. It would be preferable to say, "identify and engage lawyers and technical experts . . . ."

Question 42: Is it necessary to engage lawyers in the resolution of all International Investment Disputes and how are lawyers engaged? [Question 39 of the revised Handbook]

The first paragraph seems acceptable to me.

With regard to lawyers, it would be preferable to say, "—preparing a list of candidates from at least three law firms, taking into account experience in representing governments in ISDS cases, legal expertise in relevant substantive areas, language expertise, and sufficient legal personnel."

Question 44: How should the lawyers' performance under the legal service contract be overseen? [Question 41 of the revised Handbook]

The language used is acceptable.

Question 56: How are State agencies served the Notice of Arbitration? [Question 52 in the revised Handbook]

I agree with Mr. Perezcano's comments but I believe the language used in the Handbook adequately covers the issues. Given the time constraints affected agencies may have difficulty in responding completely in timely manner.

Question 57: What must agencies do after receiving the Notice of Arbitration? [Question 53 of the revised Handbook]

Mr. Perezcano's comments are well-taken, but are adequately dealt with in footnote 3.

Question 61: What should State agencies do while raising a plea as to the jurisdiction of the Arbitral Tribunal? [Question 57 in the revised Handbook]

It would be desirable to revise the first paragraph to reflect the fact that it is common practice of arbitral tribunals to consider jurisdictional issues in the same proceeding as consideration of the merits, rather than as a preliminary matter (even though it has the power to do so). Thus, Vietnam should be analyzing the merits of the case at the same time as it is considering jurisdictional objections. The paragraph might be modified to reads as follows:

> The jurisdiction of an Arbitral Tribunal is an important issue and should be reviewed at the outset of the proceedings. Under the rules of arbitral proceedings, an Arbitral Tribunal has the power to rule on its own jurisdiction and shall refuse to hear the case if it falls beyond its authority[2]. Therefore, Vietnam should determine if the Tribunal has the jurisdiction to hear the case and prepare arguments that can be made to contest jurisdiction. It should also strongly encourage the tribunal to consider jurisdictional issues as a preliminary matter. However, since some tribunals prefer to consider jurisdictional challenges along with the merits of the case, Vietnam must be prepared address the merits at the same time if the tribunal so decides.

Question 63: What should State agencies do while preparing for and taking part in arbitral hearings? [Question 59 in the revised Handbook]

Mr. Perezcano is correct that it is very important for Vietnam to provide all relevant evidence to the tribunal with its written pleadings. That being said, it is not unusual for additional evidence, such as depositions or witness testimony, to be provided during the hearings. It is also fairly comment for the members of the tribunal to ask the parties, including the respondent government, to provide additional evidence based on issues discussed at the hearing. However, in my experience it is unusual for the tribunal to reopen the hearing based on new evidence, although requests for discussion of such evidence in additional subsequent written pleadings may well be requested by the tribunal.

[2] Article 21, 1976 UNCITRAL Arbitration Rules and Article 23 of 2010 UNCITRAL Arbitration Rules.

Question 65: What should State agencies do during the stage of enforcement of international arbitral awards? [Question 63 in the revised Handbook]

Mr. Perezcano's comment is well taken but since this response has been completely rewritten in the revised Handbook it is no longer relevant. It would be worth noting that under the laws of many countries, as well as under the ICSID Convention, host governments commonly pay awards without the need for a court action to enforce the award. I am unsure of what Vietnamese law provides in this respect.

Question 64: What should State agencies do while the Arbitral Tribunal is in the process of issuing its award? [Question 61 of the revised Handbook]

It would be worth noting that in addition to correction of an award, awards are subject to limited court review in the seat of the arbitration (UNCITRAL and ICSID Additional Facility awards) or by the Annulment Committee (ICSID awards). While this is not the same as an appeal it allows the losing party to raise such issues as the lack of capacity of the arbitrators and to challenge an award on grounds that it goes beyond the tribunal's authority under the agreement to arbitrate. The award does not become final and enforceable until after the review process is completed.

It may also be worth noting that some ISD are settled by the Parties after the hearing but before the tribunal has issued its award. In other words, the opportunities for a negotiated settlement continue until the award is actually issued.

II. COMMENTS ON THE CASE STUDIES

The case studies prepared by Mr. Perezcano are in my view a good mix of hypothetical situations and actual ISDs, such as the Loewen v. United States, ADF v. United States, Mondev v. United States and Grand River v. United States. Taken together I believe that the ten cases represent a good-cross section of available jurisprudence on such key issues as national treatment, fair and equitable treatment and expropriation.

The principal question that arises is to what extent if any additional case studies should be added in the future. It seems to me that it would be appropriate for a national consultant or MOJ official to draft a case study based on each of the ISDs to which Vietnam has been party, to the extent they are not already been covered (e.g., in case studies 1 and 2). This is desirable for two reasons: a) it would assist readers of the Handbook and case studies in understanding how tribunals have decided legal issues in cases brought against Vietnam; and b) discussion of Vietnamese cases could make the case studies more interesting and relevant for many of the likely readers, including national judges and arbitrators.

Other than Vietnamese cases, updating the case studies would be desirable primarily for ISD awards that suggest major changes in the existing international legal consensus. This is most likely to occur in future decisions turning on the application of fair and equitable treatment principles such as the pending arbitration, Lone Pine Industries v. Canada. As with the Handbook, the subject matter, ISDS, is constantly in flux and it thus seems likely that important new tribunal awards will be issued in the coming years. Since fair and equitable treatment is probably the most difficult of

investor rights to define, having additional case material on the subject would be useful to all stakeholders, including government officials who need greater understanding of such issues.

III. COMMENTS ON WORKSHOPS AT NHA TRANG

My understanding is that the national consultant is preparing a comprehensive report on the workshop in Nha Trang. Under such circumstances, I provide here only a few general comments, although if specific questions are raised I would be pleased to try to respond, either in this report or subsequently.

My experience with the GIG/MOJ ISDS workshops, not only the recent one but similar ones in which I participated in 2015, is that they work best when the audience is divided into several smaller working groups, and a significant part of the time available is devoted to discussions within the groups, followed by a report to the plenary session by one or more designated rapporteurs from each group. The members of the audiences in these workshops vary considerably in their substantive knowledge of the subject matter, as well as their level of comfort with speaking to large groups. My observations suggest to me that participation increased greatly for those in the small groups, and I commend MOJ and GIG officials for using this format. The workshops necessarily rely in part on presentations by experts (government officials or consultants). The breakout groups provide a vitally important part and contrasting part of the process. While the discussions have occasionally become heated, I have been impressed with the ability of the participants to discuss the issues, to come up with new ideas, and in general to function in a manner that should have benefitted all of the participants.

In Nha Trang, for example, I recall particularly the useful comments from several of the attorneys present, and from officials of the VIAC. In both these and the earlier workshops, I believe the facilitators from MOJ were particularly skilled in dividing up the participants so each smaller group had a mix of persons with expertise and persons for whom the subject matter was relatively new. (I admit that in Nha Trang I was unable to follow most of the group discussions in Vietnamese, but my impressions from people's faces and the occasional intensity of the discussions was that most of those present were engaged in the process and as a result probably benefitted from it.)

One of the advantages of the Nha Trang workshop was the participation of officials from MPI (Mr. Do Van Su) and attorney/consultants (e.g., Ms. Dinh Anh Tuyet) as well as those from the MOJ (including but not limited to Mr. Tran Anh Tuan and Mr. Nguyen Van Tuan). The fact that Vice-Minister Khanh Ngoc Nguyen was present and made a number of substantive comments emphasized for all of the participants the high importance the government attaches to improving provincial officials' understanding of the ISDI process

One question for MOJ and MPI is the extent to which such workshops should be held at other venues that are convenient to provincial officials that have not yet had the opportunity to participate in one of them. It is unclear to me how many of the 63 provinces that have not done so already are likely to have the opportunity to be dealing directly with prospective foreign investors. Under such circumstances it may

well be that organizing additional workshops along the line of the one in Nha Trang is desirable.

It is obvious that the scope of the training needs are such that multiple agencies will be required to work together if the process is to continue to be successful. Even though the current GIG project will end next year, relevant aid and government agencies in my view should treat these workshops (and others suggested) as a medium to long term need for the country.

IV. RECOMMENDATIONS FOR THE REMAINING YEAR OF THE GIG PROGRAM

I note that Question 19 of the Handbook and its response relate to "what can be done to develop good investment commitments?" I believe that MOJ officials and many of the Vietnamese lawyers who have participated in the workshops, as speakers or in other roles, have expanded their knowledge not only of the process of resolving investment disputes but the importance of negotiating appropriate agreements with foreign investors in the first place. That being said, provincial officials may still in some cases have a difficult time negotiating balanced agreements with foreign investors who may be more sophisticated, unscrupulous or both. This is particularly true for officials who have not interacted directly with foreign investors in the past, or new officials who have replaced more experienced ones who are no longer performing their functions.

The Handbook in my view does well in warning officials of many of the pitfalls of concluding agreements without a proper level of "due diligence," for example, these include situations where the province promises tax or other benefits that are inconsistent with Vietnamese law. Similarly, commitments may be made with regard to environmental considerations that will be difficult or impossible to comply with, either because those commitments are illegal under Vietnamese law, because Vietnamese environmental law becomes stronger, or because of widespread public opposition to arrangements that allegedly threaten the local environment.

Improving Expertise in Concluding Investment Agreements

Improving knowledge in these areas can be undertaken in the final year of the GIG project but it should be an ongoing process. Among the possible elements would be an effort to put together a database reflecting provinces' actual experiences in negotiating and concluding foreign investment agreements, with a checklist of practices to follow (and to avoid), along with examples of agreement provisions that a) have worked effectively or b) have proved unsatisfactory. Presumably, such a database would be maintained by officials in MOJ and/or MPI, made available to provincial officials (but not to the public), and updated on a regular basis.

This effort would be most useful and effective if a number of experienced provincial officials can be identified by MOJ and MPI and then convinced to participate by sharing their negotiating and drafting successes (and failures). (A number of them have shown their willingness to be helpful through their effective participation in the

workshops and their willingness to take leadership roles in the smaller discussion groups.)

I am not sure of the best way of obtaining input from provincial government officials who have negotiated such agreements (with or without subsequent investment disputes). They should be asked such questions as: where did you feel you needed more experience and guidance? What would you have done differently if you had an opportunity to renegotiate the contract? Did you have adequate information on Vietnamese law available and if not what would have been the best way to make it available? What steps if any did you take to determine whether the foreign investor possessed the necessary technical capacity and funding to pursue the project effectively? To what extent did you consult with government ministries on the content of the agreements, relevant international agreements to which Vietnam and the investor's country are parties, the consistency of the proposed government concessions with Vietnamese tax, environmental and other laws? Presumably, there is a way of protecting the identity and privacy of the suppliers of information against disclosure if that is their preference.

A project focusing on investment agreements at the provincial level would probably require active participation of MPI in addition to MOJ, particularly in the initial planning and execution stages. I believe that GIG in the past has discussed with MPI's Foreign Investment Agency on creating a database for investment. If such a database could be created it could significantly improve the ability of provincial to conduct due diligence examinations of investors before and during the investment project.

Improving Knowledge of Effective Negotiating Techniques

It may also be appropriate to initiate training mechanisms focusing less on legal texts and more on "best practices" in the negotiation of investment agreements, covering inter alia, legal requirements under Vietnamese national law; common errors on the part of provincial governments; due diligence on potential investors (through MOJ or other national government facility providing assistance), and a general overview of negotiating techniques. In my experience workshops or classes on negotiating techniques work best when participants are broken down into small groups, as has been the practice with recent workshops devoted to resolution of ISDs. Negotiating classes are taught in most U.S. law schools. It may be that there are law professors in Vietnam, or other potential consultants, who have provided courses on negotiation techniques in an academic or business context who could be retained to create workshops for provincial officials based on their existing courses.

Some MOJ officials may recall that I briefly discussed negotiating techniques as part of a series of seminars presented in July 2016 in cooperation with the National Law Center in Tucson, the World Bank, and MOJ. (See Annex I.) MOJ officials should have access as well to the reading materials that I provided, which I have not attached here but could supply if requested to do so.

Expanding ISDS Workshops to Judges, Arbitrators and Court/Arbitration Officials

Offering the benefits of the Handbook and related workshops to selected judges and arbitrators, and their administrative officials, seems to me to be a useful objective. Given time and financial constraints, it might be best to begin with national arbitration officials. I note that several officials from VIAC were present at the Nha Trang workshop and made very useful contributions. Perhaps VIAC would be willing to sponsor a workshop in the short term, in cooperation with MOJ and GIG.

V. LONGER TERM OBJECTIVES IN IMPROVING THE LEGAL SYSTEM

Most of the key options for improving Vietnam's legal system over the medium and longer term have already been discussed at length in the past. Annex II incorporates the conclusions and recommendations of a six country study I wrote in 2015. At that time MOJ and GIG solicited several reports from various expert national consultants on the status of Vietnam's court and arbitration systems. As I recall, several of those reports were very well written. Presumably they remain available to MOJ and GIG, and would be useful to review in seeking to decide on the most appropriate follow-up steps.

These are significant challenges. For example, the fact that there is no separation of powers in Vietnam makes it difficult to convince foreign investors that if they resort to local courts in significant cases the Party, which controls the appointment and tenure of the judges, will refrain from intervening. Many of the same investors have been frustrated by similar enforcement problems in China, and are thus doubly wary of domestic remedies for ISDs, particularly given that with Vietnam (unlike China) international arbitration is accepted by the Vietnamese Government.

Among the options that could be considered by the government in the medium term are the following (most suggested in various earlier reports):

1. Create special commercial courts on a temporary, experimental level, perhaps one in HCM City and another sitting in Hanoi, whose judges would be carefully chosen in terms of legal training, business expertise and general competence, and paid sufficiently to minimize the likelihood of corruption. These courts would have narrow but exclusive jurisdiction over a defined range of business disputes whether the parties were foreign investors, domestic entities or government agencies. Presumably, there are steps that could be taken to maximize the independence of commercial courts from pressures from the executive branch that would not violate constitutional norms.

Advanced work with the existing court system (a major focus of the GIG project in 2015) is very much a critical objective in the longer term, given the current state of the judiciary. Here again, the critical issues are judge competence, judge independence from the executive branch and dealing with corruption. While this is a process that will likely require several decades for major changes, improvements must begin somewhere and small steps in the right direction are far better than taking no actions at all.

2. Strengthen the independence of the VIAC, based on a series of discussions with the various stakeholders, including the VIAC personnel, enterprises who have appeared before the VIAC, appointed arbitrators and experts on the relationship between VIAC and the courts. Study of arbitration centers in Singapore and Malaysia, given their successful experience, would be advisable. This is a two part requirement. First, potential users of the VIAC must be convinced that the VIAC itself operates independently from the government even when a government agency is one of the parties to the proceeding. Secondly, the potential users must have confidence that the national courts will not interfere in the arbitral process during the proceedings, and will objectively recognize and enforce any awards rendered.

3. Steps should be taken to improve the poor performance of Vietnamese courts in enforcing arbitral awards under the New York Convention. Presumably, this would require policy guidance to the responsible courts from the highest levels of government, along with some sort of educational campaign for the affected judges, focusing primarily on the limited intended scope of the "public policy" exception to enforcement.

4. Vietnam should become a Party to the ICSID Convention. This would require, inter alia, Vietnam to agree to pay most arbitration awards rendered by ICSID in the absence of a strong legal basis for objecting, but would provide the government with another forum option which on balance is more favorable to host states than arbitration under the ICSID Additional Facility Rules or the UNCITRAL Rules. It would also encourage the view among foreign investors that Vietnam is committed to fairer treatment of foreign investors than is true at the present time.

5. The negotiation of TPP's investment chapter 9 has confirmed that it is possible to reach agreement on investment protection language that is better balanced in terms of preserving the host government's right to impose non-discriminatory regulation in areas such as public health and the environment. Unfortunately, most of Vietnam's more than 60 existing BITs are much less favorable to the host state than the TPP language. It would be wise for MOJ, MPI and any other responsible agency to set up a priority list of BITs that should be revised to reflect this more modern approach. My sense is that many other host governments, whose lawyers are familiar with recent ISDS awards (particularly under NAFTA), would have no objection to such modernizations. It may well be than even recent investment agreements, such as the investment provisions of AANZ, should be updated to TPP standards.

The key issues include the narrower definitions of fair and equitable treatment, excluding from indirect expropriation situations where the government seeks to impose non-discriminatory regulatory actions in such areas as public health and environmental protection, and the transparency requirements under TPP Chapter 9, along with the important requirement of a notice of intent to file for arbitration 90 days before arbitration is formally notified.

The EU countries (20 BITs) are not currently good candidates for renegotiation because the responsibility for negotiating new investment agreements does not

clearly rest with either the Commission or with the individual members. Also, the uncertainty as to whether the new EU investment court/appellate body mechanism can effectively be incorporated into new trade and investment agreements makes it difficult for the Commission or the EU members to discuss these issues. Finally, if the EU-Vietnam Free Trade Agreement enters into force including the investment dispute settlement mechanism currently in Chapter 8—which many believe is very unlikely in the foreseeable future—that would effectively replace the 20 individual BITs.

6. Encourage the use of mediation of ISDs by improving the availability of mediation, perhaps through the VIAC, and by assuring that when a mediator assists the parties in reaching a settlement the government agency involved promptly implements the results of the settlement. Many of the existing mediation mechanisms, such as that provided but seldom used under the ICSID Additional Facility Rules, are time-consuming, overly formalistic and expensive (because lawyers are required). Enforcement of settlements achieved through mediation by the national courts, even where one of the parties is a government agency, is also critical to convincing foreign investors to use the facilities provided.

As a caveat, I note that my knowledge of the Vietnamese legal and court system is very limited; I have not been party to various studies that may have been commissioned by GIG, MOJ, MPI or other agencies; and that certain improvements may have been made in the past several years of which I am not aware

ANNEX I: NEGOTIATING CONSIDERATIONS AND TECHNIQUES[3]

A. Defining host country objectives for negotiations

Recall our brief discussions in the introduction to this training session. It is helpful for governments that believe economic development and job creation are in the national interest (and that is virtually all governments) to try to understand how the process of development takes place in order to take steps in terms of government policy to encourage it. If these objectives are clearly understood and articulated, it will affect the negotiation of investment arrangements whether conducted by the government, SOEs or private enterprises.

For most developing countries, including Vietnam, perhaps the greatest challenge to prosperity and stability is to provide, whether through government or private sources, new jobs for persons newly entering the work force. For Mexico, typically, this has meant about 1 million jobs annually. The Mexican Government in recent years has not met this objective, which is one reason that when the U.S. economy is strong (not unfortunately today) hundreds of thousands of Mexican citizens migrate to the United States to seek the jobs and income that the need to feed and clothe their families. Similar factors are driving many of the tens of thousands of African and Middle Eastern residents to come to Europe, even at great personal risk of death, to seek work and a better life.

Most other countries do not have this emigration “safety valve” when local job creation is insufficient even though the challenges are similar. With China, the government needs to create approximately 1 million new jobs each month to meet citizen demand, a task that has become much more difficult given that China’s economic growth is currently no more than 6% per year and possibly well below that level.

Based on Vietnam’s population, I would guess that Vietnam needs to create about 800,000-900,000 new jobs a year to keep pace with population growth. Fortunately, Vietnam’s GDP growth in recent years has exceeded 6% per year and was over 7% on an annual basis as of the final quarter of 2015. This is probably sufficient to meet the employment needs but the challenges of maintaining this rate in future years without creating inflationary pressures is a significant one, and depends among other things on continuing to attract high levels of foreign investment, providing better educational opportunities (including technical education) for Vietnamese citizens, reducing government barriers to new investment, whether foreign or domestic, controlling the growth of SOEs and stimulating the growth of a class of SMEs and entrepreneurs.

In my view Vietnam’s success over the recent past is due partly to sensible government policies (in some areas), such as the negotiation of the TPP and EVFTA (which may have some positive impact even before they enter into force) and efforts to liberalize and improve the investment climate (even if liberalization has not always been as quick as desired and SOEs continue to constitute a drag on the economy).

[3] From study materials I prepared for a seminar provided to MOJ officials and others in July 2016.

However, some of Vietnam's success is more the result of good fortune, the fact that Vietnam is relatively speaking a more attractive destination for Western investment than China or most of the other Asian alternatives. The reasons include rising labor and other costs to doing business in China; concerns over an enterprise's ability to protect its intellectual property; the increasing difficulties of competing with Chinese SOEs; the lack of alternatives to local courts and arbitral centers for dispute settlement; the increasing censorship of the Internet; and the government's failure to follow through with liberalization initiatives (as in the Shanghai Free Trade Zone).

Vietnam's liberalization in the past has benefitted from the stimulus of the VBTA beginning around 2000 and of WTO Accession beginning around 2004. It can reasonably be expected that the implementation of TPP and the EVFTA will have many of the same positive results, assuming that this group of DIL/MOJ lawyers does as well with this process as their colleagues did in the past.

B. Challenges of International Negotiations

Much of the focus of these training sessions is on dispute settlement, particularly ISDS. However, some observers have suggested that the extent of the problem relating to investor-state disputes has been exaggerated. Given the number of MNEs in the world—over 180,000 by some estimates—and the tens of thousands of investment agreements they have concluded. Because of this large number of investments, the potential for claims advanced is enormous, but there have been only about 600 ICSID and UNCITRAL arbitrations since 1965. This means that many such agreements have been harmonious as between the parties, and also that many additional investor-state disputes—probably at least half but it is impossible to know since most are not public—have been resolved by negotiation. Thus, the total number of conflicts is a "tiny fraction of the universe of foreign direct investment."

Similarly, in many countries such as the United States the vast majority of civil court actions are settled through negotiation (or sometimes mediation). In Arizona, for example, less than 5% of such cases go to trial; the rest are settled, most of them through direct negotiations. At the same time, in our law school, we historically have had many more classes on trial practice than on negotiation, which I have considered to be unfortunate. I suspect this is true in other law schools, in the United States and elsewhere.

The lesson for me is obvious; lawyers need to spend more time studying how to negotiate and practicing negotiating techniques whether they are in government service or private practice. I believe the negotiating skills I learned as a lawyer in the State Department were helpful to me in my 16 years of private practice, and many of my lawyer friends at the State Department had experience as international business lawyers, which made them better negotiators when it came to concluding international agreements or resolving disputes with other countries.

Here and elsewhere, there are really two types of negotiation. The first relates to the resolution of disputes, whether between a foreign investor and the host government or an SOE, or between an international lending institution and the recipient government.

However, the more common type of negotiations is those that take place when an international investor decides that he wishes to form a subsidiary or a joint venture or other form of business activity in Vietnam with private enterprises, SOEs or the Vietnamese Government, or when MOJ or another Vietnamese government agency decides to conclude a loan agreement with the World Bank or the Asian Development Bank or USAID. Essentially the same negotiating techniques are applicable when Vietnamese government lawyers participate in the negotiations of the TPP or the EVFTA or the RCEP. However, for many lawyers at least, there can be great satisfaction in creating a new legal entity, which will employ workers, produce useful goods and services, result in the transfer of useful technology, contribute to national economic growth and world trade, and support the economic development in the host country.

I know from personal experience that government lawyers derive gratification from assisting in the negotiation and conclusion of negotiations for a bilateral or multilateral agreement as well as from successful efforts to settle investment or other disputes under existing treaties. As an attorney in the United States Department of State, I found satisfaction in concluding a boundary treaty with Mexico in 1971 that created a new framework for dealing with the meanderings of the Rio Grande (which forms the southern border between the United States and Mexico. But like most State Department lawyers I was a problem-solver, negotiating inter alia an agreement relating to the quality of Colorado River water delivered to Mexico in 1973, a long-standing bilateral dispute, and settling a dozen expropriations of U.S. enterprises by Peru and Ecuador. Those of you who have participated in VBTA, WTO accession, TPP and EVFTA negotiations likely derived great satisfaction from those processes, perhaps more than you have when you helped settle a business dispute between a foreign investor and a sub-national government.

Readings 35, Negotiation Techniques—Int'l Negotiations Handbook

1. Background Factors

Experts have suggested that several factors influence almost every type of negotiation. These include the objectives of each party, which may be common, complementary or conflicting. Environmental factors include political, market structure and position, and social factors affecting one or both parties. For example, if you own a Vietnamese enterprise that wants to open a group of Apple Computer stores in HCM City, the only way you can do this (legally) is to negotiate an agreement with Apple; as a consequence Apple has most of the market power. (It is possible of course that Apple would decide to create a Vietnamese subsidiary which would then set up its own retail stores, either with or without a local partner. This is the approach Apple seems to be taking with regard to a series of retail stores that Apple wishes to open in India. Apple's ability to do this is based on a recent change in Indian law that allows certain retailers selling "cutting edge" items to avoid the usual requirement that 30% of the content be of Indian origin; this would be impossible given that iPhones and iPads are designed in the United States, assembled in China and contain no Indian-source parts.) Even if Apple sets up its own subsidiary and retail stores in Vietnam, it would likely contract with several Vietnamese enterprises to provide services or other support.

Still, a particularly skilled and thoughtful negotiator who understands the objectives of the other party can make his own views understandable to the other party, listens carefully to the views of the other party and can come up with creative alternatives, is more likely to strike a good bargain even if his/her negotiating power is weaker. Third parties, particularly governments, may also influence the bargain. For example, if the government must approve some portions of the agreement, such as the royalties paid for the transfer of technology or the distributorship contract as a whole, it is effectively a third party to the negotiations.

Both long term and short term expectations also affect a negotiation. In the short term, if both parties are strongly interested in a deal they will both expect a more positive outcome from continuing negotiations than if the reverse were true. Whether a deal is long term, medium term or short term depends in part on the nature of the transaction, and also affects the expectations of the parties. A mining company establishing a copper mine in Arizona realizes that for the venture to be profitable it must continue for 20-25 years given the exploration and investment that is required for success. A group of investors, whether international or domestic, that builds a hotel for $50 million in Da Nang expects the hotel once complete to be in operation for at least several decades. In contrast, the new Apple distributor in HCM City may be satisfied with a medium term agreement to be Apple's sole distributor in Hanoi—perhaps for five years—even though it expects that the arrangements will be continued if Apple is satisfied with the firm's sales performance.

It can also be argued that parties with long term objectives are more likely to be willing to negotiate and compromise their differences than those with shorter term objectives. With the Da Nang hotel, for example, if the local authorities have concerns with the hotel management after 3-4 years of operations, unless one party is being completely unreasonable it is likely that a compromise will be reached. Da Nang wants the hotel to continue in operation while the hotel's owners want to continue receiving revenue and a profit for the remaining useful life of the property; neither has much interest in formal dispute settlement whether taking place in Vietnam or internationally.

2. Understanding cultural differences between foreign investor and host country negotiators

Any international lawyer or businessman will tell you that cultural differences are important but often neglected, particularly by American lawyers and businessmen. We tend to be in a hurry to get into our negotiations and to finish them so we can go home. We often fail to learn much about cultural differences among societies that make the negotiating process more complex. (For example, those of us who have negotiated with both Japanese and Korean businessmen know that with the Japanese it is often difficult to know whether an answer to a question is a "no" or a "yes," while with a Korean you are likely to know exactly where you stand in the negotiation, even if the presentation is less diplomatic.) "Maybe" means "possibly" in some cultures while it may mean "impossible" in others.

One of the things I learned in my first major NAFTA arbitration in Mexico was that four hours spent in a nice, leisurely, alcohol-accompanied lunch paid great dividends in making the process work better. In that lunch in a lovely Mexican restaurant, none

of the arbitrators or the staff mentioned the case at hand. Rather, we discussed our families, our golf (although I don't play), tennis or other sports; our recent vacations, and (gently) the state of the United States and Mexican economies. It was a bonding experience that greatly facilitated what became a difficult arbitration over nearly three years, clearly illustrating the great importance in Hispanic cultures of establishing personal as well as business relationships. This experienced also illustrated the fact that concepts of time are different in different cultures, and individuals raised in some cultures are more (or less patient) than others.

An Article from Blue India provides several examples of cultural differences and challenges:

Never touch the head of a Thai. Do not pass an object over a Thai head. The head is considered sacred in Thailand. Nor must you point your soles in the direction of another person in Thailand (or India). In Thailand you must not cross your legs while sitting, especially in the presence of an older person.

Triangular shapes are taboo in Hong Kong, Korea, or Taiwan. The triangle is considered 'bad luck' or a negative shape in these countries.

The number 7 is bad luck in Kenya, but it is good luck in the Czech and Slovakian Republics, and has magical connotations in Benin. [The number 4 is considered bad luck in Korea and China, while many hotels in the United States have no 13th floor.]

Red is a positive colour in Denmark [and brings good luck in China], but represents witchcraft and death in many African countries.

A nod means 'no' in Bulgaria, and shaking the head side-to¬-side means 'yes'. The North Indian and the South Indian shake their heads differently and for opposite meanings.

In Guatemala, you have to engage in small talk, indicate an interest in the families of business associates and go with them for a meal. You allow time for a personal relationship to develop. Solid business opportunities usually follow a strong personal relationship in Guatemala. This holds true for Latin America in general.

When crossing cultural lines, something as simple as a greeting can be misunderstood. The form of greeting differs from culture to culture. Traditional greetings may be a handshake, hug, nose rub, kiss, placing the hands in praying position, and so on. [In many Middle Eastern nations a man would never offer a handshake to a woman.] Lack of awareness concerning the country's accepted form of greeting can lead to awkward encounters.

The 'O.K.' sign commonly used in the United States is a good example of a gesture that has several different meanings in different countries. In France, it means 'zero', in Japan it is a symbol for money and in Brazil, it has a vulgar connotation.

The use of a palm-up hand and moving index finger signals "come here" in the United States and some other countries but is considered vulgar in others. In Ethiopia, holding out the hand palm down and repeatedly closing the hand means

“come here”. In India a sibilant “sshh” or clapping of hands to summon a menial servant is accepted.

3. Language Differences

Americans, probably much more than Europeans or Asians, are language poor. Most of us speak English relatively well, and many of us have a reasonable command of Spanish. However, few of us speak any of the “difficult” languages such as Arabic, Chinese, Japanese, Korean or Vietnamese. Under such circumstances, citizens of those countries who are fluent in English have a significant advantage at the negotiating table just as they do in diplomatic intercourse. Having operated for over a decade as a trade lawyer representing Korean businesses, but with only a few words of Korean at my fingertips, I was forced to rely on interpreters in the many meetings taking place with Koreans who were not all fluent in English. I was often suspicious that the interpreter was not accurately translating my statements or those of my clients, particularly when we were discussing complicated legal or accounting issues arising out of various U.S. antidumping investigations. Most of the time the translation errors were inadvertent; all international lawyers are aware that translating legal terms from one language to another is fraught with risks. In other situations, I was suspicious that the interpreter was intentionally mis-translating my words, although I did not know enough Korean to be sure.

4 Strategic Issues

It cannot be over-emphasized that for any negotiation, including negotiating the price and terms for a new car or motorcycle, preparation is very important. For private commercial transactions the information available on the Internet may make the negotiating process much simpler because of the enormous volume of information available. (In Vietnam as in other countries except China, once a government official or the manager of a private enterprise knows the names of the individuals with whom he or she will be negotiating with, background information on those individuals are almost always available on LinkedIn or Facebook.
In the United States, for example, if I wish to purchase a new car I must do so from an authorized dealer for that brand of automobile. The dealer is a corporate entity with greater economic power, and in the United States there are no fixed prices for the vehicle, only “suggested” retail prices. I must negotiate with the salesman, but before I negotiate I should know not only the retail price but also the price the dealer paid for the vehicle from the manufacturer, and probably the price that would be charged for the same vehicle by a similar dealer nearby. I can also find out whether this dealer has a good reputation for its business dealings and after-sale service. This gives me an opportunity, if I am a good and patient negotiator, to ultimately receive a good price, because the salesperson knows that if I don’t get a price that is satisfactory to me I will look for the vehicle at another dealership. Today, no sensible auto buyer in the United States would visit the dealer without knowing such pricing and cost information. And since we tend to keep our automobiles 6-10 years, if the lowest price is from a dealer with a poor business reputation I will likely buy elsewhere.

Negotiations may be formal or formal. They may involve presentations to one or two individuals (as is often the case in the United States) or to a corporate board or

teams (as in China and Japan). In some negotiations the process begins at a very general level, while in others a detailed factual presentation, even a draft, is expected. Sometimes key issues are addressed one at a time at the outset, while in other situations the major issues are raised at the outset. There probably isn't any right or wrong way to handle these approaches, as long as both negotiators under what is expected.

Great differences of view exist over whether negotiators should be" tough" or "soft." What seems normal in some cultures could be considered deeply offensive in others. In some cases a soft-spoken negotiator may be perceived, at least initially, as weak. Where one of the parties has greater bargaining power he may be tempted to take an aggressive posture, but such an approach can backfire if it encourages the other party either to walk away from the negotiations or to refuse to compromise. Going back to the Apple Store example, while Apple has the greater economic power in the negotiations, Apple personnel have presumably investigated several potential retailers for HCM City; if they were to treat the chosen one disrespectfully (this is a hypothetical, with no basis in fact), that potential distributor might withdraw from the negotiations, and Apple would have to find someone else who might not be as well-qualified to market its products successfully.

In some cultures, including some nations in the Middle East, bargaining over prices and other factors is a major part of the process. A foreign investor would not be expected to make an offer, for example, of a royalty rate, and then refuse to compromise. On the other hand, seeking an obviously unreasonably high royalty rate is no more likely to result in a reasonable agreed rate than starting with a rate at the high end of the range of reasonableness in the affected industry.

Particularly when negotiations take place between representatives of two corporate enterprises, it is important for both to know whether the negotiators they are dealing with have the authority to conclude the deal or whether the other party's offer must be referred to a more senior official or the enterprises' home management. Sometimes the question of referral to higher authority can be used as a negotiating ploy, with the person at the table using the referral as a way of gaining time to think about a proposal, or to blame rejection on someone else. Such referral issues are in my experience can effectively be used effectively in diplomatic negotiators where, for example, the senior USTR official sitting at the table says "I must refer your latest proposal to Ambassador Froman; I can't commit the United States Government on my own." If the other party does not know the scope of the USTR official's authority to conclude the deal the approach can be effective, but if unreasonable delays occur the other party's views may become less flexible.

C. Other Aspects of Negotiations

1. Stages of negotiations

While it is difficult to generalize, many negotiations of international business deals follow predictable stages. The pre-negotiating stage, which we might also call "due diligence," is the planning and research stage. Typically, a well-prepared negotiating team with less bargaining power can prevail over another team with more bargaining power if the latter is well prepared.

The planning for an international business negotiation can be extremely costly and time-consuming. For example, an enterprise that is engaged in petroleum development, such as Royal Dutch Shell, may spend months or years locating petroleum reserves. If exploitable reserves are found in several countries, the enterprise may decide which venue is likely to be most satisfactory in terms of operations and profits. If a footwear marketing enterprise such as Nike needs to expand production through contracting with new manufacturers in Vietnam or Indonesia, Nike will likely spend many months with consultants in both countries complying lists of potential suppliers. This list will be reduced to a few candidates. For each candidate Nike will have before it detailed financial information on the supplier and information on the skills and dependability of the management. In some instances the planning process may be facilitated by illegal means, such as industrial espionage. At the same time, whether one party is Nike or another MNE, its negotiators must understand the objectives of the other party, whether that may be revenue, transfer of important technology, the prestige of working for a famous MNE (that may help the factory to attract other business) or something else.

Government officials who are successful negotiators typically follow a similar process when planning the negotiation of an international agreement or a loan agreement. For example, suppose Vietnam's government believes that it should continue concluding BITs with additional countries because BITs encourage investment and in other ways support the national interest. The pre-negotiations stage might well include compiling a list of countries that are desirable targets for a new BIT; assessing the complications that might be experienced with regard to each such country; and deciding on a short list of priority countries with which to negotiate. This stage would also include a preliminary assessment of whether the other country would be likely to agree to BIT terms that are important to Vietnam.

As a second example, consider the extensive level of research and analysis the Vietnamese Government (or the U.S. Government) will necessarily conduct if it decides in two or more years to seek the negotiation of a free trade agreement with a United Kingdom that is no longer a member of the EU. This will necessarily encompass issues of politics, economics and culture, including an assessment how a trade negotiation with the U.K. would affect Vietnam's (or the United States') future relationships with the EU.

In complex negotiations it is also important to know what the other party's main objectives are, so one can identify the possible areas of compromise. For example, in the 2002-03 negotiations for an FTA between the United States and Australia, it was said that Australia was prepared to accept ISDS in the agreement, but only if the United States was willing to agree to a substantial increase for Australian sugar exports to the U.S. market. USTR was not willing to grant such access, and the FTA's investment chapter has no ISDS provisions. Perhaps one reason that Australia accepted ISDS in the TPP (with a few reservations such as the tobacco carve-out), was the fact that Australia received substantially increased access to the U.S. sugar market.

No TPP negotiator for the United States would be considered very skilled if she did not know that the most important objective in the TPP for New Zealand was

access to the other Parties' dairy products market, Vietnam's access for apparel to the U.S. market, and Japan's access to the U.S. market for autos and small trucks (albeit with the expressed willingness to accept a very long phase out of tariffs).

The next stage is the identification of the contents of the deal, deciding what interests are at stake on both sides; what alternatives each party may have; and what political or economic factors may be relevant to the transaction. Again, in my Nike hypothetical, Nike is aware that the better footwear manufacturers in Vietnam and Indonesia may be approached by Adidas or New Balance, among others, which enterprises may be able to offer a more desirable or longer-term contractual arrangement. The local manufacturer (even if it is owned by Korean or Taiwanese interests), from its point of view, is aware that there are other Vietnamese or Indonesian enterprises that may welcome the opportunity to manufacture shoes for Nike. A major economic factor for Nike will be the duty rate for shoes imported by Nike from the Asian manufacturer to the United States, where the MFN rate of duty for "athletic" footwear is either 6% or 20% depending on the design and materials used. Nike is aware that once TPP comes into effect U.S. duties on footwear from Vietnam will be reduced over a period of several years to or near zero. With Indonesia, which is not a TPP party and probably will not be able to join for some years, the MFN duty will apply.

Wise negotiators realize that they will not be able to gain all the benefits they desire from a business negotiation unless their enterprise has overwhelming bargaining power. Even then there are risks of obtaining a deal that is overly one-sided. The histories of 1960s and 1970s expropriations in Latin America and elsewhere reflect situations where a MNE negotiated deals that were extremely favorable to themselves but unfavorable to the host governments. Once the host government changed, or realized that it has been taken advantage of, expropriations followed. Under such circumstances, negotiators on both sides should consider all available alternatives that would be acceptable to it. For most negotiations, the negotiators should develop what Fisher and Ury term the "best alternative to a negotiated agreement" (BATNA). In virtually every negotiation there is a set of developments that mean for one of the negotiating teams that reaching an agreement is no longer the best result. Rather, there is an alternative to a negotiated agreement—often negotiations with another party, declining the deal entirely, or simply deferring action—that is more beneficial. The trick is knowing what constitutes the party's BATNA well ahead of time so that the time to walk away can be identified.

For example, the Bush Administration had a strong political and economic interest in the 2004-2006 period in concluding a free trade agreement with South Africa. (It also would have included the other four members of the South African Customs Union, Botswana, Lesotho, Namibia and Swaziland.) The negotiations dragged on for more than two years. Ultimately, USTR abandoned the effort because South Africa was unwilling to consider the inclusion of chapters on intellectual property, investment and services. Since the 2002 Trade Promotion Authority explicitly included in its negotiating objectives all three of these sectors, USTR knew that an FTA without them would not be accepted by the Congress and would set a terrible precedent for future U.S. FTA negotiations. As the BATNA, the United States and South Africa signed a Trade and Investment Framework Agreement (with no significant obligations for either side), but only in 2012, amending an earlier

agreement from 1999. This was in significant part a face-saving accord, designed to show that the United States had a significant interest in stronger economic relations with the most developed country in Africa, but it has not led to further FTA negotiations.

Another very current example is the United Kingdom, where the political leadership has begun considering the options for maintaining a strong trade relationship with the EU while no longer being a member of the EU. Under Article 50 of the Lisbon Treaty, once the UK gives notice of its intent to withdraw it will have two years to negotiate a "divorce." This will be an extremely difficult process. While the UK wants to maintain duty free access to the EU market and the ability for its financial institutions to continue to continue to conduct financial transactions in Euros from London, the EU probably won't agree unless the UK continues to permit free immigration from other EU countries. The latter is opposed by virtually all of the Brexit advocates. In my view the UK leadership must decide soon, before they formally invoke Article 50, whether they are simply willing to have no agreement with the EU rather than concede on open immigration, their BATNA.

2. Asserting Control of the Negotiations

Whether or not a particular party can effectively control the negotiations depends of course on some factors that are beyond its control. These may include unequal economic power, the unwillingness of the other party to accept a reasonable agreement, and government restrictions on key aspects of the potential deal. On the other hand, a party may exert control if he has learned all available information on the other side's positions and objectives, can gauge cultural differences and plan accordingly, understands the cultural differences between the parties, is patient, and to the extent feasible control the drafting by presenting the first draft of a possible agreement at the appropriate time.

U.S. lawyers at least believe they have a major advantage if they can table a draft that becomes the basis for the subsequent negotiating sessions. The reasons for this are probably obvious. If your side provides the working draft you can include in the draft the provisions that are most important to your interests, and either exclude or minimize the provisions that are considered least favorable (although the other side will seek to add them). For example, if your side wishes disputes to be settled by international arbitration at the Singapore International Arbitration Center (rather than in London or Paris or New York), you may be more likely to obtain your objective if you put it on the table first. (Arbitration clauses are often the last to be negotiated in an agreement and sometimes do not receive sufficient attention from one or both parties.)

Also, to the extent possible, conducting the negotiations in your "home" location may provide a subtle advantage over conducting the negotiations in the offices of the other party, or alternating between the two jurisdictions. Depending on bargaining power, international business negotiations are more often than not conducted in the territory where the venture is likely to take place. Typically, with government-to-government negotiations the venue for negotiating sessions rotates among different national venues, as with the many years of TPP negotiations and the negotiation of the Vietnam—United States Bilateral Trade Agreement.

In some cases the venue of the negotiations may depend on external factors. For example, the Ministerial Meeting of the WTO in November 2001 was located in Doha in significant part because the government there would be able to control the types of demonstrations that had made the 1999 Seattle Ministerial Meeting a fiasco. (The Doha venue was probably also chosen in part because post-9/11 many governments thought it would be a good idea to hold the meeting in a Middle Eastern nation.)

3. How is a "Good" Outcome Measured?

Some would argue that the best measure of a good agreement is whether it can be successfully implemented. A concluded agreement that cannot be implemented because one or both parties do not have the financial or other resources to do so, or because it runs afoul of local law or regulations, would have better not have been concluded in the first place. There seems to be no good reason for spending extensive time negotiating, and raising expectations, if the end result is not a basis for implementing the deal. Exceptions to this rule may exist more frequently in diplomatic negotiations than private business negotiations, as with the South African—United States example noted earlier.

It is not unusual when for the foreign minister of one nation visits another nation for the diplomats on both sides to search for an agreement or multiple agreements that can be publicly signed as evidence of the strong friendship between the two nations. Historically, more than a few BITs have been concluded largely for this reason, between nations that do not have a history or likelihood of reciprocal investment, often without a careful review by the foreign ministry's lawyers. My favorite example is the 1998 BIT between the Dominican Republic and Ecuador (since terminated), concluded between two countries where there was almost no history of trade or investment. The BIT provided for ISDS only under the ICSID arbitration rules, even though the Dominican Republic (then and now) was not a party to ICSID! In other words the ISDS provisions were useless. In some cases of course agreements that have few substantive obligations may nevertheless have value as they signal intent among the parties to conclude further agreements with more significant mutual obligations. The Framework Convention on Climate Change concluded at Rio de Janeiro in 1992 by more than 150 parties falls into this category.

4. Negotiating Exercises

The following readings are a mix of mock negotiation problems and analyses of successful or unsuccessful negotiations. Both will serve as a basis for small group analysis and discussion. Except for Colorado River Salinity all are business negotiations. It is important for each group to thoroughly understand the objectives of the side to which they are assigned, and to be able to formulate a strong negotiating strategy, or understand the strategies that led to a conclusion of the negotiations. For example, in the Colorado River Salinity negotiations, what was the strategy of each government? What was the BATNA?

Readings 36, Mitsubishi Case Study
Readings 37, PepsiCo-2005-Case Analysis
Readings 38, Bata-Case-Analysis

Readings 39, Merck-Argentina Case Study
Readings 40, Sharahad exercise [to be distributed]
Readings 41, Mintana Exercise [to be distributed]
Readings 42, Colorado River Salinity Negotiation
Readings 43, Colorado River map

ANNEX II: CONCLUSIONS AND RECOMMENDATIONS ON NATIONAL COURT AND ARBITRATION REFORM[4]

A. Lessons from the Six Countries

Overall, it is evident from the discussions of Canada, the United States and Singapore that countries which have a reputation for an independent court system with well-trained and well-paid (and non-corrupt) judges are most likely to encourage foreign investors to use the courts rather than international arbitration. That being said, even the world's best court systems will not preclude some foreign investors from choosing ISDS over the local courts.

Where the lead agencies in ISDS management have strong support at high levels of government, and have institutionalized the management function, as in the United States, Canada and Mexico in particular, the administration of ISDS defense is likely to be more effective than the ad hoc approaches that seem to be evident in jurisdictions where there have been few disputes, such as Malaysia and Korea. It also helps when the lawyers working in these areas have a high level of respect, as in these nations (and in MOJ), there is less turnover and more accumulated institutional knowledge.

Creating a court system that complies fully with the rule of law in terms of judicial independence and competence is a process that will likely take a decade or more in Vietnam. However, with regard to dealing with investment disputes, it is not necessary that the entire court system be reformed. Rather, as the recent experience of Malaysia and Singapore appears to suggest, the establishment of several specialized commercial courts might be accomplished in Vietnam in the relatively short-term, and could if done properly greatly increase foreign investor confidence in the domestic legal system as it affects most aspects of foreign investment.

Of the six countries, Mexico's experience is probably most relevant to Vietnam. Mexico until 2000 was a single party system; the *Partido Revolucionario Institutional* (PRI) was in power for 72 years continuously, and never lost an election. Mexico also went through a trade and investment liberalization process beginning in 1986 and continuing until the present, driven in significant part by GATT and NAFTA accession, although the results have not been as favorable as with similar liberalization in Vietnam. Beginning in the mid-1990s, Mexico's states also began to amass much more power and independence from the federal government, a change that increased the difficulty for the lead agency (Secretariat of the Economy) in becoming aware of state actions that could result in investor disputes, and in convincing state governments to cooperate with the Economy Ministry when disputes have arisen. The Mexican court system, like Vietnam's, despite some improvements in recent years, has a reputation for a low level of competence, a high level of corruption and a lack of independence from the executive branch of the government.

[4] Prepared under the project, Review of International Institutional Arrangements For Managing Investor-State and International Commercial Disputes, DTA Activity No. MOJ027, Component 2 October (2015).

Even with this history, confidence in and use of domestic arbitration has increased in recent years, in part because of directives from the Supreme Court.

B. Recommendations

In making these recommendations, I have had the benefit of several excellently independently written reports on the Vietnamese court and arbitral systems, as presented to the GIG/MOJ workshops in Vietnam the week of October 5-10. Those analyses stand on their own and I have thus made no effort to incorporate them here. Rather, I have made below what I believe are some basic suggestions for improvement based on the experience of other countries that respond to the claims of foreign investors.

A. The completion of the TPP negations as of October 5 begins a process of up to two years during which the Government of Vietnam will be required to modify a number of laws and decrees to permit Vietnam to comply with new obligations under the TPP, including its chapters on investment and on SOEs. This presents MOJ and other government agencies, along with the National Assembly, with the opportunity to enact broader reforms in such areas as the creation of expert commercial courts and more effective and fair procedures for arbitration and for review and enforcement of both foreign and domestic arbitral awards. While such changes are not necessarily required for Vietnam to comply with its obligations under TPP, the full benefits of TPP in terms of attracting foreign investment will not be realized without such parallel reforms. Such reforms would almost certainly reduce the number of serious ISD that would otherwise be brought against the Government of Vietnam, and could help to meet MOJ's objective of convincing more foreign investors to utilize domestic courts and particularly domestic arbitration procedures. Hopefully, this opportunity will be seized upon as it may not present itself again for many years.

B. Vietnam should fully incorporate the UNCITRAL Model law, particularly its Article 34, into the domestic legal system, and take steps to assure that the Supreme Peoples' Court requires the lower courts to comply with the Article 24 criteria when reviewing arbitral awards, whether those awards have been rendered against private enterprises or government agencies. At the same time the SPC should provide mandatory guidance to lower courts entrusted with enforcing foreign arbitral awards under the New York Convention so as to correct the deplorable record of Vietnamese courts in enforcing awards, one of the worst of any party to the New York Convention.

C. Vietnamese officials should reform the laws and regulations governing arbitration in Vietnam to bring them more into compliance with modern arbitration practice, taking into account the laws and experience of the KLRCA and the SIAC as well as the factors listed in Part II of this study and also in separate reports recently provided to MOJ.

D. The Vietnam court system should be modified or augmented to create 1-3 commercial courts, perhaps beginning with modifications of the peoples' commercial court in Ho Chi Minh City. The objective would be a court or courts comprised of judges with expertise in domestic and international commercial matters who are well-paid and appointed on the basis of merit rather than connections. These courts would operate independently of the rest of the court system, except for limited oversight of

the SPC, and independently of the National Assembly except with regard to their authorizing legislation. These commercial courts would have exclusive jurisdiction under Vietnamese law to monitor arbitration in Vietnam, recognize both foreign and domestic arbitral awards, and to enforce foreign arbitral awards under the New York Convention. To improve efficiency and cost effectiveness the court would also have jurisdiction over other commercial disputes whenever either party requested the exercise of such jurisdiction, including jurisdiction over state agencies and SOEs as defendants. The new commercial courts in Malaysia and Singapore may offer some useful lessons for the organization and operation of new commercial courts in Vietnam. The creation of such special commercial courts would not obviate the need for broader court reform in Vietnam, but realistically focusing on a few commercial courts offers the possibility of achieving major changes in the short or medium term.

E. Vietnam should ratify the ICSID Convention. Certain aspects of the Convention, such as the narrower definition of "investment" in Article 25.1 and the review of awards by the Annulment Committee, offer host states benefits not found with ISDS under the Additional Facility or the UNCITRAL Rules. The fact that under Article 54 awards must be enforced is not a valid grounds for avoiding ratification, as most members pay awards against them without the need for enforcement under the New York Convention. Adherence to ICSID would help Vietnam to counter the widespread impression that when it comes to compliance with international arbitral awards Vietnam does not follow the rule of law (even though the ICSID Convention does not apply to international commercial arbitral awards).

F. Vietnamese officials should seriously consider a workshop hosted by one of the Mexican officials responsible for creating and operating Mexico's legal term for managing ISDS. Mexico's experience with expanding trade and investment several decades ago have much in common with Vietnam's today, and could be helpful to MOJ in further refining their own procedures and in avoiding some of Mexico's mistakes. [Done]