

Viet Nam's written comments on Draft provisions on procedural and cross-cutting issues

Viet Nam takes this opportunity to commend the ongoing investor-State dispute settlement (ISDS) reform process at Working Group III and its sincere gratitude towards the Secretariat for their work.

In consideration of the Working Papers numbered A/CN.9/WGIII/WP.244 and A/CN.9/WGIII/WP.248, Viet Nam raises below its comments on specific draft provisions. The views expressed herewith do not represent the priority of Viet Nam, its position on the final form of provisions, or its intention to exclude any provision. Viet Nam also reserves the right to submit additional comments on those provisions.

Draft provision 5: Security for costs; and

Draft provision 11: Consolidation and coordination of proceedings

Regarding Draft provisions 5 and 11, Viet Nam would like to reiterate the points made in its most recent written comments.

Draft provision 12: Third-party funding (*paragraphs 1 - 5, and 7*)

Considering the importance of attaining transparency in cases involving third-party funding, Viet Nam proposes that consideration be given to ensuring the provision does not prevent the non-funded party from requesting the Tribunal to order additional disclosure from the funded party, if deemed necessary.

Viet Nam also suggests including the regulation on third-party funding as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating third-party funding in ISDS.

Draft provision 14: Local remedies

To realistically prevent the potential risk of a disputing party bypassing domestic dispute resolution mechanisms before seeking intervention from international mechanisms, Viet Nam proposes the following drafting suggestions for draft provision 14:

*“Prior to submitting a claim to the Tribunal, a party shall ~~consider initiating~~ **initiate** recourse before a court or competent authority of a Contracting Party, where available.”*

Viet Nam also suggests including the regulation on local remedies as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating local remedies in ISDS.

Draft provision 15: Waiver of rights to initiate dispute resolution proceeding

Viet Nam welcomes efforts to address the issue of waiver of rights to initiate dispute resolution proceeding in ISDS, as it prevents claimants from simultaneously initiating claims under multiple international investment agreements. In practice, there have been cases where the claimants have submitted a waiver of the right to initiate dispute resolution proceeding under one agreement, yet later filed claims under multiple agreements simultaneously, and the Tribunal did not dismiss or terminate any of those cases. Therefore, when drafting this provision, Viet Nam proposes that consideration be given to establishing that failure to comply with the waiver commitment shall serve as the basis for the Tribunal to dismiss the case on the grounds that the right has been waived.

Viet Nam also suggests including the regulation on waiver of rights to initiate dispute resolution proceeding as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating waiver of rights to initiate dispute resolution proceeding in ISDS.

Draft provision 18: Shareholder claims

Considering that commitments against denial of justice are commonly regulated in international investment agreements, Viet Nam proposes that subparagraph 2(b) be deleted from this provision.

Viet Nam also suggests including the regulation on shareholder claims as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating shareholder claims in ISDS.

Draft provision 21: Joint Interpretation

Viet Nam welcomes efforts to address the issue of joint interpretation in ISDS. Viet Nam anticipates this provision to aid in clarifying the views of contracting states on each provision of the underlying agreement, which may contain general terms open to varying interpretations by different arbitral tribunals.

Considering that the speed of issuing a joint interpretation will depend on the internal procedures of each Party to the Agreement, Viet Nam proposes the following drafting suggestions for draft provision 21(4):

“4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation. Upon a request by a Party to the Agreement, the Tribunal shall consider extending this time period. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.”

In addition, when drafting this provision, in the context of multilateral agreements, Vietnam proposes that consideration be given to allowing the participation of both Parties to the Agreement and non-signatories, which would result in common interpretations of the protection standards in investment treaties among those parties.

Viet Nam also suggests including the regulation on joint interpretation as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating joint interpretation in ISDS.

Draft provision 22: Submission by a non-disputing Treaty Party

Vietnam appreciates the efforts to address the issue of submission of a non-disputing Treaty Party in ISDS, as it allows for the proactive affirmation of that Party's position on the relevant provisions of the underlying agreement, which aids the Tribunal's understanding and consistency in decision-making.

To enhance efficiency of regulating submissions by a non-disputing Treaty Party in ISDS, Viet Nam proposes the following drafting suggestions for draft provision 22(1):

*“1. The Tribunal shall allow a Party to the Agreement that is not a party to the dispute (“non-disputing Treaty Party”) to make a submission on the interpretation of the Agreement at issue in the dispute **if requested by that Party.***

*2. The Tribunal may, after consultation with the disputing parties, invite a non-disputing Treaty Party to make ~~such~~ a submission **on the interpretation of the Agreement at issue in the dispute.***

3. The Tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Treaty Party...”

Viet Nam also suggests including the regulation on submission of a non-disputing Treaty Party as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating submission of a non-disputing Treaty Party in ISDS.