

Viet Nam's written comments on the Draft clauses on mediation

1. Regarding Draft provision 1, Option 1 with "at any time" would be preferable to ensure the voluntary and flexible nature of mediation.

"Each party to the dispute may, at any time request the commencement of a mediation procedure."

The choice of compulsory mediation (Option 2 or 3) could prolong the time to resolve the case and incur unnecessary costs in cases where mediation is almost impossible

2. Viet Nam may agree with the current Draft provision 2 because it ensured the voluntary nature of mediation. The word "arbitration" should be chosen instead of "standing mechanism" because of its comprehensive meaning, especially when both the establishment and the functioning time of the "standing mechanism" is uncertain.

"1. If the disputing Parties agree, mediation may continue while the dispute proceeds for resolution before an ISDS tribunal.

2. If the disputing parties agree to mediate after the investment dispute has been submitted to arbitration /, upon request of all disputing parties, the tribunal shall stay its proceedings until the mediation is terminated.

3. All timelines pursuant to [arbitration] / are suspended from the date on which the disputing parties agreed to have recourse to mediation and shall resume on the date on which either disputing party decides to terminate the mediation. Any party may terminate the mediation at any time by written notice to the mediator and to the other part"

3. Viet Nam may agree with Draft provision 3 to utilize the available rules and procedures:

"1. Mediation of an investment dispute shall be conducted in accordance with either: (i) the ICSID Mediation Rules; (ii) the UNCITRAL Mediation Rules; or (iii) the IBA Rules for Investment State Mediation, and the provisions of this section.

2. The mediation is to be conducted by [one mediator] / [two comediators] unless otherwise agreed by the disputing parties. A mediator shall be appointed by agreement of the disputing parties. The disputing parties may also request that a selected appointing authority proposes the mediator to be selected."

4. Regarding Draft provision 4(1), in order to ensure the effectiveness of the mediation and to limit the parallel proceedings, Option 1 with a "detailed description" of the legal basis and details of the case should be preferable.

"1. To commence mediation, a party shall communicate to the other party a request for mediation ("request"), which shall contain:

a. The name and address of that party and its legal representative(s) and, where a request is submitted on behalf of a legal person, the name, address, and place of incorporation of the legal person;

b. A detailed description of the factual and legal basis of the dispute;

c. An indication of the agencies and entities of the Contracting Party that have been involved in the matters giving rise to the dispute;

d. An explanation of any prior steps taken to resolve the matters in issue"

Regarding Draft provision 4(2), since our view is mediation should not be mandatory, Viet Nam support Option 1 with the choice of 30 days to answer the request (the fact has shown that reply to a request concerning a complicated case within 15 days is almost impossible):

"The other party shall acknowledge receipt of any request for mediation within [14] days of its receipt.

The addressee of the request shall give due consideration to it and accept or reject it in writing within 30 days of receipt."

5. In order to safeguard the interests of the parties and avoid the bad faith in utilizing the information in the mediation process, Viet Nam supports the Draft provision 5:

"Recourse to mediation is without prejudice to the legal position or rights of the disputing parties"

6. The disclosure of the results of the mediation should completely depend on the will and agreement of the disputing parties. Therefore, Draft provision 6 should not regulate such issue.

7. Viet Nam supports Draft provision 7(1) to limit "parallel proceedings", especially when investors use more than one method of dispute resolution but relating to the same subject. Further, Viet Nam suggests that clarification regarding specific forms of "mutually agreed solution" should be added.

"1. The disputing parties shall not commence nor continue any other dispute settlement procedure relating to the dispute subject to mediation while the mediation is pending if the disputing parties have reached a mutually agreed solution"

Concerning Draft provision 7(2), the rules for the requirements for reliance on a settlement agreement are necessary. Therefore, Viet Nam suggests that the rules applied for the countries which are not member states of the Singapore Convention should be added (The wordings of the Singapore Convention could be included in the draft provisions or used as a source of reference)