

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

Viet Nam take 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 Paper numbered A/CN.9/WGIII/QP.244, Viet Nam raises below its comments on specific draft provisions. The views expressed herewith do not represent the priority of Viet Nam, the position of Viet Nam on the final form of provisions, or the intention of Viet Nam to exclude any provision. Viet Nam also reserves the right to submit additional comments on the above-mentioned issue.

Draft provision 1: Evidence

First, Viet Nam welcomes efforts to address the issue of evidence in ISDS, particularly paragraph 7 on the power of the Tribunal to exclude exhibits or evidence “*obtained illegally*”. However, it does not address the problems arising from ISDS practices, namely illegal taking of evidence, falsification, or fabrication of evidence. In our practice, we have faced a number of cases where Claimants submit evidence which were illegally taken, or even fabricated or falsified and the Tribunals have not addressed such issues in a proper way. Therefore, Viet Nam proposes to further clarify situations where such evidence shall be excluded at the draft paragraph 7 as followed:

“7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence ~~obtained illegally or~~ based on the following reasons:

(a) Documents, exhibits or evidence obtained illegally.

For greater clarity, documents, exhibits or evidence “obtained illegally” are those obtained against the law of the State in which they were collected;

(b) Documents, exhibits or evidence with clear signs of falsification and fabrication;

(c) [...]”

Second, considering the importance of regulating evidence in ISDS, Viet Nam suggests the following matters be taken into consideration when drafting this provision:

(i) Failure to provide evidences proving amount of damages shall be an important ground for the Tribunal to dismiss such claim of damages;

(ii) The use and production of falsified and fabricated documents shall be considered as an act against public order and grounds for dismissing claims by the Arbitral Tribunal or by the domestic court of the seat of arbitration.

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

Draft provision 4: Manifest lack of legal merit/early dismissal

Considering that this issue is always raised by States, to realistically ensure the rights of disputing parties, Viet Nam proposes the following drafting suggestions for paragraph 2:

“2. A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than 60 days after its constitution. The Tribunal may admit a later objection if it considers the delay justified.”

In addition, Viet Nam suggests including the regulation on manifest lack of legal merit/early dismissal as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure its enforceability.

Draft provision 5: Security for costs

To realistically address the issue of costs, Viet Nam proposes considering the following matters when drafting this provision:

(i) Only the State can request security for costs since the failure to pay costs under an arbitration award often comes from the investor.

(ii) The security for costs is mandatory in cases with third-party funding.

In addition, Viet Nam suggests including the regulation on security for costs as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure its enforceability.

Draft provision 11: Consolidation and coordination of proceedings

In drafting this provision, Viet Nam suggests taking reference to Article 56 of ICSID Additional Facility Rules to address more specific consolidation scenarios in arbitral cases.

In addition, Viet Nam suggests including the regulation on consolidation and coordination of proceedings as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure its enforceability.