

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

Viet Nam takes this opportunity to express its continued support of the ongoing investor-State dispute settlement (ISDS) reform process at Working Group III and thank the Secretariat for their tremendous work.

Based on the Working Paper numbered A/CN.9/WG.III/WP.231, Viet Nam raises comments on specific draft provisions below. 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 provisions. Viet Nam reserves the right to submit additional comments on the above-mentioned issue.

Draft provision 12: Right to regulate

Viet Nam welcomes efforts to address the right to regulate of the State in ISDS.

However, the essential function of the State is to serve the public interest, and the State takes many measures, including promulgating policy to carry out this function. Therefore, the words "*in the public interest*" after the words "*right to regulate*" may be redundant and create an additional obligation for the State to prove that its policy or measure is for the public interest. Besides, the list of public interest may not be exhaustive and needs to be supplemented with more comprehensive text later.

Regarding the second paragraph, Viet Nam proposes adding international commitments to the list of deference. This expansion ensures that the Tribunal considers not only domestic policies but also the State's international commitments.

Detailed proposed text of Viet Nam is below:

*“1. Nothing in the Agreement shall be construed as preventing the Contracting Parties from exercising their right to regulate ~~in the public interest~~ and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to **the public interest, including but not limited** to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].*

*2. When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to the development and implementation of domestic policies **and/or international commitments**, the right to regulate ~~in the public interest~~ and the right to adopt, maintain and enforce measures sensitive to **the public interest, including but not limited** to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].*

3. No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, if the measure alleged to constitute a breach of the Agreement was adopted by the

Contracting State to protect public health, public safety or the environment (including compliance with the Paris Agreement or any principle or commitment contained in articles 3 and 4 of the United Nations Framework Convention on Climate Change), the promotion and protection of cultural diversity, or [...]”

Draft provision 13: Evidence

The draft provision 13 only addresses general principles of taking evidence during the proceedings. It, however does not address the problems arising from ISDS practices, namely illegal taking of evidence, falsification, or fabrication. 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 the following drafting suggestion:

(i) The Tribunal shall not consider evidence which has been proved to be collected not in accordance with the law of the State where such evidence is collected.

(ii) The Tribunal shall not consider evidence with clear signs of falsification or fabrication.

Draft provision 20: Security for costs

Viet Nam concurs with the draft provision 20. However, with the aim to realistically address the issue of costs, Viet Nam proposes considering the following drafting suggestions:

(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 are mandatory in cases where there is third party funding.

Draft provision 21: Third-party funding

Viet Nam concurs with the draft provision 20. However, the draft does not fully address concerns by member States expressed during previous sessions. Viet Nam proposes the following:

(i) to revise the paragraph 3 as follows:

“3. In addition, upon request a a disputing party or at its own discretion, the Tribunal may require the disputing party to disclose:”

(ii) to add to paragraph 6 the following words:

“(c) When Third-party funding arrangement allows the third-party funder to control or influence the management of the claim or the proceeding;”