SINGAPORE'S WRITTEN COMMENTS ON DRAFT PROVISIONS CONTAINED IN A/CN.9/WG.III/WP.248 ("WORKING PAPER 248")

Pursuant to paragraph 125 of A/CN.9/1195, Singapore provides our written comments on Draft Provisions 21 and 22 set out in Working Paper 248. Singapore reserves the right to submit additional comments or to adjust our positions in the future.

Draft Provision 21: Joint Interpretation

On paragraph 4 of the draft provision and paragraph 11 of Working Paper 248, regarding the timeline for issuance of a joint interpretation, Singapore considers that a joint interpretation should be issued expeditiously within the timeframe provided for, and should be issued as early on in the arbitral proceedings as possible. This provides certainty to the investor-claimant and the tribunal, and prevents abortive work. Singapore considers that a 90-day period in paragraph 4 seems appropriate. That said, issuing a joint interpretation within 90 days may be challenging in some instances, especially where there are multiple Parties to the Agreement. Thus, Singapore proposes allowing for a one-off extension of the period, on agreement of Parties without need for leave from the tribunal. This creates flexibility to cater to situations where the issue for joint interpretation is complex. Nevertheless, there should be certainty as to the maximum duration the tribunal should wait for the issuance of a joint interpretation. This certainty can be provided for by imposing a cap on the period of extension. Singapore suggests that the period of extension be capped at 90 days. This would strike an appropriate balance between certainty and the need to give Parties adequate time to issue a joint interpretation.

On paragraph 5 of the draft provision and paragraph 12 of Working Paper 248, regarding the temporal scope of the binding effect of a joint interpretation, Singapore considers that where an arbitral award has not been rendered, the tribunal is bound by the joint interpretation that is issued within the timeline stipulated in the draft provision. As a default position, a joint interpretation should not have retrospective effect – it should not affect arbitral awards rendered prior to the issuance of the joint interpretation. Where a joint interpretation is issued after an arbitral award is rendered, it should also not affect subsequent proceedings related to that award, including setting aside, annulment or appeal proceedings. This is so that the joint interpretation exercise does not risk providing a backdoor appeal mechanism.

On paragraph 13 of Working Paper 248, Singapore considers that Parties to the Agreement should be given the option of specifying the temporal scope of the joint interpretation. In this regard, Singapore proposes the inclusion of the following

sentence in paragraph 5: "Parties to the Agreement may decide that a joint interpretation shall have binding effect from a specific date." It should, however, be clearly understood that paragraph 5 is without prejudice to what has been otherwise agreed in existing international investment agreements.

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

On paragraph 15 of Working Paper 248, regarding whether paragraph 1 of the draft provision should be subject to paragraph 4, Singapore considers that the current version of draft provision is appropriate, because it can be read harmoniously with both Rule 68 of the ICSID Arbitration Rules (for arbitrations governed by the ICSID Arbitration Rules), as well as Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (for arbitrations governed by the UNCITRAL Rules on Transparency).

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