

Singapore would first like to express our appreciation to the Secretariat for the excellent initial drafts on mediation. These drafts capture the spirit and range of discussions in the Working Group, and provide a good starting position for more in-depth discussions in the Working Group. Singapore's comments on the draft model clauses and the draft guidelines are set out below, and Singapore has no objections to the publication of these comments.

## **SINGAPORE'S COMMENTS ON THE DRAFT MODEL CLAUSES ON MEDIATION**

**Singapore:** As a general observation, Singapore understands that the final product of the draft clauses is a set of "model clauses for use in investment treaties" (para. 14 of the draft clauses), which States can graft onto existing or future investment treaties. We understand this to mean that the final product can contain various options. Singapore's comments on the draft model clauses are provided on this basis.

### **DRAFT PROVISION 1**

#### **Nature of the offer to mediate, timeframe and level of conduciveness**

##### **No clause on mediation**

##### **Option 1a – Reference to mediation as an available means for solving disputes**

*Each party to the dispute may, [before and during the cooling off period,][at any time,] request the commencement of a mediation procedure.*

##### **Option 1b**

*In the event of an investment dispute, the parties to the dispute should initially seek to resolve the dispute through non-adversarial means, which may include consultation, negotiation, and third party procedures, such as good offices, conciliation, or mediation. The parties to the dispute may, at any time, agree to have recourse to such procedures.*

##### **Option 2 – Reference to an undertaking to commence mediation**

*1. The parties to the dispute shall commence a mediation procedure [within – days from ---] and attend the first meeting convened by the mediator. If any party does not wish to pursue mediation after having attended the first meeting or at any time thereafter, it shall communicate a written notice to the mediator and to the other party terminating the mediation procedure.*

*2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings [arbitration – standing mechanism].*

##### **Option 3 – Mandatory mediation**

*1. The parties shall submit their dispute to mediation [within – days from --]. If the parties cannot reach an agreement within [6][9] months after the [commencement of*

*the mediation procedure][appointment of the mediator], the dispute shall, upon request of any party, be submitted to [arbitration][other ISDS method].*

*2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings (arbitration).*

**Singapore:** Singapore would like to propose the inclusion of an Option 1b, which is our preferred option. Option 1b lies *in between* the strictly voluntary and mandatory approaches. Our proposed Option 1b is in key respects different from Option 1. Option 1b would create a *strong expectation* that parties should first have recourse to the non-adversarial means stated, instead of immediately commencing arbitration. It anchors the parties to this as the default position. This can help achieve the objective of encouraging the use of such non-adversarial means (including mediation), and overcome potential concerns that proposing to conduct such procedures would be a sign of weakness. At the same time, it permits parties to take into account the unique dynamics and circumstances of their case, and avoid prematurely entering into mediation when the circumstances may not be ripe to do so.

Our proposed Option 1b refers to mediation as one of a suite of non-adversarial dispute resolution tools at the parties' disposal. This is not intended to detract from Singapore's strong support for the use of mediation, or dilute the focus of the draft model clauses on mediation, but rather, seeks to reflect the reality and practice that States may find it prudent to clarify the range of dispute resolution options available to the disputing parties, so as to provide the appropriate signalling from the outset. Singapore's suggested draft is adapted from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the US-Mexico-Canada Agreement. Singapore has adopted approaches similar to Option 1 in other of its recent treaties. For example, the EU-Singapore Investment Protection Agreement and the Singapore-Indonesia BIT both include mediation as a stand-alone dispute settlement mechanism.

Singapore welcomes the common element across the various options, providing that mediation should be available to a disputing party "at any time".

## **DRAFT PROVISION 2**

### **Relationship with arbitration and other ISDS mechanisms**

*1. This paragraph shall apply if the disputing parties agree to mediate before the investment dispute has been submitted for adjudication. Upon the submission of the dispute to adjudication, if the disputing Parties agree, mediation may continue while the dispute proceeds for resolution before an ISDS tribunal. If the disputing parties agree, the tribunal shall stay its proceedings until any disputing party decides to terminate the mediation.*

*2. If the disputing parties agree to mediate after the investment dispute has been submitted to [arbitration] / [standing mechanism], upon request of all disputing*

parties, the tribunal shall stay its proceedings until any disputing party decides to terminate the mediation ~~the mediation is terminated~~.

3. All timelines pursuant to [arbitration] / [standing mechanism] shall be ~~are~~ suspended from the date on which [a request for a stay is made by all disputing parties] ~~[the disputing parties agreed to have recourse to mediation]~~ and shall resume on the date on which ~~either~~ any disputing party decides to terminate the mediation. Any disputing party may terminate the mediation at any time by written notice to the mediator and to the other disputing party.

**Singapore:** Paragraphs 1 and 2 convey separate ideas. We interpret paragraph 1 as applying where mediation is commenced *before* the submission of a dispute, whereas paragraph 2 applies where mediation is commenced *after* the submission of a dispute. We have thus suggested edits to reflect this idea. We have also included in paragraph 3 an alternative date from which a stay of proceedings is to be calculated.

In terms of timelines, Singapore's view is that other ISDS proceedings can be stayed for the duration of the mediation subject to the agreement of the disputing parties. A stay should not be granted automatically. Otherwise, a disputing party intending to frustrate or delay the ISDS proceedings could use mediation to do so.

### **DRAFT PROVISION 3**

#### **Application of rules on mediation**

1. Mediation of an investment dispute shall be conducted in accordance with ~~either:~~ (a) the ICSID Mediation Rules, ~~;~~ (ii) the UNCITRAL Mediation Rules, ~~;~~ or (iii) the IBA Rules for ~~Investment~~ Investor-State Mediation; or ~~, and the provisions of this section.~~ (b) other mediation rules as may be agreed by the disputing parties, which may include the mediation rules of the institution to which the disputing parties have agreed to submit the mediation.

1bis. [In the event of any inconsistency between the mediation rules in paragraph 1 and the provisions of this section, this section shall prevail.]

2. The mediation is to be conducted by [one mediator] / [two co-mediators] unless otherwise agreed by the disputing parties.

#### **3. Option 1**

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.

#### **Option 2**

The disputing parties shall endeavour to agree on the mediator no later than [X] days after the receipt of the reply to the request for mediation. If the disputing parties cannot agree on the mediator within such timeframe, the disputing parties may request that a selected appointing authority select the mediator.

**Singapore:** Singapore supports the inclusion of draft provision 3. For paragraph (1), the accompanying commentary to Draft Provision 3 could explain (i) the rationale for why the proposed model clause makes reference to several different rules, namely, that advance consent to the applicable rules would reduce time and costs downstream, and (ii) hence, that the Contracting Parties to the treaty should consider the specific mediation rules and/or mediation institutions they wish to refer to in the treaty, which could be in addition to or in place of the specific rules currently listed in the Model Clause.

Further, we suggest further text to provide that disputing parties should be able to choose their preferred mediation rules, which may include the mediation rules of the centre or institution to which parties have agreed to submit their mediation. Drawing on the Secretariat’s comment in paragraph 39 that a “possible alternative to providing for the application of mediation rules could be to refer to a mediation centre that would provide for a comprehensive mediation framework,” the mediation rules agreed to by the parties could include the mediation rules of the centre to which parties have agreed to submit their mediation.

Further, in *1bis*, we suggest inserting a provision that would resolve an inconsistency between the mediation rules in paragraph 1 and the provisions of this section. Assuming that the provisions in this section are to be grafted into IIAs, we take inspiration from the general approach adopted for ISDS arbitration – that is to say, the specific procedural provisions in an IIA normally modify/prevail over those contained in the ICSID Arbitration Rules, UNCITRAL Arbitration Rules, *etc*, to the extent of any divergence.

In relation to the method of appointing a mediator in paragraph 3, we suggest a second option for the Working Group’s consideration, namely that there is a timeframe by which disputing parties shall agree on a mediator, failing which, they may request that an appointing authority select the mediator.

Lastly, as a matter of sequencing, we suggest that this provision come after the procedures for commencing mediation and be placed after draft provision 4 (written notice).

#### **DRAFT PROVISION 4**

##### **Written notice**

*1. To commence mediation, a party shall communicate to the other party a request for mediation (“request”) in writing, ~~which shall contain:~~*

~~Option 1:~~

- ~~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 [brief/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.~~

~~Option 2:~~

~~A brief summary of the factual and legal basis of the complaint and information on the subject matter of the claim made or received.~~

**Singapore:** Singapore agrees that it should be expressly provided that a request for mediation must be made *in writing*. The provision need not be prescriptive, or impose too many specific formalities, on the detailed information to be included in the request. This would keep the process simple and quick for parties to commence mediation, without having to first assemble detailed information or comprehensively articulate the legal basis of the dispute in order to protect their legal positions. Moreover, such information might already be available to the other disputing party, depending on the stage of the dispute. For instance, if a party requests mediation after arbitration proceedings have already commenced, the information set out in options 1 and 2 should already be known to the disputing parties.

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~~2. The other party shall acknowledge receipt of any request for mediation within [14] days of its receipt.~~

~~Option 1:~~

~~The addressee of the request shall give [sympathetic][due] consideration to it and accept or reject it in writing within [15][30] days of receipt.~~

~~Option 2:~~

~~The other party shall acknowledge receipt of any request for mediation within [14] days of its receipt. The disputing parties shall commence mediation within [20] days of the date of the request, or such other period as they may agree.~~

**Singapore:** Singapore offers the drafting suggestions as tracked above. Singapore suggests that the term with “sympathetic consideration” could be used instead of the term “due consideration”, so as to signal that disputing parties should consider a request for mediation favourably. The first drafting suggestion is adapted from Article 2(2) of Annex 6 of the EU-Singapore Investment Protection Agreement, Article 16(1) of the Indonesia-Singapore BIT (2021), and Article 2(3) of Annex 10 of the EU-Viet Nam Investment Protection Agreement. Paragraph 2 (“*The other party shall acknowledge receipt of any request for mediation within [14] days of its receipt*”) is not necessary if

Option 1 is adopted. Thus, we suggest moving paragraph 2 to the first sentence of Option 2.

## **DRAFT PROVISION 5**

### **Without prejudice provision**

*Recourse to mediation is without prejudice to the legal position or rights of any the disputing parties.*

**Singapore:** Singapore strongly supports draft provision 5 as it is important to be clear that mediation is undertaken on a “without prejudice” basis. The commentary to the draft model rules could also elaborate on what this means, for example, that a disputing party shall not rely on or introduce as evidence, nor shall any adjudicatory body take into consideration: (a) positions taken by a disputing party in the course of the mediation procedure; (b) the fact that a disputing party has indicated its willingness to accept a mediation solution; or (c) advice given or proposals made by the mediator.

## **DRAFT PROVISION 6**

### **Confidentiality and transparency**

1.

#### Option 1

Mutually agreed solutions shall be made publicly available.

#### Option 2

Mutually agreed solutions may, with the consent of the disputing parties, be made publicly available.

2. Without prejudice to paragraph 1, unless the disputing parties agree otherwise, all steps of the mediation procedure, including any advice that may be given or solution that may be proposed, are confidential. However, any disputing party may disclose to the public the fact that mediation is taking place.

**Singapore:** Whether mutually agreed solutions should be made public should be left to the Working Group to consider. Singapore suggests including an alternative option where mutually agreed solutions may be made public with the consent of the disputing parties, for the Working Group’s consideration (see our suggested drafting edits in Option 2). Singapore acknowledges that there can and there should be more transparency in the investor-State dispute settlement process. That said, Singapore wonders whether publication of mutually agreed solutions by default might stymie the frankness and openness of exchanges during the mediation process.

Separately, in relation to the confidentiality of the *mediation process itself*, we suggest including a paragraph which states that all steps of the mediation procedure are confidential, but that any disputing party may disclose the fact that mediation is taking place, for the Working Group’s consideration. In our view, this is a non-controversial principle that flows from the confidentiality of the mediation process. This paragraph

is adapted from Article 6(3) of Annex 6 of the EU-Singapore Investment Protection Agreement.

## **DRAFT PROVISION 7**

### **Settlement Agreement**

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.
2. Any settlement agreement resulting from a mediation shall comply with the requirements for reliance on a settlement agreement provided for under the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted on 20 December 2018 (“Singapore Convention on Mediation”), [provided that one or both of the Contracting Parties are signatories to the Singapore Convention on Mediation].

**Singapore:** Singapore supports the inclusion of draft provision 7.

For paragraph 2, Singapore does not support the inclusion of the words in square brackets “[provided that one or both of the Contracting Parties are signatories to the Singapore Convention on Mediation]”, as this would be inconsistent with the objective of the paragraph. As pointed out by the Secretariat in paragraph 54, a settlement agreement may need to be enforced in a country other than that of a Contracting State to the investment treaty. In our view, the requirement in paragraph 2 – for the settlement agreement to comply with Article 4 of the Singapore Convention – is meant to facilitate enforcement of the settlement agreement in any State Party to the Singapore Convention, and the focus is therefore on the *location of enforcement* and not necessarily the Contracting Parties to the IIA in question.

## **SINGAPORE’S COMMENTS ON THE DRAFT GUIDELINES ON MEDIATION**

**External:** The ability of the disputing parties to enforce the resulting mediated settlement agreement can be an important consideration for disputing parties in deciding whether to agree to mediation to begin with. While the expectation remains that the disputing parties would voluntarily comply with the mediated settlement agreement, the accessibility of avenues for enforcement may nevertheless form part of the risk assessment that parties undertake when considering their dispute resolution options.

The centrepiece of the enforcement framework for mediation, is the Singapore Convention on Mediation. The Singapore Convention makes it easier for parties to directly enforce mediated settlement agreements generally.<sup>1</sup> It can apply regardless of

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<sup>1</sup> The disputing parties may take note of whether the relevant jurisdictions have made a declaration under Article 8(1)(a) of the Singapore Convention, and the scope of that declaration. (Article 8(1)(a) provides that a Party may declare that it shall not apply the Singapore Convention to settlement agreements to which it is a party, or to which



whether the parties engage in mediation prior to commencing arbitration or litigation, or conduct a mediation in parallel with an arbitration or litigation.

We suggest including the above points in a section on the topic of enforcement in the proposed “Guidelines for Participants in Investment Mediation”. This could be placed under the sub-section on “Policy Considerations – Anchoring Mediation in the State’s Domestic and International Legal Framework”.

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any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.)