ENHANCING THE RULE OF LAW IN INVESTOR-STATE DISPUTE SETTLEMENT - A PROPOSED PROTOCOL FOR COMMUNICATION WITH NON-DISPUTING STATES ON ISSUES OF TREATY INTERPRETATION

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I. INTRODUCTION

1. The present international investment regime is made up of a wide range of bilateral, regional, plurilateral and multilateral agreements. Binding agreements exist mainly at the bilateral, regional and plurilateral levels, while agreements at the multilateral level are mostly of a non-binding nature.[1] The subject matter of existing agreements covers a broad spectrum of issues, including admission and treatment of foreign investment, promotion of foreign investment, investment insurance, aspects of corporate conduct, taxation, competition and jurisdictional matters, and dispute settlement procedures.[2]

2. The number of international investment agreements continues to grow. In 2017, 18 new international investment agreements (9 bilateral investment treaties (BITs) and 9 treaties with investment provisions (TIPs)) were concluded, bringing the total to 3,322 treaties (2,946 BITs and 376 TIPs) at year-end of which 2,638 were in force at year-end.[3] Between January and May 2018, 6 international investment agreements were signed (Australia-Peru Free Trade Agreement, Comprehensive and Progressive Agreement for a Trans-Pacific Partnership Agreement, Republic of Korea and the

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1 Richard Blackhurst & Adrian Otten, WTO Report, "Trade and Foreign Direct Investment", 9 October 1996, available at <https://www.wto.org/english/news_e/pres96_e/pr057_e.htm>.

2 *Ibid*.

3 UNCTAD IIA Issues Note: Recent Developments in the International Investment Regime, 30 May 2018, p2.

Republics of Central America Free Trade Agreement, Brazil-Suriname BIT, Brazil-Ethiopia BIT, and United Arab Emirates-Paraguay BIT).[4] As of May 2018, there are in total 3328 international investment agreements which have been signed, independent of whether the agreements have entered into force (international investment agreements for which termination has entered into effect are not included).

3. The growing number of international investment agreements is a testament to investment agreements as powerful tools to attract foreign investments. Attracting foreign investment is an engine to propel continued economic growth of a State. Foreign investment benefits not only the investor but also the State receiving the investment. The positive effects of foreign investment on a receiving State are wide ranging and include the provision of financing, management experience, technological advances, and the establishment of commercial ties with other States that may be leveraged to increase future exports and needed imports, all of which would in turn help local businesses flourish and tap on foreign expertise.

4. To attract foreign investment, a State must provide the assurances that investors need before they decide to invest. The main concerns for investors are investment protection and a fair return on their investment. Investors invest with the aim of making a profit and/or acquiring property and they expect to keep such profits and property. Investors will typically evaluate the risks involved in any foreign investment, as such risks would affect the profit margins. Such risks include political and legal risks. In a State where there is political instability, investors would take into account the risk that their rights under the investment may not be preserved or they may be

[4] UNCTAD IIA Issues Note: Recent Developments in the International Investment Regime, 30 May 2018, p2. See also UNCTAD's IIA Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu>.

subject to the arbitrary demands of a government. Investors are more reluctant to invest in such States given the increased levels of uncertainty in securing profit margins. Further, in a State where bribery and corruption are rampant in the legal system, an investor would take into account the risk that it has no meaningful recourse in the courts should its investment be seized or damaged. If such concerns are not assuaged, investors often decide not to invest in that State. That in turn results in the State in question missing out on the benefits that those investments would have brought.

5. One way to assuage potential investors' concerns is by the use of international investment agreements. These agreements can serve to encourage foreign investment by guaranteeing certain standards of investment protection to foreign investors. Typical clauses that serve to protect investments contained in such agreements include: (a) clauses providing that a State cannot expropriate an investment without compensation; (b) clauses on fair and equitable treatment of foreign investors (which would cover unprincipled or arbitrary conduct of a State); and (c) clauses on the protection of any investment agreements entered into between a State and foreign investors (which transform the breach of a contract between a State and a foreign investor into a breach of the treaty).

6. International investment agreements thus undergird the rule of law in the international investment regime by putting in place a set of rules that serve to attract foreign investment by giving investors the confidence that the risk of arbitrary actions of a State is confined. For the host State, the obligations that bind the State under international investment agreements lay the foundation for good governance, which is a key ingredient of economic growth. Creating an investment-friendly regime through international investment agreements thus benefits both the host State and the foreign investor.

7. However, the provision of investment protection standards in international investment agreements would be of little comfort if there were no effective way for those standards to be enforced. Investors must be able to enforce such standards against a State otherwise these provisions would amount to empty promises. It is for this reason that arbitration clauses are routinely included in international investment agreements, providing an avenue to investors to enforce investment protection standards against a State. These clauses often provide for ICSID or PCA arbitrations under the ICSID Arbitration Rules or under the UNCITRAL Arbitration Rules.

8. Such arbitration clauses allow investors from the home State, which is a party to an international investment agreement, to commence arbitration proceedings against the other party to that agreement, i.e., the host State in which the investment was made. An international tribunal will then be constituted to decide whether the respondent State has breached its international law obligations to abide by the terms of the investment agreement. For example, the international tribunal may well be asked to determine whether certain actions by a State amount to expropriation without due compensation. If so, the tribunal may order the respondent State to compensate the claimant investor. That award would be enforceable as extensively worldwide as commercial arbitration awards are under the New York Convention.

9. Many successful claims have been brought by investors against States and this has given credibility to investment treaty arbitration as well as to investment agreements themselves. With the rule of law applying to investment agreements in this way, the efficacy of investment agreements in incentivising foreign investment is facilitated.

10. It was not always this way. Before the advent and popularisation of investment treaty arbitration, investment disputes were resolved by arbitration only where consents to arbitration could be obtained from the respondent State after the dispute had arisen. This was usually as a result of pressure from the claimant investor's home State, occasional government-to-government negotiations of settlements requiring great diplomatic effort, and unending disagreement between developed and less developed countries over the content of applicable international law.[5] Johnson and Gimblett argue that history reveals that the fundamental value of the current BIT regime is twofold. First, the existence of more than 2,700 BITs may not have resolved the debate over what customary international law requires of a State when it expropriates alien-owned property, but it has rendered that debate largely academic.[6] Secondly, the fundamental value is found in the arbitration provisions that allow investors to resolve disputes with host States directly, without the involvement of the investor's home State.[7]

11. The second fundamental value identified by Johnson and Gimblett is the practical manifestation of the rule of law in the international investment regime. Provisions in international investment agreements that allow for investor-state dispute settlement by independent adjudication advance the procedural aspect of the rule of law in the international investment regime. F.A. Hayek describes the rule of law in this context as meaning:

> "that the government is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual

5 O. Thomas Johnson Jr. and Jonathan Gimblett, "From Gunboats to BITs: The evolution of modern international investment law", Yearbook on International Investment Law & Policy 2010-2011, p690.
6 *Ibid*.
7 *Ibid*, p691.

affairs on the basis of this knowledge. Thus, within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts".[8]

12. This captures the fundamental ingredients of investor-state dispute settlement that advance the rule of law in the international investment regime: legal procedural certainty and a level playing field among disputing parties (investor and State). Investor-state dispute settlement procedures enhance the rule of law in the international investment regime by providing a depoliticised forum where the rules are applied in an independent and impartial manner and where all parties must abide by the same rules.

13. However, the ability to resolve disputes without involving the investor's home State has another effect. Arbitral tribunals are often called upon to interpret treaties without the benefit of submissions from the investor's home State. This occurs simply because the investor's home State is a Non-Disputing State and therefore, is not party to the arbitral proceedings. Thus, unless it intervenes or is invited to participate, it would not ordinarily have any ability to contribute to the tribunal's consideration of the proper interpretation of the treaty in question.

14. Being the other party to the treaty, the Non-Disputing State is actually in a position to make significant contribution to the interpretation of the treaty. Moreover, the Non-Disputing State certainly has interests in ensuring that the tribunal correctly interprets the BIT. In addition to wanting its national who has invested in the other State to be

[8] Hayek (1944), The Road to Serfdom, Routledge Press, UK.

dealt with appropriately, decisions of tribunals are thereafter relied on by other tribunals even though there is no strict system of binding precedent.

15. In certain cases the treaty interpretation of arbitral tribunals has led to Non-Disputing States expressing their disagreement with the tribunal's interpretation after the tribunal's award came to light. For example, the Swiss government expressed disagreement with the arbitral tribunal's conclusion in *SGS v Pakistan* on the meaning of Article 11 of the Swiss and Pakistan bilateral investment treaty stating, "the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which … runs counter to the intention of Switzerland when concluding the Treaty".[9]

16. In other cases, tribunals have expressed the view that input from a Non-Disputing State would be valuable to their treaty interpretation analysis. It is possible that in some cases, investors may have that view as well.

17. There is growing recognition that there is value to tribunals having a Non-Disputing State's submissions on treaty interpretation.[10] Article 5(1) of the UNCITRAL Rules

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[9] See Yannaca-Small, K. (2006), "Interpretation of the Umbrella Clause in Investment Agreements", OECD Working Papers on International Investment, 2006/03, OECD Publishing, available at <http://dx.doi.org/10.1787/415453814578>, at pp15-16. See also The People's Republic of China's disagreement with the Singapore Court of Appeal's decision in *Sanum v Lao* on the coverage of the PRC and Lao bilateral investment treaty, stating that "the geographical scope of application of the PRC-Laos investment agreement is a question of fact concerning acts of state, which is up to the contracting parties to decide. China has confirmed twice in diplomatic notes that the China-Laos investment agreement does not apply to Macao SAR. The ruling made by the Singaporean court on this question of fact is incorrect." PRC's Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016 available at <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml>.

[10] See ICSID Arbitration Rule 37; Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration; Statement of the Free Trade Commission on Non-Disputing Party participation, October 7, 2003), available at <https://www.state.gov/documents/organization/38791.pdf>; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic); *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29; M. Kinnear, "*Transparency and Third Party Participation in Investor-State Dispute Settlement*," Presentation, Symposium co-organized by ICSID, OECD and UNCTAD, "Making the Most of International Investment Agreements: A Common Agenda" (Paris, December 12, 2005), available at <http://www.oecd.org/dataoecd/6/25/36979626.pdf>; OECD, "*Transparency and Third Party Participation*

on Transparency in Treaty-based Investor-State Arbitration expressly recognises that arbitral tribunals may invite the Non-Disputing State to submit on issues of interpretation. However, the mechanics of how such an invitation should be issued is unclear and the reality is that it is only in a small fraction of cases that such submissions are actually solicited or made.

18. UNCTAD also recognises the potential value of having the Non-Disputing State's input by encouraging that treaties provide for their authoritative joint party interpretation.[11] The goal is to clarify the content of a treaty provision and narrow the scope of interpretative discretion of tribunals. It allows treaty parties to voice their positions on a specific clause without undertaking a comparatively higher-cost and more time-consuming amendment or renegotiation of the treaty.[12] This of course requires the States in question to be in agreement on the interpretation.

19. In line with this, the ASEAN Comprehensive Investment Agreement of 2009 ("***ACIA***") (which coexists with the BITs in force between ASEAN Member States) provides that the arbitral tribunal may request a joint interpretation on any provision of the ACIA that is at issue in the dispute.[13] However, the steps that the arbitral tribunal should

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in Investor-State Dispute Settlement Procedures," Working Paper No. 2005/1 (April 2005) prepared by Katia Yannaca-Small, available at <http://www.oecd.org/dataoecd/25/3/34786913.pdf>; B. Legum, "*Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*," 19 ICSID Rev.—FILJ 349 (2004), available at < https://academic.oup.com/icsidreview/article/19/2/344/744275/Lessons-Learned-from-the-NAFTA-The-New-Generation>; A. Mourre, "*Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitrations?*", 5 L. & Prac. of Int'l Cts. & Tribs. 257 (2006); A. Bjorklund, "*The Participation of Amici Curiae in NAFTA Chapter Eleven Cases*," available at <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/participate-e.pdf>; Eloise Obadia, "*Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*", (2007) 22 ICSID Review – Foreign Investment Law Journal 349, available at < https://academic.oup.com/icsidreview/article-pdf/22/2/349/1760855/22-2-349.pdf>.

11 UNCTAD IIA Issue Note No. 2, 2017, "Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties" (6 June 2017), p9-10; WIR 2017, pp130-133.

12 WIR 2017, pp132-133.

13 Article 40(2) reads as follow: "The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request." ASEAN Comprehensive Investment Agreement, February 26, 2009,

take to communicate such a request are not addressed in the ACIA. Specifically, who the arbitral tribunal should contact to make that "request" and the form of the request are not dealt with in the ACIA. Additionally, there is no provision in the ACIA for a request to be made by a national court reviewing an arbitral award issued by an investor-State tribunal nor by an investor claimant.

20. Issues have also arisen in the past when Non-Disputing States have provided input only for the investor claimant to assert that the input did not come from the proper authority in the Non-Disputing State.[14] This can lead to significant waste of time and resources as one party seeks to establish that the input comes from the appropriate and authoritative source within the Non-Disputing State, whilst the other party seeks to cast doubt on that.

21. In such a context, it is proposed that it would be beneficial to have a protocol for handling requests for Non-Disputing States to provide input on the interpretation of a treaty to which it is a party. Such a protocol does not seek to impose any new obligations on ASEAN Member States. Rather, the proposed protocol is facilitative and allows ASEAN Member States to properly receive requests and to respond as they wish. ASEAN Member States will be able to decline any such requests if they prefer but where they believe it would be in their interests to inform the decision making process, the proposed protocol seeks to create an avenue for them to effectively and authoritatively provide their input to investor-State arbitral tribunals and national courts reviewing the decisions of such tribunals.

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available at <http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf>.

[14] See *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [34].

22. It is hoped that by establishing such a protocol, engagement with Non-Disputing States will be encouraged, and the quality of arbitral treaty interpretation thereby improved. This can only benefit the rule of law. Even where States choose not to participate, that at least will be a conscious choice which will reflect that State's assessment of particular cases and its own policy decisions on the level of its participation in such processes.

II. THE PROPOSED PROTOCOL

23. The proposed protocol is described in the following paragraphs and a draft of the protocol is at Annex A.

Request by Arbitral Tribunal, National Court or Disputing Party

24. Article 2 of the proposed protocol recognises that a request may be made to a Non-Disputing State for it to make submissions about the interpretation of provisions of the treaty which has given rise to an investment arbitration.

25. That request may be made by the arbitral tribunal, the claimant investor, the respondent State or even a national court hearing an appeal against an arbitral tribunal's decision on jurisdiction or an application to set aside or enforce such an arbitral tribunal's award.

26. The proposed protocol provides clarity on how the party making the request can convey that request to the Non-Disputing State. The Directory appended to the protocol sets out clearly the office or representative that such requests should be sent to for each ASEAN Member State and the contact details where the request should be sent. Each State is also able to designate the language the request must

be in and the manner in which the request must be conveyed (e.g. by letter fax or email). In this way, the requesting party can be confident that the request has been sent to the appropriate office or representative of the Non-Disputing State and that it will receive due attention.

27. The proposed protocol also gives some guidance about what the request should contain though it is not intended that the guidance provided in Article 2.4 should be exhaustive, as is clear from Article 2.5.

Response by the Non-Disputing State

28. Article 3.1 of the proposed protocol provides for a 30-day period for an initial response to the request to be provided. This deadline seeks to ensure that the arbitral or court proceedings are not unnecessarily delayed by the Non-Disputing State. In this regard, Article 3.3 of the proposed protocol makes it clear that the arbitral tribunal or national court retains the discretion whether or not to wait for a Non-Disputing State's substantive response.

29. Article 3.2 of the proposed protocol sets out a menu of responses for the Non-Disputing State. It can choose to say that it will not be providing a substantive response. No reasons for such a decision are required. Alternatively, it may say that it will be providing a substantive response on a specified date. Yet another alternative is for the Non-Disputing State to say that it is still undecided as to whether it will be providing a substantive response and needs a specified period of time to decide whether a substantive response will be forthcoming. The goal of this menu of responses is not to limit the Non-Disputing State unnecessarily but, recognising that

governmental processes do take time, to enable it to consider the matter whilst keeping the requesting party informed.

30. Article 3.4 of the proposed protocol, which requires that the initial response and/or any subsequent written communication from the Non-Disputing State be copied to all parties to the dispute and the arbitral tribunal or national court (as the case may be), seeks to ensure that there is transparency in the entire process of seeking input from the Non-Disputing State.

Written Request by Non-Disputing State

31. At times, a Non-Disputing State might come to know of an arbitration or a reviewing court proceeding even though no request has been made of it. That State may wish to offer its views on the interpretation of the treaty to the arbitral tribunal or national court and Article 4 of the proposed protocol seeks to create an avenue for this.

32. The proposed protocol requires the Non-Disputing State to specify the issues on which it wishes to make written submissions and the amount of time needed to make those written submissions. This enables the arbitral tribunal or national court to appropriately determine whether the Non-Disputing State's written submissions would be relevant and necessary to the resolution of the dispute put before it. It is stressed that the input must concern the interpretation of the treaty in question and/or whether there is any common agreement between the parties to the treaty on an interpretation of the treaty and any evidence thereof. This limitation serves to exclude other unnecessary interventions in the arbitral or court proceedings by the Non-Disputing State.

33. The proposed protocol envisages that the Non-Disputing State's written request is to be sent to the designated office or representative of the State which is party to the arbitral or court proceedings (as specified in the Directory at Appendix A), who shall then convey the request to the arbitral tribunal or national court in a manner consistent with the applicable procedural rules.

34. It is recognised that there are other ways for the request of a Non-Disputing State to be made, directly or indirectly, to a tribunal or court. It may well be that additional avenues can be included in the protocol.

35. The proposed protocol does not specify a deadline for an arbitral tribunal or national court to respond to a written request from the Non-Disputing State as an arbitral tribunal would not be bound to comply with the protocol. However, any tribunal or court would already have its own incentives to be prompt.

Directory

36. The Directory at Appendix A of the proposed protocol allows each ASEAN Member State to specify the designated office or representative who has the authority to deal with the matters covered by the protocol. Further, each ASEAN Member State is to specify the manner (e.g. fax or email) and language in which it wishes to receive the request.

37. The Directory seeks to ensure that there is certainty and clarity in the process of receiving input from the Non-Disputing State. All parties would know exactly who to contact and how to do so in respect of the interpretation of any investment treaty entered into between ASEAN Member States. The Directory would also serve to

eliminate any dispute that the input did not come from the proper authority in the Non-Disputing State.

III. CONCLUDING REMARKS

38. The proposed protocol aims to pave a clear and certain path of communication with Non-Disputing States such that their input can, in appropriate cases, be sought or offered for the more accurate interpretation of treaties entered into by two or more ASEAN Member States. Of course, that input does not have to be followed slavishly by any court or tribunal. Judges and arbitrators must still perform their analysis in the usual manner. However, it is hoped that the additional input will help inform the analysis and ultimately contribute towards more accurate treaty interpretation.

39. This can only reinforce the rule of law in investment treaty disputes. Treaties will be more accurately interpreted. Non-Disputing States will not feel disenfranchised as they have a possible avenue to be heard. A set process for how such involvement by Non-Disputing States can be sought or offered will inject some measure of due process and predictability. All this can be done without too much violence to the arbitral process nor to State sovereignty.

Annex A

DRAFT PROPOSED PROTOCOL FOR COMMUNICATION BETWEEN ASEAN STATES AND INVESTOR-STATE ARBITRAL TRIBUNALS AND SUPERVISORY/ENFORCING NATIONAL COURTS ON THE INTERPRETATION OF TREATIES BETWEEN ASEAN STATES

1. Introduction

1.1. ASEAN Member States have entered into bilateral and multilateral investment treaties among themselves which contain provisions providing for investor state dispute resolution. Generally, in accordance with the terms of such dispute resolution provisions, a dispute arising under such treaties may be submitted to an arbitral tribunal.

1.2. Issues of interpretation of the relevant treaty often arise in such arbitral proceedings. However, not all States party to the treaty would be party to the arbitration and thus would not necessarily be in a position to provide submissions to the arbitral tribunal on the proper interpretation and intent of the treaty. Such issues of interpretation may also arise when a national court within ASEAN is asked to review the arbitral tribunal's decision on jurisdiction or enforce or set aside the arbitral tribunal's award.

1.3. This Protocol sets out procedures for such submissions to be sought from and/or provided by a State which is not a party to a particular arbitration ("**Non-Disputing State**") in respect of the interpretation of provisions of a treaty to which the Non-Disputing State is a signatory. It also identifies the

appropriate authority from each ASEAN Member State which will deal with such matters.

1.4. The purpose of this Protocol is purely facilitative. ASEAN Member States remain at liberty to decide whether it is necessary or desirable for them to provide such submissions to any arbitral tribunal or national court.

2. Request by Arbitral Tribunal, National Court or Disputing Party

2.1. An arbitral tribunal hearing a dispute pursuant to an investor state dispute resolution provision in any investment treaty between any of the ASEAN Member States may choose to make a request to a Non-Disputing State for that Non-Disputing State to provide written submissions to the tribunal on: (a) the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof.

2.2. A national court hearing an appeal against an arbitral tribunal's decision on jurisdiction or an application to set aside or enforce an arbitral award made pursuant to an investor state dispute resolution provision in any investment treaty between any ASEAN Member States, may choose to make a request to a Non-Disputing State for that Non-Disputing State to provide written submissions to the national court on: (a) the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof.

2.3. Any party to an arbitration pursuant to an investor state dispute resolution provision in any investment treaty between any of the ASEAN Member States may make a request to a Non-Disputing State for that Non-Disputing State to make written submissions on: (a) the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof, such submissions to be made to the arbitral tribunal hearing the dispute or to the national court hearing an appeal from a decision on jurisdiction or an application to set aside or enforce an arbitral award issued by such an arbitral tribunal.

2.4. Such a request by an arbitral tribunal, national court or disputing party shall be in writing and should:

2.4.1. identify the provisions of the treaty that require interpretation and specify the question of interpretation that needs to be decided by the arbitral tribunal or national court; and/or

2.4.2. identify any alleged common agreement between the parties to the treaty on the interpretation of the treaty and specify the question that the requesting party invites submissions on in respect of that alleged common agreement.

2.5. The request should also include any other information relating to the dispute that may be relevant to the question of interpretation of the treaty.

2.6. Any such request shall be sent to the Non-Disputing State in the manner specified by that State as set out in the Directory at **Appendix A**. Any such

request to the Non-Disputing State shall be sent to the designated office or representative specified by that State as set out in the Directory at **Appendix A**. Any such request shall be in the language specified by the Non-Disputing State as set out in the Directory at **Appendix A.**

2.7. Any such request shall specify the manner in and address to which the response should be sent by the Non-Disputing State.

3. Response by the Non-Disputing State

3.1. The Non-Disputing State shall provide an initial response in writing within thirty (30) days of the receipt of the request. This initial response and all subsequent responses shall be sent in the manner and to the address specified in the request.

3.2. The initial response shall be one of the following:

3.2.1. The Non-Disputing State acknowledges receipt of the request and states that it will provide a response to some or all of the queries in the request within a specified period of time.

3.2.2. The Non-Disputing State acknowledges receipt of the request and states that it will not be providing any substantive response to the request.

3.2.3. The Non-Disputing State acknowledges receipt of the request and specifies any clarifications it requires before it can inform the requesting party whether or not it will be willing to provide a

substantive response to the request. In that event, the Non-Disputing State shall specify how much time after the clarifications are received it would require before informing the requesting party either that it will not be providing any substantive response or to provide a substantive response to part or all of the request.

3.2.4. The Non-Disputing State acknowledges receipt of the request and states that it is unable to respond within 30 days of receipt of the request and will respond within a specified period of time.

3.3. This Protocol does not seek to require any arbitral tribunal or national court to wait for a Non-Disputing State's substantive response.

3.4. The initial response and/or any subsequent written communication from the Non-Disputing State shall be sent or copied to all parties to the dispute, as well as the arbitral tribunal or national court, as the case may be.

4. Written request by Non-Disputing State

4.1. A Non-Disputing State may on its own initiative wish to provide submissions on the proper interpretation of an investment treaty between any ASEAN Member State and/or whether there is any common agreement between parties to such a treaty on an interpretation of the treaty and any evidence thereof, to an arbitral tribunal hearing a dispute pursuant to an investor state dispute resolution provision in any investment treaty between any of the ASEAN Member States or a national court hearing an appeal against a decision on jurisdiction or an application to set aside or enforce an arbitral award made pursuant to an investor state dispute resolution provision in any

investment treaty between any ASEAN Member States. In that event, the Non-Disputing State shall make a request to the arbitral tribunal or the national court, as the case may be, in the following manner.

4.1.1. The request should be in writing.

4.1.2. The request should be made by the office or representative identified by the Non-Disputing State in the Directory at Appendix A.

4.1.3. The request should specify the issues on which the Non-Disputing State wishes to make written submissions and the amount of time that that State requires to make those written submissions.

4.2. The request should be sent to the office or representative of a State which is party to the arbitral or court proceedings as specified in the Directory at Appendix A, who shall within thirty (30) days of receipt the request, convey the request to the arbitral tribunal or national court in a manner consistent with the applicable procedural rules. If the Non-Disputing State is aware of the contact details of the other parties to the arbitration or court proceedings, and/or the contact details of the arbitral tribunal or national court, the Non-Disputing State may concurrently provide a copy of the request to one or more of them.

4.3. Nothing in this Protocol is intended to prevent a State from utilising any other existing avenue to intervene in arbitral or court proceedings or communicate with an arbitral tribunal or a national court.

5. Maintenance of the Directory

5.1. The Directory at Appendix A specifies the office or representative of each ASEAN Member State which shall have authority to deal with the matters covered by this Protocol.

5.2. ASEAN Member States may amend the details in the Directory by sending the new details to all other designated offices or representatives listed in the Directory.

DRAFT APPENDIX A TO THE PROTOCOL: DIRECTORY

S/No.	ASEAN Member State	Contact Details of Designated Office or Representative	Form of Request / Initial Response	Language
1.	Brunei Darussalam		To be made in writing by way of [*insert choice of methods, e.g. fax or email*]	
2.	Cambodia			
3.	Indonesia			
4.	Laos			
5.	Malaysia			
6.	Myanmar			
7.	Philippines			
8.	Singapore			
9.	Thailand			
10.	Vietnam			