Investment Treaty Arbitration 2020

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Getting The Deal Through

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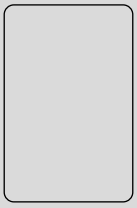

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Investment Treaty Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors Stephen Jagusch QC and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP, for their continued assistance with this volume.

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For further information please contact editorial@gettingthedealthrough.com

Contents

Singapore

Alvin Yeo, Chou Sean Yu and Koh Swee Yen*
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BACKGROUND

Foreign investment

1 | What is the prevailing attitude towards foreign investment?

Singapore has an open trade policy and is very conducive for foreign investment. In 2019, Singapore ranked second in the World Bank rankings for Ease of Doing Business, among 190 countries. According to the World Investment Report 2019 (UNCTAD 2019 Report), Singapore is the fourth-largest recipient of foreign investment in the world and was among the three largest recipients of foreign investment in Asia in 2017 and 2018, after China and Hong Kong.

In addition to various incentives for promoting foreign investment (eg, the Global Investment Programme, EntrePass, tax incentives and measures by the Economic Development Board), Singapore's strategic location in the heart of Asia, excellent connectivity and infrastructure, and professional workforce, further enhance its attraction as an investment hub.

2 | What are the main sectors for foreign investment in the state?

The major sectors of foreign direct investment (FDI) in Singapore are financial and insurance services, wholesale and retail trade, manufacturing, professional, scientific, technical administrative and support services and real estate activities. The other sectors include transport and storage, information and communications, accommodation and food services, and construction.

3 | Is there a net inflow or outflow of foreign direct investment?

Yes. In 2018, the FDI inflow was US$77.646 billion and the outflow was US$37.143 billion, while the FDI stock inward was US$1,481.033 billion and outward was US$1,021.124 billion. [Source: Annex Table 1 and Table 2 – UNCTAD 2019 Report available at https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, last visited on 26 August 2019.]

Investment agreement legislation

4 | Describe domestic legislation governing investment agreements with the state or state-owned entities.

The Arbitration (International Investment Disputes Act) (Chapter 11) implements the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Sector-specific statutes and regulations apply to investments in specific sectors in Singapore (see question 14).

Investments by foreign investors in Singapore are also governed by the respective bilateral investment treaties (BITs), multilateral investment treaties, international investment agreements (IIAs) or investment chapters in free trade agreements (FTAs) or other international treaties with investment provisions.

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

5 | Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

BITs

Singapore has entered into BITs with the following countries: Bahrain (coexists with the Gulf Cooperation Council (GCC)-Singapore FTA), Bangladesh, Belarus, Belgium-Luxembourg Economic Union (BLEU), Bulgaria (protocol signed at the time of entering into the BIT), Burkina Faso (signed, but not in force), Cambodia (coexists with the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA)), Canada, China (coexists with the ASEAN-China Investment Agreement and China-Singapore FTA), Colombia (signed, but not in force), Ivory Coast (signed, but not in force), the Czech Republic, Egypt, France, Germany (protocol signed at the time of entering into the BIT), Hungary, Indonesia (signed on 11 October 2018, not in force), Iran, Jordan, Kazakhstan (signed on 21 November 2018, not in force), Kenya (signed, but not in force), Korea, Kuwait (coexists with GCC-Singapore FTA), Laos (coexists with the ACIA), Latvia, Libya, Mauritius, Mexico, Mongolia, Mozambique (signed, but not in force), the Netherlands (protocol signed at the time of entering into the BIT), Nigeria (signed, but not in force), Oman (coexists with the GCC-Singapore FTA), Pakistan, Peru (terminated, replaced by Singapore–Peru FTA), Poland, Qatar, Rwanda (signed, but not in force), Russia, Saudi Arabia (protocol signed at the time of entering into the BIT; coexists with the GCC-Singapore FTA), Slovakia, Slovenia, Sri Lanka, Switzerland (coexists with the European Free Trade Association (EFTA)–Singapore FTA), Taiwan (an agreement between the Industrial Development and Investment Centre, Taipei and the Economic Development Board, Singapore), Turkey, Ukraine, the United Arab Emirates (coexists with the GCC–Singapore FTA), the United Kingdom, the United States (coexists with the United States–Singapore FTA), Uzbekistan, Vietnam (coexists with the ACIA) and Zimbabwe (signed, but not in force).

Treaties with investment provisions

Singapore is a party to the following treaties with investment provisions:

- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) with Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Vietnam; coexists with AANZFTA, Australia-Singapore FTA, ACIA.
- Sri Lanka–Singapore FTA (2018) – Protocol 1 deals with Rules of Origin.
- ASEAN–Hong Kong Special Administrative Region of China Investment Agreement (2017) – entered into force for Singapore, Hong Kong, Vietnam, Laos, Myanmar and Thailand on 17 June 2019.

- Singapore–Turkey FTA (2015) – Protocol 1 concerns 'the definition of the concept of Originating Products and Methods of Administrative Cooperation'.
- ASEAN–India Investment Agreement (2014) (not yet in force) – coexists with the India–Singapore CECA.
- Singapore–Taiwan Province of China Economic Partnership Agreement (EPA) (2013) – this is an Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership.
- Costa Rica–Singapore FTA (2010).
- ASEAN–China Investment Agreement (2009) – coexists with China–Singapore BIT.
- ASEAN–Korea Investment Agreement (2009) – article 9 read with the respective reservations listed in the Schedule provides the list of reservations; coexists with Korea–Singapore FTA.
- AANZFTA (2009) – Agreement establishing the ASEAN–Australia–New Zealand Free Trade Area; the First Protocol to amend AANZFTA entered into force for all the parties except Cambodia and Indonesia on 1 October 2015 (entered into force for Cambodia in January 2016); coexists with New Zealand–Singapore CEPA, P4 Agreement, Australia–Singapore FTA and CPTPP.
- ASEAN Comprehensive Investment Agreement (ACIA) (2009) – all ASEAN member countries are parties to the ACIA. The Amendment Protocol entered into force on 12 September 2016. The Second and Third Protocols were signed on 21 September 2017 and 20 December 2017, respectively. Singapore has made reservations concerning the obligations of National Treatment (NT) and Senior Management and Board of Directors. The ACIA coexists with Cambodia–Singapore BIT, Laos–Singapore BIT, Singapore–Vietnam BIT, Singapore–Indonesia BIT, CPTPP and P4 Agreement.
- GCC–Singapore FTA (2008) – with the Gulf Cooperation Council, which includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates; coexists with Bahrain–Singapore BIT, Kuwait–Singapore BIT, Oman–Singapore BIT, Saudi Arabia–Singapore BIT and Singapore–UAE BIT.
- China–Singapore FTA (CSFTA) (2008) – the Amendment Protocol was signed on 27 July 2011; coexists with the China–Singapore BIT.
- Peru–Singapore FTA (2008) – Annex 11C deals with Singapore's Cross Border Trade in Services and Investment Reservations for Existing Measures and Liberalisation Commitments; Annex 11E lists Singapore's Reservations for Future Measures.
- ASEAN–Japan Economic Partnership Agreement (EPA) (2008).
- ASEAN–US TIFA (Trade and Investment Framework Agreement between the United States and ASEAN) (2006).
- Panama–Singapore FTA (2006) – Singapore has Reservations to Chapters 9 (Investment) and 10 (Cross-border Trade in Services), Financial Services (Market Access for Financial Institutions) and Financial Services (Non-conforming Measures).
- ASEAN–Korea Framework Agreement (2005).
- Korea–Singapore FTA (2005) – coexists with the ASEAN–Korea Investment Agreement.
- P4 Agreement – Trans-Pacific Strategic Economic Partnership Agreement (2005) with Brunei, Chile and New Zealand; Schedule in Annex IV lists Singapore's reservations with respect to national treatment, most favoured nation (MFN), local presence; coexists with ACIA, AANZFTA and the New Zealand–Singapore CEPA (2000).
- India–Singapore Comprehensive Economic Cooperation Agreement (CECA) (2005); the Second Review was concluded on 1 June 2018; the First Review was concluded on 1 October 2007; coexists with the ASEAN–India Investment Agreement.
- Jordan–Singapore FTA (2004) – Annex 4-B sets out Singapore's Schedule of Specific Commitments.
- ASEAN–India Framework Agreement (2004).
- Singapore–US FTA (2003) – Schedules to Annex 8-A and 8-B list Services Market Access Reservations; Annex 10-B lists Financial Services Reservations.
- Australia–Singapore FTA (SAFTA) (2003) – the amendments from the Third Review entered into force on 1 December 2017; coexists with AANZFTA and CPTPP.
- ASEAN–China Framework Agreement (2002).
- EFTA–Singapore FTA (2002) – with EFTA member states (Iceland, Liechtenstein, Norway and Switzerland); Annex XI consists of reservations by Singapore concerning the obligations of national treatment and MFN; coexists with Singapore–Switzerland BIT.
- Japan–Singapore EPA (2002) – the Second Review was concluded on 19 March 2007.
- New Zealand–Singapore CEPA (2000) for a Closer Economic Partnership; coexists with P4 Agreement and AANZFTA.
- ASEAN–EU Cooperation Agreement (1980) – with the European Union; Protocols have been signed for the extension of the Agreement to Vietnam and Cambodia; coexists with EU–Singapore IPA.
- EU–Singapore FTA and EU–Singapore Investment Protection Agreement (IPA) – signed on 19 October 2018 (see question 32).
- RCEP – Regional Comprehensive Economic Partnership – currently in negotiation; the parties involved are the ASEAN member states, Australia, China, India, Japan, Korea and New Zealand.

6 | If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Not applicable.

7 | Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

See question 5.

8 | Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

No.

9 | Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

See question 5.

ICSID Convention

10 | Is the state party to the ICSID Convention?

Yes. Singapore has ratified the ICSID Convention on 14 October 1968. The Arbitration (International Investment Disputes) Act 1968 was enacted to implement the ICSID Convention.

Mauritius Convention

11 | Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

No. Singapore is not a party to the Mauritius Convention.

Investment treaty programme

12 | Does the state have an investment treaty programme?

Singapore does not have a designated investment treaty programme, but has a number of initiatives for promoting foreign investment (see questions 13 and 15).

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

13 | Does the state have a foreign investment promotion programme?

The Global Investor Programme (GIP), commonly referred to as the 'Investor Scheme', is an initiative by the Singapore Economic Development Board jointly administered with the Ministry of Manpower (MoM) to attract foreign investment. The programme assists investors and entrepreneurs to set up and develop their business in Singapore. Foreign investors may apply for Singaporean permanent residence status through the GIP. Contact Singapore administers the GIP and is a one-stop shop for investors interested in investing and relocating to Singapore.

The MoM also has the Entrepreneur Pass (EntrePass) scheme for foreign entrepreneurs who wish to start a business and relocate to Singapore. One can apply for an EntrePass if one has started, or intends to start, a private limited company registered with the Accounting and Corporate Regulatory Authority (ACRA) (see: www.mom.gov.sg/passes-and-permits/entrepass).

Enterprise Singapore, a government agency championing enterprise development (formed by merging International Enterprise Singapore and SPRING SG on 1 April 2018), also has various schemes and pro-trade policies for foreign investors. StartUp SG also offers incentives including funding support, mentorship and grants to encourage start-ups, including foreign companies to set up in Singapore (see: www.enterprisesg.gov.sg/non-financial-assistance/for-foreign-companies).

Applicable domestic laws

14 | Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Singapore has no separate law governing foreign investment. Foreign investment is governed by sector-specific laws and regulators. The Economic Development Board Act (Chapter 85) established the Economic Development Board (EDB), which plays an active role in promoting foreign investment (see question 15).

Registration of companies is governed by the ACRA, and consent or approval is required from sector-specific agencies, regulators or referral authorities, for certain sectors. For registering a foreign company in Singapore, the services of a registered filing agent (eg, a law firm, accounting firm or corporate secretarial firm) may be engaged to submit an online application. The branch of a foreign company must have at least one authorised representative who is 'ordinarily resident in Singapore' (the authorised representative's usual place of residence is in Singapore, a Singaporean citizen, Singaporean permanent resident or an EntrePass holder). The ACRA prescribes an application fee and a registration fee for registering a company. The foreign company may commence business once it is registered with ACRA if it does not require any licences or approvals from government agencies or regulators to carry out its business activities.

Foreign investment is restricted in certain sectors like news media, banking, telecommunications and land ownership. Section 19 of the Newspaper and Printing Presses Act (Chapter 206) (NPPA) prohibits the acceptance of any funds from a foreign source without the prior approval of the concerned Minister. The NPPA also places restrictions on shareholder composition of newspaper companies, and restricts foreign control. The Banking Act (Chapter 19) provides for the licensing and regulation of the business of banks and related financial institutions. A company desirous of carrying on banking business in Singapore has to apply in writing to the Monetary Authority of Singapore (MAS) for a licence under section 7 of the Banking Act. The MAS oversees all financial institutions in Singapore, and also regulates foreign investment in financial institutions.

Incentives

Singapore offers many investment incentives for both domestic and foreign investors. Companies may apply for tax incentives under the Income Tax Act (Chapter 134). The Economic Expansion Incentives (Relief from Income Tax) Act (Chapter 86) (EEI Act) consolidates investment incentives. Certain investment allowances and tax deductions are granted for 'approved projects' under Part X of the EEI Act.

Relevant regulatory agency

15 | Identify the state agency that regulates and promotes inbound foreign investment.

Foreign investment is regulated by sector-specific regulators. The EDB is a government agency under the Ministry of Trade and Industry that is responsible for promoting foreign investment. It develops strategies for enhancing Singapore's position as a global centre for business, innovation and talent. The functions of the EDB include:

- the stimulation, growth, expansion and development of the economy;
- formulation of investment promotion policies and plans, and promotional incentives and strategies assisting the development of support industries and services that provide important parts, components and related services to the manufacturing and services sector;
- encouraging foreign and local industries to upgrade their skill and technological levels through investment in technology, automation, training, research and product development activities; and
- identification of key enterprises and encouraging them to establish their international headquarters in Singapore and to undertake a wide range of international service and business activities.

In August 2018, the EDB and Enterprise Singapore signed a memorandum of understanding with the Japan External Trade Organisation to bolster support for start-ups, create initiatives, opportunities, information exchanges and to strengthen linkages between businesses based in Japan and Singapore. Recently, the EDB 'initiated a comprehensive review of its strategies to keep pace with the evolving and increasingly complex business landscape locally and globally' (see: www.enterprisesg.gov.sg/media-centre/media-releases/2019/march/enterprise-singapore-focuses-on-productivity-innovation-and-internationalisation-as-three-key-levers-to-drive-enterprise-growth).

Relevant dispute agency

16 | Identify the state agency that must be served with process in a dispute with a foreign investor.

Civil proceedings against the government have to be instituted against the appropriate authorised government department, or, if none of the authorised government departments is appropriate or the person instituting the proceedings has any reasonable doubt regarding the appropriate department, against the Attorney-General (section 19 of the Government Proceedings Act).

All documents to be served on the government in any civil proceedings have to be served on the solicitor, if any, in charge of the authorised government department or acting for the concerned department, or if there is no such solicitor and no person so acting, or if the proceedings are brought against the Attorney-General, on the Attorney-General (section 20 of the Government Proceedings Act).

Specific provisions for service on a party may also be found in the respective IIAs (eg, article 34 of the Investment chapter of SAFTA, Annex 9-D of the CPTPP).

INVESTMENT TREATY PRACTICE

Model BIT

17 | Does the state have a model BIT?

No.

Preparatory materials

18 | Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

There is no publicly available repository of treaty preparatory materials. The IIAs entered into by Singapore, and the related press releases, may be accessed from the Ministry of Trade and Industry website (see: www.mti.gov.sg/).

Scope and coverage

19 | What is the typical scope of coverage of investment treaties?

Typically, 'investor' and 'investment' are defined broadly. The definition of 'investors' generally includes both natural persons (usually referred to as 'nationals') and juridical persons (companies or enterprises). In certain investment treaties, the government and government agencies of a contracting party are included in the definition of an investor (eg, see Qatar–Singapore BIT, Kuwait–Singapore BIT, UAE–Singapore BIT).

Certain investment treaties require the investments to be approved in writing, by the respective government or the relevant agency (eg, article 2 of the Kuwait–Singapore BIT, article 12 of the UK–Singapore BIT and article 1(1)(ii) of the Germany–Singapore BIT).

Typically, the investment treaties apply to investments made before or after the treaty enters into force, and 'investment' is broadly defined (eg, 'every kind of asset permitted by each contracting party in accordance with its laws and regulations'), followed by an illustrative list, which is not exhaustive, and generally includes the following:

- movable and immovable property as well as other rights in rem such as mortgages, liens or pledges;
- shares, stocks, debentures and similar interests in companies;
- claims to money or to any performance under contract having an economic value;
- intellectual property rights, know-how and goodwill; and
- licences, authorisations, permits and similar rights conferred pursuant to applicable domestic law.

A common exception to the applicability of investment treaties is in matters of taxation in the territory of either contracting party, unless otherwise provided. Such matters are generally governed by an avoidance-of-double-taxation treaty between the two contracting parties (eg, article 2(3) of the Qatar–Singapore BIT, article 4(5) of the Iran–Singapore BIT and article 5(2) of the Mauritius–Singapore BIT).

Protections

20 | What substantive protections are typically available?

The substantive protections are similar in most investment treaties and include provisions concerning expropriation, fair and equitable treatment (FET), full protection and security (FPS), MFN and NT.

Expropriation

It is common for the definition of expropriation to include both direct and indirect expropriation ('measures having effect equivalent to nationalisation or expropriation').

The provisions relating to expropriation are similar in most investment treaties. You can also find various exceptions detailed in the treaty text. For example, Annex 2 of the ACIA provides that 'non-discriminatory measures of a member state that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an [indirect] expropriation'. Footnote 17 of Chapter 9 (Investment) of the CPTPP clarifies that 'public purpose' refers to a concept in customary international law. There are also certain exceptions relating to the expropriation of land.

FET and FPS

The provisions according FET and FPS to investments are similar in most BITs, especially those concluded before 2000. Typically, it is generally worded as investments shall be 'accorded fair and equitable treatment and shall enjoy full protection and security'.

The FET provisions in recent multilateral treaties are more prescriptive. For example, article 11 of the ACIA outlines what constitutes FET and clarifies that denial of justice would amount to breach of FET:

> *'For greater certainty: (a) fair and equitable treatment requires each member state not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and (b) full protection and security requires each member state to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this article.'*

Article 6 of the Investment chapter in SAFTA has a very detailed FET provision, and makes a reference to the customary international law minimum standard of treatment of aliens as the standard of treatment to be accorded. FET and FPS do not require treatment in addition to or beyond that which is required by the customary international law minimum standard. It also includes an obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process. The FET provision further mentions that the mere fact that a party's action or inaction is inconsistent with the investor's expectations does not constitute a breach of FET obligation. A similar provision is found in article 9.6 of the CPTPP.

The recently signed EU–Singapore IPA also has a detailed FET clause that includes denial of justice (see question 32).

MFN and NT

The provisions according MFN and NT are similar in most investment treaties, and exceptions to their operation are also commonplace. However, recent investment chapters in FTAs tend to extend the scope of application of MFN and NT with respect to not only the management, conduct, operation and sale, but also the establishment and acquisition of investments (eg, articles 12.4 and 12.5 of the Investment Chapter in Singapore–Turkey FTA, article 9.5 of the Investment Chapter in Singapore–Taiwan Province of China EPA).

Umbrella clauses

Not all investment treaties contain umbrella clauses, which protect contractual commitments entered into between a foreign investor and a state contracting party. An example of an umbrella clause is article 12(1) of the Singapore–Ukraine BIT that states: 'Each Contracting Party shall observe commitments, made in accordance with its laws, additional to those specified in this Agreement, it has entered into with respect to the investment of the investors of the other Contracting Party.' See also: BITs with Germany (article 8), China (article 15) and the Czech Republic (article 15(2)).

Dispute resolution

21 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Singapore has not been a party as a host state or respondent to an investment dispute with foreign investors so far.

Most of the investment treaties have provisions dealing with dispute resolution applicable to foreign investors. The common mechanisms for investor-state dispute resolution include ICSID, the ICSID Additional Facility Rules and arbitration under the UNCITRAL Arbitration Rules.

Multi-tiered dispute resolution provisions require parties to resort to alternative modes of dispute resolution (eg, negotiations, conciliation or consultations) for a certain period. There may be provisions encouraging the amicable settlement of dispute through negotiations (eg, article 13 of the Mauritius–Singapore BIT and article 11 of the Iran–Singapore BIT).

There are also dispute resolution provisions in certain treaties that allow a dispute to be referred to local courts in addition to arbitration or conciliation. For example, under the Qatar–Singapore BIT, the investor may submit a dispute to:

- the competent court of the host state;
- ICSID, if the ICSID Convention is applicable to both the parties;
- the ICSID Additional Facility Rules;
- an ad hoc tribunal under the UNCITRAL Rules; or
- any other arbitral institutions in accordance with any arbitral rules, as agreed to between the parties [article 10(2)].

Once the investor has submitted the dispute to any of the aforementioned dispute settlement mechanisms, the choice shall be final.

The ACIA has provisions for Conciliation (article 30), Consultations (article 31), and a claim may be submitted, at the choice of the disputing investor to:

- courts of the disputing member state, provided such courts have jurisdiction;
- under the ICSID Convention;
- under the ICSID Additional Facility Rules;
- under the UNCITRAL Arbitration Rules;
- to any regional centre for arbitration in ASEAN; or
- if the disputing parties agree, to any other arbitration institution.

The resort to any one of the above fora or arbitration rules, excludes the others (article 33). The EU–Singapore IPA provides for a two-tier investment court (see question 32).

Confidentiality

22 Does the state have an established practice of requiring confidentiality in investment arbitration?

There are no laws explicitly referring to the requirement of confidentiality in investment arbitration. For Singapore-seated international arbitrations, the governing legislation, the International Arbitration Act (Chapter 143A) (IAA), does not explicitly impose an obligation of confidentiality. However, a party may apply to have hearings otherwise than in open court, and for other measures to preserve the confidentiality of the proceedings in relation to arbitration (sections 22 and 23 of the IAA). An implied obligation of confidentiality in arbitrations has also been recognised by the Singapore courts (*AAY v AAZ* [2011] 1 SLR 1093 and *Myanma Yaung Chi Oo Co Ltd v Win Win Nu and another* [2003] 2 SLR(R) 547).

Recently (in June 2019), the Ministry of Law has proposed amendments to the IAA to provide explicit recognition of the powers of the court and the arbitral tribunal to enforce duties of confidentiality.

Specific provisions relating to transparency and confidentiality may be found in IIAs (eg, article 39 of the ACIA, article 9.24 of the CPTPP, article 15.20 of the Singapore–US FTA) (see question 32 for transparency provisions in the EU–Singapore IPA).

Insurance

23 Does the state have an investment insurance agency or programme?

Enterprise Singapore has a Political Risk Insurance Scheme (PRIS) for qualifying Singapore companies to receive premium support for PRI policies. Enterprise Singapore will support 50 per cent of the premium for up to the first three years of each PRI policy, subject to a cap of S$500,000 per qualifying Singapore-based company. A typical PRI policy covers risks such as: expropriation, currency inconvertibility and transfer restrictions, political violence, breach of contract by the host government and non-honouring of sovereign financial obligations. The eligibility criteria for the PRIS includes:

- the global headquarters based in Singapore;
- at least three strategic business functions in Singapore;
- an annual turnover not exceeding S$500 million;
- an annual total business spending of at least S$250,000 in Singapore for each of the past three years; and
- a minimum paid-up capital of S$50,000.

Further details about the PRIS scheme may be found at: www.enterprisesg.gov.sg/financial-assistance/loans-and-insurance/loans-and-insurance/political-risk-insurance-scheme.

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

24 How many known investment treaty arbitrations has the state been involved in?

None.

Industries and sectors

25 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Not applicable.

Selecting arbitrator

26 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Not applicable.

Defence

27 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Not applicable.

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Singapore is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Singapore acceded to the New York Convention on 21 August 1986, on the basis of reciprocity with other contracting states.

Award compliance

29 Does the state usually comply voluntarily with investment treaty awards rendered against it?

As stated previously, there have been no investment treaty awards rendered against Singapore so far.

Unfavourable awards

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

Not applicable.

Provisions hindering enforcement

31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

There have been no proceedings to date for the enforcement of an investment treaty award against Singapore.

Singapore is known for its pro-arbitration stance. The law governing the enforcement of international arbitral awards in Singapore is the IAA. As affirmed by the Court of Appeal in *AKN and another v ALC and others* [2015] 3 SLR 488, the 'policy of minimal curial intervention is the mainstay of the UNCITRAL Model Law and the IAA, and the grounds for curial intervention are narrowly circumscribed'. In *Sanum Investments Limited v ST Group Co Ltd and others* [2018] SGHC 141, the Singapore High Court reiterated its pro-arbitration stance and held that when no prejudice is shown, despite the existence of procedural irregularities, the court would exercise its residual discretion to enforce the award.

According to section 19 of the IAA, an arbitral award may be enforced in the same manner as a judgment after obtaining leave of the High Court, and judgment may be entered in terms of the award. A foreign award (defined in the IAA as an award made in any 'Convention country' – a signatory of the New York Convention) may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore under section 19 (section 29 of the IAA).

The grounds for refusing enforcement of a foreign award under section 31 of the IAA are similar to those in the New York Convention:

- a party to the arbitration agreement was under some incapacity under the law applicable to him, at the time when the agreement was made;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;
- proper notice of the appointment of the arbitrator was not given to the party refusing enforcement or the party was otherwise unable to present his case in the arbitration proceedings;
- the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration, provided that if those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

The court may also refuse to enforce the award if it finds that (section 31 of the IAA):

- the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or
- enforcement of the award would be contrary to the public policy of Singapore.

In addition to the aforementioned grounds, for international arbitrations seated in Singapore, an award may be set aside if:

- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced (section 24 of the IAA).

For Singapore-seated arbitrations, both positive and negative preliminary jurisdictional rulings of the arbitral tribunal may be challenged before the High Court (section 10 of the IAA, read with article 16(3) of the UNCITRAL Model Law). The High Court applies a de novo standard of review, while deciding on such challenges to preliminary jurisdictional rulings (*PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372; *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536).

As far as state immunity is concerned, the State Immunity Act (Chapter 313) governs proceedings in Singapore by or against states. Section 5(1) of the Act provides that a state is not immune with respect to proceedings relating to:

- a commercial transaction entered into by the state; or
- an obligation of the state that by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in Singapore.

Where a state has agreed in writing to submit a dispute to arbitration, the state is not immune as respects proceedings in the courts in Singapore that relate to the arbitration (section 11(1) of the State Immunity Act). This is subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between states (section 11(2) of the State Immunity Act).

States enjoy certain privileges under section 15 of the State Immunity Act, where fines, orders for specific performance, recovery of land or other property, or injunction, shall not be made against a

state. However, pursuant to section 15(3), any relief may be granted and process may be issued with the written consent of the state concerned. Process may also be issued in respect of property that is in use or intended for use for commercial purposes (section 15(4), State Immunity Act).

UPDATE AND TRENDS

Key developments of the past year

32 Are there any emerging trends or hot topics in your jurisdiction?

EU–Singapore IPA

The EU–Singapore FTA and the IPA (signed in October 2018) are the first bilateral trade and investment agreements concluded between the EU and an ASEAN member state. This is a huge step forward in the promotion of trade and investments between Singapore and the EU. The IPA incorporates all aspects of the EU's new approach to investment protection, including the Investor Court System. Once it comes into force, the IPA will replace BITs between Singapore and EU member states including Belgium–Luxembourg, Bulgaria, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia and the United Kingdom.

The European Parliament gave its consent to the EU–Singapore FTA and the IPA on 13 February 2019. The ratification process is under way for both the agreements. The IPA will come into force upon ratification by each EU member state.

The substantive provisions of the IPA include protection from expropriation, FET, MFN and NT. A party breaches FET obligations if its measures constitute:

- a denial of justice;
- a fundamental breach of due process;
- manifestly arbitrary conduct; or
- harassment, coercion, abuse of power or similar bad-faith conduct (article 2.4(2)).

Various footnotes in the IPA clarify the scope of the provisions for greater certainty (eg, footnote 9 of Chapter Two (Investment Protection) clarifies that the sole fact that the covered investor's claim was rejected, dismissed or unsuccessful does not constitute a denial of justice).

Article 2.6 of the IPA provides that neither party shall directly or indirectly nationalise, expropriate or subject to measures having the effect of nationalisation or expropriation, the covered investments of covered investors except for:

- a public purpose;
- in accordance with due process of law;
- on a non-discriminatory basis; and
- against payment of prompt, adequate and effective compensation, which is the fair-market value immediately before expropriation or impending expropriation becoming public knowledge.

Valuation criteria used to determine fair market value may include going-concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate. Annex 1 further clarifies that expropriation includes both direct and indirect expropriation and Annex 2 clarifies that when Singapore is the expropriating party, any expropriation of land shall be upon the payment of compensation at market value in accordance with the Land Acquisition Act (Chapter 152), and should be for a public purpose or incidental to a public purpose.

The IPA's unique feature is that it provides for a permanent Investment Court System (ICS), which is a two-tier tribunal consisting of the Tribunal of First Instance and an Appeal Tribunal. The Tribunal of First Instance consists of six members (two each nominated by the EU and Singapore, and two members who are neither nationals of a European Union member state nor Singapore, to be jointly nominated by the European Union and Singapore) appointed for an eight-year term (article 3.9). The IPA also provides for a permanent Appeal Tribunal with six members appointed for an eight-year term (article 3.10). A provisional award shall be issued by the Tribunal of First Instance within 18 months of the date of submission of the claim and if no party appeals within 90 days of the issue of the provisional award, the award shall become final (article 3.18). The grounds for appeal are:

- error in the interpretation or application of the applicable law;
- manifest error in the appreciation of facts, including the appreciation of relevant domestic law; and
- grounds provided in article 52 of the ICSID Convention in so far as they are not covered by the other two grounds in the IPA.

Grounds in article 52 of the ICSID Convention are as follows:

- the tribunal was not properly constituted;
- the tribunal manifestly exceeded its powers;
- corruption of a member of the tribunal;
- serious departure from a fundamental rule of procedure; and
- failure to state the reasons of the award.

The IPA also provides for a mediation mechanism (article 3.4 and Annex 6). There are specific provisions governing transparency of proceedings; article 3.16, Annex 8 deals with the 'Rules on Public Access to Documents', 'Hearings' and the possibility of third persons making submissions. All documents and hearings before the Tribunal will be publicly accessible and the Secretary-General of the United Nations, through the UNCITRAL Secretariat, is designated as the repository (article 5 of Annex 8).

In case of third-party funding, the IPA requires the disclosure of the name and address of the funder to the Tribunal and to the other disputing party, and the notification has to be made at the time of claim submission, or as soon as third-party funding is agreed upon, given or granted (as applicable) (article 3.8).

The decision of the Court of Justice of the European Union (CJEU) in *Slowakische Republik (Slovak Republic) v Achmea BV*, Case C-284/16 (6 March 2018) (Achmea) raised many questions regarding the compatibility of the Investor State Dispute Settlement (ISDS) mechanism in IIAs involving EU member states with EU law. Similar to the EU–Singapore IPA, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada also provides for ICS. In its Opinion 1/17 dated 30 April 2019, the CJEU has held that ICS in the CETA is compatible with EU law. The aforementioned decision of the CJEU has provided much-required clarity on the compatibility of the ICS mechanism contemplated in other IIAs like the EU–Singapore IPA and the EU–Vietnam FTA, with EU law.

Judicial engagement in investor-state arbitrations

Singapore courts have heard two cases arising out of two Singapore-seated investor-state arbitrations. In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536, which concerned a challenge to the applicability of the China–Laos BIT to Macau, the Court of Appeal had to examine state succession principles, and interpret fork-in-the-road clauses. The case of *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* ([2019] 3 SLR 12) was the first case that concerned an application to set aside an award on the merits of an investment treaty arbitration seated in Singapore. The Singapore Court of Appeal affirmed the High Court's decision to set aside the award in *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* ([2019] 1 SLR 263) on the basis that, among other things, the investors did not have a protected investment as required under the dispute resolution provision of the relevant investment instrument

and had failed to adequately exhaust local remedies. This case is yet another illustration of the Singapore court's ability and willingness to deal with complex issues arising in investment treaty cases, and adds to the Singapore jurisprudence in such cases.

Proposed amendments to the IAA

The Ministry of Law, Singapore has issued a public consultation (26 Jun 2019 to 21 Aug 2019) proposing certain amendments to the IAA. These include:

- introduction of a default mode of appointment of arbitrators in multi-party situations;
- provision for parties, by agreement, to request the arbitrator or arbitrators to decide on jurisdiction at the preliminary stage;
- explicit provision recognising that an arbitral tribunal and the High Court have powers to enforce obligations of confidentiality in an arbitration;
- allowing a party to the arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided parties have agreed to opt in to this mechanism;
- proposal that parties should have the option to limit or waive by agreement, the annulment grounds set forth in section 24(b) of the IAA and article 34(2)(a) of the UNCITRAL Model Law, but may not limit or waive by agreement, the annulment grounds in section 24(a) and article 34(2)(b). Such an agreement can only be made after the award has been rendered; and
- proposal to empower the court to make an order providing for costs of the arbitration following a successful application under section 24 of the IAA or article 34(2) of the UNCITRAL Model Law to set aside an award, whether wholly or in part.

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Public Procurement
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Renewable Energy
Restructuring & Insolvency
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