International
Comparative
Legal Guides

Investor-State Arbitration

2024

Sixth Edition

Commercial Dispute Resolution

EFILA
European Federation for Investment Law and Arbitration

glg Global Legal Group

Contributing Editor:
Tafadzwa Pasipanodya
Foley Hoag LLP

Expert Analysis Chapters

1 **The Rise of Climate Change-Related and Environmental Provisions in Investment Treaties**
Diana Tsutieva, Foley Hoag LLP

6 **The Impact of EU Law on ISDS, Intra-EU BITs and the ECT**
Prof. Dr. Nikos Lavranos, European Federation for Investment Law and Arbitration (EFILA)

Q&A Chapters

10 **Australia**
Corrs Chambers Westgarth: Nastasja Suhadolnik, Joshua Paffey, Betty Choi & Catherine Pagliaro

18 **France**
Teynier Pic: Yann Dehaudt-Delville & Sara Nadeau-Seguin

29 **Germany**
WAGNER Arbitration: Florian Dupuy, Petrit Elshani & Sophie Eichhorn

36 **Hungary**
DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm: András Nemescsói & David Kohegyi

42 **Kenya**
TripleOKLaw Advocates, LLP: John M. Ohaga & Franklin Cheluget

49 **Morocco**
Hajji & Associés: Amin Hajji

54 **Nigeria**
S. P. A. Ajibade & Co.: Dr. Babatunde Ajibade, Dr. Kolawole Mayomi, Emmanuel Bassey & Opeyemi Ojebode

61 **Saudi Arabia**
Obeid & Partners: Zeina Obeid, Charbel Akiki, Aya Sabra & Tala Harakeh

67 **Singapore**
WongPartnership LLP: Koh Swee Yen, Tiong Teck Wee, Monica Chong Wan Yee & Joel Quek

74 **Spain**
Íscar Arbitraje: Javier Íscar
Stampa Abogados: Dr. Gonzalo Stampa

80 **Switzerland**
Walder Wyss: Michael Feit & Chloé Terrapon

86 **Turkey/Türkiye**
EB LEGAL: Prof. Av. Esra Bicen

94 **United Kingdom**
Fietta LLP: Jiries Saadeh & Miglena Angelova

100 **USA**
Foley Hoag LLP: Tafadzwa Pasipanodya, Nicholas Renzler & Lucía Rueda

Singapore


Koh Swee Yen


Tiong Teck Wee


Monica Chong Wan Yee


Joel Quek

WongPartnership LLP

1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

As of 18 October 2023, there are 44 bilateral investment treaties ("**BITs**") and investment guarantee agreements ("**IGAs**"), and 21 free trade agreements ("**FTAs**") with investment chapters ratified by Singapore, that are in force: https://www.mti.gov.sg/Trade/International-Investment-Agreements. The most recent FTAs with investment chapters that are in force include the ASEAN-Hong Kong Investment Agreement ("**AHKIA**") and the Comprehensive and Progressive Agreement for Trans-Pacific partnership ("**CPTPP**").

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

As of October 2023, Singapore has signed seven BITs with the following countries which are not yet in force: Kazakhstan; Nigeria; Mozambique; Burkina Faso; Côte d'Ivoire; Colombia; and Zimbabwe: https://investmentpolicy.unctad.org/international-investment-agreements/countries/190/singapore.

The following treaties with investment provisions have also been signed but have not come into force: Kazakhstan-Singapore Services and Investment Agreement; Pacific Alliance-Singapore FTA; EU-Singapore Investment Protection Agreement ("**EUSIPA**"); the Trans-Pacific Partnership; and the ASEAN-India Investment Agreement.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Singapore does not use a model BIT. However, the format and language of Singapore's BITs generally follow the same format and language as the BITs of the world's leading capital exporting states, and generally include provisions concerning expropriation, fair and equitable treatment ("**FET**"), full protection and security ("**FPS**"), and most-favoured-nation ("**MFN**") treatment. Further elaboration on these provisions are detailed below at question 3.3.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Diplomatic Notes and Protocols are typically published together with the text of the treaty. See, e.g., the Singapore-PRC BIT and the Germany-Singapore BIT.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

No. However, the Singapore Ministry of Trade and Industry has explained that "an IIA (also commonly called "bilateral investment treaty" ("**BIT**") when used in a bilateral context, or "investment guarantee agreement" ("**IGA**")) promotes greater investment flows between two signatory countries and sets out standards of protection for investments made in one country by investors from the other country". This could be relevant in interpreting a treaty or trade agreement.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Singapore is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e., the New York Convention), which came into force on 21 August 1986.

Singapore ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (i.e., the Washington Convention or ICSID Convention) on 14 October 1968.

Singapore has not signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (i.e., the Mauritius Convention).

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

There are no specific laws in Singapore for investment. Instead, foreign investment is governed by sector-specific laws and

regulators. For instance, registration of companies is governed by the Accounting and Corporate Regulatory Authority ("**ACRA**"), and consent or approval is required from sector-specific agencies. In particular, the Economic Development Board ("**EDB**"), which was established by the Economic Development Board Act 1961, plays an active role in promoting foreign investment in Singapore. Foreign investment is also restricted in certain sectors, such as news, media, banking, telecommunications and land ownership.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

The majority of BITs concluded by Singapore provide that: "Each Party shall admit the entry of investments made by investors of the other Party pursuant to its applicable laws and regulations." Some of the significant exceptions to this include the Germany-Singapore BIT, which provides that "[e]ach Contracting Party shall endeavour to admit investments by nationals or companies of the other Contracting Party in accordance with its legislation and administrative practice within the framework of the general economic policy and to promote such investments as far as possible", as well as the PRC-Singapore BIT, Poland-Singapore BIT and Kuwait-Singapore BIT, which provide that the BITs only apply to investments in Singapore by nationals and companies of the foreign states which are "specifically approved in writing by the competent authority designated by the Government of the Republic of Singapore [(i.e., EDB)]".

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("***Sanum Investments***") (the first time an investor-state arbitration case came before the Singapore Courts), the Singapore Court of Appeal applied Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**") to interpret the provisions of the PRC-Laos BIT, in the context of an appeal by the Government of Laos against a positive jurisdictional ruling issued in an arbitration commenced under the PRC-Laos BIT. The chief questions before the Court were (a) whether the PRC-Laos BIT (which was entered into before Macau SAR's handover to the PRC) applied to Macau SAR following the handover by reason of the moving treaty frontiers rule, and (b) whether Article 8(3) of the PRC-Laos BIT, which provided for "a dispute involving the amount of compensation for expropriation" to be submitted to international arbitration, covered an expropriation dispute involving liability and not just quantum. The Court also developed and applied the critical date doctrine in international law, which "renders evidence, which comes into being after the critical date and is self-serving and intended by the party putting it forward to improve its position in the arbitration, as being of little, if any, weight".

In *Swissbourgh Diamond Mines (Pty) Ltd and ors v Kingdom of Lesotho* [2019] 1 SLR 263 ("***Swissbourgh***") (the first time the Singapore Courts dealt with the setting aside application of an investor-state award after a merits hearing), where the Kingdom of Lesotho applied to set aside a partial final award on jurisdiction and liability by a tribunal in a PCA arbitration, the Court had to consider (among other things) (a) whether there was an "investment" under Article 28(1) of Annex 1 to the Protocol on Finance and Investment of the Southern African Development Community ("**Investment Protocol**"), (b) whether the "investment" was admitted, and (c) whether the dispute concerned "an obligation of the [Kingdom of Lesotho] in relation to [that] admitted investment". The Court set aside the award on the basis that, among other things, the investors did not have a protected investment as required under Article 28(1) of the Investment Protocol, and in doing so, applied the rules of treaty interpretation as encapsulated within Articles 31 and 32 of the VCLT:

> "Essentially, they oblige the court to interpret a treaty in accordance with the ordinary meaning of the terms of the treaty, having regard to the context of the treaty and in the light of its object and purpose (Art 31(1)). When considering the context of the treaty, the court may have regard to the text of the treaty (including its preamble and annexes) together with any instrument or agreement that was made in connection with the conclusion of the treaty (Art 31(2)). The court is also permitted to consider any subsequent agreement between the parties regarding the interpretation of the treaty, or any subsequent practice in the application of the treaty that establishes such an agreement, or any relevant rules of international law (Art 31(3)). Finally, Art 32 allows the court to have regard to supplementary means of interpretation, including the *travaux préparatoires* of the relevant treaty, to either confirm the meaning of a treaty term obtained from the exercise under Art 31, or clarify the meaning of a term that might remain ambiguous or obscure, or where its plain meaning would be manifestly absurd or unreasonable."

The Court also held that "[b]eyond these principles of treaty interpretation which have been recognised to reflect customary international law, it also bears mentioning, especially in the international investment law context, that investment treaties 'should be interpreted neither liberally nor restrictively'", and "given that an investment treaty reflects the balance that has been struck between investor protection and the state's interests (generally following a considered period of negotiations between two or more states), neither an unequivocally pro-investor nor pro-state approach should be adopted in interpreting the provisions of an investment treaty".

Most recently, in *Deutsche Telekom AG v The Republic of India* [2023] SGHC(I) 7 ("***Deutsche Telekom***"), the investor sought to enforce an UNCITRAL arbitral award against India in Singapore. India resisted enforcement by alleging, *inter alia*, that the investor's investment did not constitute a qualifying investment under the Germany-India BIT as it only amounted to pre-investment, and the investor's investment was an indirect investment through its shareholding in a subsidiary, and was therefore not protected under the BIT. The Singapore International Commercial Court ("**SICC**") dismissed India's application to resist enforcement, and in so doing, interpreted the relevant provisions of the BIT. In relation to the pre-investment argument, the Court held that Article 3(1) of the BIT was not a permissive clause authorising India to decide whether to "admit" something as an investment protected by the BIT, but obliged India and Germany to admit investments into their territories subject only to their respective laws and policies. In relation to the indirect investment argument, the Court held that there was nothing in the definition of "investment" and "investor" in Article 1(b) of the BIT that limited investors to those making direct investments as opposed to indirect investments through wholly owned subsidiaries incorporated in a third country. The decision is currently on appeal to the Court of Appeal.

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

Singapore Courts are generally pro-arbitration, including investor-state arbitration. As observed by the Singapore Court of Appeal in *Swissbourgh*, investment treaty arbitration has "over the years, become a reliable avenue to which aggrieved investors turn when host states fail to honour obligations owed to them".

The Minister for Law, in response to a Parliamentary question on proposed reforms to the investor-state arbitration regime in November 2017, stated Singapore's aim of "steer[ing] Singapore's overall development and growth as a hub for international dispute resolution, including in the area of investment arbitration". The Minister also noted that while there are calls for reform of investor-state dispute settlement, it is important to first carefully consider what the gaps are and all of the proposed reforms in detail – whether they involve fine-tuning the existing framework or structural reform – in order to develop a framework that is "fair, workable, and cost-effective".

In this connection, the EU-Singapore Free Trade Agreement, which came into force on 21 November 2019 (and which has been touted as one of the first "new generation" EU free trade agreements) contains innovative investment dispute resolution provisions establishing both a permanent Investment Tribunal of First Instance and an Appellate Tribunal for appeals.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc., addressed or intended to be addressed in your jurisdiction's treaties?

Expropriation: The definition of expropriation in Singapore's investment agreements typically include both direct and indirect expropriation (i.e., "measures having effect equivalent to nationalisation or expropriation"). Exceptions to expropriation can also be found in treaty text. For example, Annex 2 of the ASEAN Comprehensive Investment Agreement ("**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 indirect expropriation".

FET and FPS: The FET and FPS provisions are similar in most of Singapore's investment agreements, and are typically worded to provide that 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 a breach of the FET standard. The EUSIPA contains a detailed FET clause that includes denial of justice, fundamental breach of due process, manifestly arbitrary conduct, or harassment, coercion, abuse of power or similar bad-faith conduct. Article 6 of the Investment chapter in the Singapore-Australia FTA ("**SAFTA**") also contains detailed FET provisions, and makes a reference to the customary international law minimum standard of treatment of aliens as the standard of treatment to be accorded.

MFN: Most of Singapore's investment agreements include an MFN clause. The inclusion of an MFN clause can have the effect of extending standards of treatment in an investment agreement to investors from states that are not privy to the investment agreement, in order to ensure that the contracting parties treat investors from the other state party at least as favourably as they treat third-party investors. The MFN provision is a notable exclusion from the EUSIPA, which was signed on 15 October 2018 and will enter into force upon approval by the regional and national parliaments of the EU Member States.

Indirect Investment: Most of Singapore's investment agreements define "investment" in broad and general terms, followed by a non-exhaustive list of categories, which typically includes "shares, stock, debentures and similar interests in companies".

Transparency: The EUSIPA and the investment chapter of the SAFTA reflect Singapore's latest approach on transparency. The EUSIPA adopts full transparency in ISDS disputes, such that all hearings will be open to the public, and all documents, including submissions by the parties, decisions of the tribunal, and expert reports, will be publicly available on a website administered by the UN and financed by the EU. Similar transparency provisions are included in Article 29 of Chapter 8 of the SAFTA Amendment Agreement.

Umbrella clauses: About half of Singapore's investment agreements contain umbrella clauses, which protect contractual commitments entered into between a foreign investor and a state contracting party. An example of a typical umbrella clause is Article 15 of the PRC-Singapore BIT, which states that: "Each Contracting Party shall observe any commitment in accordance with its laws additional to those specified in this Agreement entered into by the Contracting Party, its nationals or companies with nationals or companies of the other Contracting Party as regards their investments."

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

No, Singapore has given no such notice.

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

At the time of writing, Singapore has not been a respondent state in an investment claim. There are, however, instances where Singapore investors have been involved in investment treaty arbitrations.

In *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (ASEAN Case No. ARB/01/1), a Singapore-incorporated company entered into a joint venture with an agency of the Ministry of Industry for the operation of a beer factory in Myanmar, and later brought a claim for expropriation under the ASEAN Agreement for the Promotion and Protection of Investments ("**ASEAN Agreement**"). The tribunal held that it lacked jurisdiction to hear the claim because there was a lack of written approval and registration for the investment in Myanmar after the entry into force of the ASEAN Agreement in Myanmar.

In *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea* (ICSID Case No. ARB/13/33), a Singapore-incorporated company claimed that the enactment of a local PNG law amounted to (among other things) an unlawful expropriation of its investment in the Ok Tedi mine located in PNG, and initiated ICSID arbitration against PNG based on two domestic PNG laws. The claim was dismissed at the jurisdiction stage, with the ICSID tribunal finding that PNG had not provided its written consent to ICSID jurisdiction.

More recently, in *AsiaPhos Limited and Norwest Chemicals Pte Limited v People's Republic of China* (ICSID Case No. ADM/21/1) ("***AsiaPhos***"), the claimants, who were companies incorporated in Singapore, brought an investment claim against the PRC under the PRC-Singapore BIT, alleging expropriation, unfair

and inequitable treatment, failure to afford full protection and security, and failure to observe its commitments regarding the claimants' investments. The majority of the tribunal found that it had no jurisdiction over the claims. In respect of the claim for expropriation, the majority held that the scope of the arbitration clause was limited to disputes on the amount of compensation and did not cover the claimants' claims for indirect expropriation. Further, the scope of the arbitration clause could not be expended due to the MFN clause in the BIT to give the tribunal jurisdiction over the other claims brought by the claimants.

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

This is not applicable – there are no investor-state awards issued against Singapore.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

No, Singapore has not sought annulment proceedings in relation to such cases.

4.4 Has there been any satellite litigation arising, whether in relation to the substantive claims or upon enforcement?

No, there has been no such satellite litigation.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

In the Singapore court cases arising out of investment arbitrations either seated in Singapore or where enforcement of investment arbitral awards have been sought in Singapore, the court has shown its ability and willingness to deal with complex and novel issues arising in investment treaty cases. The Singapore judiciary is known for its efficiency, competence and integrity, and has demonstrated that it is more than capable of grappling with the most thorny and difficult issues of investment treaty law, and is fast emerging as an authority on the subject, with its decisions increasingly cited by international tribunals and courts.

For instance, the Court of Appeal's decision in *Sanum Investments* on the interpretation of the scope of arbitral consent on disputes "involving the amount of compensation for expropriation" and the application of the critical date doctrine has been cited in various investment treaty decisions, including in: *AsiaPhos*, *Beijing Urban Construction v Yemen* (ICSID Case No. ARB/14/30, Decision on Jurisdiction); *Addiko Bank v Croatia* (ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection); *Raiffeisen Bank v Croatia* (ICSID Case No. ARB/17/37, Decision on the Respondent's Jurisdictional Objections); *Gran Colombia Gold Corp v Colombia* (ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue); *ESPF and ors v Italy* (ICSID Case No. ARB/16/5, Decision on Annulment); and *UP and CD Holding v Hungary* (ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction).

In the recent case of *Deutsche Telekom*, the SICC, in a landmark decision on the point, applied Article 16(2) of the Model Law, which provides that "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence", and held that this required "a party to raise an objection or plead against jurisdiction prior to defending an arbitration on the merits", and that "[if] the party fails to do so, then it will be deemed to have waived the unargued jurisdictional point in the absence of valid justification". The SICC also squarely rejected the submission by India that Article 16(2) would "only be engaged when a party raises no plea at all that the tribunal lacks jurisdiction but instead participates in the arbitration on the merits", and held that "a party participating in an arbitration is required to put forward its entire case on the lack of jurisdiction at the outset to enable a tribunal to rule comprehensively on all objections".

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

Yes. In 2017, Singapore amended its laws to allow third-party funding for international arbitration proceedings, as well as court or mediation proceedings connected with the arbitrations. This includes investor-state arbitrations. From 2021, this was expanded to include domestic arbitration and related court proceedings, as well as proceedings commenced in the SICC (including appeals and related mediation proceedings).

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

In *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2023] 4 SLR 77, the SICC noted the potential benefits of third-party funding, including that it enables meritorious claims to be heard, that litigants may otherwise be unable to bring, especially in proceedings where legal costs may be substantial, as well as meeting business needs as a tool for companies to manage risk and cash flow.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

Third-party funding for litigation/arbitration in Singapore is a space to watch. Since the introduction of third-party funding, an increasing number of third-party funders have been active in Singapore. The positive feedback from third-party funders and users of third-party funding following the 2017 amendments led to the subsequent expanded scope for funding (see question 5.1 above).

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

There have been no published arbitral or Singapore court decisions on this issue.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Pursuant to section 12 of the International Arbitration Act 1994 ("**IAA**"), the tribunal has wide power to grant interim relief, including security for costs, discovery of documents, interim

injunctions, freezing injunctions, and orders for the preservation and interim custody of any property or evidence. The Singapore Courts have largely the same powers to grant these interim reliefs in aid of arbitration in cases of urgency and where there is no competent authority capable of acting (e.g. where the arbitral tribunal has not been constituted). Otherwise, the Singapore Courts will only grant such interim reliefs where the application (upon notice to the other parties and the tribunal) is made with the permission of the tribunal or agreement in writing of the other parties (see section 12A of the IAA).

6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs enforcement proceedings for international arbitrations seated in Singapore and foreign-seated arbitrations. The Arbitration Act 2001 ("**AA**") applies to any arbitration seated in Singapore and where part II of the IAA does not apply (i.e. domestic arbitrations).

The Arbitration (International Investment Disputes) Act 1968 ("**AIIDA**") implements the ICSID Convention, and sets out the procedure for the recognition and enforcement of ICSID awards in Singapore.

6.4 To what extent are there laws providing for arbitrator immunity?

Section 25 of the IAA expressly provides that an arbitrator shall not be liable for: (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits to the parties' autonomy to choose arbitrators, save that if the number of arbitrators is not specified by the parties, the default is a single arbitrator (section 9 of the IAA).

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. Pursuant to Article 11(4) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") read with section 8 of the IAA, if the parties' agreed appointment procedure fails, any party may request that the President of the SIAC Court or such other persons appointed by the Chief Justice of Singapore "take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment". In appointing the arbitrator, the appointing authority "shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties" (section 11(5) of the Model Law).

6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, in the context of challenges to an arbitrator. Pursuant to Article 13 of the Model Law, read with section 8 of the IAA, parties are free to agree on a procedure for challenging an arbitrator. If there is no such agreed procedure, the challenge must first be brought before the tribunal. Where the tribunal rejects the challenge, an application may be made to the General Division of the High Court ("**General Division**") for final determination.

6.8 Are there any other key developments in the past year in your jurisdiction related to the relationship between international arbitration tribunals and domestic courts?

In *CZT v CZU* [2023] SGHC(I) 11, the SICC ruled on the confidentiality of tribunal deliberations. The plaintiff applied to set aside an arbitral award issued against it by a 2:1 majority of the tribunal. The minority issued a dissenting opinion in which he made several serious allegations against the majority. In support of its setting-aside application, the plaintiff filed three applications seeking production of the records of deliberations from all three members of the tribunal. The Court dismissed the plaintiff's applications, recognising as a general principle that arbitrators' record of deliberations are confidential, and that it was only in the very rarest of cases where there is a compelling case in the interests of justice which overcomes the established policy reasons, that an exception to the default position on confidentiality of deliberations would be made. Such a case would have to involve allegations that are very serious in nature, and it must be shown that the allegations have real prospects of succeeding.

In *Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2022] 1 SLR 55, the Singapore Court of Appeal held, in the context of a setting-aside challenge, that "[a]s a general rule", Singapore Courts will not revisit a tribunal's construction of an agreed procedure in an arbitration agreement where the construction is open on the text of the agreement. This would be so "even though there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred". Where, on the other hand, an arbitral tribunal adopts a construction of a term providing for an agreed procedure which is "simply not open on any view of the text", "the tribunal cannot be said, on any view, to have adhered to the agreed procedure" and the supervising court can proceed to determine the content of the agreed arbitral procedure.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

For ICSID awards (which include "any decision interpreting, reversing or annulling an award, being a decision pursuant to the [ICSID] Convention, and any decision as to costs which under the [ICSID] Convention is to form part of the award"), any person seeking recognition or enforcement of the award is entitled to have the award registered in the General Division.

For Singapore-seated awards, parties can apply to the General Division for an award to be recognised and enforced in the same manner as a judgment or order of the General Division (section 19 of the IAA). The application is made without notice and supported by an affidavit: (1) exhibiting the arbitration agreement or any record of the content of the arbitration agreement and the original award or, in either case, a copy thereof; (2) stating the name and the usual or last known place of residence or business of the applicant and the person against whom it is sought to enforce the award, respectively; and (3) as the case may require, stating either that the award has not been

complied with or the extent to which it has not been complied with at the date of the application (see O 48 r 6 of the Rules of Court 2021). A similar procedure applies to the enforcement of foreign awards made in a country that is a contracting state within the meaning of the New York Convention (section 29 of the IAA).

A foreign award made in a jurisdiction which is not a signatory to the New York Convention can be enforced pursuant to the procedure for the enforcement of a domestic arbitral award set out in section 46(3) of the AA. The procedure is similar to that for enforcing a Singapore-seated international arbitral award and/or foreign award made in a New York Convention country.

7.2 On what bases may a party resist recognition and enforcement of an award?

For ICSID awards, the AIIDA does not provide for any other separate basis for resisting recognition and enforcement of the award outside of the annulment framework contained in the ICSID Convention.

For non-ICSID awards, the grounds for setting aside an award are limited to those set out in Article 34 of the Model Law and section 24 of the IAA (for Singapore-seated awards), and under Article V of the New York Convention, which is reflected in sections 31(2) and 31(4) of the IAA (for foreign awards), which are summarised as follows:

- The arbitration agreement is invalid.
- A party to the arbitration agreement was under some incapacity.
- The party making the setting aside application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case.
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.
- The composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement or the law of the country where the arbitration took place.
- The dispute was not arbitrable under Singapore law.
- Enforcement of the award would be contrary to the public policy of Singapore.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

There are no reported Singapore cases on this issue. However, Singapore adopts a restrictive approach to state immunity, i.e., a state cannot claim immunity from adjudication on disputes arising from its commercial transactions or execution against property used for a commercial purpose. Immunity from execution against a State's property is provided for in section 15(2) of the State Immunity Act 1979 ("**SIA**"). The commercial exception to this aspect of state immunity is found in section 15(4) of the SIA, which provides that a foreign state's immunity from execution against its property does not apply to "property which is for the time being in use or intended for use for commercial purposes".

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There are no reported Singapore decisions on the legal principles applicable to the attachment of sovereign assets owned by state-owned enterprises. In the absence of binding Singapore authority, legal authorities from the United Kingdom and the US may be persuasive.

In the United Kingdom, the leading case is the Privy Council decision in *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27 ("***FG Hemisphere***"). In that case, the Court held that the starting point was to give "full and appropriate recognition of the existence of separate juridical entities established by states, particularly for trading purposes", and this is done "[e]ven where such entities exercise certain sovereign authority *jure imperii*, providing them in return … with a special functional immunity if and so far as they do exercise such sovereign authority". While "[s]eparate juridical status is not … conclusive" and "[a]n entity's constitution, control and functions remain relevant", "where a separate juridical entity is formed by the state for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the state forming it should not have to bear each other's liabilities", and it would "take quite extreme circumstances to displace this presumption".

In the US, the Courts apply the *Bancec* factors, derived from the US Supreme Court decision of *First National City Bank v Banco Para el Comercio Exterior de Cuba*, 462 US 611 (1983). The factors are not meant to be a "mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded", and are generally seen as being a less stringent test than that provided for in *FG Hemisphere*. The *Bancec* factors are summarised as follows: (1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in US courts while avoiding its obligations.

It remains to be seen whether the Singapore Courts will adopt either of these approaches or whether it will promulgate its own approach.

Koh Swee Yen, Senior Counsel, is the Head of the International Arbitration Practice and a Partner in the Commercial and Corporate Disputes Practice of WongPartnership LLP.
In addition to her active counsel practice in complex litigation and international commercial and investment arbitration, she also sits as an arbitrator. Recognised as a Thought Leader in *Who's Who Legal*: Arbitration 2023 and Commercial Litigation 2023, as well as a global leader in Asset Recovery 2023 and Southeast Asia 2022: Energy, she was recently awarded Litigation Lawyer of the Year at *The Legal 500* Southeast Asia Awards 2023. Described as being "in a league of her own" and "razor-sharp" in her advocacy, she is commended for being "brilliant, decisive and fearless".

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore, 018982

Tel: +65 6416 6876
Email: sweeyen.koh@wongpartnership.com
URL: www.wongpartnership.com

Tiong Teck Wee is a Partner in the Commercial and Corporate Disputes Practice, and Co-Head of the Sustainability and Responsible Business Practice at WongPartnership LLP. His main areas of practice are in multijurisdictional, complex, high value commercial and corporate disputes. Teck Wee has acted for global private, public, and state-owned clients from various jurisdictions both in the Singapore Courts and in international arbitrations under the rules of major arbitral institutions. In particular, he has advised and acted for both private investors and State parties in investment treaty arbitrations and related Court proceedings.

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore, 018982

Tel: +65 6416 8112
Email: teckwee.tiong@wongpartnership.com
URL: www.wongpartnership.com

Monica Chong Wan Yee is a Partner in the Commercial and Corporate Disputes Practice at WongPartnership LLP.
Monica has an active disputes practice and routinely acts in arbitral proceedings conducted under a variety of arbitral rules, including SIAC, ICC, UNCITRAL and ICSID. She was named in the *Asian Legal Business* "40 under 40" list of outstanding legal practitioners in 2020, and is described in various legal publications as "super sharp" and "calm", with the ability to "provide solutions to difficult questions with a cultural touch" (*Benchmark Litigation 2021*).

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore, 018982

Tel: +65 6517 3748
Email: monicawy.chong@wongpartnership.com
URL: www.wongpartnership.com

Joel Quek is a Partner in the Commercial and Corporate Disputes Practice at WongPartnership LLP. His main areas of practice are in litigation and arbitration, involving commercial, corporate, shareholder and employment disputes across a range of sectors, including energy, commodities, gaming, finance, transport, construction and healthcare. Joel also has an active investment treaty arbitration practice, acting for both private investors and state parties.

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore, 018982

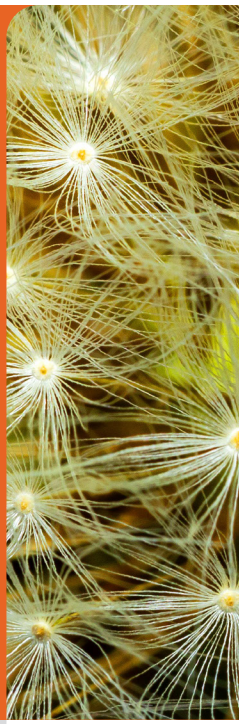
Tel: +65 6416 8124
Email: joel.quek@wongpartnership.com
URL: www.wongpartnership.com

Headquartered in Singapore, WongPartnership LLP is a market leader and one of the largest law firms in the country. We offer our clients access to our offices in China and Myanmar, and in Abu Dhabi, Dubai, Indonesia, Malaysia, and the Philippines, through the member firms of WPG, a regional law network. Together, WPG offers the expertise of over 400 professionals to meet the needs of our clients throughout the region.
Our expertise spans the full suite of legal services to include both advisory and transactional work, where we have been involved in landmark corporate transactions, as well as complex and high-profile litigation and arbitration matters. WongPartnership LLP is also a member of the globally renowned World Law Group, one of the oldest and largest networks of leading law firms.

www.wongpartnership.com

International Comparative Legal Guides

The **International Comparative Legal Guide** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.



Investor-State Arbitration 2024 features two expert analysis chapters and 14 Q&A jurisdiction chapters covering key issues, including:

- Treaties: Current Status and Future Developments
- Legal Frameworks
- Recent Significant Changes and Discussions
- Case Trends
- Funding
- The Relationship Between International Tribunals and Domestic Courts
- Recognition and Enforcement

The International Comparative Legal Guides are published by: glg Global Legal Group