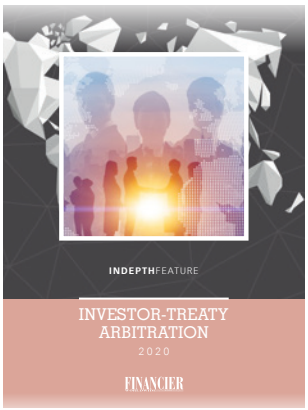

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Published by Financier Worldwide Ltd

INDEPTH FEATURE Reprint July 2020

INVESTOR-TREATY ARBITRATION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in investor-treaty arbitration.

SINGAPORE

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Q. Could you provide an overview of recent trends and developments in investor-treaty arbitration in Singapore? How would you describe the volume of such disputes over the last 12 months or so?

A: In recent years, Singapore has actively developed its legal and physical infrastructure in support of investor-treaty arbitration. In 2017, the Singapore International Arbitration Centre became the first private arbitral institution to promulgate dedicated rules for investor-treaty arbitration. The Permanent Court of Arbitration has opened an office and the International Centre for Settlement of Investment Disputes (ICSID) has also signed a memorandum of understanding for hearings to be held at Maxwell Chambers in Singapore. Other key developments include the establishment of the Singapore International Commercial Court (SICC), amendments to the Supreme Court of Judicature Act to clarify that the SICC has jurisdiction to hear any proceedings related to international commercial arbitration, including investor-treaty arbitrations, and permitting third-party funding arrangements for international arbitration proceedings and court and mediation proceedings arising from, out of, or in any way connected to, international arbitration proceedings.

Q. Are there any challenges involved in enforcing an arbitral award against sovereign and state entities in Singapore?

A: There is generally little difficulty in enforcing an arbitral award in Singapore even as against sovereign and state entities. Section 11 of the State Immunity Act provides that where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts in Singapore which relate to the arbitration. This is subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between states. Specifically, ICSID arbitral awards can be registered and are directly executable under the Arbitration (International Investment Disputes) Act and cannot be challenged before the Singapore courts. Non-ICSID arbitral awards are enforceable under Sections 19 and 29 of the International Arbitration

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Act (IAA), depending on whether the arbitration was seated in Singapore, and enforcement may only be refused on the grounds set out under Article V of the New York Convention or Section 31 of the IAA.

Q. What are some of the common causes of investor-treaty disputes in Singapore? What role are bilateral and multilateral investment treaties playing?

A: As foreign direct investment (FDI) flowing into the Association of Southeast Asian Nations (ASEAN) has increased over the years, so has the number of bilateral and multilateral investment treaties entered by ASEAN and its member states. This has led to a rise in the number of investor-treaty disputes and increasing use of investor-state dispute resolution mechanisms in investment treaties. More than half of the reported investor-treaty arbitrations to date where an ASEAN member state has been named as a respondent were commenced in the last 10 years. While Singapore has never been a respondent in a reported investor-treaty arbitration, a survey of reported investor-treaty arbitrations involving

other ASEAN member states suggests that common causes of investor-treaty disputes in the region include a lack of a clear, transparent and predictable framework for foreign investments and the carrying out of business generally, arbitrary changes in laws, discriminatory treatment of foreign investors and their investments, and lack of faith in the host state's judicial system to resolve foreign investment disputes impartially.

Q. What steps do parties need to take in relation to structuring their investments in Singapore to ensure they qualify to receive investment-treaty protection?

A: Investors should be cognisant of the definition of 'investor' and 'investment' in the treaty that they are likely to seek protection under. 'Investor' generally includes natural persons and corporate entities and 'investment' generally includes movable and immovable properties, financial instruments and claims to rights under contracts. Notably, most investment treaties which ASEAN member states are parties to require the 'investment' to be approved in writing by the host state; this requires familiarity with the host state's domestic laws. Investors should also seek advice on the different levels of substantive and procedural protections under different treaties. For example, the 2018 EU-Singapore Investment Protection Agreement (EU-SIPA) and the 2009 ASEAN Comprehensive Investment Agreement contain detailed provisions as to when the FET standard is breached and in the case of the EU-SIPA, establishes a novel, permanent two-tier Investment Court System with an appellate mechanism.

Q. What essential advice would you offer to an investor embroiled in a dispute with a foreign government? Do the emerging markets in your region pose any particular problems?

A: There are three things that an investor embroiled in an investor-treaty dispute should look out for. First, multi-tiered dispute resolution clauses that must be satisfied before the investor is entitled to commence formal legal proceedings, such as having to send a notice of dispute, or mandatory attempts at amicable settlement. Second, 'fork in the road' clauses under which the

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investor must elect whether to commence legal proceedings in the host state's domestic courts or to submit the dispute to arbitration. Third, any notice and service provisions under the host state's domestic laws to ensure that the host state is properly notified of the dispute and served. Investor-state dispute resolution remains nascent in ASEAN, especially among its developing member states. It is not uncommon for these states to be uncoordinated or delayed in their response to an investor-state dispute, or to view their treaty obligations through a unique cultural, socioeconomic or political lens. Key to the resolution of investor-state disputes with these states is the ability to understand this unique perspective.

Q. Do you believe the current investor-state dispute settlement system works well? Would you recommend any reforms to the system?

A: As noted by the United Nations Conference on Trade and Development, the seven challenges which the investor-state dispute settlement system faces as identified in its 2013 'World Investment Report' still largely persist today. While efforts have been made to address these challenges, for example by the promulgation of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, and the EU's attempt to establish and include a permanent, two-tier investment court system in its recent treaties, much remains to be done to recapture the confidence of existing users and to instil faith in new users in the system. To improve the consistency of arbitral decisions and to minimise erroneous decisions, state parties to multilateral treaties could work together to issue joint interpretive notes to give greater clarity to the standards and contents of their obligations under the treaties.

Q. How do you predict the geopolitical and economic outlook will influence investor-treaty claims and disputes?

A: Measures taken by states in response to the COVID-19 pandemic, which have included the forced closure and even expropriation of private businesses, and the global recession that is anticipated to follow, coupled with the protectionist

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reaction that many governments will likely have, will no doubt give rise to a marked increase in investor-treaty disputes and claims. This is not without precedent. The emergency measures implemented by the government of Argentina in response to the near-total collapse of its economy in 2001 spawned over 50 investor-state arbitrations by the end of 2014 and more than $2bn worth of arbitral awards against Argentina. In response to state measures taken to address the crisis in the wake of the 2011 Arab Spring, North African and Middle Eastern governments saw a spike in investor-treaty claims which in the case of *Union Fenosa Gas v. Egypt* resulted in an award of over $2bn against Egypt. It would not be surprising if states began to pull back from investor-treaty arbitration and search for alternative methods of investor-state dispute resolution. ❑

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