Introduction

As the global economy recovers from the financial crisis of 2008, foreign investments have gained momentum. These are facilitated and protected in part by the 2833 bilateral investment treaties (“BITs”) and 331 multilateral international investment agreements (“IIAs”) presently in force, as per the United Nations Conference on Trade and Development (UNCTAD) Investment Report, 2012.

Such treaties provide investors with a number of substantive rights to protect investments. The six main standards of protection are: (i) national treatment, which requires that domestic and foreign investors in similar circumstances be treated alike; (ii) most-favoured nation treatment, which requires that foreign investors of different states, in similar circumstances, be treated alike; (iii) fair and equitable treatment, which is a broad protection against arbitrary measures; (iv) full protection and security to the investments; (v) umbrella clauses, which offer treaty protection against breach of any legal obligation (even a contractual one) by the State towards the investor and; (vi) protection from expropriation or nationalization without compensation.

In recent times, investors have grown assertive as regards these protections. They utilize dispute resolution provisions in these treaties to enforce these obligations directly against a host State, without involving their home State. The mechanism of dispute settlement is usually international arbitration. This is a preferred method of dispute settlement for investors in particular, as courts of the host State may not be willing or sufficiently independent to grant them relief, and they cannot always rely on their own home State to intervene on their behalf. Equally, arbitral awards can be enforced across jurisdictions in a manner that court judgments may not be.
ICSID Arbitration

Recognizing this preference, the International Center for Settlement of Investment Disputes (ICSID) was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (“ICSID Convention”). The ICSID Center exists within the World Bank group and operates as a neutral administering institution. An award of an ICSID tribunal is considered equivalent to a final judgment of a court in all ICSID contracting States, and is hence directly executable. ICSID awards do not require domestic enforcement procedures, as is required for awards under the New York Convention, 1958, and cannot be challenged before national courts. The only recourse to a losing party is to invoke the ICSID annulment procedure, upon which ICSID will appoint an ad hoc committee, which conducts a limited scrutiny of the award, to see if the tribunal transgressed the ICSID Convention.

Consent is the cornerstone of the ICSID arbitration process. Parties to an ICSID arbitration must be a Contracting State i.e. one that has ratified the ICSID Convention, and a national of another Contracting State. Parties must also consent to submit their dispute to an ICSID tribunal. States normally give their consent unilaterally, either in relevant domestic legislation or, more commonly in the BITs and IIAs that they sign. Consequently, when an investor files the request for arbitration, that consent is deemed to have been “perfected”.

Ad Hoc Investor – State Arbitration

Where parties are from non-contracting States to the ICSID Convention or where consent is absent in the investment treaty in question, investors must turn to ad hoc arbitration. At first blush, one would think that these are rare, considering that 148 countries have ratified the ICSID Convention, as of 20 May 2013. But in fact, these are quite common. Six significant Asian economies: India, Vietnam, Laos, Taiwan, Hong Kong and Myanmar, have neither signed nor ratified the ICSID Convention; while Thailand has signed, but not ratified it. Outside of Asia, states like Brazil and South Africa have neither signed nor ratified the Convention; while Canada and Russia have signed, but not ratified the Convention. Three Latin American states, Bolivia and Ecuador and Venezuela, have recently withdrawn from the Convention.

Although an overwhelming number of investor-state arbitrations remain under the ICSID mechanism, a number of concerns have been expressed on its efficacy. The most evident advantage of ad hoc arbitration is flexibility since it can be “tailor-made” to suit the nature of the dispute, and make the arbitration process cost and time efficient. Ad hoc arbitrations allow for the option that such proceedings remain confidential unlike the ICSID system where the Secretary-General of ICSID is under an obligation to publish information.
about the existence and progress of pending disputes. ICSID arbitrations are also often plagued by challenges concerning consent to the proceedings, leading to delays.

As a consequence of the above factors, the number of potential disputes that require to be resolved by ad hoc arbitration is significant. As with commercial arbitrations, investor-state ad hoc arbitrations must select a seat, and perhaps an administering institution, to facilitate the conduct of the arbitration.

**Investment and investor–state arbitration in Asia**

Asian economies have remained resilient despite the challenging financial environment. The UNCTAD Investment Report, 2012, reports total investment inflows amounting to USD 336 billion in East and South-East Asia alone, accounting for 22% of global inflows; and another USD 39 billion into South Asia, with India taking the lion’s share at four-fifths of that amount. Interestingly, many Asian countries’ top investment partners are other Asian economies. Economies like Singapore, Japan and Taiwan are steadily shifting from being investment destinations to supplying investments globally. The investment activity of the Sovereign Welfare Funds (SWF) of China and Singapore has also grown in recent times.

Asian states have entered into a number of BITs, with China (128 BITs), India (82 BITs) and South Korea (90 BITs) being amongst the highest number of such agreements concluded by a state in the world. In 2011, a World Trade Organization Report characterized the Asia-Pacific region as the most active in concluding Free Trade Agreements (FTAs) as well, which normally contain investment chapters. The commitment to protecting investments within Asia is further illustrated by the ASEAN Agreement, 1987, and the ASEAN Comprehensive Investment Agreement (ACIA), 2009, binding the ten ASEAN member states to comprehensive investment protections. Article 33 of the latter agreement provides that investor-state disputes may be submitted for arbitration under the UNCITRAL Arbitration Rules, 1976, or to the ICSID center if the necessary consent exists, or to any other regional center for arbitration within the ASEAN, such as the Kuala Lumpur Regional Center for Arbitration (KLRCA), or the Singapore International Arbitration Center (SIAC).

Until 2010, Asian states were respondents in 50 disputes, while Asian investors had brought 14 claims. Though the number of Asian states involved in investor-state disputes is relatively lower to say, Latin American states, the number has been increasing. As of 2012, within the ASEAN, only Brunei and Singapore are yet to have claims brought against them. India, Mongolia and Turkmenistan have faced a number of claims in the past two years, with the seven claims brought against India in 2012, being only second to the
9 claims which Venezuela faced over the same period. Equally, disputes brought by Asian investors against states, both within and outside Asia, have been on the rise; most recently with Chinese investors bringing claims against Mongolia and Peru.

This growth, as well as the willingness of Asian states and investors to prefer arbitration to resolve disputes, raises the significance of a good seat and venue and the increased possibility of the use of Asian centres as seats and/or venues for such arbitrations, given their geographic proximity and cultural familiarity to Asian parties.

**The Singapore Option**

Singapore has in the past decade set itself apart as the most preferred seat for international commercial arbitration in Asia; a fact recognized by international surveys such as the University of London - Queen Mary Survey of 2010. A host of factors contribute to this commendable feat. Some of these are equally applicable to the potential choice of Singapore as a seat for *ad hoc* investment treaty arbitration or as a venue for such disputes administered by ICSID.

Singapore is a regional and financial hub that serves as a gateway between the East and West. It is today the regional headquarters of many multinational corporations. It ranks first on the World Bank’s Ease of Doing Business Index; fifth on the world corruption perceptions index; and second on the World Economic Forum Global Information Technology Report for implementing modern communication technology.

Added to these factors, are Singapore’s convenient geographic location, its easy connectivity to the rest of the world and its excellent infrastructure which are key factors for an international arbitration destination. Singapore is unique in its proximity to South Asia, China and North Asia; and South East Asia. Singapore is naturally comfortable culturally and economically for peoples from all over the world due to its distinctive history and consequent multicultural demography.

On the legal front, Singapore has adopted an open regime for international arbitration by allowing counsel from all jurisdictions to freely participate in arbitral proceedings. Arbitrators enjoy tax incentives. Courts in Singapore have constantly and strongly supported international arbitration, party autonomy and the finality of arbitral awards. Singapore’s judiciary is viewed as one that understands and encourages commercial enterprise and is independent from influence. The government has been equal to the task by
ensuring that Singapore’s UNCITRAL Model Law based arbitration legislation is up to date with international jurisprudence.

Neutrality is a key factor for an international arbitration, and more so in an investor-state arbitration. The removal of potential domestic court bias and the non-existence of any geopolitical influences which may plague other jurisdictions in the region set apart Singapore as a unique neutral option for investor-state disputes.

Singapore is also a signatory to the New York Convention which guarantees enforceability of awards rendered in investor-state disputes, under the UNCITRAL or any other rules, in over 145 countries. Moreover, parties’ perception of the quality and fairness of the arbitral process in Singapore makes it more likely that they will comply with award voluntarily, as has been the case with awards rendered with in Singapore-seated commercial arbitrations.

For the conduct of the arbitrations, Maxwell Chambers offers one of world’s largest integrated dispute resolution complex with state-of-the-art customized hearing facilities. The Maxwell Chambers is party to a MoU with ICSID for the conduct of hearings in Singapore in investor-state disputes, and hearings in three disputes have already taken place. Hearings in a number of ad hoc investor-state disputes seated in Singapore have also taken place here.

Enforcement of arbitration agreements and awards against sovereign States poses the particular challenge of sovereign immunity. Singapore follows a restrictive immunity policy that allows arbitral agreements to be enforced against sovereign states where they relate to commercial and contractual matters and not purely sovereign ones. Similarly, awards may be enforced against assets of a state used for commercial purposes and not sovereign or diplomatic purposes. Section 11 of the State Immunity Act, 1985, provides that the state is not immune in respect of proceedings in Singaporean courts which relate to arbitration. The Singapore Court of Appeal has also recently shown, in a dispute between an Indian company and the Government of Maldives, that the judiciary will readily recognize waivers of immunity by states and refer the parties to arbitration. In contrast, Hong Kong and China follow a different immunity regime as recently seen in the Hong Kong Court of Final Appeal’s denial of enforcement of an award against the Republic of Congo, despite the dispute being a purely commercial one.
Singapore has, in recent years, also been chosen as the seat for disputes such as *White Industries v. India* and *Phillip Morris v. Australia*, with the tribunal in the latter case specifically finding Singapore to be a convenient place (seat) for the arbitration.

The SIAC Experience
SIAC has benefitted from the growth of Singapore as the preferred destination for international arbitration in Asia. This is a fact reflected in the growing caseload at SIAC with a record number of 235 new cases having been filed at the centre in 2012, a 25% increase from 2011. SIAC currently handles over 600 active cases.

SIAC currently provides peripheral services to two investor-state treaty arbitrations, having been called upon to appoint an arbitrator in one of the two. SIAC has also administered commercial disputes between state entities and private investors and parties under its own rules. Equally, SIAC is comfortable with administering cases under both versions of the UNCITRAL rules having dealt with over 50 such cases.

SIAC has evolved with a new set of arbitration rules introduced once every three years. Special procedures have been introduced to control timelines and costs. SIAC’s scrutiny process is well known as being designed to ensure enforceability of awards resulting in a positive track record across several jurisdictions. The latest version of SIAC’s rules viz. SIAC Rules, 2013 specifically provide for arbitrations arising from an investment treaty as being referable to the institution for administration. SIAC’s Court of Arbitration consists of a number of eminent practitioners, who have participated as both counsel and arbitrators in investor-state disputes across the world. The President of the Court, Professor Michael Pryles, is a highly regarded arbitrator who has sat on several investor-state disputes as arbitrator and is also designated by Australia to the ICSID Panel of Arbitrators.

With a multi-national Secretariat conversant with investor-state arbitration, SIAC is competent to manage the entire range of administrative and logistical aspects of such an arbitration – from appointing arbitrators, determining costs and facilitating logistics.

With all the requisites in place including a reputed international institution and world class facilities, Singapore is today poised as an ideal option for investor-state arbitrations both as a seat for *ad hoc* investor state arbitrations and as a venue for arbitrations administered by ICSID.