

## Singapore's Highest Court Sets Aside Investment Treaty Award

### IN SHORT

**The Situation:** A group of South African mining investors attempted to revive an investment treaty award by which the Kingdom of Lesotho was held liable for its role in disbanding the Tribunal of the Southern African Development Community ("SADC Tribunal").

**The Issue:** The suit argued that the Singapore courts did not have jurisdiction to review the Permanent Court of Arbitration ("PCA") Award under s10(3) of the International Arbitration Act ("IAA") because that provision limits review to awards on jurisdiction alone and excludes reviews of awards dealing with both jurisdiction and merits.

**The Result:** On November 27, 2018, the Singapore Court of Appeal affirmed the High Court's decision and handed down its judgment in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho*, setting aside the PCA Award on the basis that the PCA Tribunal lacked jurisdiction to hear the investment treaty claim.

In a landmark decision, the Singapore Court of Appeal rejected a group of South African mining investors' attempt to revive an investment treaty award that held the Kingdom of Lesotho liable for its role in disbanding the SADC Tribunal. The Court of Appeal ruled that it had the power to set aside the Award under Article 34(2)(a)(iii) of the Model Law, which has the force of law under the IAA, extending to situations where an award deals with issues falling completely outside the arbitration agreement.

This decision is significant because it is the first time the Singapore courts have set aside a final award in an investment arbitration. States and foreign investors should take note of the Singapore courts' willingness to undertake a critical review of investor-state awards when the seat of the arbitration is Singapore, exemplified by the Court of Appeal's decision to appoint two international law experts as *amici curiae* to make submissions on areas of novel international law.



The Court of Appeal's decision confirms the Singapore courts' supervisory role over Singapore-seated arbitral tribunals and highlights Singapore's growing profile as a seat for investment arbitration.



### Background

The Award was a partial award on jurisdiction and merits, issued on April 18, 2016, by an international tribunal appointed by the PCA seated in Singapore. By majority, the PCA Tribunal found that the Kingdom of Lesotho had breached various obligations under the Finance and Investment Protocol for the Declaration and Treaty of Southern African Development Community ("SADC Treaty") by improperly voting with other African nations to dissolve the SADC Tribunal, a regional dispute resolution body comprising 15 African states.

The investors had brought an expropriation claim before the SADC Tribunal contending that the Kingdom of Lesotho expropriated their rights under several mining leases. With the SADC Tribunal dissolved, investors were effectively stripped of a forum for recourse against the

Kingdom of Lesotho, and the Kingdom was in breach of its obligations to the investors under the SADC Treaty. By way of the appropriate remedy, the PCA Tribunal directed the parties to constitute a new tribunal to hear the expropriation claim.

On October 20, 2016, the PCA Tribunal issued a final award on costs, finding that the Kingdom of Lesotho was to pay the investors the costs of the arbitral proceedings. This costs award was the subject of a separate set of enforcement proceedings in Singapore. The Kingdom then commenced the setting aside application for the Award.

### The Court of Appeal's Decision

At first instance, the Singapore High Court set aside the entirety of the Award on the basis that the PCA Tribunal lacked jurisdiction to hear the investment treaty claim. Unsatisfied with the decision, the investors appealed to the Court of Appeal to reinstate the Award.

The Court of Appeal agreed with the High Court that the PCA Tribunal lacked jurisdiction, and it affirmed the decision to set aside the Award. In analyzing the PCA Tribunal's jurisdiction to hear the dispute, the Court of Appeal found that to qualify as an investment for the purposes of an investment treaty claim, an asset must qualify as an "investment" as defined by the applicable investment treaty and have a territorial nexus with the host state.

The Court of Appeal also opined that investors can expect protection only in relation to investments that are made within the host state because states generally have no extraterritorial jurisdiction and cannot purport to protect rights or property located beyond their borders. Furthermore, where a treaty requires the exhaustion of local remedies as a precondition to arbitration (as was the case under the SADC Treaty), an investor's failure to exhaust such remedies calls into question the jurisdiction of any tribunal constituted to determine claims under that treaty.

The Court of Appeal's decision confirms the Singapore courts' supervisory role over Singapore-seated arbitral tribunals and highlights Singapore's growing profile as a seat for investment arbitration. Although the investors were likely disappointed by this outcome, parties choosing Singapore as a seat should be reassured by the disposition of the Singapore courts to objectively interpret relevant treaty provisions in reviewing jurisdiction and to take issue with the arbitral tribunal's conclusions if necessary.

### THREE KEY TAKEAWAYS

1. The Singapore Court of Appeal ruled that it had the power to set aside an award in situations where the award deals with issues falling completely outside the arbitration agreement.
2. *Swissbourgh Diamond Mines* is significant because it is the first time the Singapore courts have set aside a final award in an investment arbitration.
3. The decision demonstrates that parties to an arbitration in Singapore should feel reassured by Singapore courts' willingness to objectively review and interpret an arbitral tribunal's conclusions and to weigh in if warranted.



**Matthew J. Skinner**  
Singapore / London



**Zachary Sharpe**  
Singapore



**Baiju S. Vasani**  
London / Washington

*[Zara Shafruddin](#) and [Rong Choy](#), associates in the Singapore Office, assisted in the preparation of this Commentary.*

[All Contacts >>>](#)

---

**YOU MIGHT BE INTERESTED IN:** [Go To All Recommendations >>](#)



[SIAC Signs Memorandum of Understanding with CIETAC](#)



[The Singapore Mediation Convention](#)



[New Hong Kong International Arbitration Centre Rules Take Effect](#)

---

SUBSCRIBE

SUBSCRIBE TO RSS



---

**Disclaimer:** Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113