



INVESTMENT PROVISIONS IN THE EU-SINGAPORE FREE TRADE AGREEMENT

SUMMARY

The provisions on investment in EU-Singapore Free Trade Agreement (EUSFTA) introduce important innovations, ensuring a high level of investment protection while preserving the EU and Singapore's right to regulate. These innovations are not present in the 12 Bilateral Investment Agreements (BITs) in place between Singapore and EU Member States (covering 13 Member States) that will now be replaced by the EUSFTA.

(1) Clarifying and improving investment protection rules:

The EUSFTA reaffirms the **right of the Parties to regulate** to pursue legitimate public policy objectives.

'**Fair and equitable treatment**', a standard very frequently invoked by investors, is now clearly defined. The EUSFTA provides a clear, closed list of types of behaviour that can constitute a breach of the standard (like denial of justice, arbitrary conduct and breach of due process). This enhances legal certainty and gives proper guidance to arbitrators.

The agreement provides a detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes **indirect expropriation**. In particular, when the state is protecting the public interest in a non-discriminatory way, the right of the state to regulate prevails over the economic impact of those measures on the investor.

(2) Improving how the dispute settlement system operates.

The EUSFTA guarantees that Investor-to-State Dispute Settlement (ISDS) is only available for **breaches of the investment protection provisions** such as non-discrimination, expropriation against adequate compensation and fair and equitable treatment and which has caused damage to a specific investor.

The agreement will also prevent investors from bringing multiple or frivolous claims as it does **not allow parallel claims** before domestic courts and arbitral tribunals and provides that the investor who loses a case will be obliged to pay **all litigation costs** including those of the state. The agreement also prohibits "treaty-shopping" and allows for early dismissals of unfounded claims.

Under EUSFTA the arbitration system will be fully **transparent**: all documents will be made available to the public and interested parties (e.g. NGOs) will be able to access hearings and to make submissions.

Investment provisions in the EU-Singapore Free Trade Agreement

By introducing a **binding code of conduct** for arbitrators and a preselected list of arbitrators, it prevents conflicts of interests and promotes consistency of arbitral awards.

The EUSFTA provides also for a number of **safeguards for the Parties** (i.e. the EU and Singapore) to maintain control over how the investment provisions are being applied, by issuing binding interpretations or making submissions when they are not defendants.

All these improvements address concerns that investment protection rules may have a negative effect on states' right to regulate and will ensure that legitimate government public policy decisions cannot be successfully challenged.

INVESTMENT PROVISIONS IN THE EU-SINGAPORE FREE TRADE AGREEMENT

The provisions on investment in EU-Singapore Free Trade Agreement (EUSFTA) introduce important innovations, ensuring a high level of investment protection, while preserving the EU and Singapore's right to regulate and pursue legitimate public policy objectives such as the protection of health, safety, or the environment. The agreement also includes very progressive rules for Investor-to-State Dispute Settlement (ISDS). These provisions not only set the basis for enhanced trade and investment relations between the EU and Singapore, but lead the way for the entire Southeast Asia region.

EU and Singapore have invested more than €190 billion in each other's economies. Currently, there are 12 Bilateral Investment Agreements (BITs) in place between Singapore and EU Member States (MS) (covering 13 Member States), concluded over the past 4 decades. They will be replaced by the EUSFTA.

The EUSFTA reflects the change in the approach towards investment protection at two different levels:

- 1) Clearer and more precise **investment protection standards**, i.e. the commitments that EU and Singapore are taking in the agreement about investment protection.
- 2) New and clearer rules on the conduct of **procedures** in arbitration tribunals.

1. EU-Singapore FTA sets new, precise standards on investment

- a) EUSFTA makes clear, from the outset, that **the EU and Singapore preserve their right to regulate** and to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity.

Relevant EUSFTA provisions: The following text will be included in the Preamble – *"Reaffirming each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity"*.

By comparison, the preambles of MS BITs with Singapore focus on the economic objectives of the agreement, e.g. encourage investment, stimulate business initiative and increase prosperity in both States.

- b) **A precise and specific standard of treatment of investors and investment is introduced.** The standard of "fair and equitable treatment" provides a clear, closed list of types of behaviour that can constitute a breach of the standard, enhancing legal certainty and giving proper guidance to arbitrators.

A breach of the fair and equitable treatment obligation can only arise when there is:

- Denial of justice in criminal, civil or administrative proceedings;

- A fundamental breach of due process;
- Manifestly arbitrary conduct;
- Harassment, coercion, abuse of power or similar bad faith conduct; or
- A breach of the legitimate expectations of an investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the investor.

It is important to notice that the concept of "legitimate expectation" is duly clarified and does not cover, e.g., an expectation of profit or a general expectation that the regulatory framework would not change.

Relevant EUSFTA provisions: Article 9.4 Standard of Treatment

By comparison, most MS BITs with Singapore simply state that the Parties will grant fair and equitable treatment, without further clarifications.

c) The agreement contains appropriate guidance on what constitutes "indirect expropriation":

- Legitimate public policy measures taken to protect health, safety or the environment do not constitute expropriation, except in the rare cases where they are manifestly excessive in light of their objective.
- Indirect expropriation can only occur when the investor is substantially deprived of the fundamental attributes of property such as the right to use, enjoy and dispose of its investment;
- A detailed case-by-case analysis is introduced to determine whether an indirect expropriation has taken place;
- The sole fact that a measure increases costs for investors does not give rise to a finding of expropriation.

The issuance of compulsory licences in accordance with WTO provisions guaranteeing access to medicines cannot be considered an expropriation.

Relevant EUSFTA provisions: Annex 9-A Expropriation and Annex 9-C Expropriation and intellectual property rights

By comparison, MS BITs with Singapore simply state that the expropriation article also covers indirect expropriation without further clarifications.

d) The agreement does not protect so-called "shell" or "mailbox" companies. To qualify as an investor, it is necessary to have real business operations in the territory of one of the Parties.

Relevant EUSFTA provisions: Article 9.1 Definitions

By comparison, MS BITs do not have this additional condition for a company to qualify as an investor.

2. The EU-Singapore FTA sets new and clearer rules on the conduct of procedures in investment arbitration tribunals

Choice and conduct of arbitrators

- e) The EUSFTA includes **a binding code of conduct for arbitrators** acting in an ISDS dispute. The code sets out strict disclosure obligations, rules for the prevention of conflicts of interests, as well as rules regarding the conduct of arbitrators during and beyond ISDS proceedings. In case an arbitrator is found not to comply with the code, he/she will be replaced. That decision is taken by an outside party (the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) and not by the fellow arbitrators.

Relevant EUSFTA provisions: Annex 9-B of the ISDS Section.

By comparison, none of the investment agreements currently in force between Singapore and EU Member States contains rules on the conduct and ethics of ISDS arbitrators. The underlying arbitration rules have some provisions dealing with conduct and ethics, but these are less far-reaching than what is included in the agreement.

- f) The EUSFTA also provides for **a list of arbitrators** pre-agreed by the Union and Singapore. In case of disagreement between the disputing parties (i.e. investor –Singapore or investor –Union/Member State), the arbitrator will be selected from this list. This ensures that the Union or Singapore have **always agreed to at least two of the three arbitrators that will act under the EUSFTA and will have vetted them to ensure that they live up to the highest standards.**

Relevant EUSFTA provisions: Article 9.21 (Constitution of the Tribunal), paragraphs 1-4.

By comparison, none of the investment agreements currently in force between Singapore and EU Member States provides for the establishment of lists of arbitrators.

Scope

- g) **ISDS under EUSFTA is strictly limited to breaches of few investment protection provisions which enshrine fundamental principles such as non-discrimination, expropriation only for a public purpose and against adequate compensation and fair and equitable treatment (see explanations above) and which has caused damage to a specific investor.** It cannot be used by an investor to claim a breach of another part of the agreement. For example, it cannot be used to obtain market access.

Relevant EUSFTA provisions: Article 9.14 paragraph 1 (Scope and Definitions).

Conduct of proceedings

- a) **The EUSFTA introduces full transparency in ISDS disputes:** all documents (submissions by the parties, decisions of the tribunal, expert reports, etc.) will be publicly available on a website administrated by the United Nations and financed by the EU. All hearings will be open to the public. Interested parties (NGO's, trade unions) will be able to make submissions.

Relevant EUSFTA provisions: *Article 9.25 and Annex 9-C to the ISDS Section* (Rules on public access to documents, hearings and the possibility of third parties to make submissions).

By comparison, none of the investment agreements currently in force between Singapore and EU Member States provide for the publication of documents, open hearings or access to the proceedings by interested third parties.

- b) The EUSFTA **prohibits parallel proceedings: investors cannot seek remedies in domestic courts (or other international tribunals) and through ISDS at the same time.** The aim is to avoid double compensation and divergent verdicts.

Relevant EUSFTA provisions: Article 9.20 (Conditions to the Submission of Claim to Arbitration).

By comparison, only two of the twelve investment agreements currently in force between Singapore and EU Member States contain provisions which prevent parallel proceedings before domestic courts and ISDS tribunals.

- c) The EUSFTA has rules **preventing fraudulent or manipulative claims.** For example, the making of an investment or business re-organisation for the purpose of bringing a case (as is alleged Philip Morris has done to bring its case against Australia) is explicitly prohibited. The EUSFTA also explicitly prohibits "class action"-claims, i.e. claims submitted in the name of a class of an undetermined number of unidentified claimants.

Relevant EUSFTA provision: Article 9.20 paragraph 6 and footnote n° 4(b) to Article 9.19 paragraph 1.

By comparison, no MS BIT, or in fact other Investment agreement (except the EU-Canada agreement – where the EU has pursued the same objective) contains similar provisions.

- d) Also, under the EUSFTA, **arbitral tribunals can never order the repeal of a measure adopted by Parliaments** in the Union, a Member State or Singapore; the most which can be required of a country is compensation and this only to the level of the losses actually suffered. It is not possible to also impose punitive fines, as may be possible under domestic laws.

Relevant EUSFTA provision: Article 9.27 paragraphs 1 and 2 (Final Award).

By comparison, none of the investment agreements currently in force between Singapore and EU Member States contain such clarifications.

- e) The EUSFTA also introduces **statutory limits** (3 years, extended if a domestic court proceeding is pursued) for bringing a claim.

Relevant EUSFTA provision: Article 9.16 paragraph 3 (Consultations).

By comparison, none of the investment agreements currently in force between Singapore and EU Member States contain such limitations.

- f) The EUSFTA has a **fast track system for rejecting unfounded or frivolous claims**. Frivolous claims can be thrown out in a matter of weeks. These are innovative provisions, broader in scope of application and in functioning than any existing comparable systems.

Relevant EUSFTA provisions: Articles 9.23 (Claims Manifestly Without Legal Merit) and Article 9.24 (Claims Unfounded as a Matter of Law).

By comparison, none of the investment agreements currently in force between Singapore and EU Member States contains similar provisions.

- g) **The losing party pays the costs.** This is important because under existing agreements there are no clear rules, with the result that often even if a government successfully defends itself it still bears all of its costs. Together with the EU-Canada FTA (where the EU has pursued the same objective), the EUSFTA is the first ISDS agreement with such provisions.

Relevant EUSFTA provision: Article 9.29 (Costs).

By comparison, none of the investment agreements currently in force between Singapore and EU Member States contains such rules.

- h) The EUSFTA also contains a **clear set of mediation rules**, annexed to the ISDS Section, to encourage an amicable solution. It also introduces the possibility of a sole arbitrator when both parties agree and limits on the fees paid to arbitrators. These changes are intended to assist SMEs.

Relevant EUSFTA provisions: Article 9.17 (Mediation and Alternative Dispute Resolution) and Annex 9-A to the ISDS Section; Article 9.19 paragraph 3 (Submission of Claim to Arbitration); Article 9.29 paragraph 5 (Costs).

By comparison, whereas very few of the investment agreements currently in force between Singapore and EU Member States allow for conciliation, no existing agreement incorporates a specific set of mediation rules. None of the existing agreements explicitly addresses the possibility of resorting to a sole arbitrator or limits the fees paid to ISDS arbitrators.

Control by the Parties (EU and Singapore)

- i) As an additional safeguard, the EUSFTA makes clear that the Union and Singapore have the right to adopt **binding interpretations and to make submissions when they are not defendants**. The reason for this is to permit the Parties to control and influence the interpretation of the agreement, and correct errors by the tribunals (the likelihood of which is in any event eliminated by the clear drafting of the relevant investment protection standards).

Relevant EUSFTA provisions: Article 9.22 paragraph 3 (Applicable Law and Rules of Interpretation); Article 9.26 (The Non-Disputing Party to the Agreement).

By comparison, none of the investment agreements currently in force between Singapore and EU Member States contains such provisions.

Further work foreseen in the agreement

- j) The agreement also provides for the possible creation of an **Appeal Mechanism**, an objective first mentioned in the Commission's Communication on Investment Policy in 2010. Similar provisions can be found in US agreements and in the EU-Canada FTA (where the EU has pursued the same objective). None of the investment agreements currently in force between Singapore and EU Member States contains similar provisions.

Relevant EUSFTA provision: Article 9.33 paragraph 1 (c) (Role of Committees).

Comparison between the provisions of the EU Singapore FTA and the provisions of EU Member States BITs with Singapore

Investment Standards	Member States BITs with Singapore	EU Singapore FTA
Right to regulate	Not mentioned. The preambles focus on economic objectives	Made explicit in the Preamble, with a specific reference to public policy objectives
Fair and Equitable Treatment	Vague formulation	A close list of state behaviour that can constitute a violation (like denial of justice or arbitrariness)
Indirect expropriation	No guidance	Annex containing guidance, including various safeguards against abuses
ISDS	Member States BITs with Singapore	EU Singapore FTA
Transparency	Proceedings confidential	Full transparency
Choice of arbitrators	Disputing parties – if no agreement other arbitrators/institution	Disputing parties – if no agreement Parties pre-established roster (EU and Singapore)
Ethics of arbitrators	General reference – policed by other arbitrators	Detailed and binding Code of Conduct – policed by independent actor
Prevention of fraudulent or manipulative claims	Silent	Explicit rules against abusive claims
Parallel claims	Almost all silent	Prohibited
Party control	Silent	Binding interpretations + submissions in all proceedings
Costs	Silent	Loser pays
Appellate mechanism	Silent	Possibility to develop