

INVESTMENT TREATY ARBITRATION

Pakistan



Investment Treaty Arbitration

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

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Pakistan



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BACKGROUND

Foreign investment

What is the prevailing attitude towards foreign investment?

Pakistan has a liberal foreign investment regime. The liberalisation process began in the 1990s. Prior to this policy, foreign investment was primarily restricted to the manufacturing sector. Since then, however, most sectors of the economy have been opened to foreign investment. The current policy developed by the Board of Investment, known as the Investment Policy 2013, is geared towards the continued liberalisation and to improving the ease of doing business in Pakistan. One of the key focuses of the policy has been the push to develop special economic zones throughout the country. These zones are being developed with the hope of attracting investors – particularly foreign investors – to set up industry in Pakistan by offering enterprises operating within such zones various fiscal incentives.

The foreign exchange regime permits repatriation of returns to investors. Investors are permitted to repatriate dividends and disinvestment proceeds in foreign currency subject to fulfilment of requirements of the central bank, the State Bank of Pakistan (SBP). Foreign companies operating in Pakistan through branch offices are also allowed to repatriate profits earned in Pakistan subject to the requirements of the SBP.

Law stated - 21 January 2022

What are the main sectors for foreign investment in the state?

The main sectors that attract foreign investment in Pakistan are power, oil and gas, financial business and trade. During the last decade, the power and infrastructure sectors have consistently attracted the highest foreign investment, particularly in projects falling within the China Pakistan Economic Corridor, which is the flagship project of China's Belt and Road Initiative. The sectors that attracted the most foreign direct investment in the last financial year (2020–2021), as reported by the website of the Board of Investment, are:

- power – US\$906.1 million;
- oil and gas – US\$242.8 million;
- financial business – US\$235.5 million;
- trade – US\$142.2 million; and
- information technology and telecommunication – US\$99.8 million.

Another notable sector is tech start-ups, which attracted upwards of US\$345 million in funding, more than the last six years combined. As with most emerging markets, start-ups in e-commerce, fintech and logistics attracted the majority of this funding.

Law stated - 21 January 2022

Is there a net inflow or outflow of foreign direct investment?

There is a net inflow of foreign direct investment (FDI) in Pakistan. During the last two decades, the net inflow of FDI was at its highest in the financial years 2006–2007 and 2007–2008 crossing the benchmark of US\$5 billion. More recently, as per data of the SBP, net inflow of FDI stood at approximately US\$2.6 billion in the financial year 2019–2020 and approximately US\$1.9 billion in the financial year 2020–2021.

Law stated - 21 January 2022

Investment agreement legislation

Describe domestic legislation governing investment agreements with the state or state-owned entities.

Domestic legislation does not govern investment agreements with the state. Nor does domestic legislation govern investment agreements with state-owned entities. However, investment agreements between foreign investors and state-owned entities in Pakistan are typically governed by the laws of Pakistan. The state-owned entities that are parties to these investment agreements consist of government departments and statutory bodies. Typically, these investment agreements set out, among other things, statutory consents and tax incentives, etc (in the power sector, for example, these agreements are referred to as 'Implementation Agreements', and 'Petroleum Concession Agreements', in the oil and gas exploration sector).

Further, the federal and provincial governments in Pakistan have introduced legislation to promote and regulate partnerships of government departments and state-owned entities with the private sector (local and foreign), particularly in the areas of development projects and provision of public infrastructure. The federal legislature enacted the Public Private Partnership Authority Act 2017 (the PPP Act), which sets out a regulatory framework for public-private partnerships (with both local and foreign entities) in Pakistan and establishes the Public Private Partnership Authority (the PPP Authority). Pursuant to the PPP Act, the PPP Authority is entrusted with granting approvals to public-private partnership agreements prior to their execution.

Similarly, the four provinces have also enacted their own laws for the establishment of agencies to promote and regulate public-private partnerships with provincial public sector entities within their respective territories. These laws consist of the Sindh Public Private Partnership Act 2010, the Punjab Public Private Partnership Act 2019, the KPK Public Private Partnership Act 2020, and the Balochistan Public Private Partnership Act 2018.

Law stated - 21 January 2022

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Pakistan has signed a total of 53 bilateral investment treaties to date.

Of the bilateral investment treaties Pakistan has signed, 32 are currently in force and the counterparties to these are China, Japan, the UK, Australia, France, Singapore, Turkey, the UAE, Switzerland, Netherlands, Bahrain, Bosnia, Denmark, Germany, Iran, Kazakhstan, Korea, Lebanon, Mauritius, Romania, Sri Lanka, Sweden, Tajikistan, Uzbekistan, Portugal, Spain, the Belgo-Luxembourg Economic Union, Italy, Laos, Oman, Syria and Kuwait.

Out of these bilateral investment treaties, 23 have completed their initial duration but have not yet been terminated by either counterparty and thus remain in force.

In addition, Pakistan has signed 16 bilateral investment treaties that have not yet been ratified and thus are not in force. Further, five bilateral investment treaties signed by Pakistan were terminated; four of these were terminated due to their supersession by new treaties entered into with the respective counterparties.

Pakistan was a pioneer of bilateral investment treaties. The first ever bilateral investment treaty was entered into in 1959 by Pakistan and the Federal Republic of Germany.

The majority of Pakistan's bilateral investment treaties were signed during the period 1988–2004.

Pakistan is also party to four multilateral investment treaties and multilateral agreements containing investment provisions:

- the Agreement for the Promotion, Protection and Guarantee of Investments among the Member States of the Organization of the Islamic Conference (OIC);
- the Agreement on South Asian Free Trade Area;
- the Cooperation Agreement between European Community and the Islamic Republic of Pakistan on Partnership and Development; and
- the Agreement on Promotion and Protection of Investments among Economic Cooperation Organization Member States.

The last mentioned multilateral investment treaty is not in force.

Law stated - 21 January 2022

If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

The provisions in BITs relating to Pakistan's territory typically extend to the territorial sea, maritime zone and continental shelf where Pakistan exercises its sovereignty under international law. One BIT also specifically extends to the territory of Gilgit-Baltistan, which is not a province of Pakistan under its Constitution but is administered by the federal government.

Law stated - 21 January 2022

Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

No, Pakistan has not amended or entered into an additional protocol affecting any bilateral or multilateral treaty to which it is a party.

It has been reported that a protocol for the establishment of an OIC Investor State Settlement Organ is under consideration. This protocol is being considered to be added to the multilateral investment agreement between OIC member states. It has also been reported that the investor-state arbitration mechanism embodied in the protocol requires intermediary steps to be taken by an aggrieved investor before it can commence investment arbitration proceedings. This is reportedly being contemplated in order to reduce the number of cases brought against member states. Such a protocol has not yet been signed and is not publicly available.

Law stated - 21 January 2022

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

Pakistan has not yet unilaterally terminated a bilateral or multilateral investment treaty. However, five bilateral investment treaties signed by Pakistan were terminated; four of these were terminated due to their supersession by new treaties entered into with the respective counterparties (Malaysia (through a composite economic cooperation agreement), Tajikistan, Kuwait, and Romania) and the remaining treaty with Indonesia was unilaterally terminated by

that state.

Recently, it has been reported that the Board of Investment has recommended that the federal government renegotiate 23 treaties which have completed their initial stipulated duration, failing which, it should initiate the termination process by giving notice to the counterparties. The federal government has not yet made a decision or taken any action pursuant to this recommendation by the Board of Investment.

Law stated - 21 January 2022

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Each of the multilateral treaties of which Pakistan is a member includes states with which Pakistan has entered into bilateral treaties. As such, these treaties do have overlapping membership. These treaties operate in parallel.

Law stated - 21 January 2022

ICSID Convention

Is the state party to the ICSID Convention?

Yes, Pakistan is a party to the ICSID Convention. Pakistan signed the ICSID Convention on 6 July 1965 and the ICSID Convention entered into force for Pakistan on 15 October 1966. At present, the ICSID Convention stands incorporated in Pakistan's domestic laws through the Arbitration (International Investment Disputes) Act 2011 (the ICSID Act), which provides for domestic implementation of the ICSID Convention.

Under the ICSID Act, the High Courts in Pakistan have been exclusively entrusted with the execution of an ICSID award and award holders are required to approach the relevant High Court for registration of such award. The High Court registering an ICSID award is required to execute it as if such award had been a judgment of that High Court. Under the ICSID Act, an ICSID award is enforceable against the federal government. However, the ICSID Act does not make provision for enforcement of awards to which the federal government is not party. ICSID Awards pursuant to ICSID's Additional Facility Rules, to which the federal government is not a party, which are made in a contracting state to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), may be enforced in Pakistan under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, which incorporates the provisions of the New York Convention into the laws of Pakistan.

Notably, the ICSID Act explicitly excludes the application of the Arbitration Act 1940 (which is applicable to domestic arbitrations) to proceedings under the ICSID Act.

Law stated - 21 January 2022

Mauritius Convention

Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

No.

Law stated - 21 January 2022

Investment treaty programme

Does the state have an investment treaty programme?

Pakistan does not have a formal investment treaty programme as yet. It has been reported that the Board of Investment, which is the country's investment promotion agency, has recommended that the federal government renegotiates existing bilateral investment treaties on the basis of the model treaty developed by the Board of Investment. The federal government is not reported to have made a decision or taken any action pursuant to the recommendation of the Board of Investment as yet.

Law stated - 21 January 2022

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Does the state have a foreign investment promotion programme?

The federal government has made various efforts for the promotion of foreign direct investment in Pakistan. These include the development of the Investment Policy 2013, the Investment Promotion Strategy 2021–2025 and the Ease of Doing Business Reforms. Pursuant to these programmes and in order to promote investment in Pakistan, various steps have taken to simplify regulations and procedures for businesses, which include removing hinderances from obtaining construction permits, faster commercial electricity connections to applicants, reducing delays in registration of property, protection of minority investors, payment of taxes online, online company and tax registration, and making it easier for foreign and local businesses to invest, operate and comply with domestic regulation. An online platform known as Pakistan Single Window is also in the process of being developed to enable businesses to lodge standardised information and documents with a single-entry point to fulfil import, export and trade related regulatory requirements without being required to submit the same data more than once. On account of these concerted steps, Pakistan has jumped 39 positions in 'Ease of Doing Business' in the last two years, and has been recognised as the top reformer in South Asia and the sixth reformer in the world in the World Bank Group's Doing Business Report 2020.

In addition, Pakistan has established 24 special economic zones to promote investment, offering fiscal benefits to the enterprises as well as the developers. Pakistan has also established seven export processing zones. These export processing zones promote manufacturing for the purposes of export by offering various fiscal and other incentives to investors. These zones attract foreign direct investment, enhance the volume of exports and promote industrialisation.

Law stated - 21 January 2022

Applicable domestic laws

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

In Pakistan, domestic laws generally relating to foreign investment consist (non-exhaustively) of the following:

- the Foreign Private Investment (Promotion and Protection) Act 1976 (the Investment Act);
- the Protection of Economic Reforms Act 1992 (the Reforms Act);
- the Foreign Exchange Regulation Act 1947 (the Exchange Act);
- the Foreign Exchange Manual (the Exchange Manual);

- the Special Economic Zones Act 2012 (the SEZ Act);
- the Special Technology Zones Authority Act 2021 (the STZ Act);
- the Foreign Currency Accounts (Protection) Ordinance 2001 (the Foreign Currency Ordinance);
- the Foreign Currency Accounts Rules 2020 (the Foreign Currency Rules);
- the Companies Act 2017 (the Companies Act);
- the Foreign Companies Regulations 2018 (the Foreign Companies Regulations);
- the Limited Liability Partnership Act 2017 (the LLP Act);
- the Public Private Partnership Authority Act 2017 (the PPP Act); and
- the Income Tax Ordinance 2001 and Sales Tax on Services Laws (the Tax Laws).

The important aspects of some of these laws are discussed below.

Investment Act

The Investment Act is the primary legislation on foreign investment and sets out the framework for foreign private investment in Pakistan. It regulates foreign investment made by a person who is not a citizen of Pakistan, a Pakistani dual national, and companies incorporated outside Pakistan. The Investment Act does not regulate foreign investment made by a foreign government or its agency. Pursuant to the Investment Act, the federal government may, in keeping with national interest and subject to specified terms and conditions, authorise foreign investment in any industrial undertaking in Pakistan. To this end, only four sectors are currently restricted for foreign private investment, namely arms and ammunitions, high explosives, radioactive substances, and security printing, currency and mint. The Investment Act ensures equal treatment in the application of laws relating to import and export to industrial undertakings having foreign investment and places them on par with other industrial undertakings. The Investment Act empowers the federal government to grant tax concessions, and provides for repatriation. With the World Bank Group's assistance under its 'Improving Business Environment for Prosperity Program' to Pakistan, a new investment law is being prepared.

Reforms Act

The Reforms Act provides protection against compulsory acquisition (including acquisition of equity) and expropriation by the government of any foreign, industrial or commercial enterprise of a foreign or local investor.

Exchange Act and Exchange Manual

Pakistan's foreign exchange regime is comprehensively regulated. Pursuant to the Exchange Act, various activities including the buying of foreign currency, the making of payments to non-residents and the issuance of shares to non-residents are restricted except with the general or special permission of the State Bank of Pakistan. The Exchange Manual is a compilation of the various general permissions issued by the State Bank of Pakistan setting out the conditions under which activities restricted by the Exchange Act (such as making payments to non-residents) may be conducted.

SEZ Act

The SEZ Act provides for the establishment of economic zones by the federal or provincial governments, by the private sector exclusively, or by the governments in collaboration with the private sector, subject to approval. It establishes an Approval Committee, headed by an official of the Board of Investment, and the Board of Approval, which is the highest

approving forum under the SEZ Act. The SEZ Act confers short-term and long-term fiscal benefits for the developer as well as the enterprise of an SEZ. There are currently 24 approved SEZs in Pakistan.

Foreign Currency Ordinance and Foreign Currency Rules

The Foreign Currency Ordinance is only applicable to foreign currency bank accounts and comprehensively protects the lawful selling, withdrawing, remitting, transferring, using as security or taking out of foreign currency from foreign currency bank accounts within or outside Pakistan. The Foreign Currency Rules prescribe some qualifications, meant for banks, on the credit of foreign currency from abroad to foreign currency accounts in Pakistan and enables free withdrawals and transfers from a foreign currency account in Pakistan.

Requirement of admission

A foreign company seeking to establish a branch or liaison office in Pakistan is required to seek approval from the Board of Investment. Further, where a foreign establishes a place of business, it is required by the Companies Act and the Foreign Companies Regulations to seek registration with the Securities and Exchange Commission of Pakistan (SECP).

Foreign nationals are also permitted to incorporate companies in Pakistan; however, any foreign national who seeks to become a shareholder or director of a company incorporated in Pakistan is required to obtain security clearance from the Ministry of Interior (MOI). Such security clearance by the MOI may be obtained on a post facto basis provided that an application has been filed at the time of the foreign national becoming a director or shareholder.

The LLP Act provides that a foreign LLP shall not carry-on business in Pakistan unless it is so registered in Pakistan. Thereafter, the provisions of the LLP Act shall apply to a foreign LLP.

The Tax Laws require registration of foreign investors, companies and other entities with the Federal Board of Revenue and, in the case of provision of services, with the provincial revenue authorities as well. The Tax Laws set out the obligations of record-keeping, return filing and tax withholding, etc.

Law stated - 21 January 2022

Relevant regulatory agency

Identify the state agency that regulates and promotes inbound foreign investment.

The Board of Investment is the federal government's investment promotion agency. In addition, each province has established its own department or agency for the promotion of investment in its respective territory. These provincial departments and agencies consist of the Sindh Investment Department, Punjab Board of Investment and Trade, Balochistan Board of Investment and Trade and KPK Board of Investment. These provincial departments and agencies only promote and do not regulate inbound foreign investment.

SBP, the central bank, administers the foreign exchange laws in Pakistan and as such, in respect of equity investments, regulates the repatriation of dividends and disinvestment proceeds, and, in respect of foreign debt, repayment of loans, etc.

Law stated - 21 January 2022

Relevant dispute agency

Identify the state agency that must be served with process in a dispute with a foreign investor.

The laws of Pakistan do not designate a state agency that must be served with process in a dispute with a foreign investor. Nor is any state agency typically so designated by Pakistan under the bilateral investment treaties that are currently in force.

The federal government's Rules of Business, 1973 entrust the supervision of international disputes, including investor-state arbitration, to the Office of the Attorney General for Pakistan. The Office may therefore be served with process. The Office of the Attorney General for Pakistan is situated in the Supreme Court of Pakistan building in Islamabad.

Law stated - 21 January 2022

INVESTMENT TREATY PRACTICE

Model BIT

Does the state have a model BIT?

Pakistan developed a new model BIT in 2021, which appears to be the first of its kind. The new model BIT has been developed as a benchmark for negotiating BITs in the future and, more particularly, in the backdrop of a history of investor-state arbitrations decided against Pakistan under the dispute resolution provisions in existing BITs.

The new model BIT is not publicly available.

Law stated - 21 January 2022

Preparatory materials

Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Pakistan does not currently have a central repository of treaty preparatory materials. Records are maintained by relevant offices and agencies of the federal government, including the Office of the Attorney General and the Board of Investment. Treaty preparatory materials are not publicly available.

It has been reported that the establishment of a central repository by the federal government is under way.

Law stated - 21 January 2022

Scope and coverage

What is the typical scope of coverage of investment treaties?

Pakistan's bilateral investment treaties typically define 'investment' in broad terms encompassing every kind of tangible and intangible asset, including movable and immovable property, shares, stocks and debentures of companies, intellectual property rights, rights conferred by law or contracts and any licences and permits, etc. Unlike contemporary investment treaties entered into by some states, Pakistan's bilateral investment treaties do not set out an exhaustive list of covered investments. Nor do such treaties stipulate a requirement of registration or written approval of investments by Pakistan for the treaties to apply to such investments. Investments made prior to the entry into force of such treaties are covered thereunder and are not typically subject to a requirement of registration or written approval for the treaties to apply to them. The treaties, however, do not cover disputes arising out of investments made prior to

the entry into force of a treaty.

The investment treaty with Turkey, for example, does stipulate a threshold of investment in order to be covered by such treaty. However, such stipulation is not typical of Pakistan's investment treaties.

Similarly, 'investor' is typically specified in the bilateral investment treaties to mean both the government of the state and any natural or juristic person from such state which invests in Pakistan and vice versa. No specific qualifications have been specified for investor.

Law stated - 21 January 2022

Protections

What substantive protections are typically available?

Pakistan's bilateral investment treaties typically contain the protections of 'fair and equitable treatment', 'non-discrimination', 'national treatment' and 'most-favoured nation', etc. The investment treaties also set out protection against expropriation and nationalisation except on certain limited grounds and subject to effective compensation. In addition, the treaties also protect repatriation and transfer of return and investment, subject to fulfilment of tax obligations.

Pakistan's investment treaties also typically stipulate general exceptions which enable either state to adopt, maintain or enforce non-discriminatory legal measures for the protection of human, animal or plant life, health, environment and natural resources.

Law stated - 21 January 2022

Dispute resolution

What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

ICSID is the most commonly used dispute resolution option for investment disputes between foreign investors and Pakistan under bilateral investment treaties. Other forums also include the Permanent Court of Arbitration. ICSID is typically specified as the forum in dispute resolution provisions in Pakistan's bilateral investment treaties.

Arbitration agreements in contracts between state-owned entities and private sector sponsors of projects vary as to the arbitral institution, and include provisions for arbitration under the rules of the International Chamber of Commerce, the London Court of International Arbitration and other well-known institutions.

Law stated - 21 January 2022

Confidentiality

Does the state have an established practice of requiring confidentiality in investment arbitration?

Confidentiality in investment arbitration depends on a case-by-case basis. However, Pakistan does not have an established practice requiring confidentiality in investment arbitration. We are aware of 12 investor-state arbitrations in which Pakistan has been involved and, in those cases, Pakistan has not required confidentiality of the award (where an award was made).

Law stated - 21 January 2022

Insurance

Does the state have an investment insurance agency or programme?

No, Pakistan does not have an investment insurance agency or programme.

Law stated - 21 January 2022

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

How many known investment treaty arbitrations has the state been involved in?

Pakistan has been involved in 12 known investor-state arbitrations. Notable cases include *SGS v Pakistan* (2001), *Bayinder v Pakistan* (2003), *Impreglio v Pakistan* (2003) and *Karkey Karadeniz v Pakistan* (2013). Out of these, *SGS v Pakistan* (2001) and *Impreglio v Pakistan* (2003) were settled, *Bayinder v Pakistan* (2003) was decided in favour of Pakistan, and *Karkey Karadeniz v Pakistan* (2013) was decided in favour of the investor. According to news reports, *Karkey Karadeniz v Pakistan* (2013) was 'amicably resolved' by the governments of Pakistan and Turkey.

The most notable case would perhaps be the *Tetheyan Copper v Pakistan* (2012) case before ICSID. In this arbitration, the tribunal awarded damages of approximately US\$5.9 billion to the investor following Pakistan's denial of a mining lease to the investor for the Reko Diq gold and copper reserves in Pakistan pursuant to an order of the Supreme Court of Pakistan. The award is among the largest rendered by an ICSID tribunal.

The details of most cases can be accessed from the UNCTAD and ICSID websites.

Law stated - 21 January 2022

Industries and sectors

Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Not necessarily, investment arbitrations have concerned sectors ranging from construction, mining, power generation, port and shipping, and import of liquified petroleum gas, etc.

Law stated - 21 January 2022

Selecting arbitrator

Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Pakistan does not have a practice of using default mechanisms for appointment of arbitral tribunals and almost invariably seeks appointment of arbitrators nominated by it. Pakistan does not have a history of appointing the same arbitrators repeatedly and nominates various local and international arbitrators from time to time.

Law stated - 21 January 2022

Defence

Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Yes, Pakistan typically defends itself against investment claims. Pakistan's internal counsel for international disputes, including particularly for investor-state arbitration, is the Attorney General for Pakistan, who is the principal law officer of the federal government under the Constitution. The Office of the Attorney General has been entrusted to supervise and handle matters related to international disputes under the Rules of Business, 1973. In most investment claims, however, Pakistan has largely relied on external counsel instructed by the Attorney General whose office remains involved.

Law stated - 21 January 2022

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes, Pakistan is a party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). At present, the New York Convention stands incorporated into domestic law through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the Foreign Awards Act). The Foreign Awards Act entrusts the enforcement of foreign arbitration agreement and foreign arbitral awards to the High Court of the relevant province.

Lately, in its first judgment under the Foreign Awards Act, the Supreme Court upheld the decision of the Lahore High Court recognising and enforcing a foreign award made under the rules of the London Court of International Arbitration.

Law stated - 21 January 2022

Award compliance

Does the state usually comply voluntarily with investment treaty awards rendered against it?

Pakistan exercises its right to contest investor-state arbitrations and awards by resorting to available legal remedies.

Recently, for example, Pakistan successfully obtained provisional stay of enforcement from ICSID under article 52 of the ICSID Convention from the payment of a penalty of US\$5.9 billion, subject to specified conditions, in relation to the *Tetheyan Copper v Pakistan* (2012) ICSID arbitration.

Pakistan was also successful in getting discharged the order made by the High Court of Justice of the British Virgin Islands provisionally charging certain assets of Pakistan abroad. The BVI High Court of Justice had made such order in recognition and enforcement of ICSID award in favour of the investor in *Tetheyan Copper v Pakistan* (2012).

Law stated - 21 January 2022

Unfavourable awards

If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

ICSID

As ICSID awards are not appealable under the ICSID Convention, save for seeking annulment of the final award by challenging its validity on limited grounds set out in the ICSID Convention, Pakistan has recently sought annulment of ICSID's final award in *Tethyan Copper v Pakistan* (2012) in the sum of approximately US\$5.9 billion, and the proceedings are currently ongoing.

The federal government has previously sought to make disputes which are the subject of ICSID arbitration proceedings subject to proceedings before Pakistani courts. For example, in relation to *SGS v Pakistan* (2001) before ICSID, which was instituted under the Pakistan–Switzerland bilateral investment treaty, Pakistan simultaneously filed a claim before a domestic court pursuant to the agreement between SGS and Pakistan for pre-shipment inspection services. These proceedings were ultimately appealed to the Supreme Court, which restrained SGS from pursuing or participating in ICSID proceedings on the grounds, inter alia, that ICSID did not have jurisdiction and that, by submitting to the domestic courts, SGS had waived its right to ICSID arbitration. Such judgment of the Supreme Court was reported as *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* 2002 SCMR 1694. Ultimately, the ICSID proceedings between SGS and Pakistan culminated in a settlement.

However, the approach of the courts in Pakistan appears to be evolving and shifting towards enforcement. In a more recent instance, for example, the High Court of Sindh at Karachi on the application of a Pakistani state-owned entity made an interim order of arrest of a power producing vessel within Pakistan's territorial waters. The vessel was provided by the Turkish investor Karkey Karadeniz pursuant to a contract for rental power between itself and the state-owned entity. The said investor initiated proceedings before ICSID pursuant to the Pakistan–Turkey bilateral investment treaty and a provisional award was made by the tribunal asking Pakistan to cause the plaintiff before the High Court to obtain temporary suspension of the High Court's order of arrest and detention of the vessels. The plaintiff made an application before the Sindh High Court for a modification of the arrest order in consideration of the provisional measures ordered by the ICSID tribunal. In consideration of the provisional measures, the High Court revoked the arrest of the investor's detained vessel. The judgment of the High Court of Sindh is reported as *Lakhra Power Generation Company v Karadeniz Powership* 2014 CLD 337. The tribunal made a final award in 2017 awarding damages, inter alia, for the detention of the vessel pursuant to the High Court's interim order. However, as interim measures were complied with, liability for failure to do so was avoided.

Non-ICSID

There is no publicly available information as to whether Pakistan has sought to appeal unfavourable foreign arbitration award before its domestic courts. The federal government and its agencies have from time to time approached domestic courts with disputes that are subject to international arbitrations other than under ICSID.

A notable instance was in the 1990s when the federal government sought to restrain, through proceedings in its domestic courts, a power producing company from approaching the International Chamber of Commerce pursuant to the arbitration agreement. After several rounds of litigation before various courts in Pakistan, the matter was appealed to the Supreme Court. In its judgment, the Supreme Court recognised the validity of the arbitration agreement but held that the dispute was not capable of arbitration on account of allegations of fraud and corruption. The judgment of the Supreme Court is reported as *HUBCO v Pakistan* PLD 2000 SC 841.

Pakistan has often also sought to challenge non-ICSID international arbitration by foreign investors before the courts of the country where the arbitration was seated. Recently, for instance, the Province of Balochistan challenged a partial

arbitration award of the ICC in favour of an Australian mining company before the English High Court of Justice on the grounds of lack of jurisdiction and corruption. However, English High Court dismissed Pakistan's challenge on the basis that 'corruption allegations' had already been adjudicated by ICSID in related proceedings pursuant to the Pakistan–Australia bilateral investment treaty. The judgment of the UK High Court is reported as *Balochistan v Tethyan Copper Company Limited* [2020] EWHC 938 (Comm).

In some cases where legal proceedings have been initiated in breach of the arbitration agreements, investors have resorted to approaching the court of the jurisdiction where the arbitration is seated for relief. For instance, a number of independent power producing companies approached the English High Court of Justice against the state-owned National Transmission and Dispatch Company Limited (NTDCL) seeking an anti-suit injunction to restrain NTDCL from challenging a partial final award of the London Court of International Arbitration in the domestic courts of Pakistan. The UK High Court of Justice awarded an anti-suit injunction in favour of the power producing companies and restrained NTDCL from challenging the partial final award of the London Court of International Arbitration in Lahore or anywhere else other than England and Wales. The judgment of the UK High Court is reported as *Atlas Power Limited v National Transmission and Dispatch Company Limited* [2018] EWHC 1052 (Comm).

Law stated - 21 January 2022

Provisions hindering enforcement

Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

The ICSID Act has generally paved the way for enforcement of an award pursuant to the ICSID Convention against the federal government in Pakistan. The ICSID Act is comprehensive and sets out the procedure for enforcement of awards against the federal government in Pakistan. The ICSID Act does not set out any grounds for challenging the enforcement of ICSID awards.

Moreover, the Foreign Awards Act, where applicable, enables domestic courts to refuse to recognise and enforce a foreign award on the grounds as set out in article V of the New York Convention, including when an award is contrary to the public policy of Pakistan, etc.

The Arbitration Act 1940, where applicable, also lays down specified grounds for setting aside an award made thereunder. Such grounds include misconduct of arbitrator (which can include certain kinds of error of law), where an award is improperly procured or is otherwise invalid.

In addition, the Foreign Exchange Act may hinder domestic enforcement of awards in Pakistan as the Foreign Exchange Act restricts the remittance of payments outside Pakistan and makes it subject to the general or special approval of the State Bank of Pakistan. Indeed, the Foreign Exchange Act does not inhibit commencement of enforcement proceedings in Pakistan, but makes the execution of an award (by way of remittance of payments outside Pakistan) subject to SBP approval.

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UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in your jurisdiction?

ICSID award

It has been reported in the news that Pakistan and Tethyan Copper Company (TCC) have agreed to enter into a

settlement agreement, which is not publicly available, in respect of the ICSID award in the sum of approximately US\$5.9 billion against Pakistan in the case of Tetheyan Copper v Pakistan (2012). This award is among the largest rendered by an ICSID tribunal.

Foreign Awards Act

The Supreme Court of Pakistan, in its first judgment on the Foreign Awards Act, upheld the judgment of the Lahore High Court recognising and enforcing a foreign arbitral award made under in proceedings conducted under the rules of the London Court of International Arbitration. The judgment affirms the 'pro-enforcement' approach in judgments of the High Courts on the Foreign Awards Act. The judgment is noteworthy in that it reiterated the application of the principal of competence-competence, reaffirmed recognition of arbitration agreements to be incorporated into contracts by reference and held that enforcement of foreign awards may be denied on grounds of public policy only where enforcement would offend fundamental notions of morality and justice. The Supreme Court held that the public policy exception should not be allowed to become a device by which the merits of a foreign award may be reviewed or create grounds which are not available in article V of the New York Convention. The Supreme Court observed that the UNCITRAL Model Law ' covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world ' and termed regrettable the fact that Pakistan has not yet enacted the UNCITRAL Model Law despite being a signatory to UNCITRAL. This is being seen by commentators as recognition by Pakistan's apex court of the need for having a modern legal framework for international arbitration proceedings in Pakistan.

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Jurisdictions

	Austria	OBLIN Attorneys at Law
	Bangladesh	Vertex International Consulting
	Belgium	Linklaters LLP
	China	Zhong Lun Law Firm
	Egypt	Shahid Law Firm
	European Union	Van Bael & Bellis
	France	DLA Piper
	Japan	Anderson Mōri & Tomotsune
	Malaysia	Cecil Abraham & Partners
	Mexico	Holland & Knight LLP
	Pakistan	RIAA Barker Gillette
	Romania	STOICA & Asociații
	Russia	BGP Litigation
	Spain	DLA Piper
	Switzerland	Homburger
	Ukraine	Sayenko Kharenko
	United Kingdom	Quinn Emanuel Urquhart & Sullivan LLP
	USA	Quinn Emanuel Urquhart & Sullivan LLP
	Uzbekistan	Putilin Dispute Management