Investment Treaty Arbitration 2020

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Getting The Deal Through

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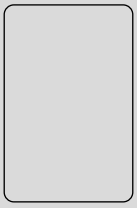

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Investment Treaty Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors Stephen Jagusch QC and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP, for their continued assistance with this volume.

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Austria

Miloš Ivković
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BACKGROUND

Foreign investment

1 | What is the prevailing attitude towards foreign investment?

The Austrian government has yet to announce any crystallised policy regarding foreign investment protection.

As a matter of general attitude unrelated to any particular investment dispute, the Federal Ministry of Digital and Economic Affairs does, however, indicate the government's openness to binding international arbitration as a proper alternative to national courts in dispute resolution under the applicable bilateral investment treaties (BITs).

The Treaty on the Functioning of the European Union (TFEU) entered into force on 1 December 2009 establishing the European Union's (EU) competence over direct investments. Based on the transferred competence, the European Parliament and the EU Council adopted Regulation 1219/2012 according to which existing BITs (see question 5) remain valid subject to authorisation by the European Commission after 'evaluating whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries' (Regulation 1219/2012, article 5). The European Commission further initiated infringement proceedings with respect to 12 intra-EU BITs (bilateral investment treaties between EU member states) signed and ratified by Austria.

Notwithstanding the foregoing, Austria signed the Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union, dated 15 January 2019 (the Declaration). Pursuant to the Declaration:

- 'All Investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to EU law and thus inapplicable';
- these arbitration clauses 'do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses)'; and
- an arbitral tribunal established on the basis of investor-state arbitration clauses lacks jurisdiction, because of a lack of a valid offer to arbitrate by the member state party to the underlying bilateral investment treaty.

Austria committed with other signing states to 'terminate all bilateral investment treaties concluded between (EU member states) by means of a multilateral treaty, or, where that is mutually recognised as more expedient, bilaterally' by 6 December 2019. Compatibility of such an action with public international law remains a matter of legal debate.

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

According to the Austrian National Bank's (Österreichische Nationalbank; OeNB) official database, the main sectors of inward direct investment (ie, investments of foreign investors into Austria) are: professional, scientific and technical service activities; financial intermediation; trade; and chemicals, petroleum products, pharmaceuticals. A comprehensive breakdown by respective industry is made conveniently available under www.oenb.at/isaweb/report.do?lang=EN&report=9.3.41.

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

When the inward direct investment income is compared with outward direct investment income (ie, investments of Austrian investors aboard) an overall net outflow of foreign direct investment may be established (compare www.oenb.at/isaweb/report.do?lang=EN&report=9.3.41 with www.oenb.at/isaweb/report.do?lang=EN&report=9.3.11).Notwithstanding the former, a significant net inflow may be present in particular industries, such as is the case in the sector of professional, scientific and technical service activities.

Investment agreement legislation

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

Austria does not have a specific (foreign) investment law. Formal admission of a foreign investment is generally not required. However, some non-discriminatory national and EU measures may become applicable (eg, in acquisition of real estate, antitrust, energy sector, public security and order).

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

5 | 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.

To date, Austria has signed and ratified 69 BITs, out of which BITs with the following 60 states are presently in force: Albania; Algeria; Argentina; Armenia; Azerbaijan; Bangladesh; Belarus; Belize; Bosnia and Herzegovina; Bulgaria; Chile; China; Croatia; Cuba; the Czech Republic; Egypt; Estonia; Ethiopia; Georgia; Guatemala; Hong Kong; Hungary; Iran; Jordan; Kazakhstan; Kosovo; Kuwait; Kyrgyzstan; Latvia; Lebanon; Libya; Lithuania; Macedonia; Malaysia; Malta; Mexico; Moldova; Mongolia; Montenegro; Morocco; Namibia; Oman; Paraguay; the Philippines; Poland; Romania; Russia; Saudi Arabia; Serbia; Slovakia; Slovenia; South Korea; Tajikistan; Tunisia; Turkey; Ukraine; United Arab Emirates; Uzbekistan; Vietnam; and Yemen.

Various trade agreements and treaties with investment provisions are in force with respect to Austria in its capacity as an EU member state. BITs signed with Zimbabwe (2000), Cambodia (2004) and Nigeria (2013) have yet to come into force.

Austria signed the Energy Charter Treaty in 1994, followed by a formal ratification in 1997.

The most important agreement awaiting ratification in EU member states' national parliaments is the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which has been in provisional force since 21 September 2017: the European Court of Justice (ECJ) declared the investor-state dispute settlement mechanism enshrined in CETA as compatible with EU law (Opinion 1/17 (CETA), EU:C:2019:341). Comprehensive overview of the status of the EU negotiated free trade agreements may conveniently be found under https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

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

Not applicable.

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

An example of diplomatic notes exchanged for the purpose of establishing the intended meaning of a BIT is related to the BIT concluded with Paraguay and available in electronic form under www.ris.bka.gv.at/Dokumente/BgblPdf/1999_227_3/1999_227_3.pdf.

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

Austria has not given notice to unilaterally terminate any BIT, yet.

It must be emphasised, however, that the conclusive effects of the transfer of competences over direct investments to the EU (see question 1) are yet to be determined.

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

See question 1.

ICSID Convention

10 | Is the state party to the ICSID Convention?

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was ratified on 25 May 1971, entering into power with respect to Austria on 24 June 1971.

Mauritius Convention

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

Austria is not a party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention).

Investment treaty programme

12 | Does the state have an investment treaty programme?

Yes. See question 5.

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

13 | Does the state have a foreign investment promotion programme?

The Federal Ministry for Digital and Economic Affairs and the Ministry for Europe, Integration and Foreign Affairs jointly support Austria's investment promotion programs.

On the one hand, the Federal Ministry for Digital and Economic Affairs is mainly in charge of the economic support to foreign investments, publishing a comprehensive overview of all support available to foreign investors under www.aws.at/fileadmin/user_upload/Downloads/Sonstiges/BMDW_InvestInAustria_EN.pdf.

On the other hand, the Ministry for Europe, Integration and Foreign Affairs and the Austrian diplomatic missions remain responsible for investment protection, committing to enforcing the applicable BITs and ensuring export control. An overview of the Ministry for Europe, Integration and Foreign Affairs' responsibilities is conveniently available under www.bmeia.gv.at/en/european-foreign-policy/foreign-trade-promotion/.

Applicable domestic laws

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

Reiterating Austria's openness to foreign investments, some non-discriminatory national and EU measures may become applicable (eg, in acquisition of real estate, antitrust, energy sector, public security and order, etc). Additionally, according to the Austrian Foreign Trade Act (AußWG), an approval of the Minister in charge of economic affairs must be obtained for an 'acquisition by a natural person who is not a citizen of the European Union, a citizen of the EEA or Switzerland, or a legal person or company established in a non-EU country other than the EEA and Switzerland' should the investor intend to obtain or otherwise acquire a controlling position in industries of specific importance for the Republic of Austria as defined in section 25(a)(2) AußWG.

The Federal Ministry for Digital and Economic Affairs is currently working on amendments to AußWG, thereby taking close account of Regulation (EU) 2019/452 on 'establishing a framework for the screening of foreign direct investments into the Union'.

Relevant regulatory agency

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

See question 13 above.

Relevant dispute agency

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

In the absence of a direct stipulation on point fund in investment treaties concluded by Austria, an investor must serve the notice of dispute to the Foreign Ministry (ie, Ministry for Europe, Integration and Foreign Affairs).

INVESTMENT TREATY PRACTICE

Model BIT

17 | Does the state have a model BIT?

Austria does have a Model BIT adopted in 2008 (Model BIT). It is, however, crucial to recall that the prevailing number of BITs signed and ratified by Austria predate the newest version of the Model BIT. An assessment of the impact the latest model BIT may have in the future is likewise challenging to make.

A comparable analysis of BITs signed after the Austrian Model BIT had been introduced shows a lack of uniformity. On the one hand, investment treaties with Tajikistan and Kosovo were strictly drafted along the lines of the Model BIT. Contrariwise, agreements of the same nature with Kyrgyzstan and Kazakhstan introduced amendments to the Model BIT in some important respects.

Furthermore, investment protection provisions are commonly becoming a part of EU trade agreements with third countries, thus limiting the purpose envisaged for the Model BIT.

As far as the content of the Model BIT is concerned, Austria certainly presented a concise, functional and advanced platform for successful protection of foreign investments. The key provisions ensure:

- equal treatment of foreign investors in comparison to national investors or investors from third countries;
- obligation of a fair treatment according to the standards of international law (closely regulated expropriation, payments made in the context of an investment must be effected without restrictions, etc); and
- effective dispute resolution in front of:
  - national courts;
  - the International Centre for Settlement of Investment Disputes (ICSID);
  - a sole arbitrator or an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); and
  - a sole arbitrator or an ad hoc tribunal under the Rules of Arbitration of the International Chamber of Commerce (ICC).

Further peculiarities of the Model BIT include a characteristic defining of the terms 'investor' and 'investment', as well as a rather wide-reaching umbrella clause. A commentary addressing important aspects of the Model BIT in greater detail is conveniently accessible online: www.iisd.org/pdf/2012/austrian_model_treaty.pdf

Preparatory materials

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

All available supporting materials to any international treaty ratified by the Parliament of the Republic of Austria are officially accessible in an electronic form under www.parlament.gv.at/PAKT/. While the Federal Ministry of Digital and Economic Affairs makes German versions of the ratified BITs with accompanying instruments available on its website for review and public scrutiny (www.bmdw.gv.at/Themen/International/Handels-und-Investitionspolitik/Investitionspolitik/BilateraleInvestitionsschutzabkommen-Laender.html), English versions, as well as translations in other languages when applicable, may be found under http://investmentpolicyhub.unctad.org/IIA/CountryBits/12.

Scope and coverage

19 | What is the typical scope of coverage of investment treaties?

Investor qualifications

Investment treaties entered into by Austria (see question 5) stipulate, somewhat not as uniformly, a number of legal qualifications that a foreign investor ought to meet to be awarded with substantive protections. While both natural persons, as well as legal entities (ie, enterprises) may generally be regarded 'investors', additional requirements include:

- Principle place of incorporation/business: article 1(3) Model BIT defines enterprise inter alia as 'constituted or organized under the applicable law of a contracting party'. The seat requirement is explicitly stipulated in multiple concluded BIT (see eg, article 1(2) Austria-Belarus BIT; article 1(2)(b) Austria-Argentina BIT; etc). The principle place of incorporation requirement may, in some instances, be substituted through establishing (pre)dominant influence over the investor established by an entity of one of the contracting parties (see, eg, article 1(2)(c), Austria-Egypt BIT; article I(2), Austria-Kuwait BIT; etc).
- Performing substantive business activities: article 1(3) Model BIT further states that the enterprise should be 'carrying out substantive business [in the host state]'. In line with the foregoing, a number of BITs invoke an obligation of genuine business activities (see, eg, article 1(2)(b), Austria-Chile BIT).
- Inconsistent qualifications depending on the contracting party: a noticeable number of BITs define requirements attached to defining 'investor' independently for each contracting party (see, eg, article I(2), Austria-Kuwait BIT).
- Denial of benefits: in line with the Model BIT, a number of concluded BITs explicitly deny protection in the cases where the above-stated requirements are not met. The prime example of such a provision is found in article 10, Austria-Uzbekistan BIT, which states: '[a] Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organized'.

Defining 'investment'

Protected 'investment' under the Model BIT includes any asset 'owned or controlled, directly or indirectly' by the protected investor. This admittedly board definition is somewhat limited by additional considerations imposed by the applicable BITs:

- Distinction between direct and indirect investments: while the prevailing number of investment treaties entered into by Austria (see question 5 above) approve of protection in both instances, some do not reach as far as to confer protection to indirect or not-for-profit investments (see, eg, article 1(1), Austria-Iran BIT).
- Territorial requirement and legality: investments are generally protected if made within the territory of a contracting party and in accordance with that party's laws and regulations (see, eg, article 1(3), Austria-Malaysia BIT).
- Questions of retroactive coverage: a significant majority of investment treaties entered into by Austria either accord protection to investments made as of a particularly stipulated date (see, eg, article 9, Austria Russia BIT), or make no distinction in awarding protection to investments made prior and subsequent to the treaty's date of entry into force (see, eg, article 24, Austria-Cuba BIT).

Protections

20 | What substantive protections are typically available?

Investment treaties entered into by Austria generally stipulate the following protections subject only exceptionally to a very view restrictions:

- fair and equitable treatment (FET);
- expropriation (direct and indirect) protection;
- most-favoured-nation (MFN) protection;
- non-discrimination/national treatment protection;
- full protection and security; and
- umbrella clause.

Dispute resolution

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

Austrian BITs most commonly provide for an ICSID institutional arbitration or UNCITRAL ad hoc proceedings as the forum to be selected for resolution of any disputes arising out of the respective BIT. In contrast to the former, some BITs further provide for an additional option of arbitrating under the Stockholm Chamber of Commerce (SCC) rules (see, eg, article 7, Austria-Russia BIT), or the International Chamber of Commerce (ICC) rules (see, eg, article 11, Austria-Cuba BIT).

Confidentiality

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

Not applicable (see question 24).

Insurance

23 | Does the state have an investment insurance agency or programme?

Austrian investors may request insurance for investing into developing countries under the Convention establishing the Multilateral Investment Guarantee Agency. Austria became in 1997 one of the 25 industrialised countries to be members to this act.

Austrian investors may furthermore apply for coverage of foreign investments against political risk. The 'G4 guarantee' provided by the Osterreichische Kontrollbank AG (OeKB) is generally intended for non-EU and non-OECD markets. A convenient overview of the services is available under: www.oekb.at/en/export-services/covering-and-financing-investments-and-participation/political-coverage-of-foreign-investments.html

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

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

At the time of writing, Austria has been actively involved in a single publicly known investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32). The proceeding was initiated in July 2015 under the BIT Austria had concluded with Malta in 2002 (in force as of March 2004). The moving investor thereby alleged that Austria:

- imposed arbitrary, unreasonable or discriminatory measures;
- denied full protection and security;
- violated applicable prohibitions of direct and indirect expropriation; and
- denied fair and equitable treatment.

The Arbitral Tribunal dismissed the claims on jurisdictional grounds in October 2017, following a hearing on a point that had arisen in March that same year.

Industries and sectors

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

Not applicable (see question 24).

Selecting arbitrator

26 | 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?

Not applicable (see question 24).

Defence

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

Not applicable (see question 24).

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

28 | 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?

Austria became a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 2 May 1961. The New York Convention applies to Austria without limitation, as the initial reciprocity reservation was withdrawn in 1988.

Award compliance

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

Not applicable (see question 24).

Unfavourable awards

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

Not applicable (see question 24).

Provisions hindering enforcement

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

Austrian lawmakers make a clear distinction between the rules on enforcing domestic (ie, rendered in arbitral proceedings with the agreed seat of arbitration in Austria) and foreign (ie, rendered in arbitral proceedings with the agreed seat of arbitration out of Austria) arbitral awards.

In the case of the former, section 1 of the Austrian Enforcement Act (EO) stipulates that domestic awards not subject to appeals (inclusive of settlement agreements) may be enforced directly as inherently conferring executory titles.

Contrary to the above, Title III EO (section 403 et seq) requires formal recognition of foreign arbitral awards prior to domestic enforcement, unless the awards ought to be enforced without prior separate declaration of enforceability by virtue of an applicable international agreement (eg, treaties with applicable obligation of reciprocity in recognition and enforcement), or an act of the European Union.

According to article IV(1)(a) New York Convention, an applicant seeking recognition of an award has to furnish the original award (or a certified copy) plus the original arbitration agreement (or a certified copy). Section 614(2) ZPO places in this respect the decision on whether to request the applicant to table the relevant arbitral agreement (or a certified copy) within the discretion of the judge. Because the competent district courts only examine whether the formal requirements are satisfied, the Austrian Supreme Court's take on this has been more formalistic – they require an examination of whether the name of the debtor as indicated in the request for enforcement authorisation is in line with the name indicated in the arbitral award.

In addition to the stated, an award may be subject to section 606 ZPO requiring the award to be in writing and signed by arbitrators. Further formal requirements may be applicable in the absence of parties' agreement.

Austrian courts are not entitled to review an arbitral award on its merits. There is no appeal against an arbitral award. However, it is possible to bring a legal action to set aside an arbitral award (both awards on jurisdictions and awards on merits) on very specific, narrow grounds, namely:

- the arbitral tribunal accepted or denied jurisdiction although no arbitration agreement or a valid arbitration agreement exists;
- a party was incapable of concluding an arbitration agreement under the law applicable to that party;
- a party was unable to present its case (eg, it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings);
- the award concerns a matter not contemplated by, or not falling within the terms of the arbitration agreement, or concerns matters beyond the relief sought in the arbitration; if such defects concern a separable part of the award, such part must be set aside;
- the composition of the arbitral tribunal was not in accordance with sections 577 to 618 ZPO or the parties' agreement;
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (*ordre public*); and
- if the requirements to reopen a case of a domestic court in accordance with section 530(1) ZPO are fulfilled.

Countries are only granted sovereign immunity for actions to the extent of their sovereign capacity. Immunity does not apply to conduct of private commercial nature. Foreign assets in Austria are thus exempt from enforcement depending on their purpose: if meant to be used solely for private transactions, they may be seized and become subject to enforcement; but if meant to exercise sovereign powers (eg, embassy tasks), no enforcement measures may be ordered. In a relevant decision on the issue, OGH concluded (see 3 Ob 18/12) that general immunity for state assets is not envisaged, instead it is the duty of the obliged state to prove that it was acting with sovereign power in suspension of enforcement proceedings according to section 39 EO.

In the absence of instructive case law, it may be rational to conclude that piercing the corporate veil with respect to sovereign assets would be legally permissible so long as the rules on the scope of sovereign immunity are complemented with satisfaction of the applicable legislative requirements on piercing the corporate veil.

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UPDATE AND TRENDS

Key developments of the past year

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

On Austria's commitment to 'terminate all bilateral investment treaties concluded between [EU member states] by means of a multilateral treaty, or, where that is mutually recognised as more expedient, bilaterally' by 6 December 2019, see question 1.

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