

Investment Treaty Arbitration 2022

Contributing editors

Stephen Jagusch QC and Epaminontas Triantafilou



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development

Adam Sargent
adam.sargent@gettingthedealthrough.com

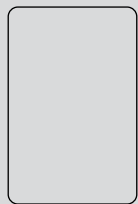
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Investment Treaty Arbitration 2022

Contributing editors

Stephen Jagusch QC and Epaminontas Triantafilou
Quinn Emanuel Urquhart & Sullivan LLP

Lexology Getting The Deal Through is delighted to publish the ninth 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.

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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 Urquhart & Sullivan LLP, for their continued assistance with this volume.



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Austria

Miloš Ivković

OBLIN Rechtsanwälte GmbH

BACKGROUND

Foreign investment

1 | What is the prevailing attitude towards foreign investment?

As a matter of general attitude unrelated to any particular investment dispute, the Federal Ministry of Digital and Economic Affairs indicates 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 entered into force on 1 December 2009 establishing the European Union's competence over direct investments. Based on the transferred competence, the European Parliament and the European Council adopted Regulation 1219/2012 according to which existing BITs 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 Judgment 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 BIT.

Austria initially 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 recognized as more expedient, bilaterally' by 6 December 2019. Notwithstanding the stated, Austria refused to join 23 EU member states in signing the Agreement for the Termination of Bilateral Investment Treaties between the member states of the European Union (the Agreement). Such a decision is truly welcomed as it appreciates valid concerns that termination of intra-EU BITs by the means of the Agreement may well be incompatible with public international law.

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

According to the official database of the Austrian National Bank (OeNB), 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 industries is available on the OeNB's website.

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 abroad) an overall net outflow of foreign direct investment may be established (compare Inward direct investment positions broken down by industry 2008 with Outward direct investment positions broken down by industry 2008 data from the OeNB). 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.

Austria has signed and ratified 69 bilateral investment treaties (BITs), out of which the following 60 are 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;
- the 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 provisionally been in force since 21 September 2017. The European Court of Justice declared

the investor-state dispute settlement mechanism enshrined in CETA as compatible with EU law (Opinion 1/17 (CETA), EU:C:2019:341).

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 available from the website of the Legal Information System of the Republic of Austria as a 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 are yet to be determined.

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

Austria has signed and ratified 69 BITs, 60 of which are in force. Austria has equally become a party to a number of multilateral treaties with investment protection clauses.

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 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.

Investment treaty programme

12 | Does the state have an investment treaty programme?

Yes.

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 programmes.

The Federal Ministry for Digital and Economic Affairs is mainly in charge of the economic support to foreign investments, and publishes a comprehensive overview of all support available to foreign investors.

The Ministry for European and International Affairs and the Austrian diplomatic missions remain responsible for investment protection, committing to enforcing the applicable bilateral investment treaties (BITs) and ensuring export control. An overview of the Ministry for European and International Affairs' responsibilities is available online.

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 European Economic Area (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.

Relevant regulatory agency

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

The Federal Ministry for Digital and Economic Affairs and the Ministry for European and International Affairs jointly support Austria's investment promotion programmes.

The Federal Ministry for Digital and Economic Affairs is mainly in charge of the economic support to foreign investments, and publishes a comprehensive overview of all support available to foreign investors.

The Ministry for European and International 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 European and International Affairs' responsibilities is available online.

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 points found in investment treaties concluded by Austria, an investor must serve the notice of dispute to the Ministry for European and International Affairs.

INVESTMENT TREATY PRACTICE

Model BIT

17 | Does the state have a model BIT?

Austria does have a model bilateral investment treaty (BIT) adopted in 2008. 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 fair treatment according to the standards of international law (closely regulated expropriation, payments made in the context of an investment must be affected 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.

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 accessible online. The Federal Ministry of Digital and Economic Affairs makes German versions of ratified BITs with accompanying instruments available on its website for review and public scrutiny. Versions translated into English and other languages, where applicable, are also available online.

Scope and coverage

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

Investor qualifications

Investment treaties entered into by Austria 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 or business

Article 1(3) model BIT defines enterprise, among other ways, as 'constituted or organized under the applicable law of a contracting party'. The seat requirement is explicitly stipulated in multiple concluded BIT (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 (eg, article 1(2)(c), Austria-Egypt BIT; article 1(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 (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 (eg, article 1(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 broad 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 approve of protection in both instances, some do not reach as far as to confer protection to indirect or not-for-profit investments (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 (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 (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 (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 to rare exceptional restrictions:

- fair and equitable treatment;
- expropriation (direct and indirect) protection;
- most favoured nation protection;
- non-discrimination and national treatment protection;
- full protection and security; and
- an 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 rules (eg, article 7, Austria–Russia BIT) or the ICC rules (eg, article 11, Austria–Cuba BIT).

Confidentiality

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

Austria has been involved in only one investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32).

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 Oesterreichische Kontrollbank AG (OeKB) is generally intended for non-EU and non-OECD markets. An overview of these services is available from the OeKB's website.

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 one 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 bilateral investment treaty 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.

Industries and sectors

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

Austria has been involved in only one investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32).

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?

Austria has been involved in only one investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32).

Defence

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

Austria has been involved in only one investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32).

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 (the 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?

Austria has been involved in only one investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32).

Unfavourable awards

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

Austria has been involved in only one investor-state arbitration: *BV Belegging-Maatschappij 'Far East' v Republic of Austria* (ICSID Case No. ARB/15/32).

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 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 Austrian Enforcement Act (section 403 et seq) requires formal recognition of foreign arbitral awards prior



RECHTSANWÄLTE
ATTORNEYS AT LAW

Miloš Ivković

milos.ivkovic@oblin.at

Josefstädter Straße 11
1080 Vienna
Austria
Tel: +43 1 505 37 05 0
www.oblin.at

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) of the Austrian Code of Civil Procedure (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, the Austrian Supreme Court (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 suspending enforcement proceedings according to section 39 Austrian Enforcement Act.

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 to the satisfaction of the applicable legislative requirements on piercing the corporate veil.

UPDATE AND TRENDS

Key developments of the past year

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

Austria refused to join 23 EU member states in signing the Agreement for the Termination of Bilateral Investment Treaties between the member states of the European Union (the Agreement). Such a decision is welcomed as it appreciates valid concerns that termination of intra-EU BITs by the means of the Agreement may well be incompatible with public international law.

The involvement of the Austrian government in remedying the covid-19 crisis of 2020 needs to be assessed through the lens of foreign investors and their ability to receive equal protection.

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