

GAR INVESTMENT TREATY ARBITRATION

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# Austria

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AUGUST 2020



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## I Overview

### 1 What are the key features of the investment treaties to which this country is a party?

BIT contracting party or MIT <sup>1</sup>	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Albania (1 August 1995)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Algeria (1 January 2006)	Yes	Yes	Yes	Yes	Yes	4 months	Yes	Yes
Argentina (1 January 1995)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Armenia (1 February 2003)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Azerbaijan (28 May 2001)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Bangladesh (1 December 2001)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Belarus (1 June 2002)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Belize (1 February 2002)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Bolivia (1 July 2002, terminated on 1 July 2013, effective until 1 July 2023 for investments already made)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Bosnia and Herzegovina (20 October 2002)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Bulgaria (1 November 1997)*	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Cape Verde (1 April 1993, terminated on 31 March 2013, effective until 31 March 2023 for investments already made)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Chile (22 October 2000)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
China (11 October 1986)	Yes	Yes	Yes	Yes	Yes	No	No	No
Croatia (1 November 1999)*	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Cuba (25 November 2001)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Czech Republic (1 October 1991)*	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes (but concerning the amount or mode of payment of compensation for expropriation and transfer rights only)
Egypt (29 April 2002)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Energy Charter Treaty (16 April 1998)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Estonia (1 October 1995)*	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Ethiopia (1 November 2005)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Georgia (1 March 2004)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Guatemala (1 December 2012)	Yes	Yes	Yes	Yes	Yes	60 days	Yes	Yes
Hong Kong (1 October 1997)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Hungary (1 September 1989)*	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes (but concerning the amount of compensation for expropriation and transfer rights only)
India (1 March 2001, terminated on 24 March 2017, effective until 24 March 2027 for investments already made)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Iran (11 July 2004)	Yes	Yes	Yes	Yes	Yes	4 months	Yes	Yes



BIT contracting party or MIT <sup>1</sup>	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Jordan (25 November 2001)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Kazakhstan (21 December 2012)	Yes	Yes	Yes	Yes	Yes	60 days	No	Yes
Korea, Republic of (1 November 1991)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Kosovo (1 February 2012)	Yes	Yes	Yes	Yes	Yes	No	No	Yes
Kuwait (22 September 1998)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Kyrgyzstan (22 April 2016, signed, not in force)	Yes	Yes	Yes	Yes	Yes	60 days	Yes	Yes
Latvia (1 May 1996)*	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Lebanon (30 September 2002)	Yes	Yes	Yes	Yes	Yes	60 days	Yes	Yes
Libya (1 January 2004)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Lithuania (1 July 1997)*	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Malaysia (1 January 1987)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Malta (1 March 2004)*	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Mexico (26 March 2001)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Moldova (1 August 2002)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Mongolia (1 May 2002)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Montenegro (1 August 2002)	Yes	Yes	Yes	Yes	Yes	No	No	Yes
Morocco (1 July 1995)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Namibia (1 September 2008)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Nigeria (8 April 2013 signed, not in force)	Yes	Yes	Yes	Yes	Yes	60 days	Yes	Yes
North Macedonia (14 April 2002)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Oman (1 February 2003)	Yes	Yes	Yes	Yes	Yes	60 days	Yes	Yes
Paraguay (1 January 2000)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Philippines (1 December 2003)	Yes	Yes	Yes	Yes	Yes	6 months <sup>2</sup>	Yes	Yes
Poland (1 November 1989, terminated on 16 October 2019, effective until 16 October 2029 for investments already made)*	Yes	Yes	Yes	Yes	Yes	12 months	Yes	Yes
Romania (1 July 1997)*	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Russian Federation (1 September 1991)	Yes	Yes	Yes	Yes	No	3 months	No	Yes (but concerning the amount or mode of payment of compensation for expropriation and transfer rights only)
Saudi Arabia (25 July 2003)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Serbia (1 August 2002)	Yes	Yes	Yes	Yes	Yes	No	No	Yes
Slovakia (1 October 1991)*	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes (but concerning the amount or mode of payment of compensation for expropriation and transfer rights only)
Slovenia (1 February 2002)*	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
South Africa (1 January 1998, terminated on 31 August 2014, effective until 31 August 2034 for investments already made)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes



BIT contracting party or MIT <sup>1</sup>	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Tajikistan (21 December 2012)	Yes	Yes	Yes	Yes	Yes	60 days	Yes	Yes
Tunisia (1 January 1997)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Turkey (1 January 1992)	Yes	Yes	Yes	Yes	Yes	1 year	No	Yes
Ukraine (1 December 1997)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
United Arab Emirates (1 December 2003)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Uzbekistan (18 August 2001)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Vietnam (1 October 1996)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Yemen (1 July 2004)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
European Economic Area Agreement (1 January 1994)	No	No	No	No	No	No	No	Yes <sup>3</sup>

\* As Austria has not signed the Termination Treaty dated 5 May 2020, it is to be expected that it will eventually terminate its intra-EU BITs bilaterally. For more information see below.

## II Qualifying Criteria

### 2 Definition of investor

What are the distinguishing features of the definition of ‘investor’ in this country’s investment treaties?

Issue	Distinguishing features in relation to the definition of ‘investor’
<b>Seat of the investor/ place of business</b>	Along with the requirement that a juridical person incorporated or duly organised according to the laws of a contracting party (ie, a country that is party to the treaty) is an ‘investor’, meaning that it is making or has made an investment within the other contracting party’s territory, Austria’s investment treaties often require that such entities have their ‘seat’ within the territory of a contracting party (eg, Albania, Argentina, Belarus). Some BITs contain additional requirements such as ‘effective economic activities’ (Chile), or ‘performing real business activities’ (Croatia) on the territory of a contracting party. In some BITs, the requirements for qualifying as investor are not the same for both contracting parties (eg, Bosnia and Herzegovina, Kuwait, the Philippines, Russia and Saudi Arabia).
<b>Incorporation in a third State</b>	Many of Austria’s BITs define investors as entities that are not incorporated in, but are controlled or influenced by, nationals of a contracting party. Such control is defined as ‘dominant’, ‘decisive’, or ‘substantial’ influence (Belarus, Moldova, Croatia, Egypt, Kuwait, Mongolia, South Africa, Vietnam), ‘control’, ‘dominant direct control’ (Bulgaria, Ukraine), and a ‘predominant’ interest (China, Malaysia). The India BIT specifies that the required ‘decisive influence over the management and operation’ must be ‘demonstrated specifically’ by ‘ownership of at least 51 per cent of shares or voting rights’ or ‘the ability to exercise decisive control over the composition of the Board of Directors making or having made an investment in the territory of the other Contracting Party’.
<b>Denial of benefits</b>	Some investment treaties deny or allow a contracting party to deny treaty protection to the nationals of a contracting party if they are owned or controlled by nationals of a non-contracting party and have no substantial business activity in the territory of a contracting party (eg, Energy Charter Treaty, Algeria, Armenia, Azerbaijan, Bangladesh, Belize, Bosnia and Herzegovina, Ethiopia, Georgia, Jordan, Lebanon, Macedonia, Malta, Namibia, Slovenia, Uzbekistan, Yemen).
<b>Permanent residence</b>	Generally, permanent residence is not required in addition to citizenship for individuals to qualify as investors subject to rare exceptions. For example, permanent residence in a contracting party is required under the Cuba (for nationals of Cuba only) and Bosnia and Herzegovina BITs (for nationals of Bosnia and Herzegovina only, an alternative requirement being a main place of business in Bosnia and Herzegovina). The Argentina BIT denies protection to nationals of a contracting party if they had a permanent residency in the other contracting party for more than two years at the time of making an investment in the latter contracting party. Under the Energy Charter Treaty, permanent residence is an alternative requirement to citizenship or nationality.



### 3 Definition of investment

What are the distinguishing features of the definition of ‘investment’ in this country’s investment treaties?

Issue	Distinguishing features in relation to the concept of ‘investment’
Eligible assets	Most of Austria’s investment treaties define ‘investment’ to include every kind of asset owned or controlled by a national.
Indirect control of assets	Approximately half of Austria’s investment treaties also cover investments indirectly controlled or owned by nationals. Another group of BITs does not specify the required form of control or ownership (eg, Albania, Belarus, Bulgaria, the Czech Republic, Slovakia, Chile, China, Cuba, Egypt, Estonia, Hong Kong, India, Iran, Latvia, Lithuania, Moldova, Mongolia, Morocco, Paraguay, Philippines, Poland, Romania, Russia, Saudi Arabia, Tunisia, Turkey, Ukraine and Vietnam).
Exclusion of certain assets	Certain types of transactions are excluded from treaty protection. For example, under the Bosnia and Herzegovina, Cuba, Georgia and Mexico BITs, commercial transactions designed exclusively for the sale of goods or services and credits to finance commercial transactions with a duration of less than three years, other credits with a duration of less than three years, as well as credits granted to the state or to a state enterprise, are not considered investments. However, this does not apply to credits or loans provided by an investor of a contracting party to an enterprise of the other contracting party that is owned or controlled by that investor.
Commencement of coverage	The majority of Austria’s BITs apply to investments made prior and after their entry into force. Some BITs impose a time limitation for application of the treaties in relation to investments made before their entry into force, which is 10 to 15 years after their entry into force (eg, China, Cuba and Morocco). Some BITs specify the date after which the protected investments must have been made (eg, the Czech Republic and Slovakia – 1 January 1950, Hungary – 1 January 1973, Latvia – 1 January 1956 (unless otherwise agreed by the contracting parties), Russia – 1 January 1956). Certain BITs do not apply to investments that are the subject of a dispute settlement procedure under the Agreement between Austria and Yugoslavia on the Promotion and Protection of Investments signed on 25 October 1989, which shall continue to apply to them until the settlement of this dispute is reached (eg, Bosnia and Herzegovina, Croatia, Macedonia, Slovenia). The Romania BIT does not apply to disputes that were initiated before the BIT’s entry into force in accordance with the Agreement on Mutual Promotion and Protection of Investments between Austria and Romania of 30 September 1976.
Accordance with local laws	Most of Austria’s investment treaties explicitly set forth that they apply to investments made in accordance with legislation of the host state. BITs may further qualify this requirement. For example, the Iran BIT stipulates that investments must be ‘approved by the competent authority of the host Contracting Party’. The Malaysia BIT states that investments must be ‘invested in a project classified as an ‘approved project’ by the appropriate Ministry in Malaysia’.

## III Substantive Protections

### 4 Fair and equitable treatment (FET)

What are the distinguishing features of the fair and equitable treatment standard in this country’s investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
Illustrations of the FET standard	Austria’s investment treaties provide that each contracting party shall ensure fair and equitable treatment to investments without specifying the elements of the standard.
Customary international law	Austria’s investment treaties typically do not equate FET with customary international law standards or make any reference thereto in the context of FET. However, the Malaysia BIT, for example, specifies that the standard cannot be less favourable than that recognised in international law.



## 5 Expropriation

What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the 'expropriation' standard
Right to regulate for a public purpose	Austria's investment treaties require that expropriation for public purposes be performed against compensation.
Indirect expropriation	The majority of Austria's investment treaties expressly protect against both direct and indirect (or 'creeping') expropriation as well as measures equivalent to expropriation.
Right to arbitration	Unlike Austria's other investment treaties, some BITs (eg, Czech Republic, Slovakia, Russia and Hungary) provide a right to arbitration only where the dispute concerns the amount or mode of payment of compensation paid as a result of an expropriation of property. It is an open question as to whether this merely affords investors a right to resort to arbitration regarding the quantification and/or mode of compensation or whether the treaty allows investors to refer disputes regarding whether or not an expropriation has occurred.
In accordance with the 'due process of law'	Most of Austria's investment treaties require that any expropriation of an investment must occur under the due process of law, which is subject to certain deviations. For example, the Malaysia BIT requires that the 'measures of expropriation shall be determined by due process of law in the territory of the Contracting Party in which the investment has been expropriated.' The Russia and Saudi Arabia BITs provide for expropriation to be in accordance with the domestic law. The Mexico, United Arab Emirates and Uzbekistan BITs specify that 'due process of law' encompasses the right of the investor to prompt review of its expropriation case by authorities of the host state. It is an open question whether such formulations constitute a different procedural standard.

## 6 National treatment/most-favoured-nation treatment

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country's investment treaties?

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' standard
Common limitations	Austria's BITs explicitly provide that the provision of 'most favoured nation' and/or 'national' treatment does not extend to the benefits of membership of a customs union, monetary union or free trade area, nor to taxation agreements and/or taxation legislation. Some treaties provide for additional specific limitations. For example, the Argentina BIT does not extend 'most favoured nation' treatment to the incentives granted to investors with regard to concessional financing under the Spain and Italy BITs. The Morocco BIT excludes from 'most favoured nation'/'national treatment' incentives, donations, loans, securities and guarantees granted to nationals of a contracting party under the programme of national development.
Scope	The 'most favoured nation' protection contained within Austria's BITs applies to 'investors and their investments'. Many BITs specify that such protection relates to management, use, enjoyment, disposal, sale and liquidation of investments (eg, Azerbaijan, Bangladesh, Hungary, India, Belize, Bosnia and Herzegovina, Bulgaria, Chile, China, Cuba, Ethiopia, Georgia, Hong Kong, Iran, Jordan, Libya, Lebanon, Macedonia, Malta, Mexico, Namibia, Oman, Poland, Slovenia, Turkey, United Arab Emirates and Uzbekistan). The Kuwait BIT extends protection to investment-related activities. The Malaysia BIT provides for 'most favoured nation' treatment in relation to fair and equitable treatment standard only.

## 7 Protection and security

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Issue	Distinguishing features of the 'protection and security' standard
Extent of obligation	The formulation of the obligation to provide protection and security in Austria's investment treaties is not uniform. BITs can provide for 'full protection' (eg, Albania, Argentina, Belarus, Bolivia, Bulgaria, Cape Verde, China, Croatia, Czech Republic, Egypt), 'full protection and security' (eg, Algeria, Hong Kong, Saudi Arabia), 'full and constant protection and security' (eg, Armenia, Azerbaijan, Bangladesh, Belize, Bosnia and Herzegovina, Cuba, Ethiopia, Georgia) or 'protection' (eg, Tunisia, Chile and Lebanon), or both.
Customary international law	It is not typical for Austria's investment treaties to limit the obligation to provide protection and security to the level required under customary international law.



## 8 Umbrella clause

What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

Issue	Distinguishing features of any 'umbrella clause'
Scope	Subject to rare exceptions (eg, Bulgaria, Ethiopia, Hong Kong, Russia, Tunisia), Austria's investment treaties contain an 'umbrella clause'.
Qualification of the obligation	A number of BITs stipulate that the clause is applied to investments 'approved' in accordance with the host state's law (eg, Albania, Argentina, Belarus, Chile, China, Croatia, Egypt, Estonia, Georgia, Hungary, Korea, Lithuania, Latvia, Moldova, Mongolia, Morocco, Paraguay, Philippines, Poland, Turkey, Ukraine and Vietnam). The Mexico BIT specifies that disputes arising from obligations covered by an 'umbrella clause' 'shall be settled under the terms of the contracts underlying the obligations'.

## 9 Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

Issue	Other substantive protections
Free transfer of payments	Austria's investment treaties contain a provision requiring the contracting parties to permit investors to freely transfer investments and investment returns. Some investment treaties (eg, Energy Charter Treaty, Armenia, Azerbaijan, Bosnia and Herzegovina, Cuba, Ethiopia, Jordan, Macedonia, Malta, Mexico, Namibia, Oman, Slovenia, United Arab Emirates, Uzbekistan and Yemen) provide that the host state can prevent/restrict a transfer in case of administrative or court proceedings (eg, in the case of bankruptcy or criminal taxation offences) or based on the right to restrict or prohibit export under the GATT 1994.
Arbitrary or discriminatory measures	A number of Austria's investment treaties explicitly prohibit arbitrary, unreasonable, unjustified and discriminatory measures (eg, Energy Charter Treaty, Algeria, Armenia, Azerbaijan, Bangladesh, Belize, Bosnia and Herzegovina, Chile, Cuba, Ethiopia, Georgia, Iran, Jordan, Libya, Macedonia, Malaysia, Malta, Mexico, Oman, Romania, Saudi Arabia, Slovenia, United Arab Emirates, Uzbekistan and Yemen).
Armed conflict/civil unrest	Subject to a number of exceptions (eg, Czech Republic, Slovakia, Estonia, Korea, Latvia, Mongolia, Morocco, Paraguay, Russia, Tunisia, Vietnam) most of Austria's investment treaties guarantee investors of contracting parties national and/or 'most favoured nation' treatment with regard to compensation paid to other investors of other states in the case of armed conflict or civil unrest.

# IV Procedural Rights

## 10 Are there any relevant issues related to procedural rights in this country's investment treaties?

Issue	Procedural Rights
Fork-in-the-road	Fork-in-the-road is an exceptional provision for Austria's investment treaties (eg, Energy Charter Treaty, the Chile BIT).
Exhaustion of local remedies	While most of Austria's investment treaties do not require exhaustion of local remedies, many of Austria's BITs contain an explicit waiver of such a requirement in relation to the ICSID arbitration (eg, Albania, Belarus, Estonia, Latvia, Morocco) or to arbitration in general (eg, Bosnia and Herzegovina, Belize, Ethiopia, Georgia, Jordan, Lebanon, Libya, Malta, Oman, United Arab Emirates, Uzbekistan, Yemen). However, the Poland BIT requires the exhaustion of local remedies.
ICSID or ad hoc arbitration	A typical arbitration-based remedy under Austria's BITs is ICSID or ad hoc arbitration based on UNCITRAL Arbitration Rules (eg, Argentina, Belarus, Bulgaria, Chile, Croatia, Estonia, Philippines). Some treaties also allow investors to pursue an arbitration claim through ICC arbitration as an additional option (eg, Algeria, Azerbaijan, Bangladesh, Belize, Bosnia and Herzegovina, Ethiopia, Lebanon, Slovenia, Uzbekistan and Yemen). The Russia BIT provides for arbitration at the Stockholm Chamber of Commerce as an alternative to UNCITRAL arbitration. The India BIT provides for certain modifications of the UNCITRAL Arbitration Rules 1976 for the purpose of investment arbitration. The Egypt BIT also lists the Cairo Regional Centre for International Commercial Arbitration and the International Arbitral Centre of the Austrian Federal Economic Chamber. Some investment treaties provide a possibility for the parties to the dispute to agree on any other dispute settlement procedure or international arbitral institution (eg, India, Iran, Malta, Saudi Arabia and the Energy Charter Treaty).





<b>ICSID or ad hoc arbitration (cont.)</b>	Only UNCITRAL or ICC arbitration is an option for investors under the Cuba BIT. Some BITs provide for a single arbitration facility (eg, the Czech Republic, Slovakia, Hong Kong and Vietnam – only UNCITRAL arbitration; Korea, Malaysia, Paraguay, Tunisia and Turkey – only ICSID arbitration).
<b>Time limits</b>	Some of Austria's BITs require that a claim be commenced within a specified time (typically five years) of when the investor first knew of or should have first known of the facts giving rise to the claim (eg, Azerbaijan, Bangladesh, Armenia, Bosnia and Herzegovina, Ethiopia, Georgia, Iran, Macedonia, Namibia, Uzbekistan, Yemen).
<b>Use of MFN to expand procedural rights</b>	MFN provisions in Austria's investment treaties do not explicitly exclude procedural rights from the scope of its application.
<b>Applicable law</b>	Some of Austria's investment treaties stipulate that investment disputes are governed by an applicable investment treaty, domestic law of the host state and international law as well as agreements entered into in relation to an investment (eg, Algeria, Argentina). Some BITs refer to the applicable investment treaty and rules and principles of international law (eg, Bangladesh, Belize, Bosnia and Herzegovina, Ethiopia, Jordan, Macedonia, Malta and Mexico). With regard to the ICSID arbitration, where treaties are silent as to governing law, the applicable law is likely to be determined in accordance with article 42 of the ICSID Convention. Article 42 provides that in the absence of an agreement between the parties, the tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

## 11 What is the status of this country's investment treaties?

Before the Lisbon Treaty entered into force on 1 December 2009, individual member states were empowered to enter into Bilateral Investment Treaties. This competence has now been transferred to the EU. What was missing in the Lisbon Treaty and became an issue in practice, were transitional provisions clarifying the status of existing extra-EU BITs.

Regulation (EU) No. 1219/2012 establishes transitional arrangements for BITs concluded between EU member states and third countries.

### Status of extra-EU BITs entered into before the Lisbon Treaty

The Regulation clearly states that extra-EU BITs concluded before the entry into force of the Lisbon Treaty will remain effective until replaced by an investment agreement of the EU. The Commission will be responsible for taking necessary steps to facilitate the replacement of existing BITs with EU investment agreements. When such agreements are signed, member states will be required to withdraw their authorisation of the respective existing BITs. Pursuant to the Regulation, member states are obliged to notify to the Commission the BITs with third countries they have signed and that they wish to maintain in force or permit to enter into force. Austria has notified nearly all extra-EU BITs that are already in force.

The Commission will further assess the notified BITs 'by 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, with a view to the progressive replacement of the bilateral investment agreements' (article 5 of the Regulation). Where the Commission establishes that such obstacles exist, the Commission and the member state concerned shall confer to elaborate measures to resolve the matter. Sixty days after the end of the consultations, the Commission 'may indicate the appropriate measures to be taken by the Member State' (article 6 of the Regulation).

### Amendment and negotiation of new extra-EU BITs

The Regulation stipulates that a member state may enter into negotiations with a third country in order to amend an existing or to conclude a new BIT provided that such intention was prior notified to and negotiations were authorised by the Commission. Following such notification and submission of the relevant documents, the Commission shall make the notification and, if requested, the documents, available to the other member state subject to a confidentiality obligation. The authorisation may be accompanied with the requirement to include into or remove from the negotiations' agenda certain treaty clauses with a view to ensure compliance with EU law and investment policy.

### Intra-EU BITs

As to the intra-EU BITs, many of which Austria concluded before the accession of its partners to the European Union, the European Commission has adopted the view that these BITs are incompatible with EU law due to their preferential treatment of investors from only some (and not all) member states, and also because arbitral tribunals may adopt an interpretation of EU law that is different from the one of the Court of Justice of the European Union (CJEU).

In March 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU) handed down its long-awaited judgment in the *Achmea* case (C-284/16). The court ruled that arbitration clauses in intra-EU BITs jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the member states and are, therefore, incompatible with EU law.

Several months later, the European Commission published a Communication to the European Parliament and the Council on the Protection of intra-EU investment in which it adopted the view that national courts must annul any arbitral award rendered on the basis of an intra-EU BIT and that member states are now under an obligation to formally terminate their intra-EU BITs. The Commission also submitted that the judgment of the CJEU affects arbitrations under the Energy Charter Treaty in the very same way.

In January 2019, Austria and 21 other EU member states declared to undertake steps to terminate all BITs concluded between them by means of a plurilateral treaty, or, where that is considered to be more expedient, bilaterally by 6 December 2019.



Following from this declaration, 23 member states have signed the agreement for the termination of intra-EU BITs, including their Sunset Clauses (Termination Treaty) dated 5 May 2020. This treaty implements the decision of the CJEU in the *Achmea* case and identifies three distinct categories of arbitration proceedings, based on their date of initiation in relation to the date when the *Achmea* decision was rendered ('concluded', 'pending' and 'new' proceedings). Each category is subject to different legal consequences, eventually putting an end to all arbitration proceedings that are based on intra-EU BITs. By implication, the parties to such arbitration proceedings shall instead initiate a 'structured dialogue' (article 9 of the Termination Treaty) or resort to national courts (article 10 of the Termination Treaty). Although Austria has declared its intent to terminate all intra-EU BITs in January 2019, it refrained from signing the Termination Treaty. It is to be expected that Austria will eventually adapt to the EU-wide trend of terminating all intra-EU BITs, however, in the form of individual bilateral treaties.

## V Practicalities (Claims)

- 12 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

Government entity to which claim notices are sent	As a rule, Austria's investment treaties do not indicate a government entity to which claim notices should be addressed. Therefore, pursuant to the Federal Ministries Act, such claim notices must be sent to the Foreign Ministry.
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- 13 Which government department or departments manage investment treaty arbitrations on behalf of this country?

Government department that manages investment treaty arbitrations	Upon receipt of the claim notice, the Foreign Ministry will appoint and coordinate all government departments tasked with the management of a specific case; these are the Federal Ministry of Science, Research and Economy, the Ministry of Finance together with the Office of the Ministry of Finance's State Attorneys and the Ministry of Justice.
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- 14 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

Internal/External Counsel	Whether and on which terms external attorneys will be consulted is decided on a case-by-case basis.
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## VI Practicalities (Enforcement)

- 15 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

Washington Convention implementing legislation <sup>4</sup>	Austria has signed and ratified the Washington Convention: <i>Ratifikationsurkunde für das Übereinkommen zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehörigen anderer Staaten</i> , BGBl. Nr. 357/1971 (NR: GP XII RV 76 AB 171 S. 16. BR: S. 296).
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- 16 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

New York Convention implementing legislation <sup>5</sup>	Austria has signed and ratified the New York Convention: <i>Ratifikationsurkunde für das Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche</i> , BGBl. Nr. 200/1961 (NR: GP IX RV 364 AB 365 S. 61. BR: S. 172).
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## 17 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	Austrian Arbitration Act 2006 (Austrian Code of Civil Procedure, Part VI, sections 577–618, in effect since 1 July 2006, last amended in 2013).
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## 18 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards	No publicly available awards have been rendered against Austria under its investment treaties.
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## 19 Describe the national government's attitude towards investment treaty arbitration.

Attitude of government towards investment treaty arbitration	Austria has concluded a large number of BITs providing for arbitration and Austrian companies frequently make use of these provisions. In the debate over intra-EU BITs, Austria has generally held the view that they are compatible with EU law and should be given effect. This view, however, changed in the Declaration from 15 January 2019, where the EU member states, including Austria, proclaimed their intention to terminate all intra-EU BITs <sup>6</sup> based on the <i>Achmea</i> decision rendered in March 2018. Nevertheless, the corresponding plurilateral Termination Treaty of 2020 was in turn not signed by Austria. <sup>7</sup> As already mentioned above, it is most likely that Austria will eventually terminate its intra-EU BITs individually to comply with its EU obligations.
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## 20 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

Attitude of local courts towards investment treaty arbitration	Austrian courts have never been called upon to enforce an investment treaty award against Austria. Austrian courts have, however, demonstrated a pro-international arbitration approach with regard to the enforcement of foreign arbitral awards in international commercial arbitration.
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# VII National Legislation Protecting Inward Investment

## 21 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

While, under specific circumstances, some of the fundamental rights granted by Austrian constitutional law may be invoked by foreigners to protect their investments, there is no legislation specifically enacted to protect foreign investments in particular.

# VIII National Legislation Protecting Outgoing Foreign Investment

## 22 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
Multilateral Investment Guarantee Agency	Austria has ratified <sup>8</sup> the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) (Seoul, 11 October 1985; effective as of 12 April 1988) (MIGA's Convention). Under the MIGA's Convention, Austrian nationals and corporations, as well as corporations majority-owned by Austrian nationals, are eligible to acquire non-commercial risk insurance from MIGA for investments made in developing states provided that certain conditions are met. Insured risks include currency inconvertibility and transfer restrictions; expropriation; war, terrorism and civil disturbances; breach of contract; non-honouring of sovereign financial obligations. Projects supported by MIGA must be financially and economically viable, environmentally sound, and consistent with the labour standards and development objectives of the country correspond to MIGA's objective of promoting economic growth and development.



Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
<b>Investment Guarantee G4 of the Oesterreichische Kontrollbank AG</b>	<p>Austrian export and investment guarantees are managed by Oesterreichische Kontrollbank AG (OeKB), a bank formally assigned by the Republic of Austria to assist the country's exportation industry and capital market. It provides tailor-made insurance packages to exporters and investors whose activities directly or indirectly benefit Austria's current account.</p> <p>The guarantee programme offered to investors is known as 'G4'. Investments covered under this programme may be made in the form of equity (cash or kind) or shareholder loans and the investor must be domiciled in Austria. The political risks that it covers are (i) the destruction of assets in foreign countries, (ii) expropriation and (iii) transfer delays exceeding three months, earnings and repayment of capital interest. Insured investors who wish to be indemnified are required to inform the OeKB. The OeKB would examine the claims and draw up a proposal for their settlement and, upon approval by the Ministry of Finance, it would ultimately indemnify the investor. The investor is further required to subrogate the claim. To claim compensation for costs incurred in the pursuit of commercial claims, investors must coordinate each step they take in the process with the OeKB.</p>

## IX Awards

### 23 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties.

#### Awards

*Strabag SE v Libya*, under the Austria–Libya BIT, ICSID Case No. ARB(AF)/15/1; Award on 29 June 2020.

*EVN AG v Republic of Bulgaria*, under the Austria–Bulgaria BIT and the Energy Charter Treaty, ICSID Case No. ARB/13/17; Award on 10 April 2019.

*Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v Republic of Serbia*, under the Austria–Serbia BIT, ICSID Case No. ARB/16/10; Award on 19 November 2018.

*Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/12/39; Award on 26 July 2018.

*BV Belegging-Maatschappij 'Far East' v Republic of Austria*, under the Austria–Malta BIT, ICSID Case No. ARB/15/32; Award on 30 October 2017.

*Nabucco Gas Pipeline International GmbH in Liqu. v Republic of Turkey*, under the Austria–Turkey BIT, ICSID Case No. ARB/15/26; Order taking note of the discontinuance of the proceedings issued on 5 November 2015.

*European American Investment Bank AG (EURAM) v Slovak Republic*, under the Austria–Slovakia BIT, UNCITRAL, Permanent Court of Arbitration Case No. 2010-17; Award on 20 August 2014.

*Club Hotel Loutraki SA and Casinos Austria International Holding GMBH v Republic of Serbia*, under the Austria–Serbia BIT and the Greece–Serbia BIT, ICSID Case No. ARB/11/4; Order taking note of the discontinuance of proceedings issued on 18 January 2012.

*EVN AG v The Former Yugoslav Republic of Macedonia*, under the Austria–Macedonia BIT and the Energy Charter Treaty, ICSID Case No. ARB/09/10; Award on 2 September 2011.

*EuroGas GmbH v The Slovak Republic*, UNCITRAL, Notice of Intent to Arbitrate issued on 16 December 2010 (no publicly available information as to further procedural developments in the case).

*Alpha Projektholding GmbH v Ukraine*, under the Austria–Ukraine BIT, ICSID Case No. ARB/07/16; Award on 8 November 2010.

*Adria Beteiligungs GmbH v The Republic of Croatia*, under the Austria–Croatia BIT, UNCITRAL, Permanent Court of Arbitration (not public); Award on 21 June 2010.

*Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, under the Energy Charter Treaty, Arbitration Institute of the SCC Case No. V (064/2008); Award on 8 June 2010.

*Austrian Airlines v The Slovak Republic*, under the Austria–Slovakia BIT, UNCITRAL Ad hoc arbitration; Award on 9 October 2009.

*ALAS International Baustoffproduktions AG v Bosnia and Herzegovina*, under the Austria–Bosnia and Herzegovina BIT, ICSID Case No. ARB/07/11; Order taking note of the discontinuance of the proceeding issued on 27 December 2007.

*Erste Bank Der Oesterreichischen Sparkassen AG v Republic of India*, under the Austria–India BIT, UNCITRAL Ad hoc arbitration (not public); year of filing 2004; settled.

#### The investment arbitration proceedings listed below are still pending

*Strabag and others v Germany*, under the Energy Charter Treaty, ICSID Case No. ARB/19/29; registered on 20 September 2019.

*Petrochemical v Romania*, under the Energy Charter Treaty, ICSID Case No. ARB/19/21; registered on 9 July 2019.

*Schönberger v Tajikistan*, under the Austria–Tajikistan BIT, ICSID Case No. ARB(AF)/19/1; registered on 15 February 2019.



### The investment arbitration proceedings listed below are still pending

*LSG Building Solutions v Romania*, under the Energy Charter Treaty, ICSID Case No. ARB/18/19; registered on 12 June 2018.

*Erste Group Bank AG and others v. Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/49; registered on 29 September 2017.

*Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/37; registered on 27 September 2017.

*Addiko Bank AG v Montenegro*, under the Austria–Yugoslavia BIT, ICSID Case No. ARB/17/35; registered on 19 September 2017.

*Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/34; registered on 15 September 2017.

*UniCredit Bank Austria AG and Zagrebačka Banka dd v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/16/31; registered on 16 September 2016.

*ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, under the Energy Charter Treaty, ICSID Case No. ARB 16/5; registered on 8 March 2016.

*Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, under the Argentina–Austria BIT, ICSID Case No. ARB/14/32; registered on 18 December 2014.

## Reading list

August Reinisch, 'Der Nichtdiskriminierungsstandard der Inländergleichbehandlung im Internationalen Investitionsrecht' in: 74 *Zeitschrift für öffentliches Recht* (2019), 673–687.

Christian W. Konrad, 'Achmea: Auswirkungen auf den Investitionsschutz in Europa' in *ecolex* (2019), Issue 3 p. 227 et seqq. Christian W. Konrad, 'Quo vadis intra-EU BIT?' in *ecolex* (2018) Issue 2, p. 140 et seqq.

Ursula Kriebaum, 'Challenges to International Investment Protection: Austria's and Mexico's Investment Treaties' in *University of Vienna Law Review*, Vol 2:2 (2018), p. 215–229.

Verena Madner, 'TTIP, CETA & Co: EU-Handelsabkommen einer neuen Generation und ihre Auswirkungen auf öffentliche Dienstleistungen', *juridikum* 2016, p. 221 et seqq.

Verena Madner, Stefan Mayr, Dragana Damjanovic, 'Die Auswirkungen des Comprehensive Economic and Trade Agreement (CETA) auf die rechtlichen Rahmenbedingungen für Dienstleistungen der Daseinsvorsorge in Österreich', white paper published by The Chamber of Labour, 2015.

Christoph Brenn, Heidrun Elisabeth Preidt, 'Kunstgegenstände eines Staats sind nicht per se immun', *EvBl* 2012/154 (2012), p.1074 et seqq.

Nathalie Bernasconi-Osterwalder, Lise Johnson, 'Commentary to the Austrian Model Investment Treaty' (The International Institute for Sustainable Development 2012).

Peter Egger, 'Die Rolle von Bilateralen Investitionsschutzabkommen für Österreichs Direktinvestitionen' (Wirtschaftspolitische Blätter 1/2005).

Christina Knahr, August Reinisch, 'Bilateral Investment Treaty Overview – Austria' (Oxford University Press 2010). Available online at <https://oxia.ouplaw.com/home/ic>.

Otto M. Maschke, 'Investitionsschutzabkommen. Neue vertragliche Wege im Dienste der österreichischen Wirtschaft' (1986) 37 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 201.

August Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession: Völkerrechtliche Theorie und zwischenstaatliche Praxis' (1996) 36 *Der Donauraum* 13–25.

## Notes

- 1 Following the entry into force of the Lisbon Treaty on 1 December 2009, Foreign Direct Investment (FDI) has come within the EU's exclusive competence. EU Regulation No. 1219/2012 establishes transitional arrangements for BITs concluded between EU member states and third countries. Although these remain binding under public international law, the Regulation establishes conditions for their continuing existence and their relationship with the Union's investment policy. According to article 5 of the Regulation, the Commission is empowered to assess existing BITs to evaluate whether they conflict with EU law. If the Commission comes to the conclusion that one or more of an existing BIT's provision constitutes a serious obstacle to negotiations or conclusions of investment agreements by the EU, the Commission and the member state concerned shall identify appropriate actions to resolve the matter (article 6). Further, member states now have to seek the Commission's authorisation to amend existing or conclude new BITs (article 7).
- 2 Time limitation applies to arbitration under ICSID Convention and UNCITRAL Arbitration Rules under article 9(3) of the BIT (and not to the domestic proceedings or previously agreed dispute settlement procedures under article 9(2) of the BIT).
- 3 Applicable to disputes regarding scope or duration of safeguard measures or the proportionality of rebalancing measures.
- 4 Date of entry into force for Austria: 24 June 1971.
- 5 Date of entry into force for Austria: 31 July 1961.
- 6 Declaration of the member states of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection
- 7 EU member states sign an agreement for the termination of intra-EU bilateral investment treaties.
- 8 Übereinkommen zur Errichtung der Multilateralen Investitions-Garantie Agentur (MIGA) (BGBl. III Nr. 181/1997).





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Konrad Partners is an international law firm delivering premier international arbitration services. The firm has offices in Vienna, Prague, Bratislava, Skopje and London. The lawyers of Konrad Partners serve both as advocates and as arbitrators in ad hoc and institutional proceedings, are qualified in multiple jurisdictions and have extensive expertise in handling high-profile arbitration cases before a wide range of international bodies.

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Our lawyers regularly advise clients throughout the life cycle of a dispute, from negotiations through arbitration and litigation, including enforcement of arbitral awards and court judgments.

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