

Serbia: Investment Arbitration – Is Your Investment in Serbia Protected?



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The past decade has been marked with an explosion of investment treaty arbitrations. Foreign investors are increasingly aware of the powerful tool contained in bilateral investment treaties (BIT).

Introduction

Under BITs, foreign investors can seek international protection against the state hosting their investment if the host state is taking certain actions adversely affecting the investment. Such protection presumes the right of the investor to bring a claim directly against the host state in a forum other than the host state's courts.

The International Centre for Settlement of Investment Disputes (ICSID) has become the most common forum for investment disputes. Its institutional link to the World Bank has further contributed to the growing importance of investment treaty protection.

Finally, such rising significance of investment treaty safeguards has resulted in the availability of investment treaty claims in a jurisdiction becoming an important factor when planning M&A transactions. Thus, much like a favourable tax regime, the transactions are themselves structured to optimise investment treaty protection.

Treaty safeguards in Serbia

Against this background, we will discuss the following questions: What investment treaty safeguards may foreign investors expect when investing in Serbia? Who is protected? What types of investment are covered? Why should foreign investors consider ICSID investment arbitration?

Serbia has ratified the ICSID Convention, which is one of the preconditions for an investment dispute against a state to be conducted before ICSID. An additional prerequisite is the clear and unconditional consent of the host state to this dispute resolution mechanism for specific investment disputes and vis-à-vis certain foreign investors. Such consent of the host state is usually provided in BITs.

Serbia has signed a relatively wide range of bilateral investment treaties. Around 50 treaties of this type are currently applicable in Serbia. Serbia has investment treaty relations with all major countries that are the principal source of foreign investment in Serbia, such as Italy, Austria, Belgium, Greece, Germany, Russia, and more. BITs signed by Serbia usually contain such consent to ICSID arbitration.

Thus, foreign investors investing in Serbia can count on ICSID arbitration as the protection mechanism for their investments if, in addition to the existence of an applicable BIT, two other jurisdictional conditions are met: (i) the investing entity is a “foreign investor” within the meaning of the applicable BIT and (ii) there is an “investment” as defined under the applicable BIT.

Protected investors

The basic principle of a BIT is that only a national of the contracting party that is not the host state may bring a claim against the host state. This encompasses both natural and legal persons. For natural persons, treaties usually require that such persons have the same nationality as the other contracting party.

As to legal entities, definitions vary. Some treaties define this category of foreign investors solely by reference to their place of incorporation, while others refer to the seat of management and require that the headquarters or the actual economic activity be located in the territory of that other contracting state. Other BITs refer to the concept of control and require that the investing entity be controlled by a natural or legal entity having the nationality of the other contracting party. Some treaties even allow claims by companies formally incorporated in the host state if they are controlled by a natural or legal person from the other contracting party.

Protected investment

In terms of categories of investment eligible for protection, BITs applicable in Serbia usually refer to “all kinds of assets” and provide an illustrative, non-exhaustive list of certain protected types of investments, such as movable and immovable property, rights derived from shares, claims to money, intellectual property rights, etc.

Substantial guarantees

BITs provide substantial guarantees for the protection of foreign investments, which assume certain standards of conduct by the host state government vis-à-vis protected foreign investors. BITs applicable in Serbia usually contain typical substantive investment protection standards. For example, they guarantee fair and equitable treatment, national treatment, most favoured nation treatment, protection from expropriation, free transfer of means and full protection and security.

Dispute resolution

Serbian BITs often contain composite settlement clauses and thus provide several alternatives for the dispute resolution procedure. Besides ICSID, ICC or other institutional or UNCITRAL arbitration might also be an option for the settlement of investment disputes. Treaties typically establish a “cooling-off period”: they require the investors to wait for a period of time (usually three to six months) before bringing a claim against the state. Additional pre-arbitration requirements may also be found in some of the treaties.

The respondent in investment arbitration is the host state (or its constituent subdivision or agency in specific cases). Thus, investment arbitration has a political aspect and may, directly or indirectly, affect the credit rating and reputation of the host state, both among other states and among the foreign investors. The commencement of ICSID proceedings is public as data on registration and main steps in the proceedings are published on the ICSID website.

Unlike commercial arbitration, an ICSID investment arbitration is entirely independent of the judicial system of the host state. First, an ICSID award may not be annulled before the courts of any state. Second, it does not undergo the recognition procedure in the state in which it is enforced. It has the legal effect of a final court judgment and can be directly enforced.

When investing in Serbia, foreign investors can count on relatively wide bilateral investment treaty coverage, but should still carefully analyse underlying jurisdictional conditions to ensure in advance the applicability of the relevant treaty.

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