Is sovereignty of the SR affected by ISDS?

No. Well balanced international investment agreements do not prevent States from adopting legislative changes, unless such a measure is discriminatory or arbitrary. Regulatory power of SK is thus preserved. Moreover, even if any violation of international investment agreement by adopting controversial legislation was proven in the course of arbitration, arbitral tribunals would not be able to order States to change their legislation; tribunals could only order the States to pay compensation in case of proven violation of international investment agreement.

What is the position of the MoF SR to investment chapter in CETA?

The MoF SR appreciates the text of the investment chapter in CETA, especially because of its balanced content which shows a significant progress towards modern investment standards. Main aspects of CETA are disclosed in document Factsheet: CETA and investor–to–state dispute settlement (ISDS) issued by the European Commission.

What is the position of the MoF SR to investment chapter in TTIP?

The text of investment chapter is not available yet, therefore it cannot be reviewed. In any case, the MoF SR will require the European Commission to negotiate similarly balanced agreement as CETA. Particularly in relation to TTIP it is necessary to bear in mind that SK concluded BIT with the USA on October 22, 1991[1]. Therefore American investors can file a claim against SK before arbitral tribunal under this BIT. This is proved by the claim filed against SK by EuroGas and Belmont on the basis of BIT between SK and the USA and BIT between SK and Canada. Moreover, existing BIT with the USA is based on so-called golden standards of investor protection, focused on high level of protection of an investor. For SK, TTIP provides a unique opportunity to replace disadvantageous BIT between SK and the USA, since the European Union as a whole, compared to SK, is much stronger negotiating partner for the USA.

[1] Valid from December 19, 1992.

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Statistics of the SR in international investment arbitrations

To this date, there are nine international investment arbitrations concluded, none of which SK lost, with the following statistics: SK won five investment arbitrations in the jurisdictional phase (Austrian Airlines, HICEE, Alps Finance and Trade, Achmea II, Euram Bank), one arbitration in merits phase (J. Oostergetel and T. Laurentius), one arbitration was discontinued by tribunal (Branimír Menšík), one arbitration ended with settlement without payment of any damages (SPP), and one arbitration ended by mutual agreement on discontinuance of the arbitration (U.S. Steel). Achmea I dispute is still pending – final arbitral award has been rendered against SK; however SK has filled motion for annulment of that award and the annulment proceedings are pending. From the above stated it is clear that SK excellently succeeded in all its previous international investment arbitrations. In several disputes the SR was also able to achieve full or partial remuneration of its costs on legal representation, which resulted in full compensation of the legal costs of SK on legal representation or its significant reduction.

Glossary

"BIT" – bilateral investment treaty, international investment agreement concluded between the two States
"CETA" – Comprehensive Economic and Trade Agreement between European Union and Canada
"ISDS" – Investor-to-State Dispute Settlement
"TTIP" – Transatlantic Trade and Investment Partnership between European Union and the United States of America
"MoF SR" – Ministry of Finance of the Slovak Republic

Contact

If you have any further questions, please contact: arbitration@mfsr.sk (Intrastate and International Legal Affairs Unit of the MoF SR).

INVESTOR-TO-STATE DISPUTE SETTLEMENT

FREQUENTLY ASKED QUESTIONS

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European Union

1 What is ISDS?

ISDS represents out-of-court dispute resolution between the foreign investors and States before an arbitral tribunal. Jurisdiction of the arbitral tribunal is constituted by the arbitration clause in international investment agreements, whether in (i) BITs or in (ii) the investment chapters of international investment agreements concluded between the EU and third countries.

BITs and/or investment chapters in EU treaties comprise of two main parts (i) the promotion and protection of the investments – so-called investment standards; investors are provided in particular with protection against discrimination, unlawful expropriation, and unlawful restrictions on the transfer of revenues relating to foreign investments and (ii) ISDS, which is a tool for enforcement of investment standards through international investment arbitration against the host State.

2 What is the position of the MoF SR to ISDS?

The MoF SR consistently declares that balanced international investment agreements with ISDS mechanism are an appropriate tool to promote inflow and sustainability of foreign direct investments. The aim of SK is to have balanced international investment agreements which on one hand preserve regulatory powers of States whilst, on the other hand, adequately protect foreign investors, prevent speculative and parallel[2] disputes and promote sustainable development of investments.

ISDS constitutes an important element of the international law which helps to strengthen the respect of sovereign States to their obligations under the international law.

[2] Parallel disputes arise e.g. when a foreign investor pursues its claims through ISDS and at the same time also in a local court.

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3 What are the benefits for SK that international investment agreements provide?

(i) Inflow and sustainability of foreign direct investments. When considering their investments, foreign investors also take into account the existence of enforcement mechanism of their impaired rights which is usually enshrined in international investment agreements of a country as one of the criteria for selection of such country. Since SK is a country with open economy and high number of foreign investors, concluding of international investment agreements with ISDS is important for SK in terms of economic development.

(ii) Protection of Slovak investors abroad. Slovak investors may encounter abroad various problems which, for various reasons, cannot be always solved before local courts (expropriation without any compensation, restriction on transfer of capital, discrimination). Therefore, ISDS provides foreign investors with the opportunity to resolve their disputes by an impartial and independent tribunal.

Each BIT concluded by SK contains ISDS.

4 What are the advantages of ISDS for the State as the respondent in international investment arbitration?

(i) Transparency. Following the adoption of the UNCITRAL Rules on Transparency in 2013[3], international investment arbitrations conducted pursuant to UNCITRAL Arbitration Rules 2013[4] will be, compared to Slovak court proceedings, even more transparent, as not only the final award, but also most of the submissions of the parties will be published. Publication of awards may preventively discourage speculative investors from trying their luck in international investment arbitrations by filing speculative claims.

[3] Rules on Transparency came into force on April 1, 2014 and are applicable to arbitrations conducted under bilateral investment treaties concluded after this date. However UNCITRAL drafted a multilateral convention in order to extend application of Rules on Transparency to ISDS under existing bilateral investment treaties concluded before April 1, 2014,

[4] Parties may agree on application of the UNCITRAL Rules on Transparency also on disputes under other arbitration rules.

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(ii) The choice of arbitrator. In international investment arbitration, each disputing party (i.e. also the State) shall appoint its own arbitrator and consequently the disputing parties shall appoint the chairman by mutual agreement. The selection of arbitrators is based on qualification of candidates and their experience in the international law. This benefit of choice would be lost for both parties, if the dispute would be heard before a local court. Moreover, court judges do not have much experience with resolution of disputes under the international investment agreements. Arbitrators have to be independent and impartial and in proceedings they are bound by international standards (e.g. International Bar Association Guidelines on Conflicts of Interest in International Arbitration).

5 What are the disadvantages of ISDS for the State as the respondent in international investment arbitration?

(i) Significant costs. It is true that international investment arbitrations are associated with significant costs, especially for legal representation. However, this fact can be mitigated by awarding a part of legal costs to a winning party (see Statistics of the SK). Significant legal costs are also related to complexity of the dispute, in which a sovereign State is sued for violation of its international obligations. However, even if there was no ISDS mechanism, investors would still be able to sue States before local courts, which would require ensuring legal representation as well. In proceedings before Slovak courts, the regulation allows to compensate costs of legal representation only to the extent of statutory remuneration tariff, while real costs of legal representation are usually severalfold higher.

(ii) Inability to appeal. It is not possible to appeal under ICSID Procedural Rules; however it is possible to annul the final award under certain circumstances. In case of UNCITRAL arbitration rules it is possible to file a motion for annulment of the award depending on the law of the state in which the place of arbitration was chosen by the disputing parties. Furthermore, CETA already foresees the possibility of establishing an appellate mechanism directly for international investment arbitrations.