BOSNIA AND HERZEGOVINA

Patricia Živković and Yancy Cottrill

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A. POLICY AND TREATY LANDSCAPE

1.01 The Federation of Bosnia and Herzegovina (hereafter “BiH”) has entered into 39 bilateral investment treaties (hereafter “BIT”), the first one dating back to 1979.¹ Additionally, BiH is party to five treaties with investment provisions (hereafter “TIP”).² Finally, BiH is party to an additional 13 investment related instruments (hereafter IRI).³ By reviewing the three different investment charters with an eye towards the dispute resolution mechanisms, BiH’s stance towards investor-state arbitration (hereafter ISA) will become apparent.

1.02 There are 38 existing BITs in BiH’s portfolio, which were entered into after the fragmentation of the former Yugoslavia, to be analyzed in regards to the dispute resolution provisions. Incidentally, the only BIT that is no longer in effect is the very first one they signed in 1979 with Sweden.⁴ The former BIT with Sweden was replaced by a new BIT between the countries which was signed in 2000 and went into effect in 2002.⁵

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- ¹ ‘Bosnia and Herzegovina Bilateral Investment Treaties’ (*Investment Policy Hub*) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/25>, accessed 26 February 2018.
 - ² ‘Bosnia and Herzegovina Treaties with Investment Provisions’ (*Investment Policy Hub*) <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/25#iiaInnerMenu>, accessed 26 February 2018.
 - ³ ‘Bosnia and Herzegovina Investment Related Instruments’ (*Investment Policy Hub*) <http://investmentpolicyhub.unctad.org/IIA/CountryIris/25#iiaInnerMenu>, accessed 26 February 2018.
 - ⁴ ‘Bosnia and Herzegovina – Sweden BIT (1978)’ (*Investment Policy Hub*) <http://investmentpolicyhub.unctad.org/IIA/country/25/treaty/629>, accessed 26 February 2018.
 - ⁵ ‘Agreement on the Promotion and Protection of Investments Between Sweden and Bosnia and Herzegovina’ (*Investment Policy Hub*, 31 October 2000) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/495>, accessed 26 February 2018.

Reviewing the close to 40 BITs that BiH has entered into, some trends become apparent. All but one BIT contains multi-tiered dispute resolution clauses. Most require an attempt to settle the dispute amicably through negotiations and consultations. In the majority of the BITs, the second tier of the clause allows the investor to choose either to resolve the dispute in a court or tribunal in the jurisdiction where the investment is made or through arbitration in various international arbitration institutions (ICC, ad hoc with UNCITRAL rules, and ICSID are the most common). These fork-in-the-road provisions are more common than not in BiH's BITs. **1.03**

Many of the clauses also include the basis for the dispute to be resolved, which are: the provisions of this Agreement; the laws and regulations of the Contracting Party in whose territory the investment has been made including the rules relative to conflict of laws; and the rules and universally accepted principles of international law. **1.04**

The exceptions to the general trends include BITs with the Netherlands and Pakistan. The Netherlands is the only BIT that does not include a multi-tiered dispute resolution clause, but instead just calls for arbitration through ICSID. While the BIT with Pakistan does include a first tier, allowing for parties to settle the dispute amicably, it does not give a choice for arbitration but stipulates ICSID only. **1.05**

All of the TIPs are currently in effect, with the exception of the Bosnia-EC Stabilization Agreement. The Bosnia-EC Stabilization Agreement was signed in 2008 and has been made effective under the Interim Agreement clause in the TIP whilst BiH completes measures to comply with all the provisions of the agreement.⁶ The other four TIPs are: Bosnia and Herzegovina-EFTA FTA (2013); CEFTA; Bosnia-Turkey FTA; and The Energy Charter Treaty (1994).⁷ **1.06**

6 'Stabilisation and Association Agreement' European Communities No. 4 (2009) (*Investment Policy Hub*, June 24, 2014) Article 135. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3272>, accessed 26 February 2018.

7 <http://investmentpolicyhub.unctad.org/IIA/CountryBits/25>, accessed 26 February 2018.

Table 1.1 *Current treaties with investment provisions – Bosnia and Herzegovina*

TIP	Other Party	Investor Dispute Resolution	Party Dispute Resolution
Bosnia and Herzegovina – EFTA FTA (2013) ⁸	Iceland, Norway, and Switzerland	Must go through country's members on the Joint Committee to resolve disputes arising out of the agreement.	Parties must attempt to resolve the dispute via the Joint Committee, if this does not succeed, then ad hoc arbitration under Optional Rules for Arbitrating Disputes between Two States of the Permanent Court of Arbitration.
Bosnia-EC Stabilization Agreement ⁹	European Union Members	Must go through country's members on the Stabilization and Association Committee to resolve disputes arising out of the agreement.	Parties must attempt to resolve the dispute via the Stabilization and Association Committee, if this does not succeed, then ad hoc arbitration using customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties.
CEFTA ¹⁰	The Republic of Albania, the Republic of Bulgaria, the Republic of Croatia, the Republic of Macedonia, the Republic of Moldova, the Republic of Montenegro, Romania, the Republic of Serbia, and Kosovo	Must go through country's members on the Joint Committee to resolve disputes arising out of the agreement.	Parties must attempt to resolve the dispute via the Joint Committee, if this does not succeed, then ad hoc arbitration using customary rules of interpretation of public international law and the Agreement.

8 'Free Trade Agreement between EFTA States and Bosnia and Herzegovina' (*Investment Policy Hub*, 24 June 2013) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2748>, accessed 26 February 2018.

9 'Stabilisation and Association Agreement' European Communities No. 4 (2009) (*Investment Policy Hub*, June 24, 2014) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3272>, accessed 26 February 2018.

10 'Agreement on Amendment of and Accession to the Central European Free Trade Agreement' (*Investment Policy Hub*, 19 December 2006) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3093>, accessed 26 February 2018.

TIP	Other Party	Investor Dispute Resolution	Party Dispute Resolution
Bosnia-Turkey FTA ¹¹	Turkey	Must go through country's members on the Joint Committee to resolve disputes arising out of the agreement.	Parties must attempt to resolve disputes via direct consultations. If this does not succeed, then the dispute must be submitted to the Joint Committee to resolve. If the Joint Committee fails to resolve the issue then the Party concerned may adopt the appropriate measures to deal with the difficulties resulting from the practice in question.
The Energy Charter Treaty (1994) ¹²	Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, and Uzbekistan	The investor can, with the unconditional consent of the Contracting Party, choose to submit the dispute for resolution either to the national court, or to any dispute settlement procedure previously agreed with the Government, or to an international arbitration (ICSID, ICSID's Additional Facility, UNCITRAL or the Stockholm Chamber of Commerce). Except in Australia, Hungary and Norway, investors of other Contracting Parties have a right to that choice of procedure even if the dispute is in relation to an investment agreement it has entered into with the Government and is not specific to one of the provisions of the ECT.	Settle disputes through diplomatic channels. If unable to settle through diplomatic channels then ad hoc arbitration and in the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators.

11 'Free Trade Agreement between Turkey and Bosnia and Herzegovina' (*Investment Policy Hub*, 3 July 2002) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2640>, accessed 26 February 2018.

12 'The Energy Charter Treaty' (*Investment Policy Hub*, 19 December 1994) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2427>, accessed 26 February 2018.

- 1.07** All but one of the TIPS provide that investors must seek enforcement of the treaty through their countries' committee membership on the internal dispute body (Joint Committee or Stabilization and Association Committee). This difference means that if an issue arises between the investor and foreign government or entity that does not specifically violate the terms of the TIP, then investors are left to local remedies or are free to include dispute resolution clauses in the underlying investment agreement. The Energy Charter Treaty has a dispute resolution structure for investors that resembles a BIT multi-tiered dispute resolution clause.
- 1.08** The Bosnia-Turkey Free Trade Agreement is also an outlier in the TIPs. This agreement only allows for the Joint Committee to resolve the dispute. If they fail to resolve the dispute then "the Party concerned may adopt the appropriate measures to deal with the difficulties resulting from the practice in question."¹³
- 1.09** BiH is party to 13 IRIs: MIGA Convention, ICSID Convention, New York Convention, Draft Supplementary Treaty to the Energy Charter Treaty, UN Code of Conduct on Transnational Corporations, UN Guiding Principles on Business and Human Rights, ILO Tripartite Declaration on Multinational Enterprises, ILO Tripartite Declaration on Multinational Enterprises, World Bank Investment Guidelines, ILO Tripartite Declaration on Multinational Enterprises, New International Economic Order UN Resolution, Charter of Economic Rights and Duties of States, and Permanent Sovereignty UN Resolution. While the majority of these IRIs provide for the enforcement of dispute resolution mechanisms and enhance the ability of the investor to collect on a claim, some of the IRIs contain investor dispute provisions.
- 1.10** The ILO Tripartite Declaration on Multinational Enterprises has a voluntary arbitration provision pertaining to the settlement of industrial disputes. It states: "Multinational as well as national enterprises jointly with the representatives and organizations of the workers whom they employ should seek to establish voluntary conciliation machinery, appropriate to national conditions, which may include provisions for voluntary arbitration, to assist in the prevention and settlement of industrial disputes between employers and workers ...".¹⁴

13 'Free Trade Agreement between Turkey and Bosnia and Herzegovina' (*Investment Policy Hub*, 3 July 2002) Article 26 (4)(c).

14 International Labour Office, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (*Investment Policy Hub*, 2006) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2890>, accessed 26 February 2018.

Comparing the BITs, TIPs, and IRIs with an eye towards investor-state arbitration in BiH reveals several trends. Fork-in-the-road provisions are common place in the BITs and even found in one of the TIPs. Investors are limited to their choice of arbitral institutions and must elect to either seek remedy through the local justice system or arbitrate, not both. Also, all the BITs except one, Netherlands, require the parties to attempt to settle the dispute amicably through consultations and negotiations. The TIPs limit the ability to arbitrate to disputes that actually involve a breach to the agreement itself. Investors are free to negotiate arbitration provisions with the foreign government or entity in the underlying contract. If the investor seeks to enforce the terms of the TIP agreement, then they will have to notify their member of the Committee who will need to bring the claim on their behalf. The dispute will be heard by the Committee and only if it is not resolved there, then it can be brought to arbitration. The choice of arbitral tribunal is also limited in the TIPs (most providing for ad hoc arbitration as the only option). **1.11**

B. DOMESTIC LEGAL STATUS OF ISA AND ALTERNATIVE REMEDIES

The domestic legal framework for ISA is contained in the Act on Policy Regarding Foreign Investment in Bosnia and Herzegovina (hereinafter: “Act on Foreign Investment”). The Act on Foreign Investment was passed in 1998, and hence after had three amendments in 2003, 2010, and 2015. The Act on Foreign Investment provides for the protection and benefits of foreign investors in Bosnia and Herzegovina. A *foreign investor* is defined as a natural person without a permanent residence in Bosnia and Herzegovina and does not have its principal place of business in Bosnia and Herzegovina, or a legal person established in accordance with a foreign law which has a registered office, central management or principal place of business in a foreign country. Direct foreign investment is, according to the same Act, defined as an investment in a newly founded commercial company or in an existing domestic commercial company, as well as an investment in a newly founded institution or existing institution. The investment can be made in money, property, or right. The Act on Foreign Investment guarantees foreign investors the same rights and obligations as its residents. It is also guaranteed that their investment will not be nationalized or expropriated, unless it is required by public interest, and conducted in accordance with applicable laws with an adequate compensation. **1.12**

The Act of Foreign Investment subjects all disputes related to the foreign investments to the jurisdiction of national courts of Bosnia and Herzegovina, **1.13**

unless the parties agreed for another procedure in accordance to which such disputes can be resolved, including, but not limited to, domestic and international mediation and arbitration. In November 2017, by the proposal of the Ministry of Foreign Trade and Economic Relations, the Council of Ministers of Bosnia and Herzegovina decided to promote negotiations in international investment disputes by adopting the Decision on the Establishment of the Negotiating Body of Bosnia and Herzegovina for the peaceful resolution of international investment disputes.¹⁵ The reason why this negotiating body is being established is to ensure the timely, coordinated, and effective action of competent institutions in representing and protecting the interests of Bosnia and Herzegovina international investment disputes initiated against BiH.

- 1.14** The negotiating body is comprised of one representative from the state ministries of foreign trade and economic relations, justice, finance, foreign affairs and the BiH Public Prosecutor's Office. Ad hoc representatives will be appointed from a legal person that is involved in the dispute, the ministries of the entities, or from the competent institutions of the entities, cantons, or Brčko District of BiH. On the proposal of the BiH Ombudsman, the Council of Ministers of BiH may appoint an external expert with relevant experience in international arbitration or investment law to the negotiating body.

C. COMPREHENSIVE ANALYSIS OF THE CASE-LAW

- 1.15** At the moment there are two pending cases before the ICSID against Bosnia and Herzegovina. These are: *Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček* (ARB/16/36) and *Elektrogospodarstvo Slovenije – razvoj in inženjering d.o.o.* (ARB/14/13). In 2007, the tribunal in the case *ALAS International Baustoffproduktions AG v. Bosnia and Herzegovina* issued an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), due to the settlement of the case.¹⁶
- 1.16** Elektrogospodarstvo Slovenije registered the case before the ICSID on June 16, 2014. Elektrogospodarstvo Slovenije brought the claim over its investment in the Ugljevik, a thermal power plant and coal mine in Republika Srpska region.¹⁷ None of the procedural materials is publicly available, and the information about all pending and closed cases can be scarcely found in

¹⁵ More information can be found on the official website of the Ministers' Council of BiH: http://vijeceministara.gov.ba/saopstenja/sjednice/saopstenja_sa_sjednica/default.aspx?id=26840&clangTag=hr-HR, accessed 26 February 2018.

¹⁶ Richard Woolley, 'Bosnia Faces Slovenian State Power Claim' (*Global Arbitration Review*, 2 July 2014).

¹⁷ *ibid.*

media and legal news portals. What can be confirmed is that the parties entered into a contract for the construction and operation of Thermal Power Plants Block I and II.¹⁸ After the contract was not performed, Elektrogospodarstvo attempted to seek remedies before local courts in 2009, but the court decided it did not have jurisdiction, due to the existence of the arbitration clause.¹⁹ According to the information available on the ICSID website, the tribunal in this case held a hearing on jurisdiction and liability from December 11, 2017 till December 15, 2017. It was reported that the claim of Elektrogospodarstvo Slovenije is worth 750 million euros, which covers the recovery of the investment into construction as well as compensation for undelivered electricity.²⁰

On January 4, 2018, the Council of Ministers of Bosnia and Herzegovina rendered a conclusion on the Harmonization of the Proposal of the Agreement on Mutual Rights and Obligations of the Council of Ministers of Bosnia and Herzegovina and the Government of the Republic Srpska in relation to the arbitration proceedings involving the Electricity Industry of Slovenia – Development and Engineering d.o.o. Maribor, Republic of Slovenia. The Council of Ministers gave its consent to the Agreement on Mutual Rights and Obligations in connection with the Arbitration Proceedings and authorized Dr. Denis Zvizdić, Chairman of the Council of Ministers of Bosnia and Herzegovina, to sign this agreement.²¹ **1.17**

Another Slovenian party, a construction company Viaduct d.o.o. Portorož, registered a claim at ICSID against Bosnia and Herzegovina on 15 November 2016. The claim, valued at 54 million euros, is over the failed construction of two hydropower plants.²² However, a tribunal has not yet been composed. **1.18**

Besides these pending ICSID cases, in 2017, a company called Arcelor Mittal, which holds 35% of the RZR Ljubija, a company that has operated the mine near Prijedor, made a threat of filing a claim against Bosnia and Herzegovina.²³ The other 65% is held by the Government of Republika Srpska.²⁴ **1.19**

18 Nevena Jevremović, 'Winter is Coming: Investment Arbitrations Striking Bosnia and Herzegovina' (*Kluwer Arbitration Blog*, 11 January 2017) <http://arbitrationblog.kluwerarbitration.com/2017/01/11/winter-is-coming-investment-arbitrations-striking-bosnia-and-herzegovina/>, accessed 26 February 2018.

19 *ibid.*

20 Woolley (n 16).

21 http://vijeceministara.gov.ba/saopstenja/sjednice/zakljucci_sa_sjednica/default.aspx?id=27260&langTag=en-US, accessed 26 February 2018.

22 Tom Jones, 'ArcelorMittal Threatens Claim Against Bosnia' (*Global Arbitration Review*, 16 May 2017).

23 *ibid.*

24 *ibid.* According to another source (the website of the RZR Ljubija), the relation between these entities is the following: ArcelorMittal Prijedor is a joint venture company formed by joint investments of strategic partners:

Arcelor Mittal is the world's largest steel production company, with over 320,000 employees in more than 60 countries. The chairman and CEO of Arcelor Mittal announced the possibility of suing over the possibility of Republika Srpska's majority stake being sold to the Israeli Investment Group.²⁵

- 1.20** The most current claim against Bosnia and Herzegovina was filed in September 2017 by Indian investors – Naveen Aggarwal, Neete Gupta, and their company Usha Industries.²⁶ The investors filed their request for an UNCITRAL arbitration, alleging misconduct by Bosnian public bodies in the process of issuing a prospectus encouraging foreign investment in a state-owned insurance company – Krajina Osiguranje.²⁷ According to available sources, the Trebinje Commercial Court found the prospectus had been fraudulent, as the investors now allege in the arbitration proceedings that it contained misrepresentation of Krajina's financial situation.²⁸

D. CONCLUSIONS: NATIONAL EXPERIENCES

- 1.21** Since the formation of Bosnia and Herzegovina in the mid to late 1990s, the government has been active in negotiating treaties to attract foreign investment. The bilateral investment treaties include the option to arbitrate via various venues. In addition to the BITs, Bosnia and Herzegovina has treaties with investment provisions and investment related instruments, most of which have arbitration provisions in place to address disputes.
- 1.22** Over the years, there have not been many disputes resolved under these treaties. The two cases that are currently under ICSID arbitration involve Slovenian companies, and both deal with issues related to the power sector. The details of these cases have not been made available publicly, therefore their issues are not known. It can be inferred that due to preexisting political issues between the countries of the former Yugoslavia, the process may not be moving as quickly as it should.

"LNM" HOLDINGS N.V., today ArcelorMittal, and RZR "Ljubija" a.d. Prijedor. See more here: http://rzzrljubija.com/pravna_lica.aspx, accessed 26 February 2018.

²⁵ Jones (n 22).

²⁶ *ibid.*

²⁷ Jarrod Hepburn, 'Indian investors file UNCITRAL BIT claim against Bosnia, alleging that they were misled during privatization tender, and later subjected to unfair treatment.' 25 September 2017, available at www.iareporter.com/articles/indian-investors-file-uncitral-bit-claim-against-bosnia-alleging-that-they-were-misled-during-privatization-tender-and-later-subjected-to-unfair-treatment-by-securities-commission/.

²⁸ Jones (n 22).

International investment arbitration should take a larger role in BiH, as the country adopts laws in line with gaining admission to the EU. These investor friendly laws should bring more foreign investors. Thus, they will find plenty of BITs with structured arbitration clause to rely upon in case of disputes. Also, foreign investors should have a handful of decisions to analyze trends in BiH from the various tribunals. **1.23**