

Principles and standards of investment protection in the agreements on the promotion and protection of investments which Bosnia and Herzegovina concludes

Considering the significant changes that the investment regime reflected in the international agreements on the protection of investments has experienced in the world in the last ten years;

Aware of the large number of international investment claims filed by investors against host states of their investment seeking the protection of rights and compensation under the provisions of such agreements;

Facing a growing number of claims in investment arbitration claims initiated by investors against Bosnia and Herzegovina on the basis of agreements on the protection of investments, as well as the large requests for monetary compensation under these claims;

Taking into account the most important processes conducted internationally at the multilateral level in the field of the environmental protection, combatting climate change, global warming, energy transition, the achievement of the sustainable development goals, protection of human rights, labour rights and others, in which Bosnia and Herzegovina participates or has already undertaken obligations by signing treaties or acceding to conventions (such as the Energy Community, Paris Agreement, Agenda 2023, etc.);

Acknowledging the need of Bosnia and Herzegovina as the host state of investments to balance its rights and obligations in agreements with rights and obligations of the investors;

Considering the fact that Bosnia and Herzegovina has 42 (1) agreements on investment protection in force, concluded between 1995 and 2011, which means that they contain broad and imprecise provisions, without references to areas such as the energy transition, climate change, human and labour rights, corporate responsibility, etc.

(1) Out of this number, 38 agreements are concluded with other countries, two with international organizations (OPIC and OPEC Fund) and two are terminated (with India and Italy upon their request), but whose provisions and right of investors to initiate investment disputes against Bosnia and Herzegovina, in accordance with provisions of those agreements, remain in force for another 15 and 5 years respectively.

Aware that this type of agreement is concluded for periods of several decades and that in case of cancellation, the protection of existing investments is extended for the next period of ten years or more, including the right to initiate disputes against Bosnia and Herzegovina in that additional period;

The following principles and standards are established, which will inevitably be contained in the agreements on the protection of investments on which Bosnia and Herzegovina, in accordance with the procedure prescribed by the Law on the procedure for the conclusion and implementation of international agreements ("Official Gazette of BiH", 29/00 and 32/13), will conduct negotiations after their adoption.

1. Protection of investments

Having in mind the fact that foreign investments are protected in Bosnia and Herzegovina in accordance with the laws of Bosnia and Herzegovina, the purpose of the conclusion of these agreements is the additional regulation of the rights and obligations of investors and its investments of one contracting party in the territory of the other contracting party. The basic standards of protection provided in these agreements are: fair and equitable treatment, full protection and security, non-discrimination treatments (national treatment and most favoured nation treatment), freedom of transfer, protection from illegal expropriation and adequate compensation. The procedural provisions of the agreements regulate the rights of the investors and the host state of the investment to seek protection of their rights before domestic courts and international arbitral tribunals.

2. Sustainable development

In September 2015, Bosnia and Herzegovina, along with 192 member states of the United Nation, committed to implement the Agenda 2030 for Sustainable Development (Agenda 2030), which consists of 17 sustainable development goals and 169 sub-goals. The Agenda 2030 document emphasizes, as one of the three key principles, "the integration of all aspects of sustainable development, which implies the balanced economic growth with the protection of the environment and natural resources, with the simultaneous creation of a just society and the reduction of inequality." Accordingly, sustainable development is one of the basic principles which form the backbone of development of Bosnia and Herzegovina in the economic, but also in every other perspective.

3. Promotion of investments

Promotion of investments is an important element, but in compliance with the level of protection of health, safety, labour rights, human rights, environment and others, as prescribed by the laws of Bosnia and Herzegovina. Therefore, Bosnia and Herzegovina will not waive or otherwise derogate the level of protection prescribed in those laws, regulations or standards for the encouraging or promotion of investments from the other contracting party in its territory. In order to facilitate investments, Bosnia and Herzegovina will publish or otherwise make available its laws and regulations of general application, as well as the international agreements which may affect the investments of investors of the other contracting party. The same will be required from the other contracting party for the protection of the rights of its own investors.

4. Responsible investing

Foreign investments can make a positive contribution to the development of Bosnia and Herzegovina, but they can also negatively affect the environment, health, labour rights, human rights or other public interests. The existing agreements have little or no provisions to establish the liability of investors in exchange for the protection they obtain. Therefore, one of the principles which should be included in the future agreements of Bosnia and Herzegovina is ensuring the responsible behaviour of investors. This includes two dimensions: maximizing the positive contribution that investors can make to society ("doing good") and avoiding negative impacts ("do no harm").

5. The right of the state to regulate in the public interest while providing investment protection

While investment protection agreements aim to contribute to a favourable investment climate, practice has shown that they inevitably limit the sovereignty of states as contracting parties in the creation of domestic policies. Considering the growing concerns that such limitations go too far, especially if they are combined with an efficient implementation, the provisions of agreements must ensure that Bosnia and Herzegovina retain its right to regulate for the achievement of its public policy objectives, including sustainable development goals (for example, the protection of the environment, the enhancement of public health, or other social goals). The protection of the right to regulate can also be necessary for the implementation of economic or financial policies. At the same time, Bosnia and Herzegovina will take care of ensuring the necessary space for regulation in the public interest so that it does not become a cover for investment protectionism or unjustified discrimination of investors and investments in its territory.

6. Reformed and modernized mechanism for the resolution of disputes between investors and the state

Arbitration practice shows that the existing mechanism for resolving disputes between investors and the state has significant shortcomings that have called into question its legitimacy. Respondent states in international investment arbitration procedures are concerned that the existing mechanism exposes them to additional legal and financial risks, which are often unforeseen at the time of the conclusion of the agreement on investment protection and in circumstances beyond clear violations of private property, without necessarily yielding any benefit in terms of additional inflows of direct foreign investments. There are also concerns that this mechanism gives foreign investors more rights in terms of dispute resolution than domestic investors, that it leads to "regulatory chill" (reluctance to regulate in order to avoid possible investment claims), that it results in inconsistent arbitral awards, that it is inadequate in terms of insurance of transparency, selection of independent arbitrators and guaranteeing due process. Therefore, the future agreements of Bosnia and Herzegovina must include the reformed mechanism in accordance with the best practices of the European Union, UNCITRAL Working Group III and other important reform fora, especially the promotion of alternative forms of dispute resolution, specifying procedure, the obligations of the disputing parties, etc.

7. Systemic consistency

The multi-tiered and multi-faceted nature of the regime established through the network of the concluded agreements on investment protection results in gaps, inconsistencies and overlapping between signed individual agreements, between signed agreements and other instruments of international law which affect investments, as well as between signed agreements and domestic policies. In the context of Bosnia and Herzegovina, this primarily relates to the obligation: 1) that all agreements are mutually consistent, 2) that all agreements are consistent with other international obligations (EU policies – SAA, obligations undertaken under other bilateral and multilateral agreements and conventions, especially those in the field of energy, climate change, the protection of the environment, labour and human rights, etc.), and 3) that all agreements are in line with the policies of Bosnia and Herzegovina, especially related to foreign direct investments.

In accordance with the established principles, concrete investment protection standards in agreements negotiated by Bosnia and Herzegovina, among other provisions, will provide for the following:

Definition of Investment:

In order to be covered by the agreement, an investment must, among other things, be made or acquired in accordance with the applicable laws of the contracting party host state (protection of investments applies after investing – post-establishment) and it must fulfil the indicative list of characteristics, such as the engagement of capital or other resources, the expectation of gain or profit, a certain duration or assumption of risk and through which the investor performs substantial business activities in the host state. From the definition of investment are excluded monetary claims arising exclusively from commercial transactions for the sale of goods and services, private funds, portfolio investments, financial instruments which are traded on unregulated markets (futures, swaps, forwards, options and other financial derivatives), etc.

Definition of Investor:

An investor is a physical person with the nationality and residence of the country of origin of the investor, in accordance with applicable regulations. In cases of dual citizens, the investor will be considered a citizen of the country of its dominant and effective nationality. Investors are also legal entities established in accordance with the laws of a contracting party, except for subsidiaries and sales offices, which has its headquarters including substantial business activities in the territory of that contracting party. The provision also includes a list of "substantial business activities" of the investor of the contracting party its home state (such as registered office or management of the company, an established company seat, the number and qualifications of the employees, turnover generated of revenue in the territory of the contracting party home state, etc.).

Scope:

Investment protection refers to the measures of the host state of the investment, which relate to the investors and their investments established under the laws of the host state before or after the entry into force of the international agreement on protection of investments. However, the treatment, benefits or privileges granted by Bosnia and Herzegovina to a third country based on an agreement on economic integrations (free trade areas, custom unions, common market, economic community, monetary union – such as the EU) will not extend to investors and their investments under that agreement. The protection and provisions of the agreement do not apply to the claims and disputes which occurred before its entry into force, or to the measures adopted by Bosnia and Herzegovina in the field of health and pension insurance. In addition, the agreement does not apply to any obligation which may arise in relation to specific investments of the investor of the other contracting party.

Investment promotion:

The contracting parties will promote and allow mutual investments in accordance with their domestic regulations, but not in a manner that would weaken or reduce the level of protection provided under domestic laws, regulations or standards on health, security, labour or the protection of the environment.

Right to regulate:

In the preamble and in the entire agreement, additional wording is introduced in order to harmonize the interests of investors and the host state of investment, that is, the right of the contracting parties to regulate within their territories. A

special article on the right to regulate confirms the right of the contracting parties to regulate in relation to investments and investors in order to achieve legitimate public policy goals, such as the protection of public health, safety, the environment or public morals, social protection or consumer protection or the promotion and protection of cultural diversity, preservation of living and non-living exhaustible natural resources, integrity and stability of the financial system. The mere fact that the state regulates, including the modification of its laws, in a way that negatively affects the investment or hinders the investor's expectations, including his expectations of profit, does not constitute a violation of the contractual investment protection obligations under the agreement. The decision of the contracting party not to approve or continue to approve the subsidy, if there is no specific obligation to do so by law or contract, will not be considered a violation of the agreement.

Definition of fair and equitable treatment:

Investments and returns on investments, as well as investors in relation to their investment are granted fair and equitable treatment. A measure or series of measures which represent a violation of this standards are, among others, the denial of justice in civil, administrative or criminal proceedings, violations of due process including the violation of transparency in judicial and administrative proceedings, discrimination on illegal grounds such as gender, race or religious beliefs, failure to meet the investor's legitimate expectations in precisely defined cases, coercion or harassment of investors, etc. A breach of any other provision of this or any other agreement does not represent a violation of this treatment.

Full protection and security:

This provision only relates to physical safety of the investor and investments.

National treatment and most favoured nation treatment (MFN):

A contracting party accords to the other contracting party's investors and their investments, as well as returns from investments, treatment no less favourable than that which it accords in similar situations to its own investors and their investments and returns from investments, or investors of any third country and their investments and returns from investments in relation to the management, maintenance, use, enjoyment and disposal of the investment in its territory. However, the granting of national and MFN treatment is limited only to "similar situations". The assessment of "similar situations" will be based on the overall circumstances relating to the investor or the investment, including the business sector in which investor operates, the character, nature, objective, duration and reasons for the measure. For the sake of greater legal certainty, MFN treatment will not be extended to investment dispute resolution procedures in other international investment or trade agreements, as well as investment contracts concluded between investors and the investment host state. Substantive provisions in other international agreements do not in themselves constitute "treatment" granted under the MFN clause. MFN and national treatment do not apply to public procurement procedures, subsidies and grants, including government loans, guarantees and insurance, nor to treatment, benefits and privileges arising from membership or accession to any existing or future free trade area, customs union, economic union, common market or similar international agreement to which the contracting party is already a party or is about to become a party or an agreement for the avoidance of double taxation or other arrangements relating in part or in whole to matters of taxation.

Definition of direct and indirect expropriation:

The contracting parties shall not carry out directly or indirectly nationalization or expropriation unless it is for a public purpose, in accordance with the prescribed legal procedure, in a non-discriminatory manner and with the payment of prompt, adequate and effective compensation. However, the new provisions clarify the term "direct expropriation" and further introduce the definition of "indirect expropriation", together with a list of factors that must be taken into account to determine the existence of indirect expropriation in each case (such as economic impact, duration of the measure, scope in which the measure being evaluated prevents the achievement of the reasonable expectations of the investor and the character of the measure). Non-discriminatory measures that are adopted to protect legitimate policy goals, such as the protection of public health, security, environmental protection, public morality, social protection or consumer protection and the promotion and protection of cultural diversity do not constitute indirect expropriation.

Compensation of losses:

In case the investment suffers losses caused by war or other armed conflicts, revolution, national state of emergency, protests and similar events, the host state of the investment will, in matters of restitution and compensation, grant treatment no less favourable than that granted to its own investors or investors of any third country, whichever is more favourable.

Investment-related transfers:

The contracting party will allow, after payment of tax and other obligations, all transfers related to the covered investment, without restrictions or delays, in freely convertible currency and at the market exchange rate on the day of the transfer. Within this provision, a list of covered transfers is provided and a list of situations is introduced when the state applies its laws in a fair and non-discriminatory manner, which cannot be interpreted as restrictions on transfers (bankruptcy, insolvency, protection of creditor's rights, issuance and trading of financial derivatives, criminal or penal offences, fraudulent practices, enforcement of international judgments, compliance with taxation laws, etc.). Exemptions related to the state's restrictive measures in case of serious difficulties in the balance of payments or external financial difficulties are explained in more detail.

Denial of benefits:

A contracting party may deny benefits under the agreement to an investor or investment of the other contracting party if it determines that that investor or investment is owned or controlled by a natural or legal person of a third country with which it does not maintain diplomatic relations or toward which it adopts or maintains measures for maintenance of international peace and security, including the protection of human rights in accordance with the Charter of the United Nations and international obligations. The clause on the denial of benefits will not be subject to prior formal notification.

Subrogation:

If there is a transfer of rights based on a subrogation contract, the contracting party host of the investment shall admit the other contracting party or its agency the right that the investor had in relation to the investment. The transferred right or claim cannot be greater than the original right or claim of the said investor.

Security issues:

The provisions of the agreements cannot be interpreted in a manner which would prevent a contracting party from taking measures aimed at protecting its security interests.

Sustainable development:

It is confirmed that the contracting parties undertake to promote the development of international investments in such a way as to contribute to the goals of sustainable development. A new section of the agreement is introduced, which refers to provisions on the promotion of sustainable development goals, corporate social responsibility, and climate change and clean energy transition. The rights and obligations that have already been assumed in these areas in multilateral international agreements, conventions and other international legal acts that Bosnia and Herzegovina signed or acceded to are confirmed.

Investor-state dispute resolution:

The investor-state dispute settlement mechanism allows an investor from one contracting party to submit a claim for dispute settlement (and appropriate monetary compensation) against the other contracting party in which that investor has made an investment in case it considers that some of its rights granted by the agreement are threatened or violated by the action or inaction of the institutions of the host state. The dispute can be submitted at its own choice to a domestic court and to international institutional or ad hoc arbitration. Claims related to investments made through misrepresentation, concealment, corruption or conduct that constitutes abuse of process are excluded from the scope of this mechanism. It also excludes disputes that would not be possible without a change in the investor's corporate structure that was made with the main goal of submitting a claim. Arbitral tribunals are instructed to reject at an early stage claims that are clearly unfounded or without a legal basis.

The procedure that the investor must follow in case it has an unresolved issue or dispute with the host state of hosting the investment is precisely prescribed, as well as the deadlines that must be observed in that procedure (consultation procedure).

The peaceful resolution of disputes is specifically defined in detail, in order to enable that before submitting a claim, in the consultation process, as well as at any stage of the procedure, two parties can try to resolve the dispute peacefully (negotiations, conciliation, mediation). It is prescribed what the request for peaceful resolution of the dispute contains, to whom it is submitted, what are the deadlines for dispute resolution, limitation periods, etc. Mediation and other methods of

alternative dispute resolution are available to the parties during the entire procedure, without affecting the position or rights of the contracting parties under the relevant agreement and are conducted according to the rules agreed by the parties to the dispute. It also defines the procedure of the arbitral tribunal for insurance of costs, third party funding, applicable law and interpretation, as well as transparency of proceedings (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration).

Resolution of disputes between the contracting parties:

A dispute between the contracting parties relating to the interpretation or application of the agreement, which has not been resolved through consultations or other diplomatic channels, may be submitted, at the request of one contracting party, to the settlement by arbitration under the UNCITRAL Arbitration Rules, unless the contracting parties agree otherwise.

"EU clause":

A provision is included that ensures that in the event Bosnia and Herzegovina becomes a member state of the EU, Bosnia and Herzegovina's obligations under the relevant agreement will be interpreted and applied in a manner consistent with the obligations arising from its membership in the European Union. Bosnia and Herzegovina will take the necessary steps to fulfil these obligations.

Duration and termination of the agreements:

The initial period of the agreement is 10 years, with the possibility of termination at any time after the expiration of that initial period according to the prescribed procedure and the duration of the so-called "sunset" clause, i.e. protection of existing investments after termination is five years.

Other issues:

All other issues that are not contained or mentioned in these standards and provisions will be regulated in accordance with the laws in Bosnia and Herzegovina, obligations undertaken in other international treaties, in accordance with the Vienna Convention on the Law of International Treaties (1969), the best practice in the world and the best interests of Bosnia and Herzegovina. Proposals for such solutions will be explained in detail in the Basis for conducting of negotiations and concluding an individual agreement on promotion and protection of investments or in the request to amend the Basis for conducting negotiations and concluding an individual agreement on the promotion and protection of investments, in accordance with the procedure prescribed by law and in the report from negotiations.

Note: Adopted at 20th session of the Council of Ministers of Bosnia and Herzegovina held on 23 August 2023