

DEVELOPING METHODOLOGY AND ASSESSING CRITERIA FOR CONCLUDING BILATERAL INVESTMENT TREATIES

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Submitted by

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To : Ministry of Foreign Trade and Economic Relations of Bosnia and
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Executive Summary

The Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina expressed its desire to have a methodology created to assess the risks associated with the conclusion of Bilateral Investment Treaties. Such methodology should identify and organize economic, legal and political factors in a user-friendly format, enabling a fact-based assessment that can help the government of Bosnia and Herzegovina assess the risks associated with any Bilateral Investment Treaty proposal.

In order to achieve this objective, this report proposes a methodology in the form of a comprehensive Checklist. The Checklist serves a purpose similar to the checklist provided by aeroplane manufacturers to pilots. It provides a pilot with the necessary information to make an informed decision about whether or not to take off. In a similar manner, the Checklist proposed in this report will assist the competent authorities of Bosnia and Herzegovina in more easily deciding whether to take off with the Bilateral Investment Treaty negotiations, enter into negotiations under specific conditions, or stay at home and not enter into negotiations. It is an easy-to-use resource enabling the competent authorities to communicate and receive input from different organs and agencies of Bosnia and Herzegovina.

The Checklist is divided into three sections: General Profiling, Economic Impacts, and Legal Risks. The first section provides a clear understanding of the intentions, benefits and potential risks of the prospective negotiating partner to Bosnia and Herzegovina. This category highlights past (pre-negotiation/historical) flows of foreign direct investment from that country into Bosnia and Herzegovina and lists the main economic sectors in which investors from the perspective partner country are likely to concentrate. The second section touches upon the possible economic benefits and losses that could result from the conclusion of the Bilateral Investment Treaty. This section is a qualitative assessment divided into two parts: sectors of Bosnia and Herzegovina's economy most likely to receive new foreign direct investment, and the investment environment created by the Bilateral Investment Treaty. The third section addresses different Bilateral Investment Treaty clauses, highlighting the likely consequences deriving from different forms of drafting them.

Each section of the Checklist is divided into multiple criteria. These criteria have been classified with one of three "risk factors": high risk, normal risk and low risk. These factors aim at indicating whether the proposal is advantageous or not to Bosnia and

Herzegovina. This classification should not be understood as an instruction to either engage or not engage in negotiations. The risk classification simply aims at communicating information that should be taken into consideration by the competent authorities in order to make an informed decision.

In order to illustrate how the Checklist should be used, this report provides Bosnia and Herzegovina with a case study prepared for exemplary Country X. It simulates a hypothetical Bilateral Investment Treaty proposal from Country X, ticking each item of the Checklist on the basis of what could possibly be expected from that country considering recent Bilateral Investment Treaties concluded with countries neighbouring Bosnia and Herzegovina.

The aforementioned simulation was completed on the basis of existing Bilateral Investment Treaties between Country X and countries situated around BiH, as well as publicly available data. The simulation does not use any concrete treaty proposal originating either from the government of Country X or Bosnia and Herzegovina.

In respect of the first section of the Checklist, the simulation concludes that foreign investment flows between Country X and Bosnia and Herzegovina are not substantial. Moreover, it demonstrates that the main capital exporting industries from Country X to the Balkans concentrate on electricity, infrastructure, agriculture, transportation, real estate and tourism. Of these industries, electricity and infrastructure are defined as high risk, whereas agriculture constitutes a normal risk, and transportation, real estate, and tourism. Consequently, the first section of the Checklist concluded that Country X has, in general, a low risk profile.

The simulation in the second part of the Checklist is partial. The absence of a concrete Bilateral Investment Treaty proposal makes it impossible to make a full fact-based assessment of all the criteria in the economic section of the Checklist. However, the items that could be assessed on the basis of publicly available data demonstrate that Country X is likely to invest in infrastructure and natural resources, which are beneficial for unleashing the growth potential of Bosnia and Herzegovina's economy. Country X is also likely to observe labour law requirements, hence unlikely to detriment Bosnia and Herzegovina's human capital. Consequently, Country X is likely to be of low risk concerning the economic impacts of its investment.

The third section of the Checklist, which deals with the legal risks associated with negotiating a Bilateral Investment Treaty, suggests that Country X is likely to be a low risk partner, provided an eventual proposal follows the same structure of the Bilateral

Investment Treaties negotiated with other selected countries in this part of the world. In general, Country X negotiates treaties aligned with modern practice, favouring protection standards that secure the host state's right to regulate, and also seek to limit the arbitral tribunal's interpretative margins. This general characteristic holds true in regard to substantial obligations, such as Fair and Equitable Treatment, Most Favored Nation, and Expropriation, as well as procedural obligations relating to investor-state dispute settlement. However, Country X consistently includes in the definition of investor a provision covering sovereign wealth funds. For this reason, it is possible to assume that any future proposal from Country X will seek to include a similar provision.

In conclusion, the Checklist is a tool aimed at assisting in the process of building an informed decision on whether to go ahead or not with any future proposals. Neither the simulation hereunder should not be read as either a green light or a red light in regard to engaging in negotiations with Country X. The Checklist provides indicative results, that may change according to the evolution of negotiations. Ultimately, the decision to go ahead with such negotiations, and to eventually conclude a Bilateral Investment Treaty, belongs to the competent authorities within the government of Bosnia and Herzegovina. The Checklist should aid in making such a decision, without being its sole basis.

1. Introduction

The present report responds to a request by the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina (“MoFTER BiH”) to elaborate a methodology for assessing economic and legal risks of initiatives for concluding Bilateral Investment Treaties (“BIT” or “BITs”). The pursuit of an objective methodology capable of clarifying the risks associated with engaging in such negotiations derives from the MoFTER BiH’s concern that political pressure for negotiating and entering into new agreements does not sufficiently take into consideration possible long-term consequences of such agreements on Bosnia and Herzegovina’s (“BiH”) as a whole.

The present report proposes a Methodology using the tool of a Checklist to assess the likely impacts of a BIT treaty. The Checklist is divided into three categories: the profile of the prospective partner, the economic risks associated with the conclusion of the treaty and legal risks associated with the conclusion of the treaty.

The report seeks to facilitate the understanding and the rationale behind the selection of each criterion. Accordingly, it is divided into four parts. First, section 2 addresses the methodological justification for preparing a checklist approach and for selecting each one of these three categories. Second, section 3 explains briefly how to operate the Checklist. Third, section 4 explains the rationale for each item of the Checklist. Fourth, the report presents in section 5 a set of final conclusions regarding the implementation of the Checklist. It is the hope of the authors that the members of the MoFTER BiH and of BiH’s Council of Ministers would enjoy an enhanced understanding of how to operate the Checklist in a real scenario. For this reason, the report uses the hypothetical conclusion of a BIT with Country X as a test scenario.

The result arising from filling the criteria of the Checklist should not be understood as a definitive decision on whether the competent authorities of BiH should engage or not into negotiations. Ultimately, the objective of the Checklist is to assist them in compiling the necessary information about the risks and benefits associated with any proposal. It will assist the competent authorities in making informed decisions about engaging in negotiations with any prospective partners.

2. Methodology

The MoFTER BiH expressed its desire to have a methodology created to assess the risks associated with the conclusion of BITs. The rationale behind this request aims at increasing the government's capacity of making an informed decision about engaging in such negotiations. The challenge is to identify and organise the economic, legal, and domestic political factors in a user-friendly format. To meet this objective, the methodology must be an objective fact-based assessment that could be both submitted by the competent services of the MoFTER BiH to decision makers prior to their decision on whether or not to enter into negotiations, and with institutions of BiH that do not necessarily share the same level of technical expertise in the field of BITs.

The development of a Checklist aims at bridging the gap between the understanding of the inherent complexity of treaty negotiations and the necessity of political organs making an informed decision. In this sense, the Checklist envisioned in this report serves a purpose similar to the checklist provided by aeroplane manufacturers to pilots. It provides a pilot with the necessary information to make an informed decision about whether or not to take off. In a similar manner, the Checklist proposed herein will assist the competent authorities of BiH in more easily deciding whether to take off with the BIT negotiations, enter into negotiations under specific conditions, or stay at home and not enter into negotiations. Thus, the competent authorities will have an easy-to-use resource to communicate and receive input from other Ministries, private businesses, and civil society organisations. This will make any ultimate decision to enter into negotiations - or not - more credible and transparent.

The Checklist is divided into three sections, each aiming at answering one of the following questions: (i) who is the prospective partner, and what are the economic opportunities that it provides to BiH? (ii) what are the likely economic impacts (positive or negative) of concluding a treaty with this country? (iii) what are the legal and liability risks originating from the clauses of this treaty? The criteria listed in each part of the Checklist were selected bearing in mind the objective of creating a straightforward medium for the MoFTER BiH to communicate with other organs and agencies of BiH the risks and benefits associated with the BIT.

The first category in the Checklist is denominated “General Profiling”. Its objective is to provide a clearer understanding of the intentions, benefits, and potential risks of the prospective negotiating partner to BiH. This category highlights past (pre-negotiation/historical) flows of FDI from that country into BiH. It also lists the main economic sectors in which investors from the prospective partner country are likely to concentrate.

The second category in the Checklist is denominated “Economic Impacts”. It aims at providing some sense of the possible economic benefits (or losses) that could result from the conclusion of the BIT. This assessment is qualitative. It is divided into two pillars. The first pillar assesses the BIT’s potential in attracting investment, and the second pillar assesses the investment’s contribution to BiH economy.

The third category in the Checklist is denominated “Legal Risks”. This is the most extensive of the three categories. It presents a detailed assessment of BIT clauses, highlighting the likely consequences deriving from different forms of drafting the clauses. The objective is to permit a clear assessment of the trade-offs between according a lower degree of protection and attracting foreign direct investors.

3. How to Use the Checklist

As noted above, the Checklist is intended to assist BiH in the process of making an informed decision about engaging in negotiations for concluding a BIT with any other country. It is envisioned as a tool of communication to be used by the MoFTER BiH to collect information from relevant ministries and agencies of BiH, as well as other reliable sources, in order to prepare detailed fact based reports for decision makers. The Checklist is designed to secure relevant information regarding proposed BIT negotiations of all relevant governmental and other organs in a simplified and straightforward manner. For this reason, the Checklist is meant to be largely completed before negotiations begin. Of course, there may be instances in which a re-evaluation of the benefits and risks of a BIT could be undertaken during the course of the negotiations.

This report serves as an instruction manual on how to use the Checklist. It is intended to be presented to other ministries and agencies of BiH if they require clarifications on some aspects of the Checklist. Considering the recent efforts on attracting investments and modernizing BITs initiated by six Western Balkan Economies at a Summit that took place in November 2020,¹ the MoFTER BiH can choose to share the Checklist with all other interested partners in the region. Therefore, the MoFTER BiH is free to choose whether they would like to circulate the Checklist accompanied by the report, or simply provide the latter upon being requested.

Some criteria in the categories of the Checklist have received one of three different risk classifications factor:² high risk, average risk, or low risk. “**High risk**” means that the criterion either touches upon an economic sector particularly sensitive to BiH,³ or represent an enhanced risk of litigation. This classification is a negative circumstance, advising caution in engaging in negotiations.⁴ Conversely, “**low risk**” means that the criterion either constitutes an economic opportunity, or legal advantage to BiH in case of litigation. For this reason, they suggest a possible favourable outcome at the end of negotiations, encouraging engagement. Lastly, a criterion classified as “**normal risk**” neither provides significant economic or legal advantages, nor significant economic and legal disadvantages to BiH. Consequently, they do not advise greater caution than what would normally be expected in negotiations. In order to use the

¹ Regional Cooperation Council, “Common Regional Market (CRM) 2021-2024 Action Plan at the Berlin Process Summit held on 10 November, 2020 in Sofia”, available at: <https://www.rcc.int/pages/143/common-regional-market>, accessed 30 June 2023.

² Some criteria do not entail a risk, and for this reason have not been classified according to this system. For example, there is no risk associated with the track-record of investments flows between BiH and the prospective partner. Consequently, this criterion was not classified.

³ Upon consultations with the MoFTER BiH, it was established that the following sectors are particularly sensitive: production and distribution of electric energy, manufacturing of armaments and military equipment in general, telecommunications, and broadcasting.

⁴ Although some of the economic sectors highlighted as high risk are also some of the most attractive to foreign investors, their sensitive nature for BiH overrules their potential to address foreign capital. For this reason, they are classified as high risk and not as low risk.

Checklist, the MoFTER BiH should go through each item upon receiving a proposal. The MoFTER BiH will select between the “low risk”, “normal risk”, and “high risk” options for each criterion, bearing in mind the option that best corresponds to the proposal. After completing each category, the MoFTER BiH will count the total amount of “low risk”, “normal risk”, and “high risk” options selected, enabling it to reach the following conclusions:

- General profiling:
 - BiH is engaging in negotiations with a high-risk prospective partner;
 - BiH is engaging in negotiations with a normal-risk prospective partner;
 - BiH is engaging in negotiations with a low-risk prospective partner.
- Economic Risks:
 - The proposal entails high economic risks for BiH;
 - The proposal entails normal economic risks for BiH;
 - The proposal entails low economic risks for BiH.
- Legal Risks:
 - The proposal entails high legal risks for BiH;
 - The proposal entails normal legal risks for BiH;
 - The proposal entails low legal risks for BiH.

After completing the Checklist, the MoFTER BiH will be confronted with one of the following scenarios:

- **Non-Advantageous Scenarios (Scenario 1-4):** concluding a BIT under these circumstances is unlikely to be advantageous for BiH. Consequently, BiH should aim at overcoming the imbalance if it wishes to proceed with the negotiations.
 - *Scenario 1:* Upon completing the Checklist, the MoFTER BiH selected a majority of high risk criteria in all three categories.
 - *Scenario 2:* Upon completing the Checklist, the MoFTER BiH selected a majority of high risk criteria in two categories and normal risk criteria in one category.
 - *Scenario 3:* Upon completing the Checklist, the MoFTER BiH selected a majority of high risk criteria in two categories and low risk criteria in one category.
 - *Scenario 4:* Upon completing the Checklist, the MoFTER BiH selected a majority of high risk criteria in one category and normal-risk criteria in two categories. Concluding a BIT under these circumstances is unlikely to be advantageous for BiH.

- **Similarly Situated Scenarios (Scenario 5-6):** concluding a BIT is neither likely to be particularly advantageous nor disadvantageous for BiH. Consequently, the BiH should strive to maintain this balance between its objectives and those of the partner if it decides to engage in negotiations.
 - *Scenario 5:* Upon completing the Checklist, the MoFTER BiH selected a majority of high risk, normal risk and low risk criteria in each of the three categories.
 - *Scenario 6:* Upon completing the Checklist, the MoFTER BiH selected a majority of normal risk criteria in all three categories.
- **Advantage Scenarios (Scenario 7-9):** concluding a BIT will be advantageous for BiH. Consequently, if BiH decides to engage in negotiations, it should aim at maintaining this favourable position.
 - *Scenario 7:* Upon completing the Checklist, the MoFTER BiH selected a majority of normal risk criteria in two categories and low risk criteria in one category.
 - *Scenario 8:* Upon completing the Checklist, the MoFTER BiH selected a majority of normal risk criteria in one category and low risk criteria in two categories.
 - *Scenario 9:* Upon completing the Checklist, the MoFTER BiH selected a majority of low risk criteria in all three categories.

Scenarios 1-9 are listed in a manner of decreasing overall risk levels. The current ordering of different risk levels compositions is instructed by the goal of risk prevention, instead of benefit generation. Hence, a high risk combined with a low risk is considered less advantageous compared to two normal risks combined.

		Level of Risk (<i>non-sequential</i>) - Risk-prevention oriented scaling: High + Low > Normal + Normal - Ascertained by the risk of majority criteria in the 3 checklist categories			BiH Position (<i>compared to the counterparty</i>)	Suggested Response to the BIT Proposal
S c e n a	1	High	High	High	Not advantageous	Dismissible
	2	High	High	Normal	Not advantageous	Dismissible
	3	High	High	Low	Not advantageous	Dismissible

r i s k	4	High	Normal	Normal	Not advantageous	Dismissible
	5	High	Normal	Low	Similar position	Negotiation
	6	Normal	Normal	Normal	Similar position	Negotiation
	7	Normal	Normal	Low	Advantageous	Encouraged
	8	Normal	Low	Low	Advantageous	Encouraged
	9	Low	Low	Low	Advantageous	Encouraged

Figure I: Assessing BIT Proposals Based on the Checklist

These scenarios are not to be interpreted as either a recommendation to either engage or not in negotiations. They merely indicate the likely overall risks associated with the proposal, assisting the competent authorities in making an informed decision. Since the level of risk derives from the number of “high risk”, “normal risk” or “low risk” criterion selected, it may lead to an outcome in which the proposal falls within Scenario 1, despite crossing a redline for BiH. Conversely, the Checklist may classify a proposal in Scenario 9, and the competent authorities in BiH may still consider it worthy to engage in negotiations. Ultimately, the decision to either engage or not in negotiations belongs to the competent political authorities of BiH, and their rational should not be exclusively based on the Scenarios hereunder.

4. Checklist for Assessing Risks and Benefits Associated with the Conclusion of a BIT

In the following subsections, the report will introduce each category of the Checklist, detailing the rationale behind the questions. Although a complete version of the Checklist can be found in Annex I of the present report, for ease and convenience, each subsection will present a snapshot of the criteria subject of analysis.

4.1. Category I: Profile of the Prospective Partner

The general profiling section of the Checklist aims at providing the MoFTER BiH with an overview of the prospective partner, including existing investment flows with BiH and investment opportunities for BiH companies. The general profiling category contemplates a track-record of foreign direct investment flows between BiH and the prospective partner and the economic sectors from which most investors of the prospective partner originate.

4.1.1. Track Record of Investment Flows

This item consists of two tables comprising the total value of investment flows originating from the prospective partner to BiH, and from BiH to the prospective partner in the course of the past five years:

Inward Foreign Investment Flows Originating From (country)				
2018	2019	2020	2021	2022
(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)
Outward Foreign Investment Flows Originating from BiH to (country)				
2018	2019	2020	2021	2022
(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)

These charts serve two purposes. First, they enable the MoFTER BiH to identify the rate of increase/decrease as well as the absolute values of investment flows between BiH and the prospective partner in the past five years. Second, they enable the MoFTER BiH to pinpoint how the track-record of foreign direct investment flows from BiH from the prospective partner compares with the global track-record of investment flows relative to the same period.⁵ Considering that the objective of concluding BITs is both to increase inward bound flow of foreign direct investments into BiH, as well as to facilitate outward bound investment from BiH to the prospective BIT partner,⁶ these two items enable the MoFTER BiH to visualise how investment flows with the prospective partner have evolved in the immediate period before the conclusion of the investment.

This item of the Checklist does not receive a risk classification. There is no risk associated with the track-record. Rather, it demonstrates whether BiH has been attracting investments from the prospective partner despite the absence of a BIT. For instance, a positive track-record suggests that BiH's economy is already attractive to investors from the prospective partner, whereas a negative track-record demonstrates a lack of incentives to invest. The first scenario reduces the pressure on BiH to create incentives for investment through the BIT, since economic factors of BiH are already capable of attracting foreign capital. In this context, BiH should be aware that it may not have a significant incentive to make too many concessions in the course of negotiations.⁷

In applying this item of the Checklist to the model scenario, it is possible to observe that trade and investment flows between BiH and Country X are not substantial. Due to the low amount of investment flows between the two countries, the competent ministry of Country X does not provide recent data on foreign direct investment stock in BiH, nor does the recent FIPA BiH report on FDI Position and Performance list the FDI stock of Country X.⁸

The most recent data from the competent ministry of Country X on foreign direct investment stock in BiH extends from 2007 until 2016. During this period, the largest growth rate of foreign direct investments from Country X was in 2013, reaching 10.2 million USD. In subsequent years, the inward flow of foreign direct investment from Country X continued to be positive. However, the growth rate was substantially reduced. Using this data to complete the Checklist, it is possible to achieve the following result:

⁵ World Bank, "Foreign Direct Investment: Net Inflows (& of GDP) of Bosnia and Herzegovina", available at: <https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=BA>, accessed 30 June 2023.

⁶ C Schreuer *et. al.*, *Principles of International Investment Law* (Oxford: Oxford University Press 2022).

⁷ *Id.*

⁸ FIPA, "FDI Position and Performance", available at:

[http://www.fipa.gov.ba/informacije/statistike/investicije/FDI%20Position%20and%20Performance January%202022 E.pdf](http://www.fipa.gov.ba/informacije/statistike/investicije/FDI%20Position%20and%20Performance%20January%202022%20E.pdf), accessed 30 June 2023.

Inward Foreign Investment Flows Originating From Country X				
2012	2013	2014	2015	2016
2.6 million USD	10.2 million USD	2.5 million USD	2.7 million USD	2.8 million USD
Outward Foreign Investment Flows Originating from BiH to (Country X)				
2012	2013	2014	2015	2016
No data available	No data available	No data available	No data available	No data available

4.1.2. Main Capital Exporting Industries of the Prospective Partner

This item consists of a list of sectors from BiH's economy that are likely to be of particular interest to investors from the prospective partner. The boxes in this section should be ticked in accordance with a correspondence between the listed sectors and the main capital exporting industries of the prospective partner:

Main Relevant Capital Exporting Industries from (country)			
Electricity ()	Armaments ()	Mining ()	Tourism ()
Broadcasting ()	Agriculture ()	Transportation ()	Manufacturing ()
Infrastructure ()	Banking ()	Real Estate ()	Other () _____

The sectors listed in these charts were selected according to their economic and political importance for BiH. Roughly 80% of inward direct investments come from a handful of sectors. In particular, BiH's electricity production, and manufacturing sector are the most attractive for foreign direct investments, accounting for 35% of total foreign direct investments in the country. The service sector of BiH's economy also attracts foreign direct investment. The highlights are banking – which accounts for 24% of foreign direct investments - and telecommunications – representing 12% of foreign direct investments.⁹

⁹ Lloyd's Bank, "Foreign Direct Investment in Bosnia and Herzegovina", available at: <https://www.lloydsbanktrade.com/en/market-potential/bosnia-and-herzegovina/investment>, accessed 30 June 2023; Central Bank of Bosnia and Herzegovina, "FDI Position and Performance", available at:

By selecting the main capital exporting industries of the prospective partner compared to the most relevant sectors of BiH's economy, the MoFTER BiH will be able to easily highlight any correspondences. Such correspondences provide the MoFTER BiH with a simple visual recourse to illustrate whether the conclusion of the treaty may reinforce already existing investment flows or create new avenues to sectors not yet permeated by foreigners.¹⁰

As mentioned in section 4.1.1., trade flows between BiH and Country X are limited. The data available demonstrates that investments from Country X in BiH are concentrated in the real estate sector. However, the competent ministry of Country X has more recent data on the main sectors of outward foreign direct investments in other Balkan countries, such as Croatia, Serbia, Montenegro, Albania and Greece. On the basis of this data, it is possible to conclude that the main capital exporting industries from Country X to the Balkans are:

Main Relevant Capital Exporting Industries from (country)			
Electricity (X)	Armaments ()	Mining ()	Tourism (X)
Broadcasting ()	Agriculture (X)	Transportation (X)	Manufacturing ()
Infrastructure (X)	Banking ()	Real Estate (X)	Other () _____

http://www.fipa.gov.ba/informacije/statistike/investicije/FDI%20Position%20and%20Performance_January%202022_E.pdf, accessed 30 June 2023.

¹⁰ C Schreuer *et. al.*, *Principles of International Investment Law* (Oxford: Oxford University Press 2022).

4.2. Category II: Economic Impact

The second category of the Checklist is divided into two pillars. **Pillar 1** analyses the prospective BIT, focusing on its ability to attract potential investments and the cost of its attempt to attract them. **Pillar 2** analyses the prospective investment flow, focusing on its contribution to the BiH economy. A particular focus assesses the possibility for increased domestic productivity and promoting BiH's integration into the global value chain ("GVC").

The assessments in both pillars are qualitative. The Checklist improves the utility of qualitative assessments by introducing two separate assessment criteria: the qualification criterion and the scaling criterion. The **qualification** criterion assesses whether an impact is "good" or "bad". The **scaling** criterion assesses whether the economic impact would be large or small.

4.2.1. Pillar 1: The BIT's Potential in Attracting Investment Flows

Pillar 1 is a qualitative assessment of the BIT, analysing the BIT's potential in attracting investment flows through a three-step examination. First, a profiling of the BIT which breaks down its instrumental designs on incentives and disincentives for investments. Second, an evaluation of how the incentives and disincentives contribute to attracting investments to BiH, based on how the (dis)incentives translate into "enabling factors". The enabling factors are a set of criteria that are tailored to BiH's domestic situation for assessing how the country attracts investment flows in practice. Third, an evaluation of how the prospective BIT inflicts regulatory costs, based on whether it promotes or conflicts with BiH's fulfilment of its domestic and international commitments.

4.2.1.1. Part 1: Profiling of the BIT's Incentives and Disincentives

The first part in Pillar 1 aims at disentangling the incentives and disincentives designed in the BIT. The Checklist decides on this specific list of (dis)incentives based on the list of investor incentives in the World Bank *Doing Business* manual.¹¹ The *Doing Business* manual

¹¹ World Bank Group (2020), *Doing Business 2020, Economy profile Bosnia and Herzegovina*.

provides an objective measurement of business regulations for local firms in economies over the world, and serves as a useful indicator of investor preferences in general.

Pillar 1: The BIT's Potential in Attracting Investment Flows			
Part 1: What are the (Dis)Incentives in the BIT for Foreign Investments?			
Incentives		Disincentives: any reservations in	
Tax incentives ()	Infrastructure support ()	Labour ()	Capital ()
Regulatory support ()	Investment guarantee ()	Land, Natural Resource ()	Other () _____
Legitimate expectations ()	Dispute settlement ()		
Other () _____			

Specifically, the incentives in the first part are laid out according to how proactive the BIT offers protections or incentives to the protected investor. The options range from (a) proactive incentives, such as preferential fiscal treatment (tax incentives), substantive/regulatory assistance (infrastructure/regulatory support), (b) passive incentives such as protection against potential risks (investment guarantees),¹² the protection of legitimate investor expectations (legitimate expectations), and (c) remedial incentives, such as special dispute settlement mechanisms.

The disincentives are categorised according to what potential restrictions a host State can inflict upon the prospective investor's factors of production. These include human capital (labour), human-made goods which are used in the production of other goods (capital), and resource (land, real estate, natural resource).¹³

¹² J Winpenny, "Guaranteeing Development? The Impact of Financial Guarantees" (2005) OECD Development Centre Studies, available at: https://www.oecd-ilibrary.org/development/guaranteeing-development-the-impact-of-financial-guarantees_9789264013315-en, accessed 30 June 2023, at 15.. "Investment guarantees" refers to investment guarantees and/or insurance product against political, contractual/regulatory, credit and foreign exchange risks.

¹³ A Smith (1776), *The Wealth of Nations*, B.I, Ch. 6, Of the Component Parts of the Price of Commodities in paragraph I.6.9. Here, capital refers to goods that can help produce other goods in the future, i.e., as the results of the investment. This includes fixed capital and working capital. The former refers to long-term investments designed to increase the productive potential of an economic entity (factory, machinery, equipment, technology, buildings, etc.). The latter refers to near-term consumable stocks used for production or made into consumer goods ("inventory"), or liquid assets (money) used for immediate expenses involved in the production process (to pay salaries, invoices, taxes, interests, etc.)

4.2.1.2. Part 2: Benefits of the BIT by Investment Attraction

The second part in Pillar 1 analyses the benefits of the prospective BIT. The rationale is to assess the capacity of the incentives or disincentives in generating an investment-enabling environment for BiH in particular. The three factors are distilled from the World Bank Systematic Country Diagnostic for BiH (Systematic Country Diagnostic, “SCD”).¹⁴

Part 2: Benefit - Will the BIT Succeed in Attracting Beneficial Inward Investment?			
<i>Enabling Factor 1: Stability of Political Environment</i>			
The (dis)incentives create a _____ political/legal environment for the prospective investment.	Better ()	Neutral ()	Worse ()
<i>Enabling Factor 2: Stability of Economic Environment</i>			
The (dis)incentives create a _____ economic environment.	Better ()	Neutral ()	Worse ()
<i>Enabling Factor 3: Educated and Skilled Work Force</i>			
The (dis)incentives provide _____ access to competent BiH work force.	Better ()	Neutral ()	Worse ()

According to the BiH SCD, conventional investment incentives have proven ineffective and costly for BiH. To achieve sustainable and equitable economic growth, the tailored solution for BiH is to invest in the private sector and promote GVC integration.¹⁵ This requires enabling factors for efficiency-seeking investments, *i.e.*, a stable political and economic environment (factors 1, 2), and the availability of a workforce with adequate education and skills (factor 3).¹⁶ The role of BITs in this regard is to offer targeted safeguards to its protected types of investments, which do not rely on a general domestic reform or restructuring.

Among the 3 factors, **factor 1** concerns the stability of the political environment. It assesses the capacity of BIT incentives or disincentives in contributing to a stable legal and

¹⁴ World Bank Group, “Bosnia and Herzegovina systematic country diagnostic” (“2015 BiH SCD 2015”); World Bank Group, “Bosnia and Herzegovina systematic country diagnostic update” Report No. 148573-BA (“2020 BiH SCD”), (2020) The World Bank, available at: <https://documents1.worldbank.org/curated/en/211081591353275875/pdf/Bosnia-and-Herzegovina-Systematic-Country-Diagnostic-Update.pdf>, accessed 30 June 2023.

¹⁵ IMF European Department, “Lifting Growth in the Western Balkans. The Role of Global Value Chains and Services Exports” Report No. 19/13, (2019).

¹⁶ 2020 BiH SCD, at 41.

political environment. This assessment examines incentives or disincentives including regulatory support, legitimate expectations, investment guarantee, and dispute settlement.

Factor 2 concerns the stability of the economic environment. Under the context of BITs and their contribution to attracting investments, factor 2 assesses the potential of the incentives and disincentives in creating a better economic environment for the investors. This assessment evaluates the relevant incentives and disincentives in the BIT, i.e., tax incentives, infrastructure support, and reservations in labour, capital, land, and natural resource.

Factor 3 concerns the availability of a quality workforce in BiH. Workforce quality is a critical driving factor for MNCs in deciding the choice of investment sites.¹⁷ Although workforce quality is not influenced by the negotiation of BITs, BITs are relevant in that they potentially affect the foreign investors' access to the workforce of the host country. Specifically, the BIT disincentives in labour are relevant for factor 3 evaluation.

The more positive answers to the three enabling factors, the greater the potential of BITs to attract growth-enhancing inward investment to BiH. The successful attraction of efficiency-seeking inward investments signifies the effectiveness of the prospective BIT, hence the second part is labelled as “benefit”. In other words, “benefit” in this session refers only to the successful fulfilment of the BIT’s investment-attraction purpose, as compared to its inevitable negotiation costs. It does not indicate that the future investments attracted to BiH are definitely beneficial to the domestic economy.

4.2.1.3. Part 3: Costs of the BIT by Regulatory Expense

The third part in Pillar 1 assesses the costs of the prospective BIT. The rationale is to assess the incentives and disincentives on whether they would promote or contradict the domestic or international commitments of BiH.

Part 3: Cost - Will the BIT Conflict with Domestic or International Commitments?			
The (dis)incentives have a _____ effect on the fulfilment of BiH’s international commitments.	Positive ()	Neutral ()	Negative ()

¹⁷ See, e.g., V Caon “A guide to the key FDI drivers” (2020) Investment Monitor, available at: <https://www.investmentmonitor.ai/features/a-guide-to-the-key-fdi-drivers/>, assessed 30 June 2023.

Agenda 2030 and the SDG Framework ()	EU accession commitments ()	WTO accession commitments ()	Regional commitment and harmonisation ()		
Labour rights treaties ()	Environment and energy treaties ()	Economic treaties: trade, tax, etc. ()	Other () _____		
The (dis)incentives have a _____ effect on the implementation of BiH ERP.			Positive ()	Neutral ()	Negative ()
Fiscal restructuring: revenue and spending ()		Governmental accountability and capacity-building ()			
Price and currency management ()		Business environment improvement ()			
Public finance management ()		Education and employment facilitation ()			

As an overview, proactive incentives are more costly at the beginning, but such costs are more controllable in terms of amount, probability, and duration. Passive and remedial incentives are potentially costly in the long term, as they require scrutiny throughout the duration of BIT obligations, and are sensitive to any specific investments attracted and the future changes in the BiH domestic situation. The duration of obligations is essential to note in the context of a BIT. In contrast to an investment contract, a BIT sets out long-term obligations for the host State, and has a multiplier effect in that the protection covers all potential investments covered by the treaty. Disincentives provide BiH with leverage against unintended risks by reserving BiH policy space in parallel with the BIT's protection of foreign investments. Disincentives are costly primarily due to their potential conflict and need for harmonisation with BiH international commitments.

This part of the economic checklist composes of two questions that address the relationship between the prospective BIT and the domestic and international commitments of BiH respectively. The rationale is to assess the regulatory costs additionally inflicted by the BIT apart from the regular harmonisation costs after concluding treaties. Here, harmonisation cost refers to the regulatory cost in adapting national law to meet the treaty standards in a BIT.

Question 1 assesses the conformity of BIT with the broader international political and legal context of BiH. The first four options assess the conformity of BIT obligations with BiH political commitments, while the latter four options assess the conformity with legal frameworks. Concerning the legal conformity of BIT, two aspects are important for consideration: first, whether there are potential conflicts between the BIT and existing/future tax, labour, or environmental treaties signed by BiH; second, whether there is a potential conflict with investors from other countries, who claim the same standard of treatment as the investors protected by negotiated BIT, due to the non-discrimination principle.

Question 2 assesses the conformity of the incentives with the BiH Economic Reform Programme (“ERP”) submitted to the European Union (“EU”) for the 2023 to 2025 period.¹⁸ The ERP should be read alongside the policy recommendations for BiH in the joint conclusions decided in the 2023 economic policy dialogue in Brussels,¹⁹ together with the assessment of ERP conducted by the EU.²⁰ The joint conclusions for BiH is aimed at boosting competitiveness and long-term and inclusive growth;²¹ The policy recommendations in the joint conclusions are translated into reform objectives in the BiH ERP, which was provided for review by the EU. The economic checklist summarises the six BiH reform objectives for the MoFTER BiH reference in the grids under the question.

The more positive answers to the questions, the lower the cost of the BIT. First, positive answers indicate the sustainability of the BIT incentives (or disincentives) under the BiH domestic environment. Second, they indicate a reduction of BIT costs, because a synergy is created between BiH’s respect for the BIT and BiH’s compliance of international and domestic commitments. On the contrary, negative answers suggest the high cost of the BIT. First, they suggest the instability of the enabling factors due to regulatory conflicts, hence the benefit of having the prospective BIT is less significant. Second, they suggest additional compliance costs in capacity-building and regulatory harmonisation, as well as costs arising from potential compensations due to treaty violations.

4.2.2. Pillar 2: The Investment’s Potential in Contributing to BiH Economy

Pillar 2 concerns an assessment of the impact of the prospective investment on the domestic BiH economy. Criteria for this assessment are mainly based on the World Bank Systematic Country Diagnostic for BiH (“BiH SCD”). The BiH SCD identifies the situation and key policy areas of the BiH economy, with the aim of providing suggestions for BiH to achieve higher, sustainable, and equitable growth.

¹⁸ European Neighbourhood Policy and Enlargement Negotiations (DG NEAR), *ERP 2023-2025 of Bosnia and Herzegovina* (“BiH ERP”). Available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/policy-highlights/economic-governance_en, accessed June 20, 2023.

¹⁹ General Secretariat of the Council of the European Union, *Joint Conclusions of the Economic and Financial Dialogue between the EU and the Western Balkans and Turkey*, 9459/22, Brussels, 24 May 2022 (“Joint Conclusions”). Full text available at: <https://data.consilium.europa.eu/doc/document/ST-9478-2023-INIT/en/pdf>, accessed June 23, 2023.

²⁰ European Neighbourhood Policy and Enlargement Negotiations (DG NEAR), *Assessments of 2023-2025 Economic Reform Programmes, Assessment of Bosnia and Herzegovina's 2023-2025 ERP*. Available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/policy-highlights/economic-governance_en. Accessed June 20, 2023.

²¹ Joint Conclusions, *supra* note 19, at 6.

The 2015 BiH SCD identifies the need for BiH to rebalance its economy in three dimensions: first, move from public sector-driven growth to growth driven by private sector competitiveness and productivity; second, move from a consumption-based economy to an investment-driven economy; third, move from inward revenue-raising economy to an export-driven economy. The 2020 BiH SCD based on the findings of the 2015 BiH SCD, proposes the main methods of development promotion to be: first, raising the productivity of the private sector; second, integrating the BiH economy into the global value chain (GVC), which links it to other countries and clients.

The following figure illustrates the 2020 BiH SCD's findings on the areas in need of intervention for BiH to achieve sustainable and equitable development. BITs can contribute to the sustainable and equitable development of BiH through the following pathways:

Primarily, the attracted investment may rebalance the economy directly, through the introduction of investments to the private sector. This requires the investment to either promote the productivity of BiH private sectors, achieved by creating healthy sectoral competition due to investment (Figure II, 1st column), or to assist BiH integration to the GVC, achieved by investing in physical capital (Figure II, 3rd column). The relevant economic sectors are selected by their productivity and added value, with attention paid to their vulnerability and growth-driving potential (which is the case for natural resources, Figure II, 4th column).

Additionally, the BIT may create a beneficial business environment which may contribute to long-term economic growth not restricted to the invested sectors (Figure II, 1st column), or cultivate a skilled workforce which may attract other investments not restricted to the current investments addressed in the BIT at hand (Figure II, 2nd column).

The overriding premise for sustainable and equitable growth, i.e., maintaining macro stability, is addressed in Pillar 1 by evaluating the enabling factors for investment attraction. It is worth mentioning that, in the case of foreign investments, macro stability does not necessarily require state-level structural reform, and can be achieved by providing special guarantees in the form of incentives through the BIT.

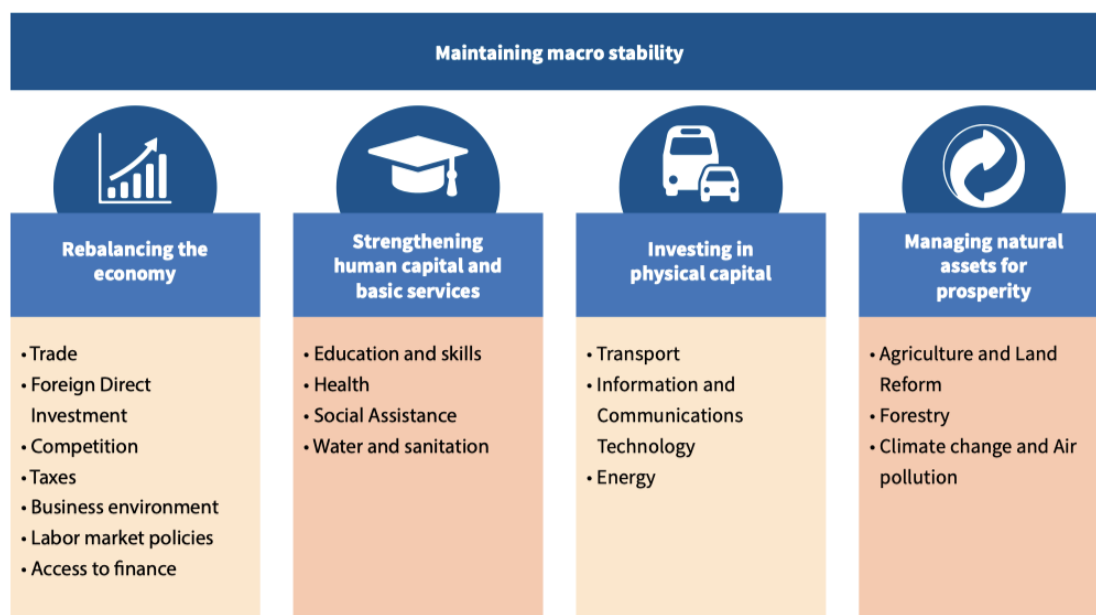


Figure II: Critical Areas for Sustainable and Equitable Growth in BiH
(Source: World Bank, BiH Systematic Country Diagnostic, 2020²²)

Pillar 2 of the Economic Checklist consists of three parts. The first part provides a profile of the prospective investment. The next two parts focus respectively on the potential for growth and human capital, the two main policy areas identified by the BiH SCD for unleashing BiH's development potential.²³ Specifically, the second part assesses the impact of the investment flow on BiH economic growth, focusing on the investment's impact on key economic sectors and entities. The third part assesses the impact of the investment flow on human capital, using a bipolar test: on the one hand, the investment's cultivation and protection of its workforce; on the other hand, the investment's impact on BiH's vulnerable population.

4.2.2.1. Part 1: Profile of the Prospective Investment

The first part of Pillar 2 provides a profile of the prospective investment attracted by the BIT, specifying which factors of production is likely to be invested in, and what type of investment is likely to be attracted. Answers to these questions can either be obtained in the

²² 2020 BiH SCD, at 11.

²³ *Id.*, at 39-40.

course of BIT negotiation, or be predicted based on profiling of the capital-exporting country (the other negotiating party) in Category 1 of the Checklist.

Pillar 2: The Investment's Potential in Contributing to BiH Economy			
Part 1: Profile of the Prospective Investment			
Qualification: Which Factor of Production is Likely to be Invested in?			
Physical Capital ()		Other ()	
Transport ()	Efficient Energy ()	Land ()	Natural Resource ()
ICT ()	Other () _____	Real Estate ()	Other () _____
Scaling: What Type of Investment is Likely to be Attracted by the BIT?			
Greenfield Investments ()	Brownfield Investments ()	Indirect Investments ()	Other () _____

The first question in Pillar 2, Part 1 assesses the factors of production that are likely to be invested in. It is a qualification question, i.e., a question capable of assessing whether the impact is “good” or “bad”. Among these, investments in physical capital refer to investment in tangible, human-made goods that assists in the process of creating products or services. Such investments stand among the three main factors of production, the other two being human capital as well as land, natural resource, and real estate.²⁴ Investment in physical capital in the context of the BiH economy refers mainly to investment in physical and digital infrastructure: transportation (i.e., road, railway, sea, air²⁵) and telecommunication.²⁶

Investment in physical capital is beneficial for economic development because it connects BiH with other countries and clients.²⁷ Hence it results in greater trade connectivity and facilitation, contributing to the development of an export-focused production and greater global value chain integration.²⁸ In addition, physical capital can stimulate the BiH reform plan in modernizing the transport sector.²⁹ This is especially important for BiH in light of its two

²⁴ T Segal, “Physical Capital: Overview, Types and Examples” (2020) Investopedia, available at: <https://www.investopedia.com/terms/p/physical-capital.asp>, accessed 30 June 2023.

²⁵ 2020 BiH SCD, at 42.

²⁶ *Id.*, at 48-50.

²⁷ *Ibid.*

²⁸ 2020 BiH SCD, at 40.

²⁹ See, e.g., EU Commission, “Bosnia and Herzegovina: EU support for transport sector development, Instrument For Pre-Accession Assistance (IPA II) (2014-2020)”, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2017-12/ipa_2017_040541.06_eu_support_for_transport_sector_development.pdf, accessed 30 June 2023;

existing gaps: the gap between the country's needs and the existing physical infrastructure; the gap between the investment available and the investment needed for infrastructure upgrading and maintenance.³⁰

Meanwhile, investment in other types of capital – land, real estate, natural resource – can be either beneficial or detrimental, based on which specific sector the investment is related to, and how the investment is utilised and regulated. Regarding investments in other factors of production, their benefits and impediments to the BiH economy are further analysed in the next two parts in Pillar 2 of the Economic Checklist.

The second question assesses the type of investment that is likely to be attracted. It is a scaling question, i.e., a question indicating the scale, or gravity of a certain impact without indicating its quality. Among the types of investments listed, a greenfield investment refers to FDIs in which the foreign parent company creates its subsidiary in BiH and builds its operations from scratch.³¹ The opposite side of the spectrum of corporate control is indirect investment, where the company has no or little control over operation and training. Brownfield investment lies between the two edges of the spectrum: the company adapts, renovates, and customizes existing facilities with lower expenses and quicker turn-around than greenfield investments.³²

A greenfield FDI has the potential of generating the greatest impetus in economic development. The impacts of a greenfield FDI are the largest, because it is a positive substantive input which involves the construction of new production facilities, and the parent company exerts full influence over the subsidiary's operation, quality control, sales, and employee training. Whether the investment is beneficial or detrimental is decided after analysing the next two parts of Pillar 2.

4.2.2.2. Part 2: The Investment's Contribution to Economic Growth

The second part of Pillar 2 assesses the investment's impact on the domestic market. It consists of three qualification questions and one scaling question. The qualification questions

World Bank, "Bosnia and Herzegovina Committed to Modernizing Transport Sector with World Bank Support", (2017) World Bank Group, available at: <https://www.worldbank.org/en/news/press-release/2017/12/07/bosnia-and-herzegovina-committed-to-modernizing-transport-sector-with-world-bank-support>, accessed 30 June 2023.

³⁰ 2020 BiH SCD, at 48-50.

³¹ J Chen, "Green-Field Investment" (2020) Investopedia, available at: <https://www.investopedia.com/terms/g/greenfield.asp>, accessed 30 June 2023.

³² A Hayes, "Brownfield Investment: Definition, Advantages, Vs. Greenfield" (2021) Investopedia, available at: <https://www.investopedia.com/terms/b/brownfield.asp>, accessed May 9, 2023.

respectively examine the following: first, the importance of the impacted sector for BiH economic growth; second, the investment's contribution to healthy sectoral competition; third, the investment's contribution to creating a business environment that stimulates sustainable growth. The scaling question examines the type of economic entities impacted, and accordingly assesses the extent of such impact based on the role of the entities in contributing to BiH economic growth.

Part 2: The Investment's Contribution to Economic Growth			
Qualification: Does the Impacted Sector Drive BiH Economic Growth?			
Industry		Services	
Manufacturing ()	Construction ()	Transport ()	ICTs ()
Green Energy ()	Agriculture and Forestry ()	Tourism ()	Electricity, Water and Sanitation ()
[Hydropower ()]			
Fossil Fuels, Mining ()	Other () _____	Retail, Restaurants ()	Other () _____
Qualification: The investment has a _____ effect on creating healthy competition.		Positive ()	Neutral ()
Technology Transfer ()	Knowledge Transfer ()	International Standards ()	Other () _____
Qualification: The investment has a _____ effect on creating a better business environment.		Positive ()	Neutral ()
Resource mobilisation ()	Interaction facilitation ()	Governance assistance ()	Other () _____
Scaling: Are the Impacted Entities Important for Economic Growth?			
Medium ()	Micro/Small ()	Large ()	Other () _____

The first question assesses the importance of the impacted sector in the BiH economy. The investment's cost and benefit for the domestic market will be analysed by whether the sector is suitable to have a higher level of competition or protection, i.e., whether it is a driving sector of economic growth, or a vulnerable sector important for economic security.

Investments in the key driving sectors and key enabling sectors for BiH economic growth are generally welcomed. These sectors are labelled green in the Economic Checklist. For sustainable and equitable development of the BiH economy, the key driving sectors identified by the report are manufacturing, construction, tourism, and green energy. Figure II is an overview of the relationship between value-addition and employment contribution identified by

the sectors in BiH.³³ The key sectors are selected due to their relatively high value-addition, their potential to contribute to employment, and their role in BiH development and reform plans such as the ERP.

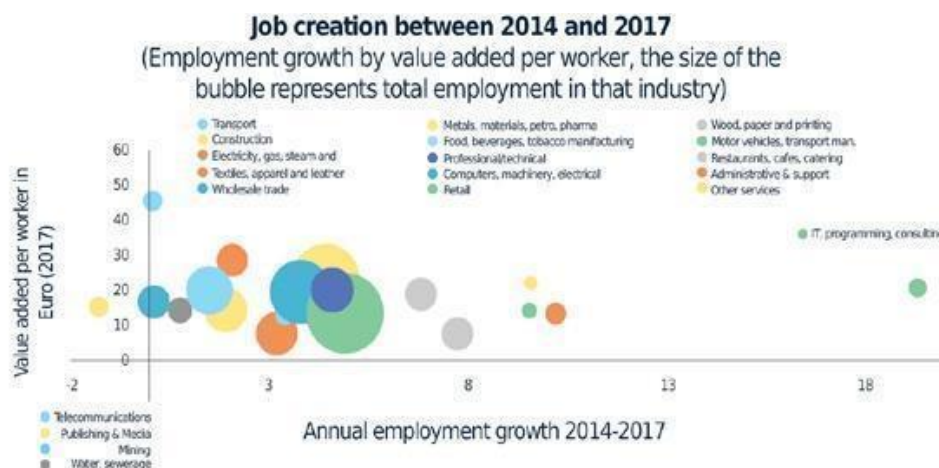


Figure III: Overview of Job Creation and Value Addition of BiH Economic Sectors
(Source: Eurostat and World Bank SCD)

The key enabling sectors are infrastructure (transport, ICTs), energy (electricity) and public service (sanitation). They are selected due to their strategic importance for BiH to connect to the global value chain physically and digitally, and their importance for preserving the BiH human capital.

For vulnerable sectors with the potential to drive growth and better employment, a careful balance is required between protecting their vulnerability and spurring their unreleased economic potential through investments. These sectors are labelled yellow in the Economic Checklist. The vulnerable sectors are agriculture and natural resource (forestry, water, hydropower). BiH has a significant natural resource reserve, but the sectors need to be leveraged to reach their full potential for economic growth and create better jobs. The list of vulnerable sectors is drawn from the BiH SCD,³⁴ the international and regional commitments of BiH,³⁵ and the impact of climate change on economic sectors and social living standards.³⁶ Among these, agriculture, water, and

³³ 2020 BiH SCD, at 44.

³⁴ *Id.*, at 58-61.

³⁵ Concerning the international obligations, BiH is party to a series of environmental and energy treaties, e.g., the Energy Charter Treaty, the Paris Agreement, the Kyoto Protocol. Concerning the regional commitments, BiH has committed to the EU green agenda, and is progressing in its green transition and energy transition.

³⁶ 2020 BiH SCD, at 58.

hydropower are becoming the most vulnerable sectors due to climate change. Agriculture and forestry are the two traditionally significant sectors in BiH, but they have decreased productivity and less value addition to the end products.

The risky sectors with little potential to contribute to growth are labelled red in the Checklist. Investment in these areas is not preferred, because they are less likely to translate into better employment and sustainable growth. Retail and restaurants create jobs with little value addition,³⁷ hence not benefiting the BiH economy or the BiH human capital. Mining and fossil fuels may even be counterproductive for BiH's green transition and energy transition, hence not contributing to the sustainable growth of the BiH economy. Mining and fossil fuels also risk causing air pollution, which affects the living standards, health, and productivity of the BiH human capital, particularly for the bottom 40% which are more vulnerable.³⁸

The second question assesses whether the investment promotes healthy competition within the economic sector. Criteria for the investment's capacity in promoting beneficial competition include: first, the introduction of international technology; second, the transfer of professional knowledge; third, the introduction of international standards.³⁹ For both greenfield and brownfield FDIs, the employee training and production monitoring they provide have the potential to stimulate communication with domestic corporations and the cultivation of the domestic workforce. This enables the exchange and transfer of international technologies, knowledge, and standards, which in the end enhances productivity.⁴⁰

The third question assesses the investment's contribution to an overall better business environment in BiH.⁴¹ It evaluates whether the investment creates a virtuous circle in promoting domestic productivity and attracting other foreign investors. This is showcased by the investment's potential in creating an entrepreneurial ecosystem, and is assessed by its role in three aspects: resource, interaction, and governance (Figure IV).⁴² According to the 2020 BiH SCD, innovation and entrepreneurship are essential for spurring the productivity of BiH's private sector, and for promoting sustainable economic development in BiH.⁴³

³⁷ *Id.*, at 43.

³⁸ *Id.*, at 60.

³⁹ *Id.*, at 41.

⁴⁰ *Ibid.*

⁴¹ The creation of a generally more beneficial political environment is not discussed in Factor 1, because this is contrary to the rationale of an investment agreement: (1) the very purpose of the agreement is to ensure special protection to investors; (2) one important consideration in designing BITs is the preservation of state regulatory space, hence it is unlikely for the BIT to affect political situation in a country in general.

⁴² Z Cao, X Shi, "A systematic literature review of entrepreneurial ecosystems in advanced and emerging economies", (2021) 57(1) *Small Business Economics*, Springer, 75, 75–110.

⁴³ 2020 BiH SCD, at 43.

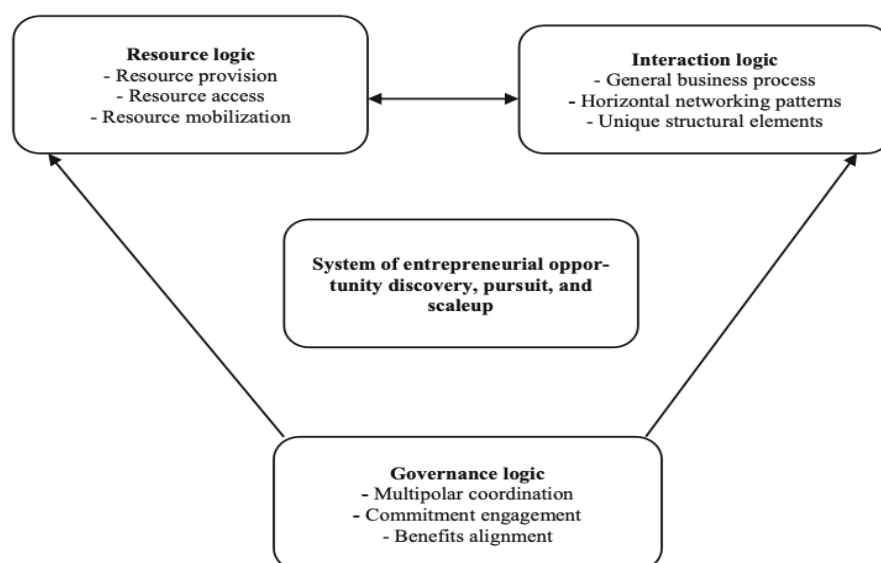


Figure IV: Conceptual Model of Entrepreneurial Ecosystems Dynamics
(Source: Zhe Cao & Xianwei Shi, 2021)

For BITs, the function they potentially serve in these aspects are: first, resource mobilisation, such as the integration of BiH into the GVC; second, interaction facilitation, such as promoting the information exchange and cooperation with domestic corporations; third, governance assistance, such as the coordination between the foreign investment and domestic economy.

The fourth question assesses the scale of BIT's impacts based on the role the affected economic entities play in the BiH economy. Among the various entities, medium-sized firms are strategically important for the long-term: first, they boost domestic employment. As of 2018, the number of medium-sized firms is less than 5% of the total number of BiH enterprises, but these firms contribute to almost 1/4 of the country's total employment.⁴⁴ In addition, medium-sized firms are strategically important for long-term development, as they possess an economic size large enough to participate in international market competitions and are capable to integrate into GVCs.⁴⁵ Attention is also paid to micro and small enterprises, which are important for economic stability in the short term, as they make up 95% of the total number of enterprises in BiH.⁴⁶

⁴⁴ Agency for Statistics of Bosnia and Herzegovina, Republika Srpska Institute for Statistics, and Institute for Statistics of Federation Bosnia and Herzegovina: Household Budget Survey/Labor Force Survey: Microdata file (2018).

⁴⁵ 2020 BiH SCD, at 42.

⁴⁶ Agency for Statistics of Bosnia and Herzegovina, *supra* note 44.

4.2.2.3. Part 3: Impact of the Investment on BiH Human Capital

The third part of Pillar 2 assesses the investment's contribution to the welfare and preservation of BiH human capital. According to the 2020 BiH SCD, human capital is a central concern for BiH in improving economic performance.⁴⁷ In order to strengthen the human capital, key aspects for intervention are the provision of well-paid employment,⁴⁸ proper education,⁴⁹ efficient and targeted social assistance,⁵⁰ and the coverage of public services.⁵¹

Part 3: Impact of Investment Flow on Human Capital				
Potential Benefits		Impact on Vulnerable Social Groups		
Well-paid employment ()	Training and education ()	Young ()	Women ()	Disabled ()
Social Assistance ()	Other () _____	Roma ()	Other () _____	

Concerning the **benefits** of prospective investments attracted by the BIT, the investments are likely to contribute to the creation of well-paid employment, the training and education of local personnel, and social assistance package for the employees according to applicable labour requirements.

Concerning the **disadvantages** of foreign investments, special attention is paid to their impact on the vulnerable population in BiH, which are additionally sensitive to changes in the job market and social environment. These include young people, women, the disabled, and the Roma population.⁵²

⁴⁷ 2020 BiH SCD, at 53. See also World Bank, *The Human Capital Project*, Washington, DC: World Bank (2018); World Bank, *Reform momentum needed. Western Balkans Regular Economic Report* No. 15 (2019).

⁴⁸ 2020 BiH SCD, at 53.

⁴⁹ *Ibid.*

⁵⁰ *Id.*, at 56.

⁵¹ *Id.*, at 57-8.

⁵² OECD, *Fostering social cohesion in Bosnia and Herzegovina, Multi-dimensional Review of the Western Balkans; From Analysis to Action* (2022).

4.2.3. Conclusion of the Economic Checklist

The economic assessment of the BIT concludes with a summary in the Table below. It summarises three findings concluded from the two pillars, which permits a qualitative assessment of the economic benefits and risks of BIT for BiH.

The first finding concerns the BIT's short-term contribution to economic growth. Whether the contribution is beneficial is determined by two factors: first, the potential of the BIT to attract investment (Pillar 1, Part 2); second, the potential of the investment to directly contribute to BiH economic growth, showcased by the importance of the impacted sector within BiH economy, and whether the investment promotes healthy competition within the impacted sector (Pillar 2, Part 2, question 1-2). The scale of the BIT's short-term contribution is decided by: first, the cost and sustainability of the BIT in investment attraction, showcased by whether it conflicts with BiH obligations and commitments (Pillar 1, Part 3); second, the type of prospective investment; a greenfield investment has the largest potential in boosting economic growth (Pillar 2, Part 1).

The second finding concerns the BIT's long-term contribution to sustainable development. Whether the contribution is beneficial is determined by the BIT's potential in creating a business environment that encourages innovation and entrepreneurship (Pillar 2, Part 2, question 3). The scale of the BIT's long-term contribution to sustainable development is decided by the type of the affected entities (Pillar 2, Part 2, question 4).

The third finding concerns the BIT's long-term contribution to equitable development. Whether the contribution is beneficial is determined by the BIT's potential in promoting the welfare of BiH population, as well as its potential in preserving the BiH human capital pool, showcased by the investment's impact on the protection of vulnerable social groups (Pillar 2, Part 3). The scale of the BIT's long-term contribution to equitable and inclusive development is decided by levelling the BIT's benefits against its potential impacts (Pillar 2, Part 3).

Conclusion: Economic Cost-Benefit Assessment of the BIT			
Short-term: Contribution to Economic Growth	Positive ()	Neutral ()	Negative ()
- Scale	High ()	Medium ()	Low ()
Long-term: Create Better Business Environment	Positive ()	Neutral ()	Negative ()
- Scale	High ()	Medium ()	Low ()
Long-term: Influence on Human Capital	Positive ()	Neutral ()	Negative ()

- <i>Scale</i>			High ()	Medium ()	Low ()
Conclusion: Cost-Benefit			Conclusion: Scale		
Positive ()	Neutral ()	Negative ()	High ()	Medium ()	Low ()

The Conclusion section of the Economic Checklist concludes with an overview of the cost and benefit of the prospective BIT (“Cost-Benefit”), combined with the extent to which the BIT’s cost or benefit outweighs the other (“Scale”).

4.2.4. Application of the Checklist

In applying the Economic Checklist to the case of the Country investments, substantive research on the specific investment from the negotiating party is needed: the intended investment’s economic nature, its underlying policy context and purpose, etc. To understand how the investment interacts with the BiH economy, it is important to consider its economic nature. Similarly, to predict its broader impact and future changes, it is necessary to examine its policy background within the negotiating party. Analysis of the investment’s economic nature is conducted after receiving the concrete BIT proposal; analysis of policy purpose is conducted before and during the BIT negotiations. These are beyond the reach of the Economic Checklist.

The Economic Checklist functions after the receipt of the BIT proposal, whereas the lack of information would render the Checklist speculative and inaccurate. The Economic Checklist is aimed at (1) providing a list of the strategic and vulnerable policy areas for the BiH economy; (2) providing a list of BiH development goals as well as existing domestic, regional, and international commitments. The purposes are: (1) For the pre-negotiation phase, to tell if the BIT is minimally worthy to be negotiated, and if so, to remind MoFTER BiH of the areas where information collection is needed. (2) For the negotiation phase, to assist the MoFTER BiH in capturing and transforming the negotiating dynamics into an analysable checklist assessment, which can possibly serve as the basis for MoFTER BiH to bargain with the opposite party for the benefit of the BiH economy.

One scenario where the Economic Checklist can be used is in deciding the definition of investor and investments: whether the investment is beneficial, or neutral and in need of policy leverage, or negative and in need of legal exceptions or carve-outs.

The following is a preliminary application of the Economic Checklist to the case of Country X, with many parts of the Checklist pending determination. Application centres on Pillar 2, as Pillar 1 depends completely on the content of the specific BIT proposal.

Pillar 2: The Investment's Potential in Contributing to BiH Economy				
Part 1: Profile of the Prospective Investment				
Qualification: Which Factor of Production is Likely to be Invested in?				
Physical Capital (X)		Other (X)		
Transport (X)	Efficient Energy ()	Land ()	Natural Resource (X)	
ICT (X)	Other () _____	Real Estate (X)	Other () _____	
Scaling: What Type of Investment is Likely to be Attracted by the BIT?				
Greenfield Investments ()	Brownfield Investments ()	Indirect Investments ()	Other () _____	
Part 2: The Investment's Contribution to Economic Growth				
Qualification: Does the Impacted Sector Drive BiH Economic Growth?				
Industry		Services		
Manufacturing ()	Construction (X)	Transport (X)	ICTs (X)	
Green Energy ()	Agriculture and Forestry (X)	Tourism (X)	Electricity, Water and Sanitation (X)	
[Hydropower ()]				
Fossil Fuels, Mining ()	Other () _____	Retail, Restaurants ()	Other () _____	
Qualification: The investment has a _____ effect on creating healthy competition.		Positive ()	Neutral (X)	Negative ()
Technology Transfer (X)	Knowledge Transfer (X)	International Standards (X)	Other () _____	
Qualification: The investment has a _____ effect on creating a better business environment.		Positive ()	Neutral (X)	Negative ()
Resource mobilisation (X)	Interaction facilitation (X)	Governance assistance ()	Other () _____	
Scaling: Are the Impacted Entities Important for Economic Growth?				
Medium ()	Micro/Small ()	Large ()	Other () _____	
Part 3: Impact of Investment Flow on Human Capital				
Potential Benefits		Impact on Vulnerable Social Groups		
Well-paid employment (X)	Training and education (X)	Young ()	Women ()	Disabled ()
Social Assistance (X)	Other () _____	Roma ()	Other () _____	

The foregoing analysis indicates that Country X is likely to be a **low risk** investor, as its interests in infrastructure and natural resource investment is likely to contribute to BiH economic growth, improve physical and digital connectivity, enhance domestic productivity, and with potential benefits to BiH society. Nevertheless, many of the impacts are neutral, as it is uncertain whether the investment realizes its potential benefit sharing to the BiH economy and population, depending on its actual operation.

Importantly, the above application is speculative in that it largely draws from the general profiling of Country X (Section 4.1), instead of a concrete proposal. If possible, it is recommended that the MoFTER BiH replace the general assessment with case-to-case assessments for each BIT proposal. The incompleteness of the Checklist is remedied by a detailed guide in Section 4.2.3, which the MoFTER BiH can use to generate a final decision on its risk level when more information is available.

4.3. Category III: Legal Risk

The assessment of legal risk seeks to provide BiH with practical ideas on limiting its liability in particular negotiations. This risk assessment analysis focuses on particular BIT elements (i.e., FET, expropriation, MFN, and ISDS clauses). These are listed in the template (see Annex I). The aim is to provide BiH with useful, practical assistance based on best practices followed either by other states or presented as ideal solutions by practitioners and scholars.⁵³

4.3.1. Fair and Equitable Treatment Clauses

The first item of the third Category of the Checklist addresses FET clauses. This item consists of a table comprising different manners of drafting an FET clause:

Assessment of the BIT: FET Clause			
How many BITs of BiH contain an FET clause?		___/37	
Is the FET clause generally broad or narrow?		Broad ()	Narrow ()
Have investors from (country) taken advantage of such FET clauses yet? <i>*based on the existing case-law</i>		Yes ()	No ()
How is FET defined in the proposal?			
Excludes FET ()	Provides a guide on how to interpret key terms ()	According to International Law ()	Other ()
Exhaustive List ()	Excludes specific concepts from FET's definition ()	According to the Minimum Standard of Treatment ()	_____

4.3.1.1. Assessment from a Legal Perspective

Among the thirty-seven BITs concluded so far by BiH, the overwhelming majority do not define, nor restrict, the term “fair and equitable treatment”.⁵⁴ Most BITs use broad

⁵³ See generally, UNCTAD, “Fair and Equitable Treatment”, (1999) *IIA Issues Series*; UNCTAD, “Latest Developments in Investor-State Dispute Settlement” (2002) *IIA Monitor*; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, (2007) *IIA Issues Series*, at 30–33 all available at: www.unctad.org/en/docs/iteia20065, accessed 30 June 2023.

⁵⁴ UNCTAD, “Investment Policy Hub: Bosnia and Herzegovina Bilateral Investment Treaties (BITs)”, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/25/bosnia-and-herzegovina>, accessed 30 June 2023.

formulations like “the other contracting party shall accord fair and equitable treatment in accordance with international law”.⁵⁵ Such broad formulations operate as a double-edged sword. The additional protection to investors has the potential to attract more foreign capital. However, they increase the risk and potential negative impact of litigation. Such risk is not to be taken lightly, considering that approximately 83% of all treaty-based investor–state arbitrations include claims based on FET.⁵⁶

Broad “unqualified FET” clauses like the ones present in most BITs concluded by BiH are high risk because they provide a broader interpretative margin to arbitral tribunals. One common FET formulation is to accord to all investments of investors of the other party “*fair and equitable treatment*.” This is known as an “unqualified FET”, because it does not define, nor limit the scope of the FET obligation.⁵⁷ Another common broad FET formulation consists of referring to international law as the standard of interpretation.⁵⁸ Yet, providing for an interpretation that will be based on general international law⁵⁹ poses the inherent of leaving to an arbitral tribunal the duty to delimit the scope of the obligation. The result can vary from a restrictive interpretation stating that FET in accordance with international law is no more than the Minimum Standard of Treatment.⁶⁰ Conversely, it could be interpreted very broadly, exposing BiH to controversial concepts⁶¹, such as “*investors legitimate expectations*”, “*manifest arbitrariness*”, “*blatant unfairness*”, “*complete lack of due process*”⁶².

⁵⁵ UNCTAD, “Agreement Between the Republic of San Marino and Bosnia and Herzegovina on the Promotion and Reciprocal Protection of Investments”, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/489/download>, accessed 30 June 2023.

⁵⁶ UNCTAD, “Investment Dispute Settlement Navigator”, available at:

<https://investmentpolicy.unctad.org/investment-dispute-settlement>, accessed 30 June 2023.

⁵⁷ For example, the tribunal in *MTD Equity Sdn. Bhd. v. Chile* examined the ordinary meaning of the words “fair” and “equitable” and found that the words stand for “just,” “evenhanded,” “unbiased,” and “legitimate,” while the tribunal in *S.D. Myers, Inc. v. Government of Canada* found that the words stand against “*treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*”.

⁵⁸ See also, J Paine, “Cairn Energy v India: Retroactive Taxation, Fair and Equitable Treatment and the General Principles method”, (2021) IAREporter, available at <https://www.iareporter.com/arbitration-cases/cairn-energy-v-india/>, accessed 30 June 2023.

⁵⁹ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 63.

⁶⁰ Reference to the Minimum Standard of Treatment also entails risk. The arbitral tribunal will have to interpret the term, delimiting the obligations that emanate from the standard. In this sense: P Dumberry, “The Formation and Identification of Rules of Customary International Law in International Investment Law”, (Cambridge: Cambridge University Press 2016).

⁶¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Award, 21 Novembre 2000, 15, at 22.

⁶² *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 2.26; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 22; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 February 2015, para. 177.

In sum, broad FET clauses that do not delimit the scope of the obligation provide arbitral tribunals with larger interpretative margins.⁶³ This may possibly increase the likelihood of an unfavourable outcome to BiH in an eventual litigation because the arbitral tribunal may consider that the arbitral tribunal may concluded that the FET clause entailed more obligations than the government of BiH originally expected. For this reason, the items FET “According to International Law” and “According to the Minimum Standard of Treatment” were classified as high risk.

BiH has direct experience with the effects of a broadly interpreted FET standard. In the case of *Goljevšček and others v. BiH*,⁶⁴ arbitrators interpreted FET as including denial of justice claims against the Government of Republika Srpska, which was found to have frustrated the claimants’ two hydroelectric power plant projects on the Vrbas River. This case pertained to protected sectors of BiH’s economy, namely it had to do with electricity, gas, steam, and air conditioning supply.

4.3.1.2. Best Practices for FET Clauses

The foregoing analysis confirms that there is a potentially significant risk of including a broad FET clause in a BIT. The following “best practices” for such clauses may assist BiH in negotiating FET clauses.

State practice and the recent outcomes of investor-state arbitration suggest the existence of three models of low risk FET clauses. The first alternative is the express or implicit exclusion of FET from the BIT. For example, the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017) in its article 4.3 states that “*For greater certainty, the standards of ‘fair and equitable treatment’ [...] are not covered by this Protocol*”.⁶⁵ This is the lowest risk option, since it eliminates the provision altogether. However, this option may be the hardest to negotiate, since it removes an important layer of protection.

The second alternative provides guarantees generally associated with FET - such as non-arbitrariness, transparency, non-discrimination, etc - without using terms such as “fair and

⁶³ K. Yannaca-Small, “Fair and Equitable Treatment Standard” in K Yannaca-Small (ed), *Arbitration under International Investment Agreements* (OUP 2010), 393-407; *Charanne and Construction Investments v Spain*, SCC Case No. V062/2012, Award, 21 January 2016, para. 539.

⁶⁴ UNCTAD, “Investment Policy Hub: *Boris Goljevšček, Viaduct d.o.o. Portorož and Vladimir Zevnik v. Bosnia and Herzegovina* (ICSID Case No. ARB/16/36)”, available at <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/752/goljev-ek-and-others-v-bosnia-and-herzegovina>>, accessed 30 June 2023.

⁶⁵ F Sarmiento, S H Nikiema, “Fair and Equitable Treatment: Why it matters and what can be done”, (2022) IISD Best Practices Series, available at <<https://www.iisd.org/publications/brief/fair-equitable-treatment>>, accessed 30 June 2023, at 5.

equitable treatment”, or “fair treatment of investors”.⁶⁶ An example of this approach is Article 4 of the Ethiopia-Qatar BIT (2017)⁶⁷.

The third alternative to BiH is an exhaustive positive list of the obligations covered by the FET clause. This list can also specify all the potential breaches covered by the FET clause (i.e., manifestly arbitrary conduct, denial of justice, fundamental breach of due process, discriminatory conduct etc.), and exclude from the text of the BIT broader concepts like “investors legitimate expectations”.⁶⁸

In conjunction with these three alternative clauses, some states choose to specify the threshold for proving a breach of FET, while other have preferred to list measures that do not constitute a breach of FET.⁶⁹ Both alternatives aim directly at constraining the tribunal's interpretative margin.⁷⁰ The latter practice usually follows the form of clarifications and not exceptions because it seems less restrictive for the states.

For instance, BiH may consider clarifying that when a tribunal assesses the possibility of a violation of the FET standard it should not link it in any way to investor's legitimate expectations. The text could provide that no breach of FET exists even if national legislation could potentially appear to contradict an investor's legitimate expectations.⁷¹ Finally, BiH could propose that breaches of other treaty provisions would not constitute a breach of FET because of an alleged “connection” with those other clauses.

⁶⁶ *Neer v Mexico*, US-Mexico General Claims Commission, 15 October 1926: “amounting to an outrage, bad faith, willful neglect of duty”; same in *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009: “an act that is sufficiently egregious and shocking, a gross denial of justice, manifest arbitrariness, blatant unfairness”.

⁶⁷ See Article 4, “Fair Administrative Treatment: (para. 1) Each Contracting Party shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural due process to investors of the other State Party or their investments”.

⁶⁸ See Article 2, “Promotion and Protection of Investments: (para. 3) With respect to the investments the following measures or series of measures constitute breach of the obligation of fair and equitable treatment:

1. denial of justice in criminal, civil or administrative proceedings; or 2. fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or 3. manifest arbitrariness; or 4. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or 5. harassment, coercion, abuse of power or similar bad faith conduct;

Upon request of a Contracting Party, the Contracting Parties may review the content of the obligation to provide fair and equitable treatment”.

⁶⁹ H Mann, “The SADC Model BIT Template: Investment for Sustainable Development”, (2012) IISD: Investment Treaty News, available at < <https://www.iisd.org/itn/fr/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/>>, accessed 30 June 2023; See also SADC Model BIT, Article 5.

⁷⁰ *Id.*

⁷¹ See the Australia–United Kingdom FTA (2022), Article 13.7 on Investment, “Minimum Standard of Treatment: (para. 2). For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. [...]”.

By applying a careful and cautious combination of the above best practices, BiH could implement a strategic approach to its negotiations that will provide for the most efficient results and safeguards in its future relationships with other states or potential investors.

A final note of caution. While omitting an FET clause is certainly the lowest risk option, it can on the other hand jeopardise BiH's ability to negotiate BITs with a future counterparty. It could also put BiH investors at a disadvantage if they run into significant limitations with their investments in the negotiating partner's territory. Thus, it would be advisable to proceed with an assessment of the potential benefits and risks based on the history of the counterparty's investors (in the sense of how many times it has invoked in the past an alleged violation of FET and under what circumstances)⁷².

4.3.2. Expropriation Clauses

The second item of the third Category of the Checklist addresses expropriation clauses. It consists of a table comprising different manner of drafting expropriation clauses, as well as different modes of payment:

Assessment of the BIT: Expropriation Clause			
How many BITs of BiH contain a specific expropriation clause?		___/37	
Does BiH want an expropriation clause?	No ()	Narrow ()	Broad ()
What does the expropriation clause contain?			
Conditions for it to qualify as lawful ()	Distinction between direct/indirect/ partial ()	Methods based on calculation of compensation ()	Other () _____
In Which Currency Should the Amount Due for Lawful Expropriation be Paid?			
USD ()	Euro ()	Bosnian Mark ()	Other () _____
Does the expropriation clause allow for payment in instalments?	Yes ()	No ()	
Does the expropriation clause set a specific valuation date?	Yes ()	No ()	
Does the expropriation clause include regulatory exceptions?	Yes ()	No ()	
How is expropriation defined in the proposal?			
High Protection ()	Increased Predictability ()	Qualified ()	

⁷² Regional Comprehensive Economic Partnership (2020), Article 10.5 (para. 3): "A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article".

4.3.2.1. Assessment from a Legal Standpoint

The majority of BITs entered into by BiH include a clause that regulates direct expropriation, enabling it under certain restrictive circumstances. For instance, under the BiH-San Marino BIT, BiH can expropriate an investment if it fulfils the following conditions:

- a) for a purpose which is in the public interest related to the internal needs,
- b) on a non-discriminatory basis,
- c) in accordance with due process of law, and
- d) accompanied by payment of prompt, adequate and effective compensation.

Various arbitral tribunals have interpreted these criteria in an inconsistent manner.⁷³ To reduce this risk, BiH could consider negotiating the inclusion of clarifications in a BIT defining what is meant by “non-discriminatory” treatment, “due process of law”, etc.⁷⁴

To a certain extent, BiH already provides certain clarifications in some of its BITs. For instance, BiH has often limited its exposure by using two explanatory provisions relating to specific valuation methods (“*fair market value of the investment*”) and specific valuation date (“*immediately before the expropriation occurred*”). These provisions assist in avoiding inflated claims and findings based on speculative methodologies such as the discounted cash flow or determining the value of the investment as of the date of the award.⁷⁵

One additional issue of concern as regards the expropriation clause is the provision providing for payment of compensation “*in a freely convertible currency, transferable without delay, to the country designated by the claimants concerned*”. BiH needs to be aware that they will, most likely, have to pay compensation in Euros or US dollars, as it happened in the recent, *Goljevšček and others v. BiH*, case, unless the BIT enables BiH to pay with its local currency.⁷⁶

⁷³ See *R S Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, para. 203; *Eudoro A Olguín v. The Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001; *Pope & Talbot Inc. v. Canada*, Award 26 June 2000, para. 99; *Saluka Investments BV v. The Czech Republic*, Award 17 May 2006, para. 264; *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award 17 February 2000.

⁷⁴ P D Isakoff, “Defining the Scope of Indirect Expropriation for International Investments”, (2013) 3(2) *The Global Business Law Review*, 189-209. The measure should be a) non-discriminatory, b) adopted bona fide, c) proportionate; *Philip Morris v Republic of Uruguay*, ICSID. Case No. ARB/10/7, Award, 8 July 2016, paras. 271, 287, 290-291.

⁷⁵ See generally, UNCTAD Website about BiH BITs’ Profile, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/285/alas-international-v-bosnia-and-herzegovina>, accessed 30 June 2023.

⁷⁶ UNCTAD, “Investment Policy Hub: *Boris Goljevšček, Viaduct d.o.o. Portorož and Vladimir Zevnik v. Bosnia and Herzegovina* (ICSID Case No. ARB/16/36)”, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/752/goljev-ek-and-others-v-bosnia-and-herzegovina>, accessed 30 June 2023.

4.3.2.2. Best Practices for the Expropriation Clauses

There are three main alternatives to protect BiH in the context of expropriation clauses: (i) a “high-protection” model, (ii) an “increased-predictability” model, and (iii) a “qualified” model.⁷⁷

The first model involves maximizing the treaty’s protective scope to ensure broader protection against expropriations and nationalizations. This approach was commonly used by states prior to the ISDS cases wave and is based on a model clause used by BiH that prohibits direct expropriation of investments, except for public purposes, in a non-discriminatory manner, under due process of law, and with prompt, adequate, and effective compensation. This clause is typically followed by a broad, non-exhaustive definition of investment, which includes property rights, contracts, licenses, concessions, claims to money, and intangible rights.⁷⁸ However, this approach can sometimes have unintended consequences due to its breadth, as it includes non-property-related rights and lacks clarity on how to distinguish between expropriation and non-compensable regulation.⁷⁹

Capital exporting countries may prefer the first model to provide their foreign investors with maximum protection, but they should consider that their regulatory measures may be challenged before international tribunals.⁸⁰ On the same grounds, developing countries may desire to attract foreign investment, but adhering to this model may not be highly beneficial in the long-term. The authors suggest it would not be advisable for BiH to continue using this model.

The second “increase-predictability” model seeks to clarify the law applicable in expropriation cases based on CIL and relevant BIT to ensure consistency and predictability of arbitral awards. This model was introduced by Canada and the US in response to numerous

⁷⁷ See generally, S H Nikièma, “Best Practices: Indirect expropriation”, (2012) IISD Best Practices Series, available at <https://www.iisd.org/publications/guide/best-practices-indirect-expropriation>, accessed 30 June 2023; R Dolzer, “Indirect Expropriation, New Developments?”, 11 (2002) *Environmental Law Journal*, 65 and R Dolzer, F Bloch, “Indirect Expropriation: Conceptual Realignment?” 5(3) (2003) *International Law Forum*, 161.

⁷⁸ Z Douglas, “Property, Investment, and the Scope of Investment Protection Obligations”, in Z Douglas, J Pauwelyn, and J E Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014), 391-393; R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd ed.), (OUP, 2012), 126-127.

⁷⁹ A Newcombe, “The Boundaries of Regulatory Expropriation in International Law”, in P Kahn, T W Wälde (Eds.), *New Aspects of International Investment Law*, (Leiden/Boston: Martinus Nijhoff Publishers 2007), at 441-445.

⁸⁰ See generally, M. Sornarajah, *The International Law on Foreign Investment*, (3rd ed, Cambridge: Cambridge University Press 2010), at 374. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

expropriation-related claims they faced.⁸¹ Its advantage is that it implicitly regulates indirect expropriation by distinguishing between compensable and non-compensable expropriation arising from a state's sovereign right to regulate its internal matters.⁸²

One possible formulation of such a clause is the following (with exceptions defined):

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.⁸³

The third model, the "qualified model," offers a potential alternative. BiH can limit the property rights capable of being expropriated. In particular, BiH could explicitly exempt measures in certain sensitive areas where regulatory activity is strong, such as the telecommunications, real estate, and energy sectors.

In sum, BiH should be extremely careful when drafting the "expropriation" provision in its future BITs or when reforming its already existing ones. Indeed, BiH has painful experience to justify such caution. The publicly available cases that are directed against BiH, most of them, such as the *Aggarwal and others v. BiH*⁸⁴, the *Goljevšček and others v. BiH*⁸⁵, and the *EGS v. BiH*⁸⁶ involve an indirect expropriation related claim.

⁸¹ Notable examples include the following cases: *Ethyl Corporation v. United States*, Award, 24 June 1998; *SD Myers Inc. v. Canada*, Award 13 November 2000; *Pope & Talbot Inc. v. Canada*, Award 26 June 2000.

⁸² G. Abi Saab dissents, *ConocoPhillips Co. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on jurisdiction and the merits, 3 September 2013, paras. 112-121.

⁸³ Annex B(13)(1)(c) of the Canadian Model BIT and Annex B(4)(c) of the American model is also written in similar terms but does not provide an example.

⁸⁴ UNCTAD, "Investment Policy Hub: *Naveen Aggarwal, Neete Gupta, and Usha Industries, Inc. v. Bosnia and Herzegovina*", available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/823/aggarwal-and-others-v-bosnia-and-herzegovina>, accessed 30 June 2023.

⁸⁵ UNCTAD, "Investment Policy Hub: *Boris Goljevšček, Viaduct d.o.o. Portorož and Vladimir Zevnik v. Bosnia and Herzegovina* (ICSID Case No. ARB/16/36)", available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/752/goljev-ek-and-others-v-bosnia-and-herzegovina>, accessed 30 June 2023.

⁸⁶ UNCTAD, "Investment Policy Hub: *Elektrogospodarstvo Slovenijerazvoj ininzeniring d.o.o. v. Bosnia and Herzegovina*, (ICSID Case No. ARB/14/13)", available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/591/egs-v-bosnia-and-herzegovina>, accessed 30 June 2023.

4.3.3. Most Favored Nation Clause (“MFN”)

The third item of the third Category of the Checklist addresses FET clauses. This item consists of a table comprising different manners of drafting an MFN clause:

Assessment of the BIT: MFN Clause			
How many BITs of BiH contain a specific MFN clause?		___/37	
Does BiH want an MFN clause?	No ()	Narrow ()	Broad ()
What limitations does the MFN clause contain?			
No definition of treatment ()	Provides a criterion for comparing investors ()	Carves out sectors ()	
Provides no temporal restriction ()	Provides a definition of treatment ()	Limited to post-establishment obligations ()	
How does the MFN clause relate to the ISDS clause?			
The MFN clause does not exclude the ISDS clause from its scope ()	The MFN clause does not encompass the ISDS clause ()		

4.3.3.1. Assessment from a Legal Perspective

A most-favored nation clause (MFN) obligates the signatories of any BIT to accord treatment to investors from the other contracting party equal to that accorded to investors protected by a BIT concluded with a third State. In other words, through an MFN clause, the home State effectively extends to investors of the other contracting party treatment that goes beyond the obligations of the BIT, provided more favorable terms are granted to investors of a third country.⁸⁷ Consequently, the risk of including an MFN clause in a BIT is the possible extension of rights and obligations beyond what would have been originally desired by the host State.

MFN clauses usually have three relevant characteristics. First, the MFN obligation is relative. It is solely based on a comparison between the guarantees that each BIT concluded by the host State grants to investors of different countries. It is not based on obligations arising from customary international law. Thus, a host State is only bound to grant MFN treatment if it has made more favorable commitments in a BIT with a third State and to the extent specified

⁸⁷ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID, ARB/97/7, Decision on Jurisdiction, 25 January 2000.

therein.⁸⁸ Secondly, precisely because the MFN clause entails a relative obligation, there is no uniform definition of “no less favorable” treatment. In essence, the host State is only liable to provide treatment equivalent to that agreed for investors of other nationalities. Thirdly, there needs to be similarities between the investors in order to claim protection under an MFN clause. The clause only applies if the investors can demonstrate they belong to the same category and have a similar relationship with the beneficiary compared to the investors benefiting from a more favorable treatment.⁸⁹

There are four general criteria for classifying MFN clauses. First, some BITs and treaties with investment protection provisions do not include a definition of “treatment”.⁹⁰ This broad unqualified obligation can be present both in the form of a stand-alone MFN clause, or be attached to other clauses, such as national treatment, FET, and full protection and security. The risk associated with this formulation is high, because it grants a large margin of discretion for arbitral tribunals to delimit the scope of the MFN obligation. In other words, it is harder for the host State to anticipate what kind of “treatment” is covered by the provision, and which kind of obligations from other BITs may be “imported”.⁹¹

BiH is no stranger to this form of broad unqualified clause. In general, the older BITs concluded by BiH adopt this formulation. For instance, Article 3 of the BiH-Pakistan does not provide a definition of treatment. It simply states that it should be “no less favorable than that accorded to investments made by investors of any third State or by its own investors”, attaching this obligation with the duty to accord FET.⁹² Conversely, newer BITs tend to provide a delimitation of a MFN clause’s scope of application. For instance, Article 3(1) of the BiH-San Marino BIT delimits the MFN obligation to “expansion, management, maintenance, enjoyment, use, or disposal” of the investment.⁹³

Secondly, MFN clauses can be distinguished between those that include a criterion for comparing foreign investors, requiring, inter alia, that investors be situated in like circumstances,

⁸⁸ MFN treatment is defined in Article 4(a) of the Draft Articles on MFN Clauses of the ILC as “*treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.*” See Draft Articles on MFN clauses with commentaries, adopted by the ILC at its third session in 1978, A/CN.4/SER.A/1978/Add.1 (Part 2), at 18.

⁸⁹ S H Nikièma, “The Most-Favoured-Nation Clause in Investment Treaties IISD Best Practices Series”, (2017) IISD Best Practices Series, available at <https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>, accessed 30 June 2023, at 2.

⁹⁰ *Id.*, at 4.

⁹¹ C Schreuer *et. al.*, *Principles of International Investment Law*, (Oxford: Oxford University Press 2022).

⁹² UNCTAD, “Article 3(1) of the Agreement between Bosnia Herzegovina and the Islamic Republic of Pakistan for the Promotion and Protection of investments”, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/484/download> accessed 30 June 2023.

⁹³ UNCTAD, “Agreement Between the Republic of San Marino and Bosnia and Herzegovina on the Promotion and Reciprocal Protection of Investments”, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/489/download>, accessed 30 June 2023.

and those that have no such limitation. The BiH-San Marino BIT does not provide a limitation on the basis of like circumstances. Rather, it excludes from the MFN obligation “the benefit of any treatment, preference or privilege resulting from”: “the membership of or association with any existing or future customs union or economic union, free trade area, common market”, *inter alia*, and “any international any international agreement or arrangement, completely or partially related to taxation”.

Such MFN clauses aim at reducing the risk of potentially creating a unilateral multilateralization of concessions and privileges accorded under free trade and tax conventions. For this reason, some BITs go one step further, explicitly carving-out certain sectors from the scope of the MFN clause, such as aviation, fisheries, maritime (including salvage). Signatory countries have the flexibility to incorporate specific exceptions to align with their national investment policies. There is also a growing trend of including a general exception based on Article XX of the General Agreement on Tariffs and Trade (GATT) in recent BITs or FTAs with investment chapters.

The third criterion for defining MFN clauses is whether they include a temporal limitation on its scope of application. Whereas some MFN clauses restrict the scope of this obligations to the post-establishment phase, others do not include such restriction. BiH uses the former, by specifying that they only cover events relating to the “expansion, management, maintenance, enjoyment, use, or disposal of their investment”). By using this formulation, BiH maintains the flexibility to establish specific entry requirements for foreign investors since the provisions of the BIT are not applicable at the admission’s phase.

Finally, the fifth criterion for defining MFN clauses consists of dividing them according to whether or not they expressly exclude dispute settlement provisions from their scope. An example of this systematic is the Colombia-United Kingdom BIT. Article 3(2) of this treaty states that “the most favourable treatment to be granted in like circumstances referred to in this agreement does not encompass mechanisms for the settlement of investment disputes”. The inclusion of such restrictions aims at restricting the possibility of investors circumventing cool-down periods, or the necessity of exhausting local remedies before filing an arbitral claim. For instance, in *Maffezini v. Spain*, the investor sought to invoke the MFN clause in the Argentina-Spain BIT in order to circumvent the requirement to go through local courts for 18 months before submitting the request to arbitration. The investor argued that Chilean investors were accorded more favorable treatment in Spain, because the Chile-Spain BIT did not impose a similar obligation.

In conclusion, MFN clauses pose a risk of broadening the scope of protection to investors of a specific nationality beyond what was originally foreseeable by the contracting parties of the

BIT. This risk can be mitigated by prescribing some limitations on the scope of the obligation, limiting the credible interpretative margin of arbitral tribunals. There are different manners of imposing such restrictions: temporally, through sector carve-outs, through an exclusion of ISDS from the clause, inter alia. These restrictions can be combined or used separately, according to the contracting parties' desire.

4.3.3.1. Best Practices for MFN Clauses

As discussed above, each MFN clause should be drafted with care. Its wording can weigh heavily on the decision of an arbitral tribunal, opening the possibility of importing different provisions on substantive treatment from other BITs.⁹⁴

Recently, capital exporting countries have negotiated restrictive MFN clauses, specifically excluding procedural, and certain substantive obligations from its scope. For instance, CETA is a new generation agreement in which the parties agreed to exclude not only procedural rules but also substantive ones from the scope of MFN by stating that “treatment (...) does not include procedures for the resolution of investment disputes”, and that “substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute treatment”.

Most importantly, by using the terms “the Parties confirm that,” or “it is understood that”, BiH could counter the argument that, in adding this type of exception it accepts, conversely, the principle of the import of substantive or procedural obligations through vague clauses in its old treaties. Hence, another option for BiH could be to restrict the scope of the MFN clause during the post-establishment phase by cumulatively incorporating the following:

- i. Exclude all previous or subsequent investment treaties (or both) from the scope of MFN, encompassing both substantive and procedural rules. This exclusion can be explicitly stated using phrases such as “for greater certainty”, like in CETA, or similar expressions;
- ii. Introduce the notion of “like circumstances” as a benchmark for comparison, along with an exhaustive list of factors to consider when assessing the similarity of circumstances between different investments or investors;

⁹⁴ Z. Douglas, “The MFN clause in investment arbitration: Treaty interpretation off the rails”, 2(1) (2010) *Journal of international dispute settlement*, 97, 113; *Salini v Jordan* (Decision on Jurisdiction, 15 November 2004), ICSID case No. ARB/02/13, para. 112; *Venezuela U.S., S.R.L. (Barbados) v Bolivarian Republic of Venezuela* (Dissenting Opinion of respondent’s nominee, Professor M. G. Kohen, 26 July 2016), PCA case No. 2013-34.

iii. Explicitly exclude pre-establishment rights for investors and investments (i.e., right to initiate investor-state arbitration).⁹⁵

By implementing these limitations, BiH can narrow down the extent to which the MFN clause applies during the post-establishment phase, granting greater control and flexibility in regulating investment matters. Needless to mention that it is also crucial to establish the non-negotiable elements pertaining to the MFN clause (like with every element of the Checklist as regards the legal analysis), including decisions regarding the extension or exclusion of the pre-establishment phase and the specific content of exceptions.

4.3.4. Investor-State Dispute Settlement (“ISDS”)

The last item of the third Category of the Checklist addresses ISDS clauses. It consists of multiple criteria listing different features of a dispute resolution clause:

Assessment of the BIT: ISDS Clause			
How many BITs of BiH contain an ISDS clause?		___ /37	
Does BiH want an ISDS clause?	No ()	Narrow ()	Broad ()
Does the clause require prior consultations/ negotiations?		Yes ()	No ()
Does the clause include cooling-off periods?		Yes ()	No ()
Does the clause include a fork-in-the-road requirement?		Yes ()	No ()
Does the clause provide for institutional, or <i>ad hoc</i> arbitration?		Institutional ()	<i>Ad hoc</i> ()
Does the clause regulate the allocation of costs?		Yes ()	No ()
How is the ISDS provision formulated in the proposal?			
Minimalistic ()		Restrictive ()	

⁹⁵ See generally, S H Nikièma, “Performance Requirements in Investment Treaties”, (2014) IISD Best Practices Series, available at: <https://www.iisd.org/publications/guide/iisd-best-practices-series-performance-requirements-investment-treaties>, accessed 30 June 2023.

4.3.4.1. Assessment from a Legal Standpoint

Upon reviewing the BITs signed by BiH with other countries, the authors have conducted a final assessment of the inclusion of different types of dispute settlement provisions, including elements seeking negotiated solutions.

BiH wisely includes a cooling-off period in its ISDS clauses, which ranges from three to six months. This provision obliges the investor to wait, regardless of whether they bring the dispute to domestic courts or international arbitration. Although investors may view this provision as ineffective, it provides the state with time to prepare a legal strategy and attempt to reconcile relations with the investors. This clause also grants the host state the right to be informed about the existence of the dispute some time in advance before the investor files the request for arbitration.⁹⁶

The inclusion of cooling-off periods in ISDS clauses can be advantageous for BiH as it can lead to a tribunal declining jurisdiction if an investor fails to comply with the requirements of the ISDS clause, unless they can prove that the cooling-off period is futile. However, some tribunals have decided not to withhold their jurisdiction even when an investor fails to comply with the cooling-off period requirement.⁹⁷ They have found it to be a procedural provision rather than one related to the jurisdiction of the tribunal.⁹⁸

The ISDS clauses in BiH's BITs have different styles. Some BITs provide for *ad hoc* arbitration based on UNCITRAL Model Law, while others prioritize institutional arbitration such as ICSID, ICC, or SCC. To better understand the risk-benefit assessment of these two types of arbitration, this report contains a table using UNCITRAL and ICSID arbitrations as examples.

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⁹⁶ See generally, J Pohl, K Mashigo and A. Nohen, "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", (2012) OECD Working Papers on International Investment: OECD Publishing, available at www.oecd.org/daf/investment/workingpapers, accessed 30 June 2023.

⁹⁷ For instance, Slovenia-Bosnia and Herzegovina BIT (2001), Article 8.4: "Neither Contracting Party shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered in those proceedings." Article 27 of the ICSID Convention contains similar rules. See also, Switzerland-Bosnia and Herzegovina BIT (2003), Article 9.5: "The Contracting Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its immunity [...]."

⁹⁸ *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, para. 32; *Eureko B.V. v. Poland case*, Partial Award, Ad Hoc Arbitration, para 246; *Fedax v. Venezuela*, ICSID Case no. ARB/96/3, Decision on Jurisdiction, 11 June 1997, 5 ICSID Rep. 186.

⁹⁹ C Schreuer *et. al.*, *Principles of International Investment Law*, (Oxford: Oxford University Press 2022).

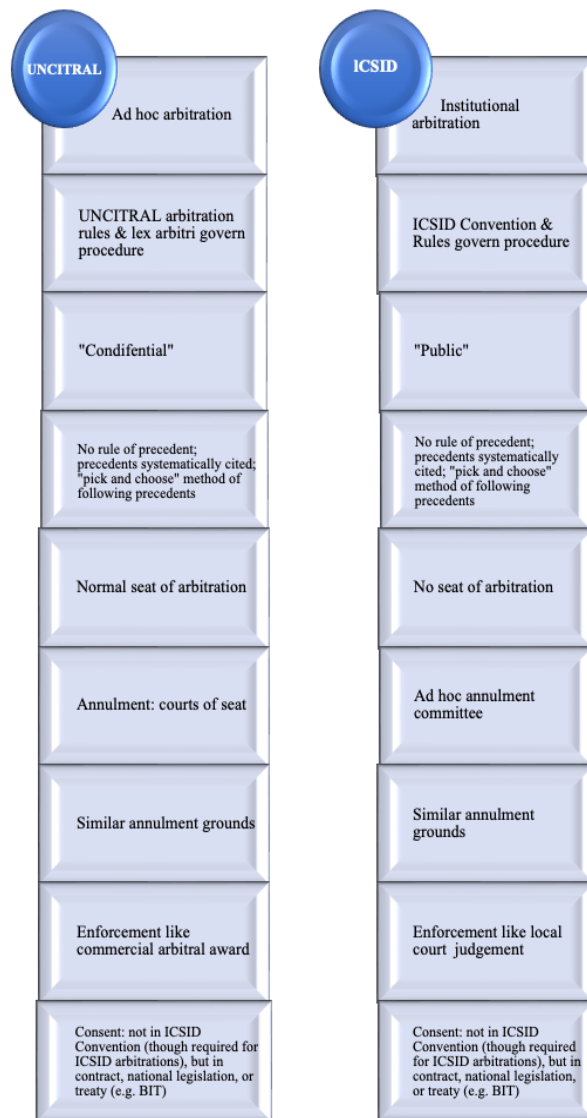


Figure V: Assessment of *ad hoc* vs. institutional arbitration

To evaluate the risks and benefits of *ad hoc* arbitration in comparison with institutional arbitration, BiH must carefully balance all the factors presented in the table. It should be cautious when choosing between the two alternatives and weigh the potential benefits and likely negative consequences.

In addition, BiH regularly includes a provision on the allocation of costs in its dispute settlement clause, which can be both beneficial and disadvantageous. Parties can regulate and

decide how to allocate the costs of arbitration without overstepping the tribunal's jurisdiction, but this approach might be harmful if the respondent state is successful in its claims.¹⁰⁰

Finally, BiH should conduct a risk-benefit assessment based on factual information about the litigiousness of investors from its counterparty, the type of claims they usually bring, and their responsibility to cover costs in case of an unfavorable outcome (see for a concrete example the template in the Annex).

4.3.4.2. Best practices for ISDS clauses

ISDS clauses in BITs can pose a significant threat to many countries, particularly developing ones, by subjecting them to costly arbitral proceedings and potentially large awards. In their efforts to attract inward investment and promote profitability, countries may enter into substantive obligations that they cannot realistically fulfil. Although it is generally the government's responsibility to negotiate these agreements, their commitments are binding at all levels of state governance. Achieving a fair balance between competing interests can be challenging, and the inclusion of ISDS provisions can further complicate matters.¹⁰¹

ISDS provisions in states follow either a minimalist or detailed approach. The former is adopted by most EU countries, including BiH, and involves a broad ISDS scope and limited procedural details. Precisely, it includes a cooling-off period for negotiation, followed by international arbitration.¹⁰² However, this approach leaves all procedural aspects to be determined by the selected arbitration rules, which can be damaging.

BiH may consider a second approach to ISDS provisions, which involves a more limited scope and detailed procedural regulation. Under this approach, the parties to the BIT would regulate important elements, such as enforcement of the award, consolidation of related proceedings, and transparency of the arbitral process. Some tailored advice for BiH includes reducing the subject-matter scope for ISDS claims, narrowing down the definition of "qualifying investors" in the BIT, and potentially introducing the requirement to exhaust local remedies

¹⁰⁰ See generally, S. Brewin, "Security for Costs", (2018) IISD Best Practices Series, available at: <https://www.google.com/search?client=safari&rls=en&q=S.+Brewin%2C+%E2%80%9CSecurity+for+Costs&ie=UTF-8&oe=UTF-8>, accessed 30 June 2023.

¹⁰¹ See generally, J Pohl, K Mashigo and A. Nohen, "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", (2012) OECD Working Papers on International Investment: OECD Publishing, available at www.oecd.org/daf/investment/workingpapers, accessed 30 June 2023.

¹⁰² C Schreuer, "Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road", (2004) 5(2) *Journal of World Investment & Trade*, 231–56; *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentina*, ICSID Case no. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paras. 96-113; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004.

before resorting to international arbitration. While some countries have abandoned ISDS altogether, it is not advisable for BiH at this stage.

BiH could also limit the treaty obligations subject to ISDS by specifying disputes related to expropriation or compensation only, or exclude pre-establishment obligations. It could also exclude disputes in specific sectors (such as real estate, financial services, national security, oil and gas services etc.), or introduce a time limit for such claims (e.g., three-years period). It could consider including a provision to limit the costs of arbitration to avoid uncertainty due to tribunals' discretionary power in this regard.¹⁰³

Additionally, to ensure an effective cooling-off period, BiH should provide specific details such as a starting date and an investor's legal obligation to notify the government agency of the dispute. BiH should also consider including further details on the consultation procedure in the BIT, such as the timing of consultations and the relevant state authority authorised to conduct such discussions, to promote settlements through negotiations as a measure of last resort.

4.3.5. Assessment of the legal risks associated with Country X based on the existing BITs

Following the beneficiary's request, the present analysis examines the possible legal risks associated with the conclusion of a BIT with Country X as an example for application of the assessment methodology. This analysis is based on BITs that have already been concluded by the exemplary Country X. For the purposes of this assessment, the BITs taken into account are primarily the ones concluded with few selected countries in the vicinity of BiH.

The choice of these countries has been based solely on the following factors: 1. commonalities and proximity with BiH, 2. litigiousness against BiH, and 3. the most recent model to assist in extrapolating safe conclusions.

¹⁰³ *Id.*

4.3.5.1. Reviewing the definition of ‘investment’ and ‘investor’ in the BITs concluded by Country X

Assessing the risk of a BIT with Country X starts with examining the new generation BITs they have concluded recently. In particular, the provisions that specify the scope of “*protected investors*”. These provisions enable the withholding of treaty benefits from an investor owned or controlled, through a corporate structure, by individuals from a third party or from the denying party itself. This limitation in the definition of investor mitigates abuses, such as treaty shopping, claims brought by “mailbox companies”, and the granting of treaty benefits to its own nationals through corporate structures. In other words, it guarantees that only companies and individuals intended to be protected by the BIT are able to enjoy its benefits.¹⁰⁴

Recent BITs concluded by Country X adopt a detailed definition of investor. However, the restrictive nature of the clause varies from one BIT to another. For instance, one of the BITs (Sample 1) excludes double nationals and mailbox corporations from the definition of investor. Article 1(3)(a) states that a natural person is an investor if it “does not have the nationality of the host state”. Article 1(3)(b)(i) requires legal entities to not only be incorporated under the laws of the home state in order to benefit from the treaty, but also demands that the “central administration or place of effective management” be situated there. Article 1(3)(b) further requires legal entities to have “substantial business activities in the territory of the home state” in order to qualify as an investor.

Another selected BIT of Country X (Sample 2), on the other hand, is not so restrictive. Although Article 1(2) contains a detailed definition of investor, it does not exclude double nationals. Moreover, the “substantial business activities” requirement for legal entities is not cumulative to the place of incorporation and administration. Under Article 1(2)(b) of that BIT, these requirements are all alternative. Fulfilling one of them is sufficient in order to be considered a protected investor.

The third selected BIT (Sample 3) is even less restrictive. Article 1(a) does not exclude double nationals from the scope of application, and “substantial business activities” is not a requirement for legal entities to benefit from the BIT.

Bearing this in mind, it is possible to expect that a BIT proposal from Country X will favor the inclusion of a definition of “investor”. The degree of restrictiveness of this provision

¹⁰⁴ UNCTAD, “Investment policy framework for sustainable development: policy options 1.1.0 to 1.1.2.”, available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf, accessed 30 June 2023.

may vary. In order to reduce litigation related risks, BiH should strive towards the adoption of a definition similar to the one in the Sample 1 BIT. Since this treaty excludes both double nationals, and has cumulative requirements for a legal entity to be considered a protected investor (both place of incorporation and substantial business activities), it provides an augmented degree of protection to a capital importing country such as BiH.

4.3.5.2. Sovereign Wealth Funds

Some countries recently pushed towards the inclusion of sovereign wealth funds within the definition of “protected investors”. Article 1(2)(b) of Country X sample BIT explicitly lists “sovereign wealth funds and development funds” as protected investors. Sovereign wealth funds are also listed in Article 3(b) of the other sample BIT. Similarly, in one of the concluded BITs the definition of investor expressly encompasses ‘governmentally owned’ or ‘government controlled’.

When the BIT does not expressly include in the definition of investor sovereign wealth funds or ‘*government controlled*’ entities, ICSID tribunals tend to apply the Broches test in order to assess whether the legal entity is a protected investor. The test aims at establishing whether the state-owned entity made the investment acting as a private entity, as opposed to an agent of the state. If the legal entity fails the test, it will not be capable of submitting a claim for arbitration under ICSID, because it is an inter-state dispute. In practice, the term ‘*national of another Contracting party*’ in Article 25(1) of the ICSID Convention has been interpreted as including wholly or partially government-owned companies. Most of the time, arbitral tribunals will focus on the nature of state-owned company’s activities, excluding commercial endeavours driven by state policies.¹⁰⁵

The main criticism of this approach is that the test has been applied in a case-specific manner. In particular, tribunals have looked at whether the sovereign investor acted as a government agent in initiating and sustaining the litigious investment itself rather than considering its role as a government agent in carrying out its functions within its home state's territory or elsewhere.

For example, in *Masdar v. Spain* a Dutch company indirectly owned by the government of Abu Dhabi asserted a claim against Spain. Spain argued that the tribunal lacked jurisdiction, because claimant's conduct was attributable to the UAE. The tribunal dismissed Spain’s

¹⁰⁵ R. Mohtashami and F. El-Hosseny, “State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?”, in N. Ziadé (ed.), *BCDR International Arbitration Review*, (Kluwer Law International 2016).

objection to its jurisdiction. Applying the reasoning adopted in *CSOB v Slovakia*, the tribunal affirmed its jurisdiction, because claimant had made the investment in a private capacity, not “*acting as an agent for the government or discharging an essential government function*”.¹⁰⁶

Bearing in mind the recent BITs concluded by Country X, it is possible to assume they will desire the inclusion of a specific provision stating that sovereign wealth funds are protected investors. In the eventuality of a litigation, arbitral tribunals will possibly invoke the Broches Test and the relevant case law in order to assess whether the fund invested in BiH in its private capacity or as an agent of the government. This scenario increases the risk of litigation, because BiH will have no control over whether or not the government’s sovereign wealth fund will be able to benefit from the BIT. The decision will ultimately fall upon the arbitral tribunal.

In order to reduce this risk, BiH could aim at excluding sovereign wealth funds from the definition of investor. Other alternatives to minimize the risk of litigation are:

- Sectoral carve-outs similar to the GATT and GATS;
- Include national security exceptions (i.e., financial stability limitations)
- Differentiate based on the new EU screening mechanism that BiH is working on implementing between two levels of investment review: Before it enters into the market (i.e., exclude pre-establishment rights and include performance criteria or compliance with national law in order for the investment to be admitted) and after it enters into the market (include annexes to the BIT, like Argentina in its model BIT to specify the definitions of ‘investment’ and ‘investor’, the particular sectors that are included or excluded from regulation, exceptions on the exercise of state’s regulatory rights, specific obligations for the investors, etc.).

4.3.5.3. Reviewing the FET, MFN and Expropriation clauses incorporated in the BITs concluded by Country X

A key element in assessing the Country’s intentions are their use of FET and expropriation clauses. The country’s BITs have taken a careful approach by providing explicit

¹⁰⁶ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 520–521.

clarity on the meaning of FET and delimiting its scope. This is achieved by exhaustively outlining the specific obligations that, if breached, would violate the FET.

The BITs demonstrate, in general, an apparent effort to preserve the right of states to regulate by explicitly stating certain government actions and other circumstances that cannot be considered breaches of the FET. They contain provisions that the FET clause shall not prevent states from implementing regulatory measures to pursue legitimate policy objectives, such as protecting public order, public health, or the environment. By including these safeguards, these treaties seek to balance protecting investors' rights and allowing states the flexibility to regulate in the public interest and pursue legitimate policy goals.

The BITs concluded by Country X usually link the MFN obligation to the FET clause. Treatment is usually defined in a restrictive manner, both excluding procedural rights, such as the ISDS clause, and substantive obligations from other treaties in themselves. The BITs usually exclude from the definition of treatment any advantage that has to be granted arising from membership in economic unions, as well as reciprocity agreements. In other words, Country X usually adopts a narrow definition of treatment, restricting the scope of application of the MFN clause.

The expropriation provision in Country X's BITs is also distinctive in its coverage of both direct and indirect expropriation, in contrast to some states that exclude indirect expropriation. These BITs address the challenge of defining the boundary between indirect expropriation and legitimate public policy by including indicative factors. To protect public interests, such as health, safety, environment, or labor rights, do not qualify as indirect expropriation or give rise to compensation claims. This balanced approach protects investors while preserving a state's regulatory autonomy, promoting legitimate public policy objectives, and ensuring fair treatment for investors and the state.

4.3.5.4. Reviewing the ISDS clause incorporated in the BITs concluded by Country X

The BITs of Country X incorporate progressive and forward-looking ISDS provisions, demonstrating a recognition of the need for reform. These ISDS provisions closely resemble the reform options put forth by UNCTAD. As an illustration, the BITs restrict the scope of disputes eligible for ISDS, confining them solely to violations of treaty obligations rather than encompassing disputes based on investment contracts. Furthermore, a time limit is imposed, rendering ISDS unavailable for claims that have been submitted but the investor fails to take

action within six months. A noteworthy advancement is also the exclusion of an investor's ability to initiate ISDS proceedings if it has not fulfilled its obligations, including compliance with domestic laws and refraining from engaging in corrupt practices. Lastly, the BITs require the exhaustion of local remedies and the exploration of consultation alternatives before commencing international arbitration.¹⁰⁷ This requirement introduced by Country X's BITs contributes to reducing the disparity between foreign and domestic investors within the realm of BITs.

As a result, through these provisions, Country X's BITs exhibit a commitment to addressing perceived deficiencies in old-generation BITs and advancing a more balanced and equitable approach to resolving investor-state disputes.

4.3.5.5. Application of the Checklist to Country X Scenario

Considering that this report was elaborated without a concrete proposal by Country X to BiH, the third section of the Checklist will be filled on the basis of the profile described in 4.3.4. *supra*. **Provided** a proposal from Country X follows its **recent BITs**, the Checklist will inform that from a legal standpoint, the proposal is predominantly classified as **low risk**:

Assessment of the BIT: FET Clause			
How many BITs of BiH contain an FET clause?		37/37	
Is the FET clause generally broad or narrow?		Broad (X)	Narrow ()
Have investors from (country) taken advantage of such FET clauses yet? <i>*based on the existing case-law</i>		Yes (X)	No ()
How is FET defined in the proposal?			
Excludes FET ()	Provides a guide on how to interpret key terms (X)	According to International Law ()	Other ()
Exhaustive List ()	Excludes specific concepts from FET's definition ()	According to the Minimum Standard of Treatment ()	_____
Assessment of the BIT: MFN Clause			
How many BITs of BiH contain a specific MFN clause?		37/37	
Does BiH want an MFN clause?	No ()	Narrow (X)	Broad ()

¹⁰⁷ See M D Brauch, "Exhaustion of local remedies in international investment law", (2017) IISD Best Practices Series, available at <https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law>, accessed 30 June 2023.

What limitations does the MFN clause contain?			
No definition of treatment ()	Provides a criterion for comparing investors ()	Carves out sectors ()	
Provides no temporal restriction ()	Provides a definition of treatment (X)	Limited to post-establishment obligations (X)	
How does the MFN clause relate to the ISDS clause?			
The MFN clause does not exclude the ISDS clause from its scope ()		The MFN clause does not encompass the ISDS clause (X)	
Assessment of the BIT: Expropriation Clause			
How many BITs of BiH contain a specific expropriation clause?		37/37	
Does BiH want an expropriation clause?	No ()	Narrow (X)	Broad ()
What does the expropriation clause contain?			
Conditions for it to qualify as lawful (X)	Distinction between direct/indirect/ partial (X)	Methods based on calculation of compensation (X)	Other () _____
In Which Currency Should the Amount Due for Lawful Expropriation be Paid?			
USD (X)	Euro ()	Bosnian Mark ()	Other () _____
Does the expropriation clause allow for payment in instalments?	Yes ()		No (X)
Does the expropriation clause set a specific valuation date?	Yes (X)		No ()
Does the expropriation clause include regulatory exceptions?	Yes (X)		No ()
How is expropriation defined in the proposal?			
High Protection ()	Increased Predictability ()	Qualified (X)	
Assessment of the BIT: ISDS Clause			
How many BITs of BiH contain an ISDS clause?		37/37	
Does BiH want an ISDS clause?	No ()	Narrow (X)	Broad ()
Does the clause require prior consultations/ negotiations?	Yes (X)		No ()
Does the clause include cooling-off periods?	Yes (X)		No ()
Does the clause include a fork-in-the-road requirement?	Yes (X)		No ()
Does the clause provide for institutional, or <i>ad hoc</i> arbitration?	Institutional (X)		<i>Ad hoc</i> (X)
Does the clause regulate the allocation of costs?	Yes ()		No (X)
How is the ISDS provision formulated in the proposal?			
Minimalistic ()		Restrictive (X)	

5. Conclusion

By implementing the Checklist approach proposed herein, the government of BiH will be able to benefit from a user-friendly communication tool capable of helping them in the process of organizing and collecting relevant data necessary for making an informed decision about engaging or not in BIT negotiations with any prospective partner.

After completing the first part of the Checklist, the competent authorities will have a simple and clear understanding of the existing foreign direct investment flows between BiH and the prospective partner. This serves as a useful mechanism for visualising the current state of the relationship, whether it has been increasing or decreasing in the past years, and which economic sectors are likely to benefit from such negotiations.

Through the second category of the Checklist, the government of BiH will be able to build a concise and simplified picture of the possible economic impacts that the BIT may entail. This qualitative assessment goes beyond a simple analysis of the impacts on investment flows (Pillar 1). It also aims at assisting in process of information gathering regarding likely impacts on BiH's economy more generally (Pillar 2), looking into the sectors that are likely to receive investment flows, the possible economic growth opportunities that arise from the BIT, the possible impacts on competition within BiH, and on human capital. Beyond providing a general picture of the possible economic risks and benefits associated with this proposal, the second category of the Checklist may serve as a useful tool for conducting consultations with sectors of BiH's industrial, service, agricultural, and extractive economy, as well as with civil society likely to be impacted by the investment treaty. Such consultations may not only ease the process of future implementation of the BIT, but also help the affected parties better understand how to benefit from the agreement.

The last category of the Checklist provides the government of BiH with a general understanding of the possible litigation risks associated with the BIT proposal. After completing this section of the Checklist, the government of BiH will dispose of a practical tool capable of assisting them at understanding the consequences that certain clauses may entail. Moreover, this section of the Checklist may also serve as a guide to better frame policy initiatives after the BIT enters into force.

Finally, risk qualifications provided herein are indicative. They serve as warning signs aimed at facilitating the visualization of possible impacts arising from the BIT. Consequently, they should not be read as a green-light to engage in negotiations, nor as red-lights ordering BiH to pass a proposal. There are multiple factors that should be taken into account when making such a relevant decision, and this Checklist touches upon some of the most pressing.

Nevertheless, It does not take into account possible red lines or relevant political considerations that competent political authorities may have to either engage or not into such negotiations. Ultimately, the decision to go ahead or stay home belongs to the competent political authorities of BiH, and this Checklist serves as a tool capable of assisting in the decision-making process.

6. Annex I – Checklist

Category I: Partner's Profile				
Country Name:				
Has Concluded a BIT with BiH?		Yes ()	No ()	
Is the BIT In Force?		Yes ()	No ()	
Inward Foreign Investment Flows Originating From (country)				
2018	2019	2020	2021	2022
(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)
Outward Foreign Investment Flows Originating from BiH to (country)				
2018	2019	2020	2021	2022
(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)	(value in million USD)
Main Relevant Capital Exporting Industries from (country)				
Electricity ()	Armaments ()	Mining ()	Tourism ()	
Broadcasting ()	Agriculture ()	Transportation ()	Manufacturing ()	
Infrastructure ()	Banking ()	Real Estate ()	Other () _____	

Category II: Economic Impact			
Pillar 1: The BIT's Potential in Attracting Investment Flows			
Part 1: What are the (Dis)Incentives in the BIT for Foreign Investments?			
Incentives		Disincentives: any reservations in	
Tax incentives ()	Infrastructure support ()	Labour ()	Capital ()
Regulatory support ()	Investment guarantee ()	Land, Natural Resource ()	Other () _____
Legitimate expectations ()	Dispute settlement ()		
Other () _____			
Part 2: Benefit - Will the BIT Succeed in Attracting Beneficial Inward Investment?			
<i>Enabling Factor 1: Stability of Political Environment</i>			
The (dis)incentives create a _____ political/legal environment for the prospective investment.	Positive ()	Neutral ()	Negative ()
<i>Enabling Factor 2: Stability of Economic Environment</i>			
The (dis)incentives create a _____ economic environment.	Positive ()	Neutral ()	Negative ()
<i>Enabling Factor 3: Educated and Skilled Work Force</i>			

The (dis)incentives provide _____ access to competent BiH work force.		Positive ()	Neutral ()	Negative ()
Part 3: Cost - Will the BIT Conflict with Domestic or International Commitments?				
The (dis)incentives have a _____ effect on the fulfilment of BiH's international commitments.		Positive ()	Neutral ()	Negative ()
Agenda 2030 and the SDG Framework ()	EU accession commitments ()	WTO accession commitments ()	Regional commitment and harmonisation ()	
Labour rights treaties ()	Environment and energy treaties ()	Economic treaties: trade, tax, etc. ()	Other () _____	
The (dis)incentives have a _____ effect on the implementation of BiH ERP.		Positive ()	Neutral ()	Negative ()
Fiscal restructuring: revenue and spending ()		Governmental accountability and capacity-building ()		
Price and currency management ()		Business environment improvement ()		
Public finance management ()		Education and employment facilitation ()		
Pillar 2: The Investment's Potential in Contributing to BiH Economy				
Part 1: Profile of the Prospective Investment				
Qualification: Which Factor of Production is Likely to be Invested in?				
Physical Capital ()		Other ()		
Transport ()	Efficient Energy ()	Land ()	Natural Resource ()	
ICT ()	Other () _____	Real Estate ()	Other () _____	
Scaling: What Type of Investment is Likely to be Attracted by the BIT?				
Greenfield Investments ()	Brownfield Investments ()	Indirect Investments ()	Other () _____	
Part 2: The Investment's Contribution to Economic Growth				
Qualification: Does the Impacted Sector Drive BiH Economic Growth?				
Industry		Services		
Manufacturing ()	Construction ()	Transport ()	ICTs ()	
Green Energy ()	Agriculture and Forestry ()	Tourism ()	Electricity, Water and Sanitation ()	
[Hydropower ()]				
Fossil Fuels, Mining ()	Other () _____	Retail, Restaurants ()	Other () _____	
Qualification: The investment has a _____ effect on creating healthy competition.		Positive ()	Neutral ()	Negative ()
Technology Transfer ()	Knowledge Transfer ()	International Standards ()	Other () _____	
Qualification: The investment has a _____ effect on creating a better business environment.		Positive ()	Neutral ()	Negative ()
Resource mobilisation ()	Interaction facilitation ()	Governance assistance ()	Other () _____	

Scaling: Are the Impacted Entities Important for Economic Growth?					
Medium ()	Micro/Small ()	Large ()	Other () _____		
Part 3: Impact of Investment Flow on Human Capital					
Potential Benefits		Impact on Vulnerable Social Groups			
Well-paid employment ()	Training and education ()	Young ()	Women ()	Disabled ()	
Social Assistance ()	Other () _____	Roma ()	Other () _____		
Conclusion: Economic Cost-Benefit Assessment of the BIT					
Short-term: Contribution to Economic Growth		Positive ()	Neutral ()	Negative ()	
- <i>Scale</i>		High ()	Medium ()	Low ()	
Long-term: Create Better Business Environment		Positive ()	Neutral ()	Negative ()	
- <i>Scale</i>		High ()	Medium ()	Low ()	
Long-term: Influence on Human Capital		Positive ()	Neutral ()	Negative ()	
- <i>Scale</i>		High ()	Medium ()	Low ()	
Conclusion: Cost-Benefit		Conclusion: Scale			
Positive ()	Neutral ()	Negative ()	High ()	Medium ()	Low ()

Category III: Legal Risks Associated with the BIT					
Assessment of the BIT: FET Clause					
How many BITs of BiH contain an FET clause?			___/37		
Is the FET clause generally broad or narrow?			Broad ()	Narrow ()	
Have investors from (country) taken advantage of such FET clauses yet? <i>*based on the existing case-law</i>			Yes ()	No ()	
How is FET defined in the proposal?					
Excludes FET ()	Provides a guide on how to interpret key terms ()	According to International Law ()	Other () _____ _____ _____		
Exhaustive List ()	Excludes specific concepts from FET's definition ()	According to the Minimum Standard of Treatment ()			
Assessment of the BIT: MFN Clause					
How many BITs of BiH contain a specific MFN clause?			___/37		
Does BiH want an MFN clause?		No ()	Narrow ()	Broad ()	
What limitations does the MFN clause contain?					
No definition of treatment ()	Provides a criterion for comparing investors ()		Carves out sectors ()		

Provides no temporal restriction ()	Provides a definition of treatment ()	Limited to post-establishment obligations ()	
How does the MFN clause relate to the ISDS clause?			
The MFN clause does not exclude the ISDS clause from its scope ()		The MFN clause does not encompass the ISDS clause ()	
Assessment of the BIT: Expropriation Clause			
How many BITs of BiH contain a specific expropriation clause?		___/37	
Does BiH want an expropriation clause?	No ()	Narrow ()	Broad ()
What does the expropriation clause contain?			
Conditions for it to qualify as lawful ()	Distinction between direct/indirect/ partial ()	Methods based on calculation of compensation ()	Other () _____
In Which Currency Should the Amount Due for Lawful Expropriation be Paid?			
USD ()	Euro ()	Bosnian Mark ()	Other () _____
Does the expropriation clause allow for payment in instalments?		Yes ()	No ()
Does the expropriation clause set a specific valuation date?		Yes ()	No ()
Does the expropriation clause include regulatory exceptions?		Yes ()	No ()
How is expropriation defined in the proposal?			
High Protection ()	Increased Predictability ()	Qualified ()	
Assessment of the BIT: ISDS Clause			
How many BITs of BiH contain an ISDS clause?		___/37	
Does BiH want an ISDS clause?	No ()	Narrow ()	Broad ()
Does the clause require prior consultations/ negotiations?		Yes ()	No ()
Does the clause include cooling-off periods?		Yes ()	No ()
Does the clause include a fork-in-the-road requirement?		Yes ()	No ()
Does the clause provide for institutional, or <i>ad hoc</i> arbitration?		Institutional ()	<i>Ad hoc</i> ()
Does the clause regulate the allocation of costs?		Yes ()	No ()
How is the ISDS provision formulated in the proposal?			
Minimalistic ()		Restrictive ()	

7. Annex II – List of BITs Concluded by BiH and Still in Force

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Treaty	Parties	Entry into Force	Protections	ISDS
BiH - Malaysia BIT	Malaysia	27/05/1995	<ul style="list-style-type: none"> • Expropriation • MFN • National Treatment • FET • FPS • War Clause 	Yes
BiH - Croatia BIT	Croatia	04/08/1997	<ul style="list-style-type: none"> • Expropriation • MFN • National Treatment • FET • FPS 	Yes
BiH - Egypt BIT	Egypt	29/10/2001	<ul style="list-style-type: none"> • Expropriation • MFN • FET 	Yes
BiH - Romania BIT	Romania	03/12/2001	<ul style="list-style-type: none"> • Expropriation • MFN • National Treatment • FET • FPS • War Clause 	Yes
BiH - Finland BIT	Finland	08/12/2001	<ul style="list-style-type: none"> • Compensation for expropriation • MFN • National Treatment • FET • FPS 	Yes

¹⁰⁸ See generally, UNCTAD Website at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/285/alas-international-v-bosnia-and-herzegovina>, accessed 30 June 2023.

BiH - Sweden BIT	Sweden	01/01/2002	<ul style="list-style-type: none"> • Expropriation • Compensation for losses • MFN • National Treatment • FET • FPS 	Yes
	Netherlands	01/01/2002	<ul style="list-style-type: none"> • Expropriation • Compensation for losses • MFN • National Treatment • FET • FPS <p><i>* Looks like an old generation BIT also in terms of formatting/structure</i></p>	Yes
	Slovenia	01/07/2002	<ul style="list-style-type: none"> • Expropriation • Compensation for losses • MFN • National Treatment • FET • FPS <p><i>* Not clear dispute settlement provision (old generation)</i></p>	Yes
	Austria	20/10/2002	<ul style="list-style-type: none"> • Expropriation • Compensation for losses • MFN • National Treatment • FET • FPS <p><i>* Looks like an old generation BIT also in terms of formatting/structure</i></p>	Yes
	Kuwait	23/12/2002	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes

BiH - Spain BIT	Spain	21/05/2003	<ul style="list-style-type: none"> • Expropriation - Compensation • Pre-admission clause • MFN • National Treatment • FET • FPS 	Yes
	United Kingdom	25/07/2003	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes (Including ICC)
	Ukraine	22/01/2004	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes (Including ICC)
	Czech Republic	30/05/2004	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Serbia	25/08/2004	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	North Macedonia	26/04/2004	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes

BiH - China BIT	China	01/01/2005	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
BiH - Switzerland BIT	Switzerland	21/05/2005	<ul style="list-style-type: none"> • Expropriation - Compensation • Pre-admission clause • MFN • National Treatment • FET • FPS 	Yes
BiH - Hungary BIT	Hungary	31/08/2005	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
BiH - Belarus BIT	Belarus	22/01/2006	* Available only in Russian	* Available only in Russian
BiH - Greece BIT	Greece	15/06/2007	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
BiH - Germany BIT	Germany	11/11/2007	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes

BiH - France BIT	France	07/12/2007	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	India	13/02/2008	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Denmark	03/06/2008	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Moldova	09/06/2008	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Qatar	05/02/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • Taxation <p><i>* Most provisions refer to maritime activities as well</i></p>	Yes
	Turkey	10/02/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS • Taxation 	Yes

BiH - Lithuania BIT	Lithuania	16/03/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Albania	06/04/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Portugal	03/05/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Iran	02/06/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • Pre-admission clause • MFN • National Treatment • FET • FPS 	Yes
	Slovakia	19/11/2009	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes
	Pakistan	14/05/2010	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS <p><i>* The MFN provision incorporates an NT clause as well</i></p>	Yes

BiH - BLEU (Belgium- Luxembourg Economic Union) BIT	BLEU (Belgium- Luxembourg Economic Union)	16/09/2010	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes (Including ICC, SCC)
			<i>* Mirrors new generation BITs in some parts</i>	
BiH - Jordan BIT	Jordan	25/11/2011	<i>* Available only in Arabic</i>	<i>* Available only in Arabic</i>
BiH - San Marino BIT	San Marino	24/05/2012	<ul style="list-style-type: none"> • Expropriation - Compensation • MFN • National Treatment • FET • FPS 	Yes

8. Annex III – Legal Assessment of the Procedural Burden of the Law on Conclusion of International Agreements of BiH

BiH's law on the Conclusion of International Treaties regulates in detail the process for negotiating and implementing a BIT.¹⁰⁹ This law enables a number of different parties/entities¹¹⁰ to propose negotiations for the initiation of negotiations for the conclusion of a BIT. However, the ultimate decision to engage in such negotiations has to be approved by the relevant Ministry and BiH's Council of Ministers ("CoM"), and the Presidency of BiH. In the meantime, preliminary negotiations may take place if the CoM of BiH and the Ministry of Foreign Affairs give their approval. If at this stage, BiH agrees to proceed on the initiation of such negotiations, a delegation representing the State will be designated by the BiH Presidency and its CoM.

As a general remark, it is to be stated that from the thirty-seven BITs that BiH has concluded through the years, it took almost a decade for all of them to be implemented and officially entered into force.¹¹¹ The same "pattern" seems to be also applicable in the negotiating stages. While the complexity of BiH's internal structure when it comes to negotiating and concluding international agreements may justify such delays, it poses a significant challenge to the country's plans. The involvement of all relevant organs/entities from the beginning of the negotiating process may seem burdensome, potentially discouraging investors who often consider the presence of a BIT offering protection.

¹⁰⁹ Law on the Conclusion and Execution of International Agreements, Official Gazzette of BiH, No. 29/00, 32/13.

¹¹⁰ Precisely, according to Art 4 of the Law on Procedure for Conclusion and Implementation of International Agreements, initiative to initiate a procedure for the conclusion of international agreements may be taken by the institutions of BiH, entities, cantons, other regional and local communities, enterprises, NGOs, and other legal persons in the field of their activities.

¹¹¹ UNCTAD, Investment Policy Hub: Bosnia and Herzegovina Bilateral Investment Treaties (BITs), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/25/bosnia-and-herzegovina>, accessed 27 April 2023.