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Post-Achmea Winds of Change: Opportunities and Perspectives for Bosnia and Herzegovina

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The Effects of Achmea on the Prospective EU Member States

Much ink has been spilt on of the aftermath of the CJEU *Achmea* decision which has turned the world of arbitration on its head. In-depth analysis and commentary were previously featured on the Kluwer Arbitration Blog as well. Following the decision of the CJEU and the clarifications of the EU Commission, all member states have taken swift actions to create the framework of full compliance with the *Achmea* decision by signing several joint declarations expressing their willingness to terminate their intra-EU BITs and to replace their investor protection mechanisms with their equivalents under the *acquis communautaire*. Regardless of what side of the discussion one may eventually settle with, there is no doubt that a new day has dawned in the world of ISDS in the EU, and this is a consideration which will have to be addressed not only by the existing member states, but also by the countries seeking to gain membership status in the near future.

Bosnia and Herzegovina ("BiH") and its neighboring countries in the Western Balkans are aspiring EU member states, and as such, they have been involved in comprehensive reform processes aimed at harmonizing their legislative and political framework with the *acquis communautaire*. The ISDS system is, therefore, no exception, and the *Achmea* decision was a pivotal moment in this process as well. Thus, BiH has to take immediate action towards developing a strategy for terminating intra-EU BITs prior to its accession to the EU, in order to avoid gaps in investor protection and legal uncertainty. The country is in the position to preemptively construct an "exit" strategy with EU member states, which will not only be beneficial to its EU accession prospects, but also to the stability of its investor protection system.

The Investor Protection Framework in BiH

BiH is currently a party to 20 BITs with EU member states, whose content is largely similar and they contain the standard terms of protection for the investors and their investments, the relationship between the contracting states and the dispute resolution mechanism. Although there are slight variations in the exact constellation of the dispute resolution clauses, all the BITs provide for arbitration as an option, following an attempt of an amicable settlement, in addition to or as an alternative to domestic remedies (national courts and administrative tribunals). These are so-called "fork in the road" provisions which allow the parties to choose among various fora, but once they

decide, they waive their recourse to the remaining options. Therefore, there is no obligation of exhausting the local remedies as a precondition to initiating arbitration. Under this framework, any dispute is most likely to end up before an arbitral tribunal (whether *ad hoc* under the UNCITRAL Rules or institutional – ICSID, ICC or national arbitral institutions). This means that the ISDS provisions in BiH BITs are "incompatible with EU law" and will thus have to be terminated and replaced. Thus far, there have been no indications from the BiH government of what (if any) BIT termination mechanism is most likely to be applied.

Best Practices in Intra-EU BIT Termination

Any approach to the termination of intra EU-BITs chosen by the BiH government will have to be in compliance with the termination provisions of the Vienna Convention on the Law of Treaties ("VCLT"), which state that a contracting state can terminate the treaty in accordance with its provisions or at any time in mutual agreement of the contracting parties. This means that the door is open to a bilateral or multilateral approach to BIT termination, in coordination with its EU counterparts.

There have been examples of mechanisms developed by states either approaching EU accession or current member states which can serve as useful models for BiH in this context.
Some member states chose the bilateral approach which allows a case-by-case modification of the relevant BITs and their ultimate termination. For example, this was done with the Czech-Malta BIT in 2009, where the BIT was amended through an exchange of notes *verbales* between the two countries. These amendments also cover the so-called "sunset clause", which maintains certain provisions of the BIT in force for a given time period after the termination of the BIT. The Czech Republic and Malta agreed to terminate the BIT and explicitly replaced the protections granted to the investors through the sunset clause by the protections provided under EU law.

An interesting approach was taken by the USA and their partner countries which were approaching EU accession in 2003. Their solution was a Memorandum of Understanding which was signed between the USA and the candidate states, expressing their desire to continue fruitful cooperation, while allowing the full compliance of the new EU member states with the *acquis*.

More recently, the member states issued declarations (on 15 January and 16 January 2019, and a third one by Hungary on 16 January 2019) that they would commit to terminating their intra-EU BITs by 6 December 2019. These declarations also clarified that the termination would extinguish the existing sunset clauses, and 22 of the member states accepted the view that the *Achmea* decision also extended to the ISDS provisions contained in the ECT.

Potential Termination Mechanisms for BiH BITs

Ultimately, the most adequate solution could be a two-step process (for each individual BIT or on a multilateral basis) where the countries

1. agree to terminate their BITs with automatic effect from the day BiH joins the EU and
2. make express amendments to the provisions of the BITs which extend the effect of certain protections (including the ISDS provisions) for a specified period of time after the termination of

the BIT (most notably sunset clauses).

The initial agreement to terminate the BIT could serve as an official notification for the investors which would contribute to the transparency and legitimacy of the process. With the knowledge of the upcoming termination, the investors would be in the position to get informed on the protections they will enjoy in the post-BIT era. The amendments which will be made to certain provisions of the BIT will ensure that there is no confusion regarding the exact protection framework and dispute resolution mechanisms which the investors can refer to.

Lock-in periods are provisions determining a period of time during which the BIT cannot be unilaterally terminated, from the date of entry into force (10 years in most BiH BITs). Three BiH intra-EU BITs are currently locked-in (the lock-in period for Portugal lapsed in February of 2019, while other BITs will remain locked in (Sweden – 3 years, the Belgo-Luxembourg Economic Union – 1 year, and Lithuania – 5 years). Although under Article 54 of the VCLT the contracting states can consensually terminate the BIT at any time, an explicit agreement between the parties on the waiver of any lock-in period could add a layer of legal certainty for future reference. Sunset clauses as a general matter provide that the investors can benefit from certain BIT protections even after its termination for a certain period (10 years in most BiH BITs). The ability of investors to initiate investor-state arbitration after the termination of the BIT would run contrary to the intention of compliance with the *Achmea* decision. Therefore, BiH and its EU counterparts should expressly extinguish such sunset clauses and enumerate the provisions of investor protection provided under EU law, which will come into effect immediately after BiH’s accession into the EU. According to the Communication issued by the EU Commission, such investor protection can be found in the four fundamental freedoms (free movement of capital, services, goods and workers), legal certainty and protection of legitimate expectations, the Charter of Fundamental Rights of the European Union, general principles of EU law, and sector-specific legislation. These investor-protection mechanisms were explicitly enumerated by the EU Commission as adequate replacements for the BIT framework, as they prohibit any discriminatory or arbitrary conduct of the states which could be harmful to the investors. They also ensure that the potential disputes will remain within the jurisdiction of the member states or any subsequent ISDS tribunal or court established in accordance with EU law.

Concluding Remarks

The future of investor-state dispute settlement within the EU is far from predictable, but there is no doubt that arbitration will not be in the picture. As it is laying down the foundations for EU accession, BiH has the opportunity to adapt its investor protection system to the EU acquis “on its feet” along with the member states thus ensuring that its policies are in line with EU best practices. In these times of intensive change, it is important to ensure that the trust of the existing and future investors is maintained and that the abandonment of intra-EU BITs does not lead to new claims being brought against BiH as a host state. In addition to the wealth of natural resources the country possesses, the predictability and stability created by a unified system under the auspices of the EU could be the boost BiH needed to become more attractive for investors.

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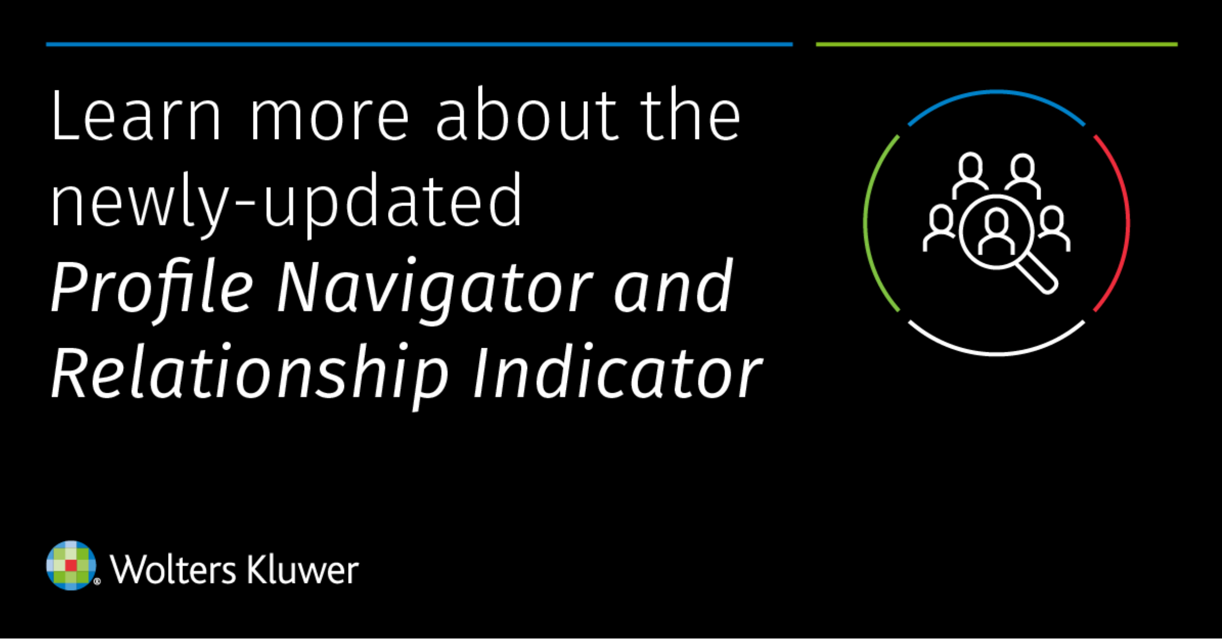

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