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# LEGAL TREATMENT OF FOREIGN INVESTMENT AND ROLE INTERNATIONAL INVESTMENT ARBITRATION THROUGH THE PRISM OF KOSOVO

Arianit KAÇANDOLLI

*University for Business and Technology - UBT, ak49527@ubt-uni.net*

Bashkim Nuredini

*University for Business and Technology, bashkim.nuredini@ubt-uni.net*

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# Legal treatment of Foreign Investment and the role of International Investment Arbitration

Arianit Kaçandolli

UBT - Faculty of Law – LL.M EU and International Business Law

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**Abstract:** This paper reflects a summary of the legal framework in Kosovo with referring to the Harmonization of EU legislation in Kosovo. In the framework of this paper we talk about the importance and meaning of foreign direct investment they have for the economy of a country, and through which I have tried to present the importance of the domestic legal order of states, as if a country wants to attract significant levels of investment and to promote itself as a good place to do business, it must protect investments and investors in all aspects in the host country. In addition, the importance of the World Bank, OECD and UNCTAD, which have historically shown interest in promoting the protection of foreign investment, is reflected, as well as the role of the ICSID Convention, which is the main instrument for resolving disputes between the state and the investor. The definition of investor and investment definitions are essential for the scope of application of the rights and obligations of investment agreements and for the establishment of the jurisdiction of arbitration courts based on investment treaties.

To finalize this scientific research, scientific literature and relevant literature were used. And for the truest finalization of this topic I have used several methods: legal method, historical method, comparative and analytical.

**Keywords:** Foreign Direct Investment, International Investment Arbitration, Determinants of FDI, legal treatment of Foreign Investments.

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## 1. Introduction

This paper addresses a summary of the legal framework in Kosovo with reference to the Harmonization of EU Legislation in Kosovo, and the importance of the SAA in terms of foreign direct investment. They talk about the importance and meaning of foreign direct investment in the economy of a country. Treats in detail and with special care, the legal regulation of foreign investments at the global level and in the Republic of Kosovo. The importance of International Commercial Arbitration in the field of investment is reflected.

Foreign direct investment (FDI) is an important part of international business and the global economy. Companies engaged in FDI can expand into new markets; relocate their production facilities across national borders; and provide the most advanced technologies, products, capabilities and ways of financing. Foreign companies can provide host countries and their domestic economies with advanced technology, improved and more effective production processes, organizational capacity, managerial skills, a market network, improved job prospects and employment skills, access to products more competitive, and economic development prospects in general. (Trakman & Ranieri, 2013, pp. 1,2 )

The main purpose of this paper is the legal treatment of foreign direct investment at the global level and in particular in the Republic of Kosovo and in the countries of the region and the role of International Investment Arbitration, analysis of the positive effects of foreign investment in Southeast European economies. and the problems faced by foreign investors, then moving on to the effects that these investments have brought to Kosovo and the problems that investors have had.

## 2. Literature Review

It is of high importance for the potential host country to identify and further develop incentives that attract FDI inflows. Market size and growth potential, business opportunities, and investment attributes (such as strong institutions and investor-friendly regulations) are some of the most powerful incentives for foreign direct investment. Therefore, improving the investment climate is an important step and opportunity for countries seeking to attract foreign investment. (European Investment Bank, 2020)

It is clear that, from ancient times, the meaning of investing in international law was limited to foreign direct investment. The evolution of international law was towards the idea that the responsibility of the state would arise if it did not treat the foreigner according to a minimum standard of treatment. This standard of treatment extended to his physical property. The physical presence in the host country and the damage suffered by the host country or its agencies were the basis of the development of the law. (Sornarajah, 2010, p. 11)

According to the United Nations Conference on Trade and Development (UNCTAD), Foreign Direct Investment (FDI) is defined as an investment that involves a long-term relationship and reflects a stable interest and control from a resident entity to an economy (investor of foreign direct or parent enterprise) to a resident enterprise in an economy other than that of the foreign direct investor (FDI enterprise or affiliated enterprise or foreign partner) (UNCTAD, 2020).

Foreign direct investment can also be determined by their "direction" or their "purpose". In their classification by direction, they are divided into: "Domestic FDI" occurs when foreign capital is invested in domestic resources. "External FDI" - sometimes referred to as "foreign direct investment" - arises when domestic capital is invested in foreign sources. (Trakman & Ranieri, 2013, p. 3).

There may be different ways in which an MNE or a foreign investor undertakes the production process in the host country. In classifying FDI according to "target", he can choose between the following strategies: (1) Greenfield investment, i.e. setting up a foreign subsidiary or factory in the host country to produce goods in the country; (2) merger and acquisition (M&A), ie the acquisition of a local firm and its production capacity; and (3) cooperating with a local firm by establishing a joint venture. (Chaudhuri & Mukhopadhyay, 2014, p. 4).

## **Legal regulation of foreign direct investment globally**

Dispute resolution within international investment law has been multilateralized to a considerable extent. Recognizing the value of FDI as an aid to development, but also the risks of investing in politically unstable countries, the World Bank established the International Center for the Settlement of Investment Disputes ('ICSID') in 1965. ICSID is now the main arbitration system for resolving disputes between foreign investors and the host countries in which they invest. ICSID is useful because it provides a well-known, neutral forum for resolving investment disputes between investors and host governments with a standardized procedure and institutional support. Related to the consent of the parties, the dispute resolution process is independent, meaning that it is independent of the influence of external bodies such as the courts. The New York Convention is widely regarded as the fundamental instrument for international arbitration, including, most importantly, what happens between investors and host countries. (Collins, 2013, pp. 16,17).

Today, it is a common summary that International Investment Law is a hybrid between domestic and international law, private and public, with analogies in commercial arbitration and public international law, as well as human rights and commercial law. (Douglas, Pauwelyn, & E. VIÑUALES, 2014, p. 18). A modern and harmonized framework of international trade law is the basis for rule-based trade relations and an indispensable part of international trade. UNCITRAL standards represent what the international community considers, at a given time, to be international best practices for regulating certain commercial transactions. (UNCITRAL, 2021).

Much of the regulation of foreign investment is done through the domestic laws of the host countries in question. Therefore, when foreign investors seek laws and regulations that affect their current potential and investment, they will also seek the provisions of domestic law. For example, a foreign investor planning to invest in China would be advised to consult the Chinese Law on Foreign-Owned Enterprises and the Law on Chinese Foreign-Owned Enterprises Joint-Venture. The main objective of international foreign investment law is to prescribe international protection standards, provide additional protection and provide foreign investors with access to an independent international tribunal in the event of a dispute between the host country and a foreign investor. Therefore, the focus of this study is the protection available under international foreign investment law rather than national laws protecting foreign investment (Subedi, 2008, pp. 55,56).

## **Legal regulation of foreign direct investments in the Republic of Kosovo**

Kosovo is recognized by approximately half of the members of the United Nations (UN) and most EU countries, but not by the United Nations or the European Union as an organization. Of course, MNEs from countries that do not recognize Kosovo face additional obstacles when considering FDI in Kosovo.

Moreover, foreigners hold concerns about the rule of law in Kosovo and remain unsure whether contracts will be ignored or enforced and protected, uncertainty is the biggest concern for MNEs in Kosovo, for fear that their investments will not be protected.

Another consequence of Kosovo's war and economic hardships is the emigration of hundreds of thousands of Kosovars. As a result, Kosovo's economy relies heavily on remittances sent by family members living and working abroad. Kosovo offers many potential advantages for MNE. In addition to its location, it features low taxes, low labor costs and project support through the Kosovo Investment and Enterprise Agency (KIESA). Perhaps Kosovo's biggest attraction is the 10 per cent corporate tax rate, a quarter lower than that of Ireland, which is considered a corporate tax haven. Businesses investing in Kosovo are allowed to keep a significant portion of their profits. Municipalities in Kosovo are allowed to rent property to foreign investors with ten-year contracts. Potential investors are being vigorously pursued by KIESA, which promotes Kosovo's competitive advantages (Deichmann, 2021, pp. 196-197).

## **Overview of Foreign Direct Investment in Kosovo over time**

This section provides a descriptive summary of FDI in Kosovo over time, noting annual fluctuations, as well as the origins and activities of MNEs. Figure 1. illustrates FDI inflows into Kosovo, which peaked at EUR 440 million in 2007 with the announcement of the privatization of many state-owned enterprises. At the time, MNEs became aware of new opportunities to revitalize obsolete buildings and public discourse focused on preparations for Kosovo's independence.

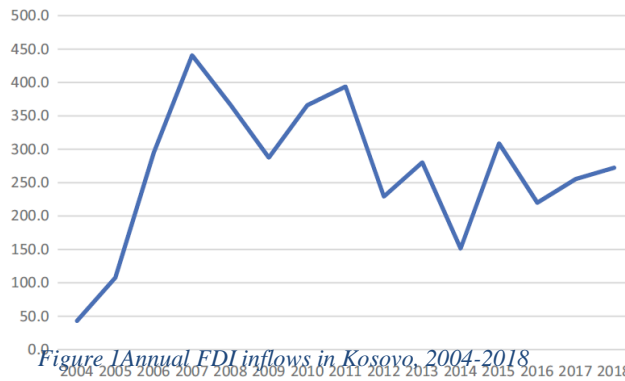


Figure 1 Annual FDI inflows in Kosovo, 2004-2018

In 2016, the introduction of the Law on Strategic Investments was intended to direct FDI in specific sectors of national interest. In response to the slow flow, in 2016 the Government of Kosovo adopted its "Law on Strategic Investments" in the hope of encouraging more FDI.

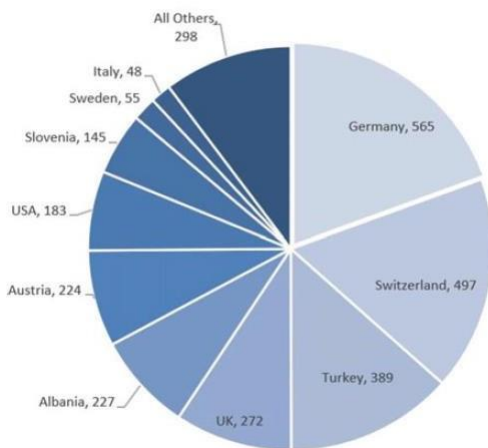


Figure 2 Origine of FDI in Kosovo - 2008-2018 (Mil Eur)

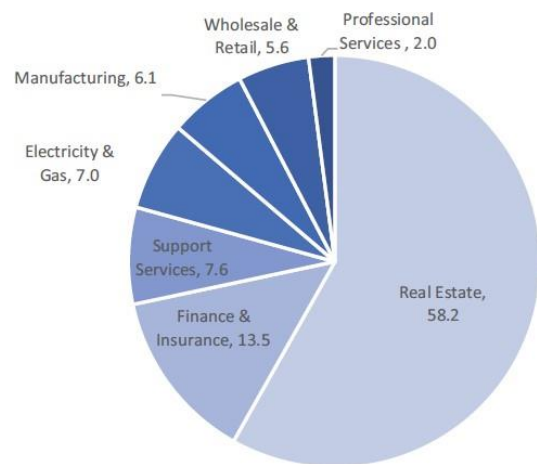


Figure 3 FDI by Industry in Kosovo

The main focus of the law is the transfer of ownership of state-owned enterprises to investors in strategic industries. What makes the law unique from other privatization schemes is that in special cases, the law allows the Government of Kosovo to negotiate directly with potential investors, bypassing traditional tender procedures. (Deichmann, 2021, pp. 201-205)

### Kosovo and the Stabilization and Association Agreement Kosovo and the Stabilization and Association Agreement

Kosovo has signed its first contractual agreement with the European Union, namely the Stabilization and Association Agreement (SAA). The SAA, in addition to regulating the trade regime between EU Member States and Kosovo, also states that 'cooperation between the parties in the field of investment promotion and protection will focus on the protection of foreign direct investment and will aim to create a climate favorable for private, domestic and foreign investment, which is essential for the economic and industrial revival of Kosovo. The agreement is expected to provide a stable legal framework in line with EU legislation, a more favorable business and investment environment in Kosovo (Group for Legal and Political Studies (GLPS), 2017, pp. 7,8).

## **Kosovo Legal Framework for Foreign Direct Investment**

The main laws related to foreign investment as a whole include: Law on Investments; Enterprise Law, Civil Code, Competition Law, Laws on the Protection of Intellectual and Industrial Property Rights, Laws related to the fight against corruption and money laundering; and Bankruptcy Law (OECD, 2001).

Foreign direct investment is mainly regulated by Law no. 04 / L-220 on Foreign Investment, the purpose of which is to promote, protect and attract foreign investment in Kosovo, mainly by providing fundamental rights, safeguards and guarantees for foreign investors. The main purpose of this law, which repealed Law no. 02 / L-33, is to improve the business climate and conditions in order to attract foreign investment and ensure fair treatment of investors in accordance with international standards. The law regulates all aspects of foreign investment, addressing non-discrimination, expropriation, compliance with obligations / standards and laws, and, inter alia, mechanisms for resolving investment disputes. (Group for Legal and Political Studies (GLPS), 2017, p. 12).

## **International Commercial Arbitration in the field of foreign direct investment**

Arbitration is a private litigation system. The arbitrating parties have decided to settle their disputes outside any judicial system. In most cases, arbitration involves a final and binding decision, producing a decision that is enforceable in a national court (Moses, 2008, pp. 1,2). As international commercial arbitration has grown and expanded with the growth of international business, arbitration institutions have also grown and changed.

The American Arbitration Association, for example, has set up an international division - the International Center for the Settlement of Disputes (ICDR) - just to deal with international disputes. Many arbitration institutions have renewed their rules to introduce an internationally friendly format of arbitration, and to improve their ability to deal with certain matters, so that court assistance is often not needed. Institutions vary in cost and quality of administration. Many companies prefer to work with older, better-established institutions, even if the cost may be somewhat higher. The parties are concerned that if they go with a new arbitration institution, that institution may not be a few years later when a dispute may arise. (Moses, 2008, p. 10).

## **Scope of the law on arbitration**

The scope of the law on arbitration mainly regulates issues such as:

- Arbitration agreements;
- Arbitration proceedings;
- Recognition and enforcement of arbitral awards; (Osmani, 2018, p. 13).

## **International Chamber of Commerce (ICC) International Court of Arbitration**

The International Court of Arbitration ICC is one of the most renowned and prestigious arbitration institutions. The International Court of Arbitration is not a court in the ordinary sense of the word; is not part of any judicial system. Rather, the Arbitral Tribunal is the administrative body responsible for overseeing the arbitration process. Its members are made up of legal professionals from all over the world. In addition, the ICC has a secretariat, which is a permanent and professional administrative staff. Some features distinguish the ICC as an arbitration institution. First, any ICC arbitral award is reviewed by the Arbitral Tribunal, which means that the award is not served on the parties until reviewed by the Court. Although the seat of the ICC International Court of Arbitration is in Paris, it administers arbitration throughout the world (Moses, 2008, p. 11).

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### 3. Problem Statement

Kosovo is limited in its ability to attract foreign investment due to a lack of dissemination of information within global markets, poor international communication regarding its economic environment, and opportunities for foreign investment. Foreign investment inflows have been impeded and a suitable environment must be created for creating incentives to attract foreign investment. Kosovo needs to reform its legislation, business climate, and promote sectors and economic resources that make Kosovo attractive to foreign investors. Administrative procedures need to be facilitated and expedited, reforms need to be made in this regard. The legal framework needs to be strengthened not only in terms of legislation, but also in its implementation and related transparency, regulations and procedures.

### 4. Research Design And Methods

In order to achieve the goal, ie the finalization of this scientific research, scientific literature and relevant literature have been used. In the most authentic work of this topic I have used several methods: • **Legal method (also known as dogmatic method)**: This method provides a true picture of copyright, the legal basis which is in function of a correct understanding of the legal norms adopted by the competent institutions in Kosovo and Albania. Thus, this method provides a true picture of laws, regulations and legislation in the field of foreign investment rights. However, its use alone does not provide a complete explanation of the research subject, therefore other auxiliary methods have been used. • **Historical method**: Using this method, I have tried to present the history related to foreign investment and the evolution of the term 'Investment' from the birth of the needs for protection of foreign investment until today. • **Comparative method (also known as comparative method)**: Using the comparative method I have tried to present the comparison between Kosovo and the countries of the region, as well as various aspects globally about Foreign Investment. • **Analytical method**: The use of the analytical method during the work of this topic is based on the deepening, detailing and analysis of the literature objecting to foreign investments and the legislation that regulates them as well as investor-state relations.

### 5. Results And Discussion

The main laws related to foreign investment as a whole include: the Law on Investments; Enterprise Law; Civil Code; Competition Law; laws on the Protection of Intellectual and Industrial Property Rights; laws related to the fight against corruption and money laundering; and Bankruptcy Law. The main objective of international foreign investment law is to prescribe international protection standards, provide additional protection and provide foreign investors with access to an independent international tribunal in the event of a dispute between the host country and a foreign investor.

### 6. Conclusion

In terms of recommendations, Kosovo needs to reform its legislation, business climate, and promote sectors and economic resources that make Kosovo attractive to foreign investors. A very important impact would be the construction of policies to attract investment in the traditional sector of the Republic of Kosovo in that of agriculture, because national policies are necessary to make this sector attractive to foreign investors, while our country will to benefit in particular know-how in relation to advanced technologies. Administrative procedures need to be facilitated and expedited, reforms need to be made in this regard. The legal framework needs to be strengthened not only in terms

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