Access to International Arbitration and Third-Party Funding in Kosovo

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Foreign Investment Framework Of Kosovo

Kosovo has made significant efforts toward building a successful legal framework for protecting foreign investments. Kosovo became a party to the International Centre for Settlement of Investment Disputes (“ICSID”) convention in 2009; has passed a number of domestic laws and regulations promoting foreign investments; has signed and ratified various bilateral investment treaties (“BIT”); and has passed a domestic arbitration law that is largely based on the UNCITRAL Model Law. In little more than a decade of state-building, Kosovo has clearly recognized the importance of foreign direct investments for developing its emerging economy.

To date, Kosovo has ratified BITs with:
- Switzerland
- Canada
- Turkey
- Macedonia
- Belgium
- Luxembourg
- Albania
- Austria
- United Arab Emirates

In addition to these BITs, Kosovo has also adopted domestic laws to protect foreign investment. Through these domestic laws and regulations, Kosovo provides similar protections to all foreign investors, even in the absence of a BIT with the investor’s home state. For example, Kosovo adopted the Law on Arbitration of Kosovo (No. 02/L-75) (“Law on Arbitration”) in 2008, which provides comprehensive protections to foreign investors against adverse state action and is based on the UNCITRAL Model Law. Similarly, Kosovo also adopted the Law of Foreign Investment (Law No. 04/L-220 (“Law on Foreign Investment”) in 2014, which supports the use of arbitration to resolve investment disputes. More specifically, the Law on Foreign Investment incorporates universally accepted protections for foreign investors such as fair and equitable treatment, limitations on expropriation, security and the transfer of rights, and full and constant protection. It also provides investors an option to choose between domestic courts in Kosovo or international arbitration forums to settle investment disputes.

Kosovo has also taken important steps to alleviate the risk of collection against the state. Although it is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), the Law on Arbitration incorporates comparable measures to those available under the New York Convention for the recognition and enforcement of international awards.

In short, Kosovo has taken significant steps towards providing protections to foreign investors that make investment in Kosovo enticing. Conversely, these measures permitted Kosovo to ratify bilateral treaties with nine countries that offer reciprocal protections to its own investors operating in those jurisdictions.

The financial climate surrounding these claims has also improved. It is no secret that investor–state dispute resolution mechanisms, particularly international arbitration proceedings, have become increasingly expensive over the last decade. However, as explained below, third-party funders have emerged to help claimants prosecute their meritorious claims under BITs and Kosovo’s local laws.
Bilateral Investment Treaties

BITs are agreements signed between two countries that establish the terms and conditions on which an investor from one state invests in another contracting state. The general purpose of BITs is to protect and promote foreign investment. BITs grant investors from a contracting state certain guarantees, including the free transfer of funds, fair and equitable treatment towards the foreign investment, and protection from expropriation. In addition to the protections that are afforded by the host state, BITs also grant powerful legal remedies to investors against the host state if the host government fails to fulfill its obligations under the BIT. For example, a foreign investor may bring a claim against the host country before international arbitration tribunals (especially and most commonly ICSID). And the contracting states do not have to give any additional consent to arbitrate the dispute because they have already done so in the BIT.

It is also common that BITs provide a multi-tiered dispute resolution mechanism before the dispute can be lodged before an international tribunal. In this setting, each tier represents an escalation of the dispute and generally includes a form of mediation, cooling-off periods, and occasionally, initial referral of disputes to domestic courts of the host state.

The content and structure of BITs can be broken into two parts: the substantive provisions and the dispute settlement mechanisms.

A. Material Provisions Of The Bilateral Investment Treaties

1. Who are the investors that BITs protect? BITs only extend protection to those who qualify under the BIT’s definition of “investor”. In most treaties, investor is defined broadly to include (i) natural persons, who are citizen of one of the contracting states, or (ii) companies, who are nationals of one of the contracting states. The determination of the nationality of an individual is easier than determining the nationality of a company. BITs generally define the latter by looking at the place of incorporation, place of effective control, place of management, or a combination of these factors. For example, the Kosovo-Belgium BIT sets a stricter standard and does not treat a company as the citizen of one contracting state if it is majority owned, controlled, or managed by the citizens of the other contracting state. An analysis of these provisions is important before making an investment in any country because it may guide an investor’s decision to design its corporate structure.

2. What investments do investment treaties cover? The definition of an “investment” under a BIT has a direct effect on the tribunal’s jurisdiction to hear the case. If the transaction falls outside this definition, the tribunal lacks the authority to adjudicate the dispute. BITs generally define investment broadly to include shares in companies, intellectual property rights, a contract involving the presence of an investor’s property in the host state’s territory, and a loan to an enterprise. For example, the Kosovo-Canada BIT defines “investment” broadly to include all kinds of assets such as enterprises, loan to an enterprise, shares in companies, intellectual property rights, and tangible and intangible rights acquired in the expectation of economic benefit or other business purpose.

3. National treatment: A national treatment clause in a BIT provides that foreign investors are entitled to be treated as favorably as their local competitors in any host state. The BITs that Kosovo has ratified include the national treatment protection for investors.
4. **Most-favored nation treatment:** A most favored nation (“MFN”) clause in a BIT requires the host country to provide foreign investors with treatment no less favorable than the treatment it provides to investors from third party countries that are party to other investment treaties that the host country signed. MFN clauses are generally drafted with a broad wording to govern the substantive rules for the protection of investments. The BITs that Kosovo has ratified include the MFN protection for investors.

5. **Expropriation:** All BITs include a provision protecting foreign investors from expropriations without compensation. Host states cannot expropriate the foreign investments unless the measures taken are for the public interest, are nondiscriminatory, and observe due process. More importantly such actions must be taken against payment of prompt, adequate, and fair compensation.

6. **Fair and equitable treatment:** BITs also include broad guarantees of treatment for foreign investors in line with international law. Host states promise to provide fair and equitable treatment to foreign investors. Various arbitral tribunals have interpreted the term “fair and equitable” to require that the host state does not interfere with a foreign investment in an arbitrary and discriminatory way.

7. **Umbrella clause:** Umbrella clauses bring the host state’s obligations and commitments related to the foreign investment under a protective umbrella. A broadly drafted umbrella clause may elevate a contract claim to the level of a treaty claim. For example, the BIT between Kosovo and Switzerland provides an obligation for each contracting state to observe any commitments of their local authorities and sub-federal entities regarding an investment of an investor of the other contracting party. In line with this umbrella clause, Swiss investors may elevate their contractual claims against local Kosovo authorities to the level of a treaty claim under the BIT.

**B. Investor-State Dispute Settlement Mechanisms Under The Bilateral Investment Treaties**

Disputes between investors and host states are governed by the terms of the relevant BIT and applicable international law principles. In this respect, Investor-State Dispute Settlement mechanisms (“ISDS”) are one of the most important provisions of BITs. They are also the most litigated. The ISDS mechanism allows foreign investors to sue the host state before international arbitration tribunals when a government breaches the terms of the BIT.

Most BITs contain pre-arbitration dispute settlement provisions. These include amicable settlement, cooling-off periods, and occasionally, initial referral of disputes to domestic courts of the host state.

1. **Amicable Settlement and Cooling-off periods**

   Almost all BITs that Kosovo has signed require that the investor observe a cooling-off period before bringing a claim. The length of the cooling-off period varies. For example, the Kosovo-Belgium BIT sets a three-month time frame before an investor can bring a claim, and during that period it requires the parties to negotiate amicably. A party may only file a claim if the parties cannot settle their difference during these negotiations. Conversely, the cooling-off period under the Kosovo-Turkey BIT is six months.

2. **Providing access to domestic courts and/or international arbitration**

   The ISDS mechanism under the BITs that Kosovo has signed mainly offer investors an alternative between domestic courts and international investment arbitration instead of mandatory recourse.
to domestic courts. This is generally perceived as an investor-friendly provision and further buttresses Kosovo’s commitment to providing security to foreign investors. Common institutions elected under BITs are tribunals established under ICSID, ad hoc tribunals established under UNCITRAL rules, and the ICC. By way of example, out of the nine BITs Kosovo had signed, all of them provide ICSID and ad hoc tribunals as acceptable arbitral forums whereas four of them provide ICC tribunals as acceptable arbitral forums for the adjudication of investor disputes.

If a foreign investor lacks the means to pursue a meritorious claim against the host country, third-party funding may be an option for the investor. What does that mean? Third-party funding refers to the provision, by a third party, of financing to one of the parties to a dispute (typically the claimant or plaintiff) in return for a fee that is payable only on successful conclusion of that dispute. Typically the third party funder pays for some or all of the costs of litigation and arbitration, such as lawyers’ fees and disbursements (i.e. experts, witnesses), any arbitration costs (e.g. the arbitrator’s fees) and barrister’s fees. The funder pays the legal bills throughout the life of the case, reducing the up-front financial burden on investors. On successful conclusion the funder’s success fee is typically calculated based either on some percentage of the sums recovered by the party taking the financing or as some multiple of the amount of financing provided. Although funders’ returns can sometimes be large, their support allows a party to a dispute to avoid some or all of the financial burden of running that dispute and/or to lay off some of the risk of that dispute. The decision to seek funding is a complex one and must be conducted in advance and with care.

3. **What are the criteria for the litigation/arbitration funding?**

The key criteria used to evaluate each case and its risks include:

*Legal Merits*: Funders typically seek cases with strong legal merits and that frequently translates into a requirement that the funder be satisfied that the claim have at least a 60% chance of success. The prospects of success will also inform the price that the funder demands.

*Budget and Damages*: Funders invariably have either (or both) a minimum or maximum size of legal budget they will be prepared to fund and/or a minimum amount of damages they require before they will entertain a claim for funding. Funders also often require a minimum ratio of funding commitment to damages (and 10:1 is a commonly-used ratio).

*Forum of dispute*: Funders will have different appetites for different forums but as a general rule, funders will be concerned about litigating or arbitrating where the jurisdiction in which the claim is brought (or seated) is perceived to be slow, unreliable, unpredictable and/or otherwise doesn’t offer appropriate procedural stability.

*Enforcement and Recoverability*: There is no point in funding a matter if the ultimate award or judgment cannot be collected. Funders will therefore be concerned to ensure that there is a clear route to collection of any judgment or award. This is a particularly sharp focus of funders in many investor state arbitration claims, since enforcement against states is often fraught. Funders will usually, therefore, want to see a well-constructed enforcement strategy as part of their due diligence. Kosovo’s efforts to alleviate the risk of collection against the state ought to make this analysis more straightforward than in some other investor-state disputes and that, in turn, will give investors more comfort when considering inward investment.
**Quality of the legal teams involved:** Given the central importance of the legal team to the claim, the funder will want to ensure that the legal team being funded has a strong track record in the relevant area of dispute.

4. **What are the benefits of third-party funding?**

Sometimes funding will be the only way in which the relevant party can access justice but, even where a claimant could fund a claim from its own resources, funding may be beneficial, for example, by allowing the claimant to deploy its capital on its core business, rather than tying up potentially millions of dollars in litigation. And some funders will even advance money to a claimant to allow it to continue or expand its core business as well as to fund the costs of the litigation or arbitration In addition the process of applying for funding means that a dispute is scrutinized by the funder and its internal or external due diligence team to assess the strengths and weaknesses of the claim. This serves the salutary function of weeding out weaker claims because no professional funder would remain long in business if it put its money behind poor claims.

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**Ongoing Investment Arbitration Proceedings Against Kosovo**

Kosovo has been named as a respondent in seven international investment arbitration proceedings over the last decade. In one of the latest decisions that came out in 2018, an ICSID tribunal dismissed claims brought by ACP Axos Capital GMBH, a German company (“Axos”) against Kosovo. Axos’ claims were based on the BIT concluded between Germany and Yugoslavia, which was extended to Kosovo through Kosovo’s ratification after declaring independence. The dispute arose from the suspension of the privatization of state-owned Post and Telecom Company of Kosovo. The ICSID tribunal dismissed Axos’ claims ruling that a winning bid in a privatization process did not constitute an investment under the applicable BIT.

A Swiss construction company also filed an investment arbitration against Kosovo in 2017. The dispute arose out of Mabco Construction SA’s purchase of shares in a tourism venture. Despite Kosovo’s objection to the ICSID tribunal’s jurisdiction to hear the claims, the tribunal sided with the Swiss claimant finding Mabco’s investment to qualify as investment under the Kosovo-Switzerland BIT. The tribunal is now hearing the merits, which includes allegations of denial of justice under the Kosovo-Switzerland BIT and the Law on Foreign Investment, as well as claims of expropriation and breach of the fair and equitable treatment under the Law on Foreign Investment.

Currently there are several other pending arbitration proceedings against Kosovo, which were all initiated pursuant to the Law on Foreign Investment:

- In 2020, an Estonia fintech company, IuteCredit Europe filed a request for arbitration against Kosovo before the ICC’s Court of International Arbitration. The dispute arose when Central Bank of Kosovo cancelled IuteCredit Europe’s license to operate as a credit institution. IuteCredit Europe claims include allegations that the Central Bank of Kosovo’s measures violated Kosovo’s commitments under the Law on Foreign Investment including the undertaking not to expropriate without compensation, as well as the umbrella clause.
• Another ICC Arbitration was initiated in 2020 by Bedri Selmani, a dual national from Kosovo and Croatia, claiming that Kosovo expropriated his interests in the landmark Victory hotel facilities in violation of the Law on Foreign Investment.

• In 2019, Fox Marble, a UK quarrying and stone processing company, initiated an UNCITRAL arbitration proceeding against Kosovo under the Law on Foreign Investment.

**Conclusion**

In its short history, Kosovo has implemented measures to protect the interests of foreign investors and alleviate the risk of collection against the state. This, together with the series of BITs the country now has in place, an improving financial climate, and stable government make the country a legitimate opportunity for foreign direct investment. Those interested should be sure to consult with legal counsel with experience in the region.

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