



The Legal Framework of Foreign Direct Investments in Kosovo

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Abstract: This paper deals with the issue of Kosovo's Legal Framework in attracting the Foreign Direct Investment and the current developments in this field. This subject matter has been in the focus of Kosovo Government for a long time, thus FDI seems to be an important instrument of Kosovo's economic growth. Legal Framework covering foreign investment differs depending in each country's legal system. Many authors throughout the history have mentioned the impact that a good Law might have in setting up a good and a comprehensive legal framework. On the other hand, many others argue that foreign investments are mainly attracted if there is a strong political willingness and a medium legal framework which covers direct investment. We will further analyze the current Legal Framework in the field of foreign investment and discuss a number of cases, applying the comparative method. The paper will give an overview of the definition of foreign investment and its legal and economic impact. We will specifically focus on the Law on FDI, the Law on Strategic Investments and other investment related laws. We will also analyze the Law approximation process with EU Acquis, the Trade Agreements, and finally the entry into force of the SAA.

Keywords: Legislation; Investment; Law approximation process; European Union

1. Introduction

Foreign Direct Investments are becoming a very important method of the further development in the economies of the developed countries in general and the fastening of the development in the economies of the developing countries in particular. Being located in the heart of the Balkans, Kosovo has strategic geographical position; the highway with Albania and the plan for the construction of the highway with Macedonia are expected to reduce the time of transport to

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these states for three, respectively for one hour. In addition, Pristina International Airport offers monthly lines and links to many of the cities of Europe and the world. Qualified and motivated young people, with multi-lingual communication capacity and involving 65% of the population, is considered to be an important asset for attracting foreign direct investment (Kosovo Agency for Statistics, 2015, p. 10).

Many authors have defined Foreign Investment differently. Foreign Investment *involves the transfer of tangible and intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets* (Sornarajah, 2012, p. 8).

Speaking about Kosovo, its commitment for the improvement of the investment climate and the support for the private sector had been seen in its *Economic Development Vision Action Plan 2011-2014*, particularly according to the Implementation Plan which was adopted in October 2011 (Office of the Prime Minister of the Republic of Kosovo, 2011, p. 12).

The discussions and the challenges presented in this paper, but also the conclusions and recommendations will be helpful, first of all for the students dealt in the field of International Investment Law as well as for the respective Kosovo Institutions.

Our motivation to write about the Legal Framework for FDI in Kosovo arises from the necessity that Kosovo has now days to absorb as much as it is possible Foreign Investments which are considered to be a very important instrument to increase the level of employment, increase growth and sustainable economic development as well as from the current barriers that the Foreign Investors are facing today. The purpose of the paper is especially the assessment of the current legal framework that the Republic of Kosovo has in its disposition, the identification of the legal barriers through which Foreign Investors claim they have to go through, the analysis by using comparative methods.

In addition, the main focus will be amongst others, the analysis in chronological order of the process that Kosovo had to go through in order to make its legal framework compatible and complete.

On the other hand, we will be assessing the outstanding importance of the undergoing Legal Approximation process of Kosovo's legislation with *Acquis communautaire*.

The outstanding importance of Trade and Investment relations, and especially the SAA of Kosovo with the EU will also be assessed.

Lastly, we will try to give answers to the questions such as the issue of what really is the actual situation of the current Legal Framework of Kosovo, and what aspects should be improved.

2. An Overview of the Legal Framework of FDI in Kosovo

2.1. Historical Background of Kosovo's Legal Framework for Foreign Direct Investment

The Republic of Kosovo during and after the UNMIK administration had to consider on its legislation, several laws of former-Yugoslavia. Once the UNMIK Administration took the lead, the UNMIK Regulations were to be applied.

Following the Declaration of Independence on 17th of February 2008, the laws from the Parliament of Kosovo after 15th of June 2008 when the Constitution of Kosovo came into force, started to be implemented.

After the war, Kosovo experienced the most critical situations ever. Besides its unresolved political status and the low living standards, there was an obvious mess in the legislative framework. In the situation of the lack of experience, and of course lack of human resources.

Just after UNMIK started to operate in Kosovo, the Regulations equivalent with the power of the laws, were the basic legislative framework based on which Kosovo was functioning. However, the situation changed when Kosovo started to adopt its own Laws just after 15th of June 2008 and on (Economic Initiative for Kosovo, n.d.).

Since the end of the war in Kosovo and until now, the Republic of Kosovo faced numerous problems, first of all, the lack of the legal framework with which they could guarantee the foreign investors that it is safe and absolutely worthy to invest in Kosovo.

Kosovo has attracted relatively a modest number of Foreign Direct Investment (FDI) since the Declaration of Independence. From 2008 to 2009, the volume decreased from EUR 367 to 291 million. There was a slight improvement in 2010, as it increased to EUR 311.2 million. The peak of FDI was prior to the country's

independence, in 2007, with over EUR 400 million being invested in present-day Kosovo (Embassy of Switzerland in Kosovo, 2012, p. 9).

In this part of the paper, we will focus on Kosovo's legal infrastructure and framework by analyzing from the critical point of view the Laws, which are necessary to make a better environment for foreign investors.

First, we will be analyzing the significance of the Declaration of the Government of Kosovo on attracting foreign investment, the three types of laws that Republic of Kosovo incorporated in its legal framework, and of course the interaction between the Law on Foreign Direct Investment and other investment-related.

Furthermore, a special attention will be given to the evolution of the legal provisions and the structure of the Law on Foreign Direct Investment.

But why is Foreign Investments, a real necessity for Kosovo. Because FDI encouragement in the private sector, in particular of trade companies, is constrained by: (i) the status of economic reform, (ii) current economic policies, (iii) the macro-economic and political instability, (iv) development of human capital (v) the promotion of a better country image through the strengthening of the market economy institutions, rule of law and independence of the judiciary (Besnik, Petrit, Enver & Aferdita, 2003, p. 46).

2.2. The Declaration of the Government of Kosovo in Attracting Foreign Investments

The Declaration provides foreign investors with the general data and possibilities they have, by investing in Kosovo and of course by ensuring them a full legal protection based on Kosovo's Constitution and laws.

"We assure you that the Government of Kosovo will remain focused in further improving the business climate and in speeding up the regional and European integration of Kosovo". This dedication has been confirmed by the former Kosovo Prime Minister during an inspection in Pristina International Airport "Adem Jashari" where a Turkish and French Consortium is investing more than €100.000.000 (Office of the Prime Minister, 2012, n.n).

2.3. The Law No. 04/I-220 on Foreign Investment

The issue of the Foreign Direct Investments is relatively new in the after war Kosovo. However, looking back into the history, we notice that, even though,

former Yugoslavia was known as a country with a centralized economy, yet there was a piece of legislation regulating Foreign Investment.

In this regard, Foreign Investment was first allowed in Yugoslavia in 1978, with the passage of the Law on Investment of Foreign Investors into Domestic Organizations of Associated Labour. This law was, however, relatively restrictive, with high requirements for invested capital and strict limit on profit repatriation. Furthermore, Foreign Investment had to accommodate Yugoslav self-management rights of workers, which in practice mean an often intolerable sacrifice of managerial control for the foreign partner (Cheryl & Franjo, 1992, p. 23).

Notwithstanding the importance of other investment-related laws, it is evident that the core of the legal Framework of FDI in Kosovo is, without any doubt, the Law on Foreign Investment (Law No. 04/L-220).

Being aware of the immediate necessity of a more serious approach in terms of drafting the Law on Foreign Investment and other investment-related laws (as a precondition and a guarantee of the Institutional dedication of Kosovo's Institutions towards the attraction of serious foreign Investment Companies), Kosovo's Government took real actions and made a clear plan on how to achieve the attraction of Foreign Investments and how to increase the economic development by using these type of investment. But how could this is achieved?

Accordingly, in April 2006 the Government of Kosovo promulgated the Law No. 02/L-33 on Foreign Investment.

The principal purpose of this law was to promote and encourage foreign investment in Kosovo by providing foreign investors with a set of fundamental and enforceable legal rights and guarantees that will ensure foreign investors that they and their investments will be protected and treated with fairness and respect in strict accordance with the rule of law and widely accepted international standards and practice (Constitution of the Republic of Kosovo, 2008, n.n.).

The main characteristics of this law were: to grant national treatment to foreign investment, establish the filing requirements, restrict military products, protect against takings, protect intellectual property and provide rights of information (Law No. 02/L-33 on Investment).

These components makes this law quite interesting and modern in the sense that generally most of the substantive legal requirements of an average law are fulfilled

and that, by this law the basics of the legal framework for foreign investment had been settled.

However, what makes more attractive this law is the definition of Investor (Law No. 02/L-33 on Investment) and the Resolution of Investment Disputes (Law No. 02/L-33 on Investment).

Even though most of the elements of this Law are internationally recognized and accepted as a good practice, the Republic of Kosovo, according to European Union's annual Reports still has to work especially in the enforcement of the decisions that are directly or indirectly linked with the foreign investor and investment.

In this respect and taking into account its legislative program for 2012 (Government of the Republic of Kosovo, 2011, n.n), the Government of Kosovo intensified its efforts to start making real changes in this law. Consequently, the new Law on Investment, namely, the Law No. 04/L-220 on Foreign Investment, after many internal and external debates and discussions of the many groups of experts, was finally adopted on 12 of December 2013, promulgated by Decree of the President of Kosovo No. DL-059-2013.

The Law No. 04/L-220 on Foreign Investment regulates protection, promotion and encouragement of foreign investment in Kosovo by providing foreign investors fundamental and enforceable rights and guarantees that ensure for foreign investors security, for their investment will be protected and will be treated fairly and based on the principles of non-discrimination and with respect in full compliance with the rule of Law, according to laws, standards and internationally recognized practices. Kosovo will provide fair and equal treatment to foreign investors and their investments in Kosovo. Kosovo shall also provide foreign investors and their investments full and consistent protection and security. In no case the treatment, protection or security required will be less favorable than that required by International Law or any provision of the present Law (Law No. 02/L-33 on Investment).

As one may reasonably observe, one of the main objectives of the Government of Kosovo is to establish a strong and efficient legal system, in accordance with European and International Standards.

It is also obvious that this Law clarifies or addresses important issues for foreign investors in order to provide legal security for their investments.

The Law contains other very important elements such as the principles of non-discrimination, compliance with obligations, stability of investment regime, expropriation and nationalization, compensation, currency conversion and guaranteed transfers, illegal action or inaction, armed conflict and civil disturbance, respect of rights and other very important legal provisions (Law No. 02/L-33 on Investment).

The inclusion of all these guarantees in this Law is in accordance with the best international practices and in full compliance with EU legislation.

The current Law on Foreign Direct Investment contains 26 articles and the Ministry of Trade and Industry (MTI) is the responsibly authority, through its mechanisms, to develop-create and monitor development policy for foreign investment.

Comparing with the previous Law on Foreign Investment (02/L-33) it is obvious that detrimental changes have occurred, such as the definition of an Investment Dispute (Law No. 02/L-33 on Investment), the establishment of the Kosovo Investment and Enterprise Support Agency (KIESA), compliance with obligations that the Republic of Kosovo carries towards foreign investors, the stability of investment regime meaning that no law, regulation or other legal act shall have retroactive force or be applied retroactively to the detriment of a foreign investor or the investment of a foreign investor (Law No. 02/L-33 on Investment).

One of the novelties laid down in this Law is that the Law recognizes as foreign investors also any natural person who is a citizen of the Republic of Kosovo but has residence abroad. This legal provision makes it easier for the Kosovo diaspora to invest their money and capital in Kosovo.

Although the new legal provisions of the current Law on Foreign Investment are of the high importance in providing the foreign investors with additional protection for their investment, there are a few permanent barriers. Likewise, even though the legislative framework for a free market-oriented economy is in place, a lack of experience owing to the communist Yugoslavia legacy, poor enforcement, a nascent modern judiciary, and uncertainties regarding legal recognition of foreign arbitral awards, hinder economic growth and investment (Bureau of Economic and Business Affairs of the U.S. Department of State, 2016, n.n).

2.4. Investment-Related Laws

The Investment Climate in Kosovo may be considered as completed as soon as other Laws related to the foreign investment are fully implemented.

Alongside with the Law on Foreign Investment, Kosovo's Parliament recently adopted one of the most important Laws in its entire history, namely the Law No. 05/L-079 on Strategic Investments in the Republic of Kosovo.

The aim of this Law is to stimulate, attract and create conditions for implementation of strategic investments in the Republic of Kosovo, to establish administrative procedures and criteria for evaluation, selection, implementation and monitoring of strategic projects, as well as determining the procedures for granting the use of the property of the Republic of Kosovo, for the purpose of implementation of strategic investments projects (Law No. 05/L-079 on Strategic Investments in the Republic of Kosovo).

The law covers different sectors such as Energy with infrastructure and Mining, Transport and Telecommunication, Tourism etc. The definitions are relatively the same as in the Law on Foreign Investment.

The Law further establishes the Inter-ministerial Committee for strategic investments. There is a slight description of the responsibilities of each Institution, namely, the Investment and Enterprise Support Agency serves as a Secretariat, whereas the Committee, based upon each individual case, issues a recommendation of granting the status of a strategic investor. The recommendation is basically given after the recommendation of KIESA, respectively the professional advices from the Operational Group on the preparation and implementation of strategic investment. The Government of Kosovo, on the other hand, reserves the exclusivity of deciding about each and individual case.

The Law comprises specific legal provisions regarding the administrative procedure which is applied in this Law. In this respect, the administrative procedures under this law are considered as high priority which is applied with accelerated procedures by all institutions and public authorities of the Republic of Kosovo involved in these procedures. All institutions and public authorities of the Republic of Kosovo are obliged to cooperate with operational group and to provide administrative and technical support to the Investment and Enterprise Support Agency (Law No. 05/L-079 on Strategic Investments in the Republic of Kosovo).

The Law further regulates the Agreement for the implementation of the strategic project, the use of Kosovo's immovable property when implementing strategic projects, the list of projects prepared by public authorities, transfer of the right to use the publicly-owned enterprise's property to the investment entity and other important legal provisions.

Other important Laws, interlinked with foreign direct investment are: The Law on Business Organizations, 02/L-123, The Law on Economic Zones 03/L-129, The Law on Arbitration (02/L-75), 2007, The Law on Chamber of Commerce No. 2004/7, The Law on Standardization (Regulation No.2004/12), The Law No. 03/1-008 on Executive Procedure, The Law No. 05/L -057 and The Law No. 05/1 -057 on the establishment of the Kosovo Credit Guarantee Fund.

All the above-mentioned laws originated from the Governmental strategy with the aim of filling the gaps that existed in different laws. This was necessary in order to complete the Legal Framework for the Foreign Direct Investments. It was irrational to think that only with a single Law on Foreign Investment the Legal Framework would be completed.

Notably, there is no significant lack of the specific provisions laid down in different laws which protect the Foreign Investor. In this respect the procedures relating to the enforcement of contracts are regulated by the Law on Contested Procedure and the Law on Execution. In general, the basic courts have jurisdiction to enforce contracts, with the exception of matters falling within the jurisdiction of the Commercial Court, which is responsible for enforcement (Economic Initiative for Kosovo, 2011, n.n).

When discussing about the certification of products, services and processing, based on the Law on Standardization (Regulation No. 2004/12), the Kosovo Standardization Agency is responsible for the issuing, application and determination of standards for the businesses that occur in the territory of the Republic of Kosovo.

On the other hand, a very important and extremely sensitive part of the Legal Framework is the settlement of investment disputes through Arbitration. Even though the respective Laws guarantee the full legal protection of foreign investors, there seem to be a problem in terms of enforcing these provisions in practice. This lack of enforcement causes the Republic of Kosovo not only less foreign investors in the field of services, but also a million euros loss because of the lack of investors.

Moreover, the attraction of foreign investment has been hampered by the high rate of corruption, slow and ineffective reforms in the business sector, lack of transparency, lack of economic activity in many sectors, negative perception of foreign investors in the diaspora, as well as the failure of institutions to implement and meet certain objectives (Erëza, Arbëresha & Delfinë, 2017, p. 6). Furthermore, unstable political environment, frequent changes of law, corruption and nepotism, weak enforcement of law, property disputes, unstable supply of electricity, insufficient supply of water, poor sanitation, uncontrolled distribution of waste, lack of central heating, seem to be the main concerns of the foreign investors (Nakije, 2016, p. 19).

However, the operation of OPIC in the territory of the Republic of Kosovo since 2000 provides financing, political risk insurance and other investment vehicles to American investors. This fact brought real success into practice. To date, there is a huge number of American Companies investing in Kosovo, especially in energy and real estate fields, but also in construction.

All in all, taking into account the high number of laws which are directly linked with foreign investment and the relations between them, there seems to be a progress in terms of preparing suitable laws guaranteeing the protection of the foreign investor, which is the main goal of the Kosovo Institutions.

Regarding the EU and Kosovo trade and investment relations, Kosovo benefits from the Preferential Trade Agreement which is currently on its Trade with the EU has expanded since 2000 (European External Action Service, 2015, n.n).

Kosovo, similar to other countries of the Western Balkan, is part of the European Integration Process since the Zagreb Summit of 2000. This process aims for an accelerated stabilization and transition of market economy, promotion of regional cooperation and prospects of EU Integration (Government of the Republic of Kosovo, 2011, p. 2).

Kosovo also signed the SAA, which among others aims that the cooperation shall be for Kosovo to improve the legal framework so as to favor and protect investment (Stabilization and Association Agreement between EU and Kosovo, 2015, p. 109).

2.5. Legal Approximation Process

One of the most important issues that Kosovo has to consider in its long but secure path to the EU is certainly the law-approximation process of our domestic legislation with the EU *Acquis*.

The Legal basis in terms of the process of law approximation is the Regulation of Rules and Procedure of the Government of the Republic of Kosovo No. 09/2011. Such legal basis consists on the possibility that the originating body is responsible for the procedures of establishing the first draft in conformity with the principles and standards on legislative drafting specified by the Government and the OPM (Government of the Republic of Kosovo, 2011, p. 19). Other legal basis are also the Regulation No.13/2013 for the Government Legal Service and the Administrative Instruction No. 03/2013 for the Standards of Drafting the Normative Acts.

The approximation process has three main phases: first, there should be a change and adoption of the national Laws, rules and procedures, so that the requests from the specific *Acquis*, are fully incorporated in the national legislation (Government of the Republic of Kosovo, 2014, n.n.).

In April 2010, the Ministry of European Integration (MEI) was established. Its mission is to ensure the technical management, coordination and monitoring of the EU integration process (European Commission, 2011-2013, p. 23).

3. Conclusions and Recommendations

In general, the attempts to create a proper Legal Framework for FDI in Kosovo are seemed to be very challenging; therefore a more serious approach from the institutions of the Republic of Kosovo is inevitable.

Considering the past and the many barriers that the Republic of Kosovo had to go through, it has to be appreciated, without being exaggerated, all the work done in attracting Foreign Investments. A cornerstone in the Legal Framework for FDI in Kosovo is, certainly, the adoption of its laws before but specifically after the entry into force of the Constitution on 15th of June 2008.

Considerable changes have been made in legislation, especially on the Law on Foreign Direct Investment, but not only; significant changes had happened also in

other investment-related laws such as Law on Strategic Investment, Law on Arbitration, Law on Business Organizations, and Law on Standardization.

It is important to note that the Promotion and Protection of Investment Agreements concluded so far by the Republic of Kosovo, had helped the country to extend its export and to be able to understand and prepare its market to be in the same line of competitiveness with regional countries, but also with other EU countries. Nevertheless, considering the substance of the Agreements themselves, one can reasonably perceive the very high level of political commitment of Kosovo's Institutions and the lack of specific legal provisions. In this regard, it is necessary, as soon as the review of these Agreements is done; to carefully adjust the Agreement itself to the current situation in the field, in order for the Agreement to be productive and successful.

Another important element, as we could observe, is the importance of the Legal Approximation Process and its influence in the Legal Framework for FDI in Kosovo. The increase of the number of civil servants in law approximation process is of absolute necessity as it is necessary a whole evaluation of the legal Framework in the field of Foreign Investment, especially with regard to the National Plan for attracting Foreign Direct. This can be done by correctly identifying the current gaps and non-clarities that exist in the laws and also by improving the level of the enforcement of the decisions from the Courts.

Though, the overall situation seems to give us the impression that changes especially in the legislation are on the way, it is essential to have more political willingness and dedication in order to have Foreign Investments as a Governmental national priority.

Foreign Direct Investments brought social stability in the region as well as in the territory of the Republic of Kosovo, yet, much more work needs to be done. All this commitment would certainly guarantee a better economic development, good and comprehensive Legal Framework, a significant increase of employment and of course wealth and prosperity to the citizens of the Republic of Kosovo.

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