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Kosovo and Arbitration – The Birth of a New State

Christian W. Konrad (Konrad & Justich) · Wednesday, November 17th, 2010

Within the last two decades, over 30 new states emerged within the international community. From a political, economic, as well as a legal point of view, the formation of a state is always an expedition into uncharted waters.

On a domestic level, the establishment of a sound legal system is the prerequisite for a stable framework within which a community can operate. To build a sustainable framework not only requires know-how and experience, but also the unyielding resolution to promote change. Such a system should cater to the state's and its population's needs, but should also reflect international standards as, from a public international law perspective, a state's ability to act on the international stage usually depends on the degree of recognition afforded to it by the international community.

Europe's youngest state is currently undergoing the process of optimising its legal system and gaining international recognition. Kosovo's declaration of independence on February 17, 2008 was the subject of intense political debate, but the country has made substantial efforts to position itself within the international community. Kosovo's political leaders have recognised the importance of attracting foreign investments and the resulting requirement to provide a stable framework for resolving disputes.

Therefore, Kosovo has started to negotiate and conclude its first bilateral investment treaties (BITs) as an independent nation. In 2010, the first BIT was completed with Belgium and Luxembourg. Other treaties, such as the Austria – Kosovo BIT, are currently in the process of ratification. Additionally, Kosovo has a BIT with Albania originating from the time when it was a UN Protectorate. The time frame for establishing a reliable investment protection framework, based on major numbers of BITs, of course depends largely on Kosovo's recognition as a state by the international community. It remains to be seen how the recently rendered ICJ Advisory Opinion, concluding that the Kosovo declaration of independence did not violate international law, will influence this development in the long term.

Since 29 June 2009, Kosovo is also a party to the ICSID convention. In addition, Kosovo has passed a number of domestic laws and regulations relating to and dealing with the promotion of foreign investments. Its arbitration law was passed in 2007 and is based largely on the UNCITRAL Model Law in its version before the 2006 amendment.

Furthermore, given the present absence of a greater number of BITs, Kosovo has undertaken to close the gap in foreign direct investment protection by setting down principles of protection in a domestic legislative act. The Law on Foreign Investment 2005 offers investors substantive

protection, relying on terminology that is well known from international investment treaties. Examples include provisions on fair and equitable treatment, and full and constant protection and security. Also, it refers to various arbitral mechanisms for dispute resolution, including arbitration under the ICSID Convention. Finally, it explicitly stipulates the state's obligation to enforce awards rendered in these arbitration proceedings in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), "regardless as to whether or not that convention is otherwise binding on Kosovo". At the moment, Kosovo is not a party to the New York Convention. It can be expected that, given the state's efforts in creating a reliable environment for arbitration, the question of accession to the New York Convention will be raised in the near future.

In cooperation with the United States Agency for International Development (USAID), the state is currently also pursuing further means of establishing an effective local alternative dispute resolution (ADR) system. The overall goal is to promote ADR as a whole in Kosovo and to create a framework for the swift enforcement of contractual rights. Specific steps planned for the near future include the establishment of a permanent arbitral institution in alliance with the Kosovo Chamber of Commerce as well as the creation of training programs for judges, practising lawyers, and law students in order to provide a broad base of specialist expertise within the country.

On an overall level, Kosovo is ambitiously striving to establish an investment protection and arbitration system. Kosovo has clearly recognised the importance of foreign direct investment for building a growing economy. It has a modern arbitration law and provides unusually high standards of investment protection on the basis of domestic legislation. Its recent ratification of the ICSID Convention and its fervent pursuit in negotiating and concluding BITs are strong evidence of this. However, its role as a seat for international arbitration in the future will depend considerably on the international enforceability of awards rendered within its territory and, ultimately, on its performance and reception on the international political stage.

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