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Evolution of Kosovo's Investment Arbitration Law: Defining the Foreign Investor and the State's Role in Arbitration

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Kosovo Law No. 04/L-220 on Foreign Investment (hereinafter, the "2014 Law on Foreign Investment"), which safeguarded foreign investors as a key element in promoting international economic cooperation and attracting foreign capital, has now been replaced by Law No. 08/L-209 on Sustainable Investments (hereinafter, the "2024 Law on Sustainable Investments"). The purpose of the 2014 Law on Foreign Investment was to protect, promote and encourage foreign investment in the Republic of Kosovo (hereinafter, "Kosovo" or the "State") by providing foreign investors with a set of fundamental rights and guarantees to ensure that their investments will be protected and treated with fairness in accordance with the accepted international standards and practices. The 2014 Law on Foreign Investment applied exclusively to foreign investors and their investments and contained most of the investment treaty standards of protection, including advance consent to arbitration in case of disputes. In doing so, it effectively integrated international standards into national law.

Significant changes to the protection of foreign investors and their investments were introduced with the 2024 Law on Sustainable Investments which entered into force in September 2024. This law introduces several changes that may affect the dispute resolution process between foreign investors and the state of Kosovo. Notably, it broadens the definition of foreign investors while removing the principle of dual nationality, eliminates open consent to arbitration, and grants Kosovo the right to seek compensation for damages caused by investors.

Personal Jurisdiction – The Investor

The 2024 Law on Sustainable Investments marks a departure from the conventional model of foreign investment law, applying equally to foreign and domestic investments. A natural foreign investor is now defined as a "*person who does not have citizenship of the Republic of Kosovo*", as opposed to the broader definition under the 2014 Law on Foreign Investment, which extended its protections, without further clarification, to citizens of Kosovo residing abroad.

The 2014 Law on Foreign Investment raised valid concerns regarding the potential of Kosovo nationals to bring claims against their own country, effectively transforming what would typically be a domestic dispute into an international investment dispute. This issue, particularly regarding dual nationality and residency, was a central point of debate in *Selmani v. Kosovo* (Case No ICC

24443/MHM), a case brought under the now-repealed law.

With the 2024 Law on Sustainable Investments now in force, investment from the diaspora—who have historically maintained strong ties to Kosovo, including formal nationality—are subject to a key limitation. Unless protected by a bilateral investment treaty, diaspora investments from countries lacking such treaties with Kosovo will not meet the personal jurisdiction requirement for investment arbitration. Yet, the question remains whether this jurisdictional test is relevant under the 2024 Law on Sustainable Investments, which defines the term *investor* as "*a natural person with citizenship of the Republic of Kosovo or foreign citizenship, whose purpose is to invest in the Republic of Kosovo …*"

Furthermore, the Law on Sustainable Investments extends protection to legal entities classified as foreign investors, whether established under the laws of a foreign country or under Kosovo's legal framework, provided the foreign investor holds majority decision-making control. As a result, domestically registered legal entities are now eligible to initiate an investor-State dispute settlement ("ISDS") proceeding as foreign investors. This marks a notable departure from the 2014 Law on Foreign Investment, which limited standing to foreign investors defined exclusively as natural persons or foreign-registered companies.

While the expanded definition now grants foreign-owned local entities standing in ISDS cases—broadening access to international arbitration—the overall conclusion is that Kosovo has moved away from offering a legal framework focused solely on protecting foreign investors and their investments. With the exception of the screening chapter, which is not discussed here, the 2024 Law on Sustainable Investments treats foreign and domestic investors equally across all provisions, granting them the same rights, obligations, and principles, including the right to seek compensation for any damages caused by the State. Given that the 2024 Law on Sustainable Investments protects investments broadly without offering distinct privileges or safeguards for foreign investors, the concept of a "foreign investor" becomes futile. This raises the question of whether, under these conditions, the law can still be marketed as a foreign investment protection law and whether it serves as a meaningful incentive for foreign investors.

Consent to Arbitrate

One of the key novelties introduced by the 2024 Law on Sustainable Investments is un updated list of legal remedies available to foreign investors. The 2014 Law on Foreign Investment was often criticized for being excessively lenient in its approach to legal remedies. In particular, it provided access to investment arbitration to all potential claimants vis-à-vis their claims against the State. Moreover, it omitted the requirement for formal consent to arbitrate investment disputes, which would typically be considered and ultimately provided on a case-by-case basis after the dispute arose, or included in the main contractual agreement. Instead, it introduced open consent to arbitration as a fundamental protection for foreign investments.

This effectively meant that Kosovo offered automatic consent to arbitrate any investment dispute under the law's authority. The decision to opt-in to investment arbitration by this means has been widely viewed as increasing the State's exposure to claims by foreign investors. Combined with other protections under the 2014 Law on Foreign Investment, such as the "umbrella clause," it significantly expanded the range of possible claims. From a historical perspective, it can be argued

that this policy was meant to serve as a guarantee to foreign investors, namely the guarantee of having access to the expertise of investment arbitration, by means of circumventing the jurisdiction of domestic courts—especially considering the weak judicial system at the time. The law explicitly stated that consent provided by virtue of the 2014 Law on Foreign Investment satisfied the formal requirements of arbitration under the ICSID Convention, UNCITRAL Rules, ICC Rules and the New York Convention. Through this mechanism, the legislature allowed for the possibility of the domestic law being transformed into a source of international investment law.

In contrast, the 2024 Law on Sustainable Investments provides multiple avenues for resolving claims through domestic court proceedings, mediation, or arbitration (Chapter VIII of the 2024 Law on Sustainable Investments). Particularly, the law requires the terms and conditions of arbitration and mediation to be established in advance (Article 47 of the 2024 Law on Sustainable Investments). In principle, this allows the parties to agree on the procedure of resolving disputes through their contract or after a dispute has arisen, by providing consent to arbitrate. Thus, while the law continues to recognize investment arbitration as an option, it mandates that the State's consent be explicitly granted on a case-by-case basis.

The 2024 Law on Sustainable Investments also introduces the option to select Kosovo as the place of arbitration, a choice that was not available under the now-repealed 2014 Law on Foreign Investments, which, unless otherwise agreed by the parties, limited the place of arbitration to EU member countries that are also signatories to the New York Convention (Article 16 para. 5 of the 2014 Law on Foreign Investments). By introducing Kosovo as a possible arbitration venue, the new law makes it possible for investors to use local arbitration mechanisms within Kosovo. This change could promote the use of local arbitration institutions, enhance investor confidence in resolving disputes within Kosovo's legal framework, and reduce the complexity and costs associated with having to arbitrate in foreign jurisdictions.

Kosovo Can Seek Compensation for Investor-caused Damages

To maintain a balanced relationship between the host state and the investor, Chapter II of the 2024 Law on Sustainable Investments outlines not only the rights but also the obligations of investors. Specifically, it requires investors to comply with all domestic laws as well as international agreements ratified by Kosovo. While requiring investors to comply with local laws is not inherently novel—the 2014 Law on Foreign Investment also imposed such an obligation—the 2024 Law on Sustainable Investments marks a significant shift by allowing Kosovo to initiate claims for compensation of damages as well as substantially limiting the standards of protection in the event of an alleged failure to comply with certain obligations on the part of the investors.

Hence, unlike the non-enforceable character of the obligation under the 2014 Law on Foreign Investment, where only foreign investors could initiate claims for non-compliance against Kosovo, the 2024 Law on Sustainable Investment establishes binding obligations on investors, allowing Kosovo to bring actions for investor non-compliance.

Looking Forward

There is no doubt that the 2024 Law on Sustainable Investments has reshaped Kosovo's investment

landscape, aiming to provide balanced treatment between foreign and domestic investments, as well as between the rights of the State and those of investors. By essentially elevating the international law principle of national treatment into a domestic law, Kosovo has made a significant shift in its investment policy. However, the full impact, if any, remains to be seen.

The introduction of a closed consent to arbitrate, where parties must agree in advance to arbitration, promotes equality between the parties and encourages mutual understanding in dispute resolution, especially considering the absence of any clear evidence that open consent to arbitrate under the 2014 Foreign Investment Law promoted, attracted, and encouraged foreign investment. Through this new approach, state bodies are better positioned to monitor potential ISDS claims and play a more active role in contractual negotiations, including the selection of dispute resolution forums. Actively participating as stakeholders in the process may further enhance the recognition of ISDS and promote the development of investment arbitration expertise among government officials.
