

REDEFINING INVESTMENT ARBITRATION LAW: THE CASE OF KOSOVO

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Introduction

Investment protection standards contained in international investment treaties are enforceable though private right of action against host states in an independent and neutral forum. The investor-state dispute settlement (ISDS) system provides investors access to international arbitration when the host state expropriates or imposes arbitrary regulation to tax economic profits of investments. Investor protection rules benefits foreign investor by reducing the investment risk premium and the costs of importing capital for the host government. This article outlines the rationale for international claims adjudication procedures involving private investors and sovereign states. The author will highlight the; 1) weakness of customary international law of diplomatic protection and inter-state arbitration, 2) role of bilateral investment treaties (BITs) in promoting and attracting global capital, 3) benefits of ICSID arbitration, and 4) foreign investment law and arbitration in Kosovo. Last section is conclusion.

1) Diplomatic protection and inter-state arbitration

Historically, the judicial settlement of investment disputes on the international level was considered to be the exclusive function of states.¹ Under classical international law, investors did not have direct access to international remedies to pursue claims against foreign states concerning violation of their rights.² This was due to the fact that, a dispute between a state and a foreign national was not considered as involving an international dispute that could be resolved through international process.³ There were a number of reasons that prevented foreign investors from prosecuting a claim against the host state in an international dispute settlement forum. First, the host state compliance with its contractual obligations did not constitute an international obligation therefore violation by the state did not give rise to internationally wrongful act.⁴ Second, aggrieved foreign investors were unable to rely on contractual breaches as their local contracting party avoided responsibility for the breach by invoking *force majeure*. Thirdly, the injury was caused by a third party; often a governmental authority.⁵ A private person (natural or legal) lacks the legal personality at international law to pursue a claim in their own right, and as a consequence, corporations are not regarded as subjects of international law.⁶ Therefore, in the absence of a special international forum designed for the settlement of investment disputes, the only remedy available to the investor on an international level is the diplomatic protection extended by its own state.⁷ The customary international law principle of diplomatic protection is a method of dispute resolution in which the home state of the investors takes up the investor claim ("espousal of claim") on its behalf with the host state through diplomatic negotiation or international arbitration.⁸ In a diplomatic protection claim, the parties to the dispute settlement proceedings are two states, the home state as the claimant and the host state as the respondent, without the involvement of the injured private investor. The International Court of Justice (ICJ) is a prominent option for settlement of investment disputes between states. An advantage of diplomatic protection is that it is an easily available method of resolving dispute

¹ M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, The Hague 2000) 151-163; I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 701-708

² R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 200

³ M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, The Hague 2000) 153

⁴ P Weil, 'The State, the Foreign Investor, and International Law: the No Longer Stormy Relationship of a *Ménage A Trois* (2000) 15 ICSID Rev: FILJ 401, 403 ('the investor enjoyed protection as a foreigner, not as a contracting party. The State did not incur international responsibility for having violated the contractual rights of the investor, but for having committed an internationally wrongful act vis-a-vis the investor's home State.')

⁵ J Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev: FILJ, 232, 253

⁶ P Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' (International Investment Law for the 21st Century 2009) 342 ('There is some authority in international arbitral jurisprudence for the view that an investment agreement between a State and a foreign corporation is an international contract subject to international law.')

⁷ M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff Publishers, London 1993) 8

⁸ See P Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' (International Investment Law for the 21st Century 2009); B Juratowitch, 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 ICSID Rev: FILJ 10; A Reinisch and L Malintoppi, 'Methods of Dispute Settlement' (The Oxford Handbook of International Investment Law 2008) 691

involving states parties, as there is no requirement for any advance agreement between disputing parties.⁹ However, the customary international law imposes a number of procedural conditions. The investor must have continued nationality of the state that is seeking its assistance at all material times, and secondly, the exhaustion of local remedies by the investor.¹⁰ In general, diplomatic protection was not deemed as an effective remedy by private investors for resolving investment disputes with the host state. First, there is no international obligation on the state of nationality of the injured person to exercise diplomatic protection.¹¹ Second, the home state may decline request by the investor to espouse its claim, or at any time it may discontinue diplomatic protection, or even waive the claim of the national or agree to a reduced settlement.¹² Third, where the home state concludes lump-sum agreement with the expropriating state to accept a portion of the outstanding claims as a settlement payment, injured parties have no entitlement under international law to receive the proceeds of such agreement from their home States.¹³ Fourth, developing countries resent pressure from capital-exporting countries, whether it is exercised bilaterally or in multilateral arena such as international lending institution.¹⁴ However, the role of diplomatic protection as a means of vindicating the rights of foreigners against host states has greatly diminished, as new trends are evolving in creation of an independent, neutral mechanism for resolution of investment disputes. With the emergence of the international law of foreign investment, the law of state contract is now considered as a component of investment law; no distinction is made between investments under a contract and investment based on a unilateral act of the host State.¹⁵ The gradual shift in public international law that previously only recognised states as the holder of right to prosecute international claim, means that private individuals and corporations can have access to neutral, third party forum for resolution of investment disputes. Protection of foreign investment entails three different potential methods; customary international law (diplomatic protection of home state of investor), private law (contractual agreement between host state and investor) and international treaty law (investor has direct recourse against host state) mechanisms.¹⁶

2) BIT law

Article 38(1) of the Statute of the International Court of Justice (ICJ), that is widely recognised as the most authoritative and complete statement as to the sources of international law provides that;¹⁷

- a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
- b) International customs, as evidence of a general practice accepted as law;
- c) The general principles of law recognised by civilised nations; and,
- d) Judicial decisions and the teachings of the most highly qualified publicists of various nations, as a subsidiary means for determination of rules of law.

Foreign investors are primarily protected by bilateral investment treaties (BITs) rather than customary international law alone that was the case in the early 1970s. Therefore, BITs for all practical reasons has become the fundamental source of international law in the area of foreign investment.¹⁸ During the past two decades one of the phenomena in international law has been the extraordinary increase in the number of agreements relating to the protection or liberalisation of foreign investment with more than 2,800 such agreements in existence now.¹⁹ Bilateral investment treaties (BITs) are designed to facilitate foreign direct investment (FDI) from economies with abundant capital and skilled labour; the Organisation for Economic Co-operation and Development (OECD) countries to the less developed

⁹ A Reinisch and L Malintoppi, 'Methods of Dispute Settlement' (The Oxford Handbook of International Investment Law 2008) 691, 712

¹⁰ P Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' (International Investment Law for the 21st Century 2009) 343-359

¹¹ B Juratowitch, 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 ICSID Rev: FILJ 10, 13 ('the law of diplomatic protection entitled such a State to do so, but whether action is taken is, as a matter of international law, entirely a discretionary matter for the State to determine')

¹² R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 212

¹³ A Reinisch and L Malintoppi, 'Methods of Dispute Settlement' (The Oxford Handbook of International Investment Law 2008) 713

¹⁴ R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 212

¹⁵ P Weil, 'The State, the Foreign Investor, and International Law: the No Longer Stormy Relationship of a *Ménage A Trois* (2000) 15 ICSID Rev: FILJ 401, 412 ('not only must disputes arising out of foreign private investment be settled by international arbitration; they must also be resolved on the basis of international law.')

¹⁶ B Juratowitch, 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 ICSID Rev: FILJ 10, 11

¹⁷ MN Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 70, see also I Brownlie, *Principles of Public International Law* (7th edn, OUP, Oxford 2008) 5

¹⁸ JW Salacuse and NP Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (The Effects of Treaties on Foreign Direct Investment, 2009) 109, 110-112

¹⁹ K J Vandeveld, 'A Brief History of International Investment Agreements' in KP Sauvart, LE Sachs (eds), *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP, Oxford 2009) 3, 3

economies.²⁰ BITs have adopted the principles established by customary international law including minimum standard of treatment, protection of alien property, compensation for expropriation and principles of natural justice and due process of law. Developing countries negotiate bilateral investment treaties (BITs) as a strategy to attract foreign direct investment.²¹ The first BIT was signed in 1959 between Germany and Pakistan and came into force in 1962. The purpose of the BIT as stated 'in the preambles of the thousands of existing BITs is to promote the flow of FDI and, undoubtedly, BITs are so popular because policy makers in developing countries believe that signing them will increase FDI.'²² BITs serve as commitment device in that countries with weak domestic property rights by explicitly committing themselves to honouring the property rights of foreign investors increase their attractiveness as potential hosts.²³ BIT threaten punishment for violation of the commitments undertaken in that the arbitration provisions of BIT have been successfully used by investors to seek compensation against the host for allegedly damaging policies far broader than classical expropriation.²⁴ Corruption, administrative/regulatory measures, and allegedly biased law enforcement are examples of actions or policies that have been the subject of arbitration proceedings under international investment treaty law. Investment treaties protect investors against contractual breach by the host state, therefore, if there is a BIT in force between the host and home country, an agreement made between the home country investor and the host government is binding for both, a breach of which by the later is a violation of the BIT and therefore a violation of international law.²⁵ BITs perform four main functions relating to investments; protection (guarantees compensation for expropriation); liberalisation (grant investor a right to establish companies); promotion (provides investment insurance), regulation (prohibition of corrupt payments by investors).²⁶ Although there are some variations in the national and regional practice, the major provisions of BITs are similar and use the following pattern. Preamble lays down the general object and purpose of such treaties, albeit they are not legally binding and may be relevant to interpretation of the agreement. The scope of application of the treaty covers the subject matter, definition of investors and investment (natural and legal persons), territorial application and temporal effect. BITs contain substantive investment protection standards applicable to investors and investments of BIT partner. The applicable standards are classified into general standards and specific standards. General standards are recognised by general international law such as fair and equitable treatment (FET), full security and protection, expropriation and compensation standard and standards which have evolved in the commercial treaty practice such as most favoured nation (MFN) and national treatment standards (non-discrimination). Specific standards are applicable to particular incident of investment activity such as transfer of funds, compensation for losses due to expropriation, armed conflict or internal disorder. Dispute settlement provision in investment treaties is divided into those dealing with disputes between contracting countries as to observance and interpretation of treaty and those dealing with disputes between the investor and the host country.²⁷ The function of BITs are to some extent like foundational or constitutional documents that create a long-term framework within which the host country must apply its international investment law and policy because they create obligations that cannot be altered merely by modifying domestic legislation.²⁸ For the host governments, the primary economic function of BITs is to act as a commitment device through the investor-state dispute settlement (ISDS) system. Therefore, investors may bring a claim to an international arbitral tribunal outside the host state if they feel the host government has violated their rights under the BIT.²⁹ BITs, *ex ante* establish transparency about risk, therefore reduce risk of investing in a country, *ex post* they ensure the company have certain rights such as property rights and preserve them from expropriation.³⁰

²⁰ P Egger and M Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (The Effects of Treaties on Foreign Direct Investment, 2009) 253, 253

²¹ KP Gallagher and MBL Birch, 'Do Investment Agreements Attract Investment? Evidence from Latin America' (The Effects of Treaties on Foreign Direct Investment, 2009) 295, 295

²² E Neumayer and L Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries' (The Effects of Treaties on Foreign Direct Investment, 2009) 225, 225

²³ M Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a BIT and They Could BITE' (The Effects of Treaties on Foreign Direct Investment, 2009) 349, 350

²⁴ T Buthe and HV Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis' (The Effects of Treaties on Foreign Direct Investment, 2009) 171, 210

²⁵ AT Guzman, 'Explaining the Popularity of Bilateral Investment Treaties' (2009) 73, 74

²⁶ KJ Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP, Oxford 2010) 5

²⁷ P Muchlinski, 'The Framework of Investment Protection: the Content of BITs' (The Effects of Treaties on Foreign Direct Investment, 2009) 37-71

²⁸ KJ Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP, Oxford 2010) 3

²⁹ E Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation' (The Effects of Treaties on Foreign Direct Investment, 2009) 395, 398

³⁰ P Egger and M Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (The Effects of Treaties on Foreign Direct Investment, 2009) 253, 253

3) ICSID arbitration

The investor-state arbitration system provides investors with an effective remedy for protection and enforcement of their rights under the international law. The proliferation of investment protection treaties, 'have opened up a clear path for the direct access of the individual to international mechanism for the assertion of claims ... in this new context, many times it is the right of the individual affected and no longer that of the State of nationality which is asserted.'³¹ The regime established by investment treaties, 'grants innumerable present and future investors the right to arbitrate a wide range of grievances arising from the actions of a large number of public authorities, *whether or not any specific agreement has been concluded with the particular complainant.*'³² However, the right of the investor to have access to international arbitration proceedings without an independent and neutral forum for adjudication of investment disputes involving a sovereign state would defeat the objective of promotion and protection of investment through the system of bilateral treaties whose beneficiary is mainly the private investor. Dispute settlement provision lays down the rules of procedure on institution of arbitration, appointment of arbitrators, constitution of arbitral tribunal and recognition and enforcement. BITs provide different options for the settlement of investment disputes, as follows:

- a) Competent court of the host state,
- b) *Ad hoc* arbitral tribunal in accordance with UNCITRAL arbitration rules
- c) ICC rules of arbitration,
- d) ICSID arbitration rules under the ICSID Convention, if or as soon as both contracting parties acceded to it, and
- e) Any other settlement procedure agreed upon by the parties to the dispute.

The host state by granting foreign investor access to international arbitration make a commitment to honour its obligations that should further enhances investor confidence.³³ BITs increase attractiveness of the host country by laying down uniform set of rules and procedure for regulation of foreign investments. In addition, existence of a BIT may also facilitate obtaining finance and political risk insurance by the foreign investor for capital-intensive and large infrastructure projects. Investment treaties potentially promote FDI flows by reducing the political risk and protecting foreign investment against illegal expropriation, non-transferability of foreign currency and discrimination by the host state authorities.³⁴ The World Bank, wary of the need for the establishment of an international institution for the settlement of investment disputes, took the initiative the drafting a convention on the settlement of investment disputes that would be acceptable to world governments and send it to the member states for ratification, acceptance and approval.³⁵ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) establishing the International Centre for Settlement of Investment Disputes (ICSID or the Centre) was adopted on 14 October 1966. The creation of ICSID was an innovative step for protection of foreign investments due to the combination of five pertinent features of ICSID as follows:

- a) Foreign companies and individuals have direct recourse against the host state;
- b) State immunity is severely restricted;
- c) International law can be applied to the relationship between the host state and the investor;
- d) The local remedies rule is excluded in principle; and,
- e) ICSID awards are directly enforceable within the territories of all states parties to ICSID.³⁶

A primary function of the ICSID Convention is provision of the institutional support for conducting arbitration proceedings between contracting states and nationals of other contracting states. The ICSID Convention only provides the procedure for arbitration of investment disputes and does not contain any substantive rules. An important feature of ICSID Convention is application of uniform set of rules through codification of customary international law rules on international adjudication. The ICSID is endowed

³¹ FO Vicuna, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000) 15 ICSID Rev: FILJ 340, 343

³² J Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev: FILJ, 232, 233

³³ UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009) UNCTAD Series on International Investment Policies for Development (United Nations, Geneva) 15

³⁴ KJ Vandeveld, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard Intl LJ 469, 488

³⁵ M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff Publishers, London 1993) 17-18

³⁶ R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 20

with separate international legal personality that is capable of providing the benefits of a fixed set of rules and the support of an experienced arbitral institution although it is not the Centre itself that engages in arbitration.³⁷ As stated in the ICSID's Preamble its primary purpose is promotion of foreign direct investment and provision of a process for independent resolution of investment disputes. The ICSID is not a private centre or state institution that operates under the laws of a particular state. The World Bank investment court (ICSID) was established by an international treaty, administered by an international organization, and conducts arbitration proceedings in accordance with the norms of public international law.³⁸ BITs offer ICSID arbitration as one of the mechanisms for settlement of investor-states disputes to be elected by the investor, provided that both the home state of investor and the host state in which the investment is made, have ratified the ICSID Convention and consented to arbitration of disputes under the rules of ICSID. Where the investor has elected to pursue its claim through ICSID arbitration it must satisfy the jurisdictional requirements under both the applicable investment protection treaty and provisions of ICSID Convention. The ICSID Convention provides that, 'the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'³⁹ The ICSID Convention does not define the term "investment" so the tribunal must refer to the provisions of the contract, bilateral or multilateral treaty and the host state national laws to determine whether the transaction qualifies as an investment pursuant to the instrument defining the term. The ICSID Convention defines an investor as, 'any natural person who had the nationality of a Contracting State other than the State Party to the dispute' and defines corporate entities as 'any juridical person which had the nationality of a Contracting State other than the State Party to the dispute.'⁴⁰ The ICSID Convention contains provisions concerning applicable law by stating that, 'the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'⁴¹ According to commentators, 'proceedings under the ICSID Convention are self-contained. This means that they are independent of the intervention of any outside bodies. In particular, domestic courts have no power to stay, to compel, or to otherwise influence ICSID proceedings. Nor do domestic courts have the power to set aside or otherwise review ICSID awards.'⁴²

4) Foreign investment law and arbitration in Kosovo

Kosovo joined the ICSID Convention 29 June 2009. Kosovo has signed BITs with Belgium and Luxembourg, Austria and Switzerland.⁴³ The ratification of BITs will promote and encourage FDI flows and facilitate arbitration of investment disputes at the ICSID. Kosovo enacted foreign investment law in 2014 entitled the Law No. 02/L-33 on Foreign Investment (foreign investment law). The said law incorporates international standards of investment protection including fair and equitable treatment, full and constant protection and security, transfer rights.⁴⁴ The dispute resolution provision in the Foreign Investment Law offers investors the option to refer its disputes against Kosovo to arbitration pursuant to ICSID, ICSID Additional Facility, ICC and UNCITRAL arbitration rules.⁴⁵ Kosovo adopted Law No. 02/L-76 on Arbitration (Arbitration Law) based on the UNCITRAL Model Law on International Commercial Arbitration. The main features of the Arbitration Law will be discussed in the following paragraphs. Any articles stated are provisions of the Arbitration Law unless stated otherwise.

Arbitration agreement

The arbitration agreement can be either signed as a separate agreement attached to the main contract or parties may include an arbitration clause in the contract. In either case the agreement of the parties to arbitrate disputes must be in writing and clearly state the parties' intention to settle contractual disputes through arbitration (arts 6 & 5 Kosovo Arbitration Law).

Party autonomy

³⁷ A Reinisch and L Malintoppi, 'Methods of Dispute Settlement' (The Oxford Handbook of International Investment Law 2008) 691, 698

³⁸ M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff Publishers, London 1993) 19

³⁹ ICSID Convention art 25(1)

⁴⁰ *ibid* art 25 (2)(a) and (b)

⁴¹ *ibid* art 42(1)

⁴² R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 223

⁴³ Ministry of Foreign Affairs of Republic of Kosovo available at <http://www.mfa-ks.net/?page=2.72>

⁴⁴ Official Gazette of the Republic of Kosovo available at <http://gzk.rks-gov.net/ActDetail.aspx?ActID=8982>

⁴⁵ Foreign Investment Law art 15.2

An advantage of arbitration is that the parties can freely choose the rules of procedure governing the arbitration proceedings, language and place of arbitration as well as selecting the applicable law of the contract (arts 16.3, 17, 19, 29). Parties are also free to choose the arbitrators who may be familiar with their case or possess expertise in specific industries.

Ad hoc or institutional arbitration

There are two main types of arbitration: *ad hoc* and institutional. In *ad hoc* arbitration the parties agree on the procedures to govern their dispute and can adapt the rules to meet their requirements.⁴⁶ Arbitration Rules of UNCITRAL contain flexible rules of procedure for adoption by the parties in *ad hoc* arbitration proceedings. However, in absence of any rules, the arbitration law of the place of arbitration acts as default rules and procedures for arbitration (i.e.: English Arbitration Act 1996 in case the place of arbitration is London).⁴⁷ In institutional arbitration, the parties choose the arbitration rules of a specialised institution such as ICSID, International Chambers of Commerce (ICC) in Paris, Alternative Dispute Resolution (ADR) Center of AmCham in Kosovo or the London Court of International Arbitration (LCIA). In institutional arbitration the parties can benefit from the support of the arbitration institution in administration and supervision of the proceedings (e.g.: setting the time schedule for hearings, appointment of arbitrators etc.)

Sole arbitrator or panel of arbitrators

The parties can either choose sole arbitrator to decide the dispute or each party appoint one arbitrator and the two arbitrators will then choose the third arbitrator to act as the presiding arbitrator (chairman).⁴⁸

Initiation of arbitration proceedings

Once dispute arises between parties to the contract, the party wishing to initiate arbitration may send a notice of dispute or request for arbitration to the other party containing the details of dispute (particulars of claim) and name of arbitrator and deadline for other party to respond to the claim and appoint its arbitrator.

Powers of the arbitral tribunal

The arbitral tribunal has power to decline or accept jurisdiction over the dispute on the basis of the consent of the parties contained in their contract to resolve their contractual disputes through arbitration. Therefore, arbitration process is consensual and once the tribunal is established it can determine whether it has jurisdiction over the case and on the validity of arbitration agreement.⁴⁹ The courts will recognise parties' agreement to arbitrate and cannot intervene in the arbitration proceedings (art 3).⁵⁰ The courts merely assist the parties and tribunal by issuing orders for collecting evidence or other judicial acts not within competence of the arbitral tribunal (art 28). However the tribunal can only decide the questions referred to it by the parties and should not exceed its authority over the dispute and parties and/or to omit any issues from its deliberations and award. Furthermore the tribunal must justify and give reason for its award (art 31.2). Otherwise there is risk of setting aside or annulment of the award by the courts of law.

Final and binding award

The tribunal's decision is final and binding on the parties and upon application by winning party the court recognises and enforces the award (art 31.1). The arbitral award cannot be appealed or revised on the merits and the losing party may only challenge and resist recognition of the awards on grounds of procedural irregularities in the arbitration proceedings (i.e. constitution of arbitral tribunal, breach of due process and respondent was not given a chance to present its defence). In case the losing party apply for setting aside and annulment the court can only review the case on the points of facts to determine whether or not there was fundamental flaws in the proceedings. The court can also annul an award if the dispute was non not capable of settlement through arbitration and/if its against public policy.

Challenging arbitrators

⁴⁶ Arbitration Law art 16.3 states that, 'subject to the mandatory provisions of this law, the parties may agree upon an arbitration provision'.

⁴⁷ Kosovo Arbitration Law art 16.4 states that, 'in absence of an agreement by the parties on the procedure and in absence of relevant provisions in this law, the arbitral tribunal shall determine by itself the arbitration rules applying dispute procedures or applying arbitrary rules of an institution of the permanent arbitration'.

⁴⁸ Arbitration Law art 9.1 stipulates that, 'the arbitral tribunal shall be composed of either a single arbitrator or a panel of arbitrators...'

⁴⁹ Arbitration Law art 14.1

⁵⁰ Arbitration Law art 3 states that: 'No court in Kosovo may intervene in arbitration proceedings, unless otherwise provided for in this Law.'

In arbitration proceedings the parties can agree on the procedures for appointment of arbitrators (art 10.1). This can be done either at the time of sending the notice of dispute or request for arbitration to other party or at the time of signing the arbitration agreement. In most cases the arbitrators are chosen after the dispute arises. In case there is evidence that the arbitrator is biased or there are doubts as to the impartiality and neutrality of arbitrator, the parties may challenge his/her appointment (art 10.2). In case of objection by one of the parties the arbitrator can be substituted.

Recognition and enforcement of arbitral award

In case the arbitral tribunals issues a favourable award the investor may apply to the court for recognition and enforcement of award. The United Nations Convention on Recognition and Enforcement of the Foreign Awards 1957 (New York Convention) applies to arbitration awards that are rendered in a country other than the country where recognition and enforcement is sought (art 1(1) NYC). Under the NYC the courts of the country in which enforcement is sought must recognise and enforce the award the same way as a local judgment. Kosovo has not joined the New York Convention. However, the Foreign Investment Law stipulates that, arbitral award issued by foreign tribunals or international arbitration bodies shall be enforceable in accordance with the New York Convention.⁵¹ For enforcement of the award, the applicant must submit the arbitral award or certified copy and the arbitration agreement together with the translated copies of the documents to the respective court in foreign jurisdiction(s). The NYC requires the arbitration agreements to be in writing and signed by the parties to the agreement.

Conclusion

The emergence of international investment law as an autonomous body has redefined international dispute resolution procedure. The inter-relationship and application of international law and domestic law enables the arbitral tribunal to recognise regulatory space for sovereign states to enforce health and safety standards, labour law and human rights and environmental protection. As regards promotion and attraction of international investments in Kosovo, the enactment of foreign investment law is the first step for creating an investment friendly regime. The ratification of international treaties containing investor protection rules will complement the international adjudication procedures and increase investor confidence in enforcement of rule of law and good governance in Kosovo. The arbitration law offers modern and flexible rules for arbitration of investment and commercial disputes. Adoption of international standards promotes the status of Kosovo as an arbitration friendly jurisdiction. International aid agencies and financial institutions and investors may structure their investment to enjoy benefits of BIT protection including access to international arbitration.

⁵¹ Foreign Investment Law art 15.4