



Access to Justice in Eastern Europe

ISSN 2663-0575 (Print)

ISSN 2663-0583 (Online)

Journal homepage <http://ajee-journal.com>

Research Article

THE CHALLENGES OF INVESTMENT ARBITRATION: SUCCESS OR FAILURE? A COMPARATIVE ANALYSIS OF INVESTMENT ARBITRATION IN NORTH MACEDONIA AND KOSOVO

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ABSTRACT

Background: *In today's modern business and technological landscape, businesses are increasingly inclined to seek alternative methods for resolving disputes rather than rely solely on traditional court procedures. Businesses are also increasingly aware of the significance of resolving conflicts through alternative means and taking proactive measures to avoid litigation. In recent decades, investment arbitration has gained widespread acceptance and has emerged as a preferred mechanism for resolving disputes involving international investors in Western Balkan countries. Some countries demonstrate a favourable inclination towards employing arbitration as a dispute resolution mechanism by enacting legislation that grants investors the right to initiate arbitration proceedings against the state in case of failure.*

This scientific research objective will be achieved through the reflection of the legislative framework in the matter of investment arbitration as well as the reflection of the flow of foreign investments, analysing and not limited to the treatment of concrete cases of arbitration disputes. Through this approach, we will answer the central question of how much arbitration as an alternative dispute resolution mechanism is a stimulating factor for attracting foreign direct investment or whether multinational companies only use the legislative and incentive favours offered by the Republic of Kosovo and North Macedonia.

Methods: *The article was conceived based on a modern methodological framework. Within the general methodological framework of scientific research, logical methods play a crucial role in the scientific processing of the research data, drawing conclusions and determining facts through which the truth of the thesis of the work is reached scientifically. In the context of this paper, the method of analysis through which the impact of arbitration as an alternative dispute resolution mechanism in relation to the flow of investments will be analysed is noteworthy.*

Additionally, methods of abstraction and concretisation will also be used. Abstraction is the basis of analysis, which sometimes represents the separation of parts from the whole subject. Moreover, the comparative method will highlight the diverse normative solutions in national legislation and international legal sources.

Results and conclusions: *In the article, the authors propose considering the effectiveness of existing provisions and determining whether adjustments or alternative approaches are needed to maximise the benefits of foreign investment while minimising potential risks and uncertainties associated with dispute resolution processes.*

1 INTRODUCTION

Arbitration's evolution has followed different trends in various periods of economic and social development. The speed and efficiency of dispute resolution are pivotal in attracting foreign investments, which is essential for any country's economic development. From an investigator's perspective, arbitration emerges as a fundamentally more accessible method of dispute resolution.¹

This paper aims to identify whether authorising foreign investors the right to sue a country in international arbitration forums serves as a catalyst for attracting foreign investors. It addresses this question in a comparative aspect by comparing the legislation of Kosovo and Macedonia, two neighbouring countries with similar legal, social and economic systems.

Structured logically and chronologically, the paper initially deals with the legislative aspects of foreign investments and then the flow of investments. The theoretical analysis relies on professional literature in the field of arbitration law, specifically examining the works of experts who have significantly contributed to research in alternative dispute resolution. The literature review method aims to summarise reliable prior knowledge and gain insights from the published scientific literature.

In addition to the doctrinal perspective of investment arbitration, as a result of the expectations of the paper's thesis, aspects of the foreign investment pool are treated through empirical data as a reference point in relation to the paper's research objectives.

In countries where the judiciary is slow and inefficient, alternative methods such as arbitration and mediation are sought. This need is expressed primarily in developing countries, which undergo thorough scrutiny by foreign investors evaluating the investment environment they offer. Respecting an investor's property rights is one of the most important elements when deciding whether to start an investment project in a third country.²

1 Mariel Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions* (Eleven International Pub 2008) vol 1.

2 Michał Bors, 'Indirect and creeping expropriation and investor's protection under international investment law' (2014) 21 *Studia Iuridica Lublinensia* 181, doi:10.17951/sil.2014.21.0.181.

In Western Balkan countries, the rule of law and the efficiency of dispute resolution by the judiciary remain challenging. Consequently, the European Commission (EC) Report on Kosovo for 2022 states, "The efficiency of the judicial system remains of concern, and the time taken for judgements (i.e. the average time from filing a court case to receiving a judgment) remains a cause for concern as they are overall far too long."³ While EC 2022 Report on North Macedonia highlights "*the positive trend of the efficiency in the judiciary.*"⁴

The attraction of foreign investment is crucial for economic development, particularly for countries under development.

In general terms, foreign investment involves a person or legal entity from one economy investing in another economy that involves a transfer of funds or capital into the economy in which the investment is made. Foreign investment involves capital flows from one country to another, granting foreign investors extensive ownership stakes in domestic companies and assets. Foreign investment denotes that foreigners have an active role in management as a part of their investment or an equity stake large enough to enable the foreign investor to influence business strategy.

A modern trend is toward globalisation, where multinational firms have investments in various countries.⁵ It is worth emphasising that investment arbitrations and commercial arbitrations differ in several aspects, particularly in terms of how jurisdiction is established. In investment arbitrations, there is no arbitration agreement; rather, jurisdiction is based on an investment protection agreement that includes a general "offer" by the state or permission for a foreign investor to initiate arbitration proceedings if they believe their investment has been harmed.

Mamingi and Martin highlight the role of FDI in facilitating growth and economic transformation among developing countries and the fact that FDI has become the largest source of external finance for developing economies.⁶

Kosovo legislation defines foreign direct investment as "*any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo to conduct lawful commercial activities.*"⁷

3 European Commission, 'Kosovo* 2022 Report: Communication on EU Enlargement policy' (*European Commission*, 12 October 2022) 22 <https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2022_en> accessed 05 December 2023.

4 European Commission, 'North Macedonia Report 2022: Communication on EU Enlargement policy' (*European Commission*, 12 October 2022) 19 <https://neighbourhood-enlargement.ec.europa.eu/north-macedonia-report-2022_en> accessed 05 December 2023.

5 James Chen, 'Foreign Investment: Definition, How It Works, and Types' (*Investopedia*, 26 October 2020) <<https://www.investopedia.com/terms/f/foreign-investment.asp>> accessed 07 October 2023.

6 Nlandu Mamingi and Kareem Martin, 'Foreign Direct Investment and Growth in Developing Countries: Evidence from the Countries of the Organisation of Eastern Caribbean States' (2018) 124 CEPAL Review 79, doi:10.18356/e270b670-en.

7 Law of the Republic of Kosovo no 04/L-220 of 12 December 2013 'On Foreign Investment' [2014] Official Gazette of the Republic of Kosovo 1/1, art 2, para 1.4.

In contrast to the Law on Foreign Investments in Kosovo, which provides a clear definition of a foreign investor as a foreign individual or entity investing in the Republic of Kosovo, the legislation in North Macedonia lacks a specific normative definition that directly outlines the status of foreign investors.

Consequently, some countries tend to use arbitration to strengthen dispute resolution and, hence, attract foreign investments. Other countries offer attractive conditions for investors while leaving arbitration as an option for dispute resolution but not an obligation.⁸

Both countries have adopted laws on the arbitration procedure, which are fully unified with the international arbitration law. However, the names of these two laws differ. The law in Kosovo bears the title “Law on Arbitration”, while in Macedonia, this act is called the “International Commercial Arbitration Act”.⁹

This paper is structured as follows: an introduction, the second section providing an overview of foreign investments, the third section delves into the legal and policy framework for FDI in Kosovo and Macedonia followed by statistical data on FDI in the fourth section, and finally, the results and conclusion.

The paper’s conclusion will reflect the general analysis of the facts and the interpretation of the legislative framework in the states under analysis. Based on the proven facts, it will be ascertained whether arbitration as an alternative dispute resolution mechanism is a factor simulative in increasing the level of foreign investments or if, in some cases, arbitration may pose challenges to governments and strain state budgets, without significantly affecting the increase in the flow of investments. In some cases, it may present a privileged status of foreign companies over domestic companies, which, in case of eventual disputes, resort to judicial forms of dispute resolution.

2 STATUSES OF THE FDI IN KOSOVO AND NORTH MACEDONIA

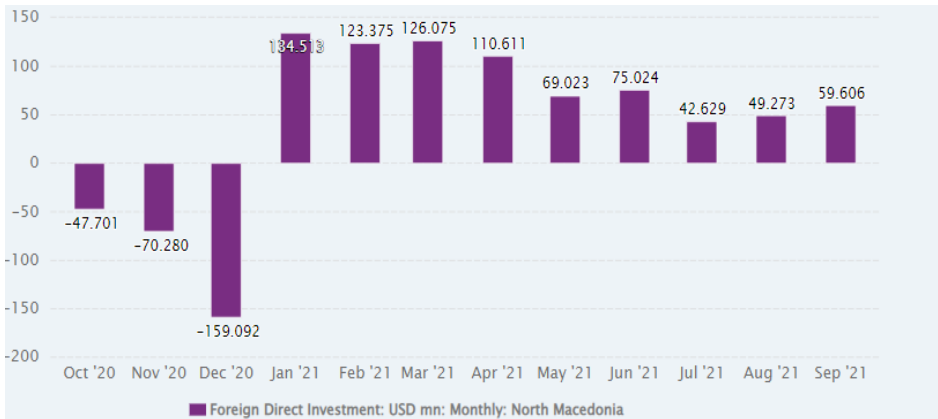
As illustrated in the graph below (Graph 1),¹⁰ Foreign Direct Investment (FDI) in North Macedonia experienced a notable rise of USD 59.6 million in September 2021, marking an increase from the previous month's growth of USD 49.3 million. The data peaked at USD 347.3 million in January 2001 while hitting a record low of – USD 159.1 million in

8 Federica I Paddeu, ‘The Impact of Investment Arbitration in the Development of State Responsibility Defences’ in Christian J Tams and Stephan W Schill (eds), *International Investment Law and General International Law: Radiating Effects?* (Edward Elgar Pub 2023) 209.

9 Mentor Lecaj, Granit Curri and Donat Rexha, ‘The Application of the International and Domestic Arbitration Law in Settlement of Legal Disputes: A Comparative Study’ (2022) 6(3) *Corporate Governance and Organizational Behavior Review* 150, doi:10.22495/cgobrv6i3p14.

10 CEIC, ‘North Macedonia Foreign Direct Investment’ (*CEIC Data*, 2023) <<https://www.ceicdata.com/en/indicator/macedonia/foreign-direct-investment>> accessed 05 April 2023.

December 2020. According to the most recent reports from North Macedonia, the Current Account displayed a surplus of USD 20.8 million in September 2021. Furthermore, North Macedonia's Direct Investment Abroad expanded by USD 35.0 million in the same month, whereas its Foreign Portfolio Investment witnessed a decline of USD 551.4 million. Notably, the country's Nominal GDP was reportedly USD 3.6 billion in December 2020.



Graph 1. Foreign direct investment in North Macedonia from October 2000 to September 2021

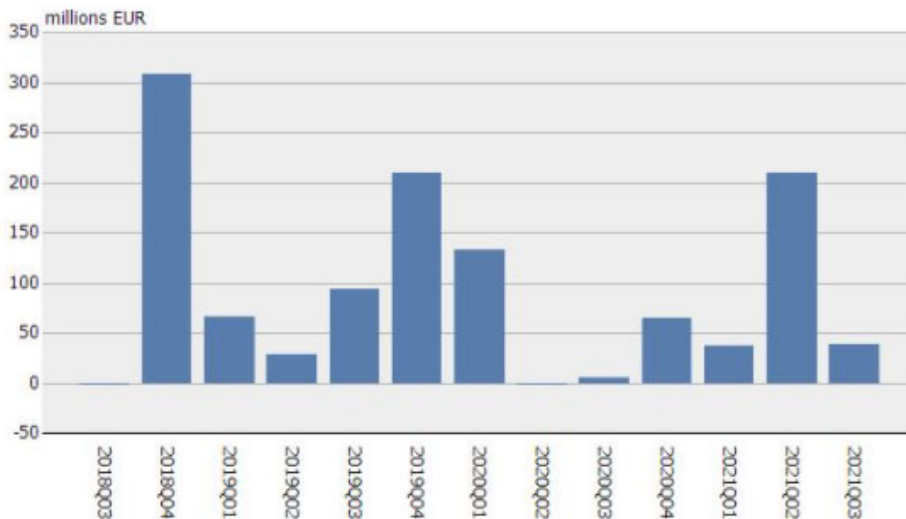
In January-September 2021, total direct investments in the country amounted to EUR 285.6 million, mainly as a result of the reinvestment of earnings and equity (EUR 196.7 million and EUR 113.2 million, respectively) amid decreased net liabilities based on intercompany lending (by EUR 24.3 million).

The data reached an all-time high of USD 347.3 million in January 2001 and a record low of -USD 223.7 million in November 2022.

Hence, the data in the above table indicate a positive trend of FDI in North Macedonia, which, in particular, is focused on the reinvestment of earnings and equity. The trend has remained constant and has not changed significantly over the years.

The National Bank of the Republic of North Macedonia provides monthly Foreign direct investment in USD (Graph 2).¹¹

11 National Bank of the Republic of North Macedonia, 'Direct Investment-Flows' (*National Bank of the Republic of North Macedonia*, 2023) <https://www.nbrm.mk/direktni_investicii_dvizenja-en.nspcx> accessed 07 April 2023.



Graph 2. Direct investment in the North Macedonia - transactions

North Macedonia’s Foreign Direct Investment (FDI) increased by USD 66.3 million in June 2023, compared with an increase of USD 99.0 million in the previous month (more data in Table 1).¹²

Table 1. Foreign direct investment in North Macedonia from January 2001 to June 2023

LAST	PREVIOUS	MIN	MAX	UNIT	FREQUENCY	RANGE
▼ 66.3 Jun 2023	▼ 99.0 May 2023	-223.7 Nov 2022	347.3 Jan 2001	USD mn	monthly	Jan 2001 - Jun 2023

In 2022, the net flow of FDI in Kosovo was estimated at EUR 778 million, a significant increase from EUR 420 million in 2021 (Table 2).¹³

12 CEIC (n 10).

13 Central Bank of the Republic of Kosovo, ‘Foreign Direct Investment - by Country’ (*Banka Qendrore e Republikës së Kosovës*, 2023) <<https://bqk-kos.org/statistics/time-series/?lang=en>> accessed 04 April 2023.

Table 2. Foreign direct investments in Kosovo by country (net)

	Total	Agriculture, forestry and fishing	Mining and quarrying	Manufacturing	Electricity, gas, steam and air conditioning supply	Construction	Wholesale and retail trade; repair of motor vehicles and motorcycles	Information and communication	Financial and insurance activities	Real estate activities	Professional, scientific and technical activities	Administrative and support service activities	Education	Not specified
	A	B	C	D	F	G	J	K	L	M	N	P		
2018	272.1	0.1	-2.7	-17.7	12.1	24.8	19.6	-9.6	15.5	205.2	5.2	4.7	0.7	2.0
2019	254.6	1.5	-6.9	14.2	13.5	-17.1	-6.7	2.3	13.9	223.8	3.4	3.7	1.3	7.6
2020	345.7	2.8	29.1	-4.6	30.0	11.4	-8.1	1.6	85.1	201.1	3.6	0.8	1.3	3.0
2021	420.7	1.1	1.4	-0.4	-38.8	16.7	-4.0	17.3	24.6	384.0	5.7	1.4	1.8	2.6
2022	778.2	0.7	52.4	14.3	44.9	26.7	15.1	14.0	53.9	523.7	10.7	10.7	2.2	12.6

Largest FDI by country is Germany and Switzerland, followed by the US and Albania (Table 3).¹⁴

Table 3. Largest Foreign direct investments in Kosovo by country

	Total	AT	DE	CH	TR	NL	AL	US	FR	IT	HU	Other
2018	272.1	11.2	60.3	71	12.2	-39.7	22.3	35.5	5.6	2.7	0.1	29.1
2019	254.6	11.9	70.2	61.9	-31.9	1.9	15.2	22.8	3.4	7.9	19.1	39.6
2020	345.7	27.6	67.5	64.1	14.6	0.1	39.8	29.6	3.7	3.5	26.1	22.3
2021	420.7	22.9	121.9	99.2	-38	7.6	50.4	63.7	10.2	8.5	3.6	40.7
2022	778.2	44.7	194.2	155.2	39	43.7	79.8	93	9.9	10.4	14.3	37

14 idid.

According to the tables above, data show no significant increase in FDI. It is important to analyse this in view of the fact that the above-given investment data are investments provided by the diaspora and not FDI in terms of attracting foreign companies to invest in Kosovo. Investments from the diaspora have been an important driver for FDI in Kosovo. Germany, which hosts the largest diaspora in the world, is the leading country of FDI in Kosovo, followed by Switzerland and Turkey. However, the question remains whether such investment should be considered as FDI.

A range of measures were implemented in the last decade to stimulate FDI, such as the introduction of a flat corporate tax rate at 10%, the establishment of economic zones with a range of benefits for investors, and the adoption of the “Law on Strategic Investments” facilitating the transfer of public assets and infrastructure support for investors in key sectors.¹⁵ However, FDI remained at a relatively low level.

Kosovo faces constraints in its capacity to draw foreign investment, primarily stemming from deficiencies in disseminating information, inadequate communication about its economic prospects and foreign investment opportunities, and the absence of a credit rating from a reputable foreign rating agency.¹⁶ Moreover, the inflow of foreign investment has been impeded by sluggish and inefficient reforms in the business environment, a lack of transparency, limited economic activity across various sectors, the weak rule of law, and unfavourable perceptions held by foreign investors and diaspora communities.

3 LEGAL FRAMEWORK AND POLICIES FOR FDI

3.1. North Macedonia

In the comparative analysis of foreign direct investments and their impact in both countries, the initial focus should be on presenting the legal framework related to the overall business environment unique to each nation.¹⁷ From the perspective of Euro integration, it is evident that Northern Macedonia is making more progress than Kosovo.

North Macedonia generally offers a favourable environment for conducting business, and its legal framework aligns well with international standards. However, corruption remains a persistent issue.¹⁸

15 Law of the Republic of Kosovo no 05/L-079 of 11 October 2016 ‘On Strategic Investments in the Republic of Kosovo’ [2017] Official Gazette of Republic of Kosovo 6/15.

16 See more: ‘2023 Investment Climate Statements: Kosovo’ (*US Department of State*, 2023) <<https://www.state.gov/reports/2023-investment-climate-statements/kosovo/>> accessed 05 December 2023.

17 Ivan Bimbilovski and Elizabeta Spiroska, ‘Macedonia’ in Csongor Nagy (ed), *Investment Arbitration in Central and Eastern Europe: Law and Practice* (Edward Elgar Pub 2019) 261.

18 See more: ‘2023 Investment Climate Statements: North Macedonia’ (*US Department of State*, 2023) <<https://www.state.gov/reports/2023-investment-climate-statements/north-macedonia/>> accessed 05 December 2023.

According to the 2020 World Bank Doing Business Report, North Macedonia was ranked 17th in the world for doing business, dropping seven positions from the previous year. The institutional framework with legislative powers in foreign direct investment (FDI) in the Republic of Macedonia covers many entities.¹⁹ Nevertheless, large foreign companies operating in the Technological Industrial Development Zones (TIDZ) generally express positive experiences with their investments and maintain good relationships with government officials.²⁰

To attract foreign direct investment, the Republic of Northern Macedonia has established several institutions whose exclusive competence facilitates the procedures for attracting foreign investment. Foremost among these is the role of Invest North Macedonia – the Agency for Foreign Investments and Export Promotion, which serves as the primary government institution facilitating foreign investments. This agency works directly with potential foreign investors, provides detailed explanations and guidance for registering a business in North Macedonia, analyses potential industries and sectors for investing, shares information on business regulations, and publishes reports about the domestic market.²¹

The companies in TIDZ realised exports of 275.4 million EUR in January 2023, the highest level in the last five years. Compared to January 2022, exports increased by 11%, i.e. 9% higher than in 2021, and by 45% and 15% higher compared to 2020, i.e., 2019.

The positive growth trend continues concerning imports. In January, the companies in TIDZ imported 221 million EUR. This is 8% more than the same period 2022, which is 44% more than January 2020 and 15% more compared to 2019. The analysis shows that Imports in January 2021 were higher by 10%.

There is a particularly positive growth trend in net exports, which in January were 24.5%. This is due, among other things, to the increased investment activities in the Zones and the increased number of jobs.

The zones' employees reached almost 16,400 in January, 16% higher than in January 2022. Only in the first month of the year were almost 80 new jobs created in the companies in the zones. Otherwise, TIDZ rounded off last year with 2,300 newly created jobs and the highest export of EUR 3.7 billion, making 2022 the most successful year of the zones existence.²²

19 Biljana Petrevska, 'Foreign Direct Investment in Macedonia – Is there Discrimination in Practice?' (Knowledge Based Sustainable Economic Development: 4th International Scientific Conference ERAZ 2018, Sofia, Bulgaria, 7 June 2018) 40.

20 See more: '2021 Investment Climate Statements: North Macedonia' (*US Department of State*, 2021) <<https://www.state.gov/reports/2021-investment-climate-statements/north-macedonia/>> accessed 04 April 2023.

21 See more: *Invest North Macedonia* (2023) <<https://investnorthmacedonia.gov.mk/mk/pocetna-stranica/>> accessed 05 December 2023.

22 'Positive Growth Trend in TIDZ Continues in 2023 – Increased Exports and New Jobs in January 2023' (*TIDZ*, 5 February 2023) <<https://fez.gov.mk/en/positive-growth-trend-in-tidz-continues-in-2023-increased-exports-and-new-jobs-in-january/>> accessed 05 December 2023.

Table 4. Investment Climate and Incentives in North Macedonia²³

Incentives	Awarded aid	Eligibility criteria	Condition for use of aid	Length of incentives	Zone specific
Tax exemptions from profit tax	Total exemption from profit tax rate, currently at 10%.	Being a domestic or foreign company registered and operating in Technological Industrial Development Zones (established to host high-tech clean industry production that is export-oriented).	Be located in the zone.	10 years ¹⁾	Yes
Tax exemptions from personal income tax	Total exemption from personal income tax rate, currently at 10%.			10 years	
Lower rents	The beneficiaries of TIDZs pay significantly low rent given the area of the parcels.			n/a	
Grant for construction	The amount of aid for construction in TIDZ is limited to EUR 0.5 million. The beneficiaries of the zones use this aid in the form of a grant under the conditions specified in the Law on TIDZ.		Be located in the zone	n/a	
Exemptions from a compensation for organising the construction land (communal taxes)	Exemption from local compensation, determined by the municipality in which the TIDZs are located.			n/a	
Aid for training employees	Zone beneficiaries can receive aid in the form of a grant for training of the employees in the amount of 50% of the eligible training costs for general trainings or 25% of the eligible training costs for general trainings/developments.			n/a	
Exemption from paying VAT	Zone beneficiaries are exempt from paying VAT on supply of goods and services in TIDZs (except the supply intended for the final consumption) and import of goods into TIDZs (provided that the goods are not intended for final consumption)., under the conditions specified in the Law on TIDZ.			n/a	
Customs duties for specific equipment, machines and spare parts, exemption.	Exemption from paying customs duties for equipment for performing the activity in the Zone, machines and spare parts, under the conditions specified in the Law on TIDZ.		n/a		

3.2. Legal Framework in North Macedonia

In North Macedonia, no singular law governs foreign investments, nor is there a comprehensive "one-stop-shop" website providing all the relevant laws, rules, procedures, and reporting requirements for investors. Instead, the legal framework comprises numerous laws, including the Trade Companies Law, the Securities Law, the Profit Tax Law, the Customs Law, the Value Added Tax (VAT) Law, the Law on Trade, the Law on Acquiring Shareholding Companies, the Foreign Exchange Operations Law, the Payment Operations Law, the Law on Foreign Loan Relations, the Law on Privatization of State-owned Capital, the Law on Investment Funds, the Banking Law, the Labor Law, the Law on Financial

23 OECD, *Competitiveness in South East Europe 2021: A Policy Outlook* (Competitiveness and Private Sector Development, OECD Pub 2021) North Macedonia profile, 1447-1651, doi:10.1787/cf2e0fc7-en.

Discipline, the Law on Financial Support of Investments, and the Law on Technological Industrial Development Zones (free economic zones).²⁴

North Macedonia has simplified regulations and procedures for large foreign investors operating within the Technological Industrial Development Zones (TIDZ). However, the overall regulatory environment in the country remains complex and lacks full transparency, although the government is striving to enhance it.

The Law on International Commercial Arbitration of the Republic of Macedonia establishes the criteria for determining whether arbitration is international.²⁵ According to this law, arbitration is deemed international if either: 1) one of the parties involved, at the time of entering into the arbitral agreement, is a natural person with domicile or habitual residence abroad or a legal entity with its place of business located abroad; or 2) a substantial part of the obligations arising from the commercial relationship is to be performed in a specific location, or the dispute is most closely connected with a particular place.

24 Decree no 08-1873/1 of 12 May 1993 'Law on Foreign Loan Relations' [1993] Official Gazette of the Republic of Macedonia 31/700; Decree no 08-2820/1 of 24 July 1996 'Law on Privatization of State-owned Capital' [1996] Official Gazette of the Republic of Macedonia 37/791; Decree no 07-2969/1 of 14 July 1999 'Law on Value Added Tax' [1999] Official Gazette of the Republic of Macedonia 44/1298; Decree no 07-3371/1 of 26 July 2000 'Securities Law' [2000] Official Gazette of the Republic of Macedonia 63/2540; Decree no 07-1600/1 of 25 April 2001 'Law on Foreign Exchange Operations' [2001] Official Gazette of the Republic of Macedonia 34/735; Decree no 07-1148/1 of 12 March 2004 'Law on Trade' [2004] Official Gazette of the Republic of Macedonia 16/279; Decree no 07-1761/1 of 30 April 2004 'Law on Trade Companies' [2004] Official Gazette of the Republic of Macedonia 28/459; Decree no 07-437/1 of 29 January 2007 'Law on Technological Industrial Development Zones' [2007] Official Gazette of the Republic of Macedonia 14/190; Decree no 07-3839/1 of 6 September 2007 'Payment Operations Law' [2007] Official Gazette of the Republic of Macedonia 113/1494; Decree no 07-1913/1 of 19 May 2005 'Customs Law' [2005] Official Gazette of the Republic of Macedonia 39/595; Decree no 07-2918/1 of 22 July 2005 'Law on Labor Relations' [2005] Official Gazette of the Republic of Macedonia 62/910; Decree no 07-2327/1 of 21 May 2007 'Law on Banks' [2007] Official Gazette of the Republic of Macedonia 67/884; Decree no 04-486/1 of 27 January 2009 'Law on Investment Funds' [2009] Official Gazette of the Republic of Macedonia 12/257; Decree no 07-1954/1 of 13 May 2013 'Law on Acquiring Shareholding Companies' [2013] Official Gazette of the Republic of Macedonia 69/1461; Decree no 07-5101/1 of 27 December 2013 'Law on Financial Discipline' [2013] Official Gazette of the Republic of Macedonia 187/4616; Decree no 07-2934/1 of 23 July 2014 'Law on Profit Tax' [2014] Official Gazette of the Republic of Macedonia 112/3354; Decree no 07-3053/1 of 3 May 2018 'Law on the Financial Support of Investments' [2018] Official Gazette of the Republic of Macedonia 83/1507. Changes and additions to the Laws were made by decrees in subsequent years. North Macedonia has concluded an Agreement for Promotion and Protection of Foreign Direct Investments with the following countries: Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, China, Croatia, the Czech Republic, Egypt, Finland, France, Germany, Hungary, India, Iran, Italy, Luxembourg, Malaysia, Montenegro, the Netherlands, North Korea, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, Turkey, and Ukraine.

25 Decree no 07-1252/1 of 21 March 2006 'Law on International Commercial Arbitration of the Republic of Macedonia' [2006] Official Gazette of the Republic of Macedonia 39/492.

3.2.1. Law on Strategic Investments²⁶

North Macedonia adopted the Law on Strategic Investment to create more favourable conditions for selected investments in the following sectors: energy, transport, telecommunication, tourism, manufacturing, agriculture and food, forestry and water economy, health, industrial and technological parks, wastewater and waste management, sport, science and education.

This Law should encourage economic growth, employment, and the use of new technologies and innovations, increasing North Macedonia's competitive economic opportunities for export, decreasing the trade deficit, and improving the well-being of the citizens of North Macedonia overall.

The Law defines a strategic investment project as a project which fulfils one or more purposes as described above and which realises investments in the amount of:

- At least EUR 100 million on the territory of at least two or more municipalities,
- At least EUR 50 million in the municipalities with a seat in a city, municipalities in the City of Skopje, and the City of Skopje, and
- At least EUR 30 million in municipalities with a seat in a village.²⁷ As an exception, projects realised in the scope of agreements between countries, projects which are conducted and financed in collaboration with the European Union, the Ministerial Council of the Energy Community (PECI – Project of Energy Community Interest; PMI – Project of Mutual Interest), and projects with international financial institutions are considered as strategic investment projects under this Law.

The strategic investment projects must be in one of the following areas: Energy and infrastructure, transport and telecommunications, tourism, manufacturing, agriculture, forestry and water economy, food industry, healthcare, industrial and technological parks, wastewater and waste management, IT zones, sport, science and education, and construction of large multifunctional construction complexes of construction buildings that cover more than one of the areas mentioned above.²⁸

If the investment is over EUR 150 million, it can be granted the status of a strategic investment project even if it is not in the areas mentioned above.

26 Decree no 08-437/1 of 16 January 2020 'Law on Strategic Investment in the Republic of North Macedonia' [2020] Official Gazette of the Republic of North Macedonia 14/256.

27 *ibid*, art 4.

28 *ibid*, art 5.

3.2.2. Law on the Financial Support of Investments²⁹

The 2021 Legislation concerning the provision of financial backing for Investments establishes guidelines for the categories, quantities, prerequisites, modalities, and processes involved in providing financial aid to enterprises making investments within the confines of the Republic of North Macedonia. This framework of support conforms to the protocols governing the oversight of government assistance.

In the previous period, many Macedonian companies received financial support, increasing the country's economic capacity.

As per the stipulations of the legislation, the following categories of entities are eligible recipients of financial assistance:

- Those entities that have initiated Initial Investments
- Entities demonstrating an increase in total operational revenues
- Entities where the reduction in the workforce does not exceed 5%
- Newly registered companies
- Manufacturers within the Textile & Leather-processing sector
- Companies engaged in military equipment production

For Initial Productive Investments made by business entities founded by residents or temporarily residing individuals of the Republic of North Macedonia located outside the country, the financial support amount will be augmented by 15% of the justified investment expenses, up to an annual limit of EUR 1 million.

Recent modifications to the legislation in 2021 broadened the financial support available for technological advancement and research, bolstered investment endeavours of notable economic significance, assisted the takeover of distressed companies, and fortified market competition.³⁰

The underlying intent behind these legislative changes is to expedite economic growth and advancement in the Republic of North Macedonia by promoting investments that enhance the country's economic competitiveness and boost employment opportunities.

29 Decree no 08-3053/1 of 3 May 2018 'Law on the Financial Support of Investments' [2018] Official Gazette of the Republic of Macedonia 83/1507. Amendments and additions to the Law on the Financial Support of Investments were made by decrees: Decree no 08-2600/2 of 17 May 2019 [2019] Official Gazette of the Republic of North Macedonia 98/1243; Decree no 08-3487/1 of 12 June 2019 [2019] Official Gazette of the Republic of North Macedonia 124/1759; Decree no 08-3677/1 of 30 July 2021 [2021] Official Gazette of the Republic of North Macedonia 178/2979.

30 'Changes in the Financial support of investments in North Macedonia' (*Lalicic & Boskoski Law Office*, 2021) <<https://lblaw.com.mk/en/financial-support-of-investments-in-north-macedonia/>> accessed 05 May 2023.

3.3. Investment Climate in Kosovo

Kosovo has three economic zones. Zones are established upon the municipality's request to the Ministry of Trade and Industry and are administered by the municipality. Business organisations or associations can also submit requests for establishment to the ministry or the municipality.

Incentives are broadly categorised into fiscal and non-fiscal incentives. Fiscal incentives provide tax and customs duty concessions, while non-fiscal incentives are any other form of state support to investors. Kosovo has established a flat corporate income tax of 10 percent. To encourage investment, the government can grant certain VAT-related privileges, such as a six-month VAT deferment upon presentation of a bank guarantee for companies importing capital goods. Suppliers may export goods and services without being required to collect VAT from foreign buyers. Suppliers may claim credit for taxes on inputs by offsetting those taxes against gross VAT liabilities or claiming a refund. The government can issue guarantees or jointly finance foreign direct investment projects but has not yet done so. Kosovo does not have legislation that incentivises businesses owned by underrepresented investors.³¹

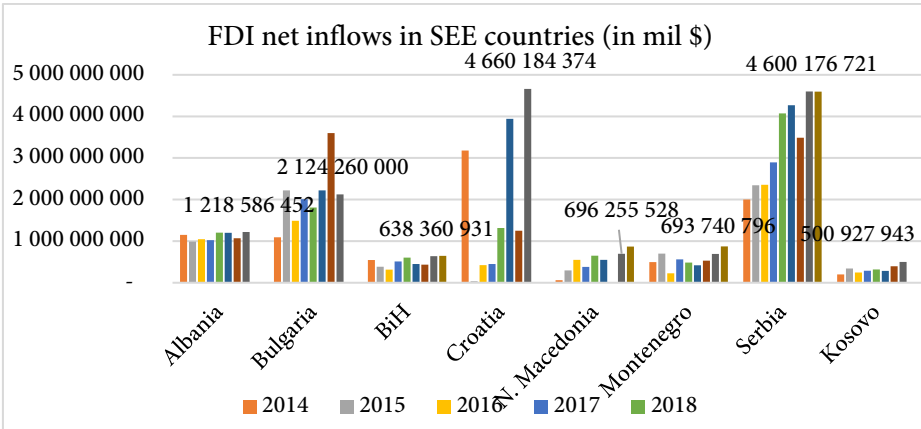
Table 5. Investment Climate and Incentives in Kosovo³²

Incentives	Awarded aid	Eligibility criteria	Condition for use of aid	Length of incentives	Zone specific
Deferred VAT payment on selected plant machinery.	Deferred payment of VAT on imports of selected plant machinery.	Yes	Import plant equipment and machinery.	Up to 6 months	No
Additional 10% deduction on heavy equipment.	Additional deduction allowance of 10% on top of normal depreciation of the cost of acquisition of heavy equipment (production lines for plant and machinery) and heavy transport vehicles.	Only permitted for "heavy" equipment and vehicles. Applicable for new assets or assets first placed in service in Kosovo. Only allowable on assets first used up to 31 December 2012 (note, both income tax usage period is extended to 31 December 2014).	Acquisition of equipment and vehicles under the category.	n/a	No
No customs duty on machinery and raw material.	Exemption from custom duties on machinery and raw material.	The Law on 0% duties was in the Parliament in 2013 – before these incentives were provided based on UNMIK Regulation NO. 2007/31 PART C.	The exempt material must be aimed at manufacturing.	n/a	No
No fees on business registration (Municipality of Suhareka).	Exemption from fees of businesses registration that are involved in production.	Manufacturing businesses.	Business must be located in Suhareka.	n/a	No
Free use of municipal land in Peja.	Free use of municipal land for business activities.	No specific criteria.	Conduct a new business.	Up to 30 years	No

Kosovo was only able to partially tap its potential in terms of the quantity and quality of attracted investments in the last decade. Despite efforts, inflows remained at relatively low levels without fully recovering after the global financial crisis. In contrast, most neighbouring economies were more successful in attracting investment projects during the same period.

31 See more: '2023 Investment Climate Statements: Kosovo' (n 16).

32 OECD (n 23) Kosovo profile, 1042-1236, doi:10.1787/573f3543-en.



Graph 3. Foreign direct investment net inflows in Southeast European countries

As shown in the above graph (Graph 3),³³ Serbia received the largest portion of the overall Foreign Direct Investment (FDI) inflows in neighbouring nations, accounting for 51%, trailed by Albania with 20%. In comparison to countries within the Southeast European (SEE) region, the statistics indicate that the percentage of FDI in relation to GDP in Kosovo has paralleled that of North Macedonia, stood above that of Bosnia and Herzegovina (B&H), and remained notably lower than Montenegro.

In terms of legislation, there are three laws in Kosovo specifically addressing investors: namely, the Law on Foreign Investors and the Law on Strategic Investment.

The legal framework for foreign investors in Kosovo encompasses various laws, including those mentioned below.³⁴ However, continuous updates and harmonisation of legislation are necessary to address the evolving needs and demands of the investment landscape. Stakeholders consistently emphasise the importance of enhancing capacities related to understanding and implementing these laws.³⁵

The government recognises the significance of filling gaps in existing legislation to complete the legal framework for Foreign Direct Investments (FDIs). However, it must be noted that the Law on Foreign Investments alone is insufficient to address all gaps in the legal framework; this requires alignment with other laws, too.

33 World Bank, 'Foreign direct investment, net inflows (BoP, current US\$)' (*The World Bank*, 2023) <<https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>> accessed 04 April 2023.

34 Antonis Bredimas, 'Kosovo and Foreign Investment Protection' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (EUROYEAR, Springer 2019) 113.

35 Steven C Young, 'Foreign Direct Investment Disputes with Unrecognized States: FDI Arbitration in Kosovo' (2016) 33(5) *Journal of International Arbitration* 501, doi:10.54648/joia2016037.

Low numbers in foreign investment in Kosovo show that to attract foreign investment, Kosovo must focus on improving and aligning the legal framework and effective implementation by increasing the efficiency of institutions, particularly those that serve businesses. In regard to alignment, it is important that aside from the Law on Foreign Investments, Kosovo also pays attention to harmonising this law with other laws by providing more flexibility and incentives for foreign investors, in particular, removing the administrative burden and unnecessary bureaucracies.

The Law on Foreign Investment has been adopted with the primary objective of attracting foreign investments in Kosovo.³⁶ This law provides a fairly comprehensive legal basis setting forth the rights of investors, protective measures, and fundamental guarantees to ensure a favourable investment climate. Incorporating these guarantees in the law adheres to the best practices observed at an international level and is fully in line with EU legislation.³⁷

The provision allowing dispute settlement through arbitration is regarded as a protective measure for foreign investors, considering certain challenges within Kosovo's legal system, such as weak rule of law, limited court efficiency, difficulties in contract implementation, and prolonged property disputes.³⁸

In cases where no agreed procedure exists, the foreign investor retains the right to settle the investment dispute through litigation before a competent court in the Republic of Kosovo or through local and international arbitration.³⁹

The Republic of Kosovo consented to submit an Investment Dispute for arbitration under this article, as authorised by the current law. The foreign investor can provide consent by filing a request for arbitration or submitting a written statement expressing their consent to the Agency.

36 Law of the Republic of Kosovo no 04/L-220 (n 7).

37 The current Foreign Investment Law consists of 26 articles, and the Ministry Industry, Entrepreneurship and Trade (MINT) assumes the responsibility of formulating, developing, and monitoring the policies related to foreign investments through its established mechanisms. It is important to note that foreign investors possess the right to settle investment disputes based on mutually agreed requirements between the investors and the Republic of Kosovo. In the absence of such an agreement, foreign investors retain the right to seek resolution of investment disputes either through judicial proceedings in a competent court in Kosovo or via local and/or international arbitration.

38 Arianit Kaçandolli and Bashkim Nuredini, 'Legal Treatment of Foreign Investment and Role International Investment Arbitration through the prism of Kosovo' (UBT International Conference 2021) 96 <<https://knowledgecenter.ubt-uni.net/conference/2021UBTIC/all-events/96>> accessed 10 May 2023.

39 According to Art. 16 of the Law on Foreign Investment, there are provisions regarding the resolution of investment disputes in the Republic of Kosovo. The article states that a foreign investor has the right to request the resolution of an investment dispute based on applicable requirements or procedures agreed upon in writing between the foreign investor and the Republic of Kosovo.

Unless otherwise agreed upon in writing between the concerned foreign investor and the Republic of Kosovo, any arbitration conducted under this law is expected to occur in an EU member country that is also a party to the New York Convention.

Law no. 05/L-079 on Strategic Investments⁴⁰ is specifically designed to promote and facilitate strategic investments within the Republic of Kosovo. Its primary objectives include encouraging investment, attracting investors, and establishing favourable conditions for the realisation of strategic projects. The law also outlines administrative procedures and criteria for evaluating, selecting, implementing, and supervising such projects. Additionally, it provides guidelines for granting the use of the Republic of Kosovo's property for strategic investment projects.⁴¹

One of the key features of the law is the establishment of the Inter-Ministerial Commission for Strategic Investments. This commission plays a pivotal role in the decision-making process. The Agency for Investments and Enterprise Support serves as the Secretariat, while the Commission, on a case-by-case basis, issues recommendations regarding granting strategic investor status. These recommendations are provided after consideration of professional advice from the Operational Group responsible for preparing and implementing strategic investments. However, the final decision for each individual case lies with the Government of Kosovo.⁴²

The law guarantees various rights to strategic investors. These rights include protection and continuous guarantees, non-discriminatory treatment, compensation in instances of nationalisation, expropriation, or violations of legislation, and protection against the retroactive application of laws. Furthermore, the Government of Kosovo has already decided to grant tax exemptions for 3 to 7 years for new investments, depending on the value of the investments and the number of employees. However, the practices have shown some weaknesses of the law in force, starting from the high threshold necessary for a project to be classified as a "strategic investment" and limited due diligence on the proposed strategic investments.

The above-mentioned concerns pose challenges for foreign investors, as the financial commitment needed to meet the criteria may discourage potential investors from pursuing strategic investment opportunities in Kosovo. Consequently, this may limit the number of projects that benefit from the preferential treatment and incentives associated with strategic investments, potentially impeding overall economic growth.

40 Law of the Republic of Kosovo no 05/L-079 (n 15).

41 The sectors covered by this law include energy, infrastructure and mining, transport and telecommunications, and tourism, among others. The definitions outlined in this law largely correspond to those outlined in the Foreign Investment Law.

42 Instituti për Ekonomi të Tregut të Lirë, *Investimet e Huaja Direkte në Kosovë: Klima e investimeve, potenciali dhe barrierat* (IETL, KAS 2019).

4 DISPUTE RESOLUTION FOR FOREIGN INVESTORS

Regarding investor protection, it should be noted that a state may undertake different measures and incentives to enact investment legislation ensuring certain treatment for investors. Such legislation might guarantee exemption from taxation regimes or provide a specific fiscal regime for investors in a particular industry sector. However, investors may be concerned that any protections contained in legislation may be subject to revocation by a subsequent government.⁴³

One category of agreements pertains to situations where an investor can engage in an investment contract with a host nation. Concession agreements and production-sharing contracts are such arrangements primarily found in extractive industries. These contracts offer investors specific safeguards that facilitate their participation in developing a country's natural resources. The investment contract shields investors against unfavourable alterations in laws or regulations that may impact their interests. However, the effectiveness of these clauses when confronted with government actions can vary.

One of the remarkable developments accompanying the surge in foreign direct investment involves the proliferation of investment treaties initiated by host states. These treaties can be bilateral investment agreements (BITs) between two countries or multilateral investment agreements (MITs) involving multiple nations. Designed to foster foreign investment, these treaties frequently include provisions that establish distinct protections for investors from the respective states. The concept of MITs permits a group of states, often regionally aligned, to extend these protective measures. It's important to highlight that recent times have witnessed significant trade agreement negotiations involving countries holding substantial sway over global trade. For instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a significant trade accord following the North American Free Trade Agreement, as well as the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States (although these negotiations have encountered challenges).⁴⁴

4.1. North Macedonia

Creating a stable regulatory framework is undeniably crucial for facilitating foreign investment. In pursuit of both attracting foreign investment and progressing towards EU membership, North Macedonia has consistently pursued a reform-oriented strategy within

43 'International Investment Protection' (*Ashurst*, 11 February 2020) <<https://www.ashurst.com/en/insights/quickguide-international-investment-protection/>> accessed 10 May 2023.

44 *ibid.*

its legislative domain. This strategy places notable emphasis on legislation directly relevant to foreign investment.⁴⁵

The foundation of the Law on International Commercial Arbitration draws from a mix of international sources, including bilateral and multilateral agreements that North Macedonia has either independently entered into or inherited from its past association with Yugoslavia.

Notably, the Republic of North Macedonia is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Geneva Convention on Execution of Foreign Arbitral Awards.⁴⁶

North Macedonia is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of the Other States and the European Convention on International Commercial Arbitration.⁴⁷ Macedonian Law gives preference to ratified international agreements over domestic legislation.

In April 2006, North Macedonia adopted the Law on International Commercial Arbitration,⁴⁸ which is exclusively applicable to international commercial arbitration processes within the country's jurisdiction. Under this law, an arbitration award holds the same weight as a final judgment and can be executed promptly. Arbitration awards originating from external jurisdictions are classified as foreign arbitral awards. They are duly acknowledged and enforced in accordance with the principles outlined in the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

North Macedonia adheres to the concept of obligatory international arbitration when addressing conflicts involving foreign investors. The nation acknowledges the validity of

45 This legal sphere encompasses an array of statutes, including: Decree no 07-2969/1 of 14 July 1999 'Law on Value Added Tax', Decree no 07-1148/1 of 12 March 2004 'Law on Trade', Decree no 07-1761/1 of 30 April 2004 'Law on Trade Companies', Decree no 07-1913/1 of 19 May 2005 'Customs Law', Decree no 07-437/1 of 29 January 2007 'Law on Technological Industrial Development Zones', Decree no 07-2934/1 of 23 July 2014 'Law on Profit Tax', Decree no 07-3053/1 of 3 May 2018 'Law on the Financial Support of Investments' (n 24); Decree no 07-173/1 of 16 January 2002 'Law on the Takeover of Joint Stock Companies' [2002] *Official Gazette of the Republic of Macedonia* 4/59. Changes and additions to the Laws were made by decrees in subsequent years.

46 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards> accessed 03 March 2023; Convention on the Execution of Foreign Arbitral Awards (26 September 1927) <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=556&chapter=30&clang=_en> accessed 03 March 2023.

47 Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) <<https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925>> accessed 03 March 2023; European Convention on International Commercial Arbitration (21 April 1961) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en> accessed 03 March 2023.

48 Decree no 07-1252/1 (n 25).

foreign arbitration awards and their enforceability within its borders, contingent upon satisfying the stipulated enforcement conditions as set forth in both the Convention and the Law on International Private Law.⁴⁹

Thus, so far, the country has encountered six documented investor-state disputes resolved through international arbitration panels, none of which have involved U.S. individuals or enterprises. The local courts within North Macedonia uphold and implement foreign arbitration awards issued against the Government, and the nation has not historically demonstrated a propensity for extrajudicial actions against foreign investors.

North Macedonia embraces the decisions of international arbitration in matters concerning investment disputes.⁵⁰ Domestic courts duly acknowledge and enforce foreign arbitral awards along with judgments rendered by foreign courts. While mechanisms for alternative dispute resolution exist for settling disputes between private entities, they are infrequently utilised.

Established in 1993 within the Economic Chamber of Macedonia (a non-governmental business association), the Permanent Court of Arbitration possesses the authority to administer both domestic and international disputes.⁵¹ North Macedonia mandates mediation in cases involving companies with a value of up to EUR 15,000 (USD 17,715 at the exchange rate as of 25 March 2021) before resorting to litigation.

In contrast to Kosovo's legislation, North Macedonia's laws do not contain a specific provision authorising foreign investors to initiate international arbitration against the state based solely on their status as investors. While the state has established a general legal framework for foreign investment, it lacks a specific provision similar to Kosovo's laws.

The legal framework pertaining to foreign investment in North Macedonia does not grant foreign investors an explicit right to pursue arbitration against the state. Consequently, in the absence of an agreed procedure, foreign investors in North Macedonia may be limited to seeking resolution of investment disputes through litigation before a domestic court or exploring alternative mechanisms for dispute resolution.

In 2017, by Decision 4 No. 44-8454/1 of 19 December 2017, the Government established a Coordinating Body for monitoring arbitration proceedings arising from the concluded or ratified international agreements of the Republic of North Macedonia. Members of the body are the Minister of Economy, the Minister of Finance and the State Attorney of the Republic of North Macedonia, and from June 2021, the Minister of Justice. The Deputy Prime

49 Decree no 07-3099/1 of 4 July 2007 'Law on International Private Law' [2007] Official Gazette of the Republic of Macedonia 87/1096.

50 The nation's Law on International Commercial Arbitration mirrors the structure of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. See: UNCITRAL Model Law on International Commercial Arbitration (21 June 1985, with amendments as adopted in 2006) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 07 April 2023.

51 See more: 'Permanent Court of Arbitration' (*Economic Chamber of North Macedonia*, 2023) <<https://arbitraza.mchamber.mk/index.aspx?lng=2>> accessed 03 March 2023.

Minister chairs the body in charge of economic issues, coordination with economic departments and investments. The Coordinating Body is tasked with providing a coordinated approach regarding issues of monitoring activities related to resolving disputes that are or will be conducted before agreed international arbitrations. The coordinating body implements the procedure for selecting law firms as an established practice with established selection criteria.⁵²

According to an analysis prepared by the coordinating body, the total amount of funds that would potentially have to be paid is in the amount of MKD 82,267,500 (EUR 945 million and USD 420 million), of which the basic value of the disputes is in the total amount of MKD 51,543,443 (EUR 575 million and USD 282 million), while the total costs, namely interest costs, attorney's fees and other costs, amount to about MKD 30,724,056 (EUR 370 million and USD 138 million), which will have implications on the budget of the Republic of North Macedonia in the coming years.⁵³

The State Audit Office of the Republic of North Macedonia, through the Final Report on the audit of the financial statements and compliance audit for 2021 of the Government of the Republic of North Macedonia on the basis of the basic budget (637), points out that: "During the audit in December 2022, a verdict was passed for an arbitration procedure (a dispute arising from the Agreement for the purchase and sale of shares and concession concluded on 8 May 1999 between the Republic of North Macedonia and the investor Hellenic Petroleum) in favour of the plaintiff, based on to which the Government should pay budget funds in the total amount of USD 21.5 million, although the amount claimed by the plaintiff was in the amount of USD 42.6 million (of which USD 31.6 million in the name of principal debt and USD 11 million in the name of default interest). Furthermore, the auditor's report states that: 'during the audit procedure, a settlement agreement was signed to settle the debt arising from the arbitration dispute in connection with the Agreement between the Government of the Republic of India (the debtor) and the Government of the Republic of Macedonia, in accordance with which the debtor has to pay an amount in favour of the Government of EUR 858,000 in 4 instalments, whereby the signing of the agreement is conditioned by the payment of the first instalment of EUR 250,000, which was carried out on 2 January 2023 based on a notification received from the Ministry of Finance.'⁵⁴

At present, North Macedonia is embroiled in four distinct international arbitration disputes encompassing various subjects, including:

The case of GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. against the Republic of North Macedonia, documented as ICC Case No. 26696/HHB, centres on international

52 State Audit Office, *Final Report on the Audit of Financial Statements and Compliance Audit for 2021 of the Government of the Republic of North Macedonia: Basic Budget Account (637)* (SAO 2003) <https://dzt.mk/sites/default/files/2023-06/4_Vlada_RSM_KOMPLET_2022.pdf> accessed 10 July 2023.

53 *ibid* 3, 40.

54 *ibid* 40-1.

commercial arbitration. The case, categorised under the Investor-State type, pertains to industries encompassing Electric Power Energy, Construction, and Specialized Construction Activities. Despite an unspecified introduction date, the proceedings remain ongoing, with Turkey representing the investor and North Macedonia as the respondent nation. The arbitration is overseen by the ICC (International Chamber of Commerce) under the framework of ICC Arbitration Rules, though the specific version remains undisclosed. Furthermore, the case is governed by treaties related to Macedonia and the former Yugoslavia.⁵⁵

In the matter involving Gokul Das Binani and Madhu Binani against the Republic of North Macedonia (II), identified as PCA Case No. 2018-38, the nature of the proceedings is characterised as international. Falling under the Investor-State category, the case revolves around the domains of Mining and Metal Ores. The case was introduced on 7 August 2017, but its status indicates a discontinuation. The claimant's origin is India, with North Macedonia as the respondent and the PCA (Permanent Court of Arbitration) serving as the overseeing institution. The arbitration adheres to the UNCITRAL Arbitration Rules from 1976, with the seat of arbitration located in Geneva. The applicable treaties pertain to India, Macedonia, and the former Yugoslavia.⁵⁶

The Skubenko and others v. North Macedonia case, identified as ICSID Case No. ARB/19/9, involves investors Valentyn Drozdenko, Artem Kadomskyi, Igor Kompanets, and others in a dispute with the Republic of North Macedonia. The heart of the matter lies in their shareholding in Copper Investments JSC and subsidiary company Sardich MC, which holds mining concessions. The case concerns North Macedonia's decision to terminate the claimants' concession for exploiting copper, gold, and silver at the Kazandol deposit in the country's southern region, citing environmental concerns. The parties involved are North Macedonia (the respondent state) and Ukraine (the investor's home state). The case falls within the economic sector of Mining and Quarrying, specifically Metal Ore Mining. The proceedings adhere to the arbitration rules of the ICSID (International Centre for Settlement of Investment Disputes), with the ICSID serving as the administering institution. The investor has claimed compensation of EUR 380.00 million (equivalent to USD 423.30 million).⁵⁷

Cunico Resources N.V. vs Macedonia, former Yugoslav Republic, as identified by ICSID Case No. ARB/17/46 revolves around the ownership of FENI Industries, a local entity engaged in ferro-nickel mining and production activities within Macedonia. The case's

55 Case 26696/HBH *GAMA Güç Sistemleri Mühendislik ve Taahhüt AŞ v Republic of North Macedonia* (ICC, 2021) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1263/gama-v-north-macedonia>> accessed 11 June 2023.

56 Case 2018-38 *Gokul Das Binani and Madhu Binani v Republic of North Macedonia (II)* (PCA, 2020) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1229/binani-v-north-macedonia-ii->> accessed 11 June 2023.

57 Case ARB/19/9 *Artem Skubenko and others v Republic of North Macedonia* (ICSID, 2019) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/960/skubenko-and-others-v-north-macedonia>> accessed 11 June 2023.

essence is derived from allegations of governmental involvement hindering the claimant's planned sale of FENI Industries, leading to bankruptcy proceedings against the company. The participating entities include North Macedonia (the respondent state) and the Netherlands (the investor's home state). Legal representation is provided by Hogan Lovells from London, U.K., and Petrol Chilikov from Moscow, Russia, for the claimants. At the same time, White & Case from New York, NY, U.S.A. represents the respondent. The proceedings are conducted in English, and the case concluded with an outcome recorded on 31 January 2020, as the Tribunal acknowledged the discontinuance of the proceedings as per ICSID Arbitration Rule 43(1).⁵⁸

4.2. Kosovo

In Kosovo, regular courts have jurisdiction over all matters. A newly established commercial court marks a significant milestone in Kosovo's legal system. By replacing outdated management structures and workflow processes, this court aims to address the inefficiencies and lengthy processing times experienced in commercial cases.⁵⁹

The jurisdiction of the Commercial Court is clearly defined in the law. In broad terms, the court will have authority over all commercial disputes and business-related administrative disputes.⁶⁰ This includes cases that are currently handled by the Commercial Department of the Pristina Basic Court and the Fiscal Division of the Administrative Department of the Pristina Basic Court, as well as other business-related administrative cases. Additionally, within the Department for Economic Matters, there is a dedicated division for disputes involving foreign investors, with jurisdiction extending throughout Kosovo. The Commercial Court will also prioritise bankruptcy cases and handle the enforcement of both foreign and local arbitral awards.⁶¹

The establishment of the Commercial Court is expected to significantly enhance the judicial system's efficiency and effectiveness in handling business disputes, offering businesses more streamlined and timely access to justice.

The presence of specialised Commercial Courts is crucial for the smooth operation of businesses and the attraction of investments. Foreign investors need a court with a specific focus on commercial matters. However, more efforts should be made to

58 Case ARB/17/46 *Cunico Resources NV v Republic of Macedonia* (ICSID, 2017) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/859/cunico-v-macedonia>> accessed 11 June 2023.

59 See more: *Commercial Court of the Republic of Kosovo* (2023) <<https://komerciale.gjyqesori-rks.org/?lang=en>> accessed 05 December 2023.

60 Law of the Republic of Kosovo no 08/L-015 of 21 January 2022 'On Commercial Court' [2022] Official Gazette of the Republic of Kosovo 7/3.

61 Valbon Mulaj, 'The Advantages and Disadvantages of Arbitration in Relation to the Regular Courts in Kosovo' (2018) 59(1) *Hungarian Journal of Legal Studies* 118, doi:10.1556/2052.2018.59.1.7.

increase the professional capacity of judges and court staff in handling investor disputes more professionally.

However, when it comes to investment disputes, foreign investors are more inclined to use alternative dispute resolution methods, such as arbitration, to resolve their disputes with the state. The Law on Foreign Investments explicitly grants foreign investors the right to initiate legal proceedings against the state, and this right is widely exercised by foreign investors in Kosovo.⁶² Thus far, there have been six instances of international arbitration in Kosovo, as allowed by Article 16 of the Law on Foreign Investment. Out of these cases, three have been successfully concluded, while the decisions on the remaining three are expected to be announced in the coming weeks. Notably, the favourable outcomes of the resolved cases have led to savings exceeding EUR 470 million. However, there is a potential risk of losses amounting to EUR 50 million in the ongoing cases.

Three ongoing cases with a combined value of approximately EUR 50 million involve "Coutur Global" and "Mabco". Coutur Global has demanded EUR 20 million in compensation. The dispute revolves around the contract between Coutur Global and Kosovo for the construction of the "Kosova e Re" thermal power plant. The power plant, with an estimated cost of EUR 1.3 billion, was expected to commence in 2020 and be completed by 2023. However, due to the contract's non-execution, the case was brought before the International Court of Arbitration.⁶³

In July 2017, "Mabco" filed a lawsuit against the state of Kosovo in the International Court of Arbitration. Despite previous rulings by the Chamber of Special Supreme Court and Constitutional Court of Kosovo in favour of the Kosovo Privatization Agency, which had returned the Grand Hotel to its ownership after encountering buyer-related issues in 2015, Mabco sought compensation of EUR 6 million from Kosovo.⁶⁴

The Ministry of Justice has undertaken procedures to select an international law firm to represent the government of Kosovo in these cases, ultimately choosing the law firm "Wagner Arbitration Part MBB" based in Berlin. The agreement for legal representation in the arbitration decision cost the government EUR 600,000.⁶⁵

Another dispute revolved around the agreement signed between "Dardafon" and Telekom of Kosovo (a publicly owned enterprise) in January 2009. The agreement stipulated that "Z-Mobile" would serve as the virtual operator for "Vala" mobile telephony. However,

62 Law of the Republic of Kosovo no 04/L-220 (n 7).

63 Case ARB/20/50 *Contour Global Kosovo LLC v Republic of Kosovo and others (I)* (ICSID, 2020) <<https://jsumundi.com/en/document/other/en-contour-global-kosovo-llc-v-republic-of-kosovo-and-others-i-request-for-arbitration-thursday-19th-november-2020>> accessed 12 July 2023.

64 Case ARB/17/25 *Mabco Constructions SA v Republic of Kosovo* (ICSID, 2020) <<https://jsumundi.com/en/document/decision/en-mabco-constructions-sa-v-republic-of-kosovo-decision-on-jurisdiction-friday-30th-october-2020>> accessed 12 July 2023.

65 *ibid.*

conflicts emerged when Z-Mobile requested additional numbering, exceeding the initially allocated 200,000 numbers.

In December 2016, the Court of Arbitration ruled in favour of Z-Mobile. As per the decision, Telekom of Kosovo was obligated to pay approximately EUR 30 million in fines, compensating for damages, lost profits, and arbitration procedure costs. Following this, a second lawsuit was filed against the state subsequent to the dispute with Telekom, which dispute was won by Kosovo in international arbitration.

The defence costs incurred by Kosovo in three international arbitration cases amounted to over EUR 1.5 million.⁶⁶

5 CONCLUSIONS

Based on the aforementioned, it is evident that Kosovo has a specific law granting foreign investors the right to initiate legal proceedings against the state, while in Macedonia, such arbitration cases can only be filed if there is an investment treaty in place. This provision in Kosovo's law has exposed the country to the risk of losing significant sums of money in investment arbitration cases. On the other hand, eight arbitration disputes worth almost EUR 1.4 billion are being conducted against North Macedonia, which is estimated to cost the state a quarter of the budget. Hence, Kosovo's approach must be reassessed to find a balance between providing investors legal certainty and mitigating the risks associated with such provision.

Furthermore, in terms of numbers, Macedonia has attracted more foreign direct investment (FDI) than Kosovo in the past three years. Only in the last year did Kosovo manage to parallel to some extent with North Macedonia. This suggests that the inclusion of the provision granting investors the right to initiate arbitration proceedings may not necessarily lead to an increase in FDI. Despite not having a similar provision, Macedonia outperformed Kosovo in terms of FDI.

Moreover, while this provision in the law on foreign investment does not guarantee an increase in FDI, it exposes Kosovo to the risk of losing millions of euros in disputes where the state is not directly involved and generates high legal representation costs.

Since the law's entry into force on foreign investments vested foreign investors with the right to sue the state in international arbitration, the effectiveness of this right in attracting foreign investors was debatable. Considering the presence of such a provision in the law did not significantly impact increasing foreign investments, perhaps more attention should be

66 Case 20990/MHM *Dardafon.net (Z-Mobile) v Kosovo Telecom (I)* (ICC, 2016) <<https://jsumundi.com/en/document/other/en-dardafon-net-lcc-v-kosovo-telecom-j-s-c-ptk-settlement-agreement-wednesday-24th-may-2017>> accessed 12 July 2023.

directed towards establishing a comprehensive legal framework that facilitates a favourable business environment and considers a case-by-case approach that considers the specific circumstances of each dispute.

While the effectiveness of dispute resolution is important for foreign investors, other important factors still influence their attraction. A comprehensive legal framework that ensures transparency, stability, and enforceability of contracts and protection of property rights may play a more significant role in fostering investor confidence, followed by efficient administrative processes, reduced bureaucracy, and addressing corruption-related issues.

Finally, balancing dispute resolution mechanisms and creating a favourable investment climate requires careful consideration. In particular, it is crucial to evaluate the effectiveness of existing provisions and consider eventual adjustments or alternative approaches to maximise the benefits of foreign investment while minimising potential risks and uncertainties associated with dispute resolution processes.

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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article

Zejnullahu N and Nuredini B, 'The Challenges of Investment Arbitration: Success of Failure? A Comparative Analysis of Investment Arbitration in North Macedonia and Kosovo' (2024) 7(2) Access to Justice in Eastern Europe 163-90 <<https://doi.org/10.33327/AJEE-18-7.2-a000213>> Last Published 1 May 2024

Submitted on 28 Dec 2023 / Revised 11 Jan 2024 / Approved 29 Feb 2024

Published ONLINE: 1 Apr 2024

DOI <https://doi.org/10.33327/AJEE-18-7.2-a000213>

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Summary: 1. Introduction. – 2. Statures of the FDI in Kosovo and North Macedonia. – 3. Legal Framework and Policies for FDI. – 3.1. *North Macedonia*. – 3.2. *Legal Framework in North Macedonia*. – 3.3. *Investment Climate in Kosovo*. – 4. Dispute Resolution for Foreign Investors. – 4.1. *North Macedonia*. – 4.2 *Kosovo*. – 5. Conclusions.

Keywords: *investments, dispute, arbitration, UNCITRAL, North Macedonia, Kosovo.*

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