

FOREIGN TRADE SOCIETY AND PROTECTION OF DIRECT FOREIGN INVESTMENT IN THE REPUBLIC OF KOSOVO

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ABSTRACT

The aim of this thesis is the reflection of theoretical, legal and practical data for registration of foreign trade society in the Republic of Kosovo, as an opportunity for direct foreign investment. The motivation for this thesis is, presentation of legal environment, which for foreign investments in Kosovo is extremely liberal and friendly. For practical and methodological reasons, this thesis is divided into two parts. In the first part are treated: Forms of organization and registration possibilities of foreign trade society in Kosovo and possibility of unification of foreign trade society with the local trade society. In the second part is treated: Legal protection of foreign trade society, in the prism of the protection of foreign direct investment in Kosovo. A specific emphasis is dedicated to the principles for protection of foreign investments, such as: non-discrimination, compliance with obligations and stability of the investment regime. Furthermore, are given guarantees in the case of expropriation and nationalization, compensation, currency conversions and guaranteed transfers, and guarantees in the case of illegal actions or non-action and guarantees in case of armed conflict and civil disturbances. Is treated respect of the rights, compliance with the laws and standards, the treatment of foreign personnel, procedure of liquidation of foreign investments, mechanisms for resolving disputes, applicable law for disputes related with foreign investments, final and obligative nature of arbitration decision and actions in their case of conflict with international agreements and other laws. In the end, is treated: registration of foreign investments, programs and measures for the creation and development of small and medium enterprises (SMEs) and are given explanations related the Agency for investments and support of enterprises in the Republic of Kosovo. Finally, are given conclusions and recommendations.

Keywords: Trade Society, foreign investment, legal protection.

INTRODUCTION

Establishment of trade societies in the main entity level in trade relations, imposed need for legal regulation and theoretical development issues which are dedicated to the registration, organization, functioning and liquidation of trade societies. One of the actions which had the purpose of achieving the objectives outlined is the adoption of the Law on commercial companies, which Kosovo has issued in 2007.¹ In the course of this, we conclude that the forms of legal organization of trade societies in Kosovo are: General Society, Commendatory Society, Limited Liability Company and Joint Stock Company. In all these forms of legal organization of trade societies, can be organized also foreign trade society, which as such is considered in all issues when as the founder presented: natural persons of other states or legal persons which, as such, are registered in the country of origin. Under the legislation of Kosovo: "*Foreign Trade Society*" is general term which means a society that is founded and

¹ Law for trade society – Law No.. 02/L-123 27 September 2007 , article 2.1, par.6.

currently existing under the law of any jurisdiction outside of Kosovo, and that is authorized under the law, to be engaged commercial activities in that jurisdiction.”²

Foreign trade society, have a very great importance of the reasons that with the establishment and action of mentioned society, are created opportunities for foreign trade capital investment in Kosovo, which the Kosovo economy as economy in development, has a great need. Kosovo as interested country to develop liberal investment policy is making efforts with all its legal infrastructure, to provide adequate security for the foreign trade and foreign investment.

For this reason, the action in the same conditions of domestic and foreign companies, is set in the level of a constitutional category.³ From this foreign investor can decide, to take part in the establishment of the company and may win rights and obligations under the same conditions as any other investor in the country. The Constitution of Kosovo, offer a lot of guarantees for foreign investors. It especially guarantees all obtained rights through investments of foreign capital, that they will not be limited by law or other legal act, and that foreign investors have guaranteed free transfer and repatriation of obtainance of invested capital. For that reason, with the purpose of creating secure conditions for establishment of foreign trade enterprises and creating of conditions for investment of foreign trade capital, it is necessary also legal regulative for insurance and protection of foreign investments. This legal protection is insured with the issuance of the law on foreign investments⁴ and other regulations and other laws which indirect presents, protection for insurance of foreign investments in Kosovo. With this legal mechanisms, Kosovo claims ti make protection of rights and giving of basic guarantees, by implementing measures as: treatment by state of foreign investments, giving the guarantee according which foreign societies and their investments to use incomes without restrictions, to secure non allowance of discriminations and to secure protection against expropriations etc. With this are ensured conditions that foreign trade societies and foreign investments be protected and treated in fair way in accordance with standards and accepted international practices.

REVIEWED LITERATURE

For succeeded treatment of discussed theme, are used and consulted books and articled which treated forms of legal organization of foreign trade societies and protection of foreign direct investments, with special emphasize, protection of foreign made investments, through investment of foreign capital in establishment of foreign trade enterprises in Kosovo.

Base literature for this thesis is Book: The right of societies, from known Croatian author Jakša Barbic.⁵ Author in chapter IV of mentioned book, treated foreign trade societies and foreign investments. Treatment of mentioned matter from this author, mainly is made by based in the Croatian law for trade societies, law for banks, law for insurance where are given explanations for establishment of foreign trade societies, in mentioned matters of economy.⁶ From local authors books, are treated books: Some actual themes of trade economy, of author

² Mentioned Law, article 2 par.2.1 point 6.

³ Constitution of Kosovo, entered in force 15 june 2008. Article 119, par.1 and 2.

⁴ Law on foreign investments No. 02/L-33 21 november 2005

⁵ Jakša Barbic, Right of societies, First book, General part, second publishing amended; Organizator, Zagreb, 2006.

⁶ Citted book, pg.561-566.

Prof. Dr. Mehdi Hetemi.⁷ Mainly we are agreed with base statement of author that: state with its legal activity can create appropriate climate, less appropriate or bad climate for foreign investors, and for movement of capital in two directions of its borders.⁸ Also are treated two modules from USAID projects for EMSG-Economic management for stability and development as: Trade societies, prepared from jur. Korab Sejdiu (October 2008_ and foreign investments, prepared by Dr. Jur. Robert Muharremi)September 2009. From international authors is treated book of author Cyril The right of business and European Union.⁹ Are treated Constitution, Law and regulations and Convention with which are treated matters regarding with trade societies, foreign investments and their protection in Kosovo.

METHODOLOGY

Thesis is treated based in Historical, legal and comparative methods. By using historical method, are compared data and findings by looking in time aspect. By using legal method and findings, based in objective reality and legal solutions offered for regulation of discussed problematic. By using comparative method, is made comparison in time and space of treated data.

RESULTS

Found results are treated by giving theoretical reasons¹⁰, legislation and practical solutions of problem, for that reason the same are not reflected though charts, figures and numbers.

DISCUSION OF MATTER AND RESULTS

As stated above, in first part of this thesis are treated: Organization forms and possibilities of registration of foreign trade societies in Kosovo, in second part is treated legal protection of foreign trade societies, in primes of protection of foreign direct investments in Kosovo.

Foreign trade society

Forms of legal organization of foreign trade society.-

Foreign trade society is considered that trade society, which in regular way is established according the right of state in which it is registered.¹¹ Foreign trade society in Kosovo, can be registered as local societies, in one of legal organization forms as: General Society, Commendatory Society, Limited Liability Company and Joint Stock Company¹².

⁷ Prof. Dr. Mehdi Hetemi; Some actual themes of trade economy University of Pristina, Law School Pristina 2006.

⁸ Citted book pg.127.

⁹ Cyril Nourissat; Right of European Union business, translated from French in Albanian from Edmond Xhabija, third publishing 2010, printed in Papyrus-Tirana-Albania.

¹⁰ Eko Umberto, How to prepare thesis, translated from original Italian dr.Kristina Jorgaqi, Tirana 1997, pg.31.

¹¹ Barbic Jakša, Pravo Drustava; prva knjiga; opci dio; Drugo izmijenjeno i dopunjeno izdanje; Organizator Zagreb,2006, pg.562.

¹² ;Law on trade society, article 4.1.

Registration of foreign trade society

Foreign Trade Society can be engaged in trade activities in Kosovo, same as the Trade Society of Kosovo, is previously is registered in Registration Office¹³ as “Foreign Trade Society”. With the case of registration, foreign trade society, must submit a “memorandum of foreign trade”, which should contain data and statements provided in article 37, of LTS.¹⁴ Reasons to invest in Kosovo, to establish foreign enterprises or to co-invest in jointly trade societies, or to direct investments in Kosovo, are that the Kosovo is the part of CEFTA from 2007 and benefits from trade preferences (ATP) with EU and access without customs obligations with USA and trade relations with Japan and Norway¹⁵.

Legal protection of foreign trade societies, in the prism protection of foreign direct investments in Kosovo

Definition and general treatment

Foreign investor is considered foreign person who made investment in the Republic of Kosovo. Foreign person is considered: every physical person who is citizen of foreign country, every physical person who is citizen of the Republic of Kosovo but that have his residence outside of Kosovo, and a legal person established according to the law of foreign country. Republic of Kosovo is committed that to the foreign investors and their investments to ensure same and equal treatment with local investors and their investments, to enjoy full and continuously protection in accordance with legislation in force. Is guaranteed that every public authority that violate or in any way fails to respect the rights and ensured guarantees for foreign investors will be obliged to pay compensation, for caused loss and running costs.¹⁶

Basic principles for protection of foreign investments¹⁷

With the purpose of insurance and protection of foreign investments, Kosovo offers and respect basic principles. Principles which guaranteed and respected, are in harmony with legislation of countries which are opened for foreign investments.

The given primary importance to the non discrimination from this reason, foreign investors are same treated as local investors. In that aspect even that Kosovo is still not member of European Union, is offered legal environment which in this area is approximate with EU legislation, regarding access to economic activities.¹⁸ To respect principle of fulfillment of obligations Kosovo accept fulfillment with faith of all obligations that Kosovo state has toward foreign investors. With this is mean that if public authority issue act regarding with foreign investor and issuance of such act is beyond authorizations of public authority, so foreign investor may have the right in compensation. To ensure respect of stability principle

¹³ Registration office is located in the Agency for registration of Kosovo businesses which is established into Ministry of Trade and Industry. With purpose of facilitating the procedure of registration, in all Kosovo municipalities, were formed offices for registration of businesses, it offered solution “one-stop-shop” for registration or businesses in whole Kosovo.

¹⁴ For more see article 37 of the Law of trade societies. Also regarding the registration of foreign trade society see module from USAID project for EMSG Economic management for stability and development: Trade societies, prepared by Dr.Jur. Korab Sejdiu (October 2008), Module 4, pg.16.

¹⁵ <http://www.invest-ks.org/sq/Pse-ne-Kosove> last seen 12.04.2015, 21:33.

¹⁶ Law for foreign investments article 3 par.5.

¹⁷ Regarding with basic principles for protection of foreign investments, see mentioned law, article 3-13.

¹⁸ See Cyril Nourissat, cited book, pg.186-189.

of regime of investments is given legal guarantee, that nor law, regulation or other legal act will not be in retroactive force in damage of foreign investor. For fulfillment of guarantee principle regarding with expropriation and nationalism, is guaranteed that foreign investments will not be expropriated or nationalized directly or indirectly, in exclusion of special cases in public use interest determined by law. Also, if expropriation is presented as necessity, then, it will be only based in law, constitution and International conventions, which anyhow should made without discrimination, with immediately compensation, appropriate and effective and in accordance with legal procedure.¹⁹ For insurance for effaces legal protection of foreign investments, they for all illegal actions or non actions, can be directed to the court or arbitration for compensation of caused damage.²⁰ To ensure efficiency of responses in claims to the foreign investors is applying principle “silence is acceptance”, according which principle: if approval or refusal of request is not given in the framework of time restrictions foreseen with legislation in force, ex lege, is considered that is decided in favour of request. And in the end, in the case of civil disturbances, war etc. foreign investments will be compensated and all these principles will be applied in accordance of the law and international standards. As the result of this “last data of direct foreign investments in Kosovo for third three months of 2014 have signed increase for 17% in compared to the same period of 2013. States that signed considered increase of investments in Kosovo are: Austria, Germany. Slovenia, England and Switzerland”.²¹

Other mechanisms for support and protection of foreign investments

Except of abovementioned principles, with the purpose of creation of liberal climate for foreign investments, are ensured also other mechanisms, which more fulfill and complete emphasized climate. Among others, foreign investors have the right to employee foreign citizen with the purpose of professional services, management, administrative and supervision or consultation.²² Foreign investor have the right to interrupt investments activities and in this case, after previously payments of all taxes and obligations, to repatriate all physical assets and non monetary obtained. Mechanisms for solution of investment contests are ensured that, contest previously to be solved according the appliance of procedure with which is arrived written agreement between foreign investors and Republic of Kosovo. And accordance of such procedure, foreign investor have the right to require that contest of investment be solved thorough court procedure or through local or international arbitration procedure. Consent of Republic of Kosovo for submission of investment contest for arbitration, is given according to the Law provisions for foreign investments. Court or arbitration tribunal which review investment contest will decide according regulations or laws, for which parties are agreeing, whereas applicable law in the Republic of Kosovo will be applied, only in absence of such agreement. All decisions of arbitration taken regarding with the contest of foreign investment, will be considered as final and obligatory for parties in

¹⁹With this solution, Kosovo state that with the appliance of article 1 of Attached Protocol of European Convention for Protection of Human rights and freedoms, signed in Rome, on 4 november 1950. Mentioned convention, according article 22 par. 1 point 2 of Constitution of Republic of Kosovo, is applied directly in the territory of the Republic of Kosovo

²⁰ For more regarding with solution of disputes regarding foreign investments, see: Module from USAID project for EMSG-Economic management for stability and development: Foreign affairs, prepared from Dr.Jur. Robert Muharremi (September2009), Module 7, pg.2.

²¹ <http://www.invest-ks.org/sq/Lajme/Investimet-e-huaja-ne-Kosove-shenojne-rritje-113> last seen 12.04.2015, 21:09

²²Law for issuance of allowance for work and employment of foreign citizens in the Republic of Kosovo, article 6 (Law No. 03/L-136).

dispute. In the case of conflict between provisions of local law and provisions of international bilateral or multilateral agreement, international agreement should have priority. Ministry establish and hold register for all foreign investors and foreign investments Government of the Republic of Kosovo, after take into account restricted administrative and budget resources, can authorize Agency to support creation and development of appropriate environment for NMVM.

Challenges and obstacles regarding with foreign societies and foreign investments in Kosovo

In addition of very advanced legislation and efforts for creation of friendly climate for foreign trade societies and foreign investments, Kosovo follow challenges and obstacles, as result of which foreign investors hesitate to register trade society respectively to make investments in Kosovo. It is important to mention emphasized level of nepotism and corruption, challenge which opened put in danger principle of equality of investments treatment. Also as a challenge and insecurity which indicate in discouraging of foreign investors is non efficacy of courts in solving of civil and trade cases, which indicate opened on violation of insurance principle of effaces legal protection of foreign investments.

CONCLUSIONS

With this study, we documented;

Existence of advanced legal regulative, for registration and action of foreign trade enterprises in Kosovo, It is testified with mitigation conditions and equal rights of foreign trade societies in Kosovo, which in nor moment cannot be disfavored nor discriminated in the report of local trade societies. Existence of advanced legal regulative for protection of direct foreign investments, for foreign investments in the prism of foreign trade enterprises forming, which presents enough guarantee for foreign investors. It remained recommendation for Kosovo institutions, to work on elimination of nepotism and corruption. Also should made continuously efforts that legal system be efficient and arrive judging standards in reasonable time.

GRATITUDE

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