Foreign Investment
and the Status of Kosovo in International Law

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I. Introduction

On 29 June 2009, the President and the Prime Minister of the Republic of Kosovo, acting pursuant to the provisions of a law adopted by the Assembly of the Republic of Kosovo on 29 May 2009, signed the International Monetary Fund’s Articles of Agreement and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Kosovo also joined the other institutions of the World Bank Group, i.e. the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA).

One of the poorest countries in Europe, Kosovo is in urgent need of foreign investments. The government of Kosovo, setting economic growth as its first priority, has committed to undertake deep economic reforms in order to make the country more attractive for foreign investors. Many observers have stressed in this respect that foreign investment is key to Kosovo’s economic – and ultimately, political – viability as an independent State.

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2 Various designations are employed alternatively in this article to refer to the territory of Kosovo and the current authorities in Kosovo. Depending on the context, the latter are referred to as ‘the government of the Republic of Kosovo’ or ‘the Provisional Institutions of Self-Government in Kosovo’ (PISG), while Kosovo is sometimes referred to as ‘the Republic of Kosovo’. As will appear from the following developments, the use of such terms does not imply the expression of any opinion whatsoever on the part of the author concerning the final legal status of Kosovo or of its authorities.


The admission of Kosovo to membership in investment-related international institutions such as ICSID and MIGA, as well as the possibility that Kosovo enters into international investment agreements (IIAs) raises crucial questions as regards foreign investment in the territory, given the uncertainties as to the present status of Kosovo in international law. The main question is whether and to what extent both these admissions and commitments are likely to grant foreign investors in Kosovo meaningful protection, in consideration of the unsettled issue of Kosovo’s situation with respect to the international law of State succession, and subsequently of the disputed statehood of the entity. On that subject it has been noted that despite the UDI,

‘[u]ncertainty over the international status of Kosovo will persist, because many States are definitely unwilling to grant recognition. For these States everyday working relationships with Kosovo may be possible, as recognition as a State is not necessarily implied. However, Kosovo's future participation in multilateral organizations, fora, and agreements causes problems which are going to persist for the time being, even though the extent of the problems caused depends on the modalities of the admission to each instrument’.  

In other respects, it has been underlined that ‘[t]he question of whether Kosovo is a state is material for a number of issues arising in international practice, before international and national courts, in terms of the aspects of recognition of the acts and transactions of this entity’.  

Dolzer and Schreuer recently stressed that ‘foreign investment law consists of layers of general international law, of general standards of international economic law, and of distinct rules peculiar to its domain’.  

This assertion proves particularly pertinent in the context of the question brought up here. The scarcity of the case law and academic commentary on State succession specifically contemplated under the angle of international investment law, indeed leads the researcher to refer to solutions drawn from general international law, as well as from other fields of international law such as State responsibility.

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10 A. Orakhelashvili, ‘Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo’, 12 Max Planck UNYB (2008) 1, at 2. The author, writing approximately one year ago, considered that ‘[t]hese issues will no doubt be raised in due course before courts and beyond, and it may be premature to examine them at this stage’ (emphasis added).

Section II of the present article briefly summarizes the principal legal opinions expressed so far with respect to Kosovo’s current status in international law, looking forward to the International Court of Justice (ICJ) rendering its advisory opinion on the issue. Section III then explores the issue of the membership of Kosovo in international investment institutions. Section IV finally deals with the current investment regime in Kosovo, and examines the effectiveness of international investment agreements (IIAs) related to Kosovo, i.e. whether concluded by Serbia before the UDI, or entered into by Kosovo itself.

II. Kosovo’s disputed Legal Status in International Law

Kosovo’s Provisional Institutions of Self-Government (PISG) unilaterally declared Kosovo’s independence from Serbia on 17 February 2008. The entity was promptly granted recognition as a State by several dozens of countries, amongst them the United States and a majority of European States, while other States remain neutral, or voiced concerns over the unilateral character of Kosovo's declaration (China, India), or even stated officially that they would not recognise the independence of Kosovo (Russia). The United Nations, for its part, has maintained to date ‘a position of strict neutrality on the question of Kosovo’s status’. On 8 October 2008 the UN General Assembly, having added the Kosovo issue on its agenda at the request of Serbia, noted that the PISG’s UDI had been ‘received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order’, and adopted a resolution by which it decided to request the International Court of Justice (ICJ) to render an advisory opinion on the following question:

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12 ‘Kosovo Declaration of Independence’, 17 February 2008, at http://www.assembly-kosova.org/. For Serbia’s official reaction, see ‘Statement by H.E. Mr. Boris Tadic, President of the Republic of Serbia, 18 February 2008, available at http://www.un.int/serbia/Statements/32.pdf : ‘The Republic of Serbia will not accept the violation of its sovereignty and territorial integrity. The Government of Serbia and the National Assembly of the Republic of Serbia have declared the decision of the Pristina authorities null and void. Likewise, we are taking all diplomatic and political measures to prevent the secession of part of our territory’.


15 UN GA Res. 63/3, 8 October 2008.
‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’

The effectiveness of Kosovo’s commitments – either actual or potential – in the field of foreign investment is to a certain extent dependent upon the answer to be given by the ICJ to that question. It seems difficult at the present stage to predict what will be the position of the ICJ. The law of State succession has indeed been described as one of the most complex issues of international law. Legal commentary frequently highlights – and deplores – the ‘instrumental weakness of State succession, its ad hoc character, the absence of determining rules from relevant treaty law and custom’. Whereas a comprehensive enquiry on the principles of law involved in the determination of the legal status of Kosovo, as well as an account of the events leading to Kosovo’s UDI, is clearly beyond the scope of this article, it is appropriate to briefly identify the relevant legal principles and give a succinct overview of the commentaries given so far by the international legal scholarship. The purpose of the following developments is not to enter the debate, but merely to evidence the disputed legality of Kosovo’s UDI, and furthermore the disputed statehood of the entity. As will appear from

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the literature referred to, international law scholars are no less divided on these issues than the
member States of the UN.20

(a) Kosovo’s UDI: a case of secession

A preliminary question to be dealt with is the precise characterization of the situation created
by Kosovo’s UDI. Orakhelashvili remarks that, as regards the legal characterization of the
event, ‘[i]t is clear that the UDI in Kosovo has been based on the claim that Kosovo has
seceded from Serbia’.21 The validity of this claim, he notes, ‘depends on the way international
law regulates secession’.22 Secession is a modality of succession of States23, which can be
declared, in the narrower sense of the concept, as ‘the creation of a new independent entity
through the separation of part of the territory and population of an existing State, without the
consent of the latter’.24 Secession refers, within the realm of State succession, to the category
of instances of continuation, as opposed to instances of dissolution:

‘In the case of continuation, one or more sub-state entities breaks away from the predecessor
state and forms an independent state. What remains of the predecessor state is referred to as the
continuing state […] and is deemed to continue the international legal personality of the
predecessor states. The break-away states are referred to as successor states or newly
independent states.

In the case of dissolution, the predecessor state dissolves into a number of independent states,
with none of these states considered the continuing state. All of the emerging states are

20 The point is made by J. d’Aspremont, ‘Kosovo and International Law: A Divided Legal Scholarship’ (2008),
21 A. Orakhelashvili, supra note 10, at 2.
22 Ibid.
23 State succession is defined as ‘the replacement of one State by another in the responsibility for the
international relations of territory’, Art. 2(1) of the 1978 Vienna Convention on Succession of States in Respect
of Treaties, UNTS 1946, 3.
adds that ‘Yet, secession can also take the form of the separation of part of the territory of a State in order to be
incorporated as part of another State, without the consent of the former’. Ibid, Some authors adopt a broader
definition, including ‘all cases of separation of States in which the predecessor State continues to exist in a
considered successor states and are treated as equal heirs to the rights and obligations of the predecessor state’. 25

The assumption that Kosovo’s UDI, leaving aside any appreciation on its legality, is a case of secession, instead of a case of dissolution analogous to what happened when the republics of Slovenia, Croatia, Bosnia, and Macedonia declared their independence from Yugoslavia in the 1990s, appears indeed to be widely shared. 26 As shown below, it also reflects the view taken by the IMF. 27

It is generally accepted that international law does not authorise the unilateral secession of a territory from the State to which it pertains. The principle of self-determination as recognized in modern international law and practice 28 does not entail, apart from in certain exceptional circumstances (that seem not to be met in the case of Kosovo), recognition of a unilateral right to secede. Crawford noted on that subject that

‘outside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States. Self-determination outside the colonial context is primarily a process by which the peoples of the various States determine their future through constitutional processes without external interference. Faced with an expressed desire of part of its people to secede, it is for the government of the State to decide how to respond, for example by insisting that any change be carried out in accordance with constitutional processes. In fact no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor State’. 29

Thus, ‘the application of the right of self-determination to Kosovo is far from self-evident’. 30

In this context, there is at least a serious doubt about the legality of Kosovo’s UDI under


27 See below, note 92.

28 See Thürer and Burri, supra note 9.


international law.\textsuperscript{31} It may be argued that the PISG’s unilateral declaration is not in accordance with international law, and therefore that it is a case of illegal \textit{de facto} secession. In the \textit{Quebec Case}, the Supreme Court of Canada acknowledged that “[a]lthough there is no legal right, under the Constitution or at international law, to unilateral secession […] this does not rule out the possibility of an unconstitutional declaration of secession leading to a \textit{de facto} secession”.\textsuperscript{32} The Court went on to suggest that

‘The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law’.\textsuperscript{33}

(b) Statehood and recognition

It appears unclear at the present stage whether Kosovo qualifies as a State or, in other words, possesses all required elements of statehood. The debate, recurrent among international law scholars, concentrates here on the relationship between statehood and recognition. There are two main theories on the role of recognition in international law. The constitutive theory holds that recognition is an essential criterion of statehood, or, as Crawford summarizes it, ‘that the rights and duties pertaining to statehood derive from recognition by other States’.\textsuperscript{34} This theory raises an important difficulty in practice, insofar as, as observed by Brownlie, ‘states cannot by their independent judgment establish any competence of other states’.\textsuperscript{35} The prevailing view on recognition is the declaratory theory, according to which ‘statehood is a legal status independent of recognition’.\textsuperscript{36} According to this position, ‘[a]n entity not recognized as a State but meeting the requirements for recognition has the rights of a State

\begin{itemize}
\item \textsuperscript{31} A. Orakhelashvili, \textit{supra} note 10, at 20.
\item \textsuperscript{32} Reference re Secession of Quebec [1998] 37 \textit{ILM} (1998), 1342, para. 155.
\item \textsuperscript{33} \textit{Ibid}.
\item \textsuperscript{34} J. Crawford, \textit{supra} note 19, at 4.
\item \textsuperscript{35} I. Brownlie, \textit{Principles of Public International Law} (2003) at 88.
\item \textsuperscript{36} J. Crawford, \textit{supra} note 19, at 93. See also Brownlie, \textit{supra} note 35, at 87-88.
\end{itemize}
under international law in relation to a non-recognizing State’. 37 This was also the view taken by the Arbitration Commission established to advise the European Peace Conference on Yugoslavia, which stated that ‘the effects of recognition by other States are purely declaratory’. 38 Crawford points out that this theory ‘assumes that there exist in international law and practice workable criteria for statehood’. 39 Such criteria can be found in the 1933 Montevideo Convention 40, which lays down “the most widely accepted formulation of the criteria of statehood in international law” 41: 1) a permanent population; 2) a defined territory; 3) a government; and 4) capacity to enter into relations with other States. 42

The application of these criteria to the Kosovo situation hardly provides certainty as to the actual statehood of the entity. At first, as regards the territorial criterion, it is evident that Serbia maintains its claim of sovereignty over the territory of Kosovo. 43 The ‘government’ criterion seems no less problematic in the case of Kosovo. Many commentators argue that the crucial criterion of statehood of an entity is ‘(the internal as well as international) effectivité of its governmental apparatus’. 44 Under this argument, the statehood of Kosovo is mainly dependent upon the fact that it possesses a government that effectively controls its territory and exercises effective authority over it. 45

Following this position, d’Aspremont observes that

‘[the] widespread recognition of Kosovo among Western State already provides the new entity with a considerable — although not unqualified — external effectivité. But this external effectivité does probably not need to be overwhelming as the government of Kosovo is already endowed with significant internal effectivité. It is true that the government does not wield its power on all parts of the territory […] and that it stills relies on the continuous well needed presence of international forces. However, the inability to rule on some parts of the territory and the support

38 Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165.
39 J. Crawford, supra note 19, at 28.
40 Montevideo Convention on Rights and Duties of States, 26 December 1933, 165 LNTS 17.
41 M. N. Shaw, supra note 16, at 178.
42 Montevideo Convention on Rights and Duties of States, supra note 40, Art. 1.
43 See supra, note 12.
44 J. d’Aspremont, ‘Regulating Statehood: The Kosovo Status Settlement’, 20 Leiden Journal of International Law (2007), 649–668, at 654. Crawford acknowledges that the existence of an effective government is ‘the most important criterion of statehood, since all the others depend on it’. J. Crawford, supra note 19, at 565.
45 See A. Orakhelashvili, supra note 10, at 9. Orakhelashvili doesn’t support this view.
provided by third States or international organizations do not suffice to deny any effectivité to the government of Kosovo’. ⁴⁶

‘It is true, however, that internal effectivité is not sufficient to ensure the general effectivité of the government apparatus that is necessary to qualify as a state. These institutions must also be endowed with international effectivité. […] The international effectivité of the government machinery of Kosovo […] will mostly depend on its recognition as a state’.⁴⁷

‘Provided that Kosovo is widely recognized as a state, it will be able to exercise its ‘right to negotiate and conclude international agreements and [its] right to seek membership in international organizations’ […] The exercise of this ‘right’ to conclude international agreements can undoubtedly shore up its international effectivité as an international actor able to establish legal relationships with other states. […] While the capacity both to conclude international treaties and to seek membership of international organizations constitutes strong roots of effectivité for the future institutions of Kosovo, it is even more important to highlight that they presuppose statehood.⁴⁸

Two brief comments can be made on these arguments. On the one hand, as regards the alleged internal effectivité of Kosovo’s government, it is to be noted that UN Resolution 1244, providing for the political trusteeship framework for Kosovo, appears to be still in force despite the UDI. ⁴⁹ As a matter of fact, even after the UDI, during the course of 2008, UNMIK has continued to exercise its supervision on the legislative activity of the PISG⁵⁰. Since then, UNMIK was replaced in its role of political trustee by the European Union Rule of Law Mission in Kosovo (‘Eulex Kosovo’),⁵¹ which is in turn entitled to ‘monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law

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⁴⁶ J. d’Aspremont, supra note 20.
⁴⁷ J. d’Aspremont, supra note 44, at 655.
⁴⁸ J. d’Aspremont, supra note 44, at 655.
(including a customs service), whilst retaining certain executive responsibilities’. ⁵²

Orakhelashvili argues that, in this context,

‘[t]he argument of according crucial importance to effectivité […] suffers from [an] important conceptual failure deriving from the fact that the independence of Kosovo is envisaged as a controlled and supervised independence and much of the burden of which is intended to be shouldered by the EU’.

He points out that

‘there has never been an objectively verifiable indication if and how long Kosovo could survive on its own and without the EU/NATO supervision as an independent state’. ⁵³

On the other hand, as regards external effectivité, evidenced by the capacity of the entity to conclude international treaties and to seek membership of international organizations, it can be argued that such capacity doesn’t presuppose stahood, or, tu put it another way, isn’t a criterion for statehood, but is rather a consequence of statehood. ⁵⁴ Applying that reasoning to the case considered, would lead to consider that the statehood of Kosovo cannot be inferred from the fact that it has entered into international agreements or has accessed international organizations.

Thus, with some commentators arguing that Kosovo doesn’t currently meet the legal criteria of statehood, while others support the idea of its statehood owing to the effectivité of its government (or even on other grounds, not reviewed in the present article, e.g. for expediency reasons), there remains in fact a serious doubt about the present statehood of Kosovo. It can at least be argued that the recognition of the independence of Kosovo by several States does not in itself imply that the PISG’s unilateral declaration of independence is in accordance with international law. ⁵⁵

(c) Consequences of the divergent positions on Kosovo’s statehood

(i) Kosovo as a de facto entity

⁵² Ibid, Art. 3.
⁵³ A. Orakhelashvili, supra note 10, at 10.
⁵⁴ J. Crawford, supra note 19, at 61.
⁵⁵ See Thürer and Burri, supra note 9, at para. 43. The authors argue that the recognitions granted to Kosovo ‘should be seen as an acknowledgment of the fact that a new State has come into existence, regardless of how that State was created’.
According to some scholars, insofar as Kosovo’s UDI is not in accordance with international law, and as the statehood of Kosovo ‘cannot be seen as established on the basis of any applicable international law criteria’, the consequence is that ‘its status and standing should be judged by standards that apply to de facto regimes’. 56 The same author defines a de facto regime as ‘a state-like organism that satisfies the criteria of factual effectiveness of statehood but does not meet the legal requirements thereof’.57

Assuming such position, it can be argued that States should not recognize Kosovo insofar as such recognition would perpetuate a breach of international law.58 Jennings and Watts state in Oppenheim’s 9th edition, along the same line, that ‘[r]ecognition may […] be withheld where a new situation originates in an act which is contrary to general international law’.59 This is in substance the position of Orakhelashvili, according to whom

[g]iven that the recognition of Kosovo cannot constitute it as a state, nor relate to what is already the state on international legal grounds, such recognition is illegal. The grounds for such illegality can be premised either on the duty not to recognise illegal entities, or the refusal of the parent state to let Kosovo become independent’.60

Non-recognition in the case of Kosovo may draw on the obligation ‘not to recognize as lawful any situation created by a serious breach of an obligation arising under a peremptory norm of general international law’, in relation with the 1999 NATO bombings of Serbia, which have been widely recognized as illegal under international law. 61 Such an obligation was enshrined in Resolution 2625 (XXV) of the UN General Assembly 62 and restated by the ICJ in the

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56 A. Orakhelashvili, supra note 10, at 19-20.
57 A. Orakhelashvili, supra note 10, at 19-20.
59 R. Jennings and A. Watts (eds), Oppenheim’s International Law (1992), at 183, quoted by C. J. Borgen, supra note 58.
60 A. Orakhelashvili, supra note 10, at 29.
62 UN GA Res. 2625 (XXV), First principle, para. 10.
Namibia advisory opinion. The application of the non-recognition obligation in the case of Kosovo is disputed.

(ii) Kosovo as a State

States as well as international or national courts may alternatively assume that Kosovo qualifies as a sovereign State, insofar as it is endowed with sufficient internal and external effectivité, or even by virtue of the application of any other legal reasoning. If they also assume (as previously mentioned) that Kosovo is a case of secession, then succession issues will have to be addressed in a different way from that applicable to the former Yugoslavia, insofar as secession implies continuation of Serbia. Secession of territory from an existing state does not affect the continuity of the latter state, even though its territorial dimensions and population have been diminished. Its international rights and obligations remain intact. Kosovo would thus be considered not as a successor state to Yugoslavia under the dissolution principle, but as a new independent state. On of the main consequences of this view would be that Serbia would be entitled, under customary international law, to retain all of the assets of the predecessor state.

In the following sections, assuming alternatively that Kosovo is a de facto entity and a sovereign State, we will limit ourselves to the examination of some consequences of these qualifications in the field of foreign investment in Kosovo, i.e. the issue of membership of Kosovo in international investment institutions, and the effectiveness of Kosovo’s investment-

64 See J. d’Aspremont, supra note 44, at 663. Against the application of the non-recognition obligation in this case, d’Aspremont argues that: ‘First, […] from a general standpoint, recognizing an entity as a state does not amount to recognizing as legal the violation of the peremptory norms that can have paved the way to its independence. Second, […] in the particular situation of Kosovo, the bombardment of Yugoslavia did not lead directly to the independence of Kosovo, neither was it aimed at ensuring it. […] It is therefore argued that recognizing Kosovo as a state in no way brings about recognition of the NATO intervention as legal’. Ibid.
65 See A. Orakhelashvili, supra note 10, at 6. The Badinter Commission emphasised in its Opinions 1 and 8 that the recognition of the successor states of the SFRY occurred in the context of the latter’s disintegration as opposed to the right of secession of individual Yugoslav republics
66 See M. N. Shaw, supra note 16, at 865.
67 See M. N. Shaw, supra note 16, at 878-879.
68 See Perritt, supra note 26, at 178.
related international commitments. But it is necessary to bear in mind that many other issues related to international trade and investment are dependent upon the solution of the problem of qualification of Kosovo’s status, e.g. whether Kosovo is to be considered as a ‘foreign State’ for particular legal purposes in judicial proceedings.\(^69\) In other respects, the answer to the question of the status of Kosovo may need to be nuanced, insofar as statehood appears not to be an univocal concept. Crawford explains thus that ‘to refer merely to statehood ‘for the purposes of international law’ assumes that a State for one purpose is necessarily also a State for another. This may be true in most cases but not necessarily all’.\(^70\) In this sense, Crawford, who argues, along with the majority of commentators, that Taiwan is not a State\(^71\), admits however that it has the capacity to enter into international agreements, and in particular that it is an ‘investment entity’, i.e. that it has the capacity to enter into international agreements in the field of foreign investment, and in particular bilateral investment treaties (BITs).\(^72\)

\(^69\) An analogy can be drawn from the case of Taiwan, considered by most legal scholars as a non-State entity. Hsieh has shown that domestic courts of many countries dealing with Taiwan ‘have employed various devices to ensure the State-like status of Taiwan’ P. S. Hsieh, ‘An Unrecognized State in Foreign and International Courts: the Case of the Republic of China on Taiwan’, 28 Michigan Journal of International Law (2008) 765. Hsieh even argues that judicial recognition of Taiwan’s existence as a State ‘has risen to the level of customary international law’ (at 768). This assertion may seem excessive, but it is true that, whereas national courts still frequently refuse to determine for themselves issues of statehood and consider that executive recognition is binding, they have sometimes distinguished between the ‘external’ and ‘internal’ consequences of non-recognition. See J. Crawford, supra note 19, at 17-18, and the jurisprudence quoted. In Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd (1977), 1 QB 205, concerning the application by a British court of the law of the ‘Turkish Federated State of Cyprus’ despite non-recognition of that entity by the United Kingdom, Lord Denning stated that:

‘The executive is concerned with the external consequences of recognition, vis-à-vis other states. The courts are concerned with the internal consequences of it, vis-à-vis private individuals. Sor far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it –in its impact on individuals – as justice and common sense require: provided always that there are no considerations of public policy against it’. Quoted by J. Crawford, supra note 19, at 18.

In practice, despite the lack of formal relations, courts in foreign States explicitly and implicitly recognize that Taiwan meets the ‘State’ requirements for particular legal purposes (at 773). P. S. Hsieh, supra, at 765. Furthermore, ‘legislation has sometimes had to be passed authorizing courts to treat unrecognized entities as ‘law areas’ for various purposes, in order to separate non-recognition from its consequences’. J. Crawford, supra note 19, at 18. The Statement of Lord Wilberforce in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853, 954 is also noteworthy:

‘[…] where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned […] the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question’.

\(^70\) J. Crawford, supra note 19, at 31. He gives the following examples: ‘The ‘A’ Mandated territories were treated as States for the purposes of nationality, but were much less certainly States for other purposes. The Free City of Danzig was a State for the purposes of Article 71(2) of the Rules of the [Permanent Court of International Justice]; whether it was a State for all purposes has been doubted’. Ibid.

\(^71\) J. Crawford, supra note 19, at 219.

\(^72\) See Crawford, supra note 19, at 220.
same reasoning may well be applied to Kosovo, with a view to separate non-recognition from its consequences, and hence avoid the legal vacuum potentially characteristic of de facto entities.

III. Membership of Kosovo in International Investment-related Organizations

a) Succession to membership in international organizations in case of secession

Once the situation created by Kosovo’s UDI has been characterized as a case of secession, the first question is that of the effect of that modality of succession on the predecessor State’s membership in international organizations. The principle is that, if a continuator State to the previous member can be identified, then that State continues the membership of the previous member. Serbia thus shall continue its membership in the various organizations to which it was a member at the time of the UDI, and retain all of its preexisting rights and obligations in every organization.

The second issue to be dealt with relates to the situation of Kosovo vis-à-vis membership of international organisations to which Serbia was a member at the time of the UDI. Raising this question presupposes assuming that Kosovo is an independent State. Indeed, even if matters concerning membership in international organizations depend primarily on the provisions of the constitutions of these organizations and on the practice of each organization, according to which, in the majority of cases, non-original members must be admitted by decision of competent organs of the organization, it remains that the condition of being an independent and sovereign State is in principle a basic condition for

73 See A. Goia, ‘State Succession and International Financial Organizations’, in M. Koskenniemi and P. M. Eisemann (eds), supra note 17, at 331.


75 On the principles involved, see M. N. Shaw, supra note 16, at 889.

76 C. F. Amerasinghe, supra note 74, at 105.

77 Ibid.
membership. In the vast majority of international organizations there can be no other members except sovereign independent States.

Article 4 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (hereinafter the ‘Vienna Convention’) states that the general rules therein codified – which provides for the fate of treaty rights and obligations as regards the predecessor and the successor State(s) – do apply in respect of ‘any treaty which is the constituent instrument of an international organization’, but this provision is made subject to ‘the rules concerning acquisition of membership and […] any other relevant rules of the organization’. The logical consequence of this provision is that automatic transmission of membership status ‘is excluded in all cases where acquisition of membership is made dependent on a formal process of admission’.

This solution seems unchallenged. As regards the issue of membership in the UN, a legal committee of the UN General Assembly considered in 1947 the situation of new states being formed through division of a member state and the membership problem and produced the following principles:

1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

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78 In fact, the constitutional provisions of international organizations do not always reserve full membership to ‘States’ (e.g. UN, IAEA, UNESCO, WHO, WIPO). Some refer to ‘nations’ (e.g. FAO) or ‘countries’ (e.g. IMF, IBRD, IFC).

79 H. G. Schermers, ‘International Organizations’, in M. Bedjaoui (ed), International Law: Achievements and Prospects (1991), 67, at 80-81. The author went on to note that ‘[i]n practice it is not always easy to establish whether a particular territory should be accepted as a State. Occasionally provinces declare themselves independent and apply for membership in international organizations. In order to prevent political problems, no international organization accepts as members such units which apply for membership, callign themselves States’. The attitude of the IMF with respect to Kosovo seems to contradict this assertion.

80 1978 Vienna Convention on Succession of States in Respect of Treaties, UNTS 1946, 3.


82 Art. 4, Vienna Convention, supra note 80.

83 A. Goia, supra note 81, at 341.

2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits’.

In view of the practice of most international organizations, especially within the system of the United Nations, in its 1974 Draft Commentary to Article 4 of the 1978 Vienna Convention the ILC concluded that, as a general rule, there was no succession to membership:

‘[P]ractice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and a member of the organization as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization. […]

New States have, therefore, been regarded as entitled to become Members of the United Nations only by admission, and not by succession. The same practice has been followed in regard to membership of the specialized agencies and numerous other organizations’. 85

The ILC therefore concluded that

‘the rules of succession of States frequently do not apply in respect of a constituent instrument of an international organization’. 86

In the same way, doctrine is unanimous that ‘[m]embership of international organizations cannot be obtained by State succession’. 87 The main reason dictating that solution seems to be that ‘the attributes of membership, such as ‘rights and obligations of voting, with specific quotas of votes, and obligations of contributing to the organization’s expenses, with fixed quotas of contributions, make it impossible to accept a successor State as a successor in membership’. 88

86 Ibid., para. 10.
87 Schermers, ‘International Organizations, Membership’, in R. Bernhardt (ed), Max Planck Encyclopedia of Public International Law 1320, at 1321. Also Vallat, ‘Some Aspects of the Law of State Succession’, 41 Grotius Society Transactions (1955) 123, at 134: ‘We can say with some confidence that the new State does not inherit a right of membership in international organizations and that the membership of the parent State continues. In other words, membership depends upon the continuing personality of the pre-existing State’.
It can be inferred from these solutions that Kosovo couldn’t invoke a devolution of membership status in international organizations; it had to apply for membership as a new member, and follow the formal process of admission provided for in the constitution of every considered organization. And that is what its government actually did.

Insofar as membership in ICSID is only open to States members of the IBRD, which in turn presupposes membership in the IMF, we will first examine the issue of Kosovo’s membership in the IMF, before dealing with its accession to ICSID.

b) Membership in IMF

The Republic of Kosovo filed an application for admission to membership in the IMF on 10 July 2008. In the context of this application, the IMF determined that ‘Kosovo had seceded from Serbia as a new independent state and that Serbia is the continuing state’. Accordingly, the IMF stated that ‘Serbia continues its membership in the [IMF] and retains all of its quota in the Fund, and all assets in, and liabilities to, the IMF’. Such analysis appears consistent with international law and the practice of international organizations, as summarized above. It is equally consistent with the previous practice of the

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89 ICSID Convention, Art. 67(a). It has been noted that with regard to the admission of non-original members, ‘the articles of agreement of the financial institutions like the IMF and the so-called World Bank Group (IBRD, IFC, IDA) are to some extent exceptional. While in these cases admission to membership is subject to approval as well, the competent organs are afforded some measure of flexibility in this respect. For instance, Article II, Section 2, of the Articles of Agreement of the IMF reads as follows: « Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms of subscription, shall be based on principles consistent with those applied to other countries that are already members ». K. G. Bühler, State Succession and Membership in International Organizations (2001), at 23.

90 IBRD Articles of Agreement, Art. 2(1). See K. G. Bühler, supra note 89, at 23.

91 See ‘Statement on Membership of the Republic of Kosovo in the IMF’, IMF Press Release No. 08/179, 15 July 2008, at http://imf.org/external/np/sec/pr/2008/pr08179.htm. The press release contained the following precis: ‘Under the IMF’s prescribed procedures for membership applications, the application must first be investigated by the IMF’s Executive Board. After its investigation, the Executive Board submits a report to the Board of Governors of the IMF with recommendations in the form of a Membership Resolution. These recommendations cover the amount of quota in the IMF, the form of payment of the subscription, and other customary terms and conditions of membership. After the Board of Governors has adopted the Membership Resolution, the applicant country may become a member once it has taken the legal steps required under its law to enable it to sign the IMF’s Articles of Agreement and to fulfill the obligations of IMF membership’.


93 Ibid.
IMF in dealing with matters of succession of States. In a 1974 Memorandum, focusing on the context of decolonization, the General Counsel of the IMF stated that:

‘In the history of the Fund, there has been no occasion on which any newly independent country has addressed a claim to the Fund to automatic membership or to succession to any part of the rights of a member because that member had formerly accepted the Articles in respect of the newly independent country or because the newly independent country had been created from the territory of the member. The Fund has recognized the continuing identity of the existing member, without any change in its rights and obligations in all such cases’.  

The same solution has been applied by the World Bank. For example, a 1974 Memorandum provided that

‘the Bank group has taken the position that on achieving independent Statehood, a former dependent territory ceases to be included in the metropolitan country’s membership […] and, if it wishes to become a member, has to acquire membership in its own right. The same is true in the case of separation or secession’.  

c) Membership in ICSID

Under Article 67 of the ICSID Convention, the Convention is open for signature on behalf of:

‘(a) States members of the International Bank for Reconstruction and Development; and

(b) other States which are parties to the Statute of the International Court of Justice and which have been invited to sign by the Administrative Council of the International Centre for Settlement of Investment Disputes […] by a vote of two-thirds of its members’.

Kosovo having accessed the IBRD on 29 June 2009, fulfilled the condition for membership stipulated in Article 67(a). Signature of the ICSID Convention was, however, only an first  

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94 Two memoranda were published by the IMF on these issues: Secession of Territories and Dissolution of Members in the Fund, 14 July 1992, and Issues of State Succession Concerning Yugoslavia and the Fund, 20 November 1992. The author of the present article was unfortunately unable to access these documents.

95 Quoted by A. Goia, supra note 81, at 340. Goia points out that ‘no distinction has been made, in this respect, between the ‘newly independent States’ and new States created in contexts other than decolonization’.


97 Quoted by A. Goia, supra note 81, at 341 (emphasis added).

step, to be taken prior to ‘deposit of an instrument of ratification, acceptance or approval’. 99 A formal act of ratification, acceptance or approval is indeed required by the signatory State as a prerequisite for the entry into force of the ICSID Convention for that State. Such instrument shall be deposited with the Secretary's Department of the World Bank, which is the depositary of the Convention. In accordance with its Article 68(2), the Convention enters into force for the State concerned 30 days after the date of deposit of the instrument. As previously mentioned, Kosovo deposited its Instrument of Acceptance 100 of the ICSID Convention with the World Bank on the same day on which it signed the Convention. 101 The ICSID Convention therefore entered into force for the Republic of Kosovo one month later, on 29 July 2009.

IV. Kosovo’s commitments in the field of foreign investment

a) Domestic regulation of foreign investment in Kosovo

Applicable laws in Kosovo currently include municipal laws 102, UNMIK laws and regulations, and any applicable laws of the former Socialist Federal Republic of Yugoslavia that were in effect in Kosovo as of 22 March 1989. 103 A Law on foreign investment (hereinafter ‘the Law on Foreign Investment’) was passed by the (PISG) Assembly of Kosovo with the assent of UNMIK on 21 November 2005. 104 It repealed an UNMIK Regulation of 12 January 2001 105, providing for an initial basic framework for foreign investment in Kosovo. 106

99 ICSID, Memorandum on Signature and Ratification, Acceptance or Approval of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. A(2).
100 Law No. 03/L-152, supra note 3.
104 Law No. 02/L-33 on Foreign Investment. Let us remind that UNMIK exercises its supervision on legislation adopted by the PISG. The law under consideration referred thus to UNMIK Regulation No. 2001/9 of 15 May 2001, ‘On a Constitutional Framework for Provisional Self-Government in Kosovo, Chapter 5.1(d) and 9.1.26 (a)’.
106 The provisions in that law regarding the settlement of dispute were terse : ‘The courts of Kosovo shall have jurisdiction over the resolution of business disputes. Notwithstanding the above, the parties to a foreign investment may specify any arbitration or other dispute resolution procedure upon which they may agree, and if
The purpose of the Law on Foreign investment is, in a wording characteristic of this kind of legislation:

‘to promote and encourage foreign investment in Kosovo by providing foreign investors with a set of fundamental and enforceable legal rights and guarantees that will ensure foreign investors that they and their investments will be protected and treated with fairness and respect in strict accordance with the rule of law and widely accepted international standards and practice’.  

The content of the provisions of the Law on Foreign Investment regarding the standards of treatment applicable to foreign investors, i.e. *inter alia* fair and equitable treatment, non-discrimination, stability of the investment regime, compensation in case of expropriation, and the substantive rules applicable to investment disputes won’t be discussed here. Dispute settlement provisions are referred to in para. c) of the present Section.

It is noteworthy that Article 28 of the Law on Foreign investment provides for its application to pre-existing investments, therefore depriving of all substance to a large extent the issue of the effects of Kosovo’s secession on the rights of foreign investors acquired before the UDI.

Nevertheless, insofar as this legal framework is potentially subject to legislative repeal, it remains necessary for foreign investors to enter into a specific agreement with the host State, such an agreement between the parties so provides, any judgment resulting from such an agreed procedure shall be final and shall be enforceable, without review or appeal in any manner, in any court of competent jurisdiction in Kosovo’ (Art. 17).

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107 Law on Foreign Investment, Art. 1, *supra* note 104.
112 Article 17 of the Law on Foreign Investment provides that ‘The court or arbitral tribunal considering an Investment Dispute shall determine the issues in dispute in accordance with the substantive rules or laws agreed upon by the parties in writing. In the absence of such an agreement, the court or arbitral tribunal shall apply the substantive law applicable in Kosovo - excluding the private international law rules thereof - and such rules of public international law as may be applicable to the issues in dispute’.
114 ‘The present law - and the rights, guarantees, privileges and protections established by the present law - shall apply equally to foreign investors that invested in Kosovo prior to the effective date of the present law [...]’ (*Ibid.*, Art. 28). On the controversy over the law applicable to government contracts with foreign investors in a context of State succession, see e.g. M. Koskenniemi, ‘Report of the Director of Studies of the English-speaking Section of the Centre’, in M. Koskenniemi and P. M. Eisemann (eds), *supra* note 17, at 107-108.
115 This possibility is expressly referred to in Article 26.2 of the Law on Foreign Investment.
and it is desirable that the investor be in the position to rely on a bilateral investment treaty (BIT) when such an agreement is in force between the State of origin of the investor and the host State of the investment.

b) International Investment Agreements

Two questions have to be examined here: (i) whether IIAs concluded by Serbia may be applicable with respect to Kosovo, and (ii) whether Kosovo may enter into new investment-related international commitments.

(i) The situation of Kosovo vis-à-vis IIAs concluded by Serbia

The rules concerning succession to treaties are those of customary international law together with the 1978 Vienna Convention\textsuperscript{116}, which entered into force in 1996 and applies with regard to a succession taking place after that date.\textsuperscript{117} It must however be borne in mind that the Vienna Convention ‘applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations’\textsuperscript{118}, which may well not be the case here, as we have seen before.

While in the context of decolonization, the Vienna Convention affirms the ‘clean-slate’ principle,\textsuperscript{119} the solution retained in cases of secession (the exact wording employed in the Convention is ‘separation’) is, in principle, automatic ‘continuation in force’ of the predecessor State’s treaties, in respect of the successor State also.

Article 35 of the Vienna Convention provides to that effect that in cases of ‘separation’,

‘any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed’\textsuperscript{120}.

This rule applies unless otherwise agreed by the States concerned, and unless ‘it appears from the treaty or is otherwise established that the application of the treaty in respect of the

\textsuperscript{116} 1978 Vienna Convention, supra note 80.
\textsuperscript{117} See M. N. Shaw, supra note 16, 871. Serbia is a signatory of the Convention.
\textsuperscript{118} 1978 Vienna Convention, Art. 6, supra note 80.
\textsuperscript{119} Ibid., Art. 16, applicable to ‘newly independent States’.
\textsuperscript{120} Ibid., Art. 35(1).
successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation’. 121

It has been underlined that this approach in the Vienna Convention ‘constitutes a rather different approach from the traditional one’. 122 The traditional solution, consistent with a rich State practice, appears to be that ‘the newly created state will commence international life free from the treaty rights and obligations applicable to its former sovereign’. 123 Shaw argues consequently that the formulation in article 34 of the Vienna Convention cannot ‘be taken as necessarily reflective of customary law’. 124 ‘Much will depend’, he insists, ‘upon the views of the states concerned’. 125

It is therefore far from evident that bilateral investment treaties concluded by Serbia 126 will continue in force in respect of Kosovo also. It would alternatively be conceivable that Kosovo confirms that BITs concluded by Serbia are binding on it, but that possibility is dependent upon the assent of the other contracting State. The conclusion between Serbia and Kosovo of a devolution agreement clarifying these issues is another possibility, but this seems highly unlikely at the present stage.

(ii) The conclusion of new IIAs by Kosovo

As a matter of fact, Kosovo has already become a party to several free trade agreements and has accessed the Central European Free Trade Agreement (CEFTA). 127 In the specific field of foreign investment, UNMIK had signed, prior to the UDI and on behalf of Kosovo’s PISG, two agreements on investment protection and promotion, with Albania 128 and Turkey 129.

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121 Ibid., Art. 35(2). See A. Goia, supra note 81, at 340.
122 M. N. Shaw, supra note 16, at 880.
123 M. N. Shaw, supra note 16, at 879.
124 M. N. Shaw, supra note 16, at 880.
125 M. N. Shaw, supra note 16, at 880.
126 As of February 2009, Serbia is a party to 41 BITs with the following countries: Albania, Austria, Belarus, Belgium and Luxemburg, Bosnia and Herzegovina, Bulgaria, Russia, China, Cyprus, Croatia, Cuba, Czech Republic, Egypt, Finland, FYR Macedonia, France, Germany, Ghana, Greece, Guinea, Hungary, Holland, India, Iran, Israel, Italy, Kuwait, Libya, Lithuania, Morocco, Nigeria, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, UK, Ukraine, Zimbabwe.
Moreover, Kosovo is in the process of negotiation and signing new BITs with Macedonia, Slovenia and other countries of CEFTA. 130

The issue of Kosovo’s statehood is relevant to the assessment of the efficiency of such commitments. There is no doubt that ‘the general capacity of concluding international treaties is an attribute reserved to states (and, additionally, to personified international organizations)’. 131

Whatever may be the outcome of the controversy on Kosovo’s statehood, the entity is likely to be considered as meeting the ‘State’ requirements for the purposes of concluding international agreements, and in particular BITs. Indeed, despite the wording of Article 1 of the 1969 Vienna Convention on the Law of Treaties, which seems to indicate that treaties can only be concluded between States 132, some authors have argued that de facto entities enjoy the capacity of concluding international agreements. For example, Sir Gerald Fitzmaurice stated before the ILC that ‘[t]he parties to the treaty must possess treaty-making capacity according to international law, that is to say they must be either (a) States in the international sense of the term; (b) para-Statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having belligerent status—de facto authorities in control of specific territory’. 133 Sir Hersch Lauterpacht, examining the treaty-making capacity of dependent States (protectorates), admitted that their capacity to conclude treaties wasn’t necessarily dependent upon ‘[their] status as a member of the international community’. 134 Under these arguments, Kosovo, despite its status as non-State entity, would nonetheless be considered a subject of international law, having the competence to enter into international agreements. It is therefore probable that national or international courts, or arbitral tribunals, seized of an investment


131 J. d’Aspremont, supra note 44, at 655-656.


dispute involving the application of a BIT signed by Kosovo, would apply the treaty and determine the issues in dispute in accordance with its provisions.

c) Investor-State dispute settlement

Will ICSID arbitration be available to foreign investors in relation to an investment in Kosovo? Schreuer observes that, in situations of State succession, ‘it may be subject to doubt whether a successor State is still a Contracting State to the Convention and whether any consent to the jurisdiction of the Centre given by its predecessor binds the new State’.135 As regards multilateral treaties, like the ICSID Convention, he notes that ‘there is a widespread practice for a new State to make a unilateral declaration indicating its willingness to continue its predecessor’s status as a Contracting State’.136 In the present case, the predecessor State, Serbia, accessed the ICSID Convention in 2007. As the possibility of an unilateral declaration by Kosovo was hardly conceivable in an hypothesis of secession, the authorities in Pristina have followed another way, and Kosovo has become, as we have seen before, a new member of ICSID.

Article 25 of the ICSID Convention sets out the criteria that disputes must satisfy in order to fall under the jurisdiction of ICSID. Article 25(1) provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Participation in the ICSID Convention in itself does not amount to consent to jurisdiction.  ^137  Consent to ICSID’s jurisdiction is in practice given either (i) in a contract between the host State and a foreign investor, (ii) in a provision in the national legislation of the host State, or (iii) through a treaty between the host State and the investor’s State of nationality. ^138  Kosovo has chosen to offer consent to ICSID arbitration in general terms to foreign investors in its legislation, before even becoming a Contracting State to the ICSID Convention. ^139  The main provisions regarding investment disputes in the Law on Foreign investment are the following:

‘Article 16  Mechanisms for the Resolution of Investment Disputes

16.1. A foreign investor shall have the right to require that an investment dispute be resolved in accordance with any applicable requirements or procedures that have been agreed upon in writing between the foreign investor and Kosovo.

16.2. In the absence of such an agreed procedure, a foreign investor shall have the right to require that the investment dispute be settled through arbitration in accordance with the procedural rules chosen by the foreign investor. The foreign investor may choose any of the following procedural rules to govern the arbitration of the investment dispute:

a. the ICSID Convention, if the foreign investor is a citizen of a foreign country and that country and Kosovo are both parties to that convention at the time of the submission of the request for arbitration;

b. the ICSID Additional Facility Rules, if the jurisdictional requirements “ratione personae” of Article 25 of the ICSID Convention are not fulfilled at the time of the submission of the request for arbitration;

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137 ICSID Convention, Preamble, para. 7, provides that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration’. See UNCTAD, Dispute Settlement. International Centre for Settlement of Investment Disputes, 2.3 Consent to Arbitration, prepared by C. Schreuer (2003), UNCTAD Doc. UNCTAD/EDM/Misc.232/Add.2, at 5. See also U. Grušić, ‘The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes’, 10 Journal of World Investment & Trade 1 (2009), 69, at 71 ff.

138 UNCTAD, Dispute Settlement. International Centre for the Settlement of Investment Disputes. 2.3 Consent to Arbitration (UNCTAD/EDM/Misc.232/Add.2), at 6. Also R. Dolzer and C. Schreuer, supra note 11, at 238.

139 See C.H. Shreuer, supra note 135, at 142, on problems which may arise from a succession of States, when the consent to arbitration was given by the predecessor State.
c. the UNCITRAL Rules, in such case the appointing authority referred to therein shall be
the Secretary General of ICSID; or
d. the ICC Rules.

16.3. The consent of Kosovo to the submission of an Investment Dispute to arbitration
under this Article 16 is hereby given under the authority of the present law. The consent of
the foreign investor may be given at any time either by filing a request for arbitration or by
providing to the Agency a written statement expressing such consent.

16.4. The consents referenced above shall be deemed to satisfy the requirements for the
forms of consent under Chapter II of the ICSID Convention, the ICSID Additional Facility
Rules, the UNCITRAL Rules, and the ICC Rules, as well as the New York Convention. In
particular, if an arbitral award is issued by a foreign or international arbitration body under
a procedure authorized by this Article 16, such award shall be enforceable in accordance
with the New York Convention, regardless as to whether or not that convention is otherwise
binding on Kosovo. […]

16.6. Unless the concerned foreign investor and Kosovo agree otherwise in writing, any
arbitration under the present law shall be held in an EU member country that is also a party
to the New York Convention’. 140

As is clear from the wording of Article 16 above, ICSID arbitration is recognized as one of
several possible means of dispute settlement. It is also specifically stated that the consent of
Kosovo to ICSID’s jurisdiction is constituted ‘under the authority’ of the law. Nothing in the
clause referring to ICSID indicates that a further ad hoc manifestation of consent to the
Centre’s jurisdiction from the part of Kosovo’s government will be required; the clause
appears to be self-executing. 141

Another question may arise: that of the possibility of access to ICSID in relation to an
investment in Kosovo undertaken before its UDI. Insofar as Article 28 of the law provides for

140 Law on Foreign Investment, Art. 16, supra note 104.

141 For a case of unclear provision in a national law, leading to a dispute as to whether the host State had given its
consent, see SPP v. Egypt, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112. See R. Dolzer
and C. Schreuer, supra note 11, at 240.
its application to pre-existing investments\(^\text{142}\), ICSID arbitration would also be available in this situation.\(^\text{143}\)

\[d)\] \textbf{State-State Dispute Settlement}

Disputes can also arise between States, in the context of investment-related governmental measures contravening the commitments contained in IIAs. States have the possibility to refer such disputes arising from the application of IIAs to the ICJ, under the condition that the latter has jurisdiction.

In the case under consideration, it is likely that inter-State dispute settlement before the ICJ will not be available to Kosovo, absent UN membership. The preconditions for access to the ICJ are indeed: (i) that the applicant be a State, pursuant to Article 34 of the ICJ Statute, and (ii) that the state be a member of the United Nations and therefore a party to the ICJ Statute forming an integral part of the UN Charter.\(^\text{144}\)

Under Article 4 of the UN Charter, Kosovo’s membership in the UN is a matter for formal decision by the UN General Assembly, upon recommendation by the UN Security Council. It is likely that Russia, as a permanent veto-wielding member of the Security Council, would oppose any request from Pristina to join the UN. As long as this opposition persists, the ICJ will not have jurisdiction \textit{ratione personae} over Kosovo. Absent the possibility of recourse before the ICJ, the only arbitral institution providing facilities for the settlement of State-to-State disputes under its auspices is the Permanent Court of Arbitration (PCA).\(^\text{145}\)

\(^\text{142}\) ‘The present law - and the rights, guarantees, privileges and protections established by the present law - shall apply equally to foreign investors that invested in Kosovo prior to the effective date of the present law […]’ (Law on Foreign Investment, \textit{supra} note 104, Art. 28).

\(^\text{143}\) On the applicability of BITs to investment made prior to the treaty’s entry into force: see R. Dolzer and M. Stevens, \textit{Bilateral investment treaties} (1995), at 45–47.

\(^\text{144}\) Article 35 of the ICJ Statute provides that ‘1. The Court shall be open to the states parties to the present Statute. 2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council […]’.