ДОСВІД ЗАРУБІЖНИХ КОЛЕГ

ECONOMIC STATE-BUILDING AND THE REGULATION OF FDIS IN KOSOVO: RECONCILING ECONOMIC SOVEREIGNTY AND CONDITIONALITY

Federica Cristani,
post-doctoral researcher in Public International Law
at the University of Verona (Italy)

Annotation: The present paper aims at defining the concept of economic sovereignty in the framework of processes of State-building, with particular regard to the regulation of foreign direct investments (FDIs). Firstly, it addresses the definition of the concept of «economic sovereignty» and its development, with particular regard to countries facing processes of economic reconstructions (like post-conflict and transitional situations). In this respect, attention will be devoted to the concept of «conditionality», as first developed by the International Monetary Fund (IMF) within its supporting programs and then used by the European Union (EU) for its enlargement policy.

The analysis will focus on the Western Balkans and in particular to Kosovo: the Kosovo case study sums up various aspects of external influences on a country's governance. Taking into account the role of EU conditionality in the exercise of the economic sovereignty of Kosovo, the main question to be answered is whether there is an 'erosion' of economic sovereignty or simply a reconfiguration of the relationship between national economic policies and EU policies, with particular regard to the definition of a domestic legal framework for investment protection.

Key words: Economic sovereignty, state-building, post-conflict reconstruction, economic reconstruction, investment protection, economic conditionality, globalization, Kosovo, EU Stabilisation and Association Process, EULEX mission.

Анотація: Метою статті є визначення концепції економічного суверенітету у контексті процесу державного будівництва з конкретним розглядом питання щодо регулювання іноземних прямих інвестицій. У першу чергу, це стосується визначення концепції «економічного суверенітету» виходячи з аналізу практики країн, які зіткнулись з процесами реструктуризації економіки (зокрема у пост-конфліктні та перехідні періоди). В цьому сенсі, особлива увага приділяється концепції «умовностей», якою керується Міжнародний валютний фонд при підтримці різних програмах, а також використовує Європейський Союз у своїй політиці розширення. Аналіз буде сфокусований на Західних Балканах, зокрема, Косово.

Ключові слова: економічний суверенітет, державне будівництво, економічна реконструкція, постконфліктний і перехідний період, міжнародні інвестиції, захист інвестицій, економічні умови, глобалізація, Косово.

Аннотация: Целью статьи является определение концепции экономического суверенитета в контексте процесса государственного строительства с рассмотрением вопроса регулирования иностранных прямых инвестиций. В первую очередь, будет определено понятие «экономического суверенитета», исходя из практики стран, которые столкнулись с процессами реконструкции экономики (такими как пост-конфликты и переходные периоды). В этом отношении, особое внимание уделяется концепции «обусловленности», которой руководствуется Международный валютный фонд при поддержке разнообразных программ, а также используется Европейским Союзом в его политике расширения. Анализ фокусируется на Западных Балканах и, в частности, Косово.

Ключевые слова: экономический суверенитет, государственное строительство, экономическая реконструкция, постконфликтный и переходный период, международные инвестиции; защита инвестиций, экономические условия, глобализация, Косово.

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1. Defining economic sovereignty in processes of State-building

1.1. The development of the concept of economic sovereignty

Article 1.2 of the United Nations (UN) Charter provides that one of the organization's purposes is the development of friendly relations among states based upon the «principle of equal rights and *self-determination* of peoples»[1], while the 1970 Declaration on Principles of International Law Concerning Friendly Relations declares that «all peoples have the right freely to determine, without external interference, their political status and to pursue their *economic*, social and cultural development, and every state has the duty to respect this right»[2].

According to the right to «economic» self-determination, people can choose whatever type of government they wish *and* they can freely undertake their economic, social and cultural development. This is also restated in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)[3].

Economic self-determination is deeply linked to the exercise of sovereignty by the State[4]. In the «Westaphalian» paradigm[5], the State is perceived as a «self-determining» political subject who has full control on the formulation of its internal and external policies without being subject to any outside control[6]. In this framework, external intervention is a direct challenge to the «autonomy» of a State, as clearly prohibited by article 2(7) of the UN Charter, according to which «nothing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State»[7], and also restated by the UN General Assembly Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty[8] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[9].

In the last decades globalization has brought new challenges to the economic sovereignty of States. Indeed, globalization has increased, on the one hand, all kinds of economic relations between countries, thus intensifying economic interdependence. On the other hand, national economies have been gradually replaced by a global economic system[10]. In the realm of globalization, instead of form of governments we are now talking of

governance[11]. As a consequence, States are now subject to several legal constraints in the exercise of their sovereign economic and monetary powers, notably to constraints arising from the membership of the IMF or, at the regional level, of the EU[12]. In this framework, one may wonder whether conditionalities of the IMF programs or within the EU system tantamount to «economic coercion» over domestic economic sovereignty[13]. «Economic coercion», has been described as «an attempt to constrain state conduct through the use of withholding of economic resources»[14]. Citing several declarations of the UN General Assembly, Professor Oscar Schachter argues that «economic coercion directed against the sovereign rights and independence of any state has been declared to be in violation of international law»[15].

This explains the renewed interest among international scholars in the State sovereignty issue[16]. The problem is to consider whether the State has lost its sovereignty or it still acts with a primary role in the market[17]. Some authors have concluded that economic sovereignty has become «eroded»[18], while others have suggested the idea of «limited sovereignty»[19]. Whatever the answer, one should not lose sight of the fact that nowadays States exercise some of their sovereign functions (as the economic ones) with a strict coordination with (or supervision of) international or supranational organizations[20]. This seems even more evident in situations of state-building processes, like in post-conflict economic reconstructions, as next paragraphs will show.

1.2. Processes of economic State-building and the role of conditionality

According to Francis Fukuyama, «state-building is one of the most important issues for the world community» and today «has risen to the top of the global agenda»[21].

State-building has been defined by the OECD as a «process to enhance capacity, institutions and legitimacy of the State driven by State-society relations»[22]. In more general terms, state-building can be seen as a series of «actions undertaken by international or national actors to establish, reform, or strengthen the institutions of the state»[23].

State building has become the predominant framework for civil interventions in post-conflict and transitional contexts. However, state-building practices should not be confused with peace-building operations, «understood as activities by international or national actors to prevent violent conflict and institutionalise peace», even though it «is often an important part of the state-building dynamic»[24].

If we intend state-building as a series of practices to enhance the internal administrative, political and economic structures of a State[25], we can easily affirm that nowadays States are never finally «built», but they change and adapt over time: in other words, State-building is an *iterative* process[26].

In this framework, the State is no more the «Westphalian State»[27]; sovereignty is rather perceived as an administration task over a defined territory[28].

State-building has been considered a good instrument for the economic growth of the State[29]. However, while a vast literature exists on the political and security dimensions of transition from war to peace, until recently less has been written on the economic dimension of this kind of processes[30].

Nevertheless, there is an emerging consensus among international scholars over the fact that economic issues are crucial in state-building operations, since they influence the behavior of economic and political actors[31]. Post-conflict economic policy and reconstruction projects generally aim to institute a free market to be (minimally) governed by the State[32], favoring the involvement of private business actors[33] and foreign investors[34]. Private sector activity is considered to cut «across ethnic and religious lines, where rules-based competition is the cornerstone»[35], thus reducing market inequalities[36]. Similarly, FDI creates job opportunities, supplies capital for production and facilitates the access to international markets[37].

In the economic state-building process, a crucial role is played by international actors, such as the Bretton Woods Institutions, established after World War II as specialized agencies of the United Nations[38] to deal with global economic problems and to provide technical assistance to member States[39]. The IMF helps to rebuild countries' capacity in the fiscal and monetary areas, while the World Bank focuses on rebuilding the microeconomic foundations for investment, employment, growth and poverty alleviation[40].

The IMF and the World Bank have been quite active in the processes of economic reconstruction in the framework of the peacekeeping operations promoted by the United Nations[41] (the so-called *post-conflict peacebuilding* operations)[42], for example in Liberia, Sierra Leone[43], Kosovo[44], East Timor[45], Afghanistan[46] and Iraq[47]. However, modalities of intervention have been different each time. In Kosovo (as well as in East Timor), the Security Council established a territorial administration, which acted as a transitional governmental body, exercising its authority over economic issues, including currency, banking and finance, and enacting laws on these matters[48]. On the other hand, the situation in Iraq was peculiar due to the presence of the Coalition Provisional Authority, which acted as the temporary governing authority from April 2003 until 30 June 2004[49]. In this case, the Security Council simply recognized the presence of the Coalition and called upon international financial institutions (IFIs) to give their contribution in the economic reconstruction process of the region[50].

Both the IMF and the World Bank have become more and more involved in post-conflict reconstruction operations[51] with an increasing intervention in national economic policies[52]. Their Articles of Agreement state that they should not interfere with the political economy of member States[53]. Nevertheless, they are sometimes involved in the drafting of commercial legislation in post-conflict regions and, even though they do not have legislative powers, they have come to exercise *de facto* legislative powers[54].

It should be recalled that IFIs may operate with the consent of the State or on request of the international community only. In the case of post-conflict activities, they usually act pursuant to relevant resolutions of the Security Council[55]. Generally, Security Council resolutions may require IFIs to provide technical assistance. For example, in Afghanistan, East Timor and Kosovo, relevant Security Council resolutions determined the conditions of operation of the IFIs and their

coordination with transitional governments in those regions[56].

Also regional organizations are becoming involved in state-building operations. Within Europe, the Organization for Economic Cooperation and Development[57] and the EU[58] have always promoted economic cooperation in the region through the creation of an internal market and the constant cooperation with international economic and financial institutions[59].

In this regard, external actors «intervene» in the internal affairs of the State, also «conditioning» the State in the definition of its domestic economy. In this respect, we talk about *conditionality*[60], which has been defined as «an exchange of policy changes for external financing»[61].

As regards the IMF, conditionalities have become part of its lending policies[62]. In particular, beginning in the late 1980s, the IMF has combined two types of conditionalities[63]: «prior actions», which are conditionalities that a country needs to satisfy before the start of a lending program or debt relief, and «performance criteria», which have to be met to ensure the release of credit tranches or continued debt relief[64]. Conditionalities in the IMF programs have significantly increased in the 1980s and 1990s[65]. For example, during the Asian financial crisis[66], South Korea had to satisfy 94 structural conditions, Thailand 73 conditions and Indonesia 140 structural policy undertakings[67].

It has been argued that the IMF has «a major effect upon the design of macroeconomic policy in the poorest countries» through the application of its conditionalities[68].

However, conditionalities are not limited to the IMF programs[69]. At the regional level, EU conditionality is worth particular attention. In particular, we refer to the strict conditions the candidate countries had to comply with in order to be admitted as EU member States[70].

The question has arisen to what extent the conditionalities attached to such programs affect the principle of economic self-determination of the affected countries.

As a general rule, every actor in the international arena must comply with general international rules, and, accordingly, to the right to economic self-determination[71]. However, an international regulatory framework for situations of post-conflict economic reconstruction is not yet in place[72].

In analyzing the complex interaction between state-building and economic dynamics, a useful concept has been developed of «institutional multiplicity»[73], with reference to the coexistence of different sets of rules under which individuals and economic actors must operate. Within this framework[74], «the interventions of the international community simply add a new layer of rules, without overriding others». Economic norms, institutions, and policies promoted as part of the state-building process affect the design, role, and functions of the State[75]. By setting up the «rules of the game», state-building shapes incentives and constraints according to which economic actors must operate[76].

1.2.1. In particular, the regulation of FDIs

Though FDI has long been part of the global economy, it has expanded greatly over the past few decades[77]. International investment law comprises core principles which are considered part of customary international rules (like the minimum standard of treatment, the fair and equitable treatment and full protection and security) and bilateral investment treaties (BITs) between States aimed at promoting and protecting foreign investments. FDIs are also regulated at the domestic level. Indeed, each State has its own investment laws[78].

International legal literature has paid little attention so far to the analysis of FDI laws and policies in post-conflict economic reconstruction processes[79], even though it is well recognized that FDIs can play an important role in promoting economic growth in those States whose economy is under «reconstruction»[80].

In the immediate aftermath of a conflict, establishing a legal framework to attract FDI requires enacting legislation, rebuilding courthouses, and training judges and lawyers. The post-conflict government may «borrow» the laws, infrastructure and expertise from another legal system[81]. This can be accomplished through investment contracts with individual foreign investors, and through international treaties: the courts and laws of the investor's country may be chosen as the adjudication *forum* and the governing law of the investment agreement. The post-conflict country may also consider adopting the international legal framework for the protection of FDIs, joining international institutions or signing international investment agreements[82].

A major concern for prospective investors in post-conflict countries is that governments may exercise their sovereign right to change laws, and even withdraw from guarantees of international arbitration at a later date. This has a negative impact on the overall inflow of FDIs in these countries. Therefore, it is imperative for post-conflict countries to include a stability clause[83] in their investment agreements, specifically granting protection to foreign investors against future adverse legislative changes[84].

Moreover, in case of disputes between the host State and foreign investors, the International Centre for the Settlement of Investment Disputes[85], the UN Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention)[86] and bilateral investment treaties (BITs) permit to solve disputes by using neutral arbitrators and to enforce the awards before the courts of any signatory state. Indeed, ICSID provides a neutral arbitral forum for settling investor-state disputes, while the New York Convention enforces any international arbitral award between a foreign and a domestic corporation[87].

To date, a legal framework for foreign investments in situation of State-building processes has not been established. Indeed, there is a case-by-case assessment of the investment regulation. In this regard, Rwanda is considered as an FDI «success story», because it has adopted policies considered by international financial institutions to be ideal for the country, implementing a largely deregulated investment regime in order to attract FDI[88].

2. The EU economic intervention in the Western Balkan States and in Kosovo: issues of State-building and the role of conditionality

The EU has been involved in several state-building processes, acquiring a certain level of expertise in the field[89]. When taking about state-building and the role of conditionality, it is very interesting to refer to the EU's enlargement policy[90]. Indeed, usually EU offers to provide financial assistance with the promise of the EU membership[91].

A good example in this regard can be taken by the experience of the Western Balkan States. In 1999, the EU proposed the establishment of the Stabilization and Association Process (SAP)[92] for the countries of the Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia, Serbia and Montenegro) as a framework for guiding their accession efforts[93]. Since then, the SAP has proven to be a successful story for the majority of the Western Balkans countries[94].

The applicable set of criteria for Balkan countries include those criteria defined by the Copenhagen European Council of 1993[95] and the conditions set for by the SAP[96]. The evaluation of each country's progress is made through mechanisms established under the SAP, like the annual Progress Reports of the Commission. The process of stabilization and association was then strengthened by the European Partnerships launched by the Thessaloniki Agenda in 2003[97]. Accordingly, the EU concluded partnerships with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia, including Kosovo, establishing a framework of priority actions and a financial structure to improve the stability and prosperity of the region[98]. The CARDS was the main financial instrument[99] until 2007, when it was substituted by the IPA (Instrument for Pre-Accession Assistance), with the aim to provide financial support for candidate and potential candidate countries and to create an overall structure for pre-accession assistance[100].

The principle of conditionality is the cornerstone of the Stabilisation and Association Process. Indeed, the economic and financial relationships between the EU and the Western Balkans are developed under the condition of respecting and promoting human rights, democracy, rule of law and the free-market economy[101]. The EU pressure to adopt specific institutional structures, policies and practices drives these governments to fulfill EU requirements and to comply with concrete economic and political demands[102]. In case of failure to respect such conditions, the Council may take any measures it considers «appropriate»[103], delaying, reducing or even stopping the EU assistance[104]. In this regard, the EU conditionality has been considered one of the most powerful tools of the EU influence in the Western Balkans[105].

Among Western Balkan countries, Kosovo deserves a separate analysis[106]. Following the end of the Kosovo war of March-June 1999[107], UN Security Council Resolution 1244 of 10 June 1999 authorized the UN Secretary-General to establish the United Nations Interim Administration Mission in Kosovo (UNMIK) that would provide «substantial autonomy and self-government» to the people of Kosovo[108]. At the same time, a NATO-led multinational Kosovo Force (KFOR) was established to provide security in the country[109].

UN Security Council Resolution 1244 gave UNMIK a very broad mandate, including to perform civilian administrative functions, maintain law and order, develop provisional institutions for self-government and support the reconstruction and economic development of the province[110]. The EU has been involved in the post-conflict economic reconstruction of the country[111] in the framework of UNMIK Pillar IV[112]. Also the IMF has been assisting the institution-building and the economic policy implementation[113]. Indeed, in the aftermath of the war, the international community was quite determined to orient the Kosovar economy towards a free market economy[114]. The first step in this regard has been the privatization of State-owned enterprises, the removal of restrictions to the free flow of capital and the adoption of the Euro as the official currency[115]. On the institutional side, UNMIK established the Central Fiscal Authority[116], while supporting a nascent finance ministry[117], a new tax system and administration, as well as a new trade regime and customs department[118]. The EU, on its side, supervised the creation of the Banking and Payment Authority and the reform of the payment system[119]. In addition, seven banks and seven insurance companies have been established, together with fourteen micro financial institutions, which provided small loans to the non-bankable sector[120]. Therefore, the international community reached to build up a capable banking system in Kosovo[121].

The EU, in particular, has continued to support Kosovo's economic development[122]. In this respect, the adoption of the European Partnership Action Plan (EPAP) in January 2006 turned to be an important component of Kosovo's European integration process[123]. Overall, the EU policy in the region has been described as one of «conditional support for reforms in the direction of Europeanization»[124]. On 4 February 2008 the European Council adopted the Joint Action establishing EULEX, which became fully operational on 9 December 2008[125]. Since then, EULEX has supported Kosovo on its path to a greater European integration in the rule of law area[126].

Following the declaration of independence by the Kosovo on 17 February 2008 and the entry into force of a new constitution in June 2008[127], the tasks of UNMIK have significantly been modified. The adoption of a Presidential Statement by the Security Council on 26 November 2008[128] allowed the European Union (EULEX) to take on an increasing role in the rule of law sector and UNMIK to terminate its rule of law operations and conclude its reconfiguration by June 2009. Following its reconfiguration, UNMIK's main strategic objective has been the promotion of security, stability and respect for human rights in Kosovo[129].

Moreover, the establishment of the Agency for Coordination of Development and European Integration in 2008 was an important step towards improving Kosovo's donor coordination and its European approximation efforts. Kosovo has also been involved in work on the Stability Pact and its transition to the Regional Cooperation Council[130].

In 2009, EU–Kosovo's relations encountered further progress, thanks to the Commission's proposal to strengthen and widen Kosovo's participation in the SAP[131]. In 2012 a visa liberalization roadmap was launched, together with the publication of the feasibility study on Kosovo by the EU[132]. In December 2012 Kosovo has become a member of the European Bank for Reconstruction and Development and in June 2013 signed a Framework Agreement with the European Investment Bank to finance projects in the region[133].

Upon suggestion of the Commission, the Council opened the negotiations on an Stabilization and Association Agreement (SAA) with Kosovo in June 2013[134]. The SAA is a unique opportunity for Kosovo to deepen internal stability and strengthen its institutions. Moreover, this is a chance for Kosovo's enterprises to enter the EU markets and also to attract foreign

investments. In brief, the SAA will assist Kosovo in developing further its economic and political system in line with European standards[135].

Today, the EU continues to closely support the development of Kosovo through its EULEX rule of law mission, its special representative[136] and the International Civilian Office Kosovo[137]. The European Commission also provides recommendations on how to meet the targets for EU accession set out in the European Partnership for Kosovo.

As remarked by the Commission in its *Kosovo 2013 Progress Report* of 16 October 2013, the economic integration with Europe remains *significant*[138]. There is also an effort to gradually approximate Kosovo's legislation and policies with the *acquis* in the areas of international market. This is particularly true with regard to consumer protection[139], while the alignment with European standards on movement of persons and services, on the one hand, and with the anti-trust and competition policy, on the other, is still at a very early stage[140]. Besides, the system for capital movement is very liberal and there is no restrictions regarding foreign ownership or investment in the financial sector[141].

One of the main consequences of the above-mentioned interventions in Kosovo's economy is its stable monetary policy. Indeed, Kosovo is one of the few countries outside the EU-zone that has introduces the Euro as its official currency, which has led to low inflation and a stable macro-economic environment[142]. Indeed, the economic strategy pursued in Kosovo is a good example of post-conflict economic state-building practices. Nevertheless, economic challenges still remain[143].

In the framework of economic reconstruction, the protection of FDI is worth particular attention. FDI is a main contributor to the economic growth of a country. Through investment, companies build the global value chains that play an increasing role in the modern international economy[144], as also restated by European institutions[145]. This is particularly true in cases of reconstruction of post-war economies, such as in Kosovo. The following paragraphs will analyze which legal framework is currently available for FDI in Kosovo, and to what extent it can be said to be «conditioned» by the EU.

2.1. The current FDI regulation in Kosovo: the domestic and international regulation *in action*

As regards the FDI regulation, Kosovo has to cope with the lack of a transparent domestic legislation, even though the government has undertaken economic reforms in order to make the country more attractive for foreign investors[146]. In particular, there has been a massive privatization process, which was engineered by the Kosovo Trust Agency (KTA), staffed by both foreign and local personnel and whose functioning costs were covered by the US Agency for International Development (USAID)[147]. After Kosovo independence, KTA was transformed into the Kosovo Privatization Agency (KPA), over which international officers retained supervisor powers[148].

However, the fact that the domestic legislation is under constant change has a negative impact on the overall inflow of FDIs in the country. In particular, the lack of a transparent investment regulation at the domestic level and the corruption in the country have been a deterrent for foreign investments[149].

In the field of investment protection, applicable laws in Kosovo currently include municipal laws, UNMIK laws and regulations, as well as international agreements.

In January 2001, UNMIK adopted Regulation 2001/3 on Foreign Investment in Kosovo[150], and the Kosovo Assembly (PISG) passed the Foreign Investment Law on 21 November 2005[151]. The purpose of the Law on Foreign Investment, according to the Preamble, is 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[152].

Under this law, foreign firms operating in Kosovo are granted the same privileges as domestic businesses[153]. However, while the basic legislation of a market-oriented economy is in place, determining property ownership remains a challenge. These legal uncertainties, in addition to weak law implementation and poor contract enforcement, continue to hinder economic growth and investment.

As regards bilateral investment agreements, before Kosovo's declaration of independence UNMIK had concluded agreements on investment protection with Albania (2004) and Turkey (2006)[154]. After 2008, the Republic of Kosovo has signed BITs with Belgium (2010), Austria (2010) and the Swiss Federation (2011)[155]. Moreover, Kosovo is in the process of negotiation of new BITs with Macedonia, Slovenia and other countries of CEFTA[156].

On 29 June 2009, the President and the Prime Minister of the Republic of Kosovo signed the IMF Articles of Agreement, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the Convention establishing the Multilateral Investment Guarantee Agency (MIGA)[157].

Chapter 4 of the Foreign Investment Law assign jurisdiction for business dispute resolution to Kosovo courts. However, foreign investors are free to agree upon arbitration or another, alternative dispute resolution mechanism, such as ICSID. Indeed, Kosovo has already consented to ICSID arbitration in its legislation, before even becoming a Contracting State to the ICSID Convention[158].

From the above it follows that the Kosovo is trying to develop a legal framework to attract foreign investors in line with international law standards and practices: the Law on Foreign Investment expressly refers to the international standards of protection[159] and Kosovo has signed investment agreements among its first international acts. In this sense, it can be said that domestic legislation is directly influenced («conditioned») by the international legal framework on foreign investments.

As regards the European legal framework, it must be recalled that the Lisbon Treaty, in force since 1 December 2009, have added FDIs to the exclusive common commercial policy of the EU[160]. This means that the EU has now the authority to conclude international investment agreements with third countries. However, a EU investment policy (developing an integrated investment market access and a post-establishment investment protection policy) will be introduced

progressively[161]. Consequently, the almost 1200 BITs of member States that currently offer investment protection will be in force until they are replaced by EU agreements[162].

As stated by the Commission in its Communication of 7 July 2010, «Towards a Comprehensive European International Investment Policy», the Union must develop an international investment policy in order to increase EU competitiveness and contribute to the objectives of smart, sustainable and inclusive growth, as set out in the Europe 2020 Strategy[163]. However, to date, the EU has not defined a clear investment policy, even though future decisions in this field will certainly affect («condition») Kosovo (as well as all EU member States) in the development of its domestic regulation of foreign investments. The following paragraph will attempt to identify the main legal challenges to the creation of a stable investment policy in Kosovo, also considering to what extent the EU may have a role to play in this respect.

2.2. A *prospective* legal framework for foreign investments in Kosovo: legal challenges

There are some legislative *lacunae* in the FDIs regulation in Kosovo, namely the lack of clarity of the domestic investment regime, of a defined «political risk» insurance (PRI) and of a clear and transparent legal system for adjudicating disputes.

According to the Independent International Commission on Kosovo one of the «characteristics of the region that represent major obstacles to regional integration (…) is the crisis of the state and the absence of a rule of law. (…) Bosnia, Kosovo, Albania, and Macedonia all rely on this system of internationally financed dependency on one hand, and the criminalization of the economy on the other (drugs, arms, prostitution)»[164].

Moreover, a major concern for prospective investors is that governments may exercise its sovereign right to change laws, which may also affect in a negative way investors' rights[165].

Kosovo needs to enhance the rule of law in order to attract foreign investments that are essential in ensuring a sustainable economic growth for the newly independent State[166]. In this respect, it can be recalled that one of the main feature of the EU's investment policy aims at fostering transparency by clarifying the regulatory framework and facilitate the movement of investment-related persons in the EU market[167]. In its recent *Fact Sheet. Investment Protection and Investor-to-State Dispute Settlement in EU Agreements*, the Commission has pointed out that in the definition of a European investment policy there is the necessity to clarify and improve investment protection rules, namely the right to regulate to pursue legitimate public policy objectives and to better define the standard of the fair and equitable treatment[168].

As regards the PRI, the US Overseas Private Investment Corporation (OPIC) has been involved in Kosovo since 2000, providing financing, political risk insurance and other investment vehicles to American investors. With OPIC assistance, American investors are currently involved with projects in the energy and real estate development sectors[169]. Moreover, Kosovo has recently joined the MIGA[170]. However, the EU law still lacks a regional system that could address this issue in a systemic way, that could attract secure investments in the country.

As regards the system for adjudicating disputes (in particular between the host State and the foreign investor) and guaranteeing investors' rights[171], Kosovo has singed the ICSID Convention (as one of its first international acts), which allows signing States and foreign investors to solve disputes by using neutral arbitrators and to enforce the awards in the courts of any signatory States. Nevertheless, this does not completely solve the problem as, even under the ICSID Convention it is up to the parties to the dispute to choose the applicable law for solving the dispute itself[172]. In the framework of a future European investment policy, the Commission has restated the need to improve the current dispute settlement system, preventing investors from bringing multiple or frivolous claims, making the arbitration system more transparent, with documents available to the public, access to hearings and allow interests parties, such as NGOs, to make submissions, and dealing with conflicts of interests and consistency of arbitral awards, for example introducing a binding code of conduct for arbitrators[173]. The EU support in this direction would have a positive impact also on the dispute settlement system carried out in its (perspective) member States.

At the regional level, it is worth mentioning that Kosovo has joined the Investment Compact initiative[174], a regional program of the Organization for Co-operation and Development (OECD), actively supported by the European Commission, aimed at helping governments of the region in improving their investment climate and fostering private sector development[175]. In the framework of OECD, also the Southeast Europe Investment Reform Index is a useful instrument. First published in 2006, it provides a qualitative assessment of policies and institutions that critically affect the environment for direct investment[176]. In the last Investment Reform Index of 2010, the study has found out that in general economies in Southeast Europe have progressively undertaken reforms which are largely in compliance with EU standards[177]. As regards in particular the situation of Kosovo, the study recognizes that some progress has been made in regulatory reform, e.g. in lowering tax compliance costs and simplifying the process of paying taxes[178]. Nevertheless, Kosovo remains one of the Southeast European economies where access to finance is the most problematic, so a number of reforms are still needed, such as a robust insolvency law and a regulatory framework for leasing and factoring[179]. It is very interesting to note that the same view was undertaken in the *Kosovo 2013 Progress Report* of the Commission[180].

It follows that the creation of an investment policy in Kosovo is strictly supported (and monitored) by the EU. In this respect, one has the feeling that EU decisions in this area of law will go hand in hand with the definition of a Kosovo's ('conditioned') investment policy.

3. Some concluding remarks: are we moving towards a new concept of «economic sovereignty?»

Globalization represents today one of the major challenges to domestic economic sovereignty[181]. Indeed, there has been a «normative» and «institutional multiplicity»[182] in the regulation of economic matters at the international level[183]. In this sense, the State is not a self-contained regime as far as economic matters are concerned.

This is even more evident in situations of state-building, like in post-conflict reconstruction situations. In this regard, also international actors intervene in supporting (or monitoring) the economic policy of the State under (re)construction.

In the words of Cassese, there is a shift from economic sovereign *of* the State to the economic sovereignty *over* the State, with the domain of the economy (in general terms, of the international and European rules of economic policy) over the domestic choices of the State[184]. In this sense, the economic sector is less bound to the territory: economy's boundaries override State's boundaries[185].

The State exercises its sovereign functions *conditioned* by international institutions; the domestic legal order must comply with the international legal order[186].

This is self-evident in the Western Balkans and in particular the Kosovo situations. The paper has shown how international actors intervene in this kind of situations and how EU conditionality influences the economic policies in these countries. In this regard, it is worth mentioning that the Independent International Commission on Kosovo concluded its report on Kosovo in 2000[187] stating that «the best available option for the future of Kosovo is *conditional independence* […]. The future of Kosovo, then, depends on the sustainability of the European idea and its supporting institutions. […T]he chief responsibility for integrating Kosovo into a peaceful Balkan region must lie with the European nations themselves».

This seems also true with regard to the regulation of foreign investments. As already shown, Kosovo has enacted a domestic regulation in line with the international and European standards of investment protection. This enhances the reliability of the national legal system and guarantees the legitimate expectations of foreign investors in the creation of a stable and transparent legal framework for foreign investments. In this sense, the State exercises its sovereign legislative powers «conditioned» by supranational rules, with the aim to attract FDIs in the country[188]. The investment policy *of* the State is moving towards the investment policy *over* the State.

ПРИМІТКИ

1. Charter of the United Nations, signed on 26 June 1945 and entered into force on 24 October 1945. The full text of the UN Charter is reproduced in 1 U.N.T.S. (1945) XVI. For a comment, B. Simma, The Charter of the United Nations: A Commentary (Oxford: Oxford University Press, 2002), 13-33.
2. UN General Assembly Res. 2625 (XXV), 24 October 1970.
3. Common Article 1(1) of the ICESCR and the ICCPR provides that: «All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development». According to James Crawford, the inclusion of this right in the two covenants has a «tone of universality» (both adopted with the UN General Assembly Res. 2200A(XXI), 16 December 1966) (J. Crawford, «The Rights of Peoples: Peoples or Governments?», in J. Crawford (ed.), The Rights of Peoples (Oxford: Clarendon Press, 1988), 58).
4. T. Mohamad Abbas, Sovereignty in the Post-Liberal Paradigm of International State-building, at http://www.academia.edu, 8-9.
5. With this expression we refer to the system of State relations in the international system as established at the end of the Forty Years War (which culminated in the Peace of Westphalia in 1648). For a general overview, among others, P. Piirimäe, «The Westphalian Myth and the Idea of External Sovereignty», in H. Kalmo, Q. Skinner, Sovereignty in Fragments: the Past, Present and Future of a Contested Concept, (Cambridge: Cambridge University Press , 2010), 64-80 and more recently P.M. Stirk, «The Westphalian Model and Sovereign Equality» 38 Review of International Studies (2012), 3, 641-660.
6. For a general overview, C.D. Zimmermann, «The concept of monetary sovereignty revisited» 24 European journal of international law (2013) 3, 797-818, at 801, Mohamad Abbas, Sovereignty, op. cit., 4 and V. Lowe, «Sovereignty and International Economic Law» in W. Shan, P. Simons, D. Singh (eds.), Redefining Sovereignty in International Economic Law (Portland: Hart, 2008), 77 (and the references quoted therein).
7. Mohamad Abbas, Sovereignty, op. cit.
8. UN General Assembly Res., 2131 [XX], 21 December 1965.
9. UN General Assembly Res. 2625 (XXV), according to which: «[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law». This declaration has been considered as reflecting customary international by the International Court of Justice: «[t]he principle of non-intervention (…) is part and parcel of customary international law. [I]nternational law requires political integrity […] to be respected» (Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27 June 1986, ICJ Rep. (1986), 14-443, par. 202), adding that: «the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States» and that «a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. [T]he element of coercion […] defines, and indeed forms the very essence of, prohibited intervention» (Ibidem, par. 205)
10. P. Hirst, G. Thompson, «The problem of globalization: international economic relations, national economic management and the formation of trading blocs» Economy and Society (1992) 21, 341-372.
11. Morrone, «Teologia economica», op. cit., 831.
12. Zimmermann, «The Concept of Monetary», op. cit., 800 and G. Harpaz, «Regionalism, Economic Interdependence, Approximation of Laws and their Impact on Sovereignty, National Identity and Legitimacy: The Euro-Med Case», in T. Broude, Y. Shany (eds.), The Shifting Allocation of Authority in International Law (Oxford: Hart, 2008), 306.
13. Villaroman, «The Loss of Sovereignty», op. cit., 8 and infra 1.2.
14. S.A. Tiewul, «The UN Charter of Economic Right and Duties of States» 10 Journal of International Law and Economics (1975). 670.
15. O. Schachter, «The Evolving International Law of Development», 15 Columbia Journal of Transnational Law (1976)1, 14.
16. G. Sorensen, «Sovereignty: Change and Continuity in a Fundamental Institution» XLVII Political Studies (1999), 590 and references quoted therein.
17. See G. de Vergottini, «Garanzia della identità degli ordinamenti statali e limiti della globalizzazione», in C. Amato, G. Ponzellini (eds.), Global Law v. Local Law. Problemi della globalizzazione giuridica (Turin: Giappichelli, 2006), 6 f. and G. Napolitano, «L'assistenza finanziaria europea e lo Stato co-assicuratore» Giornale di diritto amministrativo (2010), 1085 f. and Morrone, «Teologia economica», op. cit., 834.

18. Zimmermann, «The Concept of Monetary», op. cit., 805 and K. Raustiala, «Rethinking the Sovereignty Debate in International Economic Law» 6 Journal of International Economic Law (2003) 4, 841-878.

19. Besson, «Sovereignty in Conflict», op. cit., 10 and S. Lee, «A Puzzle of Sovereignty» 27 Californian Western International Law Journal (1997), 245-246.

20. S. Strange, The retreat of the State. The Diffusion of Power in the World Economy (Cambridge: Cambridge University Press, 1996).

21. F. Fukuyama, State-building: Governance and World Order in the Twenty-First Century, 2004, ix-xi. For a general overview see, among others, D. Chandler, International State-Building. The Rise of Post-Liberal Governance (Oxon: Routledge, 2010), viii, von Bogdandy, Haussler, Hanschmann, Uuz, «State-building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches» Max Planck Yearbook of United Nations Law (2005), 579–614 and recently E. Milano, Formazione dello Stato e processi di State-building nel diritto internazionale. Kosovo 1999-2013, (Napoli: Editoriale Scientifica, 2013), 78.

22. OECD, «Supporting State-building in Situations of Conflict and Fragility. Policy Guidance» DAC Guidelines and Reference Series (2011), 20.

23. C.T. Call, E.M. Cousens, «Ending Wars and Building Peace: International Responses to War-Torn Societies» 9 International Studies Perspectives (2008) 1, 1–21, at 4.

24. The OECD defined peace-building as a series of «activities by international or national actors to prevent violent conflict and institutionalise peace, is often an important part of the state-building dynamic(…) [I]t is important not to confuse the immediate challenges of peacebuilding with the long-term challenges of state building(…)». (OECD, State-Building in Situations of Fragility. Initial Findings, 2008). See Milano, Formazione dello Stato, op.cit., 80.

25. A more «traditional» definition of State-building is provided by Chesterman: «the term state-building refers to extended international involvement (primarily, though not exclusively, through the United Nations) that goes beyond traditional peacekeeping and peacebuilding mandates, and is directed at constructing or reconstructing institutions of governance capable of providing citizens with physical and economic security. This includes quasi-governmental activities such as electoral assistance, human rights and rule of law technical assistance, security sector reform, and certain forms of development assistance. Within this class of operations, transitional administration denotes the less common type of operation in which these ends have been pursued by assuming some or all of the powers of the state on a temporary basis» (Chesterman, You, the People, op. cit., 5). According to the OCSE, the notion of State-building muss be broader: «as purposeful action to develop the capacity, institutions and legitimacy of the state in relation to an effective political process for negotiating the mutual demands between state and societal groups» (Concepts and Dilemmas of State Building in Fragile Situations: from Fragility to Resilience (2008), at www.oecd.org). See A. Whaites, «States in Development: Understanding State-building» DFID Working Paper (2008), 4 and Milano, Formazione dello Stato, op. cit., 79.

26. Whaites, «States in Development», op. cit., 5.

27. Chandler, International State-Building, op. cit., 35.

28. Mohamad Abbas, «Sovereignty», op. cit., 7, G. Lockhart, M. Carnahan, «Closing the Sovereignty Gap: an Approach to State-Building», Overseas Development Institute Working Paper No 253 (September 2005), 4 and Milano, Formazione dello Stato, op. cit., 82.

29. Chandler, International State-Building, op. cit., 8.

30. See, among others, F. Strazzari, B. Kamphius, «Hybrid Economies and Statebuilding. On the Resilience of the Extralegal» 18 Global Governance (2012), 57, G. del Castillo, «The Bretton Woods Institutions, reconstruction and peacebuilding», in M. Berdal, A. Wennmann (eds), Ending wars, consolidating peace: economic perspectives (London: Routledge, 2010), 79 f. and G. del Castillo, Rebuilding War-torn States: The Challenge of Post-Conflict Economic Reconstruction (Oxford: Oxford University Press, 2008), 79 f.

31. See A. Wennmann, Achim, «Peace processes, business and new futures after war», in M. Berdal, A. Wennmann (eds), Ending wars, consolidating peace: economic perspectives (London: Routledge, 2010), 17 f. and references quoted therein.

32. Strazzari, Kamphius, «Hybrid Economies», op. cit., 62.

33. Wennmann, «Peace processes», op. cit.

34. A. Mihalache-O'Keef, T. Vashchilko, «Foreign Direct Investors in Conflict Zones», in M. Berdal A. Wennmann (eds), Ending wars, consolidating peace: economic perspectives (London: Routledge, 2010).

35. World Bank, World Development Report 2011: Conflict, Security, and Development (Washington, DC: IBRD/World Bank, 2011), 122.

36. M. Porter Peschka, J.J. Emery, K. Martin, «The Role of the Private Sector in Fragile and Conflict-Affected States», in The World Development Report 2011, op. cit., background paper.

37. N. Turner, A. Obijiofor, V. Popovski. Post-Conflict Countries and Foreign Investment (United Nations University Policy Brief, 2008), 2. See infra 1.2.1.

38. See Articles of Agreement of the International Bank for Reconstruction and Development, signed on 1-22 July 1944 (Bretton Woods Conference) and entered into force on 27 December 1945, in UNTS (1947), 184, Article 1: «the purposes of the Bank are: (i) to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war». See Articles of Agreements of the International Monetary Fund, signed on 1-22 July 1944 (Bretton Woods Conference) and entered into force on 27 December 1945, in UNTS (1947), 39, Article 1: «the purposes of the International Monetary Fund are: (i) to promote international monetary cooperation […]; (ii) to facilitate the expansion and balanced growth of international trade […]; (v) to give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them, with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity; (vi) in accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members». For a general overview, L.W. Pauly, «The United Nations, the Bretton Woods Institutions, and the Reconstruction of a Multilateral Order», in L.W. Pauly, W.D. Coleman (eds), Global Ordering : Institutions and Autonomy in a Changing World (Vancouver: UBC Press, 2008), 23-43 and C.H. Lee, «To Thine Ownself be True: IMF», op. cit., 879.

39. See Boon, «Coining», op. cit., 1009.

40. G. del Castillo, «The Bretton Woods Institutions, Reconstruction and Peacebuilding», in M. Berdal, A. Wennmann (eds), Ending Wars, Consolidating Peace: Economic Perspectives (London: Routledge), 79 f.

41. For a general analysis of the «economic intervention» of the Security Council, among others, Boon, «Coining a New Jurisdiction: The Security Council as Economic Peacekeeper» Vanderbilt Journal of Transnational Law (2008), 991 f.; Cellamare, «Osservazioni sulle disposizioni in materia di ricostruzione e di governance dell'economia contenute in risoluzioni del Consiglio di Sicurezza dell'ONU», in Ligustro, Sacerdoti (eds.), Problemi e tendenze del diritto internazionale dell'economia. Liber amicorum in onore di Paolo Picone (Napoli: Editorial Scientifica, 2011), 31 f.; Boisson de Chazournes, «Taking the International Rule of Law Seriously: Economic Instruments and Collective Security. Policy Paper» (October 2005), at www.ipacademy.org/Programs/Research/ProgReseSecDev_pub.htm and Boisson de Chazournes, «Collective Security and the Economic Interventionism of the UN – The Need for a Coherent

and Integrated Approach» Journal of International Economic Law (2007), 51 f.

42. The expression peacebuilding has been widely used in the practice of the United Nations (see, for example, the Secretary-General Reports Agenda for Peace, UN Doc. A/47/277-S/24111, 17 June 1992, paragraph 21, and No Exit without Strategy. Security Council Decision Making and the Closure or Transition of United Nations Peacekeeping Operations, UN Doc. S/2001/394, 20 April 2001, paragraph 11. For a comment, Boon, 'Coining, op. cit., 1030 and Cellamare, «Osservazioni», op. cit., 31.

43. Both the United Nations operations in Liberia and Sierra Leone started as «traditional» peacekeeping missions, based on an agreement between the United Nations and the authorities in the territory with a security-based mandate. Then the mandate evolved to enshrine also reconstruction activities. In particular, the mandate of United Nations Mission in Liberia (UNMIL) was to cooperate with «relevant international financial institution, international development organizations» (Resolution 1521 (2003) required UNMIL to assist the Government in the resource management). See Boisson de Chazournes, «Collective Security», op. cit., 64 and Boon, «Open for Business», op. cit., 565.

44. In Kosovo, the UNMIK's mandate included an economic component directed by the European Union in cooperation with the World Bank and other organizations. See Security Council Resolution 1244 (1999), which welcomed the work of «the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis» (paragraph 17). See infra 2.

45. In East Timor, Security Council Resolution 1272 (1999) required the United Nations Transitional Administration in East Timor (UNTAET) to «assist in the establishment of conditions for sustainable development» (Resolution 1272 (1999), paragraph 2 (f)). See Boon, «Open for Business», op. cit., 577.

46. In Afghanistan, the Security Council required Member States to provide «long-term assistance for the social and economic reconstruction and rehabilitation of Afghanistan». Resolution 1378 (2001), paragraph 4. See Boon, «Coining», op. cit., 1030 and Cristani, «The UN Security Council», op. cit., 281.

47. Ibidem, 279.

48. See Boon, «Coining», op. cit., 1031 and Boon, «Legislative Reform in post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law Making Powers» McGill Law Journal (2005), 313-314. See infra 2.

49. Until the creation of an interim Iraqi government, the Coalition was primarily composed by the US and UK military representatives, with a symbolic representation from the other members of the «Coalition of the Willing». See the official website www.iraqcoalition.org and, for a comment, Boon, «Open for Business», op. cit., 534.

50. Cristani, «The UN Security Council», op. cit., 282.

51. See Boon, «Open for Business», op. cit., 514 and Del Castillo, «Economic Reconstruction of War-Torn Countries: The Role of the International Financial Institutions» Seton Hall Law Review (2008), 1265.

52. See Boon, «Open for Business», op. cit., 515.

53. Each organization of the World Bank Group operates according to the procedures established by its Articles of Agreement or an equivalent founding document. See Boon, «Coining», op. cit., 1009.

54. The IMF has provided assistance on the legal reform of the central banking, the currency, the taxation and other fiscal matters in situations of post-conflict reconstruction. The World Bank, on the other hand, has provided technical assistance to the countries involved. See for example, East Timor Joint Assessment Mission, Building a Nation. A Framework for Reconstruction and Redevelopment (November 1999), para. 20, at http://pascal.iseg.utl.pt.

55. See Boon, «Open for Business», op. cit., 531.

56. See Boon, «Coining», op. cit., 1010.

57. The Organization for Economic Cooperation and Development (OECD) was established on 16 April 1948 (it emerged from the Marshall Plan after the end of World War II). See the official website at http://www.oecd.org.

58. First established in 1957, it now gathers 28 member States throughout Europe. See the official website http://europa.eu

59. Cristani, «The UN Security Council», op. cit., 283.

60. See N.G. Villaroman, «The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination» 2 Journal of Politics and Law (2009) 4, 3.

61. D. Zormelo, «Is Aid Conditionality Consistent with National Sovreignty?» Overseas Development Institute. Working Paper 95 (November 1996) and M. Kahler, «External Influence, Conditionality and the Politics of Adjustment», in S. Haggard, R.R. Kaufman (eds.), The Politics of Economic Adjustment, Princeton, Princeton University Press, 1992, 89.

62. Zormelo, «Is Aid Conditionality», op. cit., 8.

63. A. Buira, «An Analysis of IMF Conditionality», in A. Buira (ed.), Challenges to the World Bank and IMF: Developing Country Perspectives (London: Wimbledon Publishing Company, 2003), 57 and Villaroman, «The Loss of Sovereignty», op. cit., 6.

64. N. Woods, The Globalizers: The IMF, the World Bank and Their Borrowers (New York: Cornell University Press, 2006), 70. Some argue that there is no pressure or coercion at all because debtor countries actually gave their consent to be under conditionalities when they voluntarily enter into an IMF program. Karl M. Meessen states that in the case of conditionalities, «[e]ach word of consent expressed by debtor states… has to be taken at its face-value» (K.M. Meessen, «IMF Conditionality and State Sovereignty», in D. Dicke (ed.), Foreign Debts in the Present and a New International Economic Order (Friebourg, Switzerland: University Press, 1986), 122). See also Villaroman, «The Loss of Sovereignty», op. cit., 9.

65. Buira, «An Analysis», op. cit., 61.

66. C.H. Lee, «To Thine Ownself be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Fiscal Crisis», 24 U. Pa. J. Interl Economic Law (2003) 4, 877.

67. Villaroman, «The Loss of Sovereignty», op. cit., 7.

68. G. Helleiner, «External Conditionality, Local Ownership and Development», in J. Freedman (ed.), Transforming Development: Foreign Aid for a Changing World (Toronto: University of Toronto Press, 2000), 90-91.

69. Zormelo, «Is Aid Conditionality», op. cit., 8.

70. With the fall of the Communist regimes in Central and Eastern Europe new possibilities for further enlargement of the European Union came into place. In 1993, the Copenhagen European Council decided that if a certain criteria were met they would offer a perspective membership for all the countries of Central and Eastern Europe. In essence, the Copenhagen Criteria include democracy, the rule of law, human rights, minority rights and a functioning market economy. For a comment Q. Qerimi, «South-east Europe's EU integration: Dreams and realities» 1 South-East Europe Review (2002) 1, 47 f. and Research Institute of Development and European Affairs, Kosovo's Rocky Road to EU. Stabilisation and Association Agreement: Challenges and Opportunities (July 2013), at http://www.ridea-ks.org. See infra 2.

71. Villaroman, «The Loss of Sovereignty», op. cit., 11 and S. Zifcak, «Globalizing the Rule of Law: Rethinking Values and Reforming Institutions», in S. Zifcak (ed.), Globalisation and the Rule of Law (New York: Routledge, 2005), 52.

72. See Boisson de Chazournes, «Collective Security», op. cit., 54 and Cristani, «The UN Security Council», op. cit., 305.

73. Di John, «Conceptualizing the Causes and Consequences of Failed States: A Critical Review of the Literature» 2 Crisis States Working Paper Series (2008), 33, 34.

74. Ibidem.

75. C. Cramer, «Trajectories of Accumulation Through War and Peace», in R. Paris, T.D. Sisk (eds), The Dilemmas of

State-Building: Confronting the Contradictions of Postwar Peace Operations (London, New York: Routledge, 2009), 140.

76. Ibidem, 144.

77. R.G. Blanton, S.L. Blanton, «Rights, Institutions and Foreign Direct Investment: An Empirical Assessment» 8 Foreign Policy Analysis (2012), 431.

78. For a general overview of international investment law and principles, among others, M. Sornarajah, The International Law on foreign investment (Cambridge: Cambridge University Press, 2004), R. Dolzer, C. Schreuer, Principles of international investment Law and J.W. Salacuse, The Law of Investment Treaties (Oxford, Oxford University Press, 2010).

79. Turner, Aginam, Popovski, «Post-Conflict Countries», op. cit.

80. R. Moloo, A. Khachaturian, «Foreign Investment in a Post-Conflict Environment» 10 The Journal of World Investment and Trade (2009) 3, 341-358, at 341, R. Mills, Q. Fan, «The investment Climate in Post-Conflict Situations» The World Bank Institute Paper (2006), 278 and Turner, Aginam, Popovski, «Post-Conflict Countries», op. cit.

81. Blanton, Blanton, «Rights, Institutions», op. cit., 434.

82. See Blanton, Blanton, «Rights, Institutions», op. cit., 434 and E. Neumeyer, L. Spess, «Do Bilateral Investment treaties Increase Foreign Direct Investment to Developing Countries?» 33 World Development (2005) 19, 1567-1585.

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84. Turner, Aginam, Popovski, «Post-Conflict Countries», op. cit.

85. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed at Washington, 18 March 1965, 575 U.N.T.S. (1965), 159-235

86. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York, 10 June 1958, 330 U.N.T.S. (1959), 3-82

87. M. Dimsey, The Resolution of International Investment Disputes: Challenges and Solutions (Eleven International Publishing, 2008)

88. Turner, Aginam, Popovski, «Post-Conflict Countries», op. cit.

89. Chandler, International State-Building, op. cit., 94.

90. Ibidem, 96 and Krasner, «The Case for Shared Sovereignty», op. cit..

91. Chandler, International State-Building, op. cit., 106.

92. Through the Stabilization and Association Process (SAP) launched in 1999 in response to the war in Kosovo, the EU stated that countries in the Western Balkans were «potentially candidates» for membership. See the Communication from the Commission to the Council and the European Parliament of 26 May 1999 on the Stabilization and Association Process for Countries of South-Eastern Europe, COM(1999), No. 235, 26 May 1999. For a comment, R. Belloni, «European Integration and the Western Balkans: Lessons, Prospects and Limits» Journal of Balkan and Near Eastern Studies (2009).

93. The main principles of the SAP were outlined in the Commission Communication of May 1999 and then confirmed by the Council in June 1999. See Commission of the European Communities (1999) Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association process for countries of South-Eastern Europe and Research Institute of Development and European Affairs, Kosovo's, op. cit., 30

94. Research Institute of Development and European Affairs, Kosovo's, op. cit., 30.

95. See in general terms http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhague_en.htm

96. Most notably the Council's conditions as defined in its conclusions of 29 April 1997 and 21 and 22 June 1999

97. See the EU-Western Balkans Summit Thessaloniki, 21 June 2003, at http://europa.eu/rapid/press-release_PRES-03-163_en.htm and Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of partnerships in the framework of the stabilisation and association process (amendments: Council Regulation (EC) No 269/2006 of 14 February 2006 and Council Regulation (EC) No 229/2008 of 10 March 2008).

98. For the detailed information, http://europa.eu/legislation_summaries/enlargement/western_balkans/index_en.htm.

99. Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC.

100. Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA). For the implementation of the IPA see, among others, Commission Regulation (EU) No 80/2010 of 28 January 2010 amending Regulation (EC) No 718/2007 implementing Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA). For a comment, T. Szemlér, «EU Financial Support for the Western-Balkans: Well-suited to Real Needs?», in Center for EU Enlargement Studies (ed.), Using IPA and other EU Funds to Accelerate Convergence and Integration in the Western-Balkans (Budapest: CEU, 2008), pp. 9-22 and D. Bailey, L. De Propris, «A Bridge too Phare? EU Pre-Accession Aid and Capacity-Building in the Candidate Countries» 42 Journal of Common Market Studies (2004) 1, pp. 77-98

101. L. Appicciafuoco, «L'unione Europea e la condizionalità democratica nelle relazioni con i paesi dei Balcani Occidentali» Studi sull'integrazione europea (2010) 2, 492 – 508

102. G. di Plinio, «La costituzione economica nel processo costituente europeo» Diritto pubblico comparato ed europeo (2003). 1780 f. and P. Diman, Le costituzioni economiche dei Balcani Occidentali (Padova: Cedam, 2009), 5.

103. According to Council Regulation (EC) No. 2666/2000.

104. Commission of the European Communities (1999) Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association process for countries of South-Eastern Europe and Research Institute of Development and European Affairs, Kosovo's, op. cit., 11.

105. Belloni, «European Integration», op. cit.

106. Research Institute of Development and European Affairs, Kosovo's, op. cit., 30.

107. For a general overview of the Kosovo's conflict and the State-building process of the country, Milano, Formazione dello Stato, op. cit., at 113 f.

108. For a general analysis of the duties of UNMIK, Milano, Formazione dello Stato, op. cit., 122 f.

109. Also KFOR acts under the Security Council Resolution 1244. See Milano, Formazione dello Stato, op. cit., 125-126.

110. Demekas, Herderschee, Jacobs, «Kosovo. Institutions», op. cit., 3

111. See Security Council Resolution 1244 (1999), paras. 10, 11(g) and K.E. Boon, «Open for Business: International Financial Institutions, Post-Conflict Economic Reform and the Rule of Law» New York University Journal of International Law and Politics (2007), 513-581, at 558, 565

112. UNMIK was initially set up with four sections or «pillar», each run by an international agency: Humanitarian Affairs (UNHCR), Civil Administration (UN), Democracy-building (OSCE) and Reconstruction (EU). See Strazzari, Kamphius, «Hybrid Economies», op. cit., 62 and F. Strazzari, «LOeuvre au Noir: The Shadow Economy of Kosovo's

Independence» 15 International Peacekeeping (2008) 2, 155-170.

113. UNSCR 1244 explicitly authorized the Secretary-General to seek the assistance of «relevant international organizations» in establishing an international civil presence in Kosovo and encouraged «all Member States and international organizations to contribute to economic and social reconstruction» in the province. On this basis, in July 1999 the Executive Board approved the provision of IMF technical services in Kosovo (EBD/99/80, 7 July 1999). See D.G. Demekas, J. Herderschee, D. Jacobs, «Kosovo. Institutions and Policies for Reconstruction and Growth» International Monetary Fund Publications (2002), 1

114. G. Labinot, «The Case of Kosovo: from «International State-Building» to an «Internationally Supervised and Independent Country»» L'Europe en Formation (2008/3) 349-350, 198.

115. G. Labinot, «The case of Kosovo: International State-building from a Pending Final Political Status to an Independent Country» 18 ISIG Journal - Quarterly of International Sociology (2009) 1-2, 73 and J.P. Korovillas, «The Economic Sustainability of Post-Conflict Kosovo» 14 Post-Communist Economies (2002) 1, 110.

116. UNMIK Reg. 1999/16 of 6 November 1999. The Central Fiscal Authority is responsible for the overall financial management of the Kosovo budget and for the fiscal policy of the country.

117. See the official website: http://mf.rks-gov.net/en-us/fillimi.aspx.

118. G. Labinot, «The case of Kosovo», op. cit., 73

119. G. Labinot, «The case of Kosovo», op. cit., 73.

120. G. Labinot, «The case of Kosovo», op. cit., 74.

121. G. Labinot, «The case of Kosovo», op. cit., 74.

122. Research Institute of Development and European Affairs, Kosovo's, op. cit., 20.

123. Belloni, «European Integration», op. cit.

124. Ibidem and Centre for European Policy Studies, «The Reluctant Debutante: the European Union as Promoter of Democracy in Its Neighbourhood» CPS Working Document 223, July 2005, p. 7.

125. The EU Joint Action of February 2008 and Council Decision of June 2010 and June 2012 provide the legal basis for the Mission. See Milano, Formazione dello Stato, op. cit., 172.

126. For more information: http://www.eulex-kosovo.eu/en/info/whatisEulex.php.

127. In April 2008 the Assembly of the Republic of Kosovo adopted the country's constitution that entered into force in June 2008.

128. Available at http://www.unmikonline.org/Documents/SPRST200844.pdf.

129. Demekas, Herderschee, Jacobs, «Kosovo. Institutions», op. cit., 14-15.

130. Commission Staff Working Document, Kosovo 2013 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2013-2014, SWD(2013) 416 final, 16 October 2013

131. European Commission (2009) Kosovo. 2009 Progress Report. Available at: http://ec.europa.eu/enlargement.

132. European Commission, Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo (2012), at: http://ec.europa.eu/enlargement.

133. Commission Staff Working Document, Kosovo 2013 Progress Report, op. cit.

134. Research Institute of Development and European Affairs, Kosovo's, op. cit., 31.

135. Ibidem, 32.

136. The EU Special Representative promotes the EU's policies and interests in the region and plays an active role in efforts to consolidate peace, stability and the rule of law. It provides the EU with an active political presence in the country, acting as a «voice» and «face» for the EU and its policies (the nominee of the Special Representative in Kosovo was made with Common Action 2008/123/PESC of the Council of 4 February 2008). For the special representative in Kosovo, see the official website http://eeas.europa.eu/policies/eu-special-representatives/index_en.htm.

137. The International Civilian Office in Kosovo works to ensure full implementation of Kosovo's status settlement and support efforts at Kosovo's European integration. For more information see the official website http:// http://www.ico-kos.org.

138. Commission Staff Working Document, Kosovo 2013 Progress Report, op. cit., 27.

139. Ibidem, 29.

140. Ibidem, 29.

141. Ibidem, 31.

142. D. Papadimitriou, P. Petrov, L. Greicevci, «To Build a State: Europeanization, EU Actorness and State-Building in Kosovo» 12 European Foreign Affairs (2007), 219.

143. Demekas, Herderschee, Jacobs, «Kosovo. Institutions», op. cit., 21.

144. European Commission, Fact Sheet. Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, November 2013

145. Indeed, the European Parliament has made it clear thet «investment can have a positive impact on growth and jobs insofar as investors actively contribute to the development goals of the host State, i.e, by supporting the local economy through technology transfer and by utilising local labour and inputs». See European Parliament, Committee on International Trade, Report on the Future European International Investment Policy (2010/2203(INI)), 22 March 2011, par. 7

146. Dupont, «Foreign Investment», op. cit.

147. Strazzari, Kamphius, «Hybrid Economies», op. cit., 66.

148. Ibidem, 66 and A.L. Capussela, «An Education in Deal-Making, Kosovo-style» Transitions Online (13 July 2011), at www.tol.og/client/article/22546-an-education-in-deal-making-kosovo-stlyle.html.

149. A.L. Capussela, «Lo stato dell'economia», in L. Pineschi, A. Duce (eds.), La questione del Kosovo nella sua dimensione internazionale (Parma: MUP, 2010), 73-105.

150. UNMIK/REG/2001/3 on Foreign Investment in Kosovo, 12 January 2001, at http://www.unmikonlie.org

151. Law No 02/l-33 on Foreign Investment, at http://www.assembly-kosova.org/ (this Law is applicable together with the UNMIK Regulation no. 2006/28 of 28 April 2006)

152. Article 1 of the Law on Foreign Investment.

153. The Law on Foreign Investment expressly includes the standards of treatment applicable to foreign investors, i.e. inter alia fair and equitable treatment (article 3), non-discrimination (article 4), stability of the investment regime (article 6), compensation in case of expropriation (article 8), and the substantive rules applicable to investment disputes (article 17). See Dupont, 'Foreign Investment', op. cit.

154. See http://www.unmikonline.org. They are considered still valid after the declaration of independence of Kosovo (on this point, Dupont, 'Foreign Investment', op. cit.)

155. See Agreements on promotion and protection of Investments' on the website of the Investment Promotion Agency of Kosovo, at http://www.invest-ks.org/?cid=2,130 (accessed on 28 August 2009). The texts are all available at http://www.mfa-ks.net. Kosovo has already has accessed the Central European Free Trade Agreement (CEFTA - Central European Free Trade Agreement, 21 December 1992, 34 ILM (1995) 8-42)

156. Dupont, «Foreign Investment», op. cit. The agreements on promotion and protection of investments are available at the website of the Investment Promotion Agency of Kosovo, at http://www.invest-ks.org

157. Membership in ICSID is only open to States members of the IBRD (article 67(a) of the ICSID Convention), which in turn presupposes membership in the IMF (article 2(1) of the IBRD Articles of Agreement). The Republic of Kosovo filed an application for admission to membership in the IMF on 10 July 2008, while the ICSID Convention entered into force on

29 July 2009. For a comment, Dupont, «Foreign Investment», op. cit., «Kosovo becomes the International Monetary Fund's 186th Member» IMF Press Release No 09/240 (29 June 2009), «Republic of Kosovo joins ICSID» ICSID News Release (29 June 2009), «Kosovo Joins World Bank Group Institutions» World Bank Press Release No 2009/448/ECA (29 June 2009).

158. 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; 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». For a comment, Dupont, «Foreign Investment», op. cit.

159. See the Preamble of the Law on Foreign Investment.

160. Article 206 of the TFEU, dealing with the common commercial policy, establishes that «by establishing a customs union (...) the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers». Article 207 of the TFEU provides that «for the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules». For a general analysis see the focus «The European Union's Future International Investment Policy» 1 Investment Treaty News (September 2010) 1, available at http://www.investmenttreatynews.org.

161. N.J. Calamita, «The Making of Europe's International Investment Policy: Uncertain First Steps» 39 Legal Issues of Economic Integration (2012) 3, pp. 301-330.

162. The recent EU Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries grants legal security to the existing BITs between member States and third countries and allows the European Commission to authorize member States to open formal negotiations with a third country to amend or conclude a BIT. On the issue, see recently M. Bungenberg, C. Herrmann (eds.), Common Commercial Policy after Lisbon (Berlin, Heidelberg: Springer, 2013).

163. As to the nature of future EU investment policy, certainly it will promote European values (Articles 206 and 207 TFEU call on the EU to contribute to a harmonious development and liberalization of world trade, article 205 TFEU states that the common commercial policy should be guided by the general principles of the EU's external action, including promotion of democracy, the rule of law, further the respect of human rights and contribute to sustainable economic, social and environmental development, as elaborated in Title V, Chapter I TEU. See Commission, Communication on «Europe 2020: a Strategy for Smart, Sustainable and Inclusive growth» COM(2010) 2020, 3 March 2010

164. Independent International Commission on Kosovo The Kosovo Report: Conflict, International Response, Lessons Learned (Oxford: Oxford University Press, 2000).

165. R. Moloo, A. Khachaturian, «Foreign Investment in a Post-Conflict Environment» 10 The Journal of World Investment and Trade (2009) 3, pp. 341-358, at 342; N. Turner, O. Aginam, V. Popovski, «Post-Conflict Countries and Foreign Investment» 8 Policy Brief (2008), at http://www.unu.edu; J. Hewko, «Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?» East European Constitutional Review (Fall2002/Winter2003), pp. 71-79, at 73.

166. I. Doneva, «Interview: Kosovo Needs Strong Judiciary to Attract Foreign Investors», 27 August 2009, at http://wire.seenews.com/news/interview-kosovo-needs-strong-judiciary-to-attract-foreign-investors-248572.

167. European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a Comprehensive European International Investment Policy, COM(2010)343 final (7 July 2010).

168. Indeed, some key investment protection provisions are unclear and the way they are drafted has led to claims that such provisions do in fact undermine the ability of States to regulate in the public interest. For instance, many investment agreements in force do not specify the exact meaning and scope of key substantive standards, such as «indirect expropriation» or «fair and equitable treatment», precisely the issues under which investors bring the most claims. See European Commission, Fact Sheet. Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, November 2013. In particular, the Commission points to Philip Morris' case against Australia and Vattenfall's case against Germany as examples that raise this concern.

169. Moloo, Khachaturian, op. cit., 341-358.

170. See supra.

171. J. Hewko, «Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?» East European Constitutional Review (Fall2002/Winter2003), pp. 71-79, at 78.

172. For a general analysis on the issue of the applicable law in investment arbitration, among others, A.R. Parra, «Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties» 16 ICSID Review (2001) 1, 20-24 and G. Sacerdoti, «Arbitration of investment disputes under UNCITRAL rules and the choice of applicable law» 1 Law in the Service of Human Dignity (2005), 276-298.

173. The Commission has already introduced these improvements in the EU free trade agreement with Canada and is negotiating or will negotiate similar improvements in its agreements with other countries. See European Commission, Fact Sheet. Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, November 2013. Also the European Parliament has made it clear that there is a need «in order to include greater transparency, the opportunity for parties to appeal, the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process, the possibility to use amicus curiae briefs and the obligation to select one single place of investor-state arbitration» (European Parliament, Committee on International Trade, Report on the Future European International Investment Policy (2010/2203(INI)), 22

March 2011, par. 31). The Commission made a proposal for a Regulation of the European Parliament and the Council establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party on 21 June 2012. Indeed, the EU is already party to one agreement with the possibility for investor-State dispute settlement (the Energy Charter Treaty). It is thus necessary to consider how to manage the financial consequences of such disputes. The central principle set down in the proposal of regulation is that financial responsibility should be attributed to the actor which has afforded the treatment in dispute (See European Commission, Proposal for a Regulation of the European Parliament and the Council establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 fin., 21 June 2012)

174. Commission, Communication to the European Parliament and the Council. Kosovo - Fulfilling its European Perspective, COM(2009) 534 final, 14 October 2009

175. OECD, Investment Compact for Southeast Europe. A Decade of Partnership for Prosperity and Stability 2011. The Investment Compact was established upon suggestion of Working table II of the Stability Pact in Skopje on 10-11 February 2000. Its members include Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, the Republic of Moldova, Montenegro, Romania and Serbia, with Kosovo as an observer

176. Covering ten economies (Albania, Bulgaria, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Kosovo, the Republic of Montenegro, Romania and Serbia), based on inputs from governments, independent experts and the private sector, the study examines investment policy and promotion, human capital development, trade policy and facilitation, access to finance, regulatory reform and parliamentary processes, tax policy and infrastructures for investment and SME policy. For more information see the official website: http://www.oecd.org/investment/psd/south-easteuropeinvestmentreformindex.htm.

177. See the 2010 Investment Reform Index (7 April 2010) at http://www.oecd.org/globalrelations/psd/southeasteurope-investmentreformindex2010monitoringpoliciesandinstitutionsfordirectinvestment.htm.

178. Ibidem, 278.

179. Ibidem, 281.

180. Commission Staff Working Document, Kosovo 2013 Progress Report, op. cit., 24

181. A. Morrone, «Teologia economia v. Teologia politica. Appunti su sovranità dello Stato e ‘diritto costituzionale globale» XXXII Quaderni costituzionali (2012) 4, 829.

182. J. Di John, «Conceptualizing the Causes», op. cit., 33, 34

183. C. Brölmann, «Deterritorializing International Law: Moving Away from the Divide between National and International Law», in Nollkaemper, Nijman (eds.), New Perspectives on the Divide between National and International Law (Oxford: Oxford University Press, 2007), 84-109.

184. Cassese, La crisi, op. cit., 36, Morrone, «Teologia economia», op. cit., 180. See also F. Galgano, «Globalizzazione dell’economia e universalità del diritto» Politica del diritto (2009) 2, 177 f. and S. Strange, The Retreat of the State. The Diffusion of Power in the World Economy (Cambridge: Cambridge University Press, 1996), 161.

185. We talk in this regard of the «deterritorialization» of international law. See in this respect E. Milano, «The Deterritorialization of International Law», ESIL Reflection, 2013, at http://www.esil-sedi.eu.

186. Cassese, La crisi, op. cit., 62.

187. Independent International Commission on Kosovo, The Kosovo Report, op. cit.

188. For a general analysis of how international investment law is shaping the relationships between States, among others, W. Chien-Huei, «The Many Faces of States in International Investment Law: Supranational Organizations, Unrecognized States and Sub-State Entities», in S. Lalani, R. Polanco (eds.), The Role of the State in Investor-State Arbitration (Martinus Nijhoff, forthcoming), paper available at http://papers.ssrn.com and J.E. Alvarez, The Public International Law Regime Governing International Investment (The Hague: Hague Academy of International Law, 2011).