

THE CLAIMS OF
SERBIA REGARDING 'INVESTMENTS'
FROM SERBIAN SOCIALLY OWNED
ENTERPRISES IN *KOSOVO* AFTER 1999
IN THE CONTEXT OF AN
EVENTUAL 'GRAND FINALE'

October 2019

Supported by:



Norwegian Embassy



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Abbreviations

KEK	Kosovo Energy Corporation Kosovo Energy Corporation
KPA	Kosovo Privatization Agency
KTA	Kosovo Trust Agency
NATO	North Atlantic Organization Treaty
POEs	Publicly Owned Enterprises
PTK	Post and Telecommunication of Kosovo
SFRY	Social Federal Republic of Yugoslavia
SOEs	Socially Owned Enterprises
UNMIK	United Nations Mission in Kosovo

Introduction

1. Kosovo declared independence from Serbia in 2008 based on the Comprehensive Proposal for the Kosovo Status Settlement made by United Nations envoy Marti Ahtisaari. The Ahtisaari Plan foresaw independence with a period of supervision and certain guarantees for minority rights. The Ahtisaari Plan provided that publicly owned enterprises (POEs) located in Kosovo shall be transferred to Kosovo. Further, the Ahtisaari Plan provided that socially owned enterprises (SOEs) shall be administered by Kosovo Trust Agency's successor institution. None withstanding this, a number of issues remain open with regard to Serbia concerning property rights of socially owned enterprises situated or headquartered in one country with assets on the other.
2. The most sensitive issues are Serbia's claims over Kosovo's strategic assets, such as the Brezovica Ski Center, Trepca Mining Complex (Trepca), Kosovo Energy Corporation (KEK), Post and Telecommunication of Kosovo (PTK) and assets of socially owned enterprises located in the other states' territory. Under applicable rules of customary international law, natural resources of Kosovo, such as mines and mineral reserves, water resources, mountains and so forth, are of Kosovo and its people and it is Kosovo's sovereign right to exploit these resources. The claims made by Serbia are twofold: one, that these strategic assets constitute Serb state property, under the assumption that Kosovo is part of Serbia and second, that these assets are property of companies incorporated in Serbia and that the latter have made significant investments in the socially owned companies in acquiring the assets under their management.
3. As such, this background note/study will analyze the issue of publicly owned enterprises and socially owned enterprises in light of the claims made above and will argue that investments made during the Socialist Federal Republic of Yugoslavia's existence and those made before 1999 belong to the respective states where those assets and companies are located; secondly, all Serbia's state property as a successor state of the SFRY including publicly owned enterprises' assets located in Kosovo shall pass to Kosovo as a successor state; thirdly,

socially owned enterprises which are headquartered in one country but have assets in another country, should be exchanged on an equitable basis or compensated by the respective states; and finally, this paper proposes mechanisms for resolving claims made by the negotiating parties as well as creditors' claims over publicly owned enterprises and socially owned enterprises.

Background: Socially Owned Enterprises, property rights, and privatization

4. The Social Federal Republic of Yugoslavia (SFRY) had a socialist economy based on socially owned enterprises and very limited private initiative. As a result, there were three categories of property in the SFRY, compared to two categories seen elsewhere in Europe and other non-socialist countries. There was public or state property; private property; and a third category of social property, which was a property of the whole society that was put under the use and administration of the socially owned enterprises to generate economic output, employment and the achievement of socialist ideals of equality and ownership over the means of production. Socially owned enterprises acquired property rights mostly after World War II and in particular following the adoption of SFRY's Constitution of 1974. The social property was created by the nationalization and transformation of private property confiscated or nationalized by SFRY and by the nationalization and transformation of agricultural land. SFRY confiscated and nationalized the private property of those deemed "enemy of the state" or "collaborationists" of causes against socialism, such as liberals and anti-communist activists.¹ Agricultural land was

¹ Kosovo Institute for Policy Research and Development. (2005), 'United Nations Mission in Kosovo and Privatization of Social Property: Critical description of the current privatization process in Kosovo.' Available at: http://www.kipred.org/repository/docs/Misioni_i_Kombeve_t%C3%AB_Bashkuara_n%C3%AB_Kosov%C3%AB_dhe_Privatizimi_i_Pron%C3%ABs_Shoq%C3%ABrore_8282.pdf [Accessed on September 25, 2019].

nationalized and transformed into social property based on laws that set limits on the amount of land citizens could own.²

5. Socially owned enterprises did not own property in the traditional sense, meaning they did not have title over property under their use and administration. Rather, they only had the right to use the property under their management for the enterprises' economic purposes. Thus, the property under the possession and administration of socially owned enterprises was deemed as property of the society where they were located.³ This changed in 1989 with the passing of the so-called *Markovic laws* by Serbia, which introduced a system of discriminatory privatization, transformation and transfer of property rights of socially owned enterprises and their assets located in Kosovo to Serb nationals, legal entities incorporated in Serbia as well as foreign nationals and legal entities.⁴ As a result, strategic socially owned enterprises and their assets have been transformed from socially owned enterprises located and under the ownership of Kosovo society, municipalities and the province, to socially owned enterprises or joint stock companies headquartered in Serbia and under the ownership of the Serbian state.

6. Kosovo was part of SFRY as an autonomous province together with Vojvodina. It enjoyed extended political and economic rights, until 1989, when its autonomy was revoked by Slobodan Milosevic's regime and it was adjoined as part of Serbia. Kosovo was one of the least developed regions of Yugoslavia compared to other republics which enjoyed significant investments and stronger economies. In order to address the inequality within its members, SFRY created the so-called *Fund for Crediting the Development of Insufficiently Developed Republics and Autonomous Regions*, which provided funding for the development of the least developed republics such as Macedonia, and autonomous regions, such as Kosovo. From the investments made from this fund as well as from the

²Ibid.

³Knudsen,R. (2010), 'Privatization in Kosovo: The International Project 1999-2008, p.76'. Available at: <https://www.files.ethz.ch/isn/121346/Knudsen%20report-NUPI%20Report.pdf> [Accessed on September 25, 2019].

⁴Ibid, page 32.

exploitation of Kosovo's natural resources, Kosovo developed its economy, highlighted by strategic assets and industries such as Trepca, coal and lignite mines, tourism, and agriculture.

7. Ultimately, SFRY disintegrated – it ceased to exist as a state – following the collapse of the economy and the war waged between the former constituent republics. Serbia lost control of Kosovo in 1999, following a campaign of mass murders, ethnic cleansing and destruction of property under the leadership of Milosevic which triggered the humanitarian intervention of NATO and the allied nations. The withdrawal of Serb forces from Kosovo and the entry of NATO troops as well as the installation of the United Nations Mission in Kosovo (UNMIK) administration under United Nations Security Council Resolution 1244, marked the end of the Kosovo conflict, and the last act of SFRY's disintegration.

8. After 1999, socially owned enterprises, as well as social properties, were put under the administration of UNMIK based on UNMIK's Regulation Nr. 1999/1 of 25 June 1999 which among others provided that UNMIK has the mandate to administer with the movable and immovable property in the territory of Kosovo in case there is a reasonable basis to conclude that those properties are registered in the name of SFRY or the Republic of Serbia, or those properties are social property. UNMIK started with the process of privatization of socially owned enterprises and their assets through the Kosovo Trust Agency (KTA), which was administering with the socially owned enterprises and their assets. The privatization process aimed at creating a free market economy in Kosovo by privatizing the socially owned enterprises and their assets. The money generated through the privatization process was put under the trusteeship of KTA and later its successor institution – Kosovo Privatization Agency (KPA). That money will be later used to pay creditors' claims made toward the socially owned enterprises; a percentage will go toward former employees as bearers of interests, and any profits remaining shall be returned to the society and its economy through the budget of Kosovo.

9. The privatization process implemented in Kosovo by UNMIK's KTA and later by Kosovo's KPA did not take a clear stance on the issue of privatizations, transformations and creditors' rights created in the period between 1989 and 1999 over socially owned enterprises and their assets located in Kosovo. The privatization process recognizes that socially owned enterprises may have legitimate creditors' who have invested in these enterprises during the period between 1989 and 1999, thus these creditors' claims will have to be addressed first from the proceeds of the privatization of the respective socially owned enterprises.
10. Kosovo declared its independence from Serbia in February 2008, having thus far been recognized by more than 116 sovereign nations. As Kosovo declared independence without the consent of Serbia, it did not go through a process of state succession, whereby all issues, such as treaties, debts and obligations, archives and so forth would have been mutually agreed through a succession agreement. Nonetheless, Kosovo declared its independence based on the Ahtisaari Plan which proposed independence for Kosovo with a period of international supervision and extended guarantees for the protection of minority rights.
11. Concerning property, publicly owned enterprises, and socially owned enterprises, the Ahtisaari Plan provided that publicly owned enterprises situated in Kosovo shall be transferred to Kosovo and its municipalities, whereas socially owned enterprises shall be privatized by KTA's successor institution.⁵ As of today, most of the socially owned enterprises and their assets have been privatized or liquidated. Nonetheless, some socially owned enterprises, also considered as giants of the Kosovo economy have not yet been privatized or their assets been liquidated. Two of such giants are the Trepca Mining Complex and the Brezovica Ski Resort. Currently, the Trepca Mining Complex which is situated between Mitrovica in the south and the northern part of Kosovo is managed by two managements, one Kosovo Albanian and the other Kosovo

⁵Kosovo Assembly (2007), 'Comprehensive Proposal For the Kosovo Status Settlement'. Available at: <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf> [Accessed on September 25, 2019].

Serbs, with both claiming they are the legitimate managers and their respective communities are the owners of Trepca. In October 2016, the Parliament of Kosovo passed the Law Nr. 05/L-120 on Trepca, which provides that the Government of Kosovo is the owner of 80% of the shares of Trepca Mining Complex, whereas employees are the owners of 20% of the shares respectively. On the other hand, Brezovica Ski Resort which is situated in Shterpce municipality, a Serb-majority municipality, is barely operational, with no major investments made after 1999. Since Serbia claims Kosovo as part of it, it also claims that these socially owned enterprises are also its property.

12. On 3 September 2014, the Government of Kosovo issued the Preliminary Decision Nr. 06/195 by which it approved the nationalization of certain land and objects which fell on the territory on which the development of a new Brezovica Tourist Center was planned. The preliminary decision called upon the owners of land and objects to file any potential appeals they may have against the nationalization. On 23 September 2015, the Government of Kosovo issued the Final Decision Nr. 10/50, by which it nationalized land and objects on grounds of public interest for the development of the Brezovica Tourist Center. Again, the final decision provided that all interested parties may file appeals against the decision within thirty days from their notification with the decision. No appeals were filed by any legal entity claiming ownership over Brezovica during this period. Instead, on 22 January 2016, an entity called Holding Company Fond Inex Interexport A.D., filed a complaint at the Constitutional Court of Kosovo against Final Decision Nr. 10/50, claiming the decision violates its legal and property rights as well as discriminates based on ethnicity. On 12 April 2016 the Constitutional Court of Kosovo issued a Ruling on Inadmissibility on Case Nr. KI17/16 concerning this complaint. The Ruling stated that the complaint is inadmissible because the Claimant had not exhausted all available legal remedies before filing the complaint at the Constitutional Court. As such, the Final Decision Nr. 10/50 of Government of Kosovo is still in place and efforts are being made for the development of Brezovica Tourist Center. The Government of Serbia, on the other hand, has repeatedly opposed this development, by claiming that it has made significant investments in the resort and that an agreement must be

reached with the legitimate owners of lands, buildings, ski lifts and resources in Brezovica.

Investments in Kosovo by Socially Owned Enterprises: The case of Brezovica

13. Brezovica Ski Center, which lies in the National Park Sharr bordering Macedonia, was developed during SFRY's existence, with major investments occurring in the late 1970s in anticipation of serving for some of the ski events of Sarajevo Winter Olympics of 1984. During this period, ski lifts, hotels, and other venues were built. No major investments occurred afterwards, thus the resort degraded continuously. Brezovica Ski Center was operated and managed by the now-called Holding Company Fond Inex Interexport A.D. (Inex), which was previously known as Inex Interexport and Inex Tourism. Inex was a socially owned enterprise headquartered in Belgrade, which served as the capital of SFRY during its existence. Inex has been withdrawn from the privatization process in Serbia, due to property claims it has in the territory of Kosovo. On 05 November 2015, which coincides with the date of Government of Kosovo's Final Decision Nr. 10/50, the Government of Serbia adopted Decision 05 Nr. 023-11332/2015 through which it acquired ownership rights on the socially owned enterprise Inex.⁶ Thus, Inex was transformed into a public company of the Republic of Serbia.

14. On 20 May 2008, Inex as a parent company established the company "Ski Center Brezovica doo", headquartered in Belgrade, Serbia. Shareholders of the company "Ski Center Brezovica doo" are Inex with 78.27% of shares and Ski Resorts of Serbia with 21.73% of shares. "Ski Center Brezovica doo" was registered with a share capital of 18,870,322.74 Euro, composed of 360,202.74 Euro of monetary contributions and 18,510,120 Euro of movable and immovable assets transferred to the newly established company.⁷ After 2008, the shareholders of

⁶Inex Notes to Financial Report for 2017.

⁷Brezovica Ski Resort doo Notes to Financial Report 2017.

“Ski Center Brezovica doo” increased the share capital several times, the latest in 2016, reporting an overall share capital of 1,677,386,879.57 Serb Dinars, or 14,106,823.65 Euro based on the exchange rate of 30 December 2017 of 0.00841 RSD/EUR. Based on the current exchange rate of 0.00844 RSD/EUR, the share capital of “Ski Center Brezovica doo” is at 14,157,145.26 Euro. Of this capital, “Ski Center Brezovica doo” reports that as of 31 December 2017 it owns land, objects (buildings), equipment and objects under construction valued at around 1,225,497,000 Serb Dinars, or 10,306,429.77 Euro based on the exchange rate of 30 December 2017 of 0.00841 RSD/EUR.

15. Following the announcement by Kosovo Government that it has signed a deal for the development of Brezovica Tourist Center after adopting the Final Decision 10/50, the Government of Serbia issued several statements claiming it has invested in Brezovica and it is the rightful owner of it. If this claim is true, the value of those investments as well as the overall value of Inex’s assets in Brezovica are to be valued at the amount of 1,677,386,879.57 Serb Dinars or its equivalent in Euro, which the Government of Kosovo eventually might compensate Inex or Republic of Serbia as a result of Final Decision Nr. 10/50 of 23 September 2015.

16. If indeed Inex’s and Serbia’s property claims over Brezovica Ski Resort are true, then the above mentioned amount should represent the proper current value of those assets as reported by “Ski Center Brezovica doo” itself, and thus eventually might be compensated by Kosovo as a result of the nationalization of Inex’s property.

17. Inex, “Ski Center Brezovica doo” or Serbia have to prove however, that they have indeed invested that amount after 1999, since any investments made during the SFRY or prior to 1999 were made by Inex as a socially owned enterprise, which was a property of the whole society of SFRY, thus of Kosovo society as well.

18. If applicable customary rules on state succession are to be taken into account, Serbia or Inex, would have no valid property claims over Brezovica. Article 17(1)

(a) of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 8 April 1978 (VCS 1978) provides that “immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State”. In the context of state succession, Serbia would be the predecessor State, whereas Kosovo the successor State. Even though the VCS 1978 has not entered into force yet, there are rules of customary law and state practice which support this aspect of state succession concerning immovable State property. The issue here is then whether Brezovica in general, or the immovable assets composing “Ski Center Brezovica doo” are to be considered state property of Serbia.

19. As stated above, Inex, the majority shareholder of “Ski Center Brezovica doo” was previously a socially owned enterprise, whose assets spanned across the whole SFRY. Inex has been transformed into a public company of Serbia. Likewise, the other shareholder, Ski Resorts of Serbia, is a public company of Serbia. In turn, any immovable property these entities claim to own is considered an immovable state or public property. Since Brezovica is situated in Kosovo, it follows then that these immovable properties shall pass on Kosovo as the successor state as of its Independence Day. This view is supported by state practice on the case of succession between the successor states of SFRY, *i.e.*, Bosnia and Herzegovina, Republic of Croatia, Republic of Slovenia, Republic of Macedonia and Federal Republic of Yugoslavia (Serbia and Montenegro). Annex A – Movable and Immovable Property to the Agreement on Succession Issues signed between these states, in article 2 provides that “Immovable State Property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is located.” On the other hand, however, Annex G – Private Property and Acquired Rights to the Agreement on Succession Issues in article 1 provides that “Private property and acquired rights of citizens and other legal persons of SFRY shall be protected by the successor States...” Further, article 2 of Annex G provides that “[t]he rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognized, and protected and restored by that State in accordance with established standards

and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons...

20. The above Annex aims at the protection of private property rights of citizens and legal persons by the successor states of SFRY. The property of socially owned enterprises as well as of public companies does not fall within the meaning of “private property”, but rather public or state property. Article 2 of Annex G further continues that “...persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms.” That said, even if land, buildings and equipment in Brezovica are to be considered “private property” of the legal entities in Serbia, these legal entities would be entitled to compensation of the real market value of those assets, which as declared by them in their Financial Report are worth an estimated maximum of 14,106,823.65 Euro.

21. As seen in the Background part above, however, socially owned enterprises such as Inex during SFRY did not own land or property in the traditional sense, they simply used or administered with Brezovica. Thus, in case Serbia has transformed property rights over Brezovica from the right to use into ownership rights of Inex after 1989 in a discriminatory way, excluding the Kosovo society, those rights shall not be recognized, thus claims made over Brezovica on the basis of ownership rights shall not be recognized.

Status of Trepca Mining Complex and Creditor’s Claims

22. Trepca is considered to be the ‘crown jewel’ of Kosovo’s economy, largely because of the perceived wealth that mines under its management possess. Professor Michael Palairt writes that Trepca was established “*...on the basis of a contract in 1926, in which Radomir Pasic, son of former Yugoslav Prime Minister Nicola Pasic, sold exclusive rights to mineral exploration at Staritrg near Mitrovica in northern Kosovo to Selection Trust Ltd. of London. On 9 September 1927 Selection Trust vested these rights into Trepca Mines Ltd, under which name the*

mining company operated.”⁸ After World War II, Trepca, like most of the other enterprises in Yugoslavia was nationalized.⁹

23. Following World War II until 1950, Trepca’s resources were exploited by SFRY for exports to the Soviet Union and use in projects across SFRY.¹⁰ From 1965 until the late ‘70s and early ‘80s Trepca received intensive investments from SFRY, which according to some estimates reached over 4 billion USD. However, these investments were made as part of *the Fund for Crediting the Development of Insufficiently Developed Republics and Autonomous Regions*. A large percentage of this fund, around 47% was spent on projects and enterprises in Kosovo, with an estimated of more than 4 billion USD spent in Trepca. Most of this money was used as subsidies, to paying of around 23,000 employees of Trepca, despite the fact that Trepca was not able to support itself, *i.e.*, it was not profitable. Of these 23,000 employees, only about 13,261 were employed in Trepca’s Kosovo plants, with the remaining employed elsewhere in other SFRY republics. When Trepca stopped receiving ‘investments’ or subsidies in the ‘80s, it marked the end of its “golden age”.¹¹ Ultimately, Trepca collapsed and reorganized itself during the early ‘90s from an organization of associated labour into a joint stock company, the majority of which was owned by the Serbian state. Serbia claimed ownership rights over Trepca based on a scheme of swapping equity for debt based on which the debt towards the Development Fund was written off in exchange for ownership rights in Trepca. As of 2001, it is estimated that Trepca had debts and liabilities of around 84.4 million EUR, of which around 53.2 million EUR to a Greek entity *Mytileneos AS*; 3.86 Million EUR to a French entity named *Societe Commercial des Metaux et Minerais (SCMM)*; and 4.3 Million to Jugobanka, which have to be resolved by Trepca or its successor.

24. Currently, Trepca is functioning as a legal entity under the administration of KPA, however de facto it operates as two separate entities with one under the

⁸ Palairat, M. (2003), ‘Trepca, 1965-2000, p.5.’ Available at: https://www.esiweb.org/pdf/esi_document_id_62.pdf [Accessed on September 25, 2019].

⁹ Ibid.

¹⁰ Ibid.

¹¹ Palairat, M. (2003), ‘Trepca, 1965-2000, p.9.’ Available at: https://www.esiweb.org/pdf/esi_document_id_62.pdf [Accessed on September 25, 2019].

management of Serb majority in the north of Mitrovica and the other one under the management of Kosovo Albanians in the south of Mitrovica.

25. Under applicable rules and principles of international law, states have sovereign rights over their natural resources. Principle 21 of the 1972 Stockholm Declaration states that, *“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”*.¹² Similarly, Principle 2 of the 1992 Rio Declaration states that, *“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”*¹³ It follows then that Kosovo has sovereign rights to exploit its natural resources, including its mineral and underground resources, water resources, mountains, and similar resources.

26. SFRY invested in Trepca and reaped its benefits by exploiting it. Most of these investments were made by the Development Fund which were more subsidies without any consideration, rather than loans expecting to be repaid. Any investments made in Trepca during the period up to 1999 by Serbia and state-owned entities shall pass to Kosovo under state succession rules, including any debts thereto.

¹²United Nations Environment Programme (1972), ‘Declaration of the United Nations Conference on the Human Environment.’ Available at: https://www.ipcc.ch/apps/nj-lite/srex/nj-lite_download.php?id=6471 [Accessed on September 25, 2019].

¹³UNESCO. (1992), ‘The Rio Declaration On Environment and Development’. Available at: http://www.unesco.org/education/pdf/RIO_E.PDF [Accessed on September 25, 2019].

KEK, PTK and other POE'S and creditor's claims

27.Based on the Ahtisaari Plan the ownership rights in publicly owned enterprises, such as KEK and PTK including any debts they may have towards international creditors shall be transferred to Kosovo. Similar to the other socially owned enterprises and publicly owned enterprises, KEK and PTK were established during SFRR's existence. KEK manages with Kosovo's lignite reserves, which are estimated to be among the largest in the world. PTK provides telecommunications services across Kosovo. Again, Serbia's claims over these assets and Kosovo's natural resources are based on the assumption that Kosovo is part of Serbia and not an independent state. This argument, however, is flawed, as Kosovo is a sovereign state, thus it has sovereign rights over its natural resources as argued above and over the publicly owned enterprises located in Kosovo.

28.Likewise, any investments made in KEK and PTK during the period up to 1999 by Serbia and state-owned entities shall pass to Kosovo under state succession rules, including any debts thereto.

Property and assets of Socially Owned Enterprises in Kosovo and of Socially Owned Enterprises of Kosovo in Serbia

29.Another issue to be discussed and resolved between Kosovo and Serbia is the status of property and assets of socially owned enterprises that are registered and headquartered in one country, but their assets are situated in another country. One option, which is also supported by state succession rules is that these properties and assets are interchanged, provided they represent an equitable exchange. Another option would be that both parties compensate each other for the value of those assets, the proceeds of which would be administered by KPA and its Serb counterpart similar to funds administered from the privatization process.

30. In turn, we will see what these assets are, and which option is most suitable and practicable. Since SFRY was a federal state, it was common that socially owned enterprises headquartered in one constituent unit, had property rights and assets in another constituent unit or territory. As we saw earlier, Inex was headquartered in Belgrade, present-day Serbia, whereas it had property rights over assets in Kosovo, among others. KPA has compiled a list of socially owned enterprises headquartered in Serbia and Kosovo respectively and the location of their assets. There are at least 46 assets located in Kosovo of socially owned enterprises headquartered in Serbia.¹⁴ Most of these assets are located in Mitrovica and Prishtina and consist of shops, office space, and assembly units. On the other hand, there are at least 162 assets located in Serbia and other former republics of SFRY of socially owned enterprises headquartered in Kosovo. Of these assets, 17 or nearly 10% belong to Trepca. The majority of properties consist of shops, office space, construction land, warehouses, buildings, apartments.¹⁵ 99 assets are located in Serbia, 34 in Montenegro, 14 in Bosnia and Herzegovina, 6 in Macedonia, 5 in Croatia and 1 in Slovenia.¹⁶

31. While the status and property rights related to assets of Kosovo socially owned enterprises located in Montenegro, Bosnia and Herzegovina, North Macedonia, Croatia, and Slovenia shall be resolved through bilateral agreements between Kosovo and these respective countries, this should be done based on key principles of international law and state practice created when succession issues were resolved following the dissolution of SFRY. Such principles are the mutual recognition of property rights of private citizens and legal entities of one another; the protection and restoration of those rights; non-discrimination on any basis, and in case of nationalization or the inability of citizens and legal persons in exercising their property rights, the just compensation of the legitimate owners.

¹⁴Kosovo Privatization Agency Response to Request for Access to Public Documents.

¹⁵Kosovo Privatization Agency (2017), 'Annual Report 2017 of Kosovo Privatization Agency for the Republic of Kosovo's Assembly, p.29'. Available at: <http://www.pak-ks.org/desk/inc/media/99BF51A1-E096-4CA0-A606-1EA4C233CDB7.pdf> [Accessed on September 25, 2019].

¹⁶Ibid.

- 32.** The same principles shall be respected with regard to property and assets of Kosovo socially owned enterprises located in Serbia and vice versa, *i.e.*, the mutual recognition, protection and restoration of property rights or just compensation.
- 33.** In the case of Kosovo and Serbia, however, since both states have property and assets in one another, one option would be the exchange of property and assets provided it is done on an equitable basis, *i.e.*, that the value of the assets is similar if not the same on both parties. If, however, the exchange does not represent an equitable solution, a combined form of exchange and compensation should be used. Both parties could use evaluation experts to determine the market value of assets to be exchanged or compensated.
- 34.** Any exchange of property or assets or any compensation for that purpose should take into account any legitimate right holders' right to compensation of investments made after 1999 minus any depreciation of property or assets market value. In case Serbia and Kosovo have nationalized, privatized or otherwise enabled the transfer of title upon socially owned enterprises' assets located in their respective territories, the states should compensate one another or the rights holders with the market value of those assets.

Conclusions

- 35.** Kosovo and Serbia have not gone through a process of state succession, by which they would settle all relevant issues and reciprocal claims concerning international debt, treaties, property rights, archives, cultural heritage, and other succession issues. The negotiations for the settlement of Kosovo status which were intermediated by Marti Ahtisaari in Vienna up to 2006 did not result in a mutually agreed solution, whereby the succession issues would have been resolved. Further, the on-going process of negotiations under the mediation of European Union is focused mostly on technical issues for the normalization of bilateral relations between Kosovo and Serbia and the facilitation of free

movement of people, goods and services, by, among others, the recognition of documents and car plates, the recognition of customs documents. The actual process has not addressed the issues presented in this paper about property rights claims over Kosovo's natural resources made by Serbia and the status of property rights and claims of both Kosovo and Serbia related to publicly owned enterprises and socially owned enterprises and their assets in the respective countries.

36. This study has analyzed the issue of socially owned enterprises and property rights' claims over assets under their management, their creation, nationalization transformation, privatization and their current legal status as either state entities or socially owned enterprises. Further, this paper analyzed potential creditor's claims over debts and liabilities of socially owned enterprises located in Kosovo and property rights claims towards property and assets under the management of socially owned enterprises in both countries.

37. The major claims of Serbia related to Kosovo socially owned enterprises concern some of the strategic assets of Kosovo, such as the Trepca Mining Complex, Brezovica Ski Center, and to a lesser extent Kosovo Energy Corporation assets and Post and Telecommunication of Kosovo assets. Serbia claims property rights over these assets, stating that they are state owned entities. Serbia makes two flawed legal assumptions concerning this issue: one, which Kosovo is part of Serbia and as a consequence, its natural resources are property of the state of Serbia; and two, that the legal entities in Serbia possess title over land, property and assets under their management.

38. Trepca Mining Complex, Kosovo Energy Corporation and its power plants, Post and Telecommunication of Kosovo, Brezovica Ski Center and all other socially owned enterprises in Kosovo were created during SFRY with money belonging to SFRY citizens, including Kosovo citizens. Other sources of funding included international debts entered into by SFRY and other states or international organizations. These debts, however, have to be addressed as issues of sovereign debts and as an issue of state succession. The majority of socially owned

enterprises, including Trepca, were financed or subsidized by *the Fund for Crediting the Development of Insufficiently Developed Republics and Autonomous Regions*, as a means to narrow the gap in development between the various republics and regions of SFRY and to bring equality among all peoples within SFRY. These subsidies were later transformed into debts that the socially owned enterprises owed to SFRY financial institutions. In turn, these debts were later used by Serbia to swap debts for equity in the socially owned enterprises. Hence, Serbia claims ownership rights over Trepca and other strategic assets of Kosovo on this basis.

39.As we saw, Trepca went through different phases in its development and it had different ownership structures throughout its existence. First, it was explored and exploited by the London entity Selection Trust Ltd; later it was used by German forces throughout World War II during the occupation of SFRY. The major investments occurred after World War II when it was nationalized by SFRY. During this period major investments were made in Trepca, whereas on the other hand Trepca's resources were ruthlessly exploited for the benefit of the whole SFRY.

40.Kosovo has the sovereign right to exploit its natural resources including mineral reserves, water resources pursuant to applicable rules and principles of international law created by the 1972 Stockholm Declaration and the 1992 Rio Declaration. Any debts and private creditor's rights towards Trepca shall be recognized and compensated accordingly.

41.Likewise, other strategic assets and resources under the management of publicly owned enterprises and socially owned enterprises such as KEK and PTK are property of Kosovo, which has sovereign right to exploit its natural resources and manage its state owned enterprises.

42.Brezovica was under the administration and management of the socially owned enterprise Inex, with headquarters in Belgrade, Serbia. Inex has been transformed from a socially owned enterprise into a publicly owned enterprise

by Serbia. That, in turn, means that Serbia considers itself as the owner of the Brezovica Ski Center. However, as is the case with other public properties and based on rules of state succession, it follows that Brezovica has passed on Kosovo as a successor state in 2008.

43. Brezovica Ski Center is operated by the company “Brezovica Ski Center doo” with headquarters in Belgrade. “Brezovica Ski Center doo” has declared in its financial report for 2017 that the present value of its assets is in the amount of 1,677,386,879.57 Serb Dinars, or 14,106,823.65 Euro based on the exchange rate of 30 December 2017 of 0.00841 RSD/EUR, which eventually would have to be compensated by Kosovo as a result of the nationalization of the assets in Brezovica by the Decision Nr. 10/50 of 23 September 2015.

44. It is likely that Inex acquired property rights over Brezovica assets during the period following 1989 in a discriminatory way, in which case those rights shall not be recognized. Besides, Inex did not have ownership rights over assets and property in Brezovica during SFRY, as these assets were only under its management. Any transformation into ownership structure and property rights over land and assets in Brezovica following 1989 and 1999 respectively shall be closely looked at and not taken into account in case it has been done in a discriminatory way.

45. Socially owned enterprises and property rights towards assets managed by the socially owned enterprises were either privatized, transformed or otherwise exchanged based on discriminatory laws during the period between 1989 and 1999 known as *Markovic Laws*, which did not allow Albanians to participate or be consulted in this process. In turn, these discriminatory privatizations or transformations should not be taken into account in case there is sufficient basis to conclude that they were done in a discriminatory manner.

46. Further, this paper analyzed the issue of socially owned enterprises’ assets located in other countries and the options for exchange or compensation of the same. Currently, there are at least 46 assets in Kosovo of socially owned

enterprises of Serbia which are under the administration of KPA; whereas there are at least 162 assets in Serbia of socially owned enterprises of Kosovo, of which Kosovo does not know the status within Serbia. Kosovo and Serbia could agree for the exchange of these assets on equitable bases with one another, or compensation of the same. Private citizens and private legal entities rights shall be protected and in case of nationalization, exchange or other forms of compensation, they shall be compensated for their investments made.

47. Finally, no major investments have occurred in Kosovo and its strategic assets by socially owned enterprises and state-owned enterprises headquartered in Serbia after 1999. Any investments claimed by Serbia or enterprises in Serbia to have been done in Kosovo should be substantiated by evidence.

Recommendations

48. Kosovo and Serbia should agree for a process of state succession and sign a binding agreement on state succession issues, similar to the one signed between the former constituent republics of SFRY, whereby they would address the issues presented in this paper and other issues, such as debts, pensions, cultural heritage, archives and other issues of state succession.

49. Trepca Mining Complex and the underground mineral reserves under its management are property of Kosovo and only Kosovo has the sovereign right to exploit its natural resources under applicable rules of international law. Serbia cannot claim ownership rights for Trepca nor its assets as they were built and exploited from SFRY during its existence. Trepca shall recognize debts and liabilities towards private creditors such as *Mytileneos AS* and SCMM, and these debts shall be paid for by Trepca and or Kosovo State as Trepca's owner.

50. International debts of SFRY taken for the financing of socially owned enterprises such as Trepca and Brezovica Ski Center shall be addressed with Serbia in the context of debt succession on an equitable basis. Serbia shall not claim and

Kosovo shall not recognize claims by Serbia as creditor of socially owned enterprises, as a result of credits extended to socially owned enterprises by SFRY through the *Fund for Crediting the Development of Insufficiently Developed Republics and Autonomous Regions*.

51. Trepca or the Republic of Kosovo could enter into agreements with Trepca's creditors to pay their claims through alternative means, such as through products, equity or other forms of payment or through restructuring of the debt.
52. The Special Chamber on Privatization Issues of the Kosovo Courts shall decide on claims made by private creditors towards socially owned enterprises of Kosovo, such as Trepca, Brezovica Ski Center and the like, and those claims shall be satisfied by either the proceeds of sales of those enterprises or their assets or by the Republic of Kosovo in case of nationalization.
53. Further, entities in Serbia and other creditors could file investment claims against Kosovo before World Banks' International Center for the Settlement of Investment Disputes in Washington D.C., in case they have a litigate claim against Kosovo.
54. Brezovica Ski Center has passed on Kosovo as a state property on the day of its declaration of independence, since the company that claims ownership rights over it is a state company of Serbia. Alternatively, if this position of Kosovo is not accepted by Serbia, the maximum amount that Inex would be entitled to compensation for the market value of the assets it claims in Brezovica is the amount of 14,106,823.65 Euro, which represents the share capital and value of its assets in Brezovica as reported by "Brezovica Ski Center doo" in its Financial Report for 2017. But, Inex, "Ski Center Brezovica doo" or Serbia have to prove however, that they have indeed invested that amount after 1999, since any investments made during the SFRY or prior to 1999 were made by Inex as a socially owned enterprise, which was a property of the whole society of SFRY, thus of Kosovo society as well.

- 55.** Socially owned enterprises' assets should be recognized, protected and compensated. Since both Kosovo and Serbia have assets in one another, they could agree on the exchange of those assets, provided this exchange is done on an equitable basis. Alternatively, they could agree on the compensation of the assets, which would need a process of valuation. Any private citizens or private entities rights over the assets, in case they have been rightfully acquired should be protected pursuant to European Convention on Human Rights and Freedoms or compensated by the states in case of transformation or nationalization of the same.
- 56.** A process of restitution of property rights should be initiated in case Serbia insists on claims over properties in Kosovo. The process of restitution of property rights would enable private citizens and entities in Kosovo, whose property were privatized, confiscated or transformed during the period of 1989 until 1999 to claim ownership rights on the properties which were discriminately transformed during the above period.
- 57.** Legitimate creditors' rights shall be recognized and to the extent possible protected or compensated by the proceeds generated by the privatization process or by Kosovo's budget.
- 58.** In case Kosovo and Serbia cannot agree on the above matters and other related issues of state succession, they could establish an arbitral tribunal similar to the Badinter Commission for the SFRY, which would finally settle all the outstanding issues between them.

