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Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment

The field of law and development is fluid, its exact dimensions subject to considerable debate. While the subject defies quantification in terms of absolutes, dominant theories and themes unquestionably pervade the field. One theme is that development is a function of the particular country's legal system. Proponents of this theme frequently cite the work of Max Weber for the proposition that Western industrial development has its genesis in the development of a rational legal system.¹ Based on the assumed validity of this proposition, the proponents argue that a rational legal system is essential to a country's development.²

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1. See David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 11-12 (1972). Professor Trubek observes:

The key to this argument is the work of the German sociologist, Max Weber, who attempted to identify and explain systematically the role of the modern legal system in the emergence of Western civilization. Weber's explanation went beyond the observation that legal "development" occurred simultaneously with the political and economic transformations that led to the industrial system and the centralized nation-state. Rather, he showed with precision that these changes were mutually causative, supporting his historical conclusions with an analytic explanation. . . .

Id.

2. E.g., Marek Wierzbowski, *Foreign Investment in Eastern Europe—An Insider's View*, 4 TRANSNAT'L LAW. 623, 630 (1991) ("Experience shows that a democratic society, by guaranteeing the rights of citizens and providing mechanisms to decide disputes with government by impartial tribunals, is a much better climate for economic investment than systems based on autocracy.").

For Western legal scholars, this approach has obvious appeal; it presumes that their legal training is authoritative in a larger sense and that their training should provide them with legal solutions of general application. Consequently, the scholars' role in creating solutions to developmental problems is greatly simplified as they may rely on the skills and knowledge that they presently possess.

Unfortunately, or fortunately, depending upon one's perspective, this approach has not proved to be a panacea for the problems of the developing world. Attempts to import Western legal traditions have yielded mixed results.³ Furthermore, this approach has come under criticism for its ethnocentricity. Opponents of this approach observe that it oftentimes fails to develop effective solutions to problems in the developing world because it fails to comprehend the relevant cultural context.⁴ Nevertheless, modern legal scholarship on development frequently assumes that a rational legal system is necessary for development.⁵

Although Western legal traditions do not provide answers for all development problems, the traditions are not irrelevant to development. The developed world, which is dominated by Western nations, possesses a vast wealth of resources. These resources may play a substantial role in addressing the problems of underdevelopment. Therefore, the developing world needs to construct a relationship with the developed world that permits, on mutually agreeable terms, access by the developing world to these resources. An integral part of this endeavor will be the development of legal structures that establish mutually beneficial links between the two worlds. This effort by definition will incorporate some Western legal traditions, but not necessarily all of them.

This article addresses the role that foreign investment laws may play in forming a legal bridge between the two worlds. Foreign investment laws define the terms in which foreign direct investment (FDI) will be permitted within a state. Depending upon its construction, a foreign investment law may serve to promote or discourage FDI from the developed to the developing world. This article begins with a discussion of why FDI from the developed world is important to developing nations and addresses what role law may play in the promotion of FDI. The article then examines which legal provisions may most likely encourage FDI. The hypothesis proposed in this discussion is then examined in the context of Albania. While no empirical truths emerge, Albania's efforts to use foreign investment laws to stimulate FDI reveal that this small, developing nation has embarked upon a bold experiment. The results of Albania's experiment could have broad ramifications on the development and use of foreign investment laws in general and therefore deserve further study.

3. Trubek, *supra* note 1, at 48-50. Professor Trubek cites Brazil as one particularly poignant example of this fact.

4. *Id.*

5. See Wierzbowski, *supra* note 2.

I. The Relationship Between FDI and Development

Historically, the relationship between foreign capital and economic development was taken as axiomatic.⁶ This notion was based on the assumption that developing countries needed to undertake programs of rapid economic development that utilized technology-intensive methods. This idea implies that, in order to achieve rapid economic growth, developing countries would have had to employ the skills and technological resources of the developed world. Moreover, because developing countries were without spare domestic capital, foreign capital would have been necessary to effect the needed transformation.⁷

Not all developing nations considered these truths to be self evident, for FDI was initially met with skepticism. Nations of the developing world raised concerns about FDI resulting in a new colonialism in which foreign interests controlled sovereign resources.⁸ Nevertheless, despite the ambivalence toward FDI, data indicate that FDI in developing countries was substantial throughout the 1960s and most of the 1970s.⁹

More importantly, although not conclusive, current empirical data show a positive correlation between growth in gross national product (GNP) and FDI.¹⁰ Though this correlation does not establish a cause-and-effect link between FDI

6. E.g., ARGHYRIOS A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 16 (1962) ("Importation of foreign capital is then necessary for a country's economic development.").

7. E.I. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 2 (1965). Professor Nwogugu of the University of Lagos stated it thus:

The only way to raise the standard of living of the high proportion of the world population in under-developed countries is by rapid economic development. While many of these countries possess valuable natural wealth, they lack the basic instruments for exploiting their natural resources for the economic benefit of their peoples—capital, skilled manpower and technological inventions. The capital and technological needs of the under-developed countries are so enormous that they cannot at present be met from the local sources. Therefore there is a great need for capital and skill from the rich or industrialized countries of Europe and America.

Id.

8. Ndiva Kofele-Kale, *The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries*, 23 LAW & POL'Y INT'L BUS. 619, 624-25 (1992). For an interesting and detailed discussion of one developing country's response to these concerns, see Fiona C. Beveridge, *Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria*, 40 INT'L & COMP. L.Q. 302 (1991).

Moreover, even the developed world has expressed concerns about the degree to which FDI in their own states might interfere with government policies. See DECLARATION BY THE GOVERNMENTS OF OECD MEMBER COUNTRIES AND DECISIONS OF THE OECD COUNCIL ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (OECD rev. ed. 1984). In the 1984 Annex to the 1976 Declaration on Multinational Enterprises, OECD member countries expressed concern about the role of multinationals: "[T]he advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives." *Id.* at 15.

9. See Kofele-Kale, *supra* note 8, at 629; OECD, RECENT TRENDS IN INTERNATIONAL INVESTMENT 28 (1987).

10. See OECD, *supra* note 9, at 43.

and development,¹¹ other factors also indicate the practical utility of FDI. Due to the external debt situation of the developing world, many developing countries can no longer rely on debt to finance new development projects. FDI is one readily available alternative.¹² In addition, many developing countries no longer view FDI as a serious external threat to sovereignty; on the contrary, they attach great importance to its promotion.¹³ Taken together, these considerations demonstrate that FDI may play a significant role in a country's development strategy.

II. The Promotion of FDI and Foreign Investment Laws

A. DEFINING THE ROLE OF FOREIGN INVESTMENT LAWS

The operative assumption has been, and still is, that developing countries can stimulate FDI through their investment laws and regulations. This assumption is proved by the numerous recent revisions to foreign investment laws of the developing world that are intended to encourage FDI.¹⁴

Unfortunately, empirical studies that examine the relationship between the flow of FDI and the structure of a developing country's foreign investment laws are scarce.¹⁵ While a recent study indicates that "liberalization" of foreign investment laws may have a positive correlation to the promotion of FDI, this study only focused on the foreign investment laws of three countries that "liberalized" through the use of incentives, such as tax holidays and subsidies.¹⁶ Thus, the

11. *Id.*

12. *Id.* at 27; see also Ewell E. Murphy, *The Quiet Revolution in Andean Foreign Investment Laws*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1989, at 10-1 to -19 (1989).

13. See Kofele-Kale, *supra* note 8, at 619.

14. Eric Schneider & Alev Bilgen, *Foreign Investment Laws in the Republic of Turkey: A Model for Reform*, 5 TRANSNAT'L LAW. 99 (1992); Chudi Ubezouu, *Some Recent Amendments to Laws Affecting Foreign Investment in Nigeria*, 8 ICSID REV. FOREIGN INVESTMENT L.J. 123 (1993); Ken Laryea, *Recent Investment Legislation in Ghana*, 39 INT'L & COMP. L.Q. 197 (1990); Mary S. Flipse, *Asia's Littlest Dragon: An Analysis of the Laos Foreign Investment Code and Decree*, 23 LAW & POL'Y INT'L BUS. 199 (1991-92); Jonas Bergstein, *Foreign Investment in Uruguay: A Law and Development Perspective*, 20 U. MIAMI INTER-AM. L. REV. 359 (1989).

15. "Although a significant amount of empirical work has been done on the link between foreign direct investment (FDI) and economic growth and development, comparatively little attention has been paid to the effect that investment laws and regulations have on the amount of private capital actually invested." Kofele-Kale, *supra* note 8, at 620-21 (footnotes omitted). That is not to say that such studies are nonexistent, for some have addressed this subject to a limited extent. See THE DETERMINANTS OF FOREIGN DIRECT INVESTMENT: A SURVEY OF THE EVIDENCE 42-43 (United Nations 1992) [hereinafter DETERMINANTS].

16. See generally Kofele-Kale, *supra* note 8, at 619-71. This study evaluated changes in the investment laws of Cameroon, the Ivory Coast, and Kenya, and the effects of these changes. *Id.* Likewise many, if not most, other studies of FDI promotion generally have focused on incentives. See DETERMINANTS, *supra* note 15. Interestingly, there have been relatively comprehensive studies on the effect of regulations on FDI in the context of developed countries. OECD, CONTROLS AND IMPEDIMENTS AFFECTING INWARD DIRECT INVESTMENT IN OECD MEMBER COUNTRIES (1987).

efficacy of law itself as a promoter of FDI is speculative.¹⁷ Moreover, despite their potential effectiveness, incentives are not necessarily a viable alternative in debt-strapped developing countries because one of the significant reasons for promoting FDI is to bring in capital at little or no cost.

In light of these considerations, the host developing country should consider what, if any, legal mechanisms may be employed to attract FDI without substantial expenditures on its part. In the same vein, host developing countries should not necessarily expend their resources on massive wholesale Weberian reforms. Rather, a developing country that wishes to use law as a method of encouraging FDI may benefit from employing a minimalist approach to identify the key legal ingredients that may stimulate FDI at little or no cost. A properly drafted foreign investment law may offer a vehicle for implementing this approach.¹⁸

Because the use of foreign investment laws to attract FDI is, in significant part, a marketing issue,¹⁹ it is logical to start with an analysis of the relevant market. In this case, the relevant market is Western business, and more specifically, the lawyers and legal structures that guide Western business in the choice of investments.²⁰ While marketing studies on this particular subject may not exist, at least one comprehensive outline was developed of the key legal issues that lawyers (including Western ones) agree are important. This outline can be found

17. Kofele-Kale, *supra* note 8, at 621-22. Undoubtedly a wide range of factors affect the flow of FDI—the majority of which do not specifically relate to the legal climate. See DETERMINANTS, *supra* note 15.

18. See FATH EL RAHMAN ABDALLA EL SHEIKH, *THE LEGAL REGIME OF FOREIGN PRIVATE INVESTMENT IN THE SUDAN AND SAUDI ARABIA: A CASE STUDY OF DEVELOPING COUNTRIES* 59 (1984). Another similar vehicle is the Bilateral Investment Treaty (BIT), which has received considerable attention in recent years. In many respects, BITs resemble foreign investment laws in their purpose and structure because they are designed to give foreign investors specific, basic assurances regarding the treatment of FDI. Of course, they do not provide legal provisions of general application, but merely express a limited agreement between the two participating countries. See ICC, *BILATERAL TREATIES FOR INTERNATIONAL INVESTMENT* (1980). Due to their limited application, BITs are not tailored to the purpose of promoting FDI generally and are not a substitute for a foreign investment law of general application. While BITs may play an important role in the promotion of FDI, a full discussion of their merits and drawbacks is beyond the scope of this article.

19. See RICHARD MORAWETZ, *RECENT FDI IN EASTERN EUROPE: TOWARDS A POSSIBLE ROLE FOR THE TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY I* (ILO Working Paper No. 71, 1991). Referring to Eastern Europe, the author notes, "new investment legislation [is] designed to attract Western capital and technology." *Id.* See also Ndiva Kofele-Kale, *Investment Codes as Instruments of Economic Policy: A Cameroon Case Study*, 25 INT'L LAW. 821, 821 (1991) ("Investment codes can be viewed as road maps for companies and individuals interested in investing in host countries."); Jamie Pederson, *Comments in AMERICAN BAR ASSOCIATION, ANALYSIS OF TWO DRAFT PROPOSALS ON FOREIGN INVESTMENT FOR LITHUANIA I* (1993) ("A Foreign Investment Law should be something like an advertisement to potential investors: clear, definitive, brief, predictable, and limited to the most important substantive provisions.").

20. The focus on the West is not to deny the significant participation of other developed nations, such as Japan. See SUEO SEKIGUCHI, *JAPANESE DIRECT FOREIGN INVESTMENT* (1979). However, developing nations still concentrate on the West. See NWOGUGU, *supra* note 7.

in the Guidelines on the Treatment of Foreign Direct Investment (Guidelines) produced by the World Bank Group.²¹

B. WORLD BANK GROUP GUIDELINES ON THE ROLE OF LAW IN THE PROMOTION OF FDI

In 1991 the Development Committee of the World Bank Group "recognized the need of an overall legal framework which would embody the essential legal principles so as to promote FDI."²² Over the course of the following year, a task force examined a variety of legal materials from both the developing and developed worlds and consulted sources within and outside the World Bank Group. The examined materials ranged from detailed studies of existing foreign investment laws to a review of arbitral jurisprudence on the subject. The Guidelines were developed from the results of this examination.²³ The Guidelines are premised on the assumption that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long-term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade.²⁴

The Guidelines maintain that the promotion of FDI should be guided by legal principles that address four basic issues: admission, treatment, expropriation, and dispute settlement.²⁵

1. Admission of FDI

The Guidelines provide that host states should avoid procedures that make the entry and establishment of FDI "unduly cumbersome or complicated."²⁶ While host states have the right to regulate the admission of FDI, the Guidelines note that "experience suggests that certain performance requirements introduced as conditions of admission are often counterproductive and that open admission, possibly subject to a restricted list of investments . . . is a more effective approach."²⁷

The Guidelines, however, do acknowledge that certain exceptions to open admission may be justified. A host state may refuse admission if it determines that FDI in a particular sector would compromise national security or legally

21. *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID REV. FOREIGN INVESTMENT L.J. 295-306 (1992) [hereinafter *Guidelines*] (further citations are to the sections and paragraphs therein).

22. *Progress Report on the "Legal Framework" for the Treatment of Foreign Investment*, 7 ICSID REV. FOREIGN INVESTMENT L.J. 307 (1992).

23. *Id.*

24. *Guidelines*, *supra* note 21, at pmbl.

25. *Id.* §§ II-V.

26. *Id.* § II, para. 2(b).

27. *Id.* § II, para. 3.

defined development objectives.²⁸ In addition, the Guidelines make it clear that provisions for the protection of health, order, and the environment should apply to FDI.²⁹ To assist the foreign investor in determining the application of these exceptions and the FDI legal environment generally, this section of the Guidelines concludes with a recommendation that host states publish all relevant laws and regulations.³⁰

2. *Treatment of FDI*

The Guidelines next address the issue of the proper treatment of FDI after admission to the host state. This section of the Guidelines proposes that FDI should be granted "fair and equitable treatment" in accordance with certain standards.³¹ The basic standard enunciated is the principle of national treatment.³² This principle requires that a foreign investor receive treatment no less favorable than that of nationals of the host state.

In terms of specifics, this section provides that foreign investors should be given certain assurances about the treatment of their business operations. The host state should promptly issue all permits and licenses necessary for the operation of the investment and admit any necessary foreign personnel.³³ Also, the host state should

28. *Id.* § II, para. 4. This paragraph provides:

[A] State may, as an exception, refuse admission to a proposed investment:

(i) which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security; or
(ii) which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest.

Id.

29. *Id.* § II, para. 5.

30. *Id.* § II, para. 6. This paragraph states: "Each State is encouraged to publish, in the form of a handbook or other medium easily accessible to other States and their investors, adequate and regularly updated information about its legislation, regulations and procedures relevant to foreign investment. . . ." *Id.*

31. *Id.* § III, para. 2.

32. *Id.* § III, para. 3. This paragraph provides in part:

With respect to the protection and security of their person, property rights and interests, and to the granting of permits, import and export licenses and the authorization to employ, and the issuance of the necessary entry and stay visas to their foreign personnel, and other legal matters relevant to the treatment of foreign investors as described in Section 1 above, such treatment will, subject to the requirement of fair and equitable treatment mentioned above, be as favorable as that accorded by the State to national investors in similar circumstances.

Id.

33. *Id.* § III, para. 5. This paragraph states:

Without restricting the generality of the foregoing, each State will:

(a) promptly issue such licenses and permits and grant such concessions as may be necessary for the uninterrupted operation of the admitted investment; and
(b) to the extent necessary for the efficient operation of the investment, authorize the employment of foreign personnel. While a State may require the foreign investor to reasonably establish his inability to recruit the required personnel locally, e.g., through local advertisement, before he resorts to the recruitment of foreign personnel, labor

permit the foreign investor to repatriate profits; proceeds from the sale of assets; and amounts necessary to pay debts, wages, and compensation for expropriation.³⁴ These fund transfers should be permitted "(a) in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable currency by the International Monetary Fund or in any other currency accepted by the investor, and (b) at the applicable market rate of exchange at the time of the transfer."³⁵ Taken together, these provisions are intended to provide the foreign investor with basic guarantees necessary to facilitate FDI.

3. *Expropriation of FDI*

Another aspect of a host state's treatment of FDI is the issue of expropriation. This issue is considered sufficiently important to warrant its own specific discussion in the Guidelines. The Guidelines state a general rule:

A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.³⁶

This recommendation is based on similar provisions found in the codes of existing developing countries and the constitutions of many developed countries.³⁷

market flexibility in this and other areas is recognized as an important element in a positive investment environment. Of particular importance in this respect is the investor's freedom to employ top managers regardless of their nationality.

Id.

34. *Id.* § III, para. 6(1). This paragraph states:

Each State will, with respect to private investment in its territory by nationals of the other States:

- (a) freely allow regular periodic transfer of a reasonable part of the salaries and wages of foreign personnel; and, on liquidation of the investment or earlier termination of the employment, allow immediate transfer of all savings from such salaries and wages;
- (b) freely allow transfer of the net revenues realized from the investment;
- (c) allow the transfer of such sums as may be necessary for the payment of debts contracted, or the discharge of other contractual obligations incurred in connection with the investment as they fall due;
- (d) on liquidation or sale of the investment (whether covering the investment as a whole or a part thereof), allow the repatriation and transfer of the net proceeds of such liquidation or sale and all accretions thereto all at once; in the exceptional cases where the State faces foreign exchange stringencies, such transfer may as an exception be made in installments within a period which will be as short as possible and will not in any case exceed five years from the date of liquidation or sale, subject to interest as provided for in Section 6(3) of this Guideline [a market rate accruing as of the date of the attempt to transfer until date of completion]; and
- (e) allow the transfer of any other amounts to which the investor is entitled such as those which become due under the conditions provided for in Guidelines IV and V [Expropriation and Dispute Settlement].

Id.

35. *Id.* § III, para. 2.

36. *Id.* § IV, para. 1.

37. Antonio R. Parra, *Principles Governing Foreign Investment, as Reflected in National Investment Codes*, 7 ICSID REV. FOREIGN INVESTMENT L.J. 428, 440-42 (1992).

In the paragraphs that follow this rule, the Guidelines further define the meaning of "appropriate compensation." For compensation to be appropriate, it must be "adequate, effective and prompt."³⁸ If the compensation is based on fair market value "determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known," then it will "be deemed 'adequate.'"³⁹ The "effectiveness" of the compensation depends upon its transferability. This provision incorporates the general provisions on transferability applicable to the treatment of FDI.⁴⁰ The "promptness" of the compensation is dependent upon payment "without delay."⁴¹ However, if the host state is facing serious foreign exchange problems, a limited delay is permissible.⁴²

4. *Settlement of Disputes Concerning FDI*

Because disputes may arise when applying the above principles, the Guidelines conclude with a provision on dispute resolution. The provision emphasizes that normally disputes should be settled through negotiations between the foreign investor and the host state.⁴³ If resolution through negotiations is impossible, the provision recommends settlement "through national courts or through other agreed mechanisms including conciliation and binding independent arbitration."⁴⁴

In terms of independent arbitration, the Guidelines recommend that states consider using the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID).⁴⁵ However, the provision also approves ad hoc arbitration where the composition of the arbitral panel is not controlled solely by either party.⁴⁶

III. Albania's Search for the Right Foreign Investment Law

Albania, a small, developing nation in Eastern Europe, is converting from an authoritarian, centrally planned economy to a democratic market economy.⁴⁷ The newly elected democratic government considers the stimulation of FDI a priority in the transition to a market economy.⁴⁸ In hopes of promoting FDI, Albania has

38. *Guidelines*, *supra* note 21, § IV, para. 2.

39. *Id.* § IV, para. 3. The term "fair market value" is defined as the price agreed to between the foreign investor and the host state—or in the absence of agreement—a price determined by a tribunal or calculated by the host state to approximate an arm's-length price. *Id.* § IV, paras. 4-5.

40. *Id.* § IV, para. 7.

41. *Id.* § IV, para. 8.

42. *Id.*

43. *Id.* § V, para. 1.

44. *Id.*

45. *Id.* § V, para. 3.

46. *Id.* § V, para. 2.

47. Albania has a population of 3.3 million people and covers an area of approximately 28,748 sq. km (11,100 sq. miles). Dusko Doder, *Albania Opens the Door*, NAT'L GEOGRAPHIC, July 1992, at 66. It borders Greece and former Yugoslavia and is located across the Adriatic Sea from Italy. *Id.* The democratically elected government took over in 1991, ending 45 years of hardline communist rule. *Id.*

48. *Id.*

devoted considerable resources to the development of its foreign investment law. The discussion that follows examines the development and evolution of Albania's foreign investment law through the law's treatment of the Guidelines' four basic issues: admission, treatment, expropriation, and dispute settlement.

A. THE 1992 FOREIGN INVESTMENT LAW

On August 4, 1992, the Republic of Albania passed the Foreign Investment Act of 1992⁴⁹ (1992 Law), its first foreign investment law since its transition to democratic rule. The 1992 Law contains twenty-two articles that define the basic legal framework for FDI in Albania.⁵⁰

1. Admission of FDI

The 1992 Law conditions the entry of all FDI on authorization from a division of government.⁵¹ The size of the proposed FDI determines which division of government is responsible for the authorization. Smaller investment authorizations are handled by the local governments, mid-range authorizations by the Ministry of Trade and Foreign Economic Cooperation (MTFEC), and investments of "national importance" by the Council of Ministers.⁵²

In general, the FDI authorization process requires foreign investors to disclose a wide variety of information. Also, the MTFEC has the authority to request any additional information it considers necessary.⁵³ Exceptions to this process exist only for small investments and investments in the banking sector.⁵⁴ Once

49. Foreign Investment Act, Law No. 7594, Aug. 4, 1992, 4 FLETORJA ZYRTARE 226 (Aug. 18, 1992) (Alb.) [hereinafter 1992 Law], translated by Legal Text Service, U.S. Dep't of Commerce.

50. *Id.*

51. *Id.* art. 3. Article 3 states:

Foreign investments in Albania shall be made on the basis of an authorization given by:

a) the Council of Ministers, for an investment in major sectors of the economy which are of national importance and above a minimum value[;]

[t]he sectors of national importance and the relevant minimum values shall be determined by the Council of Ministers[;]

b) the Ministry of Trade and Foreign Economic Cooperation for all other cases, except for an investment with a value under \$50,000 in cash or in kind, or the equivalent in other convertible currencies calculated in accordance with the average rate of exchange announced by the [State] Bank upon effecting the investment;

c) by the local governmental body for an investment with a value under \$50,000.

If the foreign investment is made in an Albanian state-owned enterprise, independently of the value of the investment, the Albanian state-owned enterprise must ask for permission from the relevant ministry.

Id.

52. *Id.*

53. *Id.* art. 4. Article 4 states:

All requests for authorization for foreign investments, except those within the competence of local governmental bodies or those in the banking sector, shall be presented to the Ministry [MTFEC].

the necessary information is submitted, the 1992 Law requires the application to be processed in a timely manner.⁵⁵

While the 1992 Law does not specifically prohibit FDI in any particular sector of the economy, it does provide that certain restrictions may apply. A particular investment will not be permitted if it would compromise Albania's national defense, public order, health, environment, or morals.⁵⁶ To assist the foreign investor in determining what, if any, restrictions may apply, the 1992 Law guarantees that "Albania shall make public all the laws, rules and regulations concerning foreign investments."⁵⁷

2. Treatment of FDI

Upon the authorization and admission of FDI, the 1992 Law grants the foreign investor certain rights, including national treatment. The 1992 Law guarantees, in part, that "[t]he foreign investor enjoys the same rights and obligations as the Albanian investor, except in cases determined by law."⁵⁸ However, the exception leaves open the possibility that additional restrictions may be imposed. The 1992 Law permits the foreign investor to employ foreign "technical staff" with the qualification "in accordance with Albanian legislation."⁵⁹ This qualification also leaves open the possibility of further restrictions.

The 1992 Law permits transfers of funds under a wide variety of circumstances.⁶⁰ The 1992 Law provides a general right to transfer all proceeds from

The request must contain:

- a) the identity of the foreign investor, partners, or in the case of joint stock companies the identities of the incorporators;
- b) documents that verify the name, seat and place of registration of the company;
- c) data about the activity of the foreign investor;
- d) documents that prove that the foreign investor has the credibility and financial resources for the investment;
- e) pre-feasibility study for the investments including the amount of funds necessary for the investments;
- f) any other data that shall be deemed necessary by the Ministry.

Id.

54. *Id.*

55. *Id.* arts. 5-6. Article 5 established guidelines for MTFEC coordination with other governmental agencies and established a 20-day deadline in which these agencies were required to respond to requests for information. *Id.* art. 5. Article 6 required the Council of Ministers, the MTFEC, and the local government bodies to respond to authorization requests within 60, 45, and 30 days, respectively. *Id.* art. 6.

56. *Id.* art. 2.

57. *Id.* art. 19.

58. *Id.* art. 8.

59. *Id.* art. 14.

60. *Id.* art. 12. Article 12 states:

A foreign investor has the right to transfer abroad:

- a) The proceeds of the sale or liquidation of all or any part of his investment to a natural or legal Albanian or foreign person[;]
- b) The return of shareholder's equity resulting from the diminution of the capital when the company has decreased its capital in accordance with Albanian legislation[;]

the sale or liquidation of the FDI, payments necessary for the use of intellectual property, payments necessary to maintain the FDI, and salaries of foreign personnel.⁶¹ Also, the 1992 Law permits the repatriation of profits, dividends, and the return of equity in accordance with Albanian law.⁶² All transfers are subject to "the payment of all relevant taxes" and the "claims of creditors."⁶³ The satisfaction of these claims shall be verified by the state bank.⁶⁴

In addition, transfers are subject to balance of payment restrictions.⁶⁵ For transfers relating to the repatriation of profits, dividends, sales or liquidation proceeds, or returns of shareholder's equity, if the state bank determines that the foreign currency necessary to fulfill these transfers would adversely effect the balance of payments, the bank is authorized to make the foreign currency available on an installment basis.⁶⁶ The timing of the installments is left to the discretion of the bank.⁶⁷

3. *Expropriation of FDI*

In addition to the rights discussed above, the 1992 Law grants the foreign investor certain assurances regarding the expropriation of FDI.⁶⁸ Expropriation

c) Profit and dividends calculated in accordance with Albanian legislation[;]

d) Payment for licenses or payment to persons domiciled outside Albania for intellectual property rights used in the foreign investment, when these payments are the result of a contract[;]

e) Necessary payments for the development and maintenance of the foreign investment[;]

f) Personal earnings of foreign citizens employed by the foreign investor.

The right of transfer as determined by this Article 12 can take effect subject to:

—the payment of all relevant taxes[;]

—the taking into account of all claims of creditors[;]

—the procedure shall have been done in accordance with Albanian legislation.

The fulfillment of the above-mentioned conditions should be verified by the Bank.

In cases where the capital of the foreign investor is less than the total capital invested, then points (a), (b), and (c) of this Article 12 should be applied only to the portion of the total capital invested by the foreign investor and his pro rata share of the profits and proceeds of the sale or liquidation of the company.

The rights specified in this Article 12 do not apply to an Albanian investor.

Id.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* art. 13. Article 13 states:

If [in] the opinion of the Bank, the amount of foreign currency required to give effect to paragraphs (a) and (b) of Article 12 would have a material adverse effect on the external payments liabilities of Albania, the appropriate foreign currency may be made available by such number of installments of such amount and at such interval as the Bank may determine.

Id.

66. *Id.*

67. *Id.*

68. *Id.* art. 9. Article 9 states:

Foreign investment in Albania enjoys full protection and security. Foreign investment cannot be nationalized, expropriated or subjected to any other measure of tantamount

shall be permitted only when it is in the "public interest," "without discrimination," and in accordance with "due process of law."⁶⁹ Furthermore, compensation should be provided for all expropriated FDI. The compensation should "be immediate, realizable and appropriate."⁷⁰

The 1992 Law specifies that the compensation should approximate the market value of the expropriated FDI.⁷¹ If the market value cannot be calculated, the compensation should be determined "in accordance with equitable principles" that consider the "capital invested, current returns, depreciation, and capital repatriated."⁷² To the extent that compensation is delayed, the 1992 Law provides for the payment of "interest calculated from the date of nationalization, expropriation or other measure of tantamount effect."⁷³

4. *Settlement of Disputes Concerning FDI*

The 1992 Law provides that any disputes over expropriation of FDI shall be settled by international arbitration.⁷⁴ Also, two other types of disputes between

effect, except in special cases in the public interest and always under due process of law, with compensation and without discrimination. The compensation should be immediate, realizable and appropriate.

Id.

69. *Id.*

70. *Id.*

71. *Id.* art. 10. Article 10 states:

The compensation, for the purposes of Article 9, should be calculated in accordance with the market value of the investment at the time when the measures contemplated by Article 9 take effect or become known, whichever is earlier.

In cases where the market value cannot be ascertained, the compensation should be calculated in accordance with equitable principles, taking into account, although not exclusively, the capital invested, current returns, depreciation, and capital repatriated.

The compensation should be paid without delay and should include also interest calculated from the date of nationalization, expropriation or other measure of tantamount effect. The compensation is freely transferable and convertible in accordance with the average rate of exchange announced by the Bank on the date of such nationalization, expropriation or other measure of tantamount effect.

In cases where the compensation is considered unsatisfactory by the foreign investor, the compensation can be determined by an international tribunal in accordance with the rules and regulations set forth in Article 15 hereof.

Id.

72. *Id.*

73. *Id.*

74. *Id.* art. 15. Article 15 states:

Any dispute between the holder of the authorization and the Council of Ministers, Ministry or the local governmental body in respect of:

a) any issue relating to discrimination, or any issue relating to the amount of or any other matter in connection with any compensation payable in a case of an expropriation as provided in Articles 9 and 10 hereof [, or]

b) the validity or continued validity of the Authorization shall be referred for settlement by international arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade law in force at the time when the Authorization was issued, unless by agreement between the Minister and the foreign investor

the foreign investor and Albania shall be settled by international arbitration. These disputes concern "any issue relating to discrimination" and "the validity or continued validity of the Authorization."⁷⁵ The arbitral tribunal is to be conducted in accordance with the arbitral rules of the United Nations Commission on International Trade Law. Once rendered, an arbitral award is "final and binding on both parties."⁷⁶ Any other disputes between the foreign investor and a governmental entity must be resolved through the Albanian judicial system.⁷⁷

B. THE REVISED 1993 FOREIGN INVESTMENT LAW

Following the passage of the 1992 Law, the MTFEC monitored the progress of FDI in Albania and continued discussing the foreign investment law's role in the stimulation of FDI. In 1993, at the request of the Minister of the MTFEC, staff members began revising the 1992 Law. Their goal was to liberalize the law to further stimulate foreign investment.

In consultation with an interagency task force and foreign legal and economic advisors, the MTFEC drafted a new foreign investment law. The new draft was terse in comparison to the 1992 Law because it contained approximately half as many provisions. The new draft was designed both to provide foreign investors with the basic assurances necessary to promote FDI and to avoid unclear provisions or provisions that might otherwise impede FDI. The draft was completed in the summer of 1993 and forwarded to the Parliament. On November 6, 1993, the Parliament enacted the 1993 Act on Foreign Investments (1993 Law),⁷⁸ which replaced the 1992 Law in its entirety.⁷⁹

1. Admission of FDI

In general, the 1993 law adopts an open admissions policy for FDI in Albania. It no longer requires authorization of FDI as a condition of entry.⁸⁰ However,

to whom the Authorization is to be issued, another method of settling the dispute has been chosen and the Authorization so provides.

Any award rendered in any such arbitration shall be final and binding on both parties.

Id.

75. *Id.*

76. *Id.*

77. *Id.* art. 16. Article 16 states:

Any particular dispute between the foreign investor accorded an authorization in accordance with this Act and the Council of Ministers, Ministry or the local governmental body, except those mentioned in Article 15, shall not be referred to international arbitration but must be settled by a competent court in Albania in accordance with the procedures of Albanian legislation.

Id.

78. Law No. 7764, Nov. 2, 1993, 13 FLETORJA ZYRTARE 803 (Nov. 12, 1993) (Alb.) [hereinafter 1993 Law].

79. *Id.* art. 9, para. 1.

80. *Id.* art. 2. Article 2 provides in pertinent part: "Foreign investments in the Republic of Albania are not conditioned on any preliminary authorizations. They are permitted and treated on a basis no less favorable than that accorded in like situations to Albanian investments, except ownership of land will be treated by a special law." *Id.* art. 2, para. 1.

it does preserve a national security/public order exception. In cases where FDI might interfere with public order or national security, Albania reserves the right to take appropriate measures.⁸¹ Like the 1992 Law,⁸² the 1993 Law provides assurances that any such measures shall be published.⁸³

2. *Treatment of FDI*

The 1993 Law guarantees that, upon being admitted, FDI shall be given "fair and equitable treatment" in accordance with certain standards.⁸⁴ These standards include the right to national treatment⁸⁵ and, unlike the provisions of the 1992 Law, the right to employ foreign personnel⁸⁶ who are not specifically qualified.⁸⁷ Thus, under the 1993 Law, the foreign investor is guaranteed treatment no less favorable than that of Albanian nationals and is given the right to employ needed managerial personnel.

The 1993 Law also guarantees the foreign investor's right to repatriate FDI.⁸⁸ The 1993 Law eliminates the 1992 provision restricting repatriation on balance of payment grounds and eliminates the state bank's involvement in the authorization of repatriation.⁸⁹ Instead, the foreign investor is guaranteed the right to repatriate FDI, any "returns" on FDI, and other payments in the normal course of business.⁹⁰ Also, the foreign investor may repatriate FDI in a "freely usable

81. *Id.* art. 10. Article 10 states:

Nothing in this Act shall preclude the application by the Republic of Albania of measures necessary for the maintenance of public order, the fulfillment of its international obligations with respect to the maintenance or establishment of international peace and world security, or the protection of its own national security or defense interests.

Id.

82. 1992 Law, *supra* note 49, art. 19.

83. 1993 Law, *supra* note 78, art. 11.

84. *Id.* art. 2, para. 2. This paragraph states: "In all cases and at all times, foreign investment shall receive fair and equitable treatment and shall enjoy full protection and security." *Id.*

85. *Id.* art. 2, para. 1.

86. *Id.* art. 3. Article 3 states: "A company with a participation of foreign investment has the right to employ foreign citizens." *Id.*

87. 1992 Law, *supra* note 49, art. 14.

88. 1993 Law, *supra* note 78, art. 7, para. 1. This paragraph provides:

Foreign investors have the right to transfer out of the territory of the Republic of Albania all assets and contributions in nature related to a foreign investment, including: (a) returns; (b) compensation pursuant to Article 5 of this law [compensation for expropriation]; (c) payments arising out of an investment dispute; (d) payments made under a contract, including accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of any or all part of an investment; and (f) the return of shareholder's equity resulting from the diminution of capital when the company has decreased its capital in accordance with Albanian legislation.

Id.

89. Compare *id.* art. 12 with 1992 Law, *supra* note 49, arts. 12-13.

90. 1993 Law, *supra* note 78, art. 12.

currency."⁹¹ The only remaining restriction is that the right of transfer is subject to the payment of taxes and outstanding liabilities.⁹²

3. *Expropriation of FDI*

Like the 1992 Law, the 1993 Law grants the foreign investor certain assurances regarding the expropriation of FDI.⁹³ However, while both laws permit expropriation only when in the public interest, when nondiscriminatory, and when compensated for, the 1993 Law discusses compensation in somewhat different terms. Under the 1993 Law, compensation should be "prompt[,] adequate and effective" and should cover indirect, as well as direct, expropriation.⁹⁴

Furthermore, the 1993 Law redefines how compensation is to be determined. First, it calculates compensation as the "fair market value" of the expropriated FDI.⁹⁵ Second, it provides for a "commercially reasonable" rate of interest "from the date of expropriation."⁹⁶ Finally, it guarantees that a foreign investor "shall have the right to seek an immediate revaluation" of the compensation provided,⁹⁷ and may exercise this right by submitting the issue to the ICSID.⁹⁸

Notably, the 1993 Law does not discuss the possibility that the fair market value of the FDI may not be determinable. Thus, the 1993 Law discards the approach proffered in the 1992 Law that provided for alternate valuation methods.⁹⁹ Instead, the 1993 Law adopts the Western concept of fair market value as the standard for appropriate compensation.¹⁰⁰

91. *Id.* art. 7, para. 2. This paragraph states: "Foreign Investors shall have the right to make transfers out of the territory of the Republic of Albania in a freely usable currency calculated at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred." *Id.* Five currencies are considered "freely usable": the U.S. dollar, the Japanese yen, the English pound, the French franc, and the German mark.

92. *Id.* art. 7, para. 3. This paragraph states: "The Republic of Albania may limit the right of transfer through the equitable, nondiscriminatory and good faith application of laws of general application including those with respect to the payment of taxes and the satisfaction of obligations and court verdicts." *Id.*

93. Compare *id.* art. 4 with 1992 Law, *supra* note 49, arts. 9-10.

94. 1993 Law, *supra* note 78, art. 4. Article 4 states: "Foreign investments shall not be expropriated or nationalized either directly or indirectly or subject to any measure of tantamount effect, except in the interest of public use determined [by] law in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation and in accordance with legal procedures." *Id.*

95. *Id.* art. 5, para. 1. This paragraph states: "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier." *Id.*

96. *Id.* art. 5, para. 2. This paragraph states: "Compensation shall be paid without delay and [include] interest at a commercially reasonable rate from the date of the expropriation; be fully transferable and convertible at the market rate of exchange on the date of the expropriation." *Id.*

97. *Id.* art. 5, para. 3. This paragraph states: "A foreign investor shall have the right to seek an immediate revaluation from judicial authorities, in accordance with the provisions of Article 8 of this law, of the act of expropriation or compensation." *Id.*

98. *Id.* art. 8.

99. Compare *id.* art. 4 with 1992 Law, *supra* note 49, art. 10.

100. 1993 Law, *supra* note 78, art. 5.

4. *Settlement of Disputes Concerning FDI*

The 1993 Law significantly changes the treatment of dispute settlement. Like the 1992 Law, the 1993 Law offers the foreign investor the option of using international arbitration to settle disputes concerning expropriation and discrimination. The 1993 Law, however, goes further because it also grants this option in disputes involving the repatriation of FDI and profits therefrom.¹⁰¹ In addition, the 1993 Law designates the ICSID, which has acknowledged expertise in these areas, as the arbitral forum, and it pledges Albania's prompt enforcement of any arbitral awards.¹⁰²

More significantly, the 1993 Law goes beyond simply the issue of disputes between the foreign investor and the Albanian Government and addresses disputes between the foreign investor and private Albanian parties or state enterprises. In these cases, the parties are free to agree on whatever dispute settlement mechanism they choose, and absent agreement, these disputes may be settled in the Albanian courts.¹⁰³ This enhancement of the dispute settlement provisions expands the potential application of the 1993 Law to a wide range of private sector activities, thereby granting foreign investors the legal authority to negotiate dispute settlement procedures with which they are comfortable.

C. ANALYSIS OF THE 1993 LAW

Although the MTFEC did not rely on the Guidelines, the 1993 Law tracks many of the Guidelines' provisions and, in some cases, provides for even more

101. *Id.* art. 8. Article 8 provides:

1. If a foreign investment dispute arises between a foreign investor and either an Albanian private party or an Albanian state enterprise, and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to any applicable, previously agreed upon dispute-settlement procedure. If no dispute settlement procedure has been agreed upon, then the foreign investor may submit the dispute for resolution to a competent court or administrative tribunal of the Republic of Albania in accordance with its laws.

2. If a foreign investment dispute arises between a foreign investor and the Republic of Albania, and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal of the Republic of Albania in accordance with its laws. In case the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance [with] Article 7 of this Law, then the foreign investor has the right to submit the dispute for resolution to the International Centre for Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965.

3. Any international arbitral award rendered in accordance with this article shall be final and irrevocable on the parties to the dispute. The Republic of Albania shall carry out without delay the provisions of any such award and assure its enforcement in its territory.

Id.

102. *Id.*

103. *Id.* art. 8, para. 1.

liberal treatment. In addition, the 1993 Law responds to many of the suggestions that Western commentators submitted during the drafting of the 1992 Law.¹⁰⁴

1. *Admission of FDI*

In eliminating the authorization procedure, the 1993 Law¹⁰⁵ comports fully with the suggestions in the Guidelines, leaving Albania with the recommended open admissions policy towards FDI. The limited exceptions concerning national security and public order are acceptable limitations under the Guidelines.¹⁰⁶ Furthermore, as suggested in the Guidelines, the 1993 Law guarantees the publication of any such limitations.¹⁰⁷

Western commentators had previously objected to Albanian proposals for authorization procedures. The commentators noted that authorization procedures may create an atmosphere of suspicion concerning FDI as well as opportunities for corruption.¹⁰⁸ They also expressed doubts about open-ended exceptions for national security and public order.¹⁰⁹ While Westerners may remain concerned about the potential scope of the 1993 Law's national security and public order exceptions, its open admissions policy clearly alleviates a main concern of the Guidelines and the commentators by eliminating the possibility that FDI will be blocked or hampered as a result of restrictive authorization procedures. Thus, the open admissions policy is a direct and substantial step towards accommodating the concerns expressed by lawyers, Western ones in particular.

2. *Treatment of FDI*

The 1993 Law's assurance that FDI will receive "fair and equitable treatment" tracks the Guidelines verbatim.¹¹⁰ Taken together with the general assurance of national treatment and the right to employ foreign personnel, these provisions grant some fundamental assurances suggested by the Guidelines.¹¹¹

In addition, by removing the 1992 Law's qualification on national treatment for "cases determined by law,"¹¹² the 1993 Law directly responded to suggestions by Western commentators. These commentators had objected to this qualification as vague and potentially contradictory to the guarantee of national treatment.¹¹³

104. AMERICAN BAR ASSOCIATION, ANALYSIS OF ALBANIA'S DRAFT FOREIGN INVESTMENT ACT (1992) [hereinafter ABA ANALYSIS].

105. 1993 Law, *supra* note 78, art. 2.

106. See *Guidelines*, *supra* note 21, § II, para. 2(b).

107. Compare *Guidelines*, *supra* note 21, § II, para. 6, with 1993 Law, *supra* note 78, art. 11.

108. ABA ANALYSIS, *supra* note 104, at 2-3.

109. *Id.*

110. Compare 1993 Law, *supra* note 78, art. 2, with *Guidelines*, *supra* note 21, § III, para. 2.

111. Compare 1993 Law, *supra* note 78, arts. 2-3, with *Guidelines*, *supra* note 21, § III, paras. 3, 5.

112. 1992 Law, *supra* note 49, art. 8.

113. ABA ANALYSIS, *supra* note 104, at 1.

An equal, if not more significant, change is the treatment of the repatriation of FDI and profits. Not only does the 1993 Law remove the state bank's role from the repatriation process, it gives broad guarantees to the right to repatriate FDI and profits. Furthermore, the foreign investor may repatriate FDI and profits in a freely usable currency.¹¹⁴

As a result of these changes, the 1993 Law conforms with many of the corresponding provisions of the Guidelines; both permit all basic transfers necessary in the normal course of business in a freely usable currency.¹¹⁵ During the drafting of the 1992 Law, Western commentators had expressed concern about limiting transfers necessary for business purposes.¹¹⁶ By conforming to the Guidelines' provisions, the 1993 Law alleviates the commentators' concerns.

Moreover, the 1993 Law goes beyond the Guidelines in at least one important respect—removing restrictions on transfers based on balance of payment concerns. Both the Guidelines and Western commentators acknowledge that balance of payment concerns are legitimate grounds for restrictions.¹¹⁷ However, the liberal approach adopted by the 1993 Law will no doubt be welcomed by the Western commentators who suggested that such an approach would stimulate FDI.¹¹⁸

3. *Expropriation of FDI*

While both the 1992 Law¹¹⁹ and the 1993 Law¹²⁰ state that expropriation should be in the public interest, nondiscriminatory, and compensated for, the 1993 Law provides more explicit assurances. In particular, the 1993 Law establishes that compensation shall be "prompt, adequate, and effective."¹²¹ This provision tracks the Guidelines verbatim.¹²² The 1993 Law also clearly covers indirect investments, such as investments held through a subsidiary.¹²³

Though the 1993 Law does not specifically follow the Guidelines' definition of compensation, it does capture the essence of the definition. The 1993 Law establishes that compensation shall be calculated as the market value of the investment on the date the expropriation became known.¹²⁴

Furthermore, the 1993 Law does not provide for alternate valuation methods. Western commentators had objected to provisions in drafts of the 1992 Law that granted the government discretion in determining compensation¹²⁵ and provisions

114. See *supra* notes 85-89 and accompanying text.

115. See *Guidelines*, *supra* note 21, § III.

116. ABA ANALYSIS, *supra* note 104, at 4.

117. See *Guidelines*, *supra* note 21, § III, para. 6(1); ABA ANALYSIS, *supra* note 104, at 5.

118. ABA ANALYSIS, *supra* note 104, at 4.

119. 1992 Law, *supra* note 49, art. 9.

120. 1993 Law, *supra* note 78, art. 4.

121. *Id.*

122. *Guidelines*, *supra* note 21, § IV, para. 1.

123. 1993 Law, *supra* note 78, art. 4.

124. Compare *id.* with *Guidelines*, *supra* note 21, § IV.

125. ABA ANALYSIS, *supra* note 104, at 4.

in the 1992 Law that provided for an alternate valuation "in accordance with equitable principles"¹²⁶ if the market value was not clear. By requiring that the compensation equal the fair market value and by permitting the foreign investor to seek a redetermination through international arbitration, the 1993 Law ensures that the compensation will be determined in an impartial manner that conforms to Western standards.

4. *Settlement of Disputes Concerning FDI*

As suggested in the Guidelines,¹²⁷ the 1993 Law provides for international arbitration under the auspices of the ICSID.¹²⁸ Specifically, the foreign investor has the option to use international arbitration to settle disputes involving expropriation, discrimination, and the repatriation of FDI and profits therefrom.¹²⁹ While it does not generally endorse international arbitration for settling disputes between the foreign investor and Albania as suggested in the Guidelines, the 1993 Law goes beyond the Guidelines in that it guarantees the foreign investor the *right* to use the ICSID in the enumerated circumstances.¹³⁰

In addition, the 1993 Law addresses the issue of disputes generally whereas the Guidelines only address disputes between the foreign investor and the host state. The 1993 Law provides that disputes between the foreign investor and private Albanian parties or state enterprises may be settled by any means agreed to by the parties and, in the absence of agreement, by the Albanian courts.¹³¹ Western commentators had recommended that the 1992 Law be drafted to address these disputes and permit arbitration,¹³² but the final version of the 1992 Law did not. Thus, the 1993 Law's expansion of the dispute settlement provisions responds to these concerns. These changes should meet with the approval of the commentators.

D. THE SIGNIFICANCE OF ALBANIA'S NEW FOREIGN INVESTMENT LAW

Albania's move towards conformity with the Guidelines places it at the forefront of change with respect to foreign investment laws. Many developing countries have eased restrictions on FDI in hopes of stimulating FDI, but few have adopted as aggressive a policy as Albania.¹³³

126. 1992 Law, *supra* note 49, art. 10.

127. *Guidelines*, *supra* note 21, § IV, para. 3.

128. 1993 Law, *supra* note 78, art. 8.

129. *Id.* art. 8, para. 2.

130. Compare *id.* with *Guidelines*, *supra* note 21, § V, para. 3.

131. 1993 Law, *supra* note 78, art. 8.

132. ABA ANALYSIS, *supra* note 104, at 5.

133. Compare Albania, *supra* notes 77-100 and accompanying text, with Argentina, which restricts the types of permitted investments and repatriation of capital. Adolfo Atchabahian, *Business Operations in Argentina*, Tax Mgmt. (BNA) No. 950, at A-3 to -4 (1994). Compare also with Bulgaria, which requires disputes concerning expropriation to be settled by Bulgarian courts. Cheryl W. Gray & Peter G. Ianachkov, *Bulgaria's Evolving Legal Framework for Private Sector Development*, 27

While it may not be free from ambiguity and may need further modifications, Albania's 1993 Law is nevertheless a provocative attempt to attract FDI. Contemporaries of Albania, such as Lithuania, are still debating how far to go towards lifting restrictions on FDI, while Western lawyers have remained critical of suggestions that these restrictions should be retained.¹³⁴

The 1993 Law eliminates most of the prior restrictions on FDI. As a result, it follows the Guidelines closely in many respects and addresses a variety of the concerns expressed by Western commentators involved in the drafting of the 1992 Law. In sum, the 1993 Law incorporates a significant number, if not a majority, of the basic assurances that the international community of lawyers considers important for foreign investors.

This forthright attempt to satisfy the concerns of potential foreign investors distinguishes Albania from many other developing countries that have restrictive policies on FDI. Furthermore, the 1993 Law's conformity with the Guidelines provides an excellent case for testing the efficacy of these Guidelines as a model for other developing countries.

IV. Conclusion

The Weberian approach advocates massive structural reforms in the legal system of developing countries, like Albania, that are attempting to boost the flow of FDI. An appropriately drafted foreign investment law is a promising and less intrusive option. If a foreign investment law provides foreign investors from developed countries with certain needed legal assurances, then these investors will more likely invest in developing countries. Thus, the foreign investment law may promote FDI without immediate, wholesale legal reforms. In so doing, the foreign investment law would provide a compromise between legal cultures. It would grant the developed world a familiar surrounding in which to invest and, at the same time, leave other domestic legal developments to the discretion of host developing countries.

This scenario is not a tried and proven one. It rests upon a number of untested assumptions. Albania's 1993 Law provides an excellent model for testing these assumptions. If the 1993 Law stimulates FDI, it may serve as an example of

INT'L LAW. 1091, 1105 (1993). Compare also with Cameroon, which has restrictions on foreign ownership. Ndiva Kofele-Kale, *Investment Codes as Instruments of Economic Policy: A Cameroon Case Study*, 25 INT'L LAW. 821, 828 (1991). Compare also with India, which has authorization procedures for entry and repatriation of capital. Gautam R. Divan & N. Ramachandran, *Business Operations in India*, Tax Mgmt. (BNA) No. 966, at A-16 to -17 (1993). Compare also with the Philippines, which restrict ownership in a wide variety of areas. Ricardo J. Romulo et al., *Business Operations in the Philippines*, Tax Mgmt. (BNA) No. 978, at A-1 to -3 (1994). Compare also with Ukraine, which requires all disputes between a foreign investor and the government to be settled by Ukrainian courts. Daniel Gogek & Mary Hartnett, *Foreign Investment in Ukraine: New Laws, Opportunities, and Issues*, 27 INT'L LAW. 189, 191 n.10 (1993).

134. AMERICAN BAR ASSOCIATION, ANALYSIS OF TWO DRAFT PROPOSALS ON FOREIGN INVESTMENT FOR LITHUANIA (1993).

how a foreign investment law may bridge legal cultures. However, if the 1993 Law does not stimulate FDI, it may demonstrate that the current emphasis placed on these laws is misplaced.

Moreover, the 1993 Law may illustrate a continuing emphasis on a Weberian approach to development and FDI. If lawyers are reluctant to encourage their clients to invest in Albania, citing the need for further legal reforms, the foreign investment law is really being judged on a Weberian standard that demands wholesale reforms. Thus, Albania's experiment may reveal that foreign investment laws themselves, regardless of their conformity with the Guidelines, cannot be relied upon to promote FDI.

Both the developed and the developing worlds have invested considerable resources in the drafting and implementation of foreign investment laws, and this expenditure of resources should be examined critically. Albania's 1993 Law addresses the bulk of the issues that international lawyers, Western ones in particular, have concluded are crucial for a successful foreign investment law, and it does so in a manner that comports substantially with their recommendations. In the years that follow, both the developing and the developed worlds would be well served by detailed and critical analyses of the results of Albania's experiment.