

[DOI: 10.20472/IAC.2015.019.007](https://doi.org/10.20472/IAC.2015.019.007)

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THE FOREIGN DIRECT INVESTMENT AND ARBITRATION IN ALBANIA

Abstract:

FDI into Albania has been rising steadily since the early 2000s. These investments are essentially in the oil, metal ore, infrastructure, construction and telephony sectors. Albania has applied a policy framework favorable to FDI, and has more recently introduced policies to support private sector development in general. In recent years, the government has enacted reforms to improve the overall business climate in the country by streamlining business procedures through e-government reforms and improved legislation in a variety of sectors. The government currently is drafting a new Law on Investment that will provide investment incentives and fast-track registration and licensing procedures for strategic foreign investors. The Albanian legal system does not discriminate against foreign investors.

Albania has implemented a liberal foreign investment regime with the goal of increasing foreign direct investment. Additionally, in September 2010, the parliament approved several amendments to this law that provide special protection for foreign investment in the tourism, energy and agriculture sectors. Aiming at encouraging foreigners willing to invest in Albania, the law provides considerable guarantees to them, consisting of: Judicial protection of foreign investors with respect to the legal rights related to their investments. Foreign investors may bring disputes before an Albanian court, or refer the case to arbitration. The relevant provisions governing domestic and international commercial arbitration are incorporated in the Albanian Code of Civil Procedure.

Investors in Albania are entitled to judicial protection of the rights related to their investment. The parties to a dispute may agree to submit disputes for consideration by an arbitration institution. In the event of a failure of such arbitration, foreign investors have the right to submit the dispute to an Albanian court or to the Arbitration Court in Tirana. In the event of a dispute regarding discrimination, transfer of assets, or indirect expropriation of foreign investment by the Government, the investor may submit the dispute to the International Centre for Settlement of Investment Disputes (ICSID). Ratified international agreements have legal superiority over domestic legislation in Albania in matters relating to FDI.

Keywords:

Foreign Direct Investments (FDI), Arbitration, Albania

JEL Classification: A10, J52

Introduction

The Albanian legal system does not discriminate against foreign investors and the “Law on Foreign Investment” allows 100 percent foreign ownership of companies and outlines specific protections for foreign investors. Albanian tax policy also does not distinguish between domestic and foreign investments. Albania has implemented a liberal foreign investment regime with the goal of increasing foreign direct investment. In recent years, the government has implemented reforms to improve the overall business climate in the country by streamlining business procedures through e-government reforms and improved legislation in a variety of sectors. Furthermore, the government that took office in September 2013 has stated that promoting foreign investment is a key part of its economic development plans. Despite a legal framework designed to promote investment and significant emerging opportunities in the natural resources and energy sectors, major challenges remain for foreign investors. Recent changes in political leadership have raised questions about the legal certainty of licensing and concession agreements signed by previous governments.

Investors also cite endemic corruption, weak law enforcement, insufficiently defined property rights, government red tape, lack of developed infrastructure, and frequent changes in the legal frameworks other major obstacles to investing in Albania.

Foreign direct investment in Albania and legal framework

Albania’s attraction of foreign direct investment (FDI) has been, and remains, a major factor in its recent strong economic growth. In September 2010 the Albanian Parliament approved amendments to law no. 7764 dated 2 November 1993 "On Foreign Investments" (Foreign Investments Law). The amendments caused a heated public and political debate, not only because they were the first in 17 years but because they introduced a significant change to the foreign investment framework in Albania. Unfortunately, one of the main obstacles to FDI in Albania remains disputes on real property ownership related to the restitution and compensation process of the ex-nationalized lands. The new amendments to the law aim to provide the foreign investors with a special protection to prevail such difficulties in case of disputes resolution with private parties.

While Foreign Direct Investment (FDI) flows to neighboring countries declined in 2010, Albania’s FDI rose to more than USD 1 billion (8.9% of the GDP) for the first time in 2010, making it the second largest FDI recipient country in the region after Serbia. Significant FDI inflows started only after the year 2000, when the country finally overcame the fallout of the collapsed pyramid schemes of 1997-1998. FDI rose drastically after 2007, fueled initially in good part by large privatizations and later by projects in several sectors including financial services, telecommunications, construction, manufacturing, oil, mining, hydro, retail, etc. Cumulative FDI for the period 2007-2010 amounted to USD 3.5 billion or 64% of cumulative FDI for the period 1993-2010. The drastic growth in FDI in the last three years has put Albania’s FDI on par with

countries in the region. FDI during the first three quarters of 2011 dropped slightly from USD 768 million in 2010 to USD 615 million in 2011. Albania's foreign direct investments abroad are insignificant. The latest FDI breakdown by country of origin, industry destination or by company dates back to 2008. Leading investor nations in Albania include: Greece, Turkey, Austria, Italy, Czech Republic, US, Canada, Germany and Spain. Foreign investment focuses on financial sector, telecommunications, oil, mining, metallurgy, hydro energy, manufacturing and cement production. Albania has put in place a liberal foreign investment regime and increasing FDI is a top priority for the GOA. The government has taken measures to improve the overall business climate in the country by streamlining business procedures through e-government reforms and undertaking comprehensive structural reforms to both improve relevant legislation in a variety of sectors and lower fiscal burdens for companies. Despite progress in these reforms, major challenges remain with investors citing widespread corruption, weak law enforcement, insufficiently defined property rights, government bureaucracy, lack of developed infrastructure, and frequent changes in the legal framework.

The 'Law on Foreign Investment' is designed to create a favorable investment climate for foreign investors in the country and stipulates the following:

- No prior government authorization is needed for an initial investment and no sector is closed to foreign investment;
- 100 percent foreign ownership of companies is permissible;
- Foreign investment may not be expropriated or nationalized directly or indirectly, except for in designated special cases, in the interest of public use and defined by law;
- Foreign investors enjoy the right to expatriate all funds and contributions in kind of their investments;
- Foreign investors receive 'most favorable treatment' according to international agreements and Albanian law.

Additionally, in September 2010, the parliament approved several amendments to this law that provide special protection for foreign investment in the tourism, energy and agriculture sectors. This state special protection is not granted *a priori* but is granted only after occurrence of the dispute through a decision of the Council of Ministers following a request presented by the respective minister and the foreign investor. According to Law 10316 "On Some Amendments To The Law On Foreign Investments," special state protection is granted to investments related to a concession agreement based on the Albanian Concession Law; or an immovable property, made available to the foreign investor by the Albanian state or an immovable property over which the foreign investor has rights based on a valid, legal, public document or act issued by a competent state-entity or public authority, where such investment exceeds or is foreseen to exceed the value of EUR 10 million. Under the special state protection, the foreign investor is substituted in the judiciary process by the Albanian state and any injunction order issued by the court shall be executed over state properties. The Law on Protection of Competition governs incoming foreign investment whether it is through

acquisitions, mergers, takeovers, or green field investments. The competition law applies to all mergers irrespective of the industry or sector. In the case of particular share transfers in insurance and banking industries, additional regulatory approvals, are needed. Also, transactions between parties outside Albania, "foreign to foreign" transactions are covered by the competition law which explicitly states that it applies to all undertakings, whether domestic or foreign, whose activities have a direct or indirect effect on the Albanian market. There are limited exceptions to this liberal investment regime - most of which apply the purchase of real estate: agricultural land cannot be purchased by foreigners, but may be rented for up to 99 years; and commercial property may be purchased, but only if the proposed investment is worth three times the price of the land. There are no restrictions on the purchase of private residential property. Investors in Albania are entitled to judicial protection of legal rights related to their investments. Foreign investors have the right to submit disputes to an Albanian court. In addition, parties to a dispute may agree to arbitration. Provisions regarding domestic and international commercial arbitration are incorporated into the Albanian Code of Civil Procedure. However, many companies complain about the sluggishness of the courts and the corruption in the judiciary is endemic. The delay in the establishment of the Administrative Court is another factor that lengthens the time of court proceedings.

Legal System in Albania

Albania has a civil law system similar to that of most other European countries. The Albanian Constitution provides for a clear separation of legislative, executive and judicial branches, thus sanctioning the independence of the judiciary. Civil Procedure in Albania is governed by the Civil Procedure Code enacted in 1996. The civil court system consists of District Courts as the first instance courts, appellate courts as the second instance courts, and the Supreme Court as the third instance court. Outside of the court system, there is another special court, namely the Constitutional Court which, upon request, reviews whether laws or subsidiary legislation are in compliance with the Constitution and also protects and enforces the constitutional rights of citizens and legal entities. The District Courts are organized in special sections for adjudication- family disputes, commercial disputes and administrative disputes. Parties may appeal the judgment of the first instance courts within 15 days while the Appellate Court judgments may be appealed within 30 days to the Supreme Court. The judicial system is viewed by the business community to be slow and inefficient and lack of transparency and endemic corruption remain challenges to any settlement process. Court cases are lengthy and costly for businesses and, as a result, there is a preference to resolve disputes without seeking a judicial remedy.

As Albania does not have a commercial code, legislation is encapsulated in a series of commercial laws. Relevant laws include: Foreign Investment Law; Commercial Companies Law; Bankruptcy Law; Environmental Law; Corporate and Municipal Bonds; Transport Law; Maritime Code; Secured Transactions Law; Employment Law; Taxation Procedures Law; Banking Law; Insurance and Reinsurance Law; Concessions Law;

Mining Law; Energy Law; Water Resources Law; Waste Management Law; Excise Law; Oil and Gas Law; Gambling Law; Telecommunications Law; Value Added Law; and Sports Law. Albania has enacted and introduced laws and subsidiary legislation in respect to property rights and contract rights. The courts and the court bailiffs are the authorities empowered by law to respectively issue the writ of execution and enforce the claims of parties described in the writ of execution. According to the Albanian Civil Procedure Code, foreign court judgments are recognized and enforced by the Court of Appeal in a summary proceeding.

International Arbitration

Albania has signed and ratified the 1966 Convention “On the Settlement of Investment Disputes” between States and Nationals of Other States (Washington Convention) as well as the Convention of 1958 “On the Recognition and Enforcement of Foreign Arbitral Awards” (New York Convention).

It also has ratified the 1927 Convention and the European Convention on Arbitration (Geneva Convention). In order to have an arbitration settlement recognized by the government, a claimant must bring the award before the Court of Appeals. Under the Albanian Constitution, ratified international agreements prevail over domestic legislation. Legislation distinguishes arbitration of international disputes from arbitration of domestic disputes in that the parties involved in an international dispute may agree to settle through either a domestic or foreign arbitration tribunal. An alternative to dispute settlement via the courts is private arbitration or mediation. Parties can engage in arbitration when they have agreed to such a provision in the original agreement, when there is a separate arbitration agreement, or by mutual agreement at any time when the dispute arises.

The Albanian Appellate Court may refuse to recognize the foreign arbitral award because:

- The foreign arbitration has no jurisdiction to resolve the dispute;
- The defendant/respondent was not duly notified if the foreign arbitration has ruled in its absence;
- The same case between the same parties is subject to a decision of the Albanian courts;
- Albanian courts are examining an action filed with the Albanian courts before the foreign arbitration award became final and enforceable;
- The foreign arbitration award is issued in breach of the foreign country legislation;
- The award does not comply with the basic principles of the Albanian legislation;

The procedures for the recognition of a foreign arbitral award typically last around one month and either party may appeal the Court’s decision to the Supreme Court. The appeal must be filed within 30 days from the date of decision or notification of the other party (if absent). However, the appeal process does not suspend enforcement of the award unless ordered by the Supreme Court upon special request submitted by the defendant. The possibility of bringing an action before the local court in order to avoid

arbitration proceedings is remote. According to explicit provisions in the Albanian Code of Civil Procedure, if a party brings actions before local courts despite the parties' agreement to arbitrate, the court would, upon motion of the other party, dismiss the case without entertaining the merits of the case. The decision of the court to dismiss the case can be appealed to the Supreme Court, which has 30 days to consider the appeal.

The possible methods of dispute resolution in Albania are mediation, arbitration, and the Court system. The Government of Albania accepts binding international arbitration clauses in specific investment agreements, and in many cases it has been a party to arbitration disputes in foreign or international arbitration tribunals, as agreed to in these investment agreements. Albania has signed and ratified the New York Convention. In order to have a settlement recognized, a case must be brought before the Court of Appeals. A new law on commercial arbitration is still in draft form and aims at regulating all domestic and international arbitration procedures and transposes the provisions of United Nations Commission on International Trade Law (UNCITRAL), which in turn incorporates the New York Convention provisions. This means that to date international proceedings arbitration can be conducted based on the aforementioned ratified international conventions. Domestic arbitration continues to be governed by the provisions on the Civil Code Procedure which is more or less in line with UNCITRAL arbitration. There is a private arbitration center known as the Albanian Commercial Mediation and Arbitration center (MEDART), which is a service center established under a World Bank funded legal and judicial reform project in 2001.

An alternative to the dispute settlement via the courts is private arbitration or mediation. Parties can engage in arbitration when they have agreed to such a provision in the original agreement, when there is a separate arbitration agreement or by mutual agreement at any time when the dispute arises. Legislation distinguishes arbitration of international disputes from arbitration of domestic disputes in that the parties involved in an international dispute may agree to settle through either a domestic or foreign arbitration tribunal. Dispute settlement:

1. If a foreign investment dispute arises between a foreign investor and either an Albanian private party or an Albanian state enterprise or organization, which cannot be settled amicably, then a 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 a foreign investor may submit the dispute for resolution to an authorized court or arbitrator of the Republic of Albania, according to laws of Albania.

2. If a foreign investment dispute arises between a foreign investor and the state administration of the Republic of Albania, and this disagreement cannot be settled amicably, then a foreign investor may choose to submit the dispute for resolution to an authorized court or arbitrator of the Republic of Albania according to the laws of Albania. In cases when the dispute arises out of, or relates to expropriation, compensation for expropriation, discrimination or transfers according to article 7 of this law, then a foreign

investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Center for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Dispute between States and Citizens of Other States, approved in Washington. D.C., in March 1965.

3. Any award of international arbitration according to this article is final and binding on the parties to the dispute. The Republic of Albania must carry out, without delay, dispositions of any such award and provide for its enforcement within the territory of Albania.

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