

Aligning Albanian Investment Legislation with Good International Practice



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Overview

1. Objectives of a good investment law
2. Main content of a good investment law
3. What does it mean for Albania?
4. Key topics for discussion
 - Scope
 - Grievances mechanism
 - Strategic investments

Overview

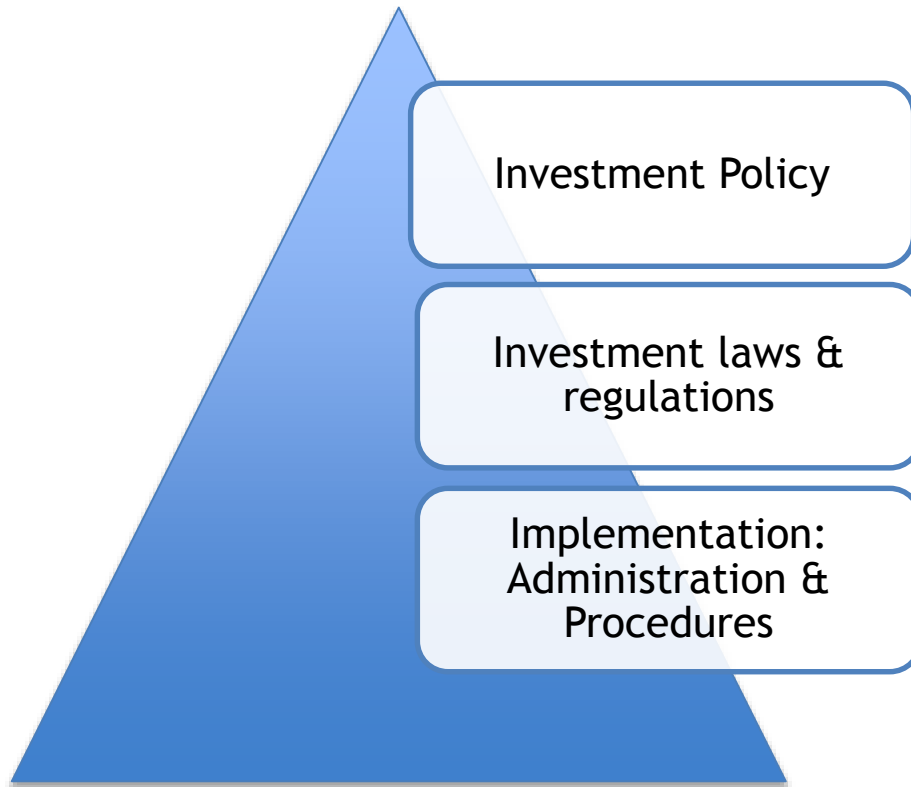
1. Objectives of a good Investment Law

What can an Investment Law achieve and what not?

Objectives of a good Investment Law

What is an investment law?

“A law containing the fundamental rules and principles governing the relation between the state and an investor”



The overall policy towards domestic and foreign investment, and of the policy principles with the aim to foster clarity and predictability.

Laws and regulations that implement the policy. They translate the policy in legal terms that can be enforced in a court of law or arbitration.

The administrative procedures and institutions that implement the laws and regulations.

Objectives of a good investment law

What can a good investment law achieve?

- Fill gaps in business legislation
- Provide a framework for investor protection and guarantees
- Regulate some exceptions regarding investment establishment as provided for in domestic laws, regulations and policies
- Create a summary of the key rules for investors:
- Spur interest in investors by giving investors confidence in the rule of law and the protection of their rights
- Ensure alignment with the country's investment policies and regional and international obligations
- Be part of a positive first impression

Objectives of a good investment law

What even the best investment law can NOT achieve:

- Work against the existing investment climate
- Attract investments on its own
- Make changes without support from regulations, relevant institutions and applicable procedures

Overview

2. Main content of a good investment law

What can typically be found in an investment law?

Main content of an investment law

No “official” content or structure of investment laws, but many laws follow more less the following structure:

Preamble

1. General provisions

Definitions, scope

2. Market access

Sector/activity restrictions, investment thresholds, screening/registration/notifications, performance requirements, regulatory procedures

3. Investor protection and guarantees

Fair and equitable treatment, National treatment, Protection against expropriation, repatriation of profits and capital, settlement of disputes, grievance mechanism, others

5. Institutional framework

IPA set up

6. Promotional devices

Incentives

7. Transition

Repeals, grandfather clause, empowerment for implementing regulations, rules in case of conflict with national or international law, etc.

Annexes: negative lists, restricted activities, thresholds

Main content of a good investment law

- Investor protection and guarantees -

Good Practice Investor Protection Clauses	What does it entail?
National Treatment (NT)	Guarantee equal treatment of foreign with domestic investors
Most Favored Nation (MFN)	Guarantee equal treatment among foreign investors
Fair and Equitable Treatment (FET)	Minimum standard of treatment
Protection against Expropriation	Based on law in public interest against prompt, effective and fair compensation
Transfer of funds abroad in convertible currency	Funds, as defined in the law, can be transferred to outside the country without restrictions
Investor-State Dispute Settlement Provision	Under what conditions investors can call national and international arbitration in disputes against the state

Overview

3. What does this mean for Albania?

What changes to the existing legal framework are needed?

What does this mean for Albania?

1. Does Albania need a new investment law?

- Yes, because the current Investment Law of 1993 is obsolete;
- Yes, because a comprehensive law on investment for domestic and foreign, regular and strategic investments is more powerful;
- Yes, because the Law on Strategic Investments expires;
- Yes, because further alignment with domestic and regional policies as well as Albania's international bilateral agreements is needed.

What does this mean for Albania?

2. What changes are needed to lift the legal framework for investments to international best standard?

Issue	Law on Foreign Investment 1993	Good international practice
Scope	<ul style="list-style-type: none">• Covers only foreign investments;• Does not cover strategic investments	The Law would cover both foreign and domestic investment as well as strategic investments
Objectives	Objectives not stated	Law would state commitment to key investor rights and protections

What does this mean for Albania?

Issue	Law on Foreign Investment 1993	Good international practice
Definitions	<ul style="list-style-type: none">• Strategic investment definitions are missing;• Definitions like domestic investor, freely convertible currency, direct investment are missing;• Definitions are not aligned with Albania's BITs	The definitions of key terms were aligned with best practice and Albania's BITs; Definitions related to Strategic investors were introduced; Portfolio investments are defined.
Fair and Equitable Treatment	Mentioned in Art. 2	Elaborated in line with best practice and BITs
National treatment and MFN clause	Mentioned in Art. 2 and 6	Elaborated in line with best practice and BITs

What does this mean for Albania?

Issue	Law on Foreign Investment 1993	Good international practice
Freedom to invest	Missing	Negative list introduced to inform investors
Freedom to manage one's own Enterprise	Missing	Statement of no state interference
Access to freely convertible currency	Art. 7	Standard investor right
Right to transfer funds abroad	Art. 7	This investor right was elaborated
Access to land		An insurance to investors to access land

What does this mean for Albania?

Issue	Law on Foreign Investment 1993	Good international practice
Protection against expropriation without compensation	Art. 4 and 5	To be modernized: The right to be further elaborated, aligned with BITs and policy space for the state
Investor obligations	Missing	To balance the law, it could state that investor have not only rights but also obligations
Investment incentives	Missing	Principles for the assessment of existing and new incentives are to be set in the new law, but actual incentives are left to the specific legislation

What does this mean for Albania?

Issue	Law on Foreign Investment 1993	Good international practice
Chapter on strategic investments	Missing	A chapter on strategic investments to be introduced to make the law a comprehensive investment law.
Grievance mechanism	Missing	A grievances mechanism for investors to be introduced to solve disputes at early stage
ISDS	Art. 8	The Investor-State Dispute Resolution as stated in the existing law continue
Transition	Art. 9- 12	Some of the transitional provisions to be elaborated such as the grandfathering of existing rights

What does this mean for Albania?

3. What does alignment mean?

- Albania's BITs: Albania has 37 BITs in force that stem from 1993 to 2013. They include definitions, restrictions and investor rights on bilateral level.
- UNCTAD Investment Policy Review for the Region, 2017 : UNCTAD made recommendations to each of the six reviewed countries including Albania. The recommendations were endorsed by the Governments.
- RIA Map: **[to be added]**

Alignment with BITs

- Example: Investor Protection and Guarantees -

Good Practice Investor Protection Clauses		Albania Foreign Investment Law of 1993	Albania (43+7) – Cyprus BIT (2011)
National Treatment (NT) - guarantee equal treatment of foreign with domestic investors		Art. 2 (1) - Excluding land ownership	Art. 4 (1) and (2) – not entry, land?
Most Favored Nation (MFN) - guarantee equal treatment among foreign investors		Art. 2 (2)? – not entirely clear though	Art. 4 (1) and (2) – not entry, more elaborated
Fair and Equitable Treatment (FET) – minimum standard of treatment		Missing	Art. 3 (3)
Protection against Expropriation – based on law in public interest against prompt, effective and fair compensation		Art. 4 and 5	Art. 5 and 6 – more elaborated
Transfer of funds abroad in convertible currency		Art. 7 – with potential reservations (taxes paid)	Art. 7 – with reservations but others than FDI Law
Investor-State Dispute Settlement Provision		Art. 8 (2) – no prior consent only for exprop, discr and transfer, only ICSID	Art. 11 – no prior consent, ICSID, ICC Stockholm, ICC Paris

Alignment with the UNCTAD Investment Policy Review for the Region

UNCTAD 2017 Recommendations	Recommended changes to the Albanian law
1. Market Entry: Review market entry and establishment limitations	<ul style="list-style-type: none">1.1. Clarify restrictions that can be imposed on foreign ownership in specific industries1.2. Initiate periodic reviews of foreign ownership restrictions1.3. Pursue a policy of general openness towards foreign investment
2. Investor Protection: Review investor protection standards	<ul style="list-style-type: none">2.1. Clarify key investor protection standards including FET and full protection and security, in line with recent reform moves in IIAs2.2. Abolish open-ended stability clauses2.3. Reserve consent to international arbitration on a case-by-case basis

Alignment with the UNCTAD Investment Policy Review for the Region

UNCTAD 2017 Recommendations	Necessary changes to the Albanian law
3. The Law and IIAs: Qualify key IIA definitions and obligations	<ul style="list-style-type: none">3.1. Use modern definition of “investment” excluding portfolio investment3.2. Qualify the FET standard3.3. Qualify the provisions on expropriation, including indirect expropriation3.4. Clarify the non-discriminatory provisions such as NT and MFN3.5. Clarify the right to transfer fund and introducing list of permissible exceptions, such as BoP difficulties3.6. Improve investment dispute settlement provisions by circumscribing the ISDS mechanism and scope
4. Ensure effectiveness of fiscal incentives	<ul style="list-style-type: none">4.1. Introduce systematic cost-benefit analysis of incentives4.2. Regularly monitor compliance of incentive-receiving companies4.3. Favor incentive schemes which foster re-investment

Overview

4. Key topics

- Scope
- Grievances mechanism
- Strategic investments

Key Topics - Scope

1. The scope decides what investments are covered by the Law:
 - Foreign vs. Comprehensive Investment Law
 - Direct vs. Portfolio investment
 - Excluded sectors or activities
 - Institutional chapter (AIDA)
 - Chapter on strategic investments

Key Topics - IGM

Investment Grievance Mechanism (IGM)

- IGM is an instrument to take care of investor grievances or frustration with the state at a very early stage.
- An IGM is successful when it solves potential conflicts before they become legal disputes.
- IGM can be seen as investor aftercare service provided by the IPA or any other institution to protect and retain investments
- IGM is part of the investment climate as it impacts the host states attractiveness as investment destination:
 - Strengthens the rule of law;
 - Helps investors enforcing their rights;
 - Ensures coherent and predictable state actions.

Key topics - IGM

Inexpensive alternative

- International dispute settlement case at ICSID incurs average costs of \$4-5m per party plus \$900,000 tribunal costs (2011-2015);
- Average costs (Sub-Saharan Africa, first instance, commercial dispute) is 44.3% of the claim;

Quick alternative

- DB average duration of a court case (Sub-Saharan Africa, first instance, commercial dispute) is 655 days in average;

Effective alternative

- Provides early on solutions;
- Prevent workload for judiciary

Informal, flexible alternative

- Easily accessible
- Unorthodox ways of problem solving
- Flexible scope

Access to investor community and information on investment climate

- Useful to IPA to establish contacts with investment community
- Useful to IPA to design and provide services
- Useful for advocacy role of IPA

Key Topics - IGM

The law should address the following issues (details in regulations):

- What are the requirements to lodge a grievance?
- What institution is in charge of the procedure?
- What powers shall the institution have vis-à-vis other institutions?
- How is the process on decision-making and escalation?

Key Topics – Strategic Investment

The Law will be covering all investments including a chapter on strategic investments, which means it should:

- Define strategic sectors;
- Additional requirements for the strategic investment status (investment thresholds);
- Details on the procedure: application for, confirmation and revocation of SI status;
- Institutional responsibilities;
- Definition of potential benefits.

Key Topics – Strategic Investment

For the new Law it must be decided, what parts of the existing SI law worked and what need to be enhanced or adjusted.