



CENTRAL EUROPEAN UNIVERSITY
LEGAL STUDIES
INTERNATIONAL BUSINESS LAW
BUDAPEST CAMPUS

PROTECTION OF FOREIGN DIRECT INVESTMENT IN ALBANIA. A COMPARATIVE
PROSPECTIVE WITH BULGARIA AND ROMANIA

BY
Evgjeni BASHARI

LL.M. SHORT THESIS
COURSE: DRAFTING AND NEGOTIATING INTERNATIONAL CONTRACTS
PROFESSOR: Prof. Dr. Stefan Messmann

Central European University
1051 Budapest, Nador utca 9
Hungary

© Central European University, March 28, 2007

ABSTRACT

The thesis focus on the protection, from a legal point of view, given to foreign direct investments by Albania, in comparison with Bulgaria and Romania, as the leading countries in South-East Europe for attracting a considerable part of foreign direct investments influx. The aim is to see whether Albania has achieved to adopt the necessary legislative measures, able to protect and guarantee foreign direct investments at the same level as Bulgaria and Romania.

Through, the detailed analysis of the legal provisions for entering and treatment of foreign direct investments, the incentives and the rights foreseen for foreign investors, it is shown that there are more similarities than differences in the way the target countries treat and protect foreign direct investments. By coming to the conclusion that Albania has enacted a legislative framework that offers to foreign investors the necessary level of protection and guarantees.

Table of Content

Table of Content	1
INTRODUCTION	2
CHAPTER 1- INVESTMENT CLIMATE	5
1.1. Investment climate in Albania	5
1.2. Investment Climate in Romania and Bulgaria	9
1.3. Policy Initiative	11
1.3.1. “Albania 1 Euro”	12
CHAPTER 2- LEGAL FRAMEWORK	13
2.1. Constitutional Provisions	13
2.2. The Law on Foreign Investment	16
2.2.1. Albanian Law on Foreign Investment	16
2.2.2. Bulgarian Law on Foreign Investment	18
2.2.3. Romanian Law on Foreign Investment.....	21
2.2.4 Foreign Investment Laws remarks	23
2.3. Corporation Law	24
2.3.1. Corporation Law in Albania	25
2.3.1.1 Limited Liability Company	26
2.3.1.2. Joint-Stock Company	29
2.3.2. Corporation Law in Bulgaria	32
2.3.2.1. Limited Liability Company	34
2.3.2.2. Joint-Stock Company	36
2.3.3. Romanian Corporation Law.....	38
2.3.3.1. Limited Liability Company	40
2.3.3.2 Joint-stock Company	41
2.3.4. Corporation Laws Remarks	44
CHAPTER 3- PROTECTION OF PROPERTY RIGHT.....	46
3.1. Protection of Foreign Investor Property	46
3.1.1. Expropriation- Condition and Limitation	47
3.2. Protection of Intellectual Property Rights	50
3.2.1. Intellectual Property in Albania	50
3.2.2. Intellectual Property in Bulgaria	52
3.2.3. Intellectual Property in Romania.....	54
3.2.4. Intellectual Property Rights Remarks	55
CHAPTER 4- TRANSFER OF PROFIT AND TAXATION	56
4.1. Transfer and Repatriation	56
4.2. Tax Regime	57
4.2.1. Corporate Income Tax	59
CONCLUSION.....	61
BIBLIOGRAPHY.....	64

INTRODUCTION

The two main forms than can be chosen by foreign investors to enter the market of a host country are direct investments and portfolio equity investments¹. The difference between them consist in the fact that foreign direct investments (FDIs) are deemed to be investments which are made outside of the home country of the investing company, but the control over the use of resources transferred remains with the investor. They consist in a package of assets or intermediate products, such as capital, technology, management skills, entrepreneurship and access to markets across national boundaries². Foreign portfolio, or indirect investments involve only the transfer of money capital, which implicates changes in the ownership of investing equity.³

For the purpose of this thesis only foreign direct investments will be treated, since they are the most wide spread form, and have been object of relevant policy measures adopted not only by the governments of the developing countries, but also by those in the developed ones. As a general tendency governments have strived to adopt policies to better promote their country and to create a more business friendly environment for foreign investors. The elimination of barriers and obstacles has been in the center of the measures taken by the governments, in order to facilitate the accessibility of foreign investors in their market economies. This because, FDIs can bring several benefits to the host country, through the direct transfer of investment means, transfer of technology, know-how and management skills, they can enhance macro-and micro-

¹ Woodward David, *The Next crisis? Direct and equity investment in developing countries* at 15, (London: Zed Books, 2001).

² Dunning, J.H: *The Activities of Multinational Enterprises: Some Introductory Remarks*, Chp.1, in Dunning, JH. *Multinational Enterprises and the Global Economy* at 5 (Addison-Wesley Publishing Company, 1993).

³ Id.

economic restructuring, and can create positive externalities. All these can improve the competitiveness of individual firms and can stimulate growth in the economy as a whole⁴

The thesis will treat the legislative measures taken toward the protection of FDIs, as one of the factors that influence the decision of foreign investors to invest in the host market, a part from the degree of economic stability, macroeconomic policies, infrastructure, geographical position.

In particular, it will focus in the protection given to FDIs by Albania in a comparative prospective with Bulgaria and Romania. The decision to compare the legislation of these countries is based mainly on the fact that they all have gone through a transition period from a communist regime, with a closed planned economy, to a democratic state, based on an open market economy. This transition has required from the governments the adoption of reforms in the political- economic fields in order to establish a stable market, and to attract foreign capital necessary for the economic growth. While, Bulgaria and Romania have achieved to pass successfully the transition period by becoming EU members, and have attracted the major part of FDIs in the South-East Europe during these years, Albania still is trying to maintain a stable and functional market economy, to adopt a legislation in conformity with *acquis communautaire* and needs to attract as much FDIs as possible.

The main question will be whether Albania has achieved to adopt a legislation that protects foreign direct investments, has eliminated obstacles in order to better promote and compete for FDIs. The response will be given by comparing and assessing the legislative measures adopted by each target country, with the aim to find similarities and differences in the

⁴ Gábor Hunya, *Integration through Foreign Direct Investment, Making Central European Industries Competitive*, at 1, (The Vienna Institute for International Economic Studies, 2000).

standards of protection given to FDIs, and to see whether Albania has the necessary level of protection able to attract foreign investors.

The thesis will be structured in four chapters. In the first chapter an overall analysis of the investment climate in Albania, Bulgaria and Romania will be given with particular focus on the economic stability and FDIs data.

The second chapter will treat the legislative framework in the field of FDIs, by interpreting and comparing the constitutional guarantees provided in each legislation for foreign investors, the provisions foreseen in the special laws on foreign investments, and an analysis of the requirements and limitations for setting up and managing a company. In particular, special attention will be paid to the limited liability company and joint-stock company as the main forms of doing business in the target countries, and the highly probability that a foreign investor may decide to invest in one of these form.

The issue of protection of foreign investor property will be addressed in chapter three, which will treat a comparative interpretation of the provisions related with the protection of the property against expropriation, the protection of intellectual and industrial property rights given to foreign investors by the legislation of the target countries.

The fourth chapter will discuss the right of the foreign investors to repatriate their profits, the tax regime, with particular focus on the corporate income-tax, as incentives for attracting foreign investors.

The last part will be dedicated to the conclusions and recommendations, in which a final evaluation of the position of Albania in protecting FDIs, in comparison with Bulgaria and Romania will be discussed, with possible recommendations for the enactment, or amendment of new legislative measures.

CHAPTER 1- INVESTMENT CLIMATE

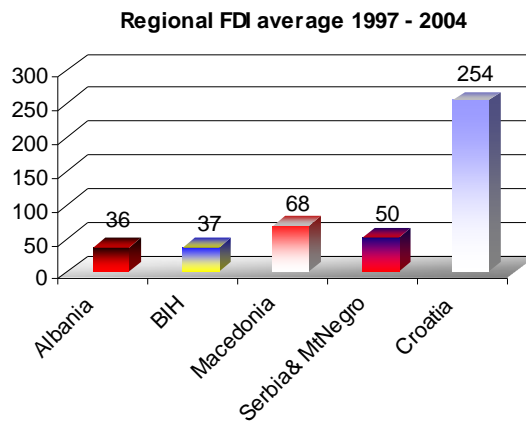
1.1. Investment climate in Albania

In June 2006 Albania signed the Stabilization Association Agreement, which has led it a step further in its long process of integration in the European Union. Even if it has been seen as an important event for the country, many obligations in the politic, economic, and legislative fields are required from the Albanian Government to be fulfilled in as much shorter period as possible.

Establishing a functional and stable market economy is one of these requirements, which has engaged the government in the adoption and implementation of relevant micro and macroeconomic policies. Due to this, on the macroeconomic prospective Albanian's economy⁵ reflects a steady growth averaging of 6% each year for the last five years, with inflation rate under control for over seven years between 2 and 3 percent, and with an unemployment rate decreasing in average with 0.5% each year.

Nevertheless, the influx of FDI has been at very low levels compared with the Region. According to the National Statistic Data in the period 1997-2004 Albania has achieved to gain only an average of 36 Euros per capital of FDI, while Croatia has been the most successful country with 254 Euros per capital, followed by Macedonia with 68 Euros.

⁵ Albanian Agency for Business and Investment (Albinvest) report on "*Investment Climate in Albania*" June 2006, published in <http://www.albinvest.gov.al> (last visited in February 2, 2007).

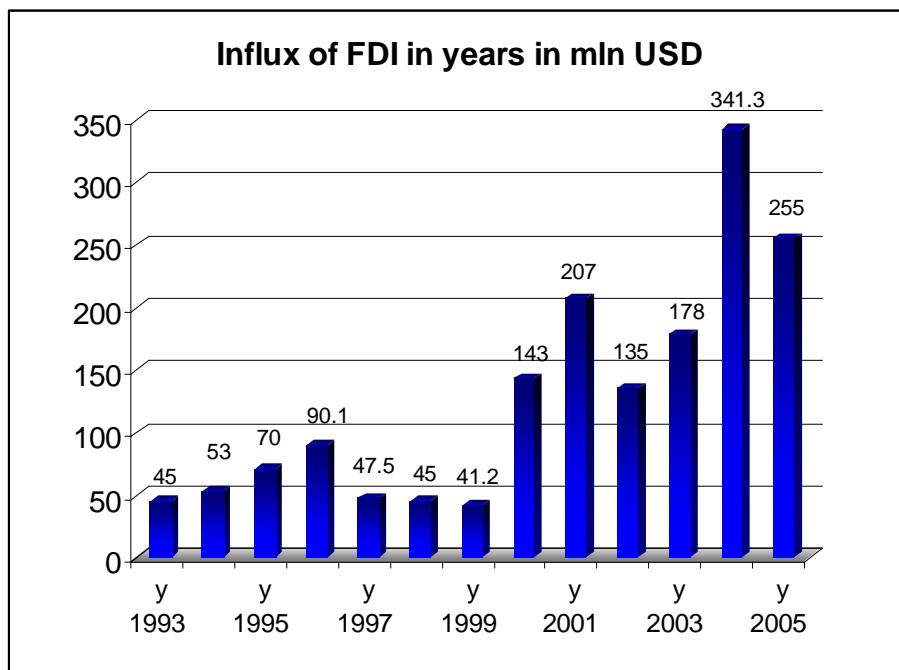


The low level of FDI can be attributed basically to⁶:

- problems of ownership on the land and conflicts, bureaucratic procedures for the registration of the ownership titles, for the approval and granting of construction permits;
- slow privatization process , medium and big enterprises of the state in the industrial sectors with intensive capital and strategic sectors such as energy, telecommunication;
- perception of a political and economic risk of the country from the potential foreign investors;
- poor functioning of the public institutions, corruption, trafficking and poor implementation of law;
- absence of efficacy and high cost of infrastructure. Although, there exists a law providing for the establishment of free zone and industrial parks, so far there has neither been any free zone, nor industrial park;
- Insufficiency of financial, banking, non-banking services (low level of crediting, low quality of financial services for international commerce, high rate of interest).

⁶ Albanian Economic and Fiscal Programme, at 59-60, (Tirana 1 December 2006).

The total amount of FDI in the recent years, as reported from the Bank of Albania in the charter below, has increased steadily coming to the considerable degree of 341 million USD during 2004.⁷ In 2005, FDI decreased to 255 million USD due to the effect of absence of privatization, but according to the forecast of the Ministry of Economy, Trade and Energy they should achieved a level of 400 million USD in 2006.⁸



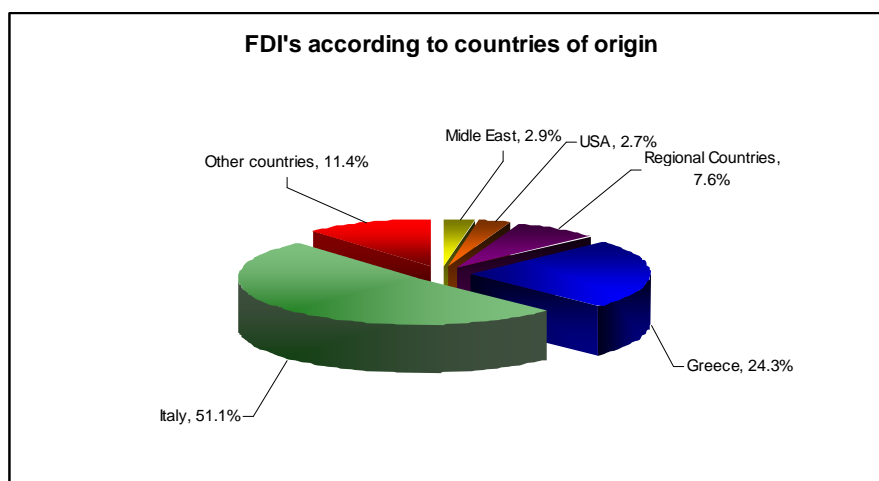
Source Bank of Albania

Regarding the origin of FDI, Italy and Greece preserve a prevailing position, since 51% of the enterprises of direct investments are with participation of foreign Italian capital and 24 %

⁷ The influx of FDI reached the highest level in this year due to the largest-ever privatization concluded by the Albanian Government with the Austrian Raiffeisen Zentralbank for the acquirement of the full ownership in the Savings Bank, the largest commercial bank in Albanian in that period.

⁸ Albanian Agency for Business and Investment (Albinvest) report on “*Investment Climate in Albania*” June 2006, published in <http://www.albinvest.gov.al> (last visited in February 2, 2007).

with foreign Greek capital. As it can be seen from the graphic below Turkish and American capital are next on the row with respectively 4 and 3 percent⁹.



Source Bank of Albania

On a geographic point of view foreign investors have concentrated their investment mainly in the zone with the highest revenues and developed infrastructure. Thus, the Capital has attracted approximately 52 % of FDIs, with the rest allocated in the western part of the country. The internal central part and the eastern-northern part are the less interesting for foreign investors due to the undeveloped infrastructure, the missing marketing, and the lack of the qualified labour, since the internal and external migration is concentrated particularly in these parts of the country¹⁰.

⁹ Albanian Economic and Fiscal Programme, at 57, (Tirana 1 December 2006).

¹⁰ Albanian Economic and Fiscal Programme, at 59, (Tirana 1 December 2006).

1.2. Investment Climate in Romania and Bulgaria

Romania and Bulgaria, from January 1, 2007 have become EU member states, by achieving to meet the political, economic and *acquis* standards of EU membership. Both countries have successfully implemented the necessary political, economic and social reforms, in order to overcome the transition period from communist regime and closed economies into democracy and well functioning market economies.

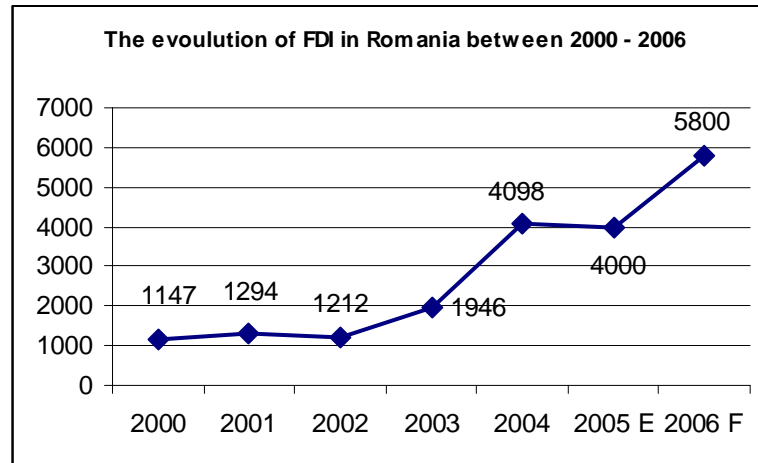
According to the information provided by The Economist Intelligence Unit, Romania and Bulgaria during the period 2003-2005 have had an average GDP growth respectively of 6.2% and 5.3%, and have maintained an average inflation of 4.3% and 12.0%.

Regarding the foreign direct investments both countries have attracted the interest of a considerable number of foreign investors, by absorbing a relevant part of the FDI's influx in the region. They were the main recipients of FDI inflows to South-East Europe (SEE) and together accounted for more than one fifth of the regional total FDI inflow and for more than 70% of the South-East European subtotal¹¹.

Thus, according to estimates of IntelliNews, which corroborates data from regional central banks, Romania ranks second in the SEE region considering total FDI inflows by the end of 2005 with an estimate amount of 4 billion of EUR¹². In addition, as reported from the Romanian Agency for Foreign Investments, this amount is forecasted to increase during 2006 by reaching a level of 5.8 billion of EUR.

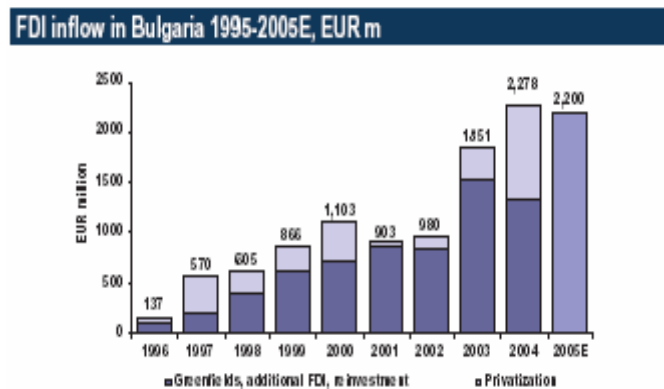
¹¹ United Nation Conference on Trade and Development (UNCTAD), *World Investment Report 2005, Transnational Corporations and the Internalization of R&D*, (Geneva, 2005).

¹² Larive Romania, *Foreign Direct Investment in Romania*, at 1, (September 2006, published in www.doingbusiness.ro (last visited, February 10, 2007))



Source ARSI Invest – The Romanian Agency for Foreign Investment

Meanwhile, also the FDI tendency in Bulgaria, as can be seen from the graphic below, has increased during the years, by reaching the estimate level of 2.200 million of EUR in 2005.



The main factors that make both Romania and Bulgaria the most attractive countries for foreign investors are:

- Political and economic stability which haven led the countries toward their accession in the EU.
- Market dominance, with Romania being the second largest market in the CEE region.

- Implementation of privatization reforms, and adoption of legislative framework with low market entry barriers.

- Favorable geographic position between the East and West of Europe.

1.3. Policy Initiative

The Albanian Government, in its Economic and Fiscal Program 2006, has identified the structural reforms which are programmed to be implemented during 2007-2008, aiming at macro-economic stabilization, and ensuring a high economic growth, as well as the establishment of a regulatory framework and sector policies in accordance with the European standards.

In relation to the FDI the main objective is the increase of the influx by accelerating the process of privatization and concessions, setting up of industrial parks with the necessary infrastructure and services decreases costs of investment, strengthening of the capacity of promoting and implementing capacities of the strategies and governmental policies in the field of inciting business and investments¹³.

In addition, one of the Government's priorities in the achievement of this objective will be the promotion of the image of Albania as the most attractive country for the investment in the region. For this reason the new "Albanian 1 Euro" initiative has been initiated.

¹³ Albanian Economic and Fiscal Programme, at 56, (Tirana 1 December 2006)

1.3.1. “Albania 1 Euro”

“Albanian 1 Euro” initiative was launched by the Prime Minister on August 2006 with the goal to make Albania the most attractive location for foreign investment in the region by offering overseas firms entry to the Albanian market literally for “1 Euro”.¹⁴

As reported by the representative of Albanian Agency for Business and Investment (Albinvest), which will have an important role as an intermediary between foreign investors and the government in the promotion and implementation process, this is a brilliant idea of marketing aiming to steer the attention toward the real concept: *“What the government wants to sell isn’t really one Euro, but it’s the option; what the concerned person is going to get is the option itself that Albania is offering in investing”*.¹⁵

The initiative consists in the adoption of a whole legislative and institutional reform, aiming to identify the state owned properties, such as assets, natural resources, which are not operating, and can be offered to foreign investors toward a symbolic price. Since it is a new initiative, currently all the Ministers are reviewing their policies related to public assets and the Ministry of Economy is working in establishing the necessary criteria for adopting the initiative based on the investment, production and the number of employees¹⁶.

¹⁴ <http://www.albinvest.gov.al/dokumenti.asp?id=371&kujam=96&menu=96>. (last visited January 28, 2007)

¹⁵ Id.

¹⁶ Id.

CHAPTER 2- LEGAL FRAMEWORK

2.1. Constitutional Provisions

The transition period, in both the target countries, from a communist regime into a democratic one has been accompanied with the adoption of new constitutions based on the principles of rule of law, separation of the legislative, executive and judicial powers, protection of fundamental human rights, establishment and functioning of constitutional institutions only upon specific laws, and the principle of market economy. The latter is a relevant guarantee for local or foreign entrepreneurs, since it restricts the state intervention in economic activities by allowing the former to make their own strategic decisions of production, distribution and prices, in order to succeed in markets driven by the supply and offer forces, and fair competition rules.

Thus, the Albanian Constitution, which was adopted by a popular referendum in November 1998, foresees that the economic system in the Republic of Albania is based on private and public property, as well as on a market economy and on freedom of economic activity.¹⁷ Also, the Bulgarian Constitution¹⁸ in its Article 19 provides that the economy shall be based on free economic initiative, with the obligation of the state to establish and guarantee equal legal conditions for economic activity to all citizens and corporate entities by preventing any abuse of a monopoly status, unfair competition and by protecting the consumer.

Furthermore, in the Romanian Constitution it is foreseen that the economy is a free market economy, based on free enterprise and competition, and the State shall secure a free trade,

¹⁷ Article 11, The Constitution of The Republic of Albania, adopted November 1998.

¹⁸ The Constitution of Bulgaria was adopted on 12 July 1991, and was amended by the Parliament in February 2005.

protection of fair competition, provision of a favorable framework in order to stimulate and capitalize every factor of production¹⁹.

Analyzing further the constitutional provisions in general all the target countries have tried to protect at the same level the human rights and economic rights for both local and foreign physical or legal persons. Nevertheless, there is an important difference regarding the treatment of the ownership right, which can be seen as a barrier for foreign investors. In Bulgaria and Romania some constitutional restrictions are foreseen for foreigners who cannot gain direct ownership on land.

According to Article 22 of the Bulgarian Constitution foreigner, whether physical or in the form of a legal entity, cannot acquire ownership over land, he can only gain limited property rights such as the right to use, to build or rights on terms established by law. Since, this restriction is not applied to Bulgarian companies the only way in which a foreign person can get full ownership, including ownership rights on agricultural land, is to set up or joint a company incorporated under the Bulgarian legislation²⁰. The country accession in EU has led the Parliament in 2005 to amend the basic law in order to liberalize the restrictive regime for acquisition of land by foreigners. According to the amendments foreign individuals and legal entities will be permitted to acquire and own land only in three ways: 1) by being EU citizens that reside in Bulgaria, or if they are self-employed persons having permanent residence in Bulgaria and carry out agricultural activity in the country; 2) by virtue of a ratified international treaty; 3) in case of *ex lege* inheritance²¹.

¹⁹ Article 135, The Constitution of The Republic of Romania, adopted on 8 December 1991, and revised on 29 October 2003.

²⁰ <http://investbg.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0056&n=000001&g=> (last visited January 28, 2007)

²¹ Id.

As can be seen, under the new regime some restrictions have been abolished, but they are applied for a specific category of foreigners. Thus, only EU citizens who fulfill the conditions stated above, or foreigners who may fall under the provisions of international treaties ratified by Bulgaria, or those who may have an *ex-lege* inheritance, are now allowed to gain direct ownership on land. The rest of foreigners are still under the conditions of the old regime, by having the possibility to gain only indirect ownership, which puts them in a less favorable position.

Romania has also provided for restrictions on a constitutional level to the right of foreigners to gain full ownership on land. According to Article 44 of the Constitution foreign citizens and stateless persons shall acquire the right to private property of land only: 1) under the terms resulting from the Romania's accession to the EU; 2) international treaties in which Romania is a party on a mutual basis; 3) under the terms stipulated by an organic law; 5) lawful inheritance. Thus, also under the Romanian regime only those foreigners who may fall under one of the five conditions can gain direct ownership, by preventing the rest from this opportunity.

Furthermore, under the Romanian law, foreign investors involved with commercial companies having any foreign capital may acquire land or property necessary for fulfilling or developing the company's corporate goals, but in case of dissolving or liquidation, they must sell the land back within one year of the company's closure and only to buyer(s) with the legal right to purchase such assets.²²

In contrast, with Bulgaria and Romania, there is no restriction on constitutional level for foreigners to acquire direct ownership on land in Albania. They, whether being in the form of a physical person, or legal one, have the same constitutional rights, freedom and obligations as

²² U.S. Department of State Report on 2006 *Investment climate statement- Romania*, published in <http://www.state.gov/e/eb/ibd/2006/62373.htm> (last visited in February 2, 2007)

Albanian citizens, except in cases when the Constitution specifically attaches the exercise of particular rights and freedoms with the Albanian citizenship²³. Nevertheless, some restrictions on legislative level have been in force from 1991 till 1996 due to the enactment of the Law “On the sanction and protection of private property, free initiative, independence private activities and privatization²⁴”. According to Article 21 of the latter foreigner physical or judicial persons could have hired land for a period of 49 years from local physical or judicial persons subject to a specific contract. But in 1996 the Parliament amended this article by allowing foreigner physical or judicial persons to buy land for building, to dispose it to third parties and to hire land in accordance with the Albanian legislation.²⁵

2.2. The Law on Foreign Investment

2.2.1. Albanian Law on Foreign Investment

Foreign investments in general terms are regulated by a specific law²⁶, which provides for the basic principles of entrance and treatment of foreign investors. According to the law the latter can freely enter the market, since no prior authorization is needed, and are treated on conditions not less favorable than those provided for domestic investors under the same circumstances.

Investments in all the cases are treated in an equal and impartial way, are fully secured, and in all the cases foreign investments are treated no less favorably than that secured by general norms of international law²⁷.

²³ Article 16, The Albanian Constitution.

²⁴ Law No. 7512, August 18, 1991

²⁵ Article 2, Law No. 1632, on some amendments on the Law No. 7512, Date 10.08.1991 “On the sanction and protection of private property, free initiative, independence private activities and privatization”, date 1.11.1996.

²⁶ Law No 7764. on Foreign Investment, dated 2.11.1993.

²⁷ Article 2, Law No 7764. on Foreign Investment, dated 2.11.1993.

The law considers foreign investment²⁸ every kind of investment in the territory of The Republic of Albania whether directed or in directed owned by a foreign investor, which consist of:

- a) movable or immovable assets, tangible or intangible or any other kind possession;
- b) a company, stock shares in a company and any form of participation in a company;
- c) loans, financial obligations or obligations in an activity that has economic value and that is connected with an investment;
- d) intellectual property;
- e) every right given by law or contract, and every license or authorization given in accordance with the laws.

In addition, a foreign investor for the purpose of the law must be consider every physical person that is a citizen of a foreign country, or that is an Albanian citizen but has always resided abroad, or every legal entity founded in accordance to the laws of a foreign country, which directly or indirectly seeks to carry out or is carrying out an investment in Albania, or has carried out investment that have taken effect since 31.07.1990 to the present²⁹.

Foreign investments are protected against expropriation and nationalization, and in any case the law provides for compensation.³⁰ Furthermore, a foreign investor is protected and treated in no less favorable manner as a local one in case of losses due to war, armed conflicts, state of national emergency, or other similar events.³¹ The former has the right to transfer out of the territory of Albania all assets related to a foreign investment, and in case when any other

²⁸ Article 1, Law No 7764. on Foreign Investment, dated 2.11.1993.

²⁹ Id.

³⁰ The legal bases and the criteria for expropriating and nationalizing foreign investments, will be treated with more details in the following chapter.

³¹ Article 6, Law No 7764. on Foreign Investment, dated 2.11.1993.

international agreement or treaty which has been ratified by the Parliament will provide for a greater rights or protection he will benefit for such protection.³²

2.2.2. Bulgarian Law on Foreign Investment

Foreign Investments in Bulgaria are regulated by two main acts The Law on Encouraging Investments (The Law) and The Rules and Regulations for the implementation of the Law on Encouraging Investments (The Rules).³³ According to the Law a foreign investor is a corporate entity not registered in Bulgaria, a company that is not a corporate entity and is registered abroad, or a natural person- foreigner permanently residing abroad³⁴. In addition, for the purpose of The Law a foreign investment must be considered any investment or increase of investment of foreign persons or their branches into:

- a) shares of commercial companies;
- b) acquisition of title on buildings or limited property rights over real estates;
- c) acquisition of title or limited property rights over capital assets necessary for production or provision of services (e.g. equipment);
- d) title to separated assets of commercial companies with more than fifty per cent state or municipal interest in their capital as per the Law on Privatization or Post-Privatization Control;

³² Id. art 7 and 9.

³³ The first act being of substantive nature is promulgated in 1997, and since then has been amended several times, the second being of procedural nature is promulgated in August 2004 and amended in April 2005. As quoted in the work of Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 231, (European University Press, Bochum-Germany 2005): The word “foreign” was removed from the title of The Law in order to encourage and protect not only foreign but also local investments.

³⁴ Supplementary provisions of Law on Encouraging Investments, promulgated in State Gazette No.97/97, amendments published in the State Gazette No. 40/04.

- e) securities, including bonds and treasury bills, as well as derivatives instruments, issued by the state, municipalities or other Bulgarian corporate entities, with maturity not less than six months;
- f) credits, including financial leasing for a period not shorter than twelve months;
- g) intellectual property rights, including but not limited to copyrights and its related rights, patentable inventions, utility models, trademarks, service marks and industrial designs; or
- h) rights under concession contracts and management contracts.³⁵

The basic principles of The Law are the national treatment and the “most favored nation status”. The first entitles any foreign investor, who is going to invest in the country, to the same rights as a local one, while the second provides for the application of international agreement, to which Bulgaria is a party, that has the most favorable conditions for carrying out economic activity by foreigners.³⁶ Under the national treatment the tendency is to protect and to encourage foreign investments at the same level as the national one, nevertheless a characteristic of the Law is the differentiated treatment among the investments.

Thus, investments are divided in classes and the application of preferential measures depends upon the fulfillment of four conditions and the participation in an investment class. According to the Law preferential treatment measures will be applied to:

³⁵ Article 6/1 of Supplementary provisions of Law on Encouraging Investments, promulgated in State Gazette No. 97/97, amendments published in the State Gazette No. 40/04.

³⁶ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 233, (European University Press, Bochum-Germany 2005)

- (i) investments that are in the form of acquisition of equipment with the purpose of creating new, or enlarging or modernizing existing production of goods and/or provision of services;
- (ii) new jobs are being created;
- (iii) the period for the realization of the investments is up to three years; and
- (iv) the investment will not be made into banks, other financial institutions, insurance companies, investment intermediaries, investment companies and companies with special investment purpose, managing companies, pension and health insurance companies, or gambling activities.³⁷

In Article 2 of the Rules depending on the size investment may fall in the first class if the amount is 70 million BGN, in the second class if the amount is from 40 million to 70 million BGN, or in the third class if they are between 10 to 40 million BGN.

In order to be part of a class and to have a preferential treatment a certificate must be issued from the Executive Director of the InvestBulgaria Agency, or thereby authorized official, after the submission of the request from the Investor together with the documentation foreseen by the Rules³⁸. The Certificate entitles the investor to has administrative services from the central and territorial executive authorities, and local self- government. In addition, general preference rule applicable to all classes of investments is the shortening of time for administrative service to one third in order to realize the investment plans.³⁹

³⁷ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 237 (European University Press, Bochum-Germany 2005).

³⁸ Chapter 2 of the Rules , first section foresees the procedure for issuing and the content of the certificate, in particular Article 4 provides the a list of documents that an investor must submit.

³⁹ See supra note 37, at 238.

2.2.3. *Romanian Law on Foreign Investment*

Direct investments in Romania are regulated by the Law on Promotion of Direct Investments with Significant Impact on Economy (The Law), promulgated by the Parliament in 2001, and further amended by the Fiscal Code in 2003. The provisions of the Law are applicable only to investments that fulfill the following conditions:

- have a value that exceed the equivalent of 1 million US dollars;
- are made in the forms and ways foreseen in the Law;
- have a considerable contribute in the development and modernization of the economic infrastructure, with a determine spin-off effect in economy;
- create new jobs;
- are made after the coming into force of the present Law by natural or legal persons subject of private law.⁴⁰

Investments can be made in all economic sectors, on the conditions that they do not infringe environment protection, are not against the interests of security and national defense, and do not affect the public order, health or morality. Nevertheless some sectors such as financial, banking, insurance, re-insurance, and sectors regulated by special laws, are not opened toward new direct investments with significant impact on economy⁴¹.

The two main principles of treatment foreseen in the Law are the national treatment and the application of one legal regime of facilities. According to the first principle all investments are subject to equality of legal treatment regardless the origin of the capital foreign or local. While, the second principle obliges the investor to chose a single set of facilities corresponding to only one legal regime; either the application of the Law for direct

⁴⁰ Article 1, Law No. 332/01 on Promotion of Direct Investment with Significant Impact on Economy, amended by the Fiscal Code in 2003.

⁴¹ Id. Art 4.

investment with significant impact on the economy, or SME regime, or Micro- enterprise, or Free Trade Area, or Disadvantaged Zone regime.⁴²

The set of incentives foreseen in the Law are as following:

- imported machinery, installations, measurement, control and other equipment, automation and software products deemed as new assets, are exempted from customs duties;
- new investments shall have a deduction of 20% of their entry value in the books. The deduction is to be made in the month when the investment is made;
- new investment shall benefit from the application of accelerated depreciation as defined and regulated in the Fiscal Code;
- an exception up to three years for the tax on real estate may be granted from the local councils⁴³.

Nevertheless, a part from the incentives the Law provides for some penalties in case when the companies that have benefit from the facilities regimes are winded up voluntary within 10 years, or when the investor decides to alienate the goods which had been excepted from the customs duties within 2 years from the date of their bringing into Romania or from their purchase. Thus, as for the first case companies have to pay all due taxes according to the law, for the entire functioning period of investment, as well as all penalties for delays in payment of taxes and duties that would have been compulsory to be paid in the absence of incentives.

While, in the second case the investor will have to pay the counter-value of the incentives

⁴² Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 886, (European University Press, Bochum-Germany 2005).

⁴³ Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 888, (European University Press, Bochum-Germany 2005).

granted, as well as the penalties for delays in payment of taxes that would have been compulsory to be paid in the absence of incentives⁴⁴.

2.2.4 Foreign Investment Laws remarks

Comparing the special laws on investments in Albania, Bulgaria and Romania it can be seen that both countries have tried to adopt provisions that give to foreign investors the guarantee of protection of their investments. Thus, as a general principle a foreign investor will be treated in the same level as a local one, by having the same rights towards the protection of investment. In addition, both Albanian and Bulgarian legislations provide that foreigner will benefit from the provisions of international agreements, in which the countries are parties, in case when they foresee a better protection. In contrast, the Romanian legislation doesn't provide in an explicit way the principle of "most favored nation status" by requiring an investor to choose between different legal regimes, and to benefit only from the facilities provided within it.

The Albanian law on foreign investment is more general in its terms and provisions, by being applicable to all the investment that fall within the definition foreseen in the law, and by providing the same treatment to all foreign investors. There is no need for a specific authorization or certificate to enter the market, and investments in spite of their amount or scope are treated in the same way and are subject to the same incentives.

In contrast, the Bulgarian and Romanian legislations are more detailed and provide for a different treatment among foreign investments. Thus, the Bulgarian legislation is a body of laws being of substantive and procedural nature in which investments, depending on the total amount,

⁴⁴ Article 18, Law No.332/01 on Promotion of Direct Investment with Significant Impact on Economy, amended by the Fiscal Code in 2003.

are divided in three classes. A certificate is necessary to be taken, in accordance with the procedure provided in the Rules, in order to benefit from the preferential treatment of administrative services and incentives allocated to each class.

The Romanian law is limited in its scope, since it is applicable only to direct investments that are deemed to have an important impact on the economy by fulfilling the conditions stated above. In addition, the incentives foreseen by the law are valid only toward foreign investors that have decided to be treated under its regime by preventing them to benefit from other regimes. Moreover, a characteristic of the law is the provision of penalties, aiming to protect the state in relation to investors that may want to speculate with the incentives granted to them.

2.3. Corporation Law

Foreign Direct Investment occurs when a parent company is holding a substantial part of equity, either by setting up a subsidiary through acquisition of an already existing company, or through establishment of *Greenfield* company, or in the form of a joint venture, in the company that is located on the foreign market⁴⁵. Thus, getting familiar with the legislative framework of setting up and operating a company in the host country is a relevant process in the decision of foreign investors. In this subchapter I will treat in general terms the corporation laws of Albania, Bulgaria and Romania, with particular focus on two types of business the limited liability company and the joint-stock company. The decision to treat the latter forms in more details rests upon the fact that they are the most common ways of doing business in the target counties, and is highly probable that a foreign investor may decide to invest in one of them.

⁴⁵ James A. Dobkin, Jeffrey A. Burt, Kenneth J. Krupsky and Mark J. Spooner, *Joint Ventures with International Partners*, at 2-4, (Butterworth Legal Publisher, 1995), quoted in the PHD Thesis Catalin R. Tripon *Foreign Direct Investment in Romania*, at 34, (CEU, February 2003).

2.3.1. Corporation Law in Albania

The main legal act that regulate the process of starting and running a business in Albania is The Law No. 7638 on Commercial Companies date 19.11.1992⁴⁶, according to which the forms of business organizations are:

1. general partnerships,
2. limited partnerships,
3. limited liability company and
4. joint-stock company.⁴⁷

Nevertheless, there is another form of partnership, which is not regulated by the provisions of the Law No. 7638, but is included in the Civil Code such as the Simple Partnership⁴⁸. The latter is deemed to be a contract between two or more people who agree to exercise an economic activity, with the purpose of dividing the profits gained from it. As a general consideration a partnership is simple when its does not show the distinguished characteristic of the commercial companies regulated by the Commercial Code.⁴⁹

A company may be founded by two or more persons who agree by means of a contract to put their resources or services in a joint enterprise, with the aim to divide the profits, or to profit from the incomes that might come from it. As an exceptional case, when a specific law so provides, a company may be found by an act of will of a single persons. The forms of business foreseen in the Law No. 7638 gain their commercial nature due to the form independent of their purposes⁵⁰.

⁴⁶ The Law No. 7638. on Commercial Companies, dated 19.11.1992 in this subsection will be referred as the Law No. 7638.

⁴⁷ Dauti Ylber, Part one *Albania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 62, (European University Press, Bochum-Germany 2005).

⁴⁸ The Simple Partnership is regulated by Chapter YXII of The Albanian Civil Code, article 1074-1112.

⁴⁹ Id. Art 1075.

⁵⁰ Article 1, 2, The Law No. 7638. on Commercial Companies, dated 19.11.1992.

In order to be able to gain rights and to have obligations a company must take judicial personality by entering in the trade register, which in case of Albania is a centralized one allocated near The Court of First Instance in Tirana. The registration process starts by filing the registration request with the “Office for the Registration of Companies” and obtaining a registration number. In a random procedure a judge of the commercial section near the Court of First Instance in Tirana is appointed, who will evaluate the articles of incorporation and the bylaws, together with all the necessary documents required for that particular form of business, and in the case when all the legal requirements are met he will issue a decision for the registration of the company.⁵¹

Nevertheless, according to Article 6 of the Law No 7638, a company after the registration and foundation may take over the rights and obligations that have been acquired by persons who have acted in the name on the company to be formed, which are deemed to have been accepted as of the time of its origin. In the case when the company doesn't take over in an explicit way the obligations the persons who have acted in its name, will be collectively liable towards third parties.

2.3.1.1 Limited Liability Company

A limited liability company (LLC) may be established by one or several partners who are responsible for losses only up to the limit of the value of their contribution to the starting capital. In case when a LLC is founded by only one partner, he will be called the “sole partner” and will have the powers which are designated for all the partners by the provisions of the Law No. 7638. The name of the company must be unique, and may include the name of one or more of the

⁵¹ The process of registration, in more details, is regulated by Article 19 of the Law No. 7632, on the Provisions that regulate the first part of the Commercial Code date 4.11.1992

partners, but in any case must be followed by the words “limited liability company” or the initials “ShPK (*shoqeri me pergjegjesi te kufizuar*)”⁵².

The Law No. 7638 requires a minimum capital of 100.000 leke in order for a LCC to be established, which must be divided in equal shares with a nominal value not less than 1.000 leke. This minimum must be preserved during the whole life of the company, and in case of reduction the partners may decide either to transform it in another form, or to increase the capital at least to the previous level⁵³.

The capital may be formed either from contribution in cash or in kind, by excluding the possibility of contributions in services. In case of the starting capital all the shares must be subscribed in their entirety by the partners, and must be paid completely when they represent contributions in kind and in cash⁵⁴. In addition, when the contributions are made in kind a report estimated the value must be attached to the statute, which must be drawn by an expert on contributions appointed unanimously by the future partners, or by the court when one of the future partners have so requested. If there has been no expert on contributions or if the value is greater than the value proposed by the expert, the partners will be collectively responsible for five years, to third parties, for the entire specified amount of the contribution during the period that the company has been established.⁵⁵

The LLC is governed by two organs the Administrator/s and the General Meeting of Partners. According to Article 50 of the Law No. 7638 Administrator/s are appointed by a decision of partners that hold more than one-half of the shares in the initial capital, within or outside the group of partners, and are responsible for the management of the company. They can

⁵² Article 37 The Law No. 7638. on Commercial Companies, dated 19.11.1992.

⁵³ Id. Art 38.

⁵⁴ Id. Art 40.

⁵⁵ Id. Art 42.

be only physical persons, and in absence of relevant provisions in the statute, are appointed for the entire period of the existence of the company. Toward the partners, the administrator/s have the powers specified in the statute of the company, and in the case when the statute does not specify these powers, Article 16 of the Law No. 7638 will be applied.

In relation to third parties, the administrator/s have the necessary powers to operate in the name of the company, in all the circumstances expect for those which the law expressly assigns to partners. In addition, under the Albanian legislation, the company is liable towards third parties for the actions of the administrator/s, even when these actions are not included in the purpose of the latter. Nevertheless, the company is not responsible in cases when it can be shown that the third parties knew or could not have been unaware that the actions of the administrator/s were in excess of the purpose of the company⁵⁶.

The General Meeting of Partners is the organ through which every partner takes part in the decision making process, with a number of votes which are equal to the shares of starting capital. He can be represented by another partner, and can be represented by another person only if the statute so allows. The meeting may decide upon-among other things- the following issues and in the following manner⁵⁷:

- i) decisions for statutory changes require the approval of the partners that own at least three-fourth of the registered capital, unless the corporate charter requires a higher majority;
- j) decisions for capital transfers require the approval of the majority of the partners who own at least tree-fourth of the registered capital;

⁵⁶ Article 50, The Law No. 7638. on Commercial Companies, dated 19.11.1992.

⁵⁷ Dauti Ylber, Part one *Albania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 77-78, (European University Press, Bochum-Germany 2005).

- k) decisions to appoint and dismiss the administrators require the approval of the partners that own more than half of the registered capital;
- l) decision to decrease the subscribed capital requires the approval of the majority of the partners that own at least three-fourth of the registered capital;
- m) decision to transform the company into another type of business organization, other than joint-stock company form, requires the unanimous approval of the partners;
- n) decision to transform the company into a joint-stock company requires the approval of the majority of the partners that own at least three-fourth of the registered capital, provided that the company has already approved the balance sheet for the last two recent years of its activity.

2.3.1.2. Joint-Stock Company

Joint-Stock Company is a company which capital is divided in stock, and may be established by one or many shareholders, who are responsible for losses only upon the amount of contribution in the initial capital. The company must have a unique name, which must be followed by the designation “joint-stock company” or ShA (*shoqeri anonime*)⁵⁸.

There are two forms of joint-stock companies foreseen in the Albanian legislation; the public joint-stock company and the private joint-stock company- which differ mainly from the amount of the minimum initial capital requirement and the types of stock than can be issue. While the former form requires a minimum capital of 2 million leke, and has the stocks register on the stock market, beginning from the date of registration, or may sell the stock through banks,

⁵⁸ Article 74, The Law No. 7638. on Commercial Companies, dated 19.11.1992.

financial institutions, stockbrokers, the latter form requires a minimum capital of 10 million leke, and the stocks are not offered to the public⁵⁹.

The capital for both types of joint-stock can be formed through contribution in cash, or in kind, by excluding any contribution in services. It must be subscribed completely, and at the time of subscription, at least one-fourth of the nominal amount of the stocks for contribution in cash must be paid, while contributions in kind must be paid completely at the time of subscription⁶⁰.

The Law No. 7836 provide for a two-tier system by requiring the existence of The Board of Directors and the Supervisory Board, a part from the General Meeting of Shareholders, as organs of both public and private joint-stock companies.

In Article 96 it is foreseen that the Board of Directors may be composed by one or more members, and in the case when the capital of the company is more than 5 million leke at the time when the board is appointed, it must have at least two members, unless it is provided otherwise in the statute. The members of the Board are appointed from the Supervisory Board, and they can be only physical persons, chosen either from the shareholders or outside their group⁶¹. The length of term of the members in the Board may be set in the statute from two to six years, and if the statute doesn't provide explicitly for this the term will be four years. Members of the Board can be removed from the Supervisory Board, and only for the legitimate reasons foreseen in the law⁶². They are in charge with the management of the company, and have full powers to operate in all the circumstances in the name of the company, except in cases when the law expressly gives those powers to the Supervisory Board or to the General Meeting of the Shareholders. In relation to third parties, the actions of the Members of the Board bind the company even if they are

⁵⁹ Id. Art. 75-76.

⁶⁰ Article 80, The Law No. 7638. on Commercial Companies, dated 19.11.1992.

⁶¹ Id. Art. 97.

⁶² Id. Art 98-99.

outside its purpose, unless it can be proven that the third parties knew or should have known that the actions were in exceed of powers conferred to them⁶³.

The Supervisory Board is responsible for the continuing supervision of the manner that the Board of Directors manages the company. It has the right to carry out, at any time, verification and monitoring operations which it considers to be reasonable and to try to become informed by means of documents which it believes to be necessary for carrying out its duties⁶⁴. In Article 104 it is foreseen that the number of the members in the Supervisory Board should not be less than three, and no more than twenty-one, in any case it should be a number than can be divided by three. Members can be both physical and judicial persons, but they can not be members of the Board of Directors. According to the Law, the shareholder hold two-third of the seats of the Supervisory Board, or their representatives and one-third are held by the employees⁶⁵. The chairman and the vice-chairman are elected by the Board itself, and decision may be taken only when half of its members are present in the meeting.⁶⁶

The General Meeting of Shareholders is held when it is required by the Supervisory Board, or the Board of Directors, and in their absence when it is convoked by the certified public accountants, a proxy designated by the court at the request of the party concerned, in any emergency, or at the request of one or more shareholders that control together at least 1/10th of the starting capital, or by the liquidator⁶⁷. It can be either ordinary or extraordinary depending on the issues that the shareholders are called to decide. Thus, in an ordinary meeting shareholders may decide upon any issue that the law doesn't require an extraordinary one, with the most

⁶³ Id Art 101.

⁶⁴ Article 103 The Law No. 7638. on Commercial Companies, dated 19.11.1992.

⁶⁵ Dauti Ylber, Part one *Albania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 74, (European University Press, Bochum-Germany 2005).

⁶⁶ Article 117 and 105, The Law No. 7638. on Commercial Companies, dated 19.11.1992.

⁶⁷ Id. Art 132.

regular activity the approval of the annual reports, which are distributed to the shareholders by the directorate at least fifteen days prior to the meeting date.⁶⁸ Statutory changes, or decisions to increase or decrease the registered capital, may be decided only in extraordinary shareholders' meeting, with a quorum, in the former case, of at least half of the registered capital present or represented in the first meeting, or one-fourth in the second meeting, and with the approval of at least three-fourth of the registered capital in the latter one⁶⁹.

2.3.2. Corporation Law in Bulgaria

The Commercial Law is the most relevant legislation act in the field of company law, which regulates five forms of business organizations, together covered by the term “merchant”, such as⁷⁰:

1. the ordinary partnership;
2. the limited liability partnership;
3. the partnership limited by shares;
4. the limited liability company or the sole-owner limited liability company;
5. the joint-stock company;

In addition, however, there are other types of economic organizations recognized by the Bulgarian Law as follows⁷¹:

- Sole merchants;

⁶⁸ Dauti Ylber, Part one *Albania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 78-79, (European University Press, Bochum-Germany 2005).

⁶⁹ Id. at 79

⁷⁰ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 274-275, (European University Press, Bochum-Germany 2005)

⁷¹ Id. at 275

- Joint ventures;
- Holdings;
- Trade representative offices;
- Public companies; and
- Co-operatives.

In order to get rights and obligations, a company must have legal personality, which is acquired upon registration in the district court where the company seat will be located. The court of registration as a general principle is entitled to monitor the company's compliance with the provisions of the pertaining laws and regulations, and may refuse registration only in case of infringement of the law and when the economic organization has to cease its activities⁷². The necessary documents for registration include the application for registration, memorandum of association, a minute of the constituent meeting, a declaration in compliance with Article 142 of Commercial Act, bank document of capital deposited, company name uniqueness certificate, certificate for actual status of a shareholder-legal person, decision of the managing body of a shareholder-legal person, receipt of paid state taxes, receipt for paid state tax for publishing in the State Gazette⁷³.

Prior to the registration a company may enter into legal transactions, but the persons who have acted in its behalf must state that the transaction is made in the name of a pending incorporation in order to be able to transfer the rights and obligation *ex lege* to the incorporated

⁷² See supra note 70.

⁷³ http://www.worldwide-tax.com/bulgaria/bulgaria_company_formation.asp (last visited February 20,2007)

company, otherwise they will be jointly and several liable without limitation even after the registration⁷⁴.

2.3.2.1. Limited Liability Company

A limited liability company (LLC) may be formed by one or more persons, which will be liable for the company's obligations only within the limited of their contribution in the registered capital. The company must have a trade name which shall contain the extension "druzhestvo s ogranichena otgovornost" (limited liability company) or the abbreviation "OOD", and in the case of a solo partner the name must contain the extension "ednolichno OOD" (single person limited liability company).⁷⁵

The company must have a minimum initial capital of 5.000 BGN, divided in shares with a value not less than 10 BGN, and the total sum of all shares shall be equal to the register capital with the value of each share to be a multiple of 100.⁷⁶

The Commercial Law provides for four conditions for the registration of a LLC: adoption of the company's articles of incorporations; appointment of the managers; every member must have paid in at least one-third of its share, but not less than BGN 10; and at least seventy per cent of the registered capital must have been paid in, with the remaining part to be paid not longer than two years as of the registration of the company⁷⁷.

⁷⁴ Article 69, Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.

⁷⁵ Id. Art 113 and 116

⁷⁶ Id. Art 117

⁷⁷ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 282, (European University Press, Bochum-Germany 2005)

The company is governed by two organs the General Meeting and the manger/s who may be either one of the partners or an outsider. According to Article 135 the General Meeting shall consists of the partners, but in case when the company has more than 50 employees they shall be represented in a consultative capacity. Each partner has a number of votes which correspond to his interest in the capital, unless the articles of association provide otherwise⁷⁸.

The powers of the General Meeting, as foreseen by Article 173/1 are on matters that include: the amendment of articles of incorporation; admission and expelling of partners; approval of the annual report and balance sheet; distributing profits and resolve on their payment; increasing or decreasing the registered capital; appointment of manager/s; setting up or closing branches and participation in other companies; acquisition or alienation of real property and real rights; brining action against the manager or controller by appointing an attorney; deciding on additional monetary contributions.

The Manager/s is responsible for the representation of the company, and shall organize and direct the activities of the company in accordance with the law and the general meeting resolutions⁷⁹. His name must be registered at the relevant court, and he his financially liable for damages caused to the company⁸⁰. According to Article 142 the manger/s may not without the consent of the company: effect commercial transactions in his own or in a third party's name; participate in partnership, partnerships limited by shares, or other limited liability companies; hold positions in managing organs of other companies. In case of infringements of these obligations, except when he is a partner, may be dismissed without notice and compensation.

⁷⁸ Article 137, Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.

⁷⁹ Id. Art 141

⁸⁰ See supra note 77.

The management of the company is not only a duty which the law imposed on the Manager, but also an obligation for the partners. Thus, Article 124 provides in an explicitly way that partners are obliged to take part in the management of the company. This is a particularity of the Bulgarian legislation since it provides this as an obligation that may lead in conflict between the powers conferred upon the manager and the partners.

2.3.2.2. Joint-Stock Company

A joint stock company is a company that has its capital divided in shares, and it is liable toward the creditors only with its assets. The trade name of the company must include the extension “aktsionemo druzhestvo” or the abbreviation “AD”.⁸¹ In order to be set up the company must have a minimum registered capital of 50.000 BGN, with the minimum value of 1 BGN for each share. A higher nominal value must be determined in integer BGN.⁸²

There are three main conditions that should be fulfilled before starting the court registration such as: the adoption of article of incorporation, the subscription of the whole initial capital and the paid in of at least twenty-five per cent, the appointment of the supervisory board and the management board (two tier- system) or respectively the board of directors (one tier-system)⁸³.

The Bulgarian legislation foresees the existence of both one-tier and two-tier corporate structure, by allowing the founders to decide for one of them. Thus, a part for the General

⁸¹ Article 158, Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.

⁸² Id. Art 161-162.

⁸³ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 285, (European University Press, Bochum-Germany 2005)

Shareholders' Meeting, a joint-stock company may have a supervisory board and the management board, or the board of directors as the case may be.

The General Meeting is composed by the voting shareholders, and can decide upon issues relating to: amendment of the by-laws, increasing and decreasing the capital stock, transformation or dissolution of the company, election and recalling the members of the board of directors, or supervisory board as the case may be, appointment of the auditors, approval of the annual financial statement, appointment of the liquidator, resolving other matters which by virtue of the law or the by-laws are in its competence⁸⁴. It is convened normally at least once a year by the board of directors, or by the managing board, but can be convened also by the supervisory board, or upon request of the owners of shares representing not less than one tenth of the registered capital.⁸⁵

The Board of Directors (in the case of one-tier system) is the organ responsible for the management and representation of the company, which consist of minimum three and maximum nine persons. It must adopt its own rules of procedure and shall elect the chairman and the vice chairman. The Board must held regular meeting once every three months to discuss the company's state of affairs and prospect of development, and must delegate the management of the company to one or several directors, who shall be termed officers.⁸⁶

The Managing Board (in the case of two-tier system) represents the company toward third parties, but has the obligation to report on its activity to the Supervisory Board at least once every three months, and in case of circumstances affecting the business of the company must

⁸⁴ Article 220-221, Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.

⁸⁵ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 287, (European University Press, Bochum-Germany 2005).

⁸⁶ Article 244, Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.

immediately report to the Chairman of the Supervisory Board⁸⁷. According to Article 241 the number of members of the Managing Board shall be determined by the by-laws, but may not exceed nine, and the Supervisory Board has the power to appoint and to dismiss the member at any time.

The Supervisory Board is the organ responsible for the supervision of the management of the company from the Managing Board, and for this it has the power to request at any time from the Board information or report on any matter concerning the company, or to carry out any necessary investigation, even with the assistance of an expert in particular cases⁸⁸. In addition, the Supervisory Board may represent the company, but only in relation with the Managing Board. Its members are appointed by the General Meeting in a number from three to seven, and they have the duty to elect the chairman and the vice chairman, and to adopt its rules of procedure⁸⁹.

2.3.3. Romanian Corporation Law

The process of setting up and running a company in Romania is regulated by The Company Law No. 31/90, which provides for six types of business associations; general partnership, limited partnership, partnership limited by shares, limited liability company, joint-stock company, and the group of economic interests⁹⁰. Due to the accession of the country in EU,

⁸⁷ See supra note 85, at 290.

⁸⁸ Article 243, Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.

⁸⁹ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 290, (European University Press, Bochum-Germany 2005)

⁹⁰ Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 862, (European University Press, Bochum-Germany 2005).

the Government has enacted several amendments to the law aiming to meet the *acquis communautaire* standards in the field of corporation law⁹¹.

The incorporation process, necessary for acquiring full legal personality, consists of three main steps: the decisions of the judge to establish the company, the registration with the company register that creates the legal entity, and the authorization for operation⁹². The judge, who has its seat at the unique office of registration where the company's registered office is located, will evaluate the application for incorporation, the constitutive act, the property titles, statements of directors and shareholders with reservation of the company's name, a copy of the deposit certificate from the prospective company's bank account, and if all the legal requirements are fulfilled, will issue a decision to be registered in the company register⁹³. The company register, under the Romanian law, issues two important acts in relation to the company's activity: the registration certificate, which contains the sole registration code of the company and a record number from the database of the company; and the authorization of operation, which guarantees that the statements of the directors regarding the compliance with the legal requirements for obtaining the mandatory administrative authorization (sanity, sanity-veterinary, fire safety, labor, environmental protection) are fulfilled⁹⁴.

Prior to the incorporation, founders, representatives, or other persons may act in the name of the company, but they will be liable without limit to third parties for the legal transactions concluded with such parties, until the company, after having obtained legal personality, decide to

⁹¹ The amendments regarding the joint-stock and limited liability company are published in the State Gazette No.441 on November 27, 2006, and will be treated in detailed in the subsections that discuss these types of business organization.

⁹² Id. at 869.

⁹³ Id. at 868.

⁹⁴ Id. at 868.

assume these transactions. The transactions thus assumed will be considered to have effect from the date of their conclusion⁹⁵.

2.3.3.1. Limited Liability Company

Limited Liability Company (LLC) may be set up from two or more persons (physical or legal) but no more than 50, with a minimum capital of RON 200, divided into equal shares with a value not lower than RON 10 lei each⁹⁶. As an exception a LLC can be founded by a sole shareholder, but the following conditions are necessary:

- He must exercise the rights and obligations of the shareholders' meeting,
- If he is the administrator (director) will have the responsibilities of that position, and an expert's report for the contribution in kind is necessary for the registration,
- Must be shareholder in only one LLC.
- In the case when the sole shareholder is a LLC it must not be held by a sole shareholder⁹⁷.

The main organs of the company are The General Shareholders' Meeting (GM) and The Board of Administrators (or the sole administrator). The GM may be both in the form of ordinary or extraordinary one, with the main duties to approve the balance sheet and distribution of the net profit; to appoint, recall and discharge the administrators and auditors; to decide to prosecute the administrators and auditors for damage caused to the company; to amend the statutes⁹⁸. The shareholders taking part in the GM have a number of votes in proportion with the number of

⁹⁵ Article 53, The Company Law No.31/90, amended several times, with the last amendments made by The Law No. 441/06, published in the State Gazette No. 955/06 .

⁹⁶ Id. Art 11-12.

⁹⁷ Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 880, (European University Press, Bochum-Germany 2005).

⁹⁸ Article 189/1 The Company Law No.31/90, by the Law No.441/06 published in the State Gazette No. 955/06.

shares, and in the case of ordinary meetings resolutions are passed with the absolute majority of shareholders that have the absolute majority of register capital, while for resolution in the extraordinary GM an unanimity is required⁹⁹.

The Board of Administrators, or the solo Administrator as the case may be, may be composed either from the shareholders or outsiders, appointed in the article of association, or by the GM¹⁰⁰. Administrators have the power to represent the company and they are liable for any damage caused to company's activities during the exercise of their powers. In addition, they have the obligation to keep a register of shareholders, with they full name, the company name, their domicile, the part own in the register capital, the transfer of shares, and upon written request to inform any shareholder for the operation of the company¹⁰¹.

2.3.3.2 Joint-stock Company

Joint- Stock company can be founded by no less than 2 persons with a minimum register capital of RON 90.000 divided in shares with the nominal value no lower than RON 0.10¹⁰². It can be either in the form of public joint-stock company, when the founders require funds from the public in order to set up the company, or private joint-stock company when the register capital is formed by private subscription¹⁰³.

⁹⁹ See supra note 96.

¹⁰⁰ Article 192 The Company Law No.31/90, by the Law No.441/06 published in the State Gazette No. 955/06.

¹⁰¹ See supra note 96.

¹⁰² Article 10 and 90 of The Company Law No.31/90, amended by the Law No. 441/06. Prior to the amendments the number of founders was at least 5 and the minimum register capital was lower then 90.000 RON. A summary of the amendments in the English version are available at <http://www.lp-legal.com/pdf/73.pdf> (last visited March 18, 2006)

¹⁰³ Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 871, (European University Press, Bochum-Germany 2005).

Under the new Romanian Law the company structure both in the public and private form can be either one or two tier-system depending on the founders decision¹⁰⁴. Now, due to the amendments, apart from the existence of the General Shareholders' Meeting (GM), the Board of Administrators (BA) the law provides for a Supervision Council, as governing organs.

The GMs are ordinary and extraordinary, and are held at the company's headquarters or at the location indicated in the convening document, unless otherwise provided in the articles of association or the statute¹⁰⁵. An extraordinary GM is held whenever it is necessary to decide upon important issues such as: changing of the legal form of the company; changing the address of the company headquarters; changing the company's object of activity; extending the duration of activity; increasing or decreasing the register capital, merger with other companies or split of the company; anticipated dissolution; issuing bonds¹⁰⁶. A resolution in such a meeting can be passed when a quorum of $\frac{1}{4}$ of voting rights is reached and the decision is approved with a number of shareholders that represent the majority of the register capital. If this quorum is not reached at the first meeting, a second GM is convened where the presence of $\frac{1}{5}$ of the voting rights is required and decision can be passed by majority. However a majority of $\frac{2}{3}$ of the voting rights of present shareholders is necessary for decisions relating to amendment of company main object of activity; increasing or decreasing the shared capital; change of legal form or merger, division or winding-up the company¹⁰⁷.

¹⁰⁴ This is a relevant amendment made to the corporate governance, since prior it the law provided only for the existence of one tier system.

¹⁰⁵ Article 110 The Company Law No.31/90, by the Law No.441/06 published in the State Gazette No. 955/06.

¹⁰⁶ Id. Art. 113

¹⁰⁷ These are new quorum and voting conditions regarding extraordinary and ordinary Shareholders' Meeting, introduced by the Amendments, available at <http://www.lp-legal.com/pdf/73.pdf> (last visited 18 March, 2007).

Any other issue, which is not in the powers of an extraordinary GM, can be decided in an ordinary one, where a quorum of $\frac{1}{4}$ of voting rights is necessary in the first meeting and decisions are made by majority of votes. If the quorum is not reached at the first meeting, a second one is convoked when decisions are made by majority of votes, regardless of shareholders presence¹⁰⁸.

The company is administered either by a sole administrator, or by a BA in the case of one-tier system, or by a Board of Directors in the case of two tier- system. Members of the BA can be physical or legal person, and in the latter case an administration contract stipulating, among other things, that the legal person shall appoint a natural person as its permanent representative is necessary¹⁰⁹.

The administrators are jointly and severally liable for the fulfilment of their obligation relating to: the paid-in capital made by the shareholders and payments of dividends; the existence of the registers required by law and their correct keeping; implementing the decisions passed by the shareholders' meeting; strict compliance with any obligations provided in the constitutive act or mandatory law¹¹⁰. Any shareholder or the Ministry of Finance can bring a legal action against administrators for failure to fulfil their duties and obligations, and for damage caused to the company¹¹¹.

In the case of two-tier system the directorate members are appointed and can be revoked by the Supervision Council. They are responsible for representing the company towards third parties, and have the obligation to present the annual financial statements, together with an

¹⁰⁸ Id.

¹⁰⁹ Article 136 The Company Law No.31/90, amended by the Law No.441/06 published in the State Gazette No. 955/06

¹¹⁰ See supra note 106, at 876

¹¹¹ Article 142/4 The Company Law No.31/90, amended by the Law No.441/06 published in the State Gazette No. 955/06.

annual report and a detailed proposal with regard to profit distribution¹¹². The Members of Supervision Council are appointed or revoked by the ordinary GM, except for the first members who are appointed in the company's bylaws. They can be physical or legal persons, and in the latter an individual as representative must be appointed¹¹³. The number of the members must be not less than 3, but no more than 11, and decisions may be taken when at least ½ of its members are present with the positive majority of them¹¹⁴.

2.3.4. Corporation Laws Remarks

Comparing the legal requirements for setting up a limited liability company or a joint-stock company in the target countries the following conclusions can be reached:

- The registration in the court district is a necessary process for a company in order to acquire full legal personality. Under the Albanian legislation a company can be registered only in the District Court of Tirana, since it provides for a centralize system with a sole trade register. In contrast, Bulgaria and Romania has a decentralize system of registration, by providing that a company can be registered in the district court where it will have its seat.
- Prior to the registration the company can enter in legal transactions through its representatives, but their responsibilities after the registration are treated in different ways. According to the Albanian and Romanian legislations a company after its

¹¹² Amendments made to the Company Law No. 31/90 by the Law No.441/06 published in the State Gazette No. 955/06. Available at <http://www.lp-legal.com/pdf/73.pdf> (last visited March 18, 2007).

¹¹³ Id.

¹¹⁴ Amendments made to the Company Law No. 31/90 by the Law No.441/06 published in the State Gazette No. 955/06. Available at <http://www.lp-legal.com/pdf/73.pdf> (last visited March 18, 2007).

registration has to take over, to take same affirmative actions toward the transactions made by the persons who have acted in its name, otherwise they will be jointly liable toward third parties. While, under the Bulgarian legislation, the rights and obligations are past *ex lege* to the company after the registration, if the persons have stated that they are acting in the name of a pending incorporation company.

- A minimum registered capital is required by all the legislation of the target countries, which can be either in the form of cash or in kind contribution, but not contribution in services.
- A limited liability company can be set up by one or more persons, and under the Albanian and Bulgarian legislation there is no restriction upon the maximum number of founders. While, according to the Romanian one the maximum number of founders is 50.
- A joint-stock company, according to the Albanian and Romanian laws, can be either in the form of public company or private one, while under the Bulgarian law it can be only in the public form.
- The system of corporate governance in a joint-stock company under the Albanian law can be only in the form of two-tier system, when apart from the General Shareholders' Meeting, and the Board of Directors, also the existence of the Supervisory Board is required as organs of the company. While, according to the Bulgarian and Romanian laws, it can be either in the form of one or two tier system leaving the choice to the founders.

- The legislation of the target countries provide that the company is liable towards third parties for the transactions concluded by the manager/s in excess of its purpose, unless it can provide that the third party knew or should have known under the circumstances.

CHAPTER 3- PROTECTION OF PROPERTY RIGHT

3.1. Protection of Foreign Investor Property

The risks that a foreign investor may face when entering the market of the host country are commercial and non-commercial. The latter category includes among currency inconvertibility risk, transfer risk, political violence, deterioration in investment environment, currency devaluation, also the risk of taking the property of the foreign investor from the host state¹¹⁵. This is a risk that cannot be avoided entirely, but with a good investment protection system the loss of the investor can be minimized¹¹⁶.

A good system requires the State to guarantee and protect the property, by preventing any arbitrary interference in the ownership rights. In addition, in exceptional circumstances when the State has to interfere with measures such as expropriation or nationalization, it requires the compliance of these measures with international standards in order to be lawful.

¹¹⁵ Robert B. Shanks, *Protection against political risk, including currency convertibility and repatriation of profits in Eastern Europe* 26 (1992); Miklos Kiraly, Ferenc Madl, *Legal Protection of Foreign Investment*, 43 (1989), quoted in the PHD Thesis Zoltan Vig *Legal Protection of Foreign Investment with special emphasis on Serbia and Montenegro and the United States of America*, Takings, at 8, (CEU, November 2005).

¹¹⁶ Vig Zoltan, *Legal Protection of Foreign Investment with special emphasis on Serbia and Montenegro and the United States of America*, Takings, at 8, (PHD. Thesis, CEU, November 2005).

International standards recognize the right of a sovereign State to take the property, but it has to base its measures upon four principles: taking has to be for public purpose, non-discriminatory, accompanied by appropriate compensation, and due process shall be guaranteed to the owner¹¹⁷. In this chapter I will treat the condition foreseen in the legislative framework of the target countries for taking the property by analyzing whether or not they are in conformity with the international standards, and by providing a good protection for foreign investor. In addition, an overview of the protection of the intellectual property, as a relevant asset of the foreign investor, will be given in the last subsection.

3.1.1. Expropriation- Condition and Limitation

The Albanian legislation has several provisions at constitutional and legislative level which guarantee local and foreign investor from expropriation and nationalization of their property. Thus, according to Article 41 of the Constitution the private property is guaranteed and expropriation or limitations in the exercise of the property right may be made only by law for reason of public interests. In any case, the owner is entitled to a fair compensation, and for any disagreement in connection with the extent of the compensation he has the right to file a lawsuit in court. This is a constitutional right which is guaranteed to every person that has a private property in the Albanian territory, regardless of his nationality or purpose of acquisition.

In relation to foreign investments they are protected not only by this constitutional provision, but also from the legislative provisions regulating them. Hence, Article 4 of the Law

¹¹⁷ Id. at 205.

on Foreign Investment foresees that the latter will not be expropriated or nationalized neither directly or indirectly, except for public interest determined by law, and will be treated in a non-discriminatory manner, paid immediately in an effective way, in accordance with due process. In addition, the compensation will be equivalent to the fair market value of the expropriated investment, will be paid without delay and will include the interest at the commercial market rate from the date of expropriation¹¹⁸. Foreign investors will have the right to fully transfer and convert at the market rate of exchange on the date of the expropriation the compensation, and the right to bring an action for the immediate review of the expropriation or compensation act through the appropriate legal or administrative institutions¹¹⁹.

The Bulgarian legislation, as the Albanian one, provides for protection against expropriation or nationalization both at constitutional and legislative level. Nevertheless, a distinction between them exist since the right of a foreign investor against expropriation is not explicitly foreseen in the provisions regulating foreign investment in Bulgaria, but is offered as a general protection through the Law on State Property and the Law on Municipal Property.

The conditions for expropriation under the Bulgarian Constitution¹²⁰ require the State to adopt a law in case of forcible expropriation of the property for State or municipal needs, to provide that they cannot be met otherwise, and a fair compensation shall be ensured in advance. In addition, according to Article 34 of the Law on State Property the request for expropriation made to the competent authority shall set out: a substantiation of public exigency; the manner of providing compensation; a general description of the property and the appraised value of the property to be taken and the compensation.

¹¹⁸ Article 5/1, Law No. 7764 on Foreign Investment dated 02.11.1993.

¹¹⁹ Id. Article 5/2

¹²⁰ Article 17 The Constitution of The Republic of Bulgaria adopted on 12 July 1991, amended in February 2005.

The Romanian legislation, as the Albanian one, provides for protection against expropriation both at constitutional and legislative level. Hence, according to Article 44 of the Romanian Constitution the right of property is guaranteed and no one shall be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance. The compensation must be agreed upon with the owner, and in case of conflict a court will decide the due amount.

Regarding foreign investments, they are protected further against expropriation through the provision of the law that regulates them. Thus, Article 8 of the Law on “Promotion of Direct Investment with Significant Impact on Economy” foresees that investments cannot be expropriated, except for public utility in accordance with the provisions of the law, with measures taken in non-discriminatory way. In addition, foreign investors have the right to transfer abroad the compensation given as damage for the expropriation¹²¹.

In conclusion, as can be seen the legislations of the target countries are in conformity with the international standards, since all of them require that expropriation must be made only for public interest, in accordance with the law, against due compensation. Furthermore, Albania and Romania provide for a more concrete protection toward foreign investments, since they explicitly recognize in their laws the right of foreign investors not to be expropriated without lawful measures, and the possibility to transfer the compensation abroad.

¹²¹ Article 9 Law No.332/01 on Promotion of Direct Investment with Significant Impact on Economy, amended by the Fiscal Code in 2003.

3.2. Protection of Intellectual Property Rights

3.2.1. Intellectual Property in Albania

The main legislative acts regulating intellectual property rights in Albania are The Law on Copyright¹²² and the Law on Industrial Property¹²³ which regulates in different chapters the protection of patents for inventions and utility models, trademarks and service marks, industrial designs and appellations of origin. In addition, Albania has ratified several international conventions in the field, in particular the Bern Convention on Copyright and the Paris Convention for the Protection of Industrial Property.

Copyright protection is granted to the literary, artistic, public and other works regardless of their form of expression, including any original intellectual creation of this nature¹²⁴. Under the Albania legislations the author of the work has both moral and economic rights. The latter are treated as a unique group of rights within the copyright content, since Albania has adopted the French system, in contrast to the British system which treat the economic rights (exclusive rights) and moral rights as a separate group¹²⁵.

The moral rights, according to Article 5 of the Copyright Law, include the right of the author: to claim the authorship of the work; to object to any distortion, mutilation or modification and other derogatory action that will be prejudicial to his honor or reputation; to remain anonymous or use a pseudonym; to object the joint authorship put in an arbitrary way from other persons. The economic rights give the author the exclusive right to authorize the reproduction,

¹²² Law No. 7564 on Copyright dated 19 May 1992, amended several times, with the last amendment made by the Law No. 8826, dated 05.11.2001.

¹²³ Law No. 7819 on Industrial Property dated 27 April 1994.

¹²⁴ Article 1 Law No. 7564 on Copyright dated 19 May 1992, amended several times, with the last amendment made by the Law No. 8826, dated 05.11.2001.

¹²⁵ Torremans Paul, Tutulani Mariana, Dedi Mariana, *Pronesia Intelektuale (Intellectual Property)* at 69 (Tirane 2005).

translation, public recitation, broadcasting and rebroadcasting of the work¹²⁶. The moral rights, unless otherwise provided in the law, are protected for the whole life of the author, while the economic rights are protected during the life of the author and 70 years after his death.

Patents are granted to any invention that is novel, involves an inventive step and is industrially applicable. They are protected, after the registration in the Patent Office located in Tirana, for a period of 20 years from the filing date¹²⁷.

Trademark is consider to be any sign or any combination of signs capable of distinguishing the goods or services of one natural or legal person from those of another natural or legal person and that can be represented graphically¹²⁸. It is protected after the registration in the Patent Office and gives the owner the right to prevent third parties to use identical or similar sign for goods or services without his prior authorization. The protection lasts for 10 years from the application date, with the possibility to be renewed for additional terms of 10 years¹²⁹.

Industrial designs are deemed to be external features of a product which are not dictated solely by the technical function of the product and confer on it a specific appearance. They can be two-or- three dimensional or a combination of both, and in order to be eligible for protection they must be new, applicable to industrial or handicraft products¹³⁰. Industrial designs, according to Article 68, are protected after the registration in the Patent Office for a period of 5 years as from the filing date, with the possibility to be renewed for additional terms of 5 years each up to a total term of 15 years from the filing date.

¹²⁶ Article 5 Law No. 7564 on Copyright dated 19 May 1992, amended several times, with the last amendment made by the Law No. 8826, dated 05.11.2001.

¹²⁷ Article 28 Law No. 7819 on Industrial Property dated 27 April 1994.

¹²⁸ Id. Art. 73

¹²⁹ Id. Art. 86

¹³⁰ Id. Art. 59

3.2.2. *Intellectual Property in Bulgaria*

Intellectual property rights are protected in Bulgaria by national and international acts. At the national level the most relevant laws are The Law on Copyright and Related rights, The Law on Patents, The Law on Marks and Geographical Indications, The Law on Industrial Patent, while at the international level Bulgaria is member in several convention such as the Paris Convention for the protection of Industrial Property, the Bern convention for the Protection of Literary and Artistic Works, the European Patent Convention.¹³¹

The Copyright over literary, artistic, scientific, program and software works is protected since the moment of creation, it last for the whole life of the author and for additional 70 years after his death¹³². The author has an exclusive right to use the work created by him and to permit other person to use it, and any related rights that may arise from the law are protected for a period of 50 years¹³³.

Patents are granted for inventions in any field of technology, which are new, involve an inventive step and are susceptible of industrial application¹³⁴. They are protected for 20 years from the date of filing the application, and give to the inventor the exclusive right to use the invention, to prohibit other persons from using it without the consent of the owner and the right to dispose of the patent¹³⁵.

¹³¹ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 268-269, (European University Press, Bochum-Germany 2005).

¹³² Article 27/1 and 2 Law on Copyright and Related Rights, promulgated in the State Gazette No. 56/93, last amendments promulgated in the State Gazette No. 77/02, quoted in Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 269, (European University Press, Bochum-Germany 2005)

¹³³ Id. Art. 18

¹³⁴ Article 6 Law on Patent, promulgated in the State Gazette No. 27/03, last amendments promulgated in the State Gazette No. 17/03.

¹³⁵ Id. Article 9

Marks, according to the Law on Marks and Geographical Indications, are sing capable of distinguished the goods or services of one person from those of others and can be represented graphically. The rights on marks are acquired by registration as of the filing date for a period of 10 years with the possibility to be renewed for an unlimited number of ten-years periods. They include the exclusive right of the owner to use the marks, to dispose and to prevent other from: using identical or similar marks for goods or services to those for which the mark is registered; using identical or similar marks for goods or services for which the mark is registered and where the mark is a well known in Bulgaria; using of marks without due cause that will take unfair advantage of or will be detrimental to the distinctive character or reputation of the mark¹³⁶.

Industrial designs means the appearance of the whole or a part of a product resulting from the specific features of the shape, lines, contours, ornamentation, colors, or combination of such elements, and the right upon a design is acquired by registration for a period of 10 years as from the filing date of the application, with the possibility to be renewed for three successive periods of 5 years each¹³⁷. The right on a design includes the possibility of the owner to use and to dispose it, and to prevent any third parties from copying or commercial use it without authorization¹³⁸.

Foreign physical or legal person, under the Bulgarian legislation, must apply for registration of its trademark, geographical indication an industrial design only though the local industrial property representative listed with the patent office¹³⁹.

¹³⁶ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 272, (European University Press, Bochum-Germany 2005)

¹³⁷ Article 3/1 Law on Industrial Design, promulgated in the State Gazette No. 15/99.

¹³⁸ Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, at 273, (European University Press, Bochum-Germany 2005)

¹³⁹ Id. at 274.

3.2.3. *Intellectual Property in Romania*

Romania protects intellectual property rights through national legislative acts and international conventions. The main national acts are the Law on Copyright and Neighboring Right, the Law on Patents, the Law on Trademarks and Indications of origin, the Law on Industrial Design, while the relevant conventions are The Bern Convention on Copyright and the Paris Convention for the Protection of Industrial Property.

Copyright in a literary, artistic or scientific work and in any similar work of intellectual creation are recognized and guaranteed since the time of creation, independently of its disclosure to the public¹⁴⁰. According to the Law No. 8/96 the author of the work will have both moral and economic rights, which have different period of protection. Thus, moral right¹⁴¹ such as the right to decide whether, how and when to disclose the work to the public, to demand recognition of authorship, to demand respect for the integrity of the work, are protected for an unlimited period of time. While, economic rights¹⁴² such as the exclusive right to decide whether, how and when the work is to be used or exploited, including the right to authorize others to use the work, are protected for the lifetime of the author and for a period of 70 years after his death.

Industrial property rights are subject to protection after the registration with the State Office for Inventions and Trademarks (The Office), and foreign investors are entitled to the same protection of patents, industrial drawings and designs, trademark, and integrated circuit designs as Romanian citizens¹⁴³.

¹⁴⁰ Article 1 Law No 8/96 on Copyright and Neighboring Rights, amended by The Law No. 285/04, which in the section will be referred as the Law no 8/96.

¹⁴¹ Id Art 10

¹⁴² Id Art 12

¹⁴³ Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 915, (European University Press, Bochum-Germany 2005).

Patents are regulated by the Patent Law which foresees that a patent is granted for a period of 20 year to any invention having as subject matter a product or a process in all technological fields, provided that it is new, involves an inventive step and is industrially applicable¹⁴⁴.

Trademarks and indications of origin are regulated with a specific law which protects trademarks for a period of 10 years since the day of filing the applications, with the possibility to be renewed within three months before the expire of the term, and foresees an unlimited protection for the indication of origin¹⁴⁵.

Industrial design and industrial models are protected under the Romanian legislation for a period of 10 years from the time of filing the request with The Office, with the possibility to be renewed for five consecutive terms of 5 years each¹⁴⁶.

3.2.4. Intellectual Property Rights Remarks

Intellectual Property rights are protected almost in a similar way in all the target countries. They all have adopted national laws regulating copyright and industrial rights, have established national office dealing exclusively with the application procedures for registration of these rights, and provide protection for the same length of time.

Furthermore, they all have ratified and implemented international conventions in the field of protecting intellectual property rights, in particular The Bern Convention and the Paris Convention by guaranteeing foreign legal or physical persons the same treatment as their nationals.

¹⁴⁴ Id.

¹⁴⁵ See supra note 139, at 916.

¹⁴⁶ See supra note 139, at 917.

CHAPTER 4- TRANSFER OF PROFIT AND TAXATION

In attracting foreign investment the host country may adopt as incentives the possibility for foreign investors to transfer the profit to their country of origin, and the application of favorable tax rates. Thus, in this chapter I will analyze whether or not the legislation of the target countries provides foreign investors with the right to transfer their profit, together with the tax regime applicable in their territories.

4.1. Transfer and Repatriation

Foreign investors carrying economic activity in Albania have the right to transfer abroad their capital and profit¹⁴⁷. They have the right to transfer: the revenues; compensation; payments as a consequence of an investment disagreement; payment made under a contract, including loan and interest payments according to a loan agreement; revenues stemming from the sale or the payment of any or all part of an investment; return of shareholders' equity, resulting from the reduction of capital when the company has decreased its capital according to the Albanian legislation¹⁴⁸. The transfer can be made to a freely convertible currency at the prevailing market rate on the date of the transfer¹⁴⁹.

Bulgaria also has adopted a liberal regime which allows foreign investors to freely transfer their profit after paying the tax profit. The right may be exercised, after the submission of the tax payment, by foreign nationals who have a residence permit and are registered as sole traders or participate in a co-operative or as an unlimited partner in a partnership¹⁵⁰.

¹⁴⁷ Article 17 Law No. 7512 on the Sanction and Protection of private Property, Free initiative, Independence private activities and Privatization, dated 18.08.1991.

¹⁴⁸ Article 7/1 Law No. 7764 on Foreign Investment dated 02.11.1993.

¹⁴⁹ Id.

¹⁵⁰ <http://investbg.government.bg/index.php?sid=18&ssid=45&c=77> (last visited March 10,2007)

<i>TAX</i>	<i>TAX RATE</i>
Corporate Income Tax	20%
Personal Income Tax	Progressive taxation with tax rates from 1% to 20%

Foreign investors also have the right, under the Romanian legislation, to fully transfer abroad the profits in compliance with the foreign currency regime in the country after payment of the taxes and obligations provided by the legislation; to transfer abroad, in the currency of the investments, the amount obtained due to the selling of shares or equity, as well as those resulted from the liquidation; to transfer abroad the compensation taken due to expropriation¹⁵¹.

4.2. Tax Regime

Tax regime in Albania is regulated through several legislative acts, which are managed by The General Tax Administration. Taxes as a general principle are collected upon a national and local base, with a further division of the national taxes in direct and indirect ones. The legislation in the field is consecutively subject to amendments and changes due to the growth of the economy, but currently physical and legal persons are subject to the following national taxes:

Personal Income Tax	Progressive taxation with tax rates from 1% to 20%
Value Added Tax	20%
Tax on immovable property	Tax level for buildings is between 5-200 All/m ² /year according to the category of land and district where it is located.
Excise duty	Levied on coffee, fruit juices, water, beverages, beer, wine, alcohol and alcoholic drinks, tobacco, oil and their by-products, and cosmetic items, perfumes and toilette waters.

¹⁵¹ Article 10 Law No.332/01 on Promotion of Direct Investment with Significant Impact on Economy, amended by the Fiscal Code in 2003.

*Source Alb-Invest June 2006*¹⁵²

Bulgaria has also a tax regime which is based upon the collection of direct and indirect taxes with the following types of taxation¹⁵³:

- Direct taxation
 - Corporate income tax
 - Personal income tax
 - Withholding taxes
- Indirect taxation
 - Vat
 - Excise duties

The tax regime in Romania is regulated by two legislative acts such as the Fiscal Code and The Fiscal Procedural Code adopted in 2003, which foresee the collection of the following types of taxation¹⁵⁴:

- tax on profit (corporate tax)
- personal income tax
- income tax on micro-enterprise
- taxes on incomes obtained by non-residents
- tax on foreign branches operating in Romania
- VAT
- Excise taxes

¹⁵² <http://www.albinvest.gov.al/foto/7.Taxation.pdf>. (last visited March 10, 2007)

¹⁵³ <http://investbg.government.bg/index.php?sid=18&ssid=45&c=77> (last visited March 10, 2007)

¹⁵⁴ Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, at 907, (European University Press, Bochum-Germany 2005).

- Local taxes

4.2.1. Corporate Income Tax

The Corporate income tax in Albania¹⁵⁵ is collected from all companies (Albanian or foreigner) which are registered for VAT. The level of the tax is currently set to 20% of the profit, which for resident taxpayers is collected from their worldwide income, and for non resident taxpayers only upon their Albanian source of income. According to the legislation a legal person is considered to be an Albanian resident when it has a permanent establishment (head office) in Albania, or has a place of effective management of business in Albania.

In Bulgaria the corporate income tax, under the Corporate Income Tax Act, is collected from all companies and partnerships (including non-incorporated partnerships) that are carrying out business in the country, at the level of 15%¹⁵⁶. The tax for Bulgarian resident is collected upon their worldwide income, while for non-resident it is applied only upon their Bulgarian-source of income. A company is consider to be tax resident if it is registered in Bulgaria, and companies which operate though their branch, office , agency or other form of a permanent establishment are consider non-resident and the tax is applied only to the profit generated through their Bulgarian establishment¹⁵⁷.

The Corporate income tax in Romania is set at the level of 16% of the gross profit to all companies carrying out economic activity in the country. For resident companies, which are considered those registered in the country the tax is applicable to their worldwide income, while non-resident companies (operating though branches, offices, agencies) are taxable only upon

¹⁵⁵ <http://www.albinvest.gov.al/foto/7.Taxation.pdf>. (last visited March 10, 2007)

¹⁵⁶ <http://investbg.government.bg/index.php?sid=18&ssid=45&c=77> (last visited March 10,2007)

¹⁵⁷ Id.

their Romanian-income¹⁵⁸. Nevertheless, under the Romanian legislations there are some exceptions for the general application of the tax such as: in the case when the profit is obtained through the selling of shares of a Romanian company, or real estates in Romania the tax level is 10%; when a person decides to invest in a disadvantages zone before July 1, 2003 the tax level is 5% during the whole duration of the investment¹⁵⁹.

In conclusion as can be seen Albania has the highest level of corporate income tax, which is not a favorable condition for attracting foreign investors, and will require from the government to take steps to decrease the level of the tax. In addition, the Romanian approach for applying lower level of tax in some exceptional circumstances is a good incentive which can be adopted by the Albanian Government toward investors who want to invest in sector that are relevant and which have major need for foreign capital.

¹⁵⁸ http://country.alibaba.com/profiles/RO/Romania/taxes_accounting.htm (last visited March 15, 2007)

¹⁵⁹ See supra note 150.

CONCLUSION

The decision of a foreign investor to enter the market of a host country depends not only upon the degree of economic stability, macroeconomic policies, infrastructure, geographic position, but also on the legislative framework adopted by it towards the protection of foreign investments. Thus, a country with a legislative framework that creates a business friendly environment and ensures at the same time the necessary level of protection for foreign investor, is in a better position to compete and attract FDIs.

The thesis has been focused on the legislative measures taken by Albania in the field of protecting FDIs, in comparison with Bulgaria and Romania, as the leading countries in the South-East Europe in attracting FDIs. The aim has been to find whether Albania has achieved to adopt a legislative framework with the necessary standards of protection for FDIs, to eliminate barriers for foreign investors, by being able to compete and attract a relevant part of FDIs in the future.

I deem, from the conclusions reached in each chapter as below stated, that Albania has adopted the necessary legislative measures, in conformity also with international standards, to guarantee and protect FDI at the same level as Bulgaria and Romania. Nevertheless problems such as the effective and rapid implementations of such measures, the efficient enforcement of the rights through administrative or legal bodies, which has been beyond the scope of this thesis, must be faced by the Albanian Government in order to ensure not only *de jure*, but also *de facto* the protection of investments.

Thus, in the second chapter I have found that foreigners enjoy the same constitutional protection of their rights and obligations, as the Albanian citizens, except for those rights and obligations that the Constitution relates with the Albanian citizenship. In addition, under the Albanian legislation there is no constitutional or legislative restriction on the foreigners' right to gain full ownership on land, while under the Bulgarian and Romanian legislation this right is still subject to limitations and conditions particularly for non-EU citizens.

Furthermore, the Albanian law on foreign investment provides for more favorable conditions for foreign investors, than the laws adopted by Bulgaria and Romania. Thus foreign investors, according to the Albanian law, can enter the market without the need to have an authorization or certificate, and are entitled to the same treatment in spite of the amount or type of investment. While, under the Bulgarian law foreign investors in relation to the amount of investment must apply for a certificate, since investments are classified in classes, and a different treatment is provided among them. The Romanian law is limited in its scope, since it can be applied only to investments that reach an amount of 1 million USD and have a significant impact on the economy.

Regarding the protection of foreign investors' property from expropriation as a non-commercial risk that can be faced in the host country, and the protection of intellectual property rights, in the third chapter I have reached in the conclusion that Albania offers the same protection as Bulgaria and Romania. Hence, the Albanian provisions for expropriation, as Bulgarian and Romanian one, are in conformity with international standards, since they require that expropriation can be done only for public interest, by law and against due compensation. Intellectual property rights are protected in Albania, as in Bulgaria and Romania, by national laws and relevant international conventions, and for the same length of time.

In relation to the right of foreign investors to repatriate the profit, and their obligations under the tax regime, in the last chapter I have reached in the conclusion that Albania, as Bulgaria and Romania, provides foreign investors with the right to transfer abroad the profit, and subject them to direct and indirect taxes. Nevertheless, regarding the corporate income tax the Albanian Government must take the necessary steps to further decrease it, since it has the highest rate among the target countries. In addition, the Romanian approach for applying lower level of tax in some exceptional circumstances is a good incentive in attracting investors who want to invest in sector that are relevant and which have major need for foreign capital.

BIBLIOGRAPHY

Albanian Laws and Regulations

1. The Constitution of The Republic of Albania, adopted November 28, 1998.
2. Law No. 7512 on the Sanction and Protection of private Property, Free initiative, Independence private activities and Privatization, dated 18.08.1991.
3. Law No. 1632, on some amendments on the Law No. 7512, Date 10.08. Sanction and Protection of private Property, Free initiative, Independence private activities and Privatization, dated 18.08.1991.
4. Law No. 7764 on Foreign Investment dated 02.11.1993.
5. Law No. 7638 on Commercial Companies dated 19.11.1992.
6. Law No. 7850 on the Albanian Civil Code dated 29.07.1994.
7. Law No. 7632 on the Provisions that regulate the fist part of the Commercial Code date 4.11.1992.
8. Law No. 7564 on Copyright dated 19 May 1992, amended several times, with the last amendment made by the Law No. 8826, dated 05.11.2001.
9. Law No. 7819 on Industrial Property dated 27 April 1994.

Bulgarian Laws and Regulations

1. The Constitution of The Republic of Bulgaria adopted in 12 July 1991, amended in February 2005.
2. Law on Encouraging Investments, promulgated in State Gazette No.97/97, amendments published in the State Gazette No. 40/04.
3. Rules and Regulations for the implementation of the Law on Encouraging Investments promulgated State Gazette 74/24 August 2004, amendments published in the State Gazette No. 34/19 April 2005.
4. Law on Commerce promulgated in the State Gazette No.48/91, amended several times, with the last amendments promulgated in the State Gazette No.58/03.
5. Law on State Property, promulgated in the State Gazette No. 44/96, last amendments promulgated in the State Gazette No. 93/04.
6. Law on Copyright and Related Rights, promulgated in the State Gazette No. 56/93, last amendments promulgated in the State Gazette No. 77/02.
7. Law on Patent, promulgated in the State Gazette No. 27/03, last amendments promulgated in the State Gazette No. 17/03.
8. Law on Industrial Design, promulgated in the State Gazette No. 15/99.

Romanian Laws and Regulations

1. The Constitution of The Republic of Romania enacted in 08.12.1991 and amended in 29.10.2003.
2. Law No.332/01 on Promotion of Direct Investment with Significant Impact on Economy, amended by the Fiscal Code in 2003.

3. Company Law No.31/90, amended by the Law No.441/06 published in the State Gazette No. 955/06.
4. Law No 8/96 on Copyright and Neighboring Rights, amended by The Law No. 285/04.
5. Law No. 84/98 on Trademark and Indications of Origin, amended by the Law No. 585/02.
6. Law No. 129/92 on Industrial Design, amended by the Law No. 585/02

Books and Articles

1. Dauti Ylber, Part one *Albania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, (European University Press, Bochum-Germany 2005).
2. Danov Mihail and Mihaylov Atanas, Part Three *Bulgaria*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. I, eds. Messmann, Stefan and Tarjti Tibor, (European University Press, Bochum-Germany 2005)
3. Tripon Catalin, Part Eight *Romania*, in *Investing in South Eastern Europe-Foreign Direct Investment in the Stability Pact Countries*, Vol. II, eds. Messmann, Stefan and Tarjti Tibor, (European University Press, Bochum-Germany 2005).
4. Vig Zoltan, *Legal Protection of Foreign Investment with special emphasis on Serbia and Montenegro and the United States of America, Takings*, (PHD. Thesis, CEU, November 2005).
5. Robert B. Shanks, *Protection against political risk, including currency convertibility and repatriation of profits in Eastern Europe* 26 (1992); Miklos Kiraly, Ferenc Madl, *Legal Protection of Foreign Investment* 43 (1989), quoted in the PHD Thesis Zoltan Vig *Legal*

Protection of Foreign Investment with special emphasis on Serbia and Montenegro and the United States of America, Takings, (CEU, November 2005).

6. James A. Dobkin, Jeffrey A. Burt, Kenneth J. Krupsky and Mark J. Spooner, *Joint Ventures with International Partners*, (Butterworth Legal Publisher, 1995), quoted in the PHD Thesis Catalin R. Tripon *Foreign Direct Investment in Romania*, CEU, February 2003.
7. Torremans Paul, Tutulani Mariana, Dedi Mariana, *Pronesia Intelektuale (Intellectual Property)*, (Tirane 2005).
8. Woodward David, *The Next crisis? Direct and equity investment in developing countries*, (London: Zed Books, 2001).
9. Dunning, J.H, *The Activities of Multinational Enterprises: Some Introductory Remarks*, Chp.1 in Dunning, JH, *Multinational Enterprises and the Global Economy*, (Addison-Wesley Publishing Company, 1993).
10. Gábor Hunya, *Integration through Foreign Direct Investment, Making Central European Industries Competitive*, (The Vienna Institute for International Economic Studies, 2000).
11. Larive Romania, *Foreign Direct Investment in Romania*, September 2006, published in www.doingbusiness.ro (last visited, February 10,2007)
12. United Nation Conference on Trade and Development (UNCTAD), *World Investment Report 2005, Transnational Corporations and the Internalization of R&D*, Geneva, 2005
13. Albanian Economic and Fiscal Programme, Tirana 1 December 2006
14. Albanian Agency for Business and Investment (Albinvest) report on “*Investment Climate in Albania*” June 2006, published in <http://www.albinvest.gov.al> (last visited in February 2, 2007).

15. U.S. Department of State Report on “2006 Investment climate statement- Romania” published in <http://www.state.gov/e/eb/ibd/2006/62373.htm> (last visited in February 2, 2007)

Internet Sources

1. <http://www.albinvest.gov.al/dokumenti.asp?id=371&kujam=96&menu=96>.(last visited January 28, 2007)
2. <http://investbg.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0056&n=000001&g=> (last visited January 28, 2007)
3. http://www.worldwide-tax.com/bulgaria/bulgaria_company_formation.asp(last visited February 20,2007)
4. <http://investbg.government.bg/index.php?sid=18&ssid=45&c=76> (last visited March 2, 2007)
5. <http://www.albinvest.gov.al/foto/7.Taxation.pdf>. (last visited March 10, 2007)
6. <http://investbg.government.bg/index.php?sid=18&ssid=45&c=77> (last visited March 10,2007)
7. http://country.alibaba.com/profiles/RO/Romania/taxes_accounting.htm (last visited March 15, 2007).
8. <http://www.lp-legal.com/pdf/73.pdf> (last visited March 18, 2007)

