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**„ LEGAL ASPECTS OF FOREIGN INVESTMENT AND ENVIRONMENTAL
PROTECTION IN ALBANIA “**

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List of Abbreviations

ANEA	Albanian National Environmental Agency
AIDA	Albanian Investment Development Agency
BIT	Bilateral Investment Treaties
CBD	Convention on Biological Diversity
CCPR	Committee on Civil and Political Rights
CESCR	Committee on Economic, Social and Cultural Rights
CSR	Corporate Social Responsibility
ECAT	Environmental Center for Administration and Technology
ECHR	European Court of Human Rights
EEA	European Environmental Agency
EIA	Environmental Impact Assessment
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
MIGA	Multilateral Investment Guarantee Agency
AMOE	Albanian Ministry of Environment
NAFTA	North American Free Trade Agreement
NPEM	National Program of Environmental Monitoring
NLC	National Licensing Centre
NSDI	National Strategy for Development and Integration
OHCHR	Office of the High Commissioner for Human Rights
PM	Particulate Matter

RECCEE	Regional Environmental Center for Central and Eastern Europe
SAP	Stabilization and Association Process
SRO	Self-Regulatory Organization
UDHR	Universal Declaration of Human Rights
UNCITRAL	United Nations Commission On International Trade Law
USTDA	United States Trade and Development Agency
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

One of the central features of the world economy throughout the last periods has been the robust evolution in the foreign direct investment flow (FDI¹) since it is an progressively important “engine” for sustainable development in many countries. Everyday more and more enterprises, in an increasing number of financial sectors and countries, have decided to enlarge their investments past their borders, and from the other side the receiving parties contend with every growing ardor to attract these investment assets. The past time has displayed a numerous alteration in foreign investment regulations as governments, mainly in unindustrialized and evolving states, which have detached so many limitations on monetary flows in and out of their countries.

Foreign Direct Investment - investing by extraterritorial enterprises in foreign holdings or joint ventures - has a customary dependence on ordinary resources use and extraction, particularly agriculture, metal and petroleum production. Nevertheless that this balance has changed in recent years, the neediest nations experience an unequal amount of investment pours into their ordinary resource sectors. The current days have shown a degradation of the environment and this is rushing in huge steps for example, harm of biodiversity greenhouse gas emissions, deforestation etc. These kinds of environmental devastation have been followed by improved economic activity, of which the direct foreign investments have been a very significant contributor. For the next thirty years, it is foreseen that the drifts of natural resource and investment are going to rise faster than the economic output. Regarding this fact, there is therefore a very strong necessity to comprehend and take account of the environmental outcomes of FDI and identify the appropriate responses. There are so many

¹ FDI involves the transfers of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.

notions that try to clarify the nexus between the protection of foreign investment and the protection of the environment, but presently much of the discussion on foreign direct investment and the environment mingles around the 'pollution havens'² hypothesis, a theory that will be elaborated in a more prolonged approach further on in this thesis. The pollution haven hypothesis predicts that increased liberalization of commerce will lead to the relocation of pollution intensive production from countries with rigorous environmental guidelines to the developing world, which is commonly considered by reasonably more negligent environmental regulation³. So the principal indication of this theory is that diverse corporations will work and move their activities mainly their production lines to less developed nations with more need for the monetary input than for the environmental safety in order to profit fewer strict and robust environmental policies. Concerning to this a linked fear is that some authorities will use lower environmental standards as a way of attracting new FDI. Nations might either drop their criteria intentionally, or they might challenge by raising their criteria, in order to gain a reasonable advantage. This is another pronounced factor that hints to excessive quantities of pollution and environmental degradation. Even though the profits of FDI are popular like: rises in effectiveness, technological novelty, enhancements in productivity and transfers of intangible and tangible resources such as new methods of management, organization, and advertising, the environmentalists have brought to attention that FDI carries undesirable environmental effects particularly in developing states that require lesser environmental criteria, possibly constituting pollution havens.

It is also hard to outline with a sole assertion the association between foreign direct investment (FDI) and the environment. The balance of global FDI has amplified rapidly in

² Driffield, N.L. (2004) 'Regional Policy and Spillovers from FDI in the UK.' *Annals of Regional Science*, 38 (4) pp 5556-

³ *Ibid*, 38 (4) pp 579-

especially in the past decades. In 1990, FDI inputs in developing nations estimated US\$ 44 billion; by 1995, the latter had reached higher monetary levels, which amounted to more than US\$ 167 billion (World Bank, 1996)⁴.

Essentially there are some features of the FDI-environment relationship that have conquered an abundant part of the research determination to date.⁵

Firstly we can argue a series of ideas such as that FDI may create both risks and opportunities for the environment, depending on the conditions. Foreign direct investments can produce new evolution and new structural efficiencies, making superior investments in possible environmental harm prevention however on the other hand it may lead to prolonged industrial occupation or to amplified production and consumption of contaminating goods.

Another issue is that foreign investors may bring contemporary know-hows that give environmental protection improvements over what is currently attainable in the state in which they are investing. So the Foreign direct investments may offer the possibility of important expertise based environmental improvements.

In a tight aspect we can say that the knowledge effects of foreign investments are likely to be positive for the environment and the main role than to emerge this affects lies to the international businesses that invest in the host countries.

Nevertheless that foreign direct investment carries growth and progress to nations it may also lead to difficulties concerning the environmental circumstances. A recent economic study examinations states the influence of foreign direct investment on environmental standards, assuming that whether this impact leads to stronger or weaker environmental regulation is provisional on the corruptibility of the host country's authority's, by which it will be clarified

⁴ World Bank Report on FDI, 1996.

⁵ DAFPE/MAI(97)33/REV1 -Organisation for Economic Co-operation and Development 22 December 1997 – page 2-5

as: states that have amply elevated levels of corruptibility are related with weaker environmental regulations and vice versa.

As aforementioned the strengthening of global competitiveness for FDI raises concerns that the efficiency of environmental standards will give advantage to countries with less demanding regulations, and industries that create pollution will be relocated there. This will evidently create environmental harms that in principle are described as four main complications: “pollution haven”, “race to the bottom”, “regulatory chill” and “pollution haloes”.

Firstly, the notion of „pollution haven“ indicates global economical powers which exert encouragement on foreign investors to pinpoint their industrial facilities in countries with low environmental standards, where working costs, in the light of environmental rules, are lesser.⁶ The process of these “polluting” activities to insignificant and emerging nations leads to the formation of pollution havens and unnecessary environmental degradation. So when indicating a state where the foreign industrial powers will invest, the major reasons why these economic actors have preferred that specific location is due to the environmental regulations in place. Secondly the other polluting principle, which is called “race to the bottom”, has a similar definition as the “pollution heaven” but it mainly clarifies the situation by which the states try to ease up their environmental rules in order to become more attractice for FDI inflow. Reports of domestic legal nature support the “race to the bottom” concept, by considering that distinctive states will benefit from eased environmental regulations in order to maintain competitiveness and attract investments in their territories and not allowing other countries to benefit economically.

⁶ See: Foreign Direct Investment and Environmental Impacts – Is the Debate Over? Kevin R. Gray, Article first published online: 13 FEB 2003

Thirdly, the “Regulatory chill” notion evidences the obvious effect of the global competition for FDI activities. It mainly states the chilling effect of competition and its implementation. Regarding Mabey and Mc Nelly this theory describes that the threat of failing to attract potential investors may retain regulations “chilled” and it hinders them from implementation and enforcement.⁷ This theory directs its elaboration on developing nations and also developed ones.

At last the fourth issue covers the “pollution haloes”. This principle indicates that foreign corporations that plan to enter a specific foreign market place in a specific country and which have to cope with very strict environmental policies in the country where they hold the headquarters of the company will make use of cleaner technologies or know how’s and will transfer their knowledge in the market place of the host country.

As aforesaid in the commencement of this thesis, FDI plays a pronounced role in developing a country and it’s an “engine” for environmental development in many republics. However on the other hand FDI plays an undesirable role on the effects it brings to the environment. The maintenance of the environmental security and prosperity all over the world is a factor of major importance since it affects our health, lifetime and the place we live our daily lives. Plenty of bilateral, multilateral and international agreements and treaties that protect the environment have been signed and ratified and plenty serve as guidelines for maintaining the environment in the best condition possible. Domestic authorities do not face the difficulty of drafting proper regulations but rather the difficulty of enforcing such regulations in accordance to the economic welfare of their country. The environmental safety shall be put a strong emphasis due to the fact that it must be protected for the living inhabitants but even for future generations to come, in order to have an unpolluted environment in the future. So it lays a problematic tie amid the need for the fortification of foreign investment and the need

⁷ See: Mabey and McNally, 1998, p. 39.”

for a safe and clean environment. The equilibrium amongst these safeguards will lead to the widely known principle of *sustainable development*. Conditional on how natural reserves including the earth's ability to prevent pollution are controlled between different generations there are diverse efficient exhaustion pathways. Greater possession demanded by the previous or present generation unmistakably decreases well-being for the next generation, and vice-versa. However, attaining "efficiency" of supply use does not essentially describe a sole level of total utilization in each generation. Based on effectiveness criteria alone, the present generation could spend all the Planet Earth's natural resources, leaving little or nothing for the future generations.⁸

We could argue that the detected FDI influence on the environment does not have only one unwavering tendency since even other features that are linked with FDI like domestic authority regulations or economic growth have their sole role and are the key variables that standardize in general how the consequence will differ in the host state's environment.

⁸ See: WWF-UK: FDI and the Environment .20

1. PLACING THE ISSUE IN CONTEXT

1.1 Foreign investment in Albania

This part will present an outline on the past expansions of FDI⁹ in the Republic of Albania after the fall of the communist regime until recent days.

Albania is a southeastern republic located on the eastern Adriatic coast in Europe. From the communist regime after the Second World War until first democratic elections in 1992, Albania was a best example of autarchy.¹⁰ During the aforementioned periods there was no foreign investment that took place in Albania after the war, but it had assistance in special programs such that of the industrialization, credit supplying, equipment and technicians, machinery etc. from communist states.¹¹ After the drop of communism the new party that came into force (The Democratic Party) put many efforts in order to change the centrally planned economy to a market economy. In this period of transition the foreign investments and the drive of capital, were set as a main concern. Regarding the transition and the hard times that Albania was temporarily facing, a large number of joint ventures have agreed upon and the same time it was established the first foreign banks.¹² Regarding the facts the annual FDI inflows in the years 1991-1997 had increased respectively from 8 million USD to 97 million USD.¹³ In 1997 the prospects for FDI dropped in a large scale because of the bad period at that time. In the wake of the violence and property destruction no one was interested to invest in Albania. This period was even followed by the collapse of the pyramid schemes

⁹ Under a general definition “foreign investment” involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets. See: *Sornarajah*, *The International Law on Foreign Investment*, (2nd ed.), 2005, p. 7.)

¹⁰ *Kaltani*, *Complementary Reforms and the Link between Trade Openness and Growth in Albania*, in *Postcommunist Economies*, June 2007, Vol. 19, No. 2, p. 226.

¹¹ See: <http://www.nationsencyclopedia.com/Europe/Albania-FOREIGN-INVESTMENT.html>.

¹² *Economist Intelligence Unit (EIU)*, *Country Profile, Albania*, March 2008, p. 32, at: www.eiu.com. An example is the establishment of the Albanian Italian Bank by Law no. 7649, dated 16.12.1992.

¹³ Figures from *Xhillari/Telhaj*, *Barriers to Entry and their Impact on Firm’s Performance in Albania*, in *Hoshi/Balcerowicz/Balcerowicz*, (eds.), *Barriers to Entry and Growth of New Firms in Early Transition: A Comparative Study of Poland, Hungary, Czech Republic, Albania and Lithuania*, 2003, p. 244, with further reference.

in which almost every Albanian had sunk their savings.¹⁴ This grave period, in which the nation experienced a strict financial crisis, was shadowed even by economic, social and political crisis.¹⁵ Then in 1998 by a referendum the Albanian parliament ratified the new constitution. After this dark period Albania had to cope with the war in Kosovo and gave status to a lot of Kosovar refugees by taking them in their homes providing food and medical help and this added deterrents to foreign investment. In 2000 the FDI inflows were increased to 143 million USD.¹⁶ Two main achievements were a concession agreement signed with an Italian consortium in the mining sector¹⁷ and the purchase of the Albanian Mobile Communication company by a Greek-Norwegian consortium.¹⁸ One year later the FDI inflows increased from 143 million USD to 207 Million USD. Two years later, were signed other agreements such as the agreements with Turkey and Germany and in the same time the United Arab Emirates donated a large amount of money in order to construct a new airport in north Albania. After this time, due to the flooding, the FDI inflows slowed down and went back to 143 million USD, as they were in 2000.¹⁹

1.2 Governmental Approach to Regulate FDI

The government was putting a lot of effort in order to restore the economic credibility and began the privatization process in two major state-owned industries in order to gain investment from foreign companies at that time. In the early stage of the year 2003 the first major state owned enterprise (insurance company) named *Institute for Insurance (INSIG)*²⁰

¹⁴ See: <http://www.nationsencyclopedia.com/Europe/Albania-FOREIGN-INVESTMENT.html>.

¹⁵ Schautzer, Albania: Country Profile and Recent Economic Developments, in Focus on European Economic Integration, 2005, Issue 1, p. 107.

¹⁶ OECD, National Treatment of International Investment in South East European Countries: Measures Providing Exceptions, South East Europe Compact for Reform, Investment, Integrity and Growth, October, 2003, p. 52, at: <http://www.oecd.org/dataoecd/2/41/20637291.pdf>.

¹⁷ Ratified respectively by Law no. 8590, dated 23.3.2000 and Law no. 8791, dated 10.5.2001

¹⁸ Ratified by Law no. 8660, dated 18.9.2000

¹⁹ Dauti, Albania, in (eds.) Messmann/Tajti, Investing in South Eastern Europe: Foreign Direct Investment in the Stability Pact Countries, 2005, Vol. 1, p. 53.

²⁰ The agreement was ratified by Law no. 9176, dated 29.1.2004.

was partially sold and in 2004 was sold even the majority of shares of the biggest Albanian Bank to the Austrian Raiffeisen Group.²¹

From 2003-2007 the FDI entries were amplified from 158 million EUR to 463 million EUR.

²²The main factors that indicated a greater FDI inflow were: the sale of the Albanian Telecommunications Company to a Major Turkish investment group and also the increase of foreign capital, due to the investments of foreign enterprises. Most of the FDI inflows (around 80 % of them) belong to the European Union (EU) with strong emphasis on investment from Italy and Greece as the main investors.²³

Today in Albania function around 16 commercial Banks out of which 14 are foreign –owned and 2 others are in collaboration between foreign investors and domestic entities. Lately the Albanian Government has signed and ratified two important contracts who aim at increase the output and production of domestic electricity which has a o lot of potential to increase and on January 2008 was ratified a concession contract between Albania and an Austrian company, which aimed in building a cascade in the southern Albania.²⁴

Within 2002-2003 the Investments Promotion Agency and the Agency for the Promotion of Exports were established in order to improve the investment regime.²⁵

Three years later the Investments Promotion Agency and the Agency for the Promotion of Exports were substituted by the ALBINVEST Agency, which was the main responsible agency for investments and exports.²⁶ So in general it could be said that the entry of foreign

²¹ The agreement was approved by Decision of Council of Ministers (DCM) no. 1, dated 7.1.2004.

²² *OECD*, Investment Reform Index 2006, Progress in Policy Reform to Improve Investment Climate in South East Europe, 2006, p. 37, at: <http://www.oecd.org/dataoecd/41/0/37686316.pdf>. ; *Bank of Albania, (BoA)* Annual Report, 2006, Chapter II, p. 75, at: <http://www.bankofalbania.org>. ; *BoA*, Annual Report, 2007, Chapter II, p. 59.

²³ DCM “On approval of business and investment development strategy for the years 2007-2013”, no. 795, dated 11.7.2007. (DCM on Investment Strategy).

²⁴ DCM no. 463, dated 18.7.2007.

²⁵ They were established respectively by Law no. 8877, dated 4.4.2002 and Law no. 8957, 17.10.2002.

²⁶ Law no. 9497, dated 20.3.2006.

investors in an important scale into the monetary and telecommunication services has amplified the extent and productivity of those services. Concerning the GDP, among the countries of South-East Europe, Albania's economy is in the medium range.²⁷ In 2009 its nominal GDP rated around 9 billion EUR, which was three times more than that of Montenegro and 50 % more than the former Y Yugoslav Republic of Macedonia but only ¼ of Croatia's. ²⁸ Since the level of development and the geographic position matter, The ratings of GDP per capita also matter when reviewed by FDI whether the country is attractive or not. Since Albania has a cheap and very motivated workforce, have so many great potentials to become a production and service focus point for exports to Greece and Italy, as the main markets, as it was assumed in the beginning of this part. Despite the financial crisis and financial slump in all the European countries, the Albanian economy had a fairly healthy progression of 3.3. %. These economic crises haven't surfaced all of its outcomes in the Albanian economy since the monetary policy framework and the vigilant banking supervision had their own comforting results. In the global background, in order to make a difference on the Albanian FDI it is important to make a difference between south eastern European countries and Albania in order to show with facts and statistical figures where our economy stands comparing to others. In the period of 2005-2007 the global FDI had doubled its inflows but on the 2005 fell back in the level of 802 billion EUR. (Tab. 1)

²⁷ South-East Europe includes Albania, Bosnia and Herzegovina, Croatia, Serbia, Montenegro and the former Yugoslav Republic of Macedonia.

²⁸ Report on foreign direct investment in albania, 2010, second paragraph, page 9.

Table 1**Albania's ranking according the Inward FDI Performance Index and the Inward FDI Potential Index, selected years ²⁹**

	1995	2000	2005	2006	2007	2008	2009
Inward FDI Performance Index	40	58	67	80	53	35	25
Inward FDI Potential Index	112	101	82	83	82	79..	^a

The latest year for which data is available for some variables included in the Inward FDI Potential Index is 2008

Based on UNCTAD's Inward FDI Performance Index (which measures the relative size of FDI inflows that the country receives based on its size of economy) the Albanian state ranks relatively high (in 2009 Albania was placed in the 25th place among 141 countries) in the global ranking. Regarding the year 2006 in which Albania was classified in the 80th place, it can be held that this is a pronounced enhancement. Nowadays Albania is classified close in ranking with Chile, that is one of the most FDI –oriented economies in the world. ³⁰

As explained before the FDI influxes in Albania were moderately low and grew slowly before the year 2006. After that year the FDI influxes have exposed an upsurge and the most noteworthy is that the increases happened during the periods in the years 2007-2008. ³¹

One year after this stage, the increase was not that strident but even so the Albanian government stands on a “great” scale among other countries that were suffering the financial crisis. Therefore the efforts put by the new government enhanced great positivity towards a really healthy economy and strong FDI input for the years to come.

²⁹ Source: UNCTAD, WIR10, annex tables

³⁰ UNCTAD, WIR06 and WIR10

³¹ Flow data reported by the Bank of Albania (BoA) in the balance of payments are obtained from the banking system's monthly reports and direct reporting from a limited number of companies. Stock data come from company surveys conducted annually in the period 2006-2008. All data are reported in euro.

FDI inflows as a percentage of gross fixed capital formation, South-East European countries, 2004-2009

Region/country	2004	2005	2006	2007	2008	2009
South-East Europe	17	21	37	36	29	22
Albania	13	9	10	17	19	23
Bosnia and Herzegovina	27	20	25	46	22	14
Croatia	12	17	27	33	32	17
Montenegro	18	118	105	78	53	177
Serbia	21	33	71	37	26	22
The FYR of Macedonia	34	10	37	44	28	13

³² Source : UNCTAD, WIR10 , annex tables.

The privatization of utility companies attracted foreign investors and so the FDI inflows were increased in a considerable number in 2006.³³

Considering the privatization process it must be emphasized that, over the five years 2005-2009, all the most important banks of Albania were privatized, with the majority of them sold to foreign banks from other countries. New growth strategies for other vital industries such as mining and energy were put in practice in 2008, which permitted for the transfer of state-owned enterprises in those areas, including finished transactions of shares to foreign companies. Some privatization deals in 2009 involving FDI are listed in box below.³⁴

³² Source : UNCTAD, WIR10 , annex tables.

³³ Major privatization deals involving FDI in Albania in 2009 included the following:

-The sale of 12.6% of shares in mobile telecommunication company AMC to the Greek telecommunications group COSMOTE, for €48.2 million;

-The sale of 76% of shares in the energy distributor (OSSh) to the Czech company CEZ for €102 million.

-Investments in the cement industry by Antea Cement (Italy), Colacem Albania (Italy), Cementos Aguila (Italy).

-The fourth mobile telephony license was sold to the Post-Telecommunication of Kosovo for €7.5 million)

Source: UNCTAD, based on data from Thomson Financial

³⁴ (Source: UNCTAD, based on data from Thomson Financial)

Box 1. Major privatization deals involving FDI in Albania in 2009

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35

³⁵ Ibid.

Also the plowed earnings signify a growing module in the year-to-year upsurge of foreign direct investment in Albania.³⁶

As I aforementioned in the previous section, some important alterations during 2006-2008 carried great enhancement in the building of FDI influxes. In this period the industry and construction sectors were developing a great and loud increase of investments. (See the table below)

Table I. FDI inflows by economic activities, 2006-2008³⁷

Table I. FDI inflows by economic activities, 2006-2008³⁸

(Millions of euro)

Economic activity	2006	2007	2008
Agriculture, hunting and fishing	2	2	- 54
Construction	8	61	147
Industry	69	56	369
Electricity and gas	-	4	2
Services sector	180	357	211
Telecommunications	62	196	- 61
Financial intermediation	30	136	167
Total	259	481	675

³⁶ Report on foreign direct investment in Albania, 2010 page 17

³⁷ Source : Data provided by the Bank of Albania.

³⁸ Source : Data provided by the Bank of Albania.

In 2008 the most important FDI inflow came from the privatization of the oil refinery complex ARMO for about 125 million EUR.

In order to accomplish a sustainable economic development it is now clear that attracting FDI and increasing competitiveness of domestic companies are so vital. Later in the text I will explain and analyse the important actions that have been made in order to not only have brought improvements on the investment climate but also the development of the infrastructure and improved conditions for free trade and regional integration, since Albania has entered in the accession process of being an European Union member state. Albania has so many great indicators that are liked by foreign investors, except its geographical position, Albania has low tax rates and low level of fiscal burden. These are great factors in attracting and competing in FDI.

2. The investment climate and the Law on Foreign Direct Investment in Albania

2.1 Macroeconomic trends

Due to the analysis made above, it can be aforementioned that in the last few years the major changes occurred in Albania led to a very significant economic shift, while services and construction replaced agriculture, by being the main contributors to gross domestic product.(GDP) The macroeconomic area has been characterized with a rise in exports as well as an increase in trade gap financed by fees, and moreover with receipts from privatizations and more than a few concessions and foreign direct investments.³⁹

According to data from the Central Bank of Albania (BoA), during 2010 and the first quarter of 2011 the Albanian economy experienced a positive trend, by taking in consideration the fact that it was a post financial crisis period for the whole world and European Community mostly, which was moreover characterized by a really slow and struggling recovery. The main macro-economic balances have continued to improve and risk premiums in the financial markets have gradually decreased.

In 2011 the economic growth has been sustained from both foreign and domestic demand for goods and services; while, on the other hand, the rapid growth in exports led to a small but still a qualitative improvement in the trade deficit. At the end of the March 2011, since the prime objective of the Central Bank of Albania is the price stability, it decided to increase the base interest rate by 25 basis point to 5.25 percent. This brought into light better and higher interest rates in the interbank market, and also the appreciation of the Albanian national currency Leke.

³⁹ 2011 KPMG Albania Sh.p.k., an Albanian limited liability company and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity.page 13

2.2 Inflation

Although that in 2010 the Albanian economy kept growing and expanded, the inflation of the consumer goods remained in those level that were expected from the BOA. On the first quarter of 2011 the inflationary pressures were deepened and the main indicators regarding this pressure were external factors such as the increased prices on imported raw materials, like food, oil. Due to the inclusion in the Value Added Tax (VAT) scheme, one of the negative effects was even the price increase in the pharmaceutical products.

2.3 Exchange rate

In the beginning of 2009 the overall tendency of the exchange rate has led in the depreciation of the Albanian currency towards foreign currencies, mostly USD and EUR. The lowest point of such depreciation occurred on the early months of 2011, where one EUR was worth about ALL⁴⁰ 140.14. Such level of depreciation of the Albanian currency is assumed to derive mainly from the government expenditures and also from the widespread use of EUR, domestically and by the flow of Euro coming from immigrants' savings.

2.4 Fiscal indicators

In Albania during 2009, the consequences of the economic global crisis were less severe than in its neighboring countries, as a matter of fact, there was an optimistic or moreover, a rise in the expectations for public revenue. Regarding the information given from the Bank of Albania, the deficit level started to improve on 2010 as a result of an increase in the budget revenue.

⁴⁰ Albanian Lek-the national currency of the Republic of Albania

2.5 Privatization and investment opportunities

Currently the privatization of a considerable number of small and medium enterprises is advancing further. Regarding the privatization strategy, the Albanian Government aims to include in this strategy all public properties apart from parks, schools and hospitals.

2.6 Agriculture

Regarding the agriculture sector, Albania has great opportunities to attract FDI since it has low-cost workforce as well as a very favorable climate. Since the agriculture sector provides annually about 20 percent to GDP, it is accounted as one of the most significant sectors in the Albanian economy.

There exist a strong expectation that the agriculture sector will quickly developed, even though small producers currently dominate it; however this sector is still accounted as inefficient. In 2010 there was around 355 000 registered farms in Albania who gave a total production of 632 million EUR. Some agriculture sub-sectors with potentially high rate of export and with great investment opportunities include: medicinal plants and herbs, vegetables, canned products such as olives/olive oil, fresh and processed fish, etc.⁴¹

2.7 Tourism

Even that Albania has a great climate and favorable geographical position, it still haven't become a major tourist destination. Most of the tourists come from the neighbor countries, like Italy, Greece, Croatia, Montenegro etc. Since Albania is rich in seaside's⁴² and surrounded by a range of mountains and great national parks, it has so many potentials and opportunities of becoming "attracted and competitive" to FDI.

⁴¹ 2011 KPMG Albania Sh.p.k., an Albanian limited liability company and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. page 18
⁴² well-preserved 450 kilometer-long coastline.

Statistics from the World Travel and Tourism Council reveal that the total contribution of tourism to GDP, including its broader economic impacts, is predicted to rise by 5.4 percent annually from around 26 percent of GDP in 2011 to 29 percent by 2021. However, even though tourism is one of the Albanian most attractive sectors for further development and investments, in reality it continues to be mostly dominated by small, locally-owned operators with little to no significant involvement of foreign investors.

More recently, studies have started to examine policy and institutional characteristics of host countries as FDI determinants⁴³. An UNCTAD study has found that institutional characteristics of a host country – combining ratings for the judiciary system; red tape and corruption – together with the host country market size – have a positive influence on inward FDI into developing countries.⁴⁴ When investing out of borders, the investors should take in consideration even the regulations and the laws of the host country because the FDI brings so many effects on the host country.

The first effect when investing in a host country can be noticed at the wages. There are many ways in which the entrance of foreign firms might affect wages in the host countries where they operate. One is if these investors offer higher wages than are paid by domestic investors. Therefore, we may rise the question if the investors could really be willing to pay higher wages? It depends on the field that they are investing, since if it is a specialized field the investors may need specialized workers, as well as structures and so they are obliged to pay higher wages. Another question can arise in the context that if the foreign investors pay higher wages, therefore does it effect the domestic firms to pay higher wages as well? This phenomenon is explained as “wage spillovers”. It is more than rare to find in a study of FDI and wages, in which not to find that wages are paid higher in the host countries from the foreign investors. This doesn't happen only in developing countries but also in high-

⁴³ UNCTAD Series on International Investment Policies for Development
⁴⁴ Id. UNCTAD, 1998a: 138

developed countries although that it still rely and depends on the industries and their structure. Logically, another question may arise, whether why a foreign-owned firm pays a higher wage than a domestic firm for the workforce for a given quality? One reason may be that the host country's regulations and law enforcement, but another reason regarding the Findlay model⁴⁵ "they pay a higher wage for labor of the same quality "...for purpose of good public relations"⁴⁶. Another serious reason has to do with preferences. The workers of any host state might be more interested in working in domestic- owned firms, and so in order to attract them, the foreign- firms pay higher wages. Even from the comparison⁴⁷ of the "wage industry" in developing countries and developed one result that foreign firms pay higher wages than domestic firms. Higher capital intensity and higher inputs that lead to higher productivity are important and have their own promising effect on the host country. Does such outcome; affect the whole wage industry in the host country? Yes it does this by increasing the demand for labor. Wither or not foreign –owned firms pay higher wages than the domestic firms, of course that this will affect the level of wages in its whole. As a conclusion it can be said that the evidence on overall wage levels have fairly positive effects on the host country.

The second issue to be analyzed regarding the effects of FDI in the host country is the host country productivity.

The foreign owned firms established in a host country, bring new technologies and employs specialized workers. If there will be benefits to the host country, than it would result only from the superior efficiency of the foreign-owned firms. As a matter of fact, domestic-firms will ask to increase their efficiency by trying to approximate their operations as the

⁴⁵ Foreign Direct Investment Theories: An Overview of the Main FDI Theories , Academy of Economic Studies, Bucharest, , page 3

⁴⁶ The Findlay model, 1978, page 9

⁴⁷ Home and Host Country Effects of FDI Robert E. Lipsey, Conference on Challenges to Globalization Lidingö, Sweden May 25, 2002-page 28

operations of the foreign-owned firms. It is supposed that foreign-owned firms are more efficient since they have taken the “best” from domestic or local-firms, due to the fact that they employ specialized workers and bring into use new technologies that are so valuable to its efficiency. After this, we should take in consideration whether the foreign-firms’ efficiency will improve the industry efficiency? Actually it depends, and if it happens it will come only from the spillovers but also from the higher efficiency of foreign-owned firms.

The third issue has to deal with the productivity spillovers to domestic firms.

Most of the theories of FDI on host countries have assumed that foreign firms have superior and high technology, and some of that high technical intelligence and attitude will spill over the host country. The rate of change of technical efficiency in the backward is an increasing function of the relative extent to which the activities of foreign firms with their superior technology pervade the local economy.⁴⁸ The technology and the methods use by the foreign-firms compete the local firms, which aim to compete with them by accelerating their time of the firm improvement even that in the most studies regarding FDI effects on the host country it is taken for granted that this kind of improvements on the local firms happen only in that sector in which the foreign firm operates.

Another effect that FDI has on the host country *is the introduction of new industries.*

Most of the contribution of the inward direct investment has been the introduction of new industries which in one way or another have changed sharply the composition of the production.

The main contribution of the foreign firms is mainly of knowledge; in particular of knowledge about how the host country can find a place in the worldwide allocation of

⁴⁸ Findlay, Ronald, 1978. "Relative Backwardness, Direct Foreign Investment, and the Transfer of Technology: A Simple Dynamic Model," *The Quarterly Journal of Economics*, MIT Press, vol. 92(1), pages 1-16, February

intermediate steps in the path of production that can be geographically separated and knowledge of demand in the world market. The developing of new products, new technologies and from introducing new methods of labor and all this in collaboration with the productivity effects, the inward of the FDI will have a faster economic growth.

3. CATEGORIES OF FOREIGN INVESTMENT

3.1 The joint Venture

Earlier methods of agreements privileged the foreign investors, but in the rising financial and multilateral process of recent years they have been shaped in various categories, differing from those sorts of agreements, modern model contracts of FDI provide for a promised equilibrium in the favor of both parties in the agreement. The aforementioned model contracts regarding FDI are more modifiable to community control than the previous systems and are the careful devices through which the government plan on FDI could give countenance. At this point, they possess the components and seek to be reciprocal with public oaths and not any longer common commercial practices.⁴⁹ Two new forms of foreign direct investment have been created by these common commercial practices internationally, the joint venture and the production-sharing agreement. These kinds of practices are maintained by special arrangements such as management contracts⁵⁰ and the transference of knowledge agreements⁵¹. The principal form, the joint venture is a concerted bargain between two or more companies in order to attain a precise real objective or even to participate in another some other strategic project derived from these joint corporate partners, which may be further successful due to their merger of incomes or even the technological know-hows. There are two forms of a joint venture; the initial is the well-known **partnership joint venture**, a partnership that does not distinguish that much with a partnership occurred in the common law legal system, the only element to be noted is that this type of partnership especially in the international level in the FDI field has a detailed well studied project to profit from. The other type of joint venture introduced in the FDI field of practice is the **corporate joint venture** where all the parties involved sign and seal an agreement to found and establish a new

⁴⁹ Sornarajah M, The International Law of Foreign Investment (3rd ed, Cambridge University Press, 2010, page 116

⁵⁰ An agreement that it is based on the separation of control and ownership so that the manager controls a project in return for a fixed sum whereas the profits of the project go to the state

⁵¹ An agreement in which the the technology required for the project is supplied from the foreign-owned firm

corporation, this corporation will enable them to put into practice the well studied common goals and differences agreed in order to accomplish their business objectives. Usually foreign direct investors prefer these type of joint ventures in order to perform better in the market they are operating in and as well as to reach assistance in the performance and endurance of their business goals in that specific market place. Since the cooperation of FDI with native and domestic companies or undertakings, make it easier for the FDI to succeed in the market place of the host state, in some unindustrialized countries the foreign direct investment can only be allowed to enter the market only if they cooperate with domestic firms registered and headquartered there could usually be incorporated under the aforementioned rules.

3.2 The Production Sharing Agreement

This new form of FDI arrangement has originated mostly from the oil industry. Before this new form of understanding, stated who where more noted for large oil exports, previously used other forms of agreements such as the concession agreement. Since this nations intended exercise more control towards their industries, they initiated to make use of these new types of agreements, called the production-sharing agreement, which transferred the control of oil related activities away from the oil trading corporations to the oil-producing countries. This contractual form is constructed on the model that the proprietorship of oil is permanently in the hands of the country that it originates from, and it is continuously the government that decides upon its dumping since the country holds the sovereign rights over its natural resources. Foreign companies proceed with the specific licenses after they have been provided with the specific know how's, they initiate to study the land and the seas in order to be able to extract oil from those resources. After the oil is found the foreign establishment may abstract the oil and then the company is entitled to a proportion of it, in order for the foreign company to generate a profit out of the performance of the activities.

Both of these new methods of foreign investments are legal practices, which establish that host states are proclaiming their control over foreign investments.⁵² The previous methods of contracts regarding FDI are now substituted with these two new forms, since the government of the host state pursues to achieve an operative and cautious control over foreign investments.

In an emergent widespread and fast globalization procedure it is so hard to envisage economic, social and environmental development without investment. One of the chief and primary bases of international expansions investments for emerging nations⁵³ is the foreign direct investment. It postulates the desired groundwork for growth, capability construction and as aforementioned in the thesis it carries technological resettlements. Subsequently the excessive benefits that states might have (including developed and developing nations) from the FDI inflow, most of them are very interested and desire to interest investment inflows into their territories. When speaking about worldwide investment it is consequently very helpful the existence of an international investment law in order to regulate this field and set some ground rules for all the parties to act in good faith according to the law, because the law is the principal instrument that guides and regulates social compoment and the specifics of law as a whole.

One of the key instruments, that the states rely on in order to attract foreign investment and benefit economically from the inflow of the latter, is the International investment agreement (IIA)⁵⁴, which is an agreement that is authorized amongst distinctive countries. Subsequently

⁵² Sornarajah M, *The International Law of Foreign Investment* (3rd ed, Cambridge University Press, 2010, pg.118

⁵³ Included here the Republic of Albania

⁵⁴ The main (and typically only) function of IIAs is to prescribe how host states are to treat foreign investors. IIAs commonly provide that if an investor is of the view that it has not been treated as required under the IIA, the investor may bypass local courts or administrative review and request the formation of an international arbitral tribunal (typically composed of three arbitrators), which will decide whether the state has breached its obligations under the IIA and must pay compensation or other damages to the investor.

the treaties postulate defenses to the investment, it is supposed that IIA reassure foreign investors to get out of their domestic market and invest their capital elsewhere.

Concerning the globalization and the affected upsurge in FDI it can be noted that international investment law has advanced in massive steps. In present-day international investments such as vacationer resorts or power plants, are in taking place in a very large number, which they include, many economic actors such as joint ventures, domestic companies, multinational establishments, governments and regulatory entities, commercial banks and insurers. The latter actors mentioned sustain their dedicated positions and alleviate joint prospects a complete framework of standards, development agreements, multilateral and bilateral treaties (BITs), court rulings, assurances and arbitral awards. It is the international investment law, which strengthens the investing character and projections of foreign investors by making it much easier for the latter to exploit a relatively positive impact to the states markets.

These contributors found their particular positions and alleviate joint expectations by means of a complete framework of standards, project agreements, guarantees, multilateral and bilateral investment treaties ("BITs"), arbitral awards and court rulings. International investment law strengthens investment functions and probabilities by distribution of power and authority among those parties who may affect the investment result so that they can circumvent and control disagreements by parties that are associated to the international investment, from investment engagements.

Although countries are the key actor of control and power in international law, their role varies partly in international investment law since it somehow allocates some of its authorities to other players comprising investors, foreign courts and regional or international arbitral tribunals. International investment treaties include investment safeguards vis-à-vis

investors and even host state regulations, based on the legislation that regulates it and all this is completed and established by the principle of the right to possess a property. These treaties and agreements require assistance by states immediately if these international regulations intervene in those parts where sovereign jurisdiction is at stake. If the host states cannot make sure to comply with these requests that are postulated in the provisions set out by these treaties than the control mechanisms need to irrupt.

There is a need to contemplate a reassurance that the association that is desirable past the needs of foreign investment and host country's regulations, primarily it needs to be clarified the legal status of international investment law. Most of the analyses about FDI have acknowledged that this administration is paramount unstated as two engaging sections: essential safeguards for foreign investors merged with corrective processes to implement those defenses.⁵⁵ In order to reach an understanding of the latter the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" is the focal instrument that regulates this structure, firstly it is compulsory to comprehend the substantive protections that it generates.

3.3 Substantive Protections

Substantive protections for foreign investors have been established both in treaties and in customary international law as a characteristic of the conduct that states were indulged to stipulate to their populations as a whole.⁵⁶ The functional privileges under these innovative bases of law, however, were harshly weakened by a diversity of preventive principles and jurisdictional rules.⁵⁷ The central functional component of the investment system as it occurs

⁵⁵ See: Rudolf Dolzer & Margarete Stevens, *Bilateral Investment Treaties* 1–18 (1995).

⁵⁶ The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law Julian Davis Mortenson* VOLUME 51, NUMBER 1, WINTER 2010-page 262

⁵⁷ In particular, investors' only recourse was typically to petition their home government for assistance; unless the host state agreed to arbitrate treaty disputes, investors could not bring direct claims themselves under international law. Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 159–61 (2005)- page 76

today, consequently, is the bilateral investment treaty (“BIT”), a novelty first presented during the 1950s period which fastly started to become the major international part of International Investment Law.⁵⁸

BITs generate a set of practical legal securities alike to the broad assurances of equality and due process found in numerous sovereign states’ national constitutions. They are protections to the partnership amongst different nations hence they declare and guarantee “fair and equitable treatment,” a kind of agreement of respectable confidence and reasonable dealing that drags the state even as a controlling independent. Many of the BIT’s comprise a most favored nation clause and often contain a warranty that necessitates, at least, that the authority would deliver satisfactory substantial defense from isolated ferocity and wrongdoing.⁵⁹

After the principal part of the administration of the international investment law, the second fragment collaborates with **procedural enforcements**. In order for the practical promises to have a thoughtful tangible power amongst all the nations, is necessary an enforcement mechanism. The main instrument that enables the enforcement of the “ICSID Convention” that was documented in 1966 by the Convention on the Settlement of Investment Disputes, a multiparty agreement envisioned in order to establish a protected structure for endorsing and safeguarding foreign investment in developing countries.⁶⁰ As articulated in the treaty, the goal of the ICSID is to endorse financial development to conclude the creation of a satisfactory investment climate.⁶¹The ICSID Convention created a capability for alternative

⁵⁸ See: Rudolf Dolzer & Margarete Stevens, *Bilateral Investment Treaties*

⁵⁹ The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law Julian Davis Mortenson* VOLUME 51, NUMBER 1, WINTER 2010-page 269

⁶⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 17, 1966, 575 U.N.T.S. 159. There are currently 156 ICSID Convention signatories, of which 144 have deposited instruments of ratification. ICSID, Member States, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=SHowHome&pageName=MemberStates_Home.

⁶¹ Principles of International Investment Law, Rudolf Dolzer, Christopher Schreuer, Oxford University Press, ISBN 978-019-921175-3, pg. 224

dispute resolutions amongst signatory states.⁶² It was this convention that created so many amenities for arbitration amid individual investors and participant countries. This convention enabled individuals to pursue direct restitution from sovereign countries formerly an institutionalized international forum—a major growth whose implication was completely evident to its legislators.⁶³ The ICSID procedural aspects also creates a termination instrument throughout which trailing parties to a case law can appeal arbitral verdicts before a another ad hoc tribunal underneath a tremendously deferential standard of assessment.⁶⁴

In nowadays are relevant even other replacements to ICISID. Several BITs allow adjudication on an ad hoc source under the “UNCITRAL” that rules over an alternative international arbitral grouping such as the Stockholm Chamber of Commerce or the International Chamber of Commerce. While the ICSID is the focal entity that postulates the procedural enforcement of arbitral awards, it is not sure if the enforcement instruments of it can be able to overcome the sovereign states immunity over the states assets.⁶⁵ In practice, any ordinary national law provisions available to contest final court rulings may also be invoked when an ICSID award has been finalized.⁶⁶ However, this step has been widely praised by the thousands of foreign investors who have been awarded full compensation for acts wrongly performed by the host states but could never enforce those arbitral awards. Specifically, the enforcement mechanism for routine business arbitration (that could be expended for UNCITRAL and further non-ICSID awards) allows domestic courts to easily make void the arbitral decisions based on the national laws in force in that territory, predominantly if there is a broad source in public policy for the counter arguments to these

62 ICSID Convention, , art. 25(1).

63 See, e.g., Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), in 2 HISTORY, supra note 9, at 256 (Uganda) (“[T]he effect of [the Convention] would be to place nationals on a par with States.

64 ICSID Convention, supra note 13, art. 52(1) (limiting annulment review to challenges claiming, for example, that the Tribunal “manifestly exceeded its powers,” was subject to “corruption,” or “failed to state the reasons” for its decision).

65 ICSID Convention, supra note 13, art. 55. For an excellent summary of the legal and practical challenges in executing ICSID awards, see Andrea Bjorklund, State Immunity and the Enforcement of Investor-State Arbitral Awards, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY

66 ICSID Convention, supra note 13, art. 54(3); see, e.g., Fed. R. Civ. P. 60(b)

awards.⁶⁷ The plusses of ICSID's distinctive enforcement competences were documented from the start.⁶⁸ Among numerous of the International Investment Agreements (IIAs), BITs remain to be the most abundant and the most significant sort of cross-border investment treaties. BITs have been contracted amongst developed and developing nations. Since the first nations contracted BITs in order to advance and found international rules in order to safeguard and pave the way for foreign investments, the secondary states engaged in BITs as part of their demand to improve their national strategy framework in order to increase the main factors that fascinate FDI and by so, to benefit from this lucrative activities. When BITs are engaged they indicate compulsory regulations to the parties that have ratified it. The initial element that a BIT produces is the "commitment effect" by which it is assumed as a binding international pledge to reasonable safeguard and conduct of foreign investors that will diminish risks and will increase FDI from the parties to it. The secondary consequence from a BIT may be baptized as the "signaling effect" by which it is implicit that the BITs indicate importance concerning improved property rights for all investors in the host states. This is characteristically founded on FDI entries into the host developing states (in utmost cases with OECD⁶⁹ states) and the figure of the ratified BITs as a descriptive alterable. BITs progress even institutional excellence. It is well known that the development of institutional quality takes some time, but the characteristics of institutions and policies are subject to FDI, BITs are the key tool that may be careful by foreign-owned companies and nominees as an alternative to enhanced institutional quality and so arouse FDI inflows from foreign investors.

67 The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law Julian Davis Mortenson* VOLUME 51, NUMBER 1, WINTER 2010-page 262; Based on United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 71 (May-June 1958).

68 Cf. Amerasinghe, The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation, 9 VAND. J. TRANSNAT'L L. 793, 815 (1976)

69 The Organisation for Economic Co-operation and Development (OECD, French: Organisation de coopération et de développement économiques, OCDE) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. It is a forum of countries committed to democracy and the market economy, providing a platform to compare policy experiences, seek answers to common problems, identify good practices, and co-ordinate domestic and international policies of its members.

Even BITs with “potential and strong provisions” in support of foreign owned businesses have a great chance to interest and inspire FDI. Based on the new studies concerning FDI, in broad-spectrum it can be determined that that BITs do endorse FDI flows to developing nations. Conclusively at last but not least are totaled the judicial decisions relevant to the aforementioned regulatory treaties and regulations. Judicial pronouncements, which comprise also arbitral awards and conclusions on international law in domestic courts, have merely supplementary importance as foundations of law.⁷⁰ Undeniably, Article 59 of the Statute of the International Court of Justice lies down that conclusions of the ICJ⁷¹ in controversial case law decided by the court are not binding in nature and also conclusively, excepting as amongst the parties and in particular of the situation below contemplation. Nonetheless the ICJ and additional committees challenge to monitor their private aforementioned judgments to safeguard a magnitude of expectedness in the improvement of international law.⁷² They had an immeasurable encouragement in determining the principles of international law. Concerning the sector of foreign investment there are four imperative pronouncements of the grand chamber of the court. The paramount case is the *Chorzow Factory Case*⁷³ which has comprises with disputes of the reimbursement for the expropriation of Investors of their private property without any justifiable reason to privatize a foreign property. The subsequent case is the *Barcelona Traction Case*⁷⁴, which is a very famous case that is allocated with the

⁷⁰ Article 38, of the Statute Of The International Court Of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁷¹ International Court of Justice

⁷² Compendium Of Judicial Decisions On Matters Related To Environment International decisions, Volume I, December 1998.-9

⁷³ Decision of the Permanent Court of International Justice, Publications of the Permanent Court of International Justice, Series A - No. 9, Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 192

⁷⁴ Cour internationale de justice recueil des arrêts, avis consultatifs et ordonnances affaire de la barcelona traction, light and power company, limited (nouvelle requête: 1962) (belgique c. Espagne) deuxième phase international court of justice reports of judgments, advisory opinions and orders case concerning the barcelona traction, light and power company, limited (new application : 1962) (belgium v. Spain) second phase judgment of 5 february 1970

commercial nationality and the diplomatic security of stakeholders, although the third case is the *ELSI Case*⁷⁵, this case brought up issues with insolvency and bankruptcy of transcontinental corporations. Although the contemporary situation concerning international investment law is the *Diallo vs. Congo*⁷⁶, that dealt with questions of corporate nationality, and in the concluding remarks of the case it long-established the equal methodology of the *Barcelona Traction Case*.

Even arbitral decisions made on disagreements that originate from foreign investment dealings may underwrite to the international law sources. The honors specified from *ad hoc*⁷⁷ committees as well as persons prepared by recognized tribunals⁷⁸ postulate a sharp confirmation of conceivable standards, which might be expended for the manufacture of standards of international law.⁷⁹

These cases are the foundations of customary international law on foreign direct investments issues, which are regulated via the treaties and agreements, elaborated in this thesis. The main goal of this cases is to direct sovereign countries in order to pave the way for international recognition and enforcement of judicial decisions and alternative dispute resolution methods .

⁷⁵ International court of justice pleadings, oral arguments, documents case concerning elettronica sicula s.p. A. (elsi) (united states of america v. Italy) volume i

⁷⁶ International court of justice reports of judgments, advisory opinions and orders case concerning ahmadou sadio diallo (republic of guinea v. Democratic republic of the congo) preliminary objections judgment of 24 may 2007

⁷⁷ Ad Hoc Tribunal is a court created to deal with specific disputes, generally by an international body like the United Nations Security Council; such a court has a geographical, subject-matter, and temporal limits on its jurisdiction

⁷⁸ Mainly those made by tribunals which are constituted under the ICSID Convention

⁷⁹ See: *The Settlement of Foreign Investment Disputes, Sornarajah (2000)*

3.4 Definition of international investment law

The importance and the impact of foreign direct investment have developed considerably in contemporary times in two principal methods. In the principal period amongst 1870 and 1914 a new element of international monetary excellence and flexibility led to an enormous development in foreign investments. The international foreign investments legal regulatory framework consists of layers of wide-ranging international law and of principles of international commercial law. International investment law could be expressed as agreed guidelines that rule international investment as a whole practice. International law on foreign investment has remained and is being designed by a back-and-forth of numerous financial, governmental, collective and historical features. Since the direct investment contains the relocation of capitals, which is a long-term assignment along with the persistence of fixed income, the contribution of the individual relocating capitals and is as well as much of a commercial risk, than an equal standard of the international law on foreign investment is the enormous ground that a study can be performed in order to regulate the aforementioned areas of investment. As it is entitled “international law on investment” it is generally comprehended that this law contains an international element that excludes it from being a domestic law in nature and scope of application, subsequently it includes numerous states to pave the way for a free cross-border foreign investment. The international law develops by means of treaties and other multinational agreement and case law, as these are the most important elements in order for states and natural or juridical persons in order to achieve effective practices out of these so called international regulations. State sovereignty is partly given upon the signature and ratification of these treaties, as after the past the ratification procedure a State cannot rely solely on its domestic legislation concerning foreign

investment, but additionally must draft and implement the international requirements into their respective national laws in order for the latter to be efficient and not contradictory with the international treaty provisions that they signed in for. After a country has conceded a foreign investment permission to enter the market, it must be issued to a slightest average standard of protection once the law will regulate its activities. Every country has its individual rights and freedoms to weight the economic and financial remunerations derived from a treaty. In contemporary days, numerous of the industrialized nations have advanced their own predilections structure concerning treaties, since investing treaties is understood as admittance permits to the international investment marketplace.⁸⁰ As clarified above, the guidelines of foreign investment trace upon national rules as numerous as labor law, governmental doctrines, the association of the judiciary, healthiness law, environmental law as well as property law and real estate regulatory frameworks. Particularly in deprived and developing economies, FDI habitually takes the shape of big developments each one of which resembles a substantial portion of the host nation's entire investment. Consequently, thus as the foreign investor has substitute possible places for its investment, it has negotiating influence vis à vis the host state's regime and may be skilled to discuss footings that are supplementary auspicious than those accessible to local investors.⁸¹ These relations might take the shape of immunities from definite national laws, comprising tax laws, and of distinct subventions and public service industries, such as new highways and elevated harbor capacities. In accumulation, foreign investors might concern about individually being oppressed by the host nation after their assets are descended and will request guarantees that the regime will treat them differently than local businesses. The host country must exercise the most favored nation treatment in order to be successful in accordance with its

⁸⁰ See: Principles of international Investment Law, Rudolf Dolzer, Christoph Schreuer, Oxford University Press, 2008

⁸¹ Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties By: Jennifer Tobin and Susan Rose-Ackerman, William Davidson Institute Working, pg.8

commitments to FDI. In current times transnational investors have survived by the assistance due to the development of multiparty and bilateral agreement and treaties. The latter are treaties or agreements reached amongst the home nations of investors and probable host states that established a universal framework for the cooperation of FDI deals. They fix the multitude state to handle all foreign investors from the home country in conducts that will guard their assets and that stretch them either equivalence with or advantages over local investors.⁸²

⁸² Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties By: Jennifer Tobin and Susan Rose-Ackerman, William Davidson Institute Working, pg.8

4. ENVIRONMENTAL PROTECTION

Concerning the explanation of the environmental safety it has remained taken for conceded that it comprises of all existing observations that are expended to safeguard environmental elements, whether on a distinctive, administrative, domestic or international level. This in other words states that every individual can do somewhat to safeguard the environment that we live in, nonetheless the greatest significant developments can be accomplished by the unified international actions. The mutual attitude in nowadays is that the environment is in a persistent level of mortification because of so countless diverse environmental complications as well as some foreign elements that might distress it destructively.

Founded on legal characterization, environmental defense deliberates to several actions in order to preserve or reinstate the value of environmental channels throughout avoiding the release of polluting elements by contaminants or plummeting the company of contaminating materials in environmental channels. It may consist of: (a) fluctuations in features of goods and services, (b) variations in utilization arrangements, (c) variations in manufacturing practices, (d) management or discarding of residuals in distinct environmental safeguard capacities, (e) reutilizing.⁸³

⁸³ Glossary of Environment Statistics, Studies in Methods, Series F, No. 67, United Nations, New York, 1997.

4.1 The necessity for environmental security

Foreign direct investment by foreign corporations in external branches or joint ventures- has a customary dependence on ecological resources of the host state, predominantly in important areas like agronomy, fuel manufacture, mineral resources etc. Environmental effect reports must be completed earlier to the authorization for the entrance of the FDI. It may occur that the FDI may be a denied admission to the host country's market, if the environmental costs have been regarded as threatening to the latter. Since countries have their autonomy, the denial to authorization of admission of a foreign corporation, which might produce damage to the environment, stands acceptable. There is likewise a responsibility on the aggregate of all countries to guarantee observance with criteria that are recommended moreover in international treaties or unwritten rules set by customary international law concerning to environmental safety.⁸⁴ The contemporary argument amongst the FDI and the influence on environment focuses derives from the well known "*pollution havens theory*"⁸⁵. This theory is clarified by the concern of the negligent edicts in emerging economies. Transnational establishments see unindustrialized nations as paradises where they create revenues exclusive of partaking to tolerate the expenditures accompanying with obedience through the severe controlling criteria that they have to comply with in their respective states or any developed states.⁸⁶ Subsequently the greatest of the transcontinental stakeholders strain a transfer of their setup in the emerging economies of developing nations thanks to their non-rigorous environmental guidelines; the humble nations and emerging ones still obtain an unequal

⁸⁴ Sornarajah M, *The International Law of Foreign Investment* (3rd ed, Cambridge University Press, 2010, pg.109

⁸⁵ See reference 4, on page 3 of this Thesis- the concept of „pollution haven“ implies global competitive forces which exert influence on foreign investors to locate their industrial complexes in countries with low environmental standards, where operational costs, in the light of environmental regulations, are lower 85The operation of these “polluting” industries to poor and developing countries leads to the creation of pollution havens and excessive environmental degradation. So when choosing a country in which than the industries will invest, the prior and the main factor in choosing this country are the environmental regulations.

⁸⁶ Sornarajah M, *The International Law of Foreign Investment* (3rd ed, Cambridge University Press, 2010, pg.225

quantity of investment inflows produced to the deficit of their natural resources.⁸⁷ However the host countries underestimate their environmental criteria in order to feed the demands of the general public to be able to attract FDI and to benefit from the cash injection that these business activities will bring to the country as a whole. This might result in even exacerbated circumstances for the environmental safety and excessive air or water contamination in the host nation as well as a very serious degradation of the country's environmental protection levels. As aforementioned there are many theories that foster the environmental protection mechanisms internationally in order to attract more monetary flow into the country since the governments try to make people believe that their efforts to bring in these investors will only brighten the country's future. It is very important to state the "Race to the bottom" theory due to the fact that this theory aims at a similar meaning to that of the "pollution haven theory" but in difference from the latter the "Race to the bottom" theory it chiefly illuminates the general public with the possible case scenarios that undermine the countries environmental safety and security by allowing certain FDI activities that have proven to be very dangerous elsewhere and also in the hypothetical possible scenario presented it could be as much harmful or even more, nonetheless the cases by which the nations endeavor to exempt or untie their environmental guidelines in demand to flatter more aggressive competition for FDI inflow. Revisions of state guidelines encourage the "race to the bottom" notion, by considering that the diverse nations will obligate assistances since they eased their environmental rules in order to maintain continued effectiveness and maintain investments from disappearing somewhere offshore. These might carry into light the so-called "war" amongst nations that are in a unceasing competitiveness to fascinate FDI activities.

⁸⁷ Most of the resource and pollution intensive industries have a preference for areas of low environmental regulations and standards

4.2 Case Law: *Chevron VS Ecuador*

As I have emphasized in the commencing of this thesis, FDI is the principal significant “mechanism” for sustainable development in numerous nations. However the latter period presented a quickened environmental mortification.⁸⁸ It so imperative that FDI maneuvers within the justifiable restrains in direction to maintain vigorous bionetwork purposes. Originating from these circumstances numerous strategies were completed in order to endorse sustainable development⁸⁹. Notwithstanding the provincial and global strategies, also countries itself must impose their environmental guidelines and law, and also must impeach each foreign corporation that abolishes the equilibrium of a vivacious ecosystem. The up-to-date paradigm vis-à-vis the fortification of the environment after the FDI is the Chevron V. Ecuador case law in which Chevron is shielding the situation in contradiction of false accusations that it is accountable for unproven environmental and social damages in the sovereign state of Ecuador⁹⁰. Chevron certainly did not perform oil extraction operations in Ecuador, and its subordinate Texaco Petroleum Co. ("TexPet") completely remedying its portion of environmental collisions developing from oil extraction operations, prior to their exit from Ecuador in 1992. After the remediation was official by all the organizations of the Ecuadorian regime liable for omission, to TexPet was sent a whole discharge from Ecuador's nationwide, regional, and civic governments that dowsed all entitlements beforehand Chevron attained TexPet in 2001. Concerning Chevron all the genuine scientific indications absolves it and demonstrates that the remediated locations stance no substantial threats to anthropological health or the environment. Nonetheless that these circumstances were positive, the definitive evaluation is controlled by the judicial authority of the court of law.⁹¹ Additional consequence that could be produced in these rivalry between nations in order to

⁸⁸ For example greenhouse gas emissions, deforestation, loss of biodiversity etc.

⁸⁹ Biodiversity Plan, Agenda 21, National Strategies for Sustainable development

⁹⁰ in the Oriente region of Ecuador- The Facts About Chevron in Ecuador and the Plaintiffs' Strategy of Fraud; www.chevron.com

⁹¹ The Facts About Chevron in Ecuador and the Plaintiffs' Strategy of Fraud; www.chevron.com

appeal FDI inflow may reason the regulatory freezing theory by which it is obtainable the focal idea that nations refrain from resolving severe environmental defenses and guidelines, from the distress of non appealing investors in their nations. This might central in an “environmental safeguard” trapped by some non-regulated aspects in latter. This attitude has continued comprehended law-abiding in developing nations. It could be predictable that this could be additionally unexceptional because the impression of investor relocation or subcontracting of manufacture might be important complete economic enlargement.⁹² Concerning the state sovereignty it is a pre-requisite to be assumed that two guidelines antagonize each other, since one pointers that the country has its freedoms to impose severe regulatory frameworks to safeguard the environment, and on the other hand the governmental policies regarding the safeguarding of the environmental standards of protection from pollution from this activities has a similarly more important role in defending foreign investments by means of immediate and innovative strict regulations.

⁹² See: J. Albrecht; Environmental Regulation, Comparative Advantage and the Porter Hypothesis, University of Ghent-CEEM September 1998 FEEM Working Paper No. 59.98

5. LEGAL FRAMEWORK OF FOREIGN INVESTMENT AND ENVIRONMENTAL PROTECTION IN ALBANIA

5.1 Sources of international law

Article 38 of the statute of the International Court of Justice⁹³, that is well thought out as a commanding declaration on the foundations of international law, allocates along with the foundations of legal order, order with which the International Court of Justice is to concern in decisive disagreements, presented to the court by applicants.

5.1.1 Treaties

The standards of an international law that regulates the area of foreign investments could be acknowledged as ideologies of international law merely if they are established on and put as acknowledged sources of public international law⁹⁴. The foundations of the international law on foreign investment are laid down in Article 38 (1) of the statute of the International Court of Justice⁹⁵. In the first paragraph of Article 38 defines the International Conventions. International conventions are the equivalent of treaties, bilateral and multilateral ones.

⁹³ Article 38, of the Statute Of The International Court Of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁹⁴ Sornarajah M, The International Law of Foreign Investment (3rd ed, Cambridge University Press, 2010, pg.79

⁹⁵ Article 38, of the Statute Of The International Court Of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

These treaties serve as a basis of international law, these agreements reached between states found the recognition of a standard of international law by the situation from the members. Upon the termination of World War II there numerous countries decided that there was a tremendous need for an International trade Organization which could prosper the international trade and these would lead advanced regulated cooperation in trade related aspects between many countries and therefore enable the more developed nations to reinvent the wheel for developing and emerging ones. These lead also to the need for FDI and the benefits that all the parties would gain from these activities but in order to achieve a proper way to engage in these activities these parties had to regulate the area.

Nevertheless this determination and approach followed to become unsuccessful, later on after numerous efforts this led to the entry into force in 1995 under the name of World Trade Organization. (WTO) Additional energies remained; in command to found other conventions concerning the foreign investment nevertheless nothing resulted positive.⁹⁶ The solitary efficacious agreement that is more closely associated to this area is the ICSID⁹⁷ convention, which essentially is a practical convention that serves as a device for the resolution of investments disagreements throughout arbitration procedures. In addition to the ICSID there are also different regional treaties that regulate foreign direct investment and the solidest articles are those stipulated in the NAFTA Agreement specifically in Chapter 11. The

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁹⁶ The Abs- Show cross Convention sought to formulate a foreign investment code but it doesn't come into force since so many States were suspicious about ratifying it and so it was not accepted. Even on 1990s the OECD attempt a Multilateral Agreement on Investment but again the attempt met the failure also from the opposition generated from NGO-s

⁹⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 17, 1966, 575 U.N.T.S. 159. There are currently 156 ICSID Convention signatories, of which 144 have deposited instruments of ratification. ICSID, Member States,

requirements in this subdivision follow the BIT of the United States of America⁹⁸ and generate a structure for the free undertaking of investments within the NAFTA member countries. Additional organizations such as NAFTA but which are extremely essential treaties are amongst many the ASEAN⁹⁹ treaty. ASEAN comprises of heavy-duty requirements but from the time when only accepted investments with positive standards were safeguarded by this treaty, around was such an abundant interplanetary left for the supervisory mechanism exercised on FDI activities. Afterwards, an adjustment to the ASEAN conveyed into power the advanced ASEAN “Agreement on Investments”. Nowadays an exceptional treaty entitled as the ASEAN Comprehensive Treaty on Investments is the successor of these treaties in order to achieve a more comprehensive and practical perspective on the matters at hand. The Mercosur Agreement¹⁰⁰ is a supplementary regional treaty, which its core aim and competencies lay exclusively on the safeguarding of the foreign direct investments. In present times exists is a high-pitched intensification on the stimulation of free trade agreements. In particular several of treaties are bilateral as well as regional understandings and the greatest noticeable one similar that it nurses not enter in force, is the Free Trade Agreement of the Americas¹⁰¹ that comprises of the territories of the whole North, Central and South Africa. These agreements foster the importance of trade related aspects in the regions and create so called new balances in order to circumvent and succeed in the free trade are that is so much desired from these nations that undertake such huge steps in the globalization process.

⁹⁸ Since this convention affect only developed countries, namely USA and Canada

⁹⁹ Agreement Among The Government Of Brunei Darussalam, The Republic Of Indonesia, Malaysia, The Republic Of The Philippines, The Republic Of Singapore, And The Kingdom Of Thailand For The Promotion And Protection Of Investments Manila, 15 December 1987

¹⁰⁰ Mercosur Free Trade Agreement; Southern Common Market (Mercosur) Agreement. Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay.

¹⁰¹ The Free Trade Area of the Americas (FTAA) is *a proposed* agreement to eliminate or reduce the trade barriers among all countries in the Americas but Cuba. In the last round of negotiations, trade ministers from 34 countries met in Miami, United States, in November 2003 to discuss the proposal. [3] The proposed agreement was an extension of the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States. Opposing the proposal were Cuba, Venezuela, Bolivia, Ecuador, Dominica, Nicaragua and Honduras (all of which entered the Bolivarian Alternative for the Americas in response), and Argentina, Chile and Brazil.

5.1.2 International Custom

An extensive and distinguished practice functions as a foundation for the international investment law from the time when it communicates an undeniable characterization that after being generally acknowledged converts to compulsory. Unindustrialized nations began to make use of their numerous strength in the meetings at the UN General Assembly to implement determinations in the expanse of foreign investments.¹⁰² The ideologies which are encompassed in UN General Assembly resolutions establish “instant customary international law” in which they are in support of an *opinio iuris*¹⁰³ by the international society formed during an official UN General Assembly meeting.¹⁰⁴

There are dualistic disapprovals to the guidelines of the opinions comprised in the General Assembly resolutions to a second-rated prominence. The principal is that, to the treatment that the determination requests to switch foreign investment inside a national sovereign territory and also limited jurisdiction over financial occupation of a definite country, it proclaims a commonly recognized suggestion of international law.¹⁰⁵ The subsequent is that, the emancipation of the standards that are outlined in the resolution, as “soft law” precondition ally assume the continuation moreover of guidelines that are founded in a more advanced scale in the hierarchy of the legal sources. The entire establishment of customary international law has been accompanied alongside supremacy and the responsibility of

¹⁰² Sornarajah M, *The International Law of Foreign Investment* (3rd ed, Cambridge University Press, 2010, pg.83

¹⁰³ *Opinio juris sive necessitatis* ("an opinion of law or necessity") or simply *opinio juris* ("an opinion of law") is the belief that an action was carried out because it was a legal obligation. This is in contrast to an action being the result of different cognitive reaction, or behaviors that were habitual to the individual. This term is frequently used in legal proceedings such as a defense for a case. *Opinio juris* is the subjective element of custom as a source of law, both domestic and international, as it refers to beliefs. The other element is state practice, which is more objective as it is readily discernible. To qualify as state practice, the acts must be consistent and general international practice.

¹⁰⁴ B. Cheng “ United Nations resolutions on Outer Space, Instant International Customary Law 91965), pg. 24

¹⁰⁵ As evidence of a general practice accepted as Law; Article 38, of the Statute Of The International Court Of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

b. international custom, as evidence of a general practice accepted as law;

supremacy in this pitch is so unmistakable. Industrialized and controlling states intended to paradigm guidelines concerning fortification of the foreign investment by expending and performing them and afterwards to pass these as customary principles.

The principle has presented leading that equal treaties of the identical state do not comprise duplicate principles and ideologies since they are opposition dependent on the observations and wants of the distinctive period, which they happened and were created.¹⁰⁶ Customary international law provides that a state might apply diplomatic protection on behalf of at least one or some of its nationals with regard to a privilege in contradiction of another state, even if its nationwide also controlled the population of the other state, providing that the foremost and applicable nationality of the individual was the nationality of the country implementing diplomatic defense. In this reverence, customary international law has progressed since the previous principles of non-responsibility below which diplomatic safety & security might not be implemented and made use of, in those particular cases.¹⁰⁷ Below the instructions of customary international law, no independent nation is bound to accept or pertain obligations to acknowledge foreign investment in its sovereign lands and country, commonly or in whichever individual subdivision of its budget, although the precise right to eliminate and to standardize foreign investment is an appearance of state sovereignty, the supremacy to complete agreements with several countries willpower also be perceived as graceful from the identical conception.¹⁰⁸

¹⁰⁶ See: Survey of the Chinese practice in N. Gallagher and w. Shan, Chinese Investment Treaties, Policy and Practice. Pg. 69

¹⁰⁷ Support for the rule of non-responsibility can be found in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. Article 4 provides that: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." See also Art. 16(a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, (1929) 23 AJIL Special Supplement 133-139. See Art. 23(5) of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, reproduced in (1961) 55 AJIL 548; Article 4(a) of the resolution on "*Le caractère national d'une réclamation internationale présentée par un État en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its 1965 Warsaw Session.

¹⁰⁸ See: Principles of international Investment Law, RUDOLF Dolzer, Christoph Schreuer, Oxford University Press, 2008

Foreign direct investment by foreign corporations in external branches or joint ventures- has a customary dependence on ecological resources of the host state, predominantly in important areas like agronomy, fuel manufacture, mineral resources etc. Environmental effect reports must be completed earlier to the authorization for the entrance of the FDI. It may occur that the FDI may be a denied admission to the host country's market, if the environmental costs have been regarded as threatening to the latter. Since countries have their autonomy, the denial to authorization of admission of a foreign corporation, which might produce damage to the environment, stands acceptable. There is likewise a responsibility on the aggregate of all countries to guarantee observance with criteria that are recommended moreover in international treaties or unwritten rules set by customary international law concerning to environmental safety.¹⁰⁹ The contemporary argument amongst the FDI and the influence on environment focuses derives from the well known "*pollution havens theory*"¹¹⁰. This theory is clarified by the concern of the negligent edicts in emerging economies. Transnational establishments see unindustrialized nations as paradises where they create revenues exclusive of partaking to tolerate the expenditures accompanying with obedience through the severe controlling criteria that they have to comply with in their respective states or any developed states.¹¹¹ Subsequently the greatest of the transcontinental stakeholders strain a transfer of their setup in the emerging economies of developing nations thanks to their non-rigorous environmental guidelines; the humble nations and emerging ones still obtain an unequal

¹⁰⁹ Sornarajah M, *The International Law of Foreign Investment* (3rd ed, Cambridge University Press, 2010, pg.109

¹¹⁰ See reference 4, on page 3 of this Thesis- the concept of „pollution haven“ implies global competitive forces which exert influence on foreign investors to locate their industrial complexes in countries with low environmental standards, where operational costs, in the light of environmental regulations, are lower 110The operation of these “polluting” industries to poor and developing countries leads to the creation of pollution havens and excessive environmental degradation. So when choosing a country in which than the industries will invest, the prior and the main factor in choosing this country are the environmental regulations.

¹¹¹ Sornarajah M, *The International Law of Foreign Investment* (3rd ed, Cambridge University Press, 2010, pg.225

quantity of investment inflows produced to the deficit of their natural resources.¹¹² However the host countries underestimate their environmental criteria in order to feed the demands of the general public to be able to attract FDI and to benefit from the cash injection that these business activities will bring to the country as a whole. This might result in even exacerbated circumstances for the environmental safety and excessive air or water contamination in the host nation as well as a very serious degradation of the country's environmental protection levels. As aforementioned there are many theories that foster the environmental protection mechanisms internationally in order to attract more monetary flow into the country since the governments try to make people believe that their efforts to bring in these investors will only brighten the country's future. It is very important to state the "Race to the bottom" theory due to the fact that this theory aims at a similar meaning to that of the "pollution haven theory" but in difference from the latter the "Race to the bottom" theory it chiefly illuminates the general public with the possible case scenarios that undermine the countries environmental safety and security by allowing certain FDI activities that have proven to be very dangerous elsewhere and also in the hypothetical possible scenario presented it could be as much harmful or even more, nonetheless the cases by which the nations endeavor to exempt or untie their environmental guidelines in demand to flatter more aggressive competition for FDI inflow. Revisions of state guidelines encourage the "race to the bottom" notion, by considering that the diverse nations will obligate assistances since they eased their environmental rules in order to maintain continued effectiveness and maintain investments from disappearing somewhere offshore. These might carry into light the so-called "war" amongst nations that are in a unceasing competitiveness to fascinate FDI activities.

¹¹² Most of the resource and pollution intensive industries have a preference for areas of low environmental regulations and standards

5.1.3 The general principles of Law recognized by civilized Nations

Nevertheless that their influence on the foundations of the international investment law hasn't been that excessive as the impression of the foundations above, overall philosophies of law are totaled as a foundation of international law. While others show great elaboration and different philosophies of legal doctrines.

Alternative Dispute Resolution Method's such as Arbitral tribunals in obtaining doctrines relevant to investment contracts have expended abundant analyses advantage that the attendance of ideologies on the international law on foreign investment is largely founded on the wide-ranging principles of law, which are extensively accepted. Since they are extensively increasing in the extent of investment contracts since the use of arbitral tribunals, subsequently they have obtained a "soft" but significant role in determining the guidelines in the area of foreign investment protection.¹¹³ These courts might not continuously use the wide-ranging codes in the acknowledged manner, subsequently their principal balanced objective was to encourage fortification of foreign investment and the latter can carry even destructive possessions on the host country. The standards based on wide-ranging principles will be progressively endangered to examination and dismissal, since they are fragile standards and cannot challenge standards that advance from foundations that trust on consensual developments between countries in order to achieve their goals.

¹¹³ Article 38, of the Statute Of The International Court Of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: "...c. the general principles of law recognized by civilized nations;"

5.1.4 Judicial Decisions

Conclusively at last but not least are totaled the judicial decisions relevant to the aforementioned regulatory treaties and regulations. Judicial pronouncements, which comprise also arbitral awards and conclusions on international law in domestic courts, have merely supplementary importance as foundations of law.¹¹⁴ Undeniably, Article 59 of the Statute of the International Court of Justice lies down that conclusions of the ICJ¹¹⁵ in controversial case law decided by the court are not binding in nature and also conclusively, excepting as amongst the parties and in particular of the situation below contemplation. Nonetheless the ICJ and additional committees challenge to monitor their private aforementioned judgments to safeguard a magnitude of expectedness in the improvement of international law.¹¹⁶ They had an immeasurable encouragement in determining the principles of international law. Concerning the sector of foreign investment there are four imperative pronouncements of the grand chamber of the court. The paramount case is the *Chorzow Factory Case*¹¹⁷ which has comprises with disputes of the reimbursement for the expropriation of Investors of their private property without any justifiable reason to privatize a foreign property. The subsequent case is the *Barcelona Traction Case*¹¹⁸, which is a very famous case that is allocated with the commercial nationality and the diplomatic security of stakeholders, although the third case is

¹¹⁴ Article 38, of the Statute Of The International Court Of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹¹⁵ International Court of Justice

¹¹⁶ Compendium Of Judicial Decisions On Matters Related To Environment International decisions, Volume I, December 1998.-9

¹¹⁷ Decision of the Permanent Court of International Justice, Publications of the Permanent Court of International Justice, Series A - No. 9, Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 192

¹¹⁸ Cour internationale de justice recueil des arrêts, avis consultatifs et ordonnances affaire de la barcelona traction, light and power company, limited (nouvelle requête: 1962) (belgique c. Espagne) deuxième phase international court of justice reports of judgments, advisory opinions and orders case concerning the barcelona traction, light and power company, limited (new application : 1962) (belgium v. Spain) second phase judgment of 5 february 1970

the *ELSI Case*¹¹⁹, this case brought up issues with insolvency and bankruptcy of transcontinental corporations. Although the contemporary situation concerning international investment law is the *Diallo vs. Congo*¹²⁰, that dealt with questions of corporate nationality, and in the concluders remarks of the case it long-established the equal methodology of the *Barcelona Traction Case*.

Even arbitral decisions made on disagreements that originate from foreign investment dealings may underwrite to the international law sources. The honors specified from *ad hoc*¹²¹ committees as well as persons prepared by recognized tribunals¹²² postulate a sharp confirmation of conceivable standards, which might be expended for the manufacture of standards of international law.¹²³

5.2 Foreign Investment under international law

As have remained quoted in the commencement of this thesis, in the contemporary globalization development and free trade movement, it is obviously comprehended the belongings that they can transport. Many arrangements amongst nations are completed in order to safeguard the precise accomplishment of distinctive laws and regulations concerning the progression of foreign investment. Since numerous unindustrialized nations pursue to fascinate foreign investment from other nations or foreign corporations it is understandably flawless the circumstance that this is profitable outside the national regulations meanwhile in these partnership are convoluted international parties. Vis-à-vis the principle and the laws

¹¹⁹ International court of justice pleadings, oral arguments, documents case concerning elettronica sicula s.p. A. (elsi) (united states of america v. Italy) volume i

¹²⁰ International court of justice reports of judgments, advisory opinions and orders case concerning ahmadou sadio diallo (republic of guinea v. Democratic republic of the congo) preliminary objections judgment of 24 may 2007

¹²¹ Ad Hoc Tribunal is a court created to deal with specific disputes, generally by an international body like the United Nations Security Council; such a court has a geographical, subject-matter, and temporal limits on its jurisdiction

¹²² Mainly those made by tribunals which are constituted under the ICSID Convention

¹²³ See; *The Settlement of Foreign Investment Disputes, Sornarajah (2000)*

when a single party is headquartered in a different country than the one of from the other party, than the international law maybe applicable and very efficient to resolve any conflict between the parties.

Countless of the unindustrialized nations have signed in to bilateral treaties (BITs) that comprehend guidelines on investment security and loosen up the law on foreign investment entry. So many efforts have been taken in order pave the way for the regulation of the foreign investment law on the international level. Very significant in this area is The North American Free Trade Agreement (NAFTA)¹²⁴ that is a covenant contracted by the countries of Canada, Mexico, and the United States. The NAFTA regional treaty comprises robust management requirements and highlights high criterions of management of foreign investment and its safeguard. Additional imperative treaty, which has existed, is the ASEAN¹²⁵ that generates a classification of safeguard inside its region¹²⁶. On 26 February 2009 this treaty was substituted with the ASEAN Comprehensive Investment Agreement. The unambiguous single-mindedness of this treaty is that it envisions the independent precise of the host country to appeal the disagreement settlement requirements of the treaty in contradiction of the foreign investor. In this covenant a pronounced role require the

¹²⁴ The agreement came into force on January 1, 1994. It superseded the Canada – United States Free Trade Agreement between the U.S. and Canada. In terms of combined GDP of its members, as of 2010 the trade bloc is the largest in the world. NAFTA has two supplements: the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).

¹²⁵ Asean Free Trade Area :(AFTA)[1] is a trade bloc agreement by the Association of Southeast Asian Nations supporting local manufacturing in all ASEAN countries. The AFTA agreement was signed on 28 January 1992 in Singapore. When the AFTA agreement was originally signed, ASEAN had six members, namely, Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand. Vietnam joined in 1995, Laos and Myanmar in 1997 and Cambodia in 1999. AFTA now comprises ten countries of ASEAN. All the four latecomers were required to sign the AFTA agreement in order to join ASEAN, but were given longer time frames in which to meet AFTA's tariff reduction obligations. The primary goals of AFTA seek to:

- Increase ASEAN's competitive edge as a production base in the world market through the elimination, within ASEAN, of tariffs and non-tariff barriers; and
- Attract more foreign direct investment to ASEAN.; See Wikipedia definition, http://en.wikipedia.org/wiki/ASEAN_Free_Trade_Area

Agreement Among The Government Of Brunei Darussalam, The Republic Of Indonesia, Malaysia, The Republic Of The Philippines, The

¹²⁶ Republic Of Singapore, And The Kingdom Of Thailand For The Promotion And Protection Of Investments Manila, 15 December 1987

evenhanded, fair treatment, full protection and security.¹²⁷ Times later afterward the first ASEAN covenant, the OECD¹²⁸ endeavored to draft a multiparty treaty. The outline of the MAI partook an identical communal contour with the NAFTA agreement. Despite that it was considered that it could have completed an abundant improvement in the investment field, this treaty never entered in force comprised of numerous motives, but the foremost remained that there weren't satisfactory arrangements inside the industrialized countries for the norms of the investment protection. Another important agreement is the Havana Charter of 1948 for the International Trade Organization (ITO). The specific provisions such as articles 11 and 12 stipulated guidelines regarding foreign investment. Due to the United States disapproval, the ITO certainly did not come into force, leave alone the fact that it intended safeguard of the foreign investment. Some really great determinations' were put in the investment field in the Uruguay Round. The most noteworthy acts are: Trade-related investment measures (TRIMS) and the General Agreement on Trade in services (GATS). Its persists are supplementary of a noteworthy value, since it allocates with amenities and describes services supplied by foreign companies within a Country. Thus GATS categorizes foreign investment in the services subdivision by developing as core philosophies the non-discrimination and countrywide equal treatment. Meanwhile the TRIMS focuses nonstop with foreign investment.

¹²⁷ Article 11 ,Treatment of Investment

1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security. 2. For greater certainty: (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.

¹²⁸ The Organisation for Economic Co-operation and Development (OECD, French: Organisation de coopération et de développement économiques, OCDE) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. It is a forum of countries committed to democracy and the market economy, providing a platform to compare policy experiences, seek answers to common problems, identify good practices, and co-ordinate domestic and international policies of its members.

It is not the most well organized mechanism of the Uruguay Round from the time when it contracts only with convinced categories of performance necessities.¹²⁹

5.2.1 The Sovereign Right to Freely Dispose, Use and Exploit Natural Resources

Hence the nation has its individual sovereignty, it has the absolute right to evaluate the entry of foreign investments and might do everything that the government thinks is better for the territory. Concerning the notion of the state sovereignty in the monetarist background, it is momentarily comprehended from side to side the ideologies of monetary self-determination and everlasting sovereignty over natural possessions.

These doctrines were best merged and designated in the Seoul Declaration of the International Law Association, and in the segment five of it, is quoted that: “PSNR over natural recourses, economic activities and wealth is a principle of international law”.¹³⁰

It attempts on by quoting that: “everlasting sovereignty that originates from the standard of self-determination is unchallengeable. A country might nevertheless acknowledge responsibilities with respect to the implementation of such sovereignty, by agreement or by treaty, spontaneously inserted into. It is the precise will of the nations to standardize, to engagement professional, disseminate and perform taxes in respect of natural resources appreciated and financial activities exercised and prosperity held in their terrains by foreign interests substance only two several appropriate necessities of international law”.

Therefore, only States are authorized to standardize and regulate the admittance of foreign investors, the compromise of enterprises vis-à-vis the development of evident natural

¹²⁹ On the role of the pharmaceutical industry in bringing about TRIPS, See S. Sell, Private Power, Globalization of Intellectual Property

¹³⁰ Seoul Declaration of the International Law Association – ‘permanent sovereignty over natural resources, economic activities and wealth is a principle of international law’ Section 5 (1988).

reserves, the period in which it will last for, the performance of bodies involved in the mistreatment and the delivery of incomes.¹³¹

It is the restricted right of the government to overturn remaining arrangements and likewise to reestablish remaining franchises.¹³² Furthermore, it could begin to propose the accession into international treaties conceding to other body's admittance to the use of its natural reserves and is permitted to generate an environment reassuring foreign and local investments by promising assured slightest quantities of investment shield.¹³³ To make available the complete satisfaction of these obligations it is consequently necessary to ascertain instances essential for nations to be competent to sequence full management over their natural properties by making public, expropriating and appropriating estates, controlling to a transmission of proprietorship, whether the movable or immovable property that is being adjudicated is possessed by inhabitants of the country itself or by foreign bodies.¹³⁴ Nonetheless the country sovereignty can be set to some limitations from foreign investment treaties, in command to increase the postulated management of foreign investors consequential of the treaty requirements.

¹³¹ N. Schrijver: Sovereignty over Natural Resources – Balancing Rights and Duties, p. 274; Paras. 21, 23, Rio Declaration on Environment and Development – Application and Implementation, Report of the Secretary-General, Feb. 10, 1997, UN Doc. E/CN.17/1997/8.

¹³² S. R. Chowdhury: “Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration”, p. 62;

¹³³ Jane A. Hofbauer, The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications, pg.14

¹³⁴ *Ibid.*

5.2.2 Obligations Of States Along With Obligations Of Investors.

The nation has unlimited sovereignty in its region, concerning the director of the preparing commission of the Agreement of Monetary Rights and State Responsibilities, has clarified that the Agreement “consents that international law might action as an issue warning the autonomy of the state”.¹³⁵ Furthermost unindustrialized nations requirements agreed to a foreigner the equivalent management as the inhabitants of the host country. Given that international law has documented the fortification of the status of foreign corporations and their investments by means of treaties and customary international law, it has remained such a slight determination concerning the acknowledgment of the responsibilities of these transnational companies regarding host countries. This compassionate responsibility is acceptable underneath the perception that transnational companies are not delivered with disposition in the international law. The contemporary established difficulty is the environmental safeguard, and the enormous requirement for foreign investors to sequence in thoughtfulness of local laws of the host countries and furthermore not to transport detrimental results by there investment practice. International corporations are accommodated to not obstruct in local government policies and also have responsibilities concerning human rights. This responsibility comprises the responsibility not to provision a regimen, which exploits human rights in the host country.¹³⁶ Founded on the court verdicts rendezvous, when investing in multitudes of the government the investor’s foremost responsibilities are:

1. Not to involve in unacceptable behavior, comprising corruption,
2. To brand a judicious risk valuation preceding to capitalizing in the host country and,
3. To achieve and control the investment rationally.

¹³⁵ See: International Law on Foreign Investment, m. Sornarajah, pg. 119, undercited : J. Castenada. “ La Charte Des Droits et Devoirs Economique des Etats”, 1970, 16 *Annuaire Francais de Droit International* 31

¹³⁶ See: International Law on Foreign Investment, m. Sornarajah, pg. 149

The stakeholder might be excluded from implementing its privileges underneath an investment treaty, if the stakeholder has expended through fraud¹³⁷, bribery¹³⁸, falsification and misuse of control. In this circumstance the host nation is qualified to take actions in contradiction of the investor. Another responsibility, which the investor pertains, is that the investor necessitates commencing a suitable attainability inquiry previously before investing and must **construct a practical risk evaluation prior to investing.**¹³⁹

When allocating with the host country, the investor requires a performance with clearness and previously before the investment has happened¹⁴⁰, the investor must manage the investing in an approach that motivates the ensuring of the financial sustainability of the investment. The foreign investor necessitates granting an extraordinary thoughtfulness and also analyzing the laws of the host countries in order to ensure compliance with the latter. At latest but not slightest lies down individually one of the foremost responsibilities of the investor is their responsibility to accommodate to the environmental regulations of the host state. Subsequently we are all breathing in a profligate globalization development, with an enormous quantity of foreign investments it is well defined that in what way it is significant for every nation to have a well-adjusted ecology. In the same time the host countries have their own sovereign rights while acting towards foreign investors.

Numerous case law tried by the tribunals¹⁴¹ commanded to the foremost responsibilities of the host country, which the furthestmost imperative element is the reverence from host country to foreign investors to assure parity treatment. Underneath the international law this management is postulated from Article 1105 of the NAFTA promise from that it follows:

137 In the 2006 case of *Inceysa v. El Salvador*

138 *World Duty free Company Limited (claimant) v. The Republic of Kenya (respondent)*, ICSID case No. Arb/00/7

139 *Maffezini v Spain*, ICSID Case No ARB/97/7, award 13 November 2000

140 *Read: Genin v Estonia*, Year of Claim: 1999, Basis for Claim: US-Estonia BIT, Respondent State: Estonia, Claimant Alex Genin, Primary Nationality of Claimant: USA

141 ICSID Arbitration Case No. ARB/05/8, *Parkerings-Compagniet AS Claimant v. REPUBLIC OF LITHUANIA Respondent* AWARD TRIBUNAL Date of dispatch to the parties: September 11, 2007

every member will reach consensus to ventures of investors of an alternative member management in agreement with international law, comprising *fair and equitable treatment* and complete safeguard.¹⁴² Under distinctive BITs the host country shall postulate *complete fortification and safety* to investors originating from other member states of the treaty ratified by the host state.¹⁴³ This responsibility originates as a liability of the host country to defend the investor as well as the foreign direct investment against the damaging effects produced by the outsider entities. Additional very significant responsibility of the host country is that they requisite to require *non-discriminatory* criteria¹⁴⁴ by these means it is comprehended that the host country could postulate to foreign investors no less favorable treatment than it affords to its local business entities. Host countries may not disrupt the protection paragraphs.¹⁴⁵ Consequently it measures that no host country must disrupt the criteria of shield deriving from the Treaty, in other words they should be very careful not to constitute violations of the ratified BIT's. The Albanian government has engaged in several BITs and arrangements that are very significant in the sector of FDI. When the time came that the Republic of Albania

142 Article 1105 of NAFTA Agreement: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)

143 Contracting states that have signed the BIT

144 It is best described in the case: Champion Trading Company, against Arab Republic of Egypt, International centre for settlement of investment disputes, Case n° arb/02/9 Decision on Jurisdiction

145 The extent of subject matter (*rationae materiae*) jurisdiction is not uniform under Bilateral Investment Treaties (BITs). Some BITs cover only disputes relating to an "obligation under this agreement", i.e. only for claims of BIT violations. Others extend the jurisdiction to "any dispute relating to investments". Some others create an international law obligation that a host state shall, for example, "observe any obligation it may have entered to"; "constantly guarantee the observance of the commitments it has entered into"; "observe any obligation it has assumed", and other formulations, in respect to investments. These provisions are commonly called "umbrella clauses", although other formulations have also been used: "mirror effect", "elevator", "parallel effect", "sanctity of contract", "respect clause" and "*pacta sunt servanda*". Clauses of this kind have been added to provide additional protection to investors and are directed at covering investment agreements that host countries frequently conclude with foreign investors

was granted membership of the World Trade Organization¹⁴⁶ it approved the convention consequential from the Uruguay rounds of the Multilateral Trade Negotiations¹⁴⁷. Albania has also consented to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards necessitating law courts of member countries, to adjudicate, acknowledge and enforce arbitral awards completed in the territories of the member states substantiated to definite incomplete sanctions.¹⁴⁸ Another significant treaty authorized by the Albanian government is the Energy Charter Treaty¹⁴⁹, the treaty stipulates a dependable and constant boundary amongst an investor in the electric sector and the host administration¹⁵⁰. Concerning district range its essential to highlight the consignment of the INOGATE (Interstate oil and gas Transport) Protection Contract¹⁵¹, The European Convention on International Commercial Arbitration¹⁵², The Energy Community Treaty¹⁵³ and the Convention of the Trans- Balkans amongst Bulgaria and Macedonia. Albania has contracted and inputted in comparable agreements with the states of: Turkey, Bulgaria, Saudi Arabia, Swiss Confederation, Russia, Italy, Greece, France, Czech Republic, Poland, Austria, Croatia, Romania, Israel, Sweden and China. In the year 1991 Albania turn out to be a member of the International Financial Corporation (IFC), International Monetary Fund (IMF), and Multilateral Investment Guarantee Agency (MIGA), International bank for Reconstruction and Development (IBRD), European Bank for reconstruction and Development and International Center for Settlement of Investment Disputes (ICSID). From the year 2007 Albania was inserted to the Central Europe Free Trade Agreement (CEFTA), this agreement is a designated area trade arrangement that comprises bilateral free commerce

146 Law No.8648, dated 28.07.2000. another change in the Protocol of membership was made and ratified by Law No. 9521, 25.04.2006

147 Law No. 8649, 28.07.2000

148 Law No. 8688, 09.11.2000

149 Law No. 8261, 11.12.1997

150 Law No. 9560, 12.06.2006

¹⁵¹ Ratified by Law No. 8573, 03.02.2000

152 Law No. 8687, 09.11.2000

153 Law No. 8501, 03.04.2006

treaties.¹⁵⁴ The international foreign investments legal regulatory framework consists of layers of wide-ranging international law and of principles of international commercial law. International investment law could be expressed as agreed guidelines that rule international investment as a whole practice. International law on foreign investment has remained and is being designed by a back-and-forth of numerous financial, governmental, collective and historical features. Since the direct investment contains the relocation of capitals, which is a long-term assignment along with the persistence of fixed income, the contribution of the individual relocating capitals and is as well as much of a commercial risk, than an equal standard of the international law on foreign investment is the enormous ground that a study can be performed in order to regulate the aforementioned areas of investment.

154 Law No. 9696, 21.03.2007

6 DOMESTIC ENVIRONMENTAL SAFETY REGULATIONS UNDER INTERNATIONAL LAW

As developed previously, the state has exclusive sovereignty in its territory. Leave alone the fact that it is internationally accepted that multinational agreement or bilateral ones, might exploit as an influence in controlling the self-determination of the countries, nevertheless the country nurses its own private rights. Proceeding to authorization for admittance to the foreign investment, countries require their individual accurate to construct environmental analyses and repudiate the authorization for the admittance, whether or not the environmental influence that originates after the foreign investment might result to a disadvantageous consequence. Nevertheless if the authorities of the host state establish this authorization, it might be annulled if it is presented that the maltreatment to the environment is irreparable or overshadows the reimbursements of the developments.¹⁵⁵ The state competence to annul the authorization, streams not simply deriving from the independence of the Country that certifies the right to protect its space from the environmental damage as well as of the circumstance, which in contemporary international law, a country is a warehouse of the duty to preserve the ecosystem to the benefit of humanity.¹⁵⁶ The right and freedom to a clean and regulated Environmental standards is a portion of basic human rights, and the countries must not practice their privileges to terminate authorizations in a non impartial basis since this can conclude to the misunderstanding if the countries propose so in order to defend its environment or to preserve the foreigners away from its economy.¹⁵⁷

¹⁵⁵ See: International Law on Foreign Investment, m. Sornarajah, pg. 109

¹⁵⁶ Ibid. pg 110

¹⁵⁷ Case no. Arb(AF)/97/1 ICSID, Metalclad Corporation vs. The United Mexican States, August 30, 2000

Nevertheless of what is quoted beyond every country nurses its personal independence to resolve upon capacities and supplementary guidelines concerning FDI, GATT requirements, particularly Article XX designates significant exclusions where WTO members might be excused of GATT guidelines. Ten rules have been postulated in order to designate that nevertheless if the articles of the GATT are not complied with in a method that might comprise a method of uninformed or indefensible discernment amongst nations, nothing in the GATT must be interpreted to preclude the acceptance or implementation by any member of procedures compulsory to safeguard unrestricted ethics of human life, ecological elements and animals, indispensable to locked obedience with laws or regulations that are not inconstant with the requirements of the GATT, concerning to the produces of prison labor, obligatory for the fortification of national possessions of creative, extraordinary or archaeological value, comprising constraints on distributes of local resources indispensable to guarantee vital amounts of such materials to a domestic processing industry during periods when the domestic price of the types of materials, it is apprehended below the global expense as a fragment of a governmental maintenance strategy; Stipulating that such limitations should not function to proliferate the exports of or the fortification provided to these local productiveness, and should not proceed after the requirements of this Agreement linking to non-discrimination. This incomplete self-determination to practice trading procedures might be implemented at the countrywide level or in additional worldwide arrangements. Article XX consequently occupies a fundamental function in regulating “wherever resolutions must be done...with regard to diverse focuses” and, as a consequence, stipulates an focus to the consideration on how the resolution constructing power is to be apportioned between countrywide administrations and international organizations.¹⁵⁸ For the safety of the environment, the furthestmost significant subsections of GATT Article XX are paragraph (b)

¹⁵⁸ GATT Article XX and Proximity of Interest:Determining the Subject Matter of Paragraphs b and g, Bradly J. Condon*, Forthcoming in 10 UCLA Journal of International Law and Foreign Affairs (2005). Pg. 2

and (g). Dependable with these subsections, the WTO members may instrument other procedural methods which are not equivalent to GATT restraints, however in despite of every factor, aim to protect human rights, plant and animal life (b), or connecting to the safeguarding of finite biological supplies (g).

6.1 Non-discrimination and national treatment

6.1.1 Technical regulations

Similar to several WTO Agreements, the TBT¹⁵⁹ Agreement contains the GATT's Most Favored Nation (MFN)¹⁶⁰ and national treatment requirements. Article 2.1 of the Agreement postulates explicitly and I quote “in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country”.¹⁶¹ The MFN and national treatment requirements pertain as well to compliance valuation techniques. Practices for conventionality valuation will be functional to commodities imported within the territories of the WTO Member States, Article 5.1.1 of the Technical Barriers to Trade Agreement stipulates that “in a manner no less favorable then that accorded

¹⁵⁹ The TBT Agreement» seeks to assure that: (1) mandatory product regulations, (2) voluntary product standards, and (3) conformity assessment procedures (procedures designed to test a product’s conformity with mandatory regulations or voluntary standards) do not become unnecessary obstacles to international trade and are not employed to obstruct trade. The TBT Agreement seeks to balance two competing policy objectives: (1) The prevention of protectionism, with (2) the right of a Member to enact product regulations for approved (legitimate) public policy purposes (i.e., allowing Members sufficient regulatory autonomy to pursue necessary domestic policy objectives).

¹⁶⁰ Described even in NAFTA Agreement, Article 1103: Most-Favored-Nation Treatment by which :

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments

¹⁶¹ Agreement on technical barriers to trade 1995 s (2.1).

to like products of national origin and to like products originating in any other country”.¹⁶² Art 5.1.1 emphasizes that imported goods shall be preserved correspondingly with reverence to the levies charged to measure the compliance of the latter with the respective applicable laws. Likewise, the WTO member states shall hold the confidentiality of the knowledge concerning the consequences of conventionality evaluation actions for imported goods in the exact manner that they reserve the treatment to their own national productions in order to safeguard profitmaking benefits.¹⁶³ Together the preface of the TBT Agreement and Article 2.2 of the TBT Agreement categorize specific governing objectives, which are considered “lawful” for regulatory determinations. Article 2.2 circles onwards a catalogue of lawful TBT purposes that include: safety of living/health, safety of persons, and fortification of nationwide safekeeping, safeguarding of the environment, deterrence of misleading advertising practice and *several indeterminate purposes*. This catalog of lawful purposes in Article 2.2 is not limited.¹⁶⁴ A unique goal of the TBT Agreement is that all the practical rules stipulate a requirement to accomplish a rightful determination. Concerning the other lawful objectives, which have not been stipulated in Article 2.2 it may be comprised together: the rules that regulate energy produces, CPUs, infrastructures apparatus and excellence ethics (for example classifying necessities for manufacture and merchandises) that are knowledgeably lawful. In industrialized states both of the aforementioned guidelines endure. In the TBT Agreement workers entitlements and human rights are not particularly stated as lawful purposes but they are intricate in Article 2.2, as the safeguard of human life and wellbeing. If a Member State of the WTO sources a national rule on an international average, and if the national legislation serves as an enforcer of the rightful purposes unambiguously declared in Article 2.2, it is supposed not to generate a needless difficulty to international

¹⁶² Article 5.1.1 of TBT

¹⁶³ Articles 5.2.4 and 5.2.5 of TBT

¹⁶⁴ United Nations Conference on Trade and Development, Dispute Settlement, WTO, Technical Barriers, Pg 4

trade.¹⁶⁵ When allocating with the host country, the investor requires a performance with clearness and previously before the investment has happened¹⁶⁶, the investor must manage the investing in an approach that motivates the ensuring of the financial sustainability of the investment. The foreign investor necessitates granting an extraordinary thoughtfulness and also analyzing the laws of the host countries in order to ensure compliance with the latter. At latest but not slightest lies down individually one of the foremost responsibilities of the investor is their responsibility to accommodate to the environmental regulations of the host state. Subsequently we are all breathing in a profligate globalization development, with an enormous quantity of foreign investments it is well defined that in what way it is significant for every nation to have a well-adjusted ecology. In the same time the host countries have their own sovereign rights while acting towards foreign investors.

¹⁶⁵ Article 2.5 of the TBT Agreement.

¹⁶⁶ Read: *Genin v Estonia*, Year of Claim: 1999, Basis for Claim: US-Estonia BIT, Respondent State: Estonia, Claimant Alex Genin, Primary Nationality of Claimant: USA

6.1.2 NAFTA Article 1114(2) – it is inappropriate for parties to lower environmental standards to attract foreign investment.

Regarding the protection of the environmental measures even NAFTA Agreement includes a wide scope in its Article 1114, especially in its second paragraph that cites:” *The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.*”¹⁶⁷

So Article 1114 unequivocally states each country's independent freedom to ratify regulations or strategies of universal submission regulatory or modifiable or confining investments so as to safeguard or defend the environment but accordingly it obligates member states not to neglect internal wellbeing, security and environmental procedures in a way that it may harm and found in its sovereign region foreign investments. This comprehensive detailed shelters all deriving from the environmental crash valuation necessities to pollution regulatory requirements to commonly appropriate limitations on terrestrial custom or exclusions on the manufacture of clear substances.

¹⁶⁷ North American Free Trade Agreement January 1, 1994 s 1114.

7 ALBANIAN ENVIRONMENTAL REGULATION OF FOREIGN INVESTMENT

Currently in the Republic of Albania are in power about eighteen¹⁶⁸ (18) laws and resolutions which standardize the foreign investments taking place in the sovereign territory of Albania. These regulations are intended to standardize the establishing of the foreign investments in the country of Albania. The foreign investments are understood as ample associated to the environment and for the fortification of the environment are in power fourteen laws.¹⁶⁹ In the year 2011 Albania ratified several of the very imperative legislation that regulates the safeguarding of the environment alongside innovative Laws¹⁷⁰. A very crucial legislation

¹⁶⁸ Nr.7764 Law dated 2.11.1993 For foreign investment, Law No. 9663 dated 18.12.2006 For concessions amended by Law nr.9995, dated 22.9.2008, DCM No.27 dated 19.1.2007 "On approval of rules of evaluation and granting of concessions", Law nr.9497 dated 20.3.2006 "For the creation of the Albanian Agency of Business and Investment"; Decision nr.509 dated 19.7.2006 On the composition of the Governing Council of the Albanian Agency of Business and Investments and how the compensation of its members; Decision nr.514 dated 26.7.2006 For the adoption of Albanian Agency of Business and Investment; Law No. 9723 dated 3.5.2007 On the National Registration- Changed by Law nr.9916, dated 12.5.2008; Decision nr.537 dated 1.8.2007 For rules for names and trade names; Decision nr.315 dated 24.4.2003 For leases of real enterprises, companies and institutions; UMF No. 5 dated 19.1.2004 To monitor leasing and contracts, evaluating investment in facilities and enterprises, companies or institutions state, leased or emphyteusis, their monitoring and application of reduction coefficients of the price of rent "Nr.1129 Decision dated 5.8.2008 On determination of the value of land, put, the owners its available to investors building; UMF No. 8 dated 17.2.2003 For recording, registration, use and reporting of funding foreign in the context of projects and agreements with foreign donors; Law nr.8493 dated 27.5.1999 To ratify the "Agreement between the Government of the Republic of Albania and the Belgo-Luxemburg Economic Union to promote and mutual protection of investments"; DCM No. 49 dated 23.1.2003 AGREEMENT between the Government of the Republic of Albania and the Government of Ukraine, to promote and protect mutual investment; DCM No.51 dated 23.1.2003; To approve the agreement between the Council of Ministers Republic of Albania and the Federal Government of the Federal Republic Yugoslavia, for the promotion and mutual protection of investments; DCM No. 49 dated 22.1.2004 To approve the agreement between the Council of Ministers Republic of Albania and the Government of the Republic of Korea, for promotion and mutual protection of investments; Decision nr.306 dated 14.5.2004 To approve the agreement between the Council of Ministers Republic of Albania and United Nations Mission for Interim Administration in Kosovo (UNMIK) on behalf of Provisional Institutions of Self Government in Kosovo, to promote and mutual protection of investments; Decision nr.482 dated 16.7.2004 To approve the agreement between the Council of Ministers Republic of Albania and the Government of the Republic of Moldova, for promotion and mutual protection of investments".

¹⁶⁹ **Law No. 9868, dated 4.02.2008** Updating the law no. 8906 dated 6.06.2002 "on Protected Areas" ; **Government Decree No. 177, dated 31.03.2005** Allowed norms of liquid releases and the zoning criteria of receiving water environments ; **Law No. 9115, dated 24.07.2003** For the environmental treatment of polluted waters List of Albanian state laws; **Law No. 8990, dated 23.01.2003** On environmental impact assessment; **Law No. 8934, dated 5.09.2002** On environmental protection; **Law No. 8906, dated 6.06.2002** Protected Areas; **Law No. 8905, dated 6.06.2002** On protection of marine environment from pollution and damage; **Law No. 8870 dated 21.03.2002** Some additions and changes to law no. 7908 dated 5. 04. 1995, "on fishing and aquaculture"; **Law No. 8752 dated 26.03.2001** Concerning the creation and operation of land protection and administration structures; **Law No. 8736 dated 01.02.2001** Concerning some changes and additions to law no. 8093 dated 21. 03. 1996 "on water reserves", changed by law no. 8605 dated 20.04.2000; **Law No. 8605 dated 20.04.2000** Some changes and additions in the law no. 8093 dated 21. 03. 1996 "on water reserves"; **Law No. 8375 dated 15.07.1998** On amending the law no. 8093 dated 21.03.1996 "on water reserves"; **Law No. 8093, dated 21.03.1996** On water resources; **Law No. 7908, dated 5.4.1995** On fishing and aquatic life

¹⁷⁰ Law No. 10431, 09.06.2011' Environmental protection", Law. 10 448 " On the environmental permitting" and Law. Nr. 10 440, 07.07.2011 "ON ENVIRONMENTAL IMPACT ASSESSMENT"

enacted for the safeguarding of the environment in Albania is Law. No 10 431, 2011 on “Environmental Protection”. The foremost objective of this regulation is the safeguard of the environment and activities, decisive to well-balanced collaborations between the population and the environment; as a consequence the law seeks for sustainable development. Law. No 10 431, 2011 could be interpreted as a “framework” that sets the basic requirements hence it contains all the essential stages for controlling the levels of activities detrimental to the environment; in fact, furthermore outlining the prominence of the preservation of the natural reserves, inhibition of anti polluting occurrences, and retrieval actions, it also visualizes undeniable significant activities such as “environmental impact assessment”¹⁷¹ procedures, worldwide collaboration on environmental matters and the elevation of public involvement in explicit opinions. Another imperative law that was ratified on 31 January 2013, which replaces completely the law no. 990, dated 23.01.2003, is the *Law on Environmental Impact Assessment*¹⁷² (law no.10440, dated 07.07.2011). This legislation enacted postulates the guidelines and techniques that apply to the procedure of environmental impact assessment within the framework of activities that have or could have had an influence in the environmental issues. As a percentage of the growth of a final structure/action that could have a positive influence on the environment, the originator shall also accomplish the environmental impact assessment that is repeated in the analyses on environmental impact assessment. The principal Article of this law collections out that this regulations intentions to:

a) a prominent level of environmental safety from side to side anticipation, minimization and reparation of injuries to the environment from the propositioned plans previous of their support for growth; and

¹⁷¹ ec.europa.eu/environment/eia/eia-legalcontext.

¹⁷² This law is fully aligned with Council Directive 85/337/KEE, dated June 27, 1985 "On evaluating the effects of public and private projects on the environment", as amended, the number CELEX: 31985L0337, the European Union's Official Journal, L series, no. 175, dated 5.7.1985, pp. 40-48.

b) Guarantee a transparent policymaking procedure throughout the documentation, establishment and assessment of contrary influences, as and when suitable, and presence of all the participants involved in it. The *Law on Environmental Impact Imposit*¹⁷³ pertains to all the recommended projects, secretive or open to the general public that might instigate noteworthy opposing effects, in a direct or indirect manner, to the environment as a consequence of the scope, type or situation. The provisions of this law stipulate a distinction amid business operative projects exposed to the primary analyses and those exposed to the specific environmental impact assessment in a manner, which divides the latter in annexes. The achievement of the subject specific environmental impact assessment is monitored by the release of the environmental announcement; this credentials need to be presented to the authorized experts in charge, which are going to release the license for improvement of the environmental plan.¹⁷⁴ Prior to the initiation of the specific investment activity that will be situated in Albania a foreign corporation is obliged to submit a preparatory analyses in official written form. If the expert authority grants the permit to the foreign corporation¹⁷⁵ than the Albanian National Environmental Agency (ANEA) grants a certificate of authorization for the permit to run the forthcoming investment assets of the foreign corporation. Article 21 of Law Nr. 10440 dated 07.07.2011 stipulates some significant deviations. Article 21 states: *“When the ANEA or the ministry, at the conclusion of the procedure for assessing the environmental impact of a project, stated that the proposed activity, separately or in conjunction with activities or plans and other projects completed or proposed, could impact significant adverse on the integrity of a particular protected area,*

¹⁷³ This law is fully aligned with Council Directive 85/337/KEE, dated June 27, 1985 "On evaluating the effects of public and private projects on the environment", as amended, the number CELEX: 31985L0337, the European Union's Official Journal, L series, no. 175, dated 5.7.1985, pp. 40-48.

¹⁷⁴ development permit under the Law on Territory Planning, L A W. No.10 119, dated 23.4.2009

¹⁷⁵ Pursuant to the law the report on environmental impact assessment may be (i) **preliminary report** or (ii) **in depth report on environmental** impact assessment depending on the kind of activity intended to be conducted by the developer and impact that such activity might have on environment.

then the responsible authority covering the area of the project, does not allow its development, except when:

a) There is no alternative solution;

b) The proposed activity must apply for urgent reasons of public interest of adults, including those with social or economic nature.”¹⁷⁶

Law “On Environmental Permits”¹⁷⁷, sets out the rules for the undertakings, which could influence the environment as well as the prerequisites for the grant of an environmental permit, incorporated environmental permit (i.e. license obligatory in occasions when the undertaking implicates numerous subject areas, specifically the sea, rivers, lakes and air; (ii) the certification to be presented by the candidate to acquire the environmental permit; (iii) the participants in the procedure of issuance of the environmental permit; (iv) substance of the environmental permit, the structure of the environmental permit; (v) occasions in which the environmental permit could be edited or assigned to other parties, charges pertinent for licensing of environmental permits; (vi) organization of environmental permits in different stages, correspondingly I, II and III conditioned on the nature of occupation to be completed; (vii) structure of the environmental intelligence archive, as well as the proficient agency assigned for its supervision, wide-ranging responsibility of undertakings licensed with environmental permits; (viii) responsibilities for the intermittent supervising and assessment. The first provision stipulates that this law intends to preclude, decrease and regulate the detrimental activities to the environment instigated by specific classifications of undertakings, aiming to attain a strict level of environmental safety and standards of lifetime. The scope of application of this law extends to the environmental safety, animal, plant and human life which is at the same page with Article XX of the GATT and Article 1114 of the NAFTA. If the foreign investment produces environmental harms, the environmental permit

¹⁷⁶ Law Nr. 10440 dated 07.07.2011 Art 21

¹⁷⁷ Nr.10448, dated 14.07.2011

could be annulled. The grounds for the annulment of the environmental permit cover also the irregularities such prescribed in articles 12-17 of this law. Concerning the prevention of air pollution, this legislation in its annex I postulates that public or private, national or international business entities while pointing to start businesses that operate with hazardous elements¹⁷⁸ that might be detrimental to the environment, are substance to the in depth assessment on environmental impact assessment.

¹⁷⁸ 1. Dioxide and other sulphur compounds.
2. Nitrogen oxides and other nitrogen compounds.
3. Carbon monoxide.
4. Volatile organic components.
5. Metals and their compounds.
6. Dust.
7. Asbestos (suspended particles, fibbers).
8. Chlorine and its compounds.
9. Gold and its compounds.
10. Arsenic and its compounds.
11. Cyanide.
12. Substances and preparations which have been proven to have carcinogenic or mutagenic properties or properties which may affect reproduction via the air.
13. of polychlorinated dibenzodioxins and dibenzofuran of dibenzodioxins.

7.1 States' obligations in relation to non-state actors under international environmental law and human rights

The right to development and the right to a clean environmental

As aforementioned, plenty of bilateral investment treaties (BITs) and multilateral investment agreements (MEAs), which safeguard and intend to progress the investments amongst diverse states. These agreements have laid down very important foundations for these hard to enforce international business activities are regulated and comprehended by all the parties involved since mutual cooperation exists amongst the latter.

The battle of portions of the citizens alongside poverty, in emerging states might be measured as more significant than environmental safety. It is the main responsibility of the countries to lastingly progress their financial competence in order to interest foreign direct investments and to continue to be competitive. However the right to development has to be balanced with the right to a clean environment instead of putting the populations health to danger, hence it is common in the practice of the international law to balance the self-contradictory but appropriate standards. Consequently it is the international public that has to balance the right to development and the right to environment. Thus it is the international community that has to standardize the right to development and the right to a safe and clean environment. The countries which will succeed to attain this balance will than have achieved the success of the two being complementary not exclusionary practices. This equilibrium is extensively acknowledged as “sustainable development”.

7.1.1 Sustainable development, progressive right

The importance and the impact of foreign direct investment have developed considerably in contemporary times in two principal methods. In the principal period amongst 1870 and 1914 a new element of international monetary excellence and flexibility led to an enormous development in foreign investments. The international foreign investments legal regulatory framework consists of layers of wide-ranging international law and of principles of international commercial law. International investment law could be expressed as agreed guidelines that rule international investment as a whole practice. International law on foreign investment has remained and is being designed by a back-and-forth of numerous financial, governmental, collective and historical features. Since the direct investment contains the relocation of capitals, which is a long-term assignment along with the persistence of fixed income, the contribution of the individual relocating capitals and is as well as much of a commercial risk, than an equal standard of the international law on foreign investment is the enormous ground that a study can be performed in order to regulate the aforementioned areas of investment. As it is entitled “international law on investment” it is generally comprehended that this law contains an international element that excludes it from being a domestic law in nature and scope of application, subsequently it includes numerous states to pave the way for a free cross-border foreign investment. The international law develops by means of treaties and other multinational agreement and case law, as these are the most important elements in order for states and natural or juridical persons in order to achieve effective practices out of these so called international regulations. State sovereignty is partly given upon the signature and ratification of these treaties, as after the past the ratification procedure a State cannot rely solely on its domestic legislation concerning foreign

investment, but additionally must draft and implement the international requirements into their respective national laws in order for the latter to be efficient and not contradictory with the international treaty provisions that they signed in for. After a country has conceded a foreign investment permission to enter the market, it must be issued to a slightest average standard of protection once the law will regulate its activities. Every country has its individual rights and freedoms to weight the economic and financial remunerations derived from a treaty.

By attraction of FDI as well as by the implementation of certain specific laws which aim in environmental development, states pave the way towards a sustainable development; such process meets the needs of the current generation by not preventing the future generation to meet their needs as well.¹⁷⁹ Such statement was firstly introduced in the Brundtland Report in 1987 and was further outlined in the Rio Declaration in 1992. According to the Brundtland Report the theory of sustainable development is not based on absolute ones; however, there were limitations based on the current state of technology and social organization for the purpose of environmental resources as well as to enable the biosphere to absorb the effects of human activities. There can be achieved a balance on social organization as well as technology in order to accomplish all the criteria for a new era of economic growth. As a matter of fact, in order for all the states to pave the way towards a better life for their citizens, a sustainable development is the key of such achievement; as it is cited even in this Report: “sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful

¹⁷⁹ FDI Work for Sustainable Development United Nations Conference on Trade and Development and Sustainable Business Institute at the European Business School, UNITED NATIONS, New York and Geneva, 2004 pg .30

choices have to be made. Thus, in the final analysis, sustainable development must rest on political will.”¹⁸⁰ A sustainable development can be achieved by accomplishing the objectives further explained above. First of all, a mandatory minimum environmental standard should be set which would protect foreign companies from unfair competitors. Such requirement might cause disagreements among sectors of economy; however, there should be taken in consideration that these companies have full capacity to perform such standard. The minimum environmental standard may encourage the companies, which aim to implement higher standards with a floor corporate behavior and facilities. Furthermore, comprehensive and solid civil society functions are the key element in achieving sustainable development. On the other hand, a Civil society improves the quality of development by founding a “social market place” where non-market principles are eliminated.¹⁸¹ As aforementioned, the sustainable development can be attained when states reach a balance among social and environmental concerns. However, in order to achieve such environmental protection, there is essential to have effective institutions, which can provide clean air, good labor practices, education or fair competition. Since, we should consider the fact that many investors may be involved in active corruption, which might lead into a poor application of such standards, there is a strong need for a country to fight such corruption in their institutions. On the other hand, sustainable development might be perceived as a progressive right, due to the fact that every state is intending to attract FDI and also to stabilize their environment issues. When allocating with the host country, the investor requires a performance with clearness and previously before the investment has happened¹⁸², the investor must manage the investing in an approach that motivates the ensuring of the financial sustainability of the investment. The

¹⁸⁰ FDI Work for Sustainable Development United Nations Conference on Trade and Development and Sustainable Business Institute at the European Business School, UNITED NATIONS, New York and Geneva, 2004 pg .15

¹⁸¹ Mabey N & McNally R, Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development WWF Report, July 1998-pg.75

¹⁸² Read: Genin v Estonia, Year of Claim: 1999, Basis for Claim: US-Estonia BIT, Respondent State: Estonia, Claimant Alex Genin, Primary Nationality of Claimant: USA

foreign investor necessitates granting an extraordinary thoughtfulness and also analyzing the laws of the host countries in order to ensure compliance with the latter. At latest but not slightest lies down individually one of the foremost responsibilities of the investor is their responsibility to accommodate to the environmental regulations of the host state. Subsequently we are all breathing in a profligate globalization development, with an enormous quantity of foreign investments it is well defined that in what way it is significant for every nation to have a well-adjusted ecology. In the same time the host countries have their own sovereign rights while acting towards foreign investors.

7.1.2 Multilateral Environmental Agreements

Multilateral Environmental Agreements (MEAs) came into force by the strong demand of nations in protecting their environment by setting out a minimum environmental standard. Such agreements are done through United Nations and once they are ratified, they become legally binding on signatory countries. These agreements are based on the political recognition for a global action towards trans-boundary or global environmental problems, which cannot be undertaken sufficiently through national actions. Such issues incorporate desertification, biodiversity loss, ozone layer depletion, climate change and acid rain. MEAs contain procedures, which may affect trade by the application of trade restrictions as well as financial support to developing countries. Therefore, these agreements can affect foreign direct investment. Some of the most important multilateral environmental agreements are:

The Montreal Protocol¹⁸³, The Basel Convention¹⁸⁴, The United Nations Conference on

¹⁸³ The Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the Vienna Convention for the Protection of the Ozone Layer) (1987), is an international treaty designed to protect the ozone layer by phasing out the production of numerous substances believed to be responsible for ozone depletion. The treaty was opened for signature on September 16, 1987, and entered into force on January 1, 1989, followed by a first meeting in Helsinki, May 1989. Since then, it has undergone seven revisions, in 1990 (London), 1991 (Nairobi),

Environment and Development, Rio de Janeiro¹⁸⁵ which in the Principles 1-3 postulates that :
“Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”¹⁸⁶

Additional extensively significant MEA is the Kyoto Protocol¹⁸⁷ that intends to limit global warming. The aforementioned agreements are very crucial for what they aim for, in order to safeguard the environment from detrimental activities.

1992 (Copenhagen), 1993 (Bangkok), 1995 (Vienna), 1997 (Montreal), and 1999 (Beijing). It is believed that if the international agreement is adhered to, the ozone layer is expected to recover by 2050. Due to its widespread adoption and implementation it has been hailed as an example of exceptional international co-operation, with Kofi Annan quoted as saying that "perhaps the single most successful international agreement to date has been the Montreal Protocol". The two ozone treaties have been ratified by 197 states and the European Union making them the most widely ratified treaties in United Nations history. The agreement has an impact on the trade of goods and services and on FDI, since the provisions of the Protocol restrict the possibility to relocate abroad those production processes that contribute to stratospheric ozone depletion. The Protocol is therefore characterized by trade barriers against the non signatories as well as by financial transfers from the industrialized countries to the developing countries in support of the application of environmentally friendly substances.

¹⁸⁴ The Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal (1989) , usually known simply as the Basel Convention, is an international treaty that was designed to reduce the movements of hazardous waste between nations, and specifically to prevent transfer of hazardous waste from developed to less developed countries (LDCs). It does not, however, address the movement of radioactive waste. The Convention is also intended to minimize the amount and toxicity of wastes generated, to ensure their environmentally sound management as closely as possible to the source of generation, and to assist LDCs in environmentally sound management of the hazardous and other wastes they generate.

The Convention was opened for signature on 22 March 1989, and entered into force on 5 May 1992. A list of parties to the Convention, and their ratification status, can be found on the Basel Secretariat's web page. Of the 175 parties to the Convention, only Afghanistan, Haiti, and the United States have signed the Convention but not yet ratified it.

¹⁸⁵ General Assembly, Distr. GENERAL 12 August 1992, ORIGINAL: ENGLISH; REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT* Rio de Janeiro, 3-14 June 1992)

¹⁸⁶ Ibid. Principles 1-3.

¹⁸⁷ The Kyoto Protocol is a protocol to the United Nations Framework Convention on Climate Change (UNFCCC or FCCC), aimed at fighting global warming. The UNFCCC is an international environmental treaty with the goal of achieving the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

7.2 Principles of environmental law such as the polluter pay principle, precautionary principle and prior informed consent.

Despite many multilateral environmental agreements which have as a primary aim the protection of the environment, the main details of most environmental protection systems originate from a number of fundamental principles. The first one is “*the Polluter Pays Principle*” which was at first adopted in the early 1970s when strict environmental regulations were initially introduced in OECD countries, and complaints regarding high costs and negative effects on competitiveness began to spread in the industry. This principle, whose primary aim is more of an economic policy rather than a specific legal principle which states recognizes the polluter of covering the expenses of carrying out pollution prevention measures or compensating for damages caused by pollution. In the 1972 OECD Guiding principles on the International Economic Aspects of Environmental Policies states that: "*The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter Pays Principle'. This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the costs of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.*"¹⁸⁸

The Protocol was initially adopted on 11 December 1997 in Kyoto, Japan, and entered into force on 16 February 2005. As of September 2011, 191 states have signed and ratified the protocol

¹⁸⁸ OECD, C(72)128, reprinted in OECD (1975), *The Polluter Pays Principle: Definition, Analysis, Implementation*.

Another widely prominent principle is the "**Precautionary Principle**" from which it can be derived the imposition of measures corresponding to potential environmental threats instead of waiting for absolute scientific proof. This principle has also been stipulated in the aforementioned Rio Declaration. In its Principle 15 is stated that: "*Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*"¹⁸⁹

This principle is of a tremendous significance in regard to the management of species and the preservation of biodiversity, due to the fact that living resources in order not to get lost must have a suitable management. This principle highlights even the burden of proof criteria by which, before proceeding, the polluter or the resource user must prove that there is not a present causal link between his activity and the damaging of the environment.

And last but not least is the principle of "**Prior Informed Consent**" which derives from "**International Co-operation**" principle in which it is stated that countries are obliged to cooperate with each other in cases of trans-boundary and global environmental issues. Moreover, principle 19 of Rio Declaration stipulates that: "*States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse trans-boundary environmental effect.*"¹⁹⁰ Therefore, the preceding knowledgeable approval intends to notify the state that is ratifying this international agreement.

Since the key commitment of these provisions is to safeguard the environment and the environmental principles, every participant and non participant countries must instrument in their national laws, in order to attract FDI but even protect the environment, thus aiming the sustainable development that comes only from the balance between the right to development and the right to a clean environment.

¹⁸⁹ The Rio Declaration On Environment And Development (1992), principle no. 15

¹⁹⁰ The Rio Declaration On Environment And Development (1992), principle no. 19

CONCLUSION

As mentioned in the commencement of this thesis, the strong growth in the direct foreign investment flow has been one of the crucial traits of the world economy over the previous decades, (FDI¹⁹¹) for the reason that it is a continuously and increasing crucial “engine” aiding sustainable development in many countries. On a day-to-day basis more and more companies in a vast number of economic sectors and countries, have chosen to develop their businesses past their domestic borders. On the other hand, the receiving parties have avidly worked in order to attract these investment capitals. Despite the fact that foreign direct investments bring growth and prosperity to countries, they may also lead to issues related to the environmental problems. The primary protector of its citizens’ rights must be the state itself, which should make sure that prosperity and harmony are always present. Due to the State’s absolute sovereignty, it can give the ultimate decision on whether a new foreign company can be established or excluded from its territory. This thesis gives an explanation on how FDI’s have rapidly grown in Albania, and also which specific provisions are obligatory to foreign companies under the Albanian national law on The Environment Protection. Due to the fact that Albania is a signatory state in various BITS and MEAs, it must implement the international provisions into national provisions, of which have as a primary aim is the protection of foreign investments, and in the other hand aim protection of the environment. An ever increasing issue elaborated in this thesis is the correlation between FDI’s and the environment. It is shown that a lot of states yearn for the liberation of their environmental standards in order to attract foreign investment, and this increasing desire may lead to the so called pollution haven theory, by which derives the endeavor of foreign companies that will try to establish in those countries which have weaker and less strict environmental standards,

¹⁹¹ FDI involves the transfers of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.

in order not to complicate their activity. In order to achieve a sustainable development, which can be achieved if a state finds the proper balance between the right to development and the right to a clean environmental living, states must take into account various measures. One of the primary steps that can be taken is the reformation of the existing and planned investment agreements, in order for them to not diminish environmental protection. States ought to build a framework of international regulations to ensure that FDI encourages sustainable development and does not cause severe damages to the environment. As aforementioned, this can be done, by mandatory minimum environmental standards on the environmental management; preventing devastating competition for FDI through either environmental or social deregulation or financial incitement, by magnifying the rights of civil society groups and local communities to observe the quality of FDI, and hold investors accountable for their actions.

Concerning developing countries, increasing foreign direct investments leads to substantial benefits in terms of the transfers of resources (technical, financial and human). The positive outcome can only derive from an extensive regulatory framework that contributes to the sustainable development and ensures that environmental standards are properly preserved.

SUMMARY

This Master Thesis has as a primary aim the identification of the issues relating to the environmental protection obligations of foreign investors under international investment law regarding Albania in particular. Although foreign direct investment may benefit the economy of the host state – in this case Albania, it may have different consequences on the community and the community's right to a clean environment. Therefore, two conflicting issues have arisen: i) the right to development; and ii) the right to a clean environment. The objective is the determination of how foreign direct investment can be restricted (if it can be restricted) by environmental protection regulations of national legal orders under international law. Under international environmental law, States have different environmental obligations regarding air pollution. Furthermore, under the administration of the World Trade Organization, States can regulate investment and trade –e.g. under Article XX of the GATT. The thesis also attempts to determine on whether foreign investors are subject to any environmental obligations under international environmental law.

Foreign investors possessing intensive polluting technologies have moved their industries to developing countries, because of less strict environmental protection restrictions. Baek and Koo as the FDI - environment interconnection, have described this phenomenon where countries that lack adequate environmental protection regulations have been described as 'pollution havens'. The proclamation that developed countries put greater emphasis on the impact of foreign investor's actions on the environment will also go through a detailed analysis.

First, important terminology will be defined – this includes a brief examination of ‘foreign direct investment’, ‘environmental protection’, ‘international environmental law’ and ‘investment law’. Second, the prominence of environmental protection will be discussed with brief reference to certain cases where foreign investment has had an adverse affect on the environment. Furthermore, it will analyze various theories on how investors choose the venue where to invest (for example the pollution haven theory, bottom down theory etc). Subsequently, the international legal framework for international investment law, FDI and environmental protection will be examined. Various international agreements Albania has entered into will be discussed in this section. The thesis will then determine if and how national jurisdictions can issue environmental regulations in conformity with international law. Albania’s national regulation on foreign investment in relation to the environment will be discussed and analyzed. Consequently, this Master Thesis will attempt to determine whether international environmental law regulates foreign investment based on internationally recognized principles such as polluter pays and the precautionary principle.

Finally, the thesis will determine on whether the international legal framework for FDI regards air pollution as a subset of the myriad of environmental concerns. Moreover, it will critically evaluate the current Albanian framework and will identify various issues such as the fact that international law does not provide for specific and concrete means of resolving conflicts between investment law and other areas of international law, such as environmental law. Furthermore, international investment law does not create an effective link between the rights of investors and human rights obligations, such as the right to a clean environment.

These issues regarding the current framework will be identified and recommendations will be made in this regard. The Commonwealth Secretariat Investment Experts Meeting of 2011 will be studied and deliberated in order to make suggestions. These suggestions are going to

comprise of a dialogue on the WWF's recommendation 'Best Practice for Foreign Investors' as well as the organization's proposals for international regulation of foreign direct investment.

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ANNEX

ABSTRACT

The strong growth in the direct foreign investment flow has been one of the crucial traits of the world economy over the previous decades, (FDI¹⁹²) for the reason that it is a continuously and increasing crucial “engine” aiding sustainable development in many countries. On a day-to-day basis more and more companies in a vast number of economic sectors and countries, have decided to expand their investments beyond their borders. On the other hand, the receiving parties have avidly worked in order to attract these investment capitals. Despite the fact that foreign direct investments bring growth and prosperity to countries, they may also lead to issues related to the environmental problems. The primary protector of its citizens’ rights must be the state itself, which should make sure that prosperity and harmony are always present. Due to the State’s absolute sovereignty, it can give the ultimate decision on whether a new foreign company can be established or excluded from its territory. This thesis gives an explanation on how FDIs have rapidly grown in Albania, and also which specific provisions are obligatory to foreign companies under the Albanian national law on The Environment Protection. Due to the fact that Albania is a signatory state in various BITS and MEAs, it must implement the international provisions into national provisions, of which have as a primary aim is the protection of foreign investments, and in the other hand aim protection of the environment. An ever increasing issue elaborated in this thesis is the correlation between FDIs and the environment. It is shown that a lot of states yearn for the liberation of their environmental standards in order to attract foreign investment, and this increasing desire may lead to the so called pollution haven theory, by which derives the endeavor of foreign companies that will try to establish in those countries which have weaker

¹⁹² FDI involves the transfers of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.

and less strict environmental standards, in order not to complicate their activity. In order to achieve a sustainable development, which can be achieved if a state finds the proper balance between the right to development and the right to a clean environmental living, states must take into account various measures. One of the primary steps that can be taken is the reformation of the existing and planned investment agreements, in order for them to not diminish environmental protection. States ought to build a framework of international regulations to ensure that FDI encourages sustainable development and does not cause severe damages to the environment.

ABSTRACT

Das starke Wachstum der ausländischen Direktinvestitionen (FDI) war einer der entscheidenden Züge der Weltwirtschaft in den letzten Jahrzehnten; aus dem Grund, dass es ein kontinuierlich und erhöht entscheidender "Motor" der Unterstützung einer nachhaltigen Entwicklung in vielen Ländern war. Stets haben immer mehr Unternehmen in einer Vielzahl von Branchen und Ländern beschlossen, ihre Investitionen über ihre Grenzen hinaus zu erweitern. Auf der anderen Seite haben sich die empfangs Parteien eifrig bemüht um diese Investitionen zu gewinnen. Trotz der Tatsache, dass ausländische Direktinvestitionen Wachstum und Wohlstand in Ländern bringen, können sie auch zu Fragen im Zusammenhang mit Umweltproblemen führen. Der primäre Garant der Rechte seiner Bürger muss der Staat selbst sein und dafür sorgen, dass Wohlstand und Harmonie immer erhalten werden. Durch absolute Souveränität des Staates ist es möglich die endgültige Entscheidung darüber, ob ein neues ausländisches Unternehmen gegründet werden kann oder aber der Zugang verweigert wird, getroffen. Diese Arbeit gibt eine Erklärung, wie sich ausländische Direktinvestitionen schnell verbreitet haben und wie die besonderen Bestimmungen unter Albanischen nationalen Rechts für Umweltschutz ausländische Unternehmen fordern. Aufgrund der Tatsache, dass Albanien Vertragspartei verschiedenen Investitionsschutzabkommen und Umweltabkommen ist, muss es die internationalen Vorschriften im nationalem Recht implementieren, und ein vorrangiges Ziel dieser Abkommen ist auf einer Seite der Schutz der ausländischen Investitionen, und auf der anderen Seite der Umweltschutz. Eine stets wachsendes Problem, das in dieser Arbeit ausgearbeitet wird, ist die Korrelation zwischen ausländischen Investitionen und der Umwelt. Es wird gezeigt, dass viele Staaten dazu geneigt sind sich von Umweltstandards zu befreien um ausländische Investitionen anzuziehen, aber solcher Wunsch kann die sogenannte Pollution-Haven-Hypothese herbeirufen, wo sich ausländische Unternehmen jene

Länder zum Standort ihrer Investitionen aussuchen, die niedrigere Umweltstandards erfordern, die in der Regel ihre Tätigkeit erschweren würden. Um eine nachhaltige Entwicklung, die erreicht werden kann, wenn ein Staat die richtige Balance zwischen dem Recht auf Entwicklung und dem Recht auf eine saubere Umwelt Wohn findet zu erreichen, müssen die Staaten verschiedene Maßnahmen berücksichtigen. Einer der wichtigsten Schritte, der ergriffen werden kann, ist die Revidierung bestehenden und geplanten Investitionsschutzabkommen, damit sie den Umweltschutz nicht vermindern. Staaten sollten einen Rahmen für internationale Vorschriften aufbauen um sicherzustellen, dass FDI eine nachhaltige Entwicklung fördern und nicht zu schweren Schäden für die Umwelt führen.