

Doing Business in Uzbekistan

A Guide to its Foreign Investment Framework

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I. INTRODUCTION

Uzbekistan's position at the crossroads of Central Asia, its sizable population¹ and enormous energy export potential offer foreign investors as yet untapped long-term investment opportunities. The Geology Committee of Uzbekistan estimates the country's total reserves of oil at more than 5.3 billion tons, of condensate at 480 million tons and of gas at 5,095 billion cubic meters.² Uzbekistan possesses 30 percent of the oil reserves, 40 percent of the natural gas reserves and 74 percent of the gas condensate of Central Asia.³ The value of its oil and gas reserves alone is estimated at over US\$ 1,000 million.⁴ At present, only around 30 percent of these reserves is being explored. As such, the scope for development is substantial. Uzbekistan also holds considerable reserves of the world's gold, copper and uranium.

In order to tap into these resources, effect structural reform and improve its competitiveness, Uzbekistan needs massive investment. In just the next few years, the Uzbek government has estimated that US\$ 53 billion is required to undertake its priority investments. In the energy sector alone, US\$ 1.4 billion is needed to carry out the reconstruction and development programme.⁵ The Government has repeatedly highlighted the importance of foreign investor participation as a means of carrying out the country's structural reform, modernization and economic liberalization.⁶

Despite its vast potential and calls for increased foreign investment, to date foreign direct investment (FDI) has been negligible. *Table 1* shows the net inflow of FDI into Uzbekistan from 1985 to 2002. After peaking in 1997, net FDI amounted to

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¹ Its population of 25 million makes it the single largest market in Central Asia.

² U.S. Department of Trade, *Oil and Gas Industry, Industry Sector Analysis*, 28 March 2003, at 1; available at: «<http://www.usatrade.gov>». It should be noted, however, that these figures have not been confirmed by independent experts and thus may be highly speculative.

³ Speech by Mr Elyor Ganiev, Deputy Prime Minister of the Republic of Uzbekistan, at the Annual Meeting of EBRD Governors, Tashkent, Uzbekistan, 5–6 May 2003.

⁴ U.S. Department of Trade, *supra*, footnote 2, at 2.

⁵ U.S. Department of Trade, *Energy Sector of Uzbekistan, Industry Sector Analysis*, 14 March 2003, at 1; available at: «<http://www.usatrade.gov>».

⁶ State Property Committee of Uzbekistan, *Foreign Investment Attraction*, 22 July 2003; available at: «<http://www.spc.gov.uz>».

US\$ 71 million in 2001. In 2002, it dropped to US\$ 65 million, down 9 percent on the year.⁷ With FDI per capita of US\$ 6.00 in 2002, Uzbekistan has the lowest ratio of FDI to gross domestic product of all transition economies.⁸

TABLE 1: FDI NET INFLOW, 1990–2002
(US\$ millions)

	1990–1995 (Annual average)	1996	1997	1998	1999	2000	2001	2002
Uzbekistan	27	90	167	140	121	73	71	65
Kazakhstan	754	1,674	1,321	1,152	1,472	1,283	2,823	2,561
Russian Federation	1,167	2,579	4,865	2,761	3,309	2,714	2,469	2,421
Central Asia	662	2,590	3,107	2,997	2,462	1,871	3,963	4,035

Sources: United Nations Conference on Trade and Development, *World Investment Report 2002—Transnational Corporations and Export Competitiveness*, United Nations, New York and Geneva, 2002, Annex table B.1, pp. 303–306; and *World Investment Report 2003—FDI Policies for Development: National and International Perspectives*, United Nations, New York and Geneva, 2003, Annex table B.1, pp. 249–252.

Over the years, Uzbekistan has sought to attract foreign investment into export-oriented sectors and, in particular, into the energy sector. It has sought to improve the investment climate and to create favourable conditions for foreign investors by adopting numerous laws and regulations.

The aim of this article is to provide a guide to the laws governing foreign investment in Uzbekistan today, highlighting the reasons why the current investment framework essentially discourages investment. A review of the key investment laws and regulations currently in force in Uzbekistan will be undertaken in Section II. Section III will, in turn, analyse the rights accorded to investors under international agreements to which Uzbekistan is a party, thereby completing the general overview of the foreign investment framework. This article does not seek to provide an exhaustive list of all incentives and privileges accorded to investors under tax and other laws nor will it review sector-specific privileges and rights accorded to investors. As such, it provides an introductory rather than a complete guide to doing business in Uzbekistan.

II. THE FOREIGN INVESTMENT FRAMEWORK

A. GENERAL OVERVIEW

More than forty laws and regulations make up the complex framework of rules presently governing foreign investment in Uzbekistan.⁹ The key provisions concerning

⁷ Economist Intelligence Unit (EIU), *Uzbekistan—Country Report 2003*, London, June 2003, at 3.

⁸ European Bank for Reconstruction and Development (EBRD), *Uzbekistan, Country Strategy*, 4 March 2003; available at: <http://www.ebrd.org/about/strategy/country/uzbe/main.htm>.

⁹ The key laws are published in English; see W.E. Butler, *Foreign Investment Law in the Commonwealth of Independent States*, Simmonds & Hill, London, 2002.

foreign investment are set out in The Law on Foreign Investments (the Investments Law)¹⁰ and the Law on Guarantees and Measures for Protection of Rights of Foreign Investors (the Guarantees Law).¹¹

A myriad of other laws and regulations amend or supplement the basic rules established in these laws. Consequently, the current investment framework is overly complex, non-transparent and often inconsistent.¹² As will be seen below, the Government has a tendency to legislate by decree and to take a case-by-case approach to approving investments. Thus, the foreign investment regime lacks the stable framework which is essential for attracting investors.¹³ In addition, rights granted under legislation are typically subject to limitations in unspecified laws and regulations, making the process of legislative review difficult. The fact that it is difficult to obtain the relevant foreign investment decrees in translation further exacerbates this problem.¹⁴

As a means of reducing the above-mentioned regulatory risk, the Government often issues project-specific decrees, typically in respect of large investors. These tailor-made decrees set out special rights and obligations of such investors in a given project and exclude the application of unclear legal provisions that would otherwise apply.¹⁵ Often, these special decrees are secret, and sometimes even the investor to whom they are addressed is not aware of their terms.¹⁶ Obtaining such decrees is expensive and time consuming. Moreover, instead of aiding the process of investment, these decrees have rendered the process unpredictable and non-transparent. This lack of transparency and predictability, being the two most important factors for investors when deciding where to invest, undoubtedly plays a large part in discouraging investment.¹⁷

B. RIGHTS GRANTED TO INVESTORS UNDER THE FOREIGN INVESTMENT FRAMEWORK

The following is an analysis of the most important rights accorded to foreign investors in respect of investments under Uzbek law. In order to better understand the nature and scope of the rights granted to foreign investors, one needs first to determine to whom these rights accrue and what constitutes a “foreign investment”.

¹⁰ Dated 30 April 1998, as amended 20 August 1999.

¹¹ Dated 30 April 1998, No. 611-1.

¹² The over-complexity of the investment framework was commented upon by the United Nations Conference on Trade and Development (UNCTAD) in its investment profile review in 1999. Since then the level of complexity and lack of transparency has, if anything, increased; see UNCTAD, *Investment Policy Review of Uzbekistan*, March 1999; available in .pdf format at: «<http://www.unctad.org/templates/Download.asp?docid=161&lang=1&intlitmid=1773>».

¹³ U.S. Department of Trade, *Chapter 7—Investment Climate Statement, Uzbekistan Country Commercial Guide F Y 2002*, at 1; available at: «<http://www.usatrade.gov>».

¹⁴ Presently, there is no governmental authority or institution responsible for the dissemination of such laws.

¹⁵ The right of the Government to issue decrees granting foreign investors additional guarantees and protection is set out in Article 4 of the Guarantees Law.

¹⁶ See U.S. Department of Trade, *supra*, footnote 13, at 1.

¹⁷ The study of the Organisation for Economic Co-operation and Development has shown that transparency and predictability are the most important factors for investors when making an investment; see OECD, *Trends and Recent Developments in Foreign Direct Investment*, Paris, June 2003, at 1.

1. *Who is a Foreign Investor?*

According to Article 4 of the Investments Law, a foreign investor is:

- a foreign State or any administrative organ of the State;
- any international organization;
- any legal person established and operating in accordance with the laws of another State, whether a company, partnership or association; or
- any natural person who is either a citizen of another State or a national of Uzbekistan who is permanently resident abroad.

Unusually, certain rights under Uzbek law accrue to “enterprises with foreign investment” rather than to investors themselves. An enterprise with foreign investment (EFI) was initially defined in Article 6 of the Investments Law to mean any Uzbek company in which a foreign investor holds 30 percent or more of the share capital. However, this definition was subsequently amended on two occasions by Presidential decree.¹⁸ Presently, a company is deemed an EFI if:

- (i) its share capital is equivalent to no less than US\$ 150,000;
- (ii) a foreign investor holds at least 30 percent of the share capital of such company; and
- (iii) at least one shareholder is a foreign legal person (other than a natural person).¹⁹

By according certain rights to EFIs, Uzbek law granted rights to a broader group of companies incorporated in Uzbekistan than is typically the case in most other countries and under bilateral investment protection agreements (IPAs). The latter usually afford protection only to investors in respect of their interest in Uzbek companies. In some cases, IPAs also protect Uzbek companies, but only if such companies are under the direct or indirect control of a foreign investor. However, at the same time, the scope of protection afforded investors in their own right against certain actions of the State is narrower, since certain rights are afforded to EFIs only, rather than to investors *per se*. The difference in the scope of application of the rights granted under the laws will be highlighted below.

It is not clear why the concept of EFIs was introduced, given that granting rights on such a basis is not in line with the obligations to investors undertaken by Uzbekistan under IPAs to which it is a party. In fact, it is one of the recommendations of the United Nations Commission for Trade and Development (UNCTAD) that Article 4 of the Investments Law be amended so that all rights accrue to investors rather than to EFIs.²⁰

¹⁸ See Presidential Decree dated 30 November 1996; and Presidential Decree dated 27 March 1998.

¹⁹ See the Presidential Decree dated 27 March 1998, para. 1.

²⁰ See UNCTAD, *supra*, footnote 12.

It is not clear at present whether the Uzbek government will amend its laws in accordance with this recommendation.

2. *What is a Foreign Investment?*

Foreign investment is defined in Article 3 of the Investments Law as any “material and non-material benefits or rights, including rights to intellectual property, and ... any revenue from foreign investments to be contributed by investors” into companies which are not prohibited by legislation. As such, the Investments Law adopts a broad definition of foreign investment which, importantly, includes revenue yielded from an investment (defined to include profits, interests, dividends and royalties) which is re-invested.

The terms “material benefits and rights” and “non-material benefits and rights” are not defined under the Investments Law. However, Article 5 does set out the form which foreign investment can take and, thereby, assists the interpretation of the scope of these terms. According to this Article, the following fall within the definition of foreign investment:

- (i) shares in an Uzbek company *directly* owned by a foreign investor;²¹
- (ii) any Uzbek company *wholly owned* by a foreign investor;
- (iii) any proprietary rights of a foreign investor in Uzbekistan;
- (iv) bonds issued by, or rights arising under any loan made to, an Uzbek company;
- (v) any intellectual property rights, including goodwill, know-how, trademarks, etc. of a foreign investor; and
- (vi) rights granted under any concessions agreement to a foreign investor.

The most important rights accorded to foreign investors in respect of investments are discussed below.

3. *Right of Access*

Article 3 provides that investors may invest in any business activity unless otherwise prohibited by other legislation. In line with international law, Article 3 does not accord investors a right to establish an investment (often referred to as the “right of market access”).²² The Investments Law is instead concerned with investments that are already made or established in Uzbekistan.

²¹ Thus, shares indirectly owned by a foreign investor in an Uzbek company are not deemed an investment under the Investments Law.

²² Most countries do not accord investors a right of access to their markets in order to regulate the level of foreign ownership in certain sensitive sectors such as defence and telecommunications.

According to the U.S. government, it seems that there is no business activity—other than defence²³—which is reserved exclusively for Uzbek nationals, although there are a number of sectors where foreign ownership cannot exceed a set percentage share.²⁴ For example, an investor may not hold more than a 49 percent interest in a bank. Thus, on the face of it, Uzbekistan appears to be substantially open for foreign investment in all forms and in most areas of business.

In practice, however, the Uzbek government is highly interventionist at the entry level. It regulates and controls the entry of investors in a number of ways. First of all, certain activities—including those in the areas of national security, public health and safety, natural resources and financial services—can only be undertaken upon issue of a licence by the relevant government authority. Through this process of licensing, the State controls the ability of investors to enter the market. Second, an investor must negotiate with the State a tailor-made investment regime applicable to its specific investment.²⁵ This case-by-case approach to investment approval is cumbersome and protracted, enabling the Uzbek government to exercise excessive control over investments. Third, a complex system of registration exists in Uzbekistan. The main requirements an investor must comply with in order to set up a business are set out below:

- (i) Under Article 9 of the Law on Investment Activity,²⁶ an investor must obtain an “opinion of an expert regarding the compliance of the project with sanitary-hygienic, radiation, ecological, architectural-urban construction, and other requirements”.
- (ii) In order to set up a joint venture with an investment programme valued at US\$ 20,000,000 or more, an investor must obtain approval of the Cabinet of Ministers.²⁷
- (iii) An investor wishing to set up an EFI must register it with the Ministry of Justice.²⁸ More specifically, if the share capital of such company is to exceed the equivalent of US\$ 500,000, the registration must be done at the national branch of the Ministry of Justice; otherwise, it needs to be done at the regional

²³ See Article 9(d) of the Investments Law.

²⁴ See U.S. Department of Trade, *supra*, footnote 2.

²⁵ The UzPEK Decree dated February 2001 is an example of a tailor-made decree. It prescribes tax incentives and currency exemptions specifically for UzPEK Ltd. in respect of its development projects.

²⁶ Dated 24 December 1998.

²⁷ See Article 6 of the Statute of the Procedure for Conducting Legal Expert Examination, State Registration and Liquidation in the Republic of Uzbekistan of Enterprises with Foreign Investment, confirmed by Decree of the Cabinet of Ministers of the Republic of Uzbekistan, No. 336 of 2 July 1997, as amended by Decree No. 134 of 27 March 1998, and Decree No. 427 of 14 September 1999.

²⁸ It would seem that a company being incorporated by a foreign investor with a share capital of less than the equivalent of US\$ 150,000 (and thus not falling within the definition of an EFI) does not need to be registered. However, Article 6 of the Investments Law could be construed as implying that a company in which a foreign investor has more than 30 percent of the share capital must be registered, irrespective of the total amount of its share capital, before it will be conferred the status of a legal person. It is, therefore, unclear whether a company which is not an EFI due to its share capital being less than the equivalent of US\$ 150,000 must be registered or not.

level.²⁹ Although the law requires the Ministry of Justice to register a company within ten days of receipt of a complete application, the registration procedure often takes many months and sometimes longer than a year.³⁰ This is because the right to register with the Ministry of Justice is conditional upon the receipt of the approval by the Cabinet of Ministers referred to in point (ii) above, the issuance of which is not subject to any time limitation.

- (iv) Each EFI must be registered at the Ministry of Foreign Economic Relations pursuant to Article 5 of the Law on Foreign Economic Activity³¹ and Article 1 of the Statute on the Procedure for the Registration of Enterprises with Foreign Investment as Participants of Foreign Economic Relations.³² Such registration must be renewed on an annual basis with the Ministry of Foreign Economic Relations.

Thus, in practice, the entry process for investments is complicated, cumbersome, time consuming, and involves extensive negotiations with numerous government ministries and agencies.

4. *Right to Just Treatment and Security of Investment*

Article 9(b) of the Investments Law provides that investors shall be subject to a “just and equal regime”, pursuant to which “full and constant defence and security” will be granted to them. As such, investors are granted the right to non-discriminatory treatment and to full protection under the law. Presumably, this wording is intended to mirror the rights to “fair and equitable treatment” and “full protection and security” usually accorded to investors under IPAs.

In practice, however, the State seems to favour large investors. These are often granted additional tax exemptions and other privileges pursuant to decrees passed specifically for their benefit. Often, such decrees are secret so that it is impossible for other investors to even determine whether they are receiving comparable and, thus, fair treatment.

5. *Right to National Treatment*

Article 9(c) of the Investments Law accords foreign investments treatment that is no less favourable than that accorded to investments of domestic investors. In other words, investors are guaranteed national treatment in line with international law.³³

²⁹ See Article 8 of the Statute, *supra*, footnote 27. Since no registration procedure has been adopted at the regional level, investors have to establish companies with a share capital of over US\$ 500,000.

³⁰ UNCTAD, *supra*, footnote 12, at 14.

³¹ Dated 14 June 1991, and amended on 2 July 1992.

³² Confirmed by Decree of the Cabinet of Ministers of the Republic of Uzbekistan, No. 336 of 2 July 1997.

³³ For a discussion on the rights granted to investors under international law, see Section III of this article.

Paragraph (d) of the same Article clarifies that, unlike domestic investors, a right to national treatment does not afford a foreign investor an automatic right of entry into any sector of the economy. The right to national treatment accrues to an investor only after the investor actually makes an investment in Uzbekistan.

A review by UNCTAD in 1999 did not find any discriminatory laws on Uzbek's statute books.³⁴ In fact, as discussed in the following Sections, unlike domestic investors, foreign investors are exempt from paying numerous taxes, are subject to less stringent currency rules and are granted numerous tax incentives and other privileges. Therefore, if anything, foreign investors are in effect granted more favourable treatment than national treatment.

6. *Right to Most-Favoured-Nation Treatment*

There does not seem to be a specific provision under the Investments Law which grants investors most-favoured-nation (MFN) treatment. The right to MFN treatment is the right of an investor to have its investments subject to treatment no less favourable than the treatment offered by a host country to investments of investors from other countries. In other words, this right seeks to establish a level playing field amongst investors from different countries operating in the host country. The obligation on a host State to grant investors MFN treatment is typically set out in IPAs to which such State is a party.³⁵

The last sentence of Article 9(b) of the Investments Law could be interpreted as granting foreign investors in Uzbekistan a right analogous to a right to MFN treatment. It provides that the investment regime of Uzbekistan "may not be less favourable than the regime determined in international treaties of the Republic of Uzbekistan". Uzbekistan has to date entered into thirty-five IPAs according investors of the countries party to these agreements certain rights, including the right to MFN treatment and national treatment. It could thus be argued that the wording of Article 9(b) should be construed as requiring Uzbekistan to ensure that investments of an investor from any country are treated no less favourably than investments of investors from countries with which Uzbekistan has entered into an IPA. The investment regime of Uzbekistan would otherwise be less favourable than the regime accorded to certain investors under international treaties to which Uzbekistan is a party.

As discussed in Section II.A of this article, however, the Uzbek government typically accords individual investors special rights and privileges pursuant to tailor-made decrees. By engaging in this practice, it discriminates between investors from different countries. Thus, notwithstanding the right accorded to them under Article 9, investors do not enjoy a right to MFN treatment under Uzbek law.

³⁴ UNCTAD, *supra*, footnote 12, at 17.

³⁵ Uzbekistan has granted such a right to investors of countries pursuant to the terms of IPAs to which it is a party. For further discussion, see Section III of this article.

7. *Right of Import and Export*

Pursuant to Article 12(d) of the Investments Law, EFIs (rather than investors) are entitled to “autonomously ... effectuate export-import operations in compliance with the requirements of legislation”. Neither export of own production nor imports for own production are subject to a licence, quota or customs duty. Thus, in principle, export and import for own production are not regulated, whilst exports and imports not for own production are subject to licence.

However, it is the Cabinet of Ministers that determines which goods fall within the definition of “imports for own production”.³⁶ This means that the Cabinet of Ministers must review on a case-by-case basis the list of specific goods each company wishes to import. Consequently, imports of goods are always subject to prior governmental approval.

In addition, up until recently, import contracts had to be registered with the Ministry of Foreign Economic Relations. This process could take as long as four months. This made it difficult for investors to plan their production schedules, in addition to imposing on them hefty storage fees.³⁷ On 26 September 2003, the President of Uzbekistan adopted a Decree “On Measures for Further Liberalization of Foreign Economic Trade Activity in the Republic of Uzbekistan”, abolishing the above-mentioned registration requirement as from 1 October 2003.³⁸ However, in an act running counter to its claim of being committed to trade liberalization, the Government sealed its international borders in early October in an attempt to restrict imports.³⁹ Thus, it would seem that the Government is still reluctant to liberalize trade and cut import restrictions.

The requirement under Article 12(c) that an EFI must be “currency self-sufficient” of the Investments Law, by matching its import expenses with its export revenues, further limits EFIs’ ability to freely conduct their export-import operations.

Accordingly, due to the above-mentioned restrictions, investors’ ability to freely devise their import and export policy is fairly limited in practice.

8. *Right to Transfer Funds*

Article 10 of the Investments Law provides that an investor has the right to “dispose autonomously and freely of revenue (including unobstructed repatriation thereof) obtained as a result of investment activity”. The investor is, however, required to exercise this right in accordance with other Uzbek legislation.

³⁶ See Article 12(c) of the Investments Law.

³⁷ U.S. Department of Trade, *supra*, footnote 13, at 2.

³⁸ For terms of the Decree, see: <http://www.press-service.uz/eng/documents>. See also *Uzbekistan Abolishes Pre-registration on Import Contracts*, UzReport.com News Server, 29 September 2003; available at: <http://www.uzreport.com>.

³⁹ *Uzbekistan: Commitment to Reform Remains in Doubt*, Oxford Analytica, 14 October 2003; available from: <http://www.oxan.com>.

Pursuant to Article 7 of the Guarantees Law, an investor is granted a broader right of “free transfer” in foreign currency of, *inter alia*, the investment, returns on the investment and monies payable under contracts. Such a right is conditional upon the payment by the investor of all taxes and other payments related to such transfer and the right of the State to suspend the repatriation in case of the insolvency or bankruptcy of an investor or the investment.

There is a slight inconsistency in the scope of the rights accorded to investors under the two provisions. Under Article 10 of the Investments Law, the right to dispose extends only to returns from investment, whilst Article 7 of the Guarantees Law provides that all funds held by an investor should be freely transferable in a foreign currency. In addition, the ability of the State to limit the right of transfer under Article 7 of the Guarantees Law is carefully circumscribed, whilst the grounds on which it can do so under Article 10 of the Investments Law are not defined, thereby giving the State a greater discretion to interfere.

More important for the investor than the issue of inconsistency in the scope of the right to transfer funds under Uzbek law is the fact that the above-mentioned provisions are in fact not implemented. At present, tight currency controls are in place, severely restricting the ability of investors to dispose of their assets. The key restrictions in place are as follows. First, there exists a requirement to convert 50 percent of all foreign currency earnings into Uzbek *soum* at the domestic foreign exchange rate.⁴⁰ Second, a 10 percent tax is imposed on revenue which the investor wishes to transfer abroad.⁴¹ Third, and as discussed in Section II.B.9, an investor is actually not able to obtain foreign currency. These restrictions impede an investor’s ability to dispose freely of investments and to repatriate funds abroad.

These restrictions have the effect of making investment projects “non-bankable”. By restricting foreign investors’ ability to repatriate the proceeds of their exports, these restrictions prevent investors from borrowing from international institutions and other investors to finance their investments in Uzbekistan.⁴² Although large investors have managed to negotiate special decrees exempting them from these requirements, the very existence of such requirements undoubtedly deters investors from investing in Uzbekistan.⁴³

It is unclear whether the present push by the Uzbek government to liberalize

⁴⁰ The calculation of the proportion of earnings a company needs to convert is based on such company’s projected earnings rather than its actual earnings. As such, the actual proportion of earnings converted commonly exceeds 50 percent; see PricewaterhouseCoopers, *Uzbekistan, A Business and Investment Guide*, July 2002, at 10; available at: <http://www.pwcglobal.com>.

⁴¹ See Article 35(d) of the Tax Code, approved by Law No. 396-1, dated 24 April 1997, as amended by numerous laws, the latest dated 13 December 2002.

⁴² Usually loan agreements contain a “waterfall” provision determining how monies generated from an investment are to be used. Such monies are usually held in escrow accounts abroad and the company is given limited control over how they are applied until the loan is repaid.

⁴³ U.S. Department of Trade, *supra*, footnote 13, at 5.

currency operations will result in a removal of these restrictions.⁴⁴ If they remain in place, then such liberalization will have a minimal effect on boosting foreign investment in practice.

9. *Right to Acquire Foreign Currency*

Article 10(g) of the Investments Law grants investors a right to, in accordance with Uzbek legislation, “use means in national currency in their own accounts in order to acquire foreign currency on the internal currency market”. In other words, it provides them with a right to acquire foreign currency on the Uzbek foreign currency market. However, again, such right can only be exercised in accordance with other relevant Uzbek laws.

Since 1996, tight currency controls have been in place in Uzbekistan. Although introduced as a temporary measure, they have resulted in the creation of a multiple exchange-rate system. Investors are required to buy foreign currency at the official exchange rate. The gap between the official rate of exchange and the “real”, black market, rate of exchange has, over the years, been enormous.⁴⁵ Typically, there is a lack of foreign currency, so that the investor is unable to source foreign currency even at the official exchange rate. There have been cases where investors were forced to cease operations for a few months, as they lacked the foreign currency needed to import raw materials. Other investors have found themselves unable to repay debts to foreign creditors. The only remaining avenue available to an investor is the commodities market, where an investor can contract with an exporter for needed imports. The exporter uses its export revenue to buy the imports needed by the investor and sells them to the investor at a price with, typically, an implied exchange rate well in excess of the black market rate.

From the above, it can be concluded that at present Uzbek authorities control the supply, demand and price of foreign currency. The International Monetary Fund (IMF), the World Bank and the European Bank for Reconstruction and Development (EBRD) regard currency restrictions as the single greatest obstacle to doing business in Uzbekistan. In recognition of this, the Government of Uzbekistan, together with the IMF, devised a Staff Monitoring Programme pursuant to which the foreign currency market was to have been liberalized by the end of 2002. Uzbekistan had also undertaken at the same time to sign Article VIII of the Articles of Agreements of the IMF, which would prohibit it from imposing restrictions on the making of payments and transfers in respect of current account transactions unless it received permission to do so from the IMF.⁴⁶ These undertakings, however, were not honoured.⁴⁷ In June 2003, the Cabinet of Ministers

⁴⁴ For details of the present push to liberalize currency operations, see Section II.B.9 of this article.

⁴⁵ The gap has narrowed down considerably in 2003, but this has primarily been achieved by reducing the supply of *soum*.

⁴⁶ Republic of Uzbekistan, Letter of Intent addressed to Mr Horst Kohler, Managing Director of the IMF, dated 29 July 2002; see: <http://www.imf.org/external>.

⁴⁷ EU, *supra*, footnote 7, at 8.

passed a further Resolution "On Further Liberalization of the Currency Market and Unification of Currency Rates", pledging once again to complete the liberalization process, this time by the end of 2003.⁴⁸ According to Mr Fayzulla Mullajonov, the Chairman of the Central Bank, Uzbekistan is hoping to sign on to Article VIII of the IMF Agreement by November 2003.⁴⁹

In order to meet this deadline, the President and the Cabinet of Ministers have adopted numerous Decrees and Resolutions, thereby removing certain currency restrictions.⁵⁰ A meeting was held in Tashkent between the IMF and the Uzbek government in early October 2003 and, in a letter to the Managing Director of the IMF dated 15 October 2003, the Uzbek government accepted obligations under Article VIII of the IMF Agreement.⁵¹ On that same day, the Government proclaimed the *soum* to be convertible for current international operations.⁵² It is too early to say whether the promulgation of these Resolutions and Decrees will mean that current account currency restrictions will in practice be removed. There still seems to be considerable doubt that President Islam Karimov's Government has the commitment to actually do so. The IMF will be conducting a review of these Decrees and Resolutions in the next few months before making an official announcement confirming Uzbekistan's adherence to Article VIII requirements.

10. *Right to Raise Foreign Capital*

Pursuant to Article 10(f) of the Investments Law, investors have the right to raise funds abroad in accordance with the laws of Uzbekistan. A similarly worded right is accorded to investors under Article 6 of the Guarantees Law.

Unfortunately, the ability of investors to raise foreign capital is limited under secondary legislation. First, although an investor has a right to open an account abroad under Article 6 of the Guarantees Law, the investor must first obtain a licence from the Central Bank to do so.⁵³ In order to obtain such a licence, a company must submit the following information to the Central Bank:

- the purpose of opening such an account;

⁴⁸ *Uzbek Cabinet of Ministers Resolves on Introduction of Unified Currency Rates*, UzReport.com News Server, 22 July 2003, at: <http://www.uzreport.com>.

⁴⁹ National Bank for Foreign Economic Activity of the Republic of Uzbekistan, *Action Plan to Ensure Convertibility of National Currency on Current International Operations*, 8 July 2003, available at: <http://eng.nbu.com>.

⁵⁰ For example, the Cabinet of Ministers adopted a Resolution "On Measures of Liberalization of Currency Transactions During Foreign Trade Activities" on 26 August 2003. On 7 October 2003, it adopted a Resolution "On the Measures for Further Liberalization of Currency Operations", whereby the ban on currency payments to offshore zones was removed. The author understands that other Resolutions have been passed as well but has not been able to obtain copies of these Decrees as at 23 October 2003.

⁵¹ Oxford Analytica, *supra*, footnote 39.

⁵² Press Service of the President of the Republic of Uzbekistan, *Uzbek Soum Now Convertible*, available at: <http://www.press-service.uz/eng>.

⁵³ See Procedure for Giving Authorization to Open Bank Account Abroad, dated 28 March 1999; available at: <http://lawlib.freenet.uz/laws/eng/474.html>.

- the type of account it proposes to open and the nature of the transactions to be undertaken;
- the name of the foreign bank at which the account is to be opened;
- information regarding the foreign currency account presently opened in Uzbekistan;
- a copy of its constitutive documents;
- a copy of its certificate of registration as a participation in foreign economic activity issued by the Ministry of Foreign Economic Relations;
- a reference from the local bank certifying that opening an account abroad is advisable and that such bank is willing to provide services to the foreign bank; and
- details of the sources of funds which will be deposited in the foreign account.⁵⁴

In addition, an investor must obtain a licence from the Central Bank in order to raise or invest funds abroad.⁵⁵ Again, an extensive list of documents must be submitted to the Central Bank, including the principal terms of any loan to be taken.⁵⁶ The Central Bank is given a broad discretion to request any additional information and documents it determines are necessary in order to issue the licence.

In practice, the ability of an investor to raise funds abroad is therefore severely restricted. As discussed earlier, there have been cases where, due to the inability to obtain foreign currency, investors have simply defaulted on loans. The requirement to keep 50 percent of profits in *soum* discussed in Section II.B.8 further hinders the ability of investors to raise money abroad.⁵⁷ Lenders typically require that all revenue generated by an investment be deposited in blocked escrow accounts abroad over which the investor has no real control. This requirement, therefore, inhibits investors from raising money abroad by making their investments non-bankable.

11. *Right to Grant Security over Assets*

Under the previous foreign investment laws, investors were not permitted to grant security over their assets. This meant that companies were unable to raise funds from international banks, as such lending is usually secured. The right to grant security over all assets owned by an investor is now enshrined in Article 10(i) of the Investments Law. Although a positive development, the introduction of this right is of little practical

⁵⁴ See *ibid.*, para. 2.2.

⁵⁵ Procedure for the Execution of Foreign Borrowings and Other Currency Operations Associated with Capital Movement, dated 28 March 1998; available at: <http://lawlib.freenet.uz/laws/eng/474.html>.

⁵⁶ See *ibid.*, para. 2.

⁵⁷ It would seem that this restriction was still in place as at 23 October 2003.

benefit to investors faced with all the restrictions on the way they carry out their business in Uzbekistan that have been discussed earlier.

12. *Protection from Adverse Regulatory Changes*

Pursuant to Article 3 of the Guarantees Law, “if subsequent legislation ... worsens the conditions of investing, then the legislation which operated at the date of investing shall apply to foreign investments for ten years from the moment of investing”. In addition, if a provision of a subsequent law is more favourable to the investor, the investor may, under this Article, choose for such provision to apply to the investment. Thus, except as discussed below, an investor’s rights and obligations as at the time of the investment are stabilized for ten years, and so it is protected against adverse changes in the law for this period. At the same time, pursuant to this Article, an investor can benefit from the provisions of any subsequent legislation which may be more favourable to it.

This stabilization provision accords investors unusually wide protection concerning their investments. With the exception of laws “which are directly connected with ensuring the defence of the interest of national security”, the investor is afforded protection against all adverse changes in Uzbek law.⁵⁸ This protection is much wider than the protection typically accorded to investors under concession and other investment agreements in other jurisdictions. These usually relate to changes in tax law only.

This broad protection, however, is afforded to foreign investments as defined under the Law. As such, only Uzbek companies that are wholly owned by a foreign investor are protected under this provision since only such companies fall under the definition of an “investment”. Consequently, only wholly owned EFIs are afforded protection against changes in the law.

Although in principle the protection is broadly defined, attempts by investors to enforce this provision have been unsuccessful in the past.⁵⁹ Even cases which, pursuant to this Article, challenged the adverse tax increases and changes in the foreign currency regime have failed. In light of this, investors are likely to be better served by seeking to incorporate stabilization clauses into investment, concession and other such agreements that they enter into with the State in order to minimize the impact of changes in law on their projects.

That Article 3 of the Guarantees Law is not implemented is perhaps not all that surprising since, as currently worded, it unduly ties the hands of the Uzbek government, preventing it from implementing sensible policy changes. It also means that as laws change and the Uzbek legal system evolves, this overly broad stability arrangement will,

⁵⁸ See the last paragraph of the Guarantees Law, Article 3.

⁵⁹ U.S. Department of Trade, *supra*, footnote 13, at 3.

in effect, create barriers to entry into the market by unduly favouring existing firms over new investors. Consideration should therefore be given to amending this Article to allow the relevant governmental authority to negotiate stabilization clauses in limited circumstances and only with respect to a selective list of matters with respect to which investors are typically protected, such as changes in taxation. This approach would provide investors with the protection they are used to having in the developing countries whilst at the same time enabling the Government to adopt new environmental, health, safety and other laws.

13. *Right to Compensation in Case of Nationalization and Expropriation*

Foreign investments may not be subject to nationalization according to Article 5 of the Guarantees Law. In addition, the right of the State to expropriate foreign investments is limited to cases of “natural disaster, accident, epidemic or epizootic”. The State can only expropriate in these limited circumstances if such expropriation is non-discriminatory in nature, undertaken in accordance with applicable legal procedure and accompanied by the payment of adequate compensation.⁶⁰ Pursuant to this Article, an investor also has the right to appeal any decision of the State to expropriate its assets in the Uzbek courts or to commence arbitration proceedings under Article 10 of the Guarantees Law in respect of such decision.

The nature of the guarantee provided in case of both nationalization and expropriation is wider than that accorded under international law and, in particular, pursuant to bilateral investment protection agreements. Under international law, a country is permitted to nationalize or expropriate investments if it does so for a public purpose, on a non-discriminatory basis and provides the investor whose investment is so nationalized or expropriated with adequate compensation.⁶¹ Under the Guarantees Law, investment may not be nationalized and may only be expropriated in the very limited circumstances set out above.

At the same time, however, the scope of investments protected under Article 5 of the Guarantees Law is narrower than under international law. This is because it grants protection to foreign investments only. This term is not defined under the Guarantees Law. If the definition of “foreign investment” under the Investments Law is adopted, then Uzbek companies which are not wholly owned subsidiaries of foreign investors are not protected. Based on this interpretation, in case of an expropriation of such a company, the compensation payable to the investor would be calculated based on the value of the shares owned by the investor rather than on the value of the company as a whole.

⁶⁰ The requirement to provide investors with adequate compensation is also set out in Article 10 of the Investments Law. Similar wording is also contained in Article 22 of the Law on Investment Activity.

⁶¹ For further details, see Section III of this article.

No cases of expropriation of foreign investments have so far been recorded.⁶² However, the Government has in the past taken property of local investors without providing them with adequate compensation. Thus, in practice, foreign investors seem to be subject to more favourable treatment than local investors.

14. *Right to Most Favourable Rules*

Article 22 of the Investments Law provides that “in the event of any inconsistency between the provisions of this Law and other acts of legislation or international treaties ... the provisions most favourable to the investor shall have preferential force”.⁶³ In other words, it guarantees an investor that the provisions most favourable to it will apply in the case of an inconsistency between the provisions of domestic and international law. However, this provision is inconsistent with Article 2 of the Investments Law, which provides that, in the case of inconsistency, the rules of the international treaty shall prevail. How this inconsistency is reconcilable is not clear. Nevertheless, since presently the rights granted to investors under international treaties are more favourable, the issue has not yet arisen.

The Investments Law does not define what is meant by “international treaties”. IPAs, the Energy Charter Treaty (ECT) and other international treaties which accord rights to investors clearly fall within the ambit of “international treaties”. It could also be argued that investment agreements entered into between an investor and Uzbekistan fall within the definition. The international character of these agreements derives from the fact that an investor is not an Uzbek national. These agreements often provide that international arbitration, rather than Uzbek local courts, should resolve any disputes arising under them, further adding to their international character.

Article 22 of the Investments Law provides investors with a very important protection.⁶⁴ As discussed in Section III, Uzbekistan is party to numerous IPAs, as well as to the ECT.⁶⁵ Pursuant to these treaties, investors incorporated in signatory States have rights whose nature and scope are typically broader than the rights accorded to investors under Uzbek law. So, for example, pursuant to Article 6 of the United Kingdom–Uzbekistan Treaty,⁶⁶ a U.K. investor has the right to freely repatriate its returns and investments. Unlike the right to transfer funds under Article 10 of the Investments Law, the exercise of this right is not subject to Uzbek legislation. Thus, Article 22 should enable a U.K. investor to invoke the more favourable provision of the

⁶² U.S. Department of Trade, *supra*, footnote 13, at 3.

⁶³ A similarly worded provision has also been inserted as Article 12 in the Guarantees Law.

⁶⁴ The author is not aware of any instance in which an investor has relied on Article 22 to take advantage of a more favourable right granted to it under an international treaty.

⁶⁵ The ECT entered into force on 16 April 1998.

⁶⁶ The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan for the Promotion and Protection of Investments, dated 24 November 1993; see 1996 UN Treaty Series, 248.

United Kingdom–Uzbekistan Treaty and thereby avoid the operation of the stringent currency rules.⁶⁷

It should also be noted that IPAs and the ECT grant rights to investors investing in Uzbekistan, rather than to EFIs as is the case in respect of certain rights under the Investments Law. Thus, in certain instances, such as, for example, the right to compensation in case of expropriation, these treaties accord protection to investors where they otherwise would not have any. In turn, such investors can invoke Article 22 as a ground for being granted effectively the same right to compensation as EFIs have under Uzbek law.

It is unclear whether Article 22 of the Investments Law can be construed as granting investors the right to invoke the more favourable provisions of any IPA including that to which the State of their incorporation is not a party. This may be too broad an interpretation, the result of which would be to remove the need to negotiate IPAs. Due to the uncertainty of the scope of Article 22, investors incorporated in countries with which Uzbekistan does not have an IPA or which are not party to the ECT should negotiate with the Uzbek government for these rights to be incorporated under the terms of their individual investment agreements. Alternatively, such investors should structure their investment so that they can invoke the rights accorded to investments under such an IPA.⁶⁸

15. *Right of Access to Legislation*

Pursuant to Article 9 of the Guarantees Law, investors have the right of access to legislative acts, departmental regulations and court decisions that affect them. Under Article 20 of the Investments Law, State agencies are required to disseminate information concerning the “possibilities and conditions for investment activity”. Similar provisions are also set out in Article 25 of the Law on Investment Activity. If implemented, these provisions would help to ensure that the investment process is transparent.

However, this is another example where the facts on the ground do not mirror the provisions of the law. At present, there are no public records in Uzbekistan. Decisions of the Central Bank, Ministries and governmental agencies are often not even published. Some decrees are kept secret, even from the investor to whom they apply. This lack of transparency is undoubtedly a significant factor in keeping foreign investment into Uzbekistan low.

Recognizing the need to improve transparency, the Cabinet of Ministers passed a Resolution on the “Additional Measures to Strengthen the Legal Protection of Direct

⁶⁷ A similar right to repatriate profits and investment is also accorded to an investor investing in the Uzbek energy sector under Article 14 of the ECT. Thus, such an investor may also invoke the more favourable provision of the ECT for additional protection.

⁶⁸ An investor may set up a company in a country that has an IPA with Uzbekistan, make an investment through such company and thereby enable itself to invoke the protection of such IPA.

Foreign Investments” on 2 May 2003.⁶⁹ Pursuant to Article 1 of this Resolution, the Ministry of Justice is assigned the task of ensuring the protection of investors and their investments. Specifically, it is required to review the obligations accorded to investors under the law and ensure that their rights are not infringed by:

- (i) bringing any such infringement to the attention of the relevant State authority;
- (ii) suspending any decision of a State authority to the extent it so infringes; or
- (iii) commencing proceedings in Uzbek courts in case of such infringement.

The Ministry of Justice is thus given a quasi-judicial power of suspending decisions of other State organs if such decisions infringe foreign investment rights. The power to commence proceedings on behalf of investors in case of an infringement may prove an important one, given that investors have in the past been reluctant to openly criticize the actions of the Government. Whether the Ministry of Justice will use any of these powers is uncertain.

In order to perform these tasks, the Ministry of Justice is required by the aforementioned Resolution to set up the Administration of Legal Protection of Foreign Investors and Enterprises with Foreign Investments Unit. This Unit was required to prepare, in conjunction with the Ministry of Finance, the State Tax Committee, the State Customs Committee of the Republic of Uzbekistan and other interested Ministries and Departments, a list of the privileges and rights accorded to investors and their investments, together with a commentary, within two months of the promulgation of the Resolution. As at 23 October 2003, it would seem that such a list has not yet been made available to investors.

Of most practical benefit to investors is undoubtedly the provision concerning the posting of investment laws and regulations on the Internet. The Ministry of Justice, together with the Agency for Foreign Investments, was to compile a collection of all the relevant Uzbek laws and regulations regarding investment, in languages other than Uzbek, and post them on the Internet by 3 August 2003 pursuant to Paragraph 3 of the Resolution. Since getting hold of an English version of Uzbek legislation is extremely difficult, this may prove the most important provision of the Resolution. It would certainly make the investment process more transparent. As at 23 October 2003, such a compilation was not yet made available and all attempts to contact the Agency for Foreign Investment or the Ministry of Justice to find out when such information would be available proved unsuccessful.

16. *Right to Commence Arbitration*

According to Article 10 of the Guarantees Law, parties are able to choose to have their disputes, whether or not related to an investment, resolved by “arbitration in

⁶⁹ For the terms of the Resolution, see: http://www.press-service.uz/eng/documents_eng.

accordance with the rules and procedures of international treaties” to which Uzbekistan has acceded.⁷⁰ Article 28 of the Law on Investment Activity, the enactment of which preceded the Guarantees Law by a few days, states the opposite. It provides that “disputes connected with investments (investment disputes) shall be settled by a court”. The Concession Law also provides that only Uzbek courts can resolve disputes arising from a concession agreement.

It is unclear how the Uzbek courts will resolve this inconsistency. The issue is made more complex by the fact that there is currently no comprehensive domestic law on arbitration and, in particular, international arbitration, and that hardly any domestic arbitration occurs in practice.⁷¹ One way of resolving the inconsistency is to rely on Article 22 of the Investments Law and Article 12 of the Guarantees Law. As discussed in Section II.B.14 of this article, these Articles provide that, in the case of an inconsistency between the provisions of an Uzbek law and an international treaty, the provisions more favourable to the investor shall prevail. Accordingly, by the operation of these Articles, investors would have a right to commence arbitral proceedings in case of investment disputes under Uzbek law, since this more favourable right is granted to them under IPAs to which Uzbekistan is a party.

Whether an Uzbek court will adopt this reasoning is not certain. It would thus be advisable for investors to negotiate for all disputes arising under investment or similar agreements which they enter into with the State to be resolved by arbitration, as it is likely that an arbitration tribunal hearing the case would adopt the above reasoning.

In addition, it should be noted that investors are also able to protect their investments by commencing arbitral proceedings pursuant to the terms of the ECT or an IPA. Investors making investments in the energy sector are accorded the right to commence arbitral proceedings for any breach of their rights under the ECT.⁷² This right, however, is granted only to investors who are incorporated in one of the States party to the ECT. Similarly, a right to commence arbitration proceedings is granted to investors incorporated in countries with which Uzbekistan has an IPA in respect of any breach of rights granted to such investors under such IPA.⁷³

The enforcement of foreign arbitral awards is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷⁴ The

⁷⁰ Uzbekistan acceded to the 1965 Washington Convention on the Settlement of Investment Disputes in 1993. The Convention entered into effect in May 1994 upon its ratification by the *Oliy Majlis*, the Uzbek Parliament.

⁷¹ See Y. Sato and A. Rashidov, *Current Status and Future of Arbitration in Uzbekistan*, Law in Transition—Focus on Central Asia, EBRD publication, Spring 2003, 60, at 61; available at <http://www.ebrd.com/pubs/law/lit/sp03/litspr03c.pdf>. Uzbekistan is considering adopting a new arbitration law in line with the UNCITRAL Model Law on Commercial Arbitration. A draft law on international commercial arbitration was discussed at a seminar organized by the Open Society Institute in June 2002 in Tashkent. It is, however, unclear when this law will actually be adopted.

⁷² For details of the rights of investors under the ECT, see Section III.A of this article.

⁷³ For details of the rights of investors under IPAs, see Section III.B of this article.

⁷⁴ This Convention was ratified by Uzbekistan on 22 December 1995.

Convention enumerates the limited circumstances in which Uzbekistan can refuse to enforce a foreign arbitral award, for example when such enforcement would be contrary to public policy. Article 4 of the Convention lists the documents a party seeking to enforce an award must provide to Uzbek courts. Such documents must be submitted in Uzbek. Article 27 of the Law on Execution of Judicial Acts and Acts of Other Organs⁷⁵ further provides that foreign arbitral awards must be submitted to the relevant Uzbek court within three years of their issuance in order to be enforced.

Despite the fact that the grounds on which local courts can refuse enforcement are limited under the Convention, Uzbek courts are often reluctant to enforce foreign arbitral awards. Moreover, there have been instances where the Government has successfully invoked sovereign immunity when foreign arbitral awards were sought to be enforced in Uzbekistan against State enterprises.⁷⁶ It is unclear whether under Uzbek law the State can waive its immunity under a contract, as there is no law on sovereign immunity at present. Thus, in practice, the ability of investors to enforce arbitral awards may be limited.

17. *Right to Indemnification*

According to Article 10 of the Investments law, investors have a right to “compensation for losses caused as a result of illegal actions (or failure to act) and decisions of agencies of State administration ... and officials thereof”. In other words, they have a right to damages for any failure of the State and local authorities to afford them rights in accordance with the law.

The term “losses” is not defined under the Investments Law. According to Geller, under Uzbek law, lost profits are usually not included when calculating the damages suffered by a party.⁷⁷ Thus, the scope of the protection granted to an investor under this Article may be limited to direct losses only.

III. RIGHTS OF INVESTORS UNDER INTERNATIONAL LAW

A review of the foreign investment framework of Uzbekistan would not be complete without a review of the rights accorded to investors under international treaties to which Uzbekistan is a party. The review of these rights is rendered even more important by the operation of Article 22 of the Investments Law and Article 12 of the Guarantees Law, as discussed in Section II.B.14 of this article, which effectively amend the scope of Uzbek law to accord investors the more favourable rights enjoyed by them under international treaties.

⁷⁵ Dated 1998.

⁷⁶ See *Two Views of the New Uzbek Laws on Investors' Rights*, BISNIS On-Line, 17 June 1998; at: <http://www.bisnis.doc.gov/bisnis/country/9807uzin.htm>.

⁷⁷ See her comments, id.

This Section briefly examines the key rights of investors under the ECT and the IPAs to which Uzbekistan is a party. It should be noted that Uzbekistan is also party to other agreements, such as host government agreements in respect of particular investment projects and free trade agreements, which afford investors additional rights. However, the analysis in this Section shall not extend to these agreements.

A. THE ENERGY CHARTER TREATY

Investors from a State party to the ECT⁷⁸ have, under Part III of the Treaty, the following rights in respect of investments made in the energy sector of Uzbekistan:

- (i) to fair and equitable treatment;⁷⁹
- (ii) to national treatment, being a right to treatment which is no less favourable than that conferred on companies incorporated in Uzbekistan;⁸⁰
- (iii) to MFN treatment;⁸¹
- (iv) not to have its investment in any way impaired by any unreasonable or discriminatory measures, whether in respect of management, maintenance, use, enjoyment or disposal of such investment;⁸²
- (v) to protection against losses caused by war or similar events;⁸³
- (vi) not to have its investment expropriated, nationalized or subjected to any measure of equivalent effect, unless any such measure is undertaken for a purpose which is in the public interest, is carried out on a non-discriminatory basis and is accompanied by the payment of prompt, adequate and effective compensation;⁸⁴ and
- (vii) to commence arbitration proceedings against Uzbekistan for a breach of any of the above-mentioned rights.⁸⁵

These rights are, thus, substantially the same as those of investors under IPAs.⁸⁶ The definition of an investment is as broadly defined as under IPAs, except that to be

⁷⁸ For a list of States party to the ECT, see the Energy Charter Website at: <http://www.encharter.org>.

⁷⁹ ECT, Article 10(1).

⁸⁰ ECT, Article 10(3).

⁸¹ *Id.*

⁸² ECT, Article 10(1).

⁸³ This right ensures an investor that in the case of armed conflict, a state of national emergency or civil disturbance in Uzbekistan (essentially, in a case of *force majeure*) its investments in Uzbekistan will be treated no less favourably than an investment made by local investors or investors of other countries with regard to compensation for losses suffered by it as a result of such events; see ECT, Article 12.

⁸⁴ ECT, Article 13.

⁸⁵ ECT, Article 26.

⁸⁶ For a detailed discussion of the ECT and the investment protection provisions under it, see Ilais Bantekas, John Paterson, and M.K. Sulcimanov (eds.), *International Framework for the Transit of Oil and Gas: The Caspian Perspective*, *Kazakhstan Oil and Gas Law: National and International Perspective*, Kluwer International, The Hague, 2003.

protected under the ECT such investments must be undertaken in “economic activities connected with the exploration, extraction, refining, production, storage ... of energy materials and products”.⁸⁷ The term “investor” is defined narrowly and is in line with that of the United Kingdom–Uzbekistan Treaty to cover nationals of an ECT Member State and companies incorporated in such State.

B. INVESTMENT PROTECTION AGREEMENTS

To date, Uzbekistan has signed 35 IPAs, including with China, France, Germany, Holland, Malaysia, Russia, Turkey, the United Kingdom and the United States.⁸⁸ Typically, the following rights are accorded to investors under such agreements:

- (i) the right to fair and equitable treatment;
- (ii) the right to national and MFN treatment;
- (iii) the right to protection against expropriation;
- (iv) the right to protection against losses caused by war or similar events;
- (v) the right to transfer of funds; and
- (vi) the right to commence arbitration proceedings against Uzbekistan in case of a breach of the above-mentioned rights.⁸⁹

As IPAs are bilateral in nature, the rights under them accrue only to investors incorporated in States party to such agreements. The category of investors and investments protected under such agreements varies. So, for example, under the United Kingdom–Uzbekistan Treaty,⁹⁰ the above-mentioned rights are accorded to U.K. nationals and to companies incorporated in the United Kingdom which have made an investment in Uzbekistan.⁹¹ On the other hand, under the Netherlands–Uzbekistan Treaty,⁹² nationals of Holland and companies incorporated in Holland, as well as companies (wherever incorporated, including in Uzbekistan) that are under the direct or indirect control of companies incorporated in Holland, are granted protection. The definition of investors under the latter IPA is thus significantly broader and extends to Uzbek companies controlled, directly or indirectly, by a Dutch company or individual.

Under an IPA, rights are granted to an investor with respect to all their investments regardless of the size of the Uzbek company in which they have invested and their

⁸⁷ See the definition of investment and economic activity in the energy sector in ECT, Article 1.

⁸⁸ The agreement with the United States was ratified by the U.S. Senate but has been put on hold until foreign currency restrictions are removed by Uzbekistan.

⁸⁹ For a detailed discussion on the nature of these rights, see UNCTAD publications on investment protection agreements.

⁹⁰ *Supra*, footnote 66.

⁹¹ The term investment is broadly defined to include all assets.

⁹² The Agreement on Encouragement and Reciprocal Promotion of Investments between the Kingdom of the Netherlands and the Republic of Uzbekistan, dated 14 March 1996; see 1997 UN Treaty Series, 72.

ownership share in such company. In other words, IPAs do not distinguish between EFIs and other Uzbek companies. Thus, as discussed in Section II.B.13 in relation to expropriation, the category of investments protected against certain acts of the Uzbek government is broader than under Uzbek law.

The nature of certain rights granted under IPAs, such as the right to fair and equitable treatment, national treatment and to commence arbitral proceedings, is substantially similar to that of the rights accorded to investors under Uzbek law. Other rights, such as the right to protection against losses, are additional rights which investors do not have under Uzbek law. The scope of certain other rights is broader than under Uzbek law. The most important example of such a right is the right of an investor under an IPA to freely repatriate investments and profits in the convertible currency in which the investment was originally made. Unlike under the Investments Law, such right is typically not subject to any limitations.⁹³ Thus, arguably, investors should be able to challenge the application of the currency controls and restrictions on repatriation of investments currently in place by invoking Article 22 of the Guarantees Law or by commencing arbitral proceedings under the relevant IPA.

IV. CONCLUSION

Uzbekistan is without doubt a country of far-ranging investment opportunities. Its unique geographical location, at the crossroads of the ancient Silk Road between China and Europe, means that it has the potential to become a hub of growth and development for the entire region.⁹⁴

Yet, despite its innate attractions as an investment destination,⁹⁵ Uzbekistan has the lowest per capita rate of investment of all transition countries. This can largely be ascribed to the significant weaknesses in Uzbekistan's investment laws. First, the rights granted to investors are narrowly defined under Uzbek law. Although broadly defined under the Investments Law and the Guarantees Law, the operation of these rights is subject to extremely restrictive rules contained in other laws. An example of this is the right to transfer funds, granted under Article 10 of the Investments Law and Article 7 of the Guarantees Law, which is rendered meaningless by the currency restrictions currently in place pursuant to other laws. Second, there are numerous cases of inconsistencies between the rights granted under the various laws, giving rise to uncertainty in interpretation and application. Third, the multiplicity of laws and regulations governing foreign investment makes the entire investment framework non-transparent and overly complex. This is further exacerbated by the fact that this area of law is subject to sudden changes, which are often made pursuant to secret decrees.

⁹³ See, for example, Article 6 of the United Kingdom–Uzbekistan Treaty, and Article 5 of the Netherlands–Uzbekistan Treaty.

⁹⁴ EBRD, *Investment Profile—Uzbekistan*, 2001, at 4; available at: <http://www.ebrd.com/pubs/profiles/uzbe.pdf>.

⁹⁵ UNCTAD, *supra*, footnote 12.

Fourth, the policies and practice in relation to foreign investment are poorly developed. There is, as discussed earlier, excessive reliance on a case-by-case approach to approving investments. The proliferation of incentives and exemptions, especially by way of secret decrees issued on an *ad hoc* basis, make the entire process arbitrary, inconsistent and unpredictable. Fifth, and most importantly, the laws are not implemented and investors therefore have very few rights in practice.

In order to harness its investment potential, Uzbekistan needs to adopt a targeted and coherent investment policy and replace the myriad of *ad hoc* decrees presently in existence. It must also make significant strides in the political, economic and legal spheres. In the political sphere, steps need to be taken to ensure greater political openness by allowing the formation of political parties and civil society groups, to guarantee the freedom of the media and to improve the country's human rights record, thus creating the open and stable political environment crucial for attracting foreign investors.⁹⁶ In the economic sphere, Uzbekistan needs to remove the remaining foreign exchange restrictions, initiate banking sector reform and gradually open up the economy to more competition.⁹⁷ In terms of legal reform, there is a need to make the legal system more transparent and significantly less bureaucratic. It must ensure that laws are given effect, as otherwise there is little real benefit in adopting new, more favourable laws. It would be advisable to abolish the category of "enterprises with foreign investment" and instead accord rights under the Investments Law and Guarantees Law to all foreign investors and their investments. Lastly, the Government of Uzbekistan should ensure that Uzbek legislation is made available to all potential investors and their advisers.

If it fails to take these steps, Uzbekistan runs the risk of falling further behind its regional competitors as it continues to be passed over by investors.

⁹⁶ In the past, numerous cases of torture have been reported by foreign non-governmental organizations; see, for example, *Human Rights Watch World Report*; available at: <http://www.hrw.org>.

⁹⁷ EBRD, *EBRD Activities in Uzbekistan—Country Presentation*, 4 May 2003; available at: <http://www.ebrd.com>.