Dr. Thomas Meyer,
Staatssekretar a. D., Deutsche Gesellschaft
für Technische Zusammenarbeit (GTZ) Gmbh

Protection of investments through stabilization of the legal system and a stable judiciary

1) Introduction

Since the 1st of March 2002, I am the head of the GTZ project "Legal Advice" in Belgrade. From that it was surprising, just arrived, to achieve a contribution for a conference of an organization, whose members have great importance for the further economical development of the country. This is not a politeness formula for the invitation to this conference. In every developed market economy the attorneys that are dealing with commercial law are in a key role. They have to make available the legal instruments to the users of the legal system. These are the actors of the economy of a country or the actors that want to become economically active in this country. They need those instruments to carry out their transactions within the framework of the legal system. Confronted with the fact that all political decision makers in this country expressed their will, to reform the economy-legal frame comprehensively, this key role of the attorneys will be intensified. They are the first that transform these new or reformed regulations into legal life. New contracts must be formed according to the reformed law. In legal disputes they must interpret the new regulations and have to consider them in their process strategy. Regardless of this, I try with this short contribution to take part in the legal discussion that is actually mainly political influenced.

In consideration of the topic of my contribution, I thought spontaneously on two aspects, which are obvious. One of them resulted from current discussions in Germany.

As you perhaps know, the German government decided to end the production of electricity from atomic energy. As far as it concerned permission for new plants, the problem

could be solved to a large extent in an unproblematic way. The Government has the power, when it assessed the risks, resulting from using nuclear power in another way as former governments did, not to issue any further permission for such plants. As far as not already considerable developments costs had arisen for new projects, the decision makers dealt within the framework of their political power. Since the energy producing industry currently did not practise any new intentions for the establishment of nuclear power plants, no problems resulted from that.

Differently the situation set itself up, however, for already established, in operation-contained plants. Very high investments were made, that from the previous revenues, resulting from the working of the plants still not, or not in the planned manner had amortized. At the beginning of the discussion the energy industry argued, the prohibition of the further working represents an expropriation that has to be compensated by the state. This is supported by the fact that no new risks would have resulted by any new scientific findings. Rather the new government evaluates the risks differently, which were already known when the permission was given. The interesting and variously of the jurisprudence weighted condition-legal problem was, whether the new decision makers were bound to the actions of their precedents. For this, it has to be taken into account, that the German Constitution, the "Grundgesetz", guarantees property in a comprehensive manner. Single restriction results only from "social binding of property" stated in Article 14 paragraph 2 of the German Constitution.

Finally the question was controlled, as you surely know from your daily practice, by a compromise. Rest operation times were conceded for existing plants, so that the operators can amortize their investments and on the other hand the government is able to determine a firm chronological frame for the termination of using atomic energy.

Despite this topic acts within the framework of the congress theme, I decided on choosing another topic, that fits more to the current needs of this country. That concerns to the question if new legal arrangements are suitable to take positive influence onto the investment behaviour.

First I would like to prefix that I am not an expert on this field. Nevertheless in eight years of work on legal reforms in transition countries I could gain experiences, which enable me to make some remarks to this topic.

Let me start with two maybe provocative theses.

Firstly: The privilege of foreign investments in the national legal systems offends equality before the law and there is the danger that such arrangements perform counter-productive results.

Secondly: There is less need for arrangements tailored especially to investments as for fostering development and stabilization of an appropriate legal system that gives adequate legal instruments to the business to carry out their activities and give them, when a dispute arises, the opportunity to execute their claim with the aid of state power.

2) Privileges for foreign investments

Here is not to speak about bilateral agreements in this field, to attempt the guarantee that investments are not depreciated by state measures. Normally such agreements imply that investors of another country must not be handled worse, than other investors. It appears problematic, if through privileges of foreign investors their economical activities are subject to specific exceptions. If these investors get tax vacations, which are not conceded to native investors, this is already to concern, if such a regulation is able to attract investment activities. Taxes set up in connection with an economical activity are as other costs, which have to be regarded within the framework of the company-economical calculation of this activity. If these transaction costs are lowered for investors of a specific group, the economical success of the non- favoured groups is curtailed and the market coverage of the favoured group increases. Such privileges can be reasonable only in such fields in which no other groups act. Corresponding regulations led in Moldova to the absurd result, that domestic investors set up a company in Romania that in turn invested in Moldova to be able to receive the privileges.

Also under the aspect of the constitution those privileges are hardly to be legitimized. The principle of equality before the law is stated in Article 13 of the Serbian constitution (Art. 20 of the condition of the federal republic of Yugoslavia), however, only to citizens named. Formally one could argue, that Article 13 (and/or 20) only protects the citizens of Serbia (and/or Yugoslavia) in relation to each other so that privileges of citizens of other nations or legal persons are not subject to this principle. Also the German constitution (Grundgesetz) has the distinction according to civil freedom rights that are conceded only to citizens of Germany and such that are conceded to everyone. Only citizens of Germany enjoy for example the right, to move everywhere in the country (Article 11 Grundgesetz). The principle of equality points, however, no such restriction on. Rather Article 3 of the Basic Law determines that all people are equal before the law.

The principle of equality represents, however, a general category. Only if there is an objective reason, unequal processing is to be legitimized. Such an objective reason for the unequal processing of foreign opposite domestic investors does not exist. To the state it doesn't matter, from which origin investments are (if it is not a question of illegal money, however this is completely another topic). Nevertheless I am so far not familiar with the matter, to state that such regulations are void because they mean a breach of the constitution.

Following the above considerations, the regulations in Article 13 and 14 of the Law on Foreign Insertions are (only as an example to be mentioned) problematic. While Serbian (and/or Yugoslav) investors must achieve customs and other duties in relation to the import of investment goods, foreign investors don't have to pay such costs.

Following the Moldovian example a domestic investor would be advised well if he transfers his capital values into a foreign country, sets up an enterprise and reinvest in Serbia (and/or Yugoslavia). If the costs for such a procedure is under the saved costs he earns a completely senseless advantage.

That does not mean of course that regulations on privileges for investments are senseless. Rather it has not to be distinguished between domestic and foreign investors and concede such privileges generally if one wants to invest in Serbia (and/or Yugoslavia).

This consideration is naturally without regarding further laws and fineness of the Serbian (and/or Yugoslavian) law system, which I will get familiar with on my further activities in this country.

3) Investment support through development of the law system

a) Initial consideration

So we have a look on my second, much more important thesis.

Mentioned already in the introduction, reforms of the law system can have effects on gained investments. But not every amendment on the existing law system, which has a negative effect for investors, can imply that the state has to compensate these effects. Then every increase in taxation would become impossible, every amendments of the due to other views of the newly elected democratic representatives would be impossible. Nevertheless it can be observed, that the stability of a right system can have, of course next to other factors, effects on the economical activities. An investor will invest, as far as not exceptional economical chances justify the incorporation of such a risk, where he has secure information about the valid legal situation and the given legal instruments are suitable for his activities. He will accept evolutions of the legal system rather then, when they follow international trends, because then they are foreseeable for him to a higher degree. Transformation countries as Serbia (and/or Yugoslavia), where it is recognized generally, that the legal system must be reformed, are obliged to guarantee, that this reform will follow international legal standards. Effective instruments are supposed to be created by the reform of the law system first. With that, however, the direction of these reforms is already given. On the other hand reforms cause always costs. The governmental authorities, which are familiar to the implemented, traditional structures, need training for implementing the reformed regulations. Regarding this, a law reform process has to meet with some requirements, resulting from those initial considerations, which the legislator, next to the entire national community of the professionals concerned with the law, must keep to implement the law reform successful.

b) Requirements of an investment supporting law reform

First of all, it is to distinguish between short- and long-term projects. Certainly short-term projects could help to react to current developments. Especially in a democracy the problem exists, that the governments are eager to implement rather for a short period of time oriented projects, which return their results before the next election. This tendency is even stronger, if the parliamentary system is not developed. Indeed most transformation states stated the separation between Legislation, Executive Power and Judiciary. Nevertheless the parliaments often have no developed structures and resources to take real influence

onto the legislation. I can't say, to what extent this applies to Serbia (and/or Yugoslavia). From my experience from other transformation states, in many fields not comparable with this country, I know that the parliaments have only very small influence on their actual task, the legislation. During in Western democracies chambers and committees in the chambers have very considerable influence on legislation, even when drafts are often inserted by the governments, in many transformation states drafts are simply blessed by the parliaments, often a large amount in short sessions. Consequently the existing resources are concentrated on the short-term projects, and there are no further budgets for mid- to long-term projects. Accordingly, in transformation states there is a special responsibility of the professionals concerned with the law. They have to support long-term projects and participate in the different stages of the reform. Next to the identification of the fields to be reformed, their assistance is needed on the legislation and the implementation of reformed laws.

Since the resources are always most extremely limited, available and functioning structures should be used. As far as a restructuring is necessary, these should be based on legal systems with which the local legal system is related traditionally. This results not only from economical and regional considerations, like the European view, but also from the current, inadequate structures often developing from traditional structures, and that the resumption of this tradition could be realized more easily.

To give the economy actors an overview on reform activities, there is an urgent need on information on the reform process. Next to the field this information must also be given on the status of the process and on the contents. So the economy actors are able to take part in the process in an active way and to realize their own demands.

Finally it must be avoided that the actors in different fields of the law reform work independently. Otherwise the reforms in the different fields become incompatible. In a second step the discrepancies have to be eliminated. In this context also the activities of the different international donor organizations must be coordinated with each other. The missing coordination is based not only on the competition of these organizations that often come from different right traditions but also on the above mentioned, lacking coordination of different national actors, that competition among each other and the entitled interest, not to be ruled by international organizations by the contents of the law reform.

c) Current Practice

Of course I can express only my first impressions. Nevertheless, the project exists since a year and I kept up through the files and in the personal conversation with my predecessor, Dr. Faupel, whose experiences become acquainted.

Different to other transition states the political authorities identify the reform needs in the different fields in general. In particular new regulations or amendments are supposed to be provided with the deficiencies of the given legal situation in secured transactions. Nevertheless, sometimes I had the impression that the authorities focused to carry out smaller modifications to react on current problems. Only smaller modifications were made in the Company law, to solve the problem on socially owned companies in relation to the urgent

problem of privatization. But the politically responsible authorities are conscious and that is supported by opinions of international experts that there is the need to revise the whole Company Law in order to fulfil international standards.

The situation is not favoured by the current political developments. Thus to the new agreement between Serbia, Montenegro and the Yugoslavia federal republic some legislation projects contained in process are endangered. It has to be secured to continue the very competent preparatory work in the federal Ministry of Justice on some fields, only as an example the Law on Bankruptcy and the attempts to implement (again) with a Law on notary public the traditional notary. Here it is necessary to use already acquired know-how, in spite of political problems between the federal and the republican level.

With the introduction of a notary system a further point of the above-described requirements is touched. The courts carry out many tasks, which are assigned in the continental-European tradition to the notaries. This assignment of new tasks onto the courts seems to be a trend without relating budget increases. Those assignments could be "privatized" by introduction of a notary system and allow to follow current European tendencies. Here exist overlapping with urgent needs of reform land register, which at least does not work at all (except in one region), and where no actual projects are on the run. Now the Ministry for urbane planning and construction is starting a project in connection with a reform of the cadastre, which is also essential for the economical development.

Other fields seem in need for reform only in smaller scale. So the Law on Contracts and Torts represents a Law which follows with European and international legal standards and must be amended only in small parts onto the current developments in the European Union.

From my first impressions there exist structures to enable law professionals to get information about current intentions in the field of the law reform. On the other hand, however, other economic actors hardly attempt to be included in the discussions. This impression could be wrong because it is based on the presently available information in English or German language, nevertheless also these information should not be neglected even if there are no budgets to make all information available at least bilingually. As far as there are information, they are not updated and there is a tendency to publish very limited time periods for imminent reforms, which often are already overtaken by the current timeout.

Finally it is to come back onto the coordination of the participants. Here, there are structures, which cannot be encountered in other transformation countries. Specific departments in ministries stand in continuous contact with other ministries, which participated in the reform but also with the donor organizations. Based on this structure it could be reached easily, which appears in other countries unconceivable: That the participants know on the activities of other authorities and organizations, in order to prevent contradictions in the regulations, and to discuss necessities for the ongoing process of the law reform.

All over all, I get the impression that Serbia (and/or Yugoslavia) is on a good way to work off the identified reform fields, although a stronger preference on mid- and long term sections to be reformed would be more efficient. In spite of the extremely difficult political situation the region sets itself up for the requirements of a law reform. The beauty of the

country and the existing professional level supports this positive impression that I could win in the first month of my stay. Please believe me if I tell again that it is not a question also in this respect of politeness, but around the impression of a interested observer and participant that could already gather impressions in other areas of the world.