Cristina-Elena Popa Tache

Introduction to International Investment Law

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Cristina - Elena POPA TACHE

Activity

Cristina Elena POPA TACHE is doctor in international law, specialized in international investment law and she also developed an intense legal research activity, as a scientific researcher at the *Institute of Legal Research of the Romanian Academy*. PhD. Cristina Popa Tache is arbitrator and mediator registered in the lists of *VIAC - Vienna International Arbitral Center* and works as a member of the *Scientific College of the Journal of Banking and Financial Law*, being the author of over 80 articles and scientific studies, most of them in the field of foreign investment.

Publications

Cristina - Elena POPA TACHE is author of the monograph *Dreptul internațional al investițiilor. Coordonate (International investment law. Coordinates)*, Coresi Publishing House 2019, and author of numerous articles in the field of international investment law, among which we list: *Principles of international law of investments, recognition and trajectory,* „Juridical Tribune – Tribuna Juridica", volume 7, special issue, October 2017; *The strategic importance of international investments in the field of mining and international law,* „Juridical Tribune – Tribuna Juridica", volume 7, issue 1, 2017; *The obsolescence of the Court, the evolutions of its application in the new Civil Procedure Code and the shortcomings of the Law, pendig the reform,* „Civil Procedure Review", Volume 8, no. 3/2017; *Repere istorice în dreptul internaţional al investiţiilor. Direcţii de cercetare* (*Historical landmarks in international investment law. Research directions*), „Pandectele Romane" no. 12/2016.

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ADJURIS
International Academic Publisher

Bucharest 2020

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ISBN 978-606-94978-2-1 (E-Book)

Editing format .pdf Acrobat Reader
Bucharest 2020

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Argument

We are in the presence of a recent scientific paper, an analysis prepared with professionalism, which deals with a topic of great relevance in the inter-human and inter-state relations that contemporaneity has brought to today's society. The paper aims to know the international law of investment as a require to understand the connection between international investment and the science of law, and can be used as a subject (course) of university study.

Mrs. Cristina Popa Tache, PhD., presented several proposals aimed at contributing to the regulation of the legal regime of foreign investment and concluded that it can be seen that the legal regime of foreign investment can evolve only through cooperation in this area of all specialists to strengthen legislative, economic and social cohesion, by creating a comprehensive legislative framework, as well as by promoting appropriate government policies.

I would like to accentuate once again the special value of this research work in the international context of a topic full of interest in current international relations. Recommending the reading of a wide circle of people interested in the field of international foreign investment law, I am convinced that those who know this monograph will considerably enrich their information in view of understanding a very current and useful phenomenon for this field of information and legal culture.

PhD. **Ianfred Silberstein**

The approach of this sphere is, without a doubt, of special scientific interest, contributing to the clarification of several aspects regarding the content and delimitations of the international investment law, the emphasis being on the legislation and doctrine of international law, but also on the jurisprudence of international courts.

The originality and scientific innovation of the paper lies in the way of approaching the research of the legal regime of foreign investments, both in terms of interdisciplinarity, interference and interconnections between areas of law, and by identifying a coagulating factor - unifying - international justice and mechanisms put into operation, analysis that was possible due to a double quality of the author of this paper: associate scientific researcher at the Institute of Legal Research "Acad. Andrei Rădulescu" of the Romanian Academy and international arbitrator practitioner - doctor in international law, registered in the lists of arbitrators within the Vienna International Arbitral Center (VIAC).

Thus, the monograph entitled *International Investment Law*, it stands out, in particular, by the special importance from a theoretical and practical point of view of the field that formed the object of the research. The paper develops one

of the newest, perhaps even the newest field of law, the international law of foreign investments, and has the mission to place in the forefront of Romanian legal research a new topic, faced with some ambiguities or legislative inconsistencies, marked by concerns of doctrine and practice so far. The monograph includes the specificity and the adequate mechanisms of application of the principles of the international law of the foreign investments and is based on an ample bibliographical source.

The arguments presented emphasize the novelty, topicality and importance of the chosen topic, and as its placement in the context of scientific research in international law, it can be said that it is for the first time in Romania when the legal regime of foreign investment is treated by strict reference to public international law and at the same time individualized in a new field of law.

The topic provides, for legal theorists and practitioners, a systematic approach to the role of the legal regime of foreign investment in international law, emphasizing the trends of contemporary judicial practice and containing valuable proposals for improving legislation in the field, which can be successfully supported in future regulations.

This paper is characterized, as a form and as a background, by the balanced treatment of all the component chapters of this subject, without exceeding the limits of the public international law, which derive from this concept of international investments. The paper is identified by the seriousness and professionalism of approaching the topic, based on a prior research of the most common problems in judicial practice, especially foreign, as well as problems reported at conferences and reports of international organizations and bodies.

The results obtained by PhD. Cristina Popa Tache open the way to new research directions, such as: applicable law, admission, establishment and treatment of foreign investments; the specificity of resolving disputes in the field of international investments; the responsibility of the state regarding international investments and the duties of investors; defining and redefining terms such as defining international investment, through a dedicated language; developing the institutional framework and capacities in the field of international investments; elaboration of an International Investment Code; thematic research at the initiative of researchers; supporting the participation of Romanian research in international programs in the field of the legal regime of foreign investments. The Institute of Legal Research of the Romanian Academy allows and encourages the promotion, at international level, of the Romanian scientific identity, the creation of leadership in the legal field. The recognized competence of the Institute allows the orientation towards internationally competitive frontier research, towards topics with theoretical potential, but also applied at national level (concrete requirements and realistic offers), the extension of inter- and multidisciplinary research, simultaneously maintaining a "constraint-free" area specifically academic, conducive to pure fundamental research, a permanent source of scientific accumulation.

Last but not least, this approach urges the creation of a learning mechanism, for the study in the university framework of the discipline of International Investment Law and the deepening of specific notions and problems within master's programs.

All these directions are complex challenges both theoretically and practically, but the importance and topicality of the field, as well as the general interest are sufficient motivations to address them and are due to an overview of the author on the issue addressed, the rigor of investigations, the quality of the argumentation, the safety of the approach, the force of the theoretical, practical and methodological impact of the obtained results.

In conclusion, this monograph reflects the scientific maturity of the author, her ability to perform, with appropriate means, a demanding approach in a modern field, with strong application valences, this result being possible due to the overall scientific content of this paper and original contributions examined.

Professor **Dumitra Popescu**

Introduction

The mission of this monograph is to announce and present the international law of investments in the stage in which it is at the moment, the final goal not being to direct the analysis towards certain ideologies, but towards knowledge. Why is a connection between international investment and law necessary? Only law may, within a specific or specially created institutional framework, define and regulate investment rights, obligations and legal relations, resolve foreign investment disputes, direct, control and encourage international capital flows, improve or to decrease the predictability of an investment transaction or to be able to increase or decrease the costs associated with an international investment.

The effectiveness of the law in influencing human behavior requires more than written legal regulations. It requires institutions. Institutions, according to the 1993 Nobel Laureate in Economics, Douglass C. North, "*are the constraints developed by people that structure political, economic, and social interaction.*"[1]

The legal regime of foreign investments is in a constant flow of evolution, but it does not follow a predetermined trajectory[2]. The international law of foreign investments consists of the norms of the general international law, of the general standards of the international economic law, as well as of distinct norms specific to its field[3]. In the famous scientific journal *Revue Générale de Droit International Public*, a 1988 issue states: "*International trade is a pure fact, but a fact that has given rise to international law in its entirety*."[4] This statement recognized from those times the importance of international economic relations equally constituted by relations, involving states and trading companies, trade and financial exchanges. In all international relations, the economic dimension has naturally joined the "traditional" international relations (the political[5] and military dimension), which is a feature of the international system in which states, international organizations and public and private bodies operate.

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[1] Arguments conferred in J.W. Salacuse, *The Three Laws of Investment Treaties*, The Oxford International Law Library, 2013, p. 25.

[2] On developments in the legal regime for international investment, see E. Alvarez, K.P. Sauvant, K.G. Ahmed, G.P. Vizcaino (eds), *The Evolving International Investment Regime: Expectations, Realities, Options*, Oxford University Press, 2011.

[3] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press (OUP), Second edition, 2012, Cap. I, p. 2.

[4] D. Carreau, P. Juillard, *Droit International économique*, 3e éd., Éd. Dalloz, Paris, 2007, p. 1.

[5] M. Koskenniemi, *What is International Law For?*, în M. Evans, *International Law*, OUP, Oxford, 2nd ed., 2006, p. 77.

Analyzing the issue of international economic law, it was stated in Romanian doctrine that it is necessary to formulate the link between the global economic dimension and the legal dimension[1]. In this sense, it was stated that the notion of international economic order starts from the international economic relations, to which is added the political dimension of ordering, in the sense of applying a policy in relation to the economic relations within a certain market. Because there is really a dynamic and heterogeneous nature of the rules applicable to international economic relations, the use of the term "ordering" has been determined, because these rules have the quality of adapting to various developments and situations "*either by interpretation or by changing the scope or identifying new exceptions*" [2].

In some respects, the normative dimension of the international economic order goes beyond the law of international trade[3], as not only inter-company contractual relations are considered. The same phenomenon is observed in private international law, in the way in which both private individuals and states interact with the norms of law. In this regard, it is worth mentioning the statement of the judge of the International Court of Justice (ICJ) Phillip Jessup, according to which "*international law is increasingly becoming a transnational law, which would mean an integrated body of rules of international law and domestic law, which regulates the conduct of states and individuals, competition and the functioning of markets, the movement of public and private goods*".

We have to admit that economic integration is the driving force of a considerable part of today's international public law, as on the traditional concepts of this law legal constructions have been made which are instruments of economic integration and regulation of market relations, integration both at regional level (EU) as well as worldwide (WTO). At the same time, "*international law retains its regulatory function, in the sense that from the moment of elaboration of norms or their customary consecration, there is a" limitation "of the margin of economic action of state and non-state actors*".[4]

Compared to this evolution of international relations and existing branches of law at a given time, concepts have emerged being promoted especially by developing countries, namely concepts on the emergence and need to promote a new type of international law as opposed to classical and which should in principle also take into account the normative complex of interests of this large category of states and which could be called an "international development law".[5]

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[1] A. Năstase, *Dreptul Internațional Economic II. Soluționarea diferendelor în cadrul organizațiilor economice internaționale*, Ed. Monitorul Oficial, Bucharest, 1996, p. 22.

[2] J. Touscoz, *Droit International*, PUF, Paris, 1993, p. 239.

[3] S. Schill, *The Multilateralization of International Investment Law*,Cambridge University Press (CUP), 2009.

[4] For details, see A. Năstase, I. Gâlea, *Dreptul internațional economic*, Ed. C.H. Beck Bucharest, 2014, p. 6.

[5] For details, see Gr. Geamănu, *Drept internațional public*, vol. II, Didactic and Pedagogical

Also in this context, it was stated during the mentioned period that a new international economic order deserves a new international law with an edifying role in the construction of this order. In this sense, we started from the well-known documents adopted by the UN General Assembly in 1962 by Resolution no. 1803 (XVII) on permanent sovereignty over natural resources, and in 1974 by Resolution no. 3281 (XXIX) on the Charter of Economic Rights and Obligations of States[1]. However, international investment and the rules governing public international law may differ causally from the purposes of those branches of international law involved, as well as from the distinctive features of investment relations. While the rules governing public international law in this area are fairly neutral in terms of the interaction between most branches of international law, investment tribunals generally seek to promote the fundamental objective of investment law, in particular increasing foreign investment flows. Despite the fact that public international law generally gives preference to fundamental human rights and those related to international peace and security (investment tribunals have very rarely faced such superior rules of international law), international investment law is a sub-branch of public international law, especially due to the pedestal of this new branch of law, a pedestal that has the privilege of being composed of specific international treaties (or that include specific provisions) that govern the relations of international investment law.

Initially, the doctrine[2] launched a debate on the emergence of an autonomous discipline under the name of international economic law in one variant, and in another variant it was stated that a general international law applicable to economic relations is born, currently facing a discipline autonomous: international law on foreign investment, due to the rapid evolution of this new branch of law. The successive editions of some authors who published monographs under the name of international economic law in the late 1970s played an important role in this matter[3]. Tangentially, as far as we are concerned, a comprehensive formula that defines international economic law was that formulated by Andreas F. Lowenfeld, according to which, international economic law encompasses the norms of international law governing international legal order and economic relations between states, but stating that the term may include a wide range of rules ranging from public international law to commercial law, foreign investment, taxation, etc. [4].

With regard to the different fundamental characteristics of international

Publishing House, Bucharest, 1983, pp. 346-374.

[1] A. Nastase, B. Aurescu, I. Gâlea, *Drept Internațional Contemporan. Texte esențiale*, Ed. Universul Juridic, Bucharest, 2007, pp. 775-788.

[2] See also *The First Report of the ILA Committee on the International Law of Foreign Investment*, Toronto, 2006, in *Ila Report of the Seventy-Seccond Conference, Toronto 2006*, London, ILA, 2006, p. 410et seq.

[3] For example D. Carreau, P. Juillard, T. Flory, *Droit International Economique*, 2e ed., LGDJ, Paris, 1980, as well as subsequent editions.

[4] A. Lowenfeld, *International Economic Law*, ed. 1, Oxford University Press, 2002, p. 3.

investment relations, it should be noted that while the fundamental assumption of public international law is sovereign equality, legal relations between host states and foreign investors remain asymmetric, as host states are in a position to can influence both domestic law and relevant rules of international law (generally through their participation in the negotiation and signing of international treaties such as BITs - the Bilateral Investment Treaties or TIPs - Treaties with Investment Provisions), treaties establishing rights and obligations for foreign investors, third parties to them.

The conceptual analyzes performed in connection with the international economic law have ended with the conclusion that, although it includes a very wide scope of regulation, it is based on public international law, being a subbranch of this law. Which appears logical, given the content of international economic law which shows its nature of international law. Even the fact that the norms of domestic law are often referred to in international economic law means that the modalities of application of international norms in concrete (well-defined) economic relations are taken into account, showing precisely this nature of international law. In this context, the norms regarding the obligations of the states to comply with the provisions of the General Agreement on Tariffs and Trade (GATT), of the General Agreement on Trade in Services (GATS), of the norms regarding the mutual promotion and protection of investments guaranteed by relevant internal norms can be cited.

In the context of the development of international economic law, a series of norms and principles inspired by international law in the investment field were promoted, reaching the creation of bodies and institutions for guaranteeing and resolving disputes in this field. This evolution has determined some doctrinal positions, affirming the appearance of an international law of foreign investments, treated individually in specialized works[1].

At present, the debates regarding this new field of law no longer concern its existence or non-existence, these being oriented, for example, towards the direction of reforming the law on foreign investment protection or towards the relationship between investments, environmental concerns or sustainable development of local communities, these being possibilities for reform that have emerged from the current tensions noted around international law.

In conclusion, we are in the presence of international investment law, a new branch of law that has gone beyond the stage of remark by justifying its existence and, developing upwards, has reached the stage of remodeling.

[1] M. Sornalajah, *The International Law on Foreign Investment*, Cambrige University Press, 2e ed., 2004.

Historical considerations

The presentation of historical landmarks supports the effort of contemporary doctrine to understand the path followed by international investments since its emergence and until now, from the stage of legal phenomenon (consisting of all ideas, concepts and opinions on the emergence of this right, including references to the need to impose certain behaviors on members of the international investment community through specific legal rules) at the objective law stage of international investment as it is presented today.

Research directions mainly include: the role of customary international law on the protection of aliens; diplomatic protection; the forerunners of modern investment treaties; the colonial origins of investment protection; the connection with the development of the general regulation of the settlement of international disputes; international state contracts; the early emergence of the bilateral investment treaties (BIT); decolonization and the attempt to create a new international economic order; the emergence of ways/mechanisms for resolving disputes between investors and the state and the emergence of a distinct regime of international investment and its hybrid character.

Being in front of a field of law marked by novelty, any discussion on its history should start from the study of development and specific successive changes, by researching the events and facts that fall into this development. Although international law on foreign investment consists of the rules of general international law, the general standards of international economic law, as well as distinct rules specific to its field, as we presented in the introduction, the historical elements of the component fields stated above will not be developed, but will be presented tangentially, aspects regarding the origins and implicitly, the appearance of this field of law. These are the reasons why, in this paper, the historical exposure has been distributed for research according to the stage of development of the states (starting from the early phase of the nation-states), according to the evolution over time of their quality as debtor. or creditor in the international economic framework, or by reference to a certain historical period, following the complex course of investments, by presenting the experiences of investors, and, last but not least, by examining political and economic conditions, especially the range of public policies that have affected over time foreign investment. As such, we aim to understand the introductory notions, namely: the object of the history of international foreign investment law, the methodology, the research concept, the sources on which it is based and the way in which all this is divided on different periods of evolution.

Therefore, this historical identification can be achieved by observing, on the level of historical events marked by passing through the angles stated above,

the following topics: the emergence and evolution of participants/subjects of international law of foreign investment; the origins and evolution of the sources of the international law of foreign investments, their heterogeneity; the emergence and historical evolution of the definition, forms and classification of foreign investment; the historical evolution of the types of treatment granted, of the general applicable principles, of the state responsibility, of the admission and guarantee of international investments - this being the nucleus around which the secondary elements are grouped and which lead the thread of history until our times and, last but not least, the deserved historical importance given to the origins and the foundation of the settlement of disputes in the field of international investments.

Therefore, a progressive role belonged to historical personalities and, implicitly, to historical events (battles, wars, revolutions, etc.). In the development of this field, in addition to the internal factors that acted within each society, there were also external factors such as invasions, conquests of territories, wars, subjugation of some peoples by others, but also cooperation, contacts and support. accord nations among themselves. Over time, peoples (nations) have reached different stages of economic evolution and, even within the same people, regions have manifested different stages of development. Therefore, among the configuration factors of the international investment law are predominantly, in their continuous evolution: the natural environment, the socio-economic framework, the historical, national and political framework, the ideological and cultural framework, the international factor and, not least row, the human factor.

The presentation of historical landmarks supports the effort of contemporary doctrine to understand the path followed by international investments since its emergence and until now, from the stage of legal phenomenon (consisting of all ideas, concepts and opinions on the emergence of this right, including references to the need to impose certain behavior of members of the international investment community through specific legal norms) at the objective law level of international investment as it is presented today, as a set of all legal norms included in the normative system no longer in force. As an objective law, international investment law is the foundation of the subjective right exercised by the participating parties, which must always take into account the fact that a subjective right belonging to a subject of law also corresponds to an obligation. Or, precisely this interdependence is based on certain historical landmarks that marked the emergence of this right.

Since the international factor is essential among the configuration factors of international investment law, we consider, first of all, the historical and legal aspects regarding the formation of communities made up of several peoples - the emergence of a *jus gentium*[1] (*jus inter gentes*) initially represented by customary

[1] Charles Louis de Secondat Montesquieu, in *De l'esprit des lois*, I, publicat în 1748, republished in English in 1750, and in Romania in 1964, Scientific Publishing House, Bucharest, p. 15.

rules and became international law[1].

The first stages in the path of the legal regime of international investment to the stage of legal phenomenon were generated by the phenomenon of migration[2] (identified since antiquity) and even tribal migration (ancient tribes negotiated trade issues, hunting, etc.), in which a certain part of a population, often merchants, migrated in search of better conditions. When the situation that generated the migration dissipated, the migrants returned to their countries (original territories). This phenomenon can also be observed in the case of the dismemberment of the colonial system, where the former colonists also returned to their original places, bringing with them considerable resources. Indeed, it is a well-known fact that, initially, foreign investments were made by individuals or groups of freely associated persons, in order to obtain profits, often as quickly as possible[3], by conducting trade in foreign countries (foreign territories). They had to cross borders to sell their products, and the behavior of the host state (territory) significantly affected their activity.

Since ancient times, the heads of state or territory have promised each other or "given their word of honor" that they will give a certain treatment to foreign merchants who engaged in trade in their territory. Treaties could be concluded in Antiquity in oral form (sometimes using human beings or even gods) or concluded in written form. In general, the peace (friendship or alliance) or exchange agreements included provisions on the manner (conditions) in which traders could carry out economic activities in the territories covered by that agreement. For example, in 562, the Byzantine Empire and Persia reached an agreement that established a 50-year peace. Among the aspects subject to the agreement, the Byzantine and Persian merchants had to make trade activities only in the predetermined places, where the customs points were located. An early example is given by Egypt, through the development of trade relations with the whole East; the regulation of the regime of some merchants was, in most cases, ancillary to the treaties of friendship and alliance, as is the Treaty of friendship and alliance between Ramses III, as Pharaoh of Egypt, and Hatusil III, The King of the Hittites, concluded in 1296 BC, a treaty containing a number of 350 tablets of which about 40 contained letters of vassality, letters dealing with political issues, trade agreements, diplomatic arrangements, marriages or exchanges of gifts.

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[1] Jeremy Bentham în *An Introduction to the Principles of Moral and Legislation*, published in 1789 in Oxford Clarendon Press, used the expression *International Law*, p. 25; the notoriety of this finding is also confirmed by the International Law Commission; to access http://legal.un.org/ilc/ilcintro.shtml, accessed on 13.03.2019.

[2] With reference to the phenomenon of migration, see D. Popescu, *Cataclismele economice care zguduie lumea*, Ed. Continent, 2010. See also D. Popescu, *Consideraţii privind migraţia populaţiei şi capacitatea reală de ocupare a economiei româneşti*, in *Studii de istorie economică şi istoria gândirii economice*, Romanian Academy Publishing House, vol. XVII, Bucharest, 2015, pp. 9-14.

[3] For a similar observation, see M. Sornalajah, *op. cit.*, p. 60, 3rd ed., 2010.

Another example is the treaties between city-states, as is the treaty[1] between Eanatum of Lagas and Enakale of Umma, from the period of Dynasty III (about 2400 B.C.), which regulated the extent of borders and even allowed the construction of a monument, the restoration of another and the exploitation by the conductor of Umma of a predetermined quantity of barley from the foreign harvest under the title of interest loan[2]. The Chinese emperors also attached great importance to the organization of relations with neighboring peoples, using the messages in these relations, starting with the regime of caravans that frequently traveled on the well-known "silk road". In 6th century BC China, a treaty on renouncing war and settling disputes by arbitration was concluded. In another part of the world, also in the 6th century BC, the Greeks concluded the Treaty of Alliance between Greeks and Heretics, a document that contained aspects of trade, non-aggression, mutual aid and peace. The Greek cities used arbitration and even set up arbitral tribunals to settle disputes (in this type of treaty, the Greeks provided for "mediation" as a means of settlement).

The Classical Greek Antiquity gave mankind the first consuls called *proxeni*, who were citizens of the host state, remunerated by the mandated state to defend its commercial interests in the first place. The Romans also regulated the way in which trade between themselves and other peoples was allowed, and they also opted for arbitration as a form of settlement of most disputes. It was identified, for example, the presence of Roman craftsmen beyond the borders of the empire, thus making a real transfer of technology.

All the great empires of Antiquity (India, China, the Abbasid Caliphate, the Mongol Empire, the Byzantine Empire, the Ottoman Empire, the Persian Empire) developed strong international trade relations, developments that were largely influenced by military and political power and situation.

Over time, in the European continent, the feudalism has influenced, since its emergence in the early Middle Ages, the way and conditions in which individuals could do business in foreign states/ territories, feudalism being a system of organization of a society based, among others, on the relations of interdependence, of mutual obligations between persons, brothers and guilds[3], lands, cities,

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[1] *Early ancient Near Eastern Law: A History of Its Beginnings, the Early Dynastic and Sargonic Periods*, Claus Wilcke, München, 2003, p. 73.

[2] Although the text of this treaty is incomplete due to its impressive antiquity, it can be seen that if the loan was not repaid, the other side could move the borders and divert the canals, of course through a war. This treaty is considered to regulate one of the first cases of international arbitration, the arbitrator being King Mesalim.

[3] The presence of foreign craftsmen in the guilds was attested, for example, in Romania, in the Suceava region and not only, where the number of craftsmen began to grow and diversify due to the establishment of foreign craftsmen in the area. The role of small craft workshops was of particular importance for the entire period of Habsburg rule. Foreign craftsmen enjoyed equal treatment with Romanian craftsmen, settling even in ethnic groups; a historical example is revealed on September 3, 1804, when the festive moment of reunion of the guilds from Suceava took place (regardless of ethnicity, because there were also fraternities formed within ethnic communities,

villages and states, formalized by promises, oaths and vassal relations. The Guilds were one of the first forms established by joint ventures in Europe, a conclusion that results from the fact that, *exempli gratia*, on Romania's territory, the activity of craft guilds in medieval society was conditioned by the existence of a statute which, in The Country of Moldova was confirmed by both secular and ecclesiastical power, and foreign craftsmen who wished to join these guilds had to abide by the rules established by the statute, pay the established taxes and respect Christian dogmas. Later, the Phanariots, related to the Romanian historical events (in some situations even acquiring the dignity of rulers of the Romanian Lands, Moldova and/or Muntenia), expanded their business first in the Kingdom of Hungary, and later in all Central European countries. All these "businesses" have intensified their contacts with Western nations.

In the Romanian Country of the 1400s[1], during the reign of *Mircea Cel Bătrân*, it should be mentioned that it was forbidden by his dispositions to take compensations from the compatriots of the indebted merchants, as was the "custom" in the Middle Ages, and there were exchanges (in reality, these were genuine reciprocity agreements) which were distinguished by the existence of detailed trade privileges[2], establishing their customs and amount for different categories

such as "Armenian brastava" or that of the "jâdovilor"). In a first stage of the modern era (1775-1850), the number of "earthly" craftsmen and merchants, ie nationals, was almost equal to that of foreigners. At the beginning of the twentieth century, with the transition to factory production, new professions began to appear and, within the new economic structures, the reorganization of production and labor, the guilds disappeared. The Romanian historian Nicolae Iorga wrote, in 1911, lamenting the disappearance of these forms of professional association, that "national work" thus lost "one of those old forms of manifestation, which guaranteed discipline, morality, piety and love of nation."

[1] In Romania, the economy was influenced by the importance of trade routes used especially by foreign merchants who invested considerable capital, such as the example of Italian merchants who rented customs. The importance of the main trade routes in Europe has been studied and their influence on our social and economic development has been shown in the studies of N. Iorga, I. Nistor and the Polish historian O. Górka. The connection with the Italian colonies was for a time through Poland, the center of oriental trade being, at first, Lviv, then through the Tatar lands of southern Russia and in the Crimea, at Caffa, the main Genoese colony, on the so-called "Tatar road". After the consolidation of the Moldovan state, it presented several guarantees of safety of goods and merchants, so the Moldovan road replaced the Tatar one, and its ends went to Chilia and the White Fortress, instead of the Crimean Caffe. The Italians were the greatest capitalists of Europe at the end of the Middle Ages (it is known that in this age of Frühkapitalismus there was only commercial capitalism, not yet industrial capitalism). The large number of Italian investors and the importance of the capitals invested by them on the Moldovan road (in addition to trade, they rented customs from the lord of Moldova and the salt mines in Galicia from the king of Poland) show the European role of this trade route.

[2] Among the commercial privileges regarding Transylvania can be enumerated: the privilege of King Sigismund of Luxembourg for the monasteries Vodița and Tismana (1419), by which they were exempted from customs at the exit from Transylvania, the privilege of King Sigismund for Brasov (1395) which renewed that of King Ludovic cel Mare (1358), the Privilege of the Voivode Știbor of Transylvania for the people of Brașov (1412), confirmed by the Privilege of Mircea for the people of Brașov (1413), written in two copies, Slavonic (August 6) and Latin (August 25), which also contained other provisions more.

of products, but also the rights and obligations of traders, as well as some exemptions from payment.

Over time, it has been observed that foreign investors have sought as much protection as possible from the sovereigns of the territories where they invested, especially seeking protection from any negative or adverse action that would have affected their investment. Prior to the formation of states, investors and traders associated and negotiated their rights directly with sovereigns, as was the case of the Chrysobulus (991 Imperial Act) between the Byzantine Emperor Basil II and Constantine VIII, which conferred on merchants from Venice rights to trade in ports and other places in the Byzantine Empire, without paying customs duties, as well as the right to organize in cartels in Constantinople[1]; in 992, between the Byzantine Empire and Venice, the privilege of immunity was established under the tenure of Pietro Orseolo I, so that the Venetians could sail freely and trade in all places in the Empire, also the chrysobolus of 1082 (Byzantine Empire under the reign of Alexios I Comnenus) has similar provisions (acquisition of real estate in the Golden Horn area of Constantinople and cancellation of transit fees).

The Byzantine Empire, especially between 1081-1185, sought support for the nomads who affected the Empire, while Venice offered military protection and maritime support in exchange for trade privileges[2]. Such developments have also been identified in northwestern Europe, where King Henry II guaranteed the protection of German merchants and their settlement in London. At that time, the use of the term "grant" or "concessions" was noted, and the terms "agreements" or "conventions" were not used, as they began in medieval Europe, when nation-states appeared that negotiated the rights of domestic investors in foreign territories[3].

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[1] See *Concessions granted to the Merchants of Venice bu the Byzantine Emperors Basilius and Constantinus, Excetuted in March 991* în P. Fischer, *A Collection of International Concessions and Related Instruments*, 1976, vol. 1, pp. 15-18.

[2] Among the commercial privileges regarding Transylvania can be enumerated: The privilege of King Sigismund of Luxembourg for the monasteries Vodita and Tismana (1419), by which they were exempted from customs at the exit from Transylvania, The privilege of King Sigismund for Brasov (1395) which renewed that of King Louis cel Mare (1358), the Privilege of the voivode Ştibor of Transylvania for Brasov (1412), confirmed by Mircea's Privilege for Brasov (1413), written in two copies, Slavonic (August 6) and Latin (August 25), which also contained other provisions more.

[3] P. Fischer, *Some Recent Trends and Developments in the Law of Foreign Investment*,în K-H Boeckstiegel et al. (eds), *Valkerrecht, Recht der internaţionalen Organisationen*, Weltwirtschafatsrecht: Festchrift fur Ignasz Seidl-Hahenveldern (1988), p. 97. These historical accounts are frequently exemplified in doctrine. See recently J.W. Salacuse, *The Three Law of Investment Treaties*, The Oxford International Law Library, 2013, p. 80.

In the eighteenth and nineteenth centuries, foreign investment in its existing form was made into consideration through the massive colonial[1] or imperialist expansion[2]. Thus, the need for international rules on investment was minimal, and the responsibility, a non-articulated institution, due to the unilateralism imposed by the imperial and colonizing entity[3]. In Europe, from the point of view of foreign investment, the dissection of the feudal period[4] can make significant contributions to our goal, which will be developed in further work. The seventeenth century and colonial expansion also provided important examples for the history of foreign investment, which were treated in detail by authors such as: M. Sornarajah, K. Milles, S. W. Schill, C.J. Tams, R. Hoffman. Several elements of recent history appear punctuated in this paper, corresponding to each chapter presented.

Particularly useful for historical analysis are certain considerations on the origins and evolution of the sources[5] of international investment law in the context of their heterogeneity, which in itself represents an important direction of research.

[1] For example, globally, the history of multinational corporations is closely linked to the history of colonialism, with the first multinational corporations established (founded) on the occasion of colonial expeditions ordered by European monarchs, among the first such societies to be listed: Hudson's Bay Company, British East India Company (VI-IX centuries), Royal African Company, Swedish Africa Company, many of them having in reality a role of control and expansion of colonialism, being dissolved with the disappearance of the historical colonial phenomenon, some experts believe that the colonial regime it is the cause of the current differences in economic development. In Romania, the first company with foreign capital was founded by the Englishman Jackson Brown in 1864 - Valachian Petroleum Co. Ltd, and the market was dominated by oil investments, in industry, banks and in the exploitation of natural resources, and according to the mining law of 1895, which allowed a free regime of exploitation, international trusts made their presence felt.

[2] The term "imperialism" must be observed strictly from a historical perspective, which is somewhat avoided in doctrine due to its pejorative use by communists, being affected by a distorted semantic enrichment, culminating in the appearance of the term "current imperialism" when referring to imperialism. religious, economic imperialism or media imperialism. Precisely for these reasons, the word "imperialism" used in this paper strictly reflects the historical period of existence of empires and the foreign policies of the states (territories) affected by domination.

[3] See S. Krasner, *Structural Conflict Third World Against Global Liberalism,* 1985.

[4] By feudalism we also mean the relations of interdependence and mutual obligations between people, guilds, lands, cities, villages and states.

[5] P. Juillard, *L'évolution des sources du droit des investissements*, Recueil des Cours, vol. 250, 1994, pp. 350-389.

Chapter I
Participants in investment relations

Introductory manuals on public international law invariably include a section on topics of international law, which appear as part of the basis of this branch of law[1]. Within international relations, the presence of states is currently doubled by the increasingly intense activity of international organizations of an intergovernmental nature, as well as by non-governmental bodies, which has led to a substantial change in the nature of these relations.

As a general definition found in the normative and in the specialized works, the subjects of international law are the entities that participate in the creation of the norms of international law, have the quality of direct recipients of these norms, as well as the capacity to assume and exercise rights and to acquire obligations within the international legal order, these being: states, considered main, traditional, typical subjects of international law, which until the 4-5 decades of the twentieth century were, in reality, the only subjects of international law; international intergovernmental organizations, which are derivative subjects of international law because they are created by the agreement of the will of the states, acquiring, through the act of "creation" their own legal personality, distinct from that of the states that created them; movements/peoples fighting for national liberation, with a limited and transitory capacity; the Vatican (Papal State), with a limited capacity; other entities participating in international legal relations, but whose legal personality is not traditionally recognized in public international law, namely international non-governmental organizations and individuals.

In terms of international economic relations and especially in international relations on foreign investment, we identify as participants: states, international organizations, especially those of an economic nature, international non-governmental organizations with economic vocation and well-known multinational enterprises (transnational corporations). The predominant conception today admits, along with states, the existence of other subjects, based on the theory of plurality of subjects[2]. International foreign investment law is undoubtedly the part of international law in which non-state actors play the largest role[3]. It would seem unnatural for an international investment treaty to establish obligations and

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[1] See I. Brownlie, *Principles of Public International Law*, 1999, pp. 57-68; A. Cassese, *International Law*, 2005, pp. 71-150; M. Dixon, *Textbook on International Law*, 2007, pp 111-141.
[2] A. Preda-Mătăsaru, *Tratat de Drept Internațional Public*, 2nd ed., Ed. Lumina Lex, Bucharest, 2006, p. 93.
[3] Patrick Dumberry, E. Labelle-Eastaugh, *Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration*, 2011, in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, Jean D'Aspremont, Ed. Routledge-Cavendish, 2011, pp. 360-371.

sanctions for parties who are not party to that treaty and who are not recognized as having at least an incipient status as subjects of international investment law.

Investment laws, contracts and treaties govern not only investments, but also investors: the people and organizations that make investments. As a result of globalization, the number of people and organizations investing abroad has increased and they have therefore become generally sensitive as foreign investors. Thus, the universe of potential foreign investors consists, literally, of millions of individuals, companies and organizations, and this number continues to expand constantly. Each of these millions of individuals, companies and organizations and their significant dollar capital could be affected by international investment laws. There are many types of international investors[1].

1. States

The investing states, but also the host states have an essential role in the creation and functioning of the international economic relations and form a large and important category of investing governments and investing governmental entities; all governments, to a greater or lesser extent, invest in enterprises intended to provide services or goods to their own population. The sources of international economic law are in large part the creation of states, they, in turn, being the recipients of the norms contained in these sources. According to the principle of self-determination, complemented by the principle of economic sovereignty, each state freely chooses its own national economic system, and as an application of the principle of sovereign equality, each state is known free and equal participation in international economic life[2]. The state entities invest at home or abroad for countless financial or political reasons. Even if the globalization of the economy is increasing, creating a certain uniformity, in terms of its rights in terms of the international economic law (IEL) rules, it is clear that states do not have the same treatment. From the point of view of the principles of international investment policies, all states are "invited" to maintain or establish a specific market economy, to liberalize foreign trade, to open up to foreign direct investment (FDI) and to pursue a consistent domestic economic policy. The economic institutions and bodies in which the states participate, UNCTAD, the International Monetary Fund (IMF), the World Bank (WB) and the World Trade Organization (WTO), encourage states (including through the means of pressure at their disposal) to fulfill the above. At the same time, as stated, the states have the right to be helped, especially since, most often, the origin of their problems is not attributable to them, but is due to external causes.

The increase of international interdependencies - at global, regional and

[1] J. W. Salacuse, *The Three Laws of International Investment*, OUP 2014, p. 7.
[2] A. Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, The American Journal of International Law*, vol. 107, No. 1, January, 2013, pp. 45-94, published by the American Society of International Law, pp. 19-20 of the paper itself.

subregional level - generates, among others, an accelerated development - quantitative and qualitative - of the economic flows within the international community of states. This international expansion also highlights a multiplication of national interests and, on this basis, a proliferation of divergences, especially in the economic field, especially due to the emergence and participation in the dialogue on international issues of an increasing number of states. The report presented by Boutros Boutros-Ghali, UN Secretary-General to the General Assembly in September 1994, entitled Agenda for Peace and Development, states that: "In the new international context (...) we understand that the gaps in economic, social and political are the root causes of conflicts." [1]

In theory, the international law does not treat developed and developing countries in the same way. It has developed rules that ensure that, in international economic relations, developing countries are treated more favorably than developed countries, in order to compensate for future development inequalities. As there have been and continue to be ideological differences between states, the rules developed and adopted, original in content, take into account the idea of real equality and less the idea of formal equality. The relevant doctrine and practice have led to the idea that the identification of developing countries is of great importance, as it triggers the application of derogating rules.

The problem is complex because distinctions must be made at the level of each developing state, using criteria such as national income. The United Nations (UN) has established a list[2] (LDC - Least Developed Countries) of the 47 least developed countries based on three general criteria: GDP per capita, the share of manufacturing in GDP and the level of literacy. The Committee on Development Policy (CDP) held its 20th plenary session on 12-16 March 2018 at United Nations Headquarters in New York. During the plenary session, the CDP conducted a triennial review of the list of least developed countries (LDCs). Special measures are also considered for states in special situations (enclaves, islands, etc.) or in the case of industrialized states such as the group of states in Southeast Asia (Taiwan, Republic of Korea, Singapore) and Latin America (Mexico, Brazil, Argentina).

As is well known, after the completion of the decolonization[3] process and the promotion, especially within the UN, of principles and norms meant to create a new economic order, a new system of international economic relations was developed, after overcoming the divergences between the different categories of

[1] A. Năstase, *Drept internațional economic II*, 1996, RA Monitorul Oficial, p. 11.
[2] For the 2018 version, see: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/Snapshots2018.pdf, last accessed 04.03.2019.
[3] F. Ortino, L. Liberti, A. Sheppard, H. Warner (eds.), *Investment Treaty Law: Current Issues*, vol. II, London, BIICL, 2007, p. 99. For a detailed observation, see also R. Dolzer, *Permanent Sovereignty over Natural Resources and Economic Decolonization*, 7 *Human Rights Law Journal*,p. 217 (1986).

developing states that characterized the 8th decade of the last century[1], so that with the beginning of the 9th decade, all these debates and controversies faded. This evolution was due to the highlighting of the international economy and its globalization[2]. An aspect often observed by analysts in our field of analysis, revealed that most critics of international investment law, and especially those related to nationalization, have gradually faded in the face of the positive effects that growth and developing foreign direct investment where possible. Thus, the developing countries have adopted and promoted various legal instruments, such as multilateral investment codes and bilateral investment protection and promotion treaties (BIT), to attract foreign direct investment, which falls under the trend by virtue of which states must be more proactive and strive for globalization in order to promote a sustainable system of international foreign investment law[3].

At all levels of cooperation in this regard, currently, the decision-makers in this area can be guided by the guiding principles of the United Nations Conference on Trade and Development (UNCTAD), where the International Policy Framework for Sustainable Development (IPFSD) was launched and developed. It consists of a set of basic principles for the development of investment policies, guidelines for national investment policies, as well as guidelines for decision-makers on how to engage in international investment policies. In the form of options for the design and use of international investment agreements, this framework aims to help states align investment policy with their development strategy and promote a "new generation" of BIT that focus on development. durable[4].

1.1. State corporations

G. Tunkin[5] opined in 1974 that contemporary international organizations[6], as interstate entities, are generally characterized by the following: they are created by states through international treaties and operate on the basis of such treaties; states remain sovereign and equal both within and outside an international organization; the mechanism of an international organization becomes operational through states; Member States have the right to withdraw from the or-

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[1] K. Abbott, R. Keohane, A. Moravcsik, A.M. Slaughter, D. Snidal, *The Concept of Legalization*, *International Organization* (2000), vol. 54, issue 3, Cambridge University Press, pp. 401-419.

[2] This was an argument encountered during the negotiations on the Multilateral Investment Agreement (MIA), for example, among non-governmental organizations. See *L'Observatoire de la Mondialisation, "Lumière sur l'AMI: le test de Dracula", L'Esprit Frappeur* (1998), p. 77.

[3] W. Alschner E. Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*,July 18, 2013, p. 11. F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives*, CUP 2013.

[4] See *Investment Policy Framework for Sustainable Development*, online at https://investment policyhub.unctad.org/IPR/Index, last accessed 04.03.2019.

[5] See reprint W. Butler, 2014 of G.I. Tunkin, *Theory of International Law* Harvard University Press, 1974, p. 344.

[6] Referring, of course, to state corporations in view of the Soviet regime.

ganization; the basic resolutions of international organizations are of a recommendatory nature.

It should be noted that the states have entered in the sphere of international trade in the twentieth century, especially in the form of state corporations, as conventional partners with similar bodies in other states and with foreign individuals and legal entities. For example, after the Second World War, the companies in the United States of America not only resumed their functions that had briefly been taken over by the state, but also expanded them[1].

These corporations were the main agents through which the states belonging to the socialist bloc[2] acted in terms of international economic relations. The states with a strong socialist orientation can choose to reserve exclusively to the state important areas of economic activity (exploitation of mining resources, electricity production, air and land transport). Undoubtedly, certain elements related to the nationalist ideology of a government may exclude foreigners from investing in economic sectors considered vital or essential to the sovereignty, economic independence or national security of a state. In addition to states in this category, other states[3] have used the state corporation to coordinate important sectors such as health, education, transportation and communications, generally important public services. It was motivated, as we argued before, that this administrative-economic solution is required in certain sectors of the state economy, being a priority to ensure public services over a profit[4]. State corporations were seen as entities with a certain specificity in the "factory" of international relations[5]. Even today, amid globalization, governments continue to be important investors in certain sectors of industry, both domestically and internationally.

The process of disintegration of the state sector through privatizations[6], staged and incidental, which Western Europe has known, but especially, recently, Central and Eastern Europe, has favored the penetration of foreign investment in those states, so that the privatization process has focused on interested sectors in need of foreign investment. Foreign investors, also largely interested in the important sectors of certain economies, have strengthened their investment relations with the sectors controlled by state corporations/enterprises, especially through

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[1] See *Howard Bowen (1953). Social Responsibilities of the Businessman, New York: Harper*, pp. 183-188; Murray, K. and Montanari J, (1986). *Strategic Management of the Socially Responsible Firm: Integrating Management and Marketing Theories*,Academy of Management, review vol.11, No.4, pp. 815-827.

[2] The name was that of socialist enterprises.

[3] See D.C. North, *Institutions, Institutional Change and Economic Perfomance*, Cambridge University Press (1990), New York – United States.

[4] M. Sornarajah, *The International Law on foreign investment*, third edition Cambridge University Press, 2010, p. 64.

[5] G.I. Tunkin, *op. cit.*, p. 305.

[6] See S. Ogden, R. Watson, (1999). *Corporate performance and stakeholder management: balancing shareholder and customer interest in the U.K. Privatized water industry*, Academy of Management Journal, vol. 42, No.5, pp. 526-538.

joint ventures. Without going into the analysis of these forms of cooperation, we mention that there were reasons for divergences[1]given that the state participating in the company was interested in achieving long-term economic objectives, while the foreign investor was interested in achieving an immediate profit. Such disputes have raised many issues for international investment law, especially as long as attempts have been made to invoke the sovereign immunity of the state.

It is sufficient, at this stage of our research, to emphasize that the foreign investor, in the case of the transnational corporations (TNCs), has a conciliatory role, adopting certain rules in relations with the host state, which assists[2] its entities in relations with TNCs. by adopting appropriate legislation.

2. International intergovernmental organizations

These international organizations (or institutions) are the creation of states and belong to them, playing an expansive role[3] in the development of international legal norms[4]. "The world is getting smaller and more interdependent every day. As a result, national and regional developments are a matter of necessity, seen in a global context. States want to maintain their independence, but they face a growing list of problems that they can only solve in collaboration with others. As a result, decisions and results at the national level and intergovernmental cooperation have become closely interconnected."[5] There are several criteria for classifying these organizations[6], but from the point of view of the topic we are dealing with, the classification that distinguishes between global international organizations and regional international organizations is of interest. The economic

[1] Over time, various opinions have emerged. For example, Steen Jakobsen, chief economist of the Danish bank Saxo Bank, an institution founded in 1992, which stated in 2014 that: *the public sector is swallowing more and more substantial slices of the economy, in any country in the world, or not. it is not healthy at all, since the private sector is the one that generates jobs. Democracy works only as long as less than 51% of GDP is due to the public sector*.

[2] V. Lowe, *Corporations as International Actors and International Law Makers*, 14 Italian Y. B. INT'L L., 2004 pp. 23, 26.

[3] However, the Soviets were more reluctant about the international legal personality of international organizations and their role in developing new rules of international law. See, to that effect, G.I. Tunkin, *Theory of International Law*, Edited and translated by William E. Butler, Harvard University Press, 1974, pp. 327-336.

[4] D.W. McNemar, *The Future Role of International Institutions* in C.E. Black, R.A. Falk, eds, *The Future of the International Legal Order*, vol. 4, 1972, pp. 448-449, 459-462.

[5] J. Wouters, *Intergovernmental Organizations*, Wolters Kluwer International, 2014.

[6]There are several initiatives to list these organizations. See Cristian Jura, *271 organizații internaționale interguvernamentale*, C.H. Beck, Bucharest, 2013. See also https://www.itu.int/online/mm/scripts/gensel11?_memb=OTHERORGS, accessed on 13.03.2019 or https://unstats.un.org/unsd/iiss/List-of-International-Organizations.ashx, accessed on 13.03.2019.

factor in their activity imposes and distinguishes international economic organizations[1]. According to the findings of this analysis, a large number of international economic organizations are grouped around the United Nations, with the Charter giving the Organization, inter alia, the task of developing international economic cooperation. The founders of the new world order after the Second World War designed an institutional ensemble grouped around the UN General Assembly, the Economic and Social Council (ECOSOC) and their subsidiary bodies[2].

The Bretton Woods Conference (July 1944) established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD). Their statutes give them the status of specialized UN institutions, being constituted as elements of the same international economic order[3]. In March 1948, the International Trade Organization (ITO) was established by the Havana Charter, the founding document not being ratified by the United States of America (being blocked by the US Senate, considering *that it could be used to regulate, rather than to liberalizing big business* — Lisa Wilkins, 1997); the gap was filled by the entry into force of the General Agreement on Tariffs and Trade (GATT), which essentially resumed the provisions of the Havana Charter on Trade Policy (Part IV).

As a result of the multiple trade negotiations, known as the Uruguay Round 1986-1993, a new institution was born to replace the GATT: WTO (successor to the ITO), which became operational on 1 January 1985. Unlike the IMF or the World Bank[4] (WB), the WTO is not a specialized institution of the UN, being conceived as an international organization with a universal vocation.

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[1] For details on the legal personality of international organizations, see R. Miga-Beşteliu, *Organizaţii internaţionale interguvernamentale*, Ed. All Beck, Bucharest, 2000, pp. 30-51.

[2] Gr. Geamănu, *Drept Internaţional Public*, vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, pp. 267-272.

[3] For example, the investment arbitration is not the only subject of international law that raises issues regarding the liability of states for non-state actors, in particular the position of non-state actors in the international legal order in general. To be seen K. Parlett, *The Individual in the International Legal System* (2011), în cap. 3-5; Roberts şi Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 *Yale J Int'l L,* 2012, p. 107; M. Karavias, *Corporate Obligations under International Law*,2013.

[4] According to the presentation on the official website, the World Bank is an internationally funded bank that provides financial and technical assistance to poor countries. The World Bank Group is an institution made up of five other international institutions, namely: the International Bank for Reconstruction and Development - IBRD (International Bank for Reconstruction and Development), the International Finance Corporation - IFC (International Finance Corporation), the International Development Association - IDA (International Development Association), Multilateral Investment Guarantee Agency (MIGA), International Center for Settlement of Investment Disputes (ICSID). Each institution has a distinct role, especially in the fight against poverty and the improvement of living conditions for the population of developing countries. The generic term World Bank refers mainly to IBRD and IDA, and the main financing projects are carried out through IBRD. The United States is the main shareholder and financier of the World Bank.

The idea of "economic regionalization" that gained ground led to the grouping of many capitalist, developing, developed and, until yesterday, socialist states. This economic regionalism is presented in two main ways: cooperation and integration. In the case of cooperative regionalism[1], the objectives are limited. The aim is to promote trade and investment between Member States by creating economic solidarity, which have been successful because states were not required to limit their sovereignty, unlike integration regionalism in its finalized forms, which limit sovereignty. Member States, establishing in their mutual relations elements of genuine economic federalization[2].

The "*integralization*", based, of course, on the principle that no state can isolate itself (and cannot remain isolated) from the international environment, has known three main forms.

The free trade area is an economic-geographical area within the limits of which two or more states eliminate in their mutual relations the tariff and non-tariff restrictions from their trade. It is an elementary form of economic integration: the European Free Trade Association (EFTA) and the North American Free Trade Agreement[3] (NAFTA) illustrate this stage of regional integration.

The customs union is an economic-geographical area within which two or more states, on the one hand, eliminate in their mutual relations tariff and non-tariff restrictions on their trade, and on the other hand establish a common tariff and non-tariff protection in their relations with third countries. This category includes BENELUX, created by various conventions between Belgium, the Netherlands and Luxembourg.

The common market is an economic-geographical area within which two or more states eliminate, primarily in their mutual relations, tariff or non-tariff restrictions on trade; secondly, it establishes common tariff or non-tariff protection of their trade relations with third countries; third, it removes all restrictions on the free movement of other economic factors, tending to create a homogeneous economic environment. The developed countries, as well as developing countries, have adopted this form of economic integration such as, outside the European Communities - the European Union, the Andean Pact and the Southern Common Market (or Mercado Comun del Sur: MERCOSUR). From the doctrine it was concluded that the "logic" of economic integration is economic federalism, in which the creation of the common market requires a true harmonization of all

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[1] D. Carreau, P. Juillard, *Droit International economique 3e edition*, Éd. Dalloz, Paris, 2007, pp. 26-27.

[2] S. Issacharoff, C.M. Sharkey, *Backdoor Federalization*,2006, în New York University Law and Economics Working Papers,p. 65.

[3] The North American Free Trade Association (NAFTA) is currently abandoned in favor of the USMCA. On November 30, 2018, Canada, the United States and Mexico signed the new Canada-United States-Mexico Agreement (USMCA), on the sidelines of the G20 Leaders Summit in Buenos Aires. The Parties will now undertake their internal process to ratify and implement the USMCA, which retains the key elements of this trade relationship and includes new and updated provisions aimed at addressing trade issues in the 21st century and promoting new opportunities.

production conditions, the movement of products, goods and services. Such harmonization (which is based in particular on the separation of economic policy, but which, as a whole, requires simultaneous political and economic harmonization) is possible if Member States agree to the need for the transfer of powers - the prerogative of states sovereignty - to the economic integration bodies. The experience of European economic integration began with the Common Market (Treaty of Rome, 1957), the Community orienting itself, through the Maastricht Treaty of 1992, towards the establishment of an Economic and Monetary Union (EMU) finalized by the creation of the single currency.

International economic organizations therefore have a specific character: OECD, EFTA or NAFTA (current USMCA) are classic; the IMF and the IBRD include a number of innovative elements, which have served as a model for many universal or regional institutions, aspects resulting from their regulations and statutes, which have established in a different way, specifically, the competencies, organizational structure and solution. disputes.

Summarizing, we can say that the management of these specific[1] or general systems belongs to the international economic organizations[2], based on their normative competence that is executed at universal or regional level. Indeed, the role of intergovernmental organizations in international affairs has expanded substantially as a result of the need of the international community to achieve goals that states have not been able to achieve. These organizations have even been officially granted international legal personality for certain purposes[3]. While these entities are still largely controlled by the nation state, they also have international importance as separate legal entities. To a lesser extent, the international role of individuals, non-governmental organizations and the transnational corporations (TNC) has also been recognized[4].

While these entities are still largely controlled by nation-states, they are also of international importance as separate legal entities.

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[1] C.M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law* (2005), in Columbia Journal of Transnational Law, vol. 43, pp. 927-959, 2005; Georgetown Law and Economics Research Paper No. 12-024; Georgetown Public Law Research Paper No. 12-078.

[2] V. Lowe, *Corporations as International Actors and International Law Makers*, XIV, 2004, *The Italian Yearbook of International Law*, p. 23.

[3] See the issue of compensation for injuries suffered during service in the UN, 1949 I.C.J. p. 174; W. Friedmann, *The Changing Structure of International Law*, pp. 218-219 (1964); in Charney's view (J.I. Charney, *Transnational Corporations and Developing Public International Law*, 1983, Duke L.J.), there are a number of theories used to explain the origins of the international legal personality of international organizations. These include: 1) conferring personality expressly or implicitly, with the consent of the states that created the organization; 2) personality derived from the voting structure, composition and competencies of the organization; 3) the personality derived from the specific rights and obligations of the international organization that gives it international legal personality; 4) personality derived from the inherent legal personality based on the existence of the international organization and the general international law.

[4] J.I. Charney, *op. cit.*, pp. 759, 760.

3. International non-governmental organizations with an economic vocation

As has been done consistently in doctrinal analyzes starting from the variety of sources, international law allows the elaboration of a definition of the international non-governmental organization (NGO), respectively of the international non-governmental organization with economic vocation: a group created at the initiative of private individuals or legal entities - bringing together members of different nationalities, established for the purpose of exercising a disinterested international activity[1] and endowed with legal personality of domestic law and not of international law[2]. Thus, the international non-governmental organization with economic vocation presents itself as a pressure group with the mission to defend especially in the hands of states or international governmental organizations the interests of certain international economic environments[3]. For example, we can mention the chambers of commerce. These are a set of actors in the field of international investment law, who could support opinions in favor of multinational corporations. The International Chamber of Commerce played a leading role. It has initiated draft foreign investment codes and other related instruments[4]. A strong state anchored in international investment must host and encourage a leading investment chamber of commerce. Other examples can be given by international professional associations: international producer and consumer groups, international trade union federations, the International Chamber of Commerce based in Paris (ICC), which plays an important role in formulating trade rules and international practices. In addition to these traditional organizations, there are a large number of other organizations involved in highly specialized areas of international economic relations, such as the Center for International and Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD), which have a not inconsiderable influence in the field of investment law.

3.1. Participating in the elaboration of the norms of international law of foreign investments and in the settlement of disputes

As the above interests tend to protect international corporations, these organizations have an active involvement in the process of developing *soft* or

[1] For a full review of the activities of non-governmental organizations (NGOs) at the international level in 1963, see J.J. Lador-Lederer, *International Non-governmental Organization and Economic Entities: A Study in Autonomous Organization and Ius Gentium*, A. W. Sythoff (ed.), 1963, p. 29.
[2] D. Carreau, P. Juillard, *op. cit.*, pp. 32-33.
[3] W. Feld, *Nongovernmental forces and world politics*, New York: Praeger. Feld, W., & Coate, R. (1976), pp. 4, 25.
[4] M. Sornarajah, *The International Law on Foreign Investment Third Edition*, Cambrige University Press, 2010, p. 61.

hard law in the field of international investment, protesting against the development of investment codes without taking into account, at the same time, environmental degradation and human rights violations. These organizations often participate[1], directly or indirectly, in the development of rules of international law that fall within the objectives of international governmental organizations, and are frequently consulted. For example, by art. 71 of the United Nations Charter, which enshrines the Economic and Social Council (ECOSOC), allows this body to consult with non-governmental organizations dealing with issues within its competence, but only if the NGO is able to make a significant contribution to the activities ECOSOC. NGOs have a predominantly technical role, separate from politics, with particularly useful results in intergovernmental cooperation[2]. Within this technical role, as previously exemplified in the case of chambers of commerce, other examples can be given such as: the International Air Transport Association (IATA) or the Association of International Road Carriers (ASMAP), the Advisory Committee on Business and Industry Advisory Committee (BIAC), the Trade Unions Advisory Committee (TUAC), or the Investment and Multinational Enterprises Committee (CIME). The above-mentioned NGOs, CIEL and IISD, have been involved in the revision of the Arbitration Rules of the United Nations Conference on Trade and Development - UNCITRAL. This arbitration regulation, although over 30 years old, is increasingly used in disputes between investors and states. In conclusion, the participation of such organizations in the elaboration of the norms of international law (excluding the political and social dimension) is on the rise, the global market needing uniform standards[3].

With regard to the involvement of these organizations in the settlement of international disputes, for example, in the settlement of disputes within the WTO, the Memorandum of Understanding on Rules and Procedures for Dispute Settlement already allowed specialized groups to request information or technical advice from any person or body it deems appropriate (art. 13 par. 1) and to consult experts in order to obtain their opinion on certain aspects of the issue in question (art. 13 par. 2). The specialist groups may agree to receive comments from NGOs as independent sources wishing to enlighten the judge in the interests of justice (*amici curiae*), and these comments must be likely to help resolve the dispute.

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[1] A se vedea W. Feld, *Nonguvernamental Forces and World Politics, a Study of Business, Labor and Political Groups*, 1972, pp. 22-23.

[2] For example, the failed Nabucco pipeline project, which included Turkey, Bulgaria, Romania, Hungary and Austria, was backed by an intergovernmental agreement (IGA) in the form of a 50-year treaty. IGA grants transit rights for the pipeline in each state and political support, which means that the pipeline can be built even if there is no local shareholder in the consortium.

[3] This was an argument heard during the MIA negotiations, for example among NGOs. See e.g. *L'Observatoire de la Mondialisation, "Lumière sur l'AMI : le test de Dracula", L'Esprit Frappeur,* 1998, p. 77.

Some NGOs have obtained third party status in the procedure (see ICSID Regulation) through arguments in the public interest[1].

Other examples that allow the presence of third parties in the proceedings when the dispute contains elements of public interest are the American model (2004) and the Canadian model (2004) of bilateral conventions for investment promotion and protection or other BITs in which the jurisdiction to resolve disputes belongs to ICSID.

4. The incipient stage of multinational enterprises in their path towards becoming subjects of international investment law

They are generically called transnational companies (STN or TNC) and represent the main operators of international trade[2], making almost all international investments. Gh. Ionescu mentioned that "the emergence of the global economy is strongly shaped by the actions of transnational enterprises. They are the main actors on the world stage and the main factors of a country's economic competition"[3]. Other voices[4] are also of the opinion that the theory of international relations recognizes the emergence of transnational corporations as significant actors in international relations and in international political economy.

The multinational enterprise or the transnational company, unlike NGOs, is a private interest group, aiming to achieve benefits. What characterizes these societies is, above all, the coordination and hierarchy between the various elements that make up the group; there are therefore complex legal and financial links between the parent company and the subsidiaries or affiliates, and the legal personality also refers to the law of each of the states in which they operate, although, in practice, TNC is granted the nationality of the parent company, using formulas as RENAULT SA (French multinational) or COCA-COLA (American multinational). The most important of these enterprises have their origins in developed countries.

Without being subject to international law in the classical sense of the

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[1] See D. Lewis, P. Opoku-Mensah, *Moving Forward Research Agendas on International NGOs Theory, Agency and Context*, Journal of International Development J. Int. Dev. 18, 2006, pp. 665-675.

[2] W. Feld found that: "STNs often have considerably more material resources than many countries of origin that allow them, under certain conditions, to exert stronger influences in the international sphere than the governments of many small and medium-sized states." After a comparison between General Motors and Switzerland, he noted: "(...) although state power is based on elements other than production capacity and financial resources, in the sense that military force, political assets and capabilities are a significant part of the overall capabilities of a state in the international arena, the figures presented demonstrate the potential power of multinational companies in world affairs".

[3] Gh. Ionescu, *Cultura afacerilor. Modelul american*, Ed. Economica, Bucharest,1997.

[4] J. Baylis, S. Smith, *The Globalization of World Politics. An introduction to Internaţional Relations*, Oxford University Press, 1997, p. 224.

term, some TNCs have a capacity for influence[1] that exceeds that of many sovereign states; their turnover is higher than the GDP of these countries, the number of employees exceeds the population of many developed and developing countries, and the level of foreign sales is higher than that of the exports of several states. The publication promoted by UNCTAD "World Investment Reports" regularly provides essential data about these multinational companies. Current trends have placed the origin of many TNCs in developing countries as well, being the product of the liberalization of the international economy[2].

These subjects have a special type of international legal personality. In other words, they have and exercise certain rights and obligations in accordance with international law. How could it be determined whether or not a particular entity has international legal personality? An entity is a subject of international law if it has "international legal personality". In other words, subjects must have rights, powers and attributions in accordance with international law and should be able to exercise these rights, attributions and competences. The different rights, competences and attributions change according to their status and functions. In the case of the TNC, it can be said that they are recognized as having incomplete international legal personality. Is the international community ready for full recognition as a subject of international law by the TNC? Some authors believe that it would be imprudent, at this time, to grant such recognition, as it could put pressure on the international legal system.

Legal personality also includes the ability to ensure the observance of one's own rights as well as to oblige other entities to fulfill their obligations under international law. For example, this means that a subject of international law should be able to: (1) make claims before international and national courts and tribunals to exercise their rights, e.g. in front of the ICJ; (2) have the capacity or power to become a party to international conventions which have binding legal force under international law, for example in treaties; (3) enjoys immunity from jurisdiction before foreign courts; for example, immunity for state acts; (4) be subject to obligations under international law (Martin Dixon) and have the right to create rules of international law.

Subjects of international law do not have the same rights, obligations and capabilities. The International Court of Justice states in its 1949 Advisory Opinion on "Reparation for Damage to the Service of the United Nations" that the subjects of law in a legal system are not necessarily identical in the nature or extent of their rights.

At present, there are still debates about some controversies regarding their positive or negative role in the globalization of the economy and they are

[1] For example, The University of North Carolina at Chapel Hill holds courses at Kenan - Flagler Business School for foreign and national dignitaries in the armed forces, in which the typical STN management model is studied, in order to be implemented in the armed structures concerned.

[2] See R. Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (The Harvard multinational enterprise series), Hardcover, June, 1971, p. 249.

accused of being a formidable competition for states, bringing limitations to their sovereignty, and of tending to organize their own economic system. threatening the interstate international order. Some experts believe that they could, in a way, disrupt that balance between states and individuals, a balance that is at the heart of the current structure of international law[1]. Other voices believe that the existence and evolution of the TNC is a good reason to believe that international power has changed[2]. These TNCs are clearly hybrids[3] of international law. An entity is a subject of international law if it has "international legal personality". In other words, subjects must have rights, powers and attributions in accordance with international law and should be able to exercise these rights, attributions and competences. In the case of TNC/STN, it can be stated that they are recognized as having incomplete international legal personality. Is the international community ready for full recognition as a subject of international law by the TNC? Some authors believe that it would be imprudent, at this time, to grant such recognition, as it could put pressure on the international legal system[4]. Authors such as Antonio Cassese, on the other hand, have argued that STNs have neither international rights nor obligations because states - regardless of their ideological perspectives - are reluctant to grant them international status[5]. However, a balanced approach to the package of rights and obligations would benefit States, in the sense that a full recognition, for example, of international obligations, would bring an additional liability of STN, proportionate to the obligations thus recognized, to clarify the international role of the STN, amid the debates of several authors who talk about the legal invisibility[6] of the STN/TNC in the landscape of international law. Analyzing the role of public international law (a role that must be, indisputably, a complete role), it is observed that, in essence, it compresses a system of rules and principles that govern international relations between sovereign states and other institutional subjects of international law such as United Nation, Arab League, etc. However, it is precisely this system of rules that would be affected if some members of the international community, in particular the TNC, were placed or placed in a corner of invisibility.

Customary international law recognizes the TNC as potential[7] subjects of international law. And from this point of view, the TNC must promote a more

[1] For an overview, see N. Bolzman, *Sovereignty Eclipsed: Multinational Corporations As The New International Actor*, Michigan State International Law Review Forum Conveniens, 2013.
[2] J.I. Charney, *op. cit.*, pp. 748, 770 .
[3] V. Lowe, *Corporations as International Actors and International Law Makers*, vol. 14, Italian Y. B. INT'L L., 2004, pp. 23, 26.
[4] See Martin Dixon, *Textbook on International Law*, Oxford University Press 2013.
[5] A. Cassese, *International Law in a Divided World*, Clarendon Press, 1986, p. 103.
[6] See A. Claire Cutler, *Critical reflections on the Westphalian assumptions of International Law and organization: a crisis of legitimacy*, Review of International Studies nr. 27/2001, pp. 133-150.
[7] For considerations on a rapid process of transformation into international custom, see B. Cheng, *United Nation Resolutions on Outer Space: Instant International Customary Law?*, 1965.

active role, an expansionist, dynamic and uninterrupted involvement in international law, in order to remove the inertia currently installed.

It has also been argued that such enterprises can act against the interests of the international economic order. In fact, the concentration of economic power operating for the benefit of STN may prejudice the guiding principles on which this order is based. It is indisputable that, in relation to this economic and political force that international enterprises have, there have been tendencies to control and direct them, respectively, the attempts being numerous and unsuccessful. Two of these attempts to control and regulate STN are worth presenting and analyzing: the United Nations Code on STN, which remains in the draft phase, and the OECD Declaration and Decisions of 1976, important for international investment[1].

A future set of international regulations must aim at the visibility of the TNC as subjects of international law, and the international society must work together to complement the very role of public international law. It can be said that yes, indeed, TNCs are not traditional subjects of international law, but they are indisputably progressive subjects of international law.

As a negotiating and drafting body, the *United Nations Commission on Transnational Corporations* (UNCTC) has succeeded in drafting a code whose structure seems to have satisfied those concerned[2]. The UNCTC became operational on 1 November 1975[3], on the basis of a resolution of the United Nations Economic and Social Council, adopted in 1974. The document comprises six distinct parts: the preamble and objectives; definition and scope; activities of transnational corporations; treatment of transnational corporations; intergovernmental cooperation; application of the code of conduct. As it was finally found, due to consensus issues, this STN code of conduct will not be able to be a conventional instrument (a treaty or an international convention) and, consequently, its legal value will be similar to the United Nations resolutions. This Code remained at the draft stage due to differences of opinion and interests that resulted in the North-

[1] See J.H. Dunning, *Seasons of a Scholar: Some Reflections of an International Business Economist* (Edward Elgar 2009); T. Fredriksson, *Forty Years of UNCTAD Research on FDI,* (2003) vol. 12 Transantional Corporations, pp. 1-39.

[2] For details and analysis, see T.H. Moran, *The United Nations and Transnational Corporations: a review and a perspective*, *Transnational Corporations*, vol. 18, No. 2 (august 2009).

[3] By Resolution of the Economic and Social Council (ECOSOC) 1908 (LVII) of 2 August 1974. Subsequently, the Commission for Transnational Corporations was established - by Resolution ECOSOC 1913 (LVII) of 5 December 1974. See Sotirios Mousouris, Transnationals in the UN Spotlight: The Beginning in Khalil Hamdani and Lorraine Ruffing (eds), The United Nations Center on Transnational Corporations: Corporate Conduct and the Public Interest (Routledge, forthcoming) (Mousouris was one of those directly involved in establishing UNCTC and became deputy director UNCTC, Policy Analysis Division, from 1975 to 1981, he was the secretary of the Working Group on the Code of Conduct and, in that capacity, the main person in charge of negotiating the Code.

South negotiations. The negotiations on the draft code revealed conceptual differences between developed and developing countries. From the textual analysis of the draft code, the specialists concluded that the developed countries wanted to develop a true status of transnational corporations, defining both their obligations and their rights, while developing states insisted on enumerating and codifying the obligations of transnational corporations.

The issue of balancing regulations on STN rights and obligations has also been a point of contention between developed and developing countries. The developed states have called for a clear and unambiguous definition of STN rights and have called for these rights to be stable, which means that they have in mind the legal order in which these rights are developed and exercised and which can only be the internal legal order of the host state (full consensus between the two categories of states on this issue). The developing states wanted to include a reference only to international obligations, as for them the term includes only conventional sources of international law, not unconventional ones to which they were reluctant. We must mention that the subject is closed, due to the globalization of the economy[1] which, among other things, also meant the multinationalization of an increasing number of enterprises, some of which originate from developing countries. The Center for Transnational Corporations ceased operations in the early 1990s.

Above all, improving the international investment regime must be in the interest of governments, both as host countries and as key parties, in order to give this regime legitimacy and robustness, because every international regime requires long-term viability. The experience gained over time and the lessons learned from the negotiations for the STN Code of Conduct should be helpful in achieving this goal[2].

Along with the draft STN Code of Conduct, another soft law initiative was the OECD Regulations of 21 June 1976[3]. The textual analysis of the document shows that it consists of a declaration on international investment and multinational enterprises and three "interdependent instruments", entitled guiding principles for multinational enterprises, "national treatment", "incentives and obstacles to international investment" - *soft law* instruments, documents to which a text has been added inviting states to avoid or mitigate "contradictory obligations".

Other coding initiatives were:

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[1] UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (A/RES/35/63 5 December 1980, valabilă la *http://www.un.org/documents/ga/res/35/a35r63e.pdf*, accessed on July 15, 2015); see also UN Doc TD/RBP/CONF/10/Rev.1 (1981).

[2] K.P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations. Experience and Lessons Learned*, The Journal of World Investment & Trade No. 16, publised by Brill Nijhoff, 2015, series 11-87, p. 77.

[3] OECD, International Investment and Multinational Enterprises (OECD 1976). All 34 OECD members and 12 non-OECD members subscribed to the Declaration.

- the project entitled "Obligations of multinational companies and member companies", developed by the Institute of International Law in 1995;

- the proposal to integrate the activities of multinational enterprises into the "ten principles of the Millennium Development Goals", April 2000.

A number of important cases were mentioned: the cases of *Badger*, *Batco*, *Bendix*, *Citicorp*, *Filestone*, *Siemens*, *Hoover* and *Renault Vilvoorde* in particular. The reports of the Investment Committee of Multinational Enterprises have played a significant role in regulating these cases. There has been a reduction in the use of the procedure for clarifying the guiding principles, which most experts consider to be a proof of the viability of these instruments and of the correct observances[1].

5. Conclusions

The participants in the mentioned investment relations each have a different role in terms of approaching and developing these relations. States must be viewed from the perspective of different regimes in relation to specific economic conditions. The non-governmental organizations and transnational corporations have a more important role to play in their interaction with states in the formation of legal norms or the determination of economic conditions that lead to the generation and completion of legal norms.

Obviously, the states have the main role[2] in the international economic society, since most of the rules on this society are created by states and are addressed to states.

The essential attribute of the state, according to international law, is sovereignty, and the basic principle that represents the foundation of interstate relations from a political point of view is sovereign equality. The rules and model of the market economy - liberal capitalism - impose certain limits on sovereign equality. Addressing the issue of international economic law, some authors have pointed out that this is the first time that a single model has been imposed[3] on the world, with states being required to make the necessary internal adjustments to comply with this model.

One of the key principles is more favorable treatment of developing countries (South), which allows developed countries and developing countries not to be treated legally in the same way. The qualification of a state as belonging to one or the other of the two categories requires the use of economic criteria. The

[1] For details, see D. Carreau, P. Juillard, *op. cit.*, p. 44; See also the colloquium of the French Society of International Law in Aix-en-Provence, with the theme: *Pays en voie de développement et transformation du Droit International*, Pedone, Paris, 1974.

[2] K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, *The Concept of Legalization*, 54 *International Organization* (2000), pp. 401-419.

[3] *Ibidem*, p. 25

developed countries (North) can also join a network of treaties of friendship, trade and navigation that protect not only trade but also investment; these treaties were sometimes, as in the United States, directly enforceable in local state courts[1].

As for international organizations, we have considered those organizations that have an economic profile, either global organizations or regional organizations. In addition to the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), the World Trade Organization, established by the Marrakesh Agreement in 1995, has a special role to play.

As we have mentioned, but also as it will be confirmed in the subsequent developments of the scientific research undertaken in this paper, a regional role has an essential role, both those of cooperation and those of integration. In the first category we mention the OECD, where there are areas of economic integration (free trade areas), customs unions, common markets and forms of economic federalism – the Economic and Monetary Union, although established by treaties, their decision-making mechanism for efficiency is not unanimity. The transfer of sovereign powers to these organizations is visible both in the history of the Benelux and in more recent forms of the North American Free Trade Agreement (NAFTA, currently abandoned in favor of the USMCA. On November 30, 2018, Canada, The United States and Mexico signed the new Canada-United States-Mexico Agreement at the G20 Leaders Summit in Buenos Aires. The parties will now undertake their internal process to ratify and implement the USMCA), the European Economic Area, Mercosur, etc. Some organizations aim to intervene in economic relations in concrete cases such as state financing, projects (IMF and IBRD) or granting guarantees in investment operations (Multilateral Investment Guarantee Agency - MIGA).

The entire codification process of international law carried out under the auspices of specialized UN bodies, such as the Commission on International Law (ILC), the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development and other relevant organizations very technically, they postulated the essential, dynamic role that non-governmental organizations have in grouping professionals and practitioners in fields of activity covered by the standardization and codification process, and through their contributions they imprinted the practical character of many adopted regulatory solutions.

The transnational corporations do not yet have the quality recognized as a traditional subject of international law, but their role is very important, as it stems

[1] For example, see the Treaty of Friendship, Commerce, and Navigation Between the United States of America and Japan (signed April 2, 1953), which states that Japanese citizens residing in the United States may not be subject to more burdensome taxes than those paid. by US citizens and in accordance with the Japanese status of the most-favored-nation clause. To be seen *Japan Line Ltd c. Los Angeles County*, 441 US 434 (1979) (holding California state property tax on Japanese shipping affiliates unconstitutional since it results in multiple taxation).

from several factors. Having a special economic power, it exerts a political influence on the decisions of the states with the consequence of formulating some conventional or customary norms of international law. Attempts have been made to obtain favorable legislation for the creation of new markets, fiscal facilities or bilateral trade treaties as favorable as possible. The legal influence of these companies should also be emphasized, by establishing the constituent elements of "state contracts". The regulations aimed at detailing the role, activity and position of these transnational corporations, even if they have not always achieved their purpose, cover a wide range of concerns.

Chapter II
Definition, forms and classification of foreign investment

1. Preliminary considerations

The international economic law, but also economic sciences have shown attempts to define the notion of foreign investment. From a legal point of view, international investment regimes must define their scope *ratione materiae*. The difficulty of elaborating a definition of international investment is due to the fact that there are several opinions on the subject that reflect, moreover, the many sources through which solutions to this problem have been sought, so that the identification of this definition can be done only from sources this field. The internal sources are numerous because, practically, there is no state that does not have its own legislation and its own regulation in the matter of investments, which does not support the achievement of a unification. As for international sources, they, in turn, are numerous, having the same character: lack of unity.

The main current problems generated by the evolving moment of international investment law are represented by the definition of the key terms "investments" and "investors". The issues related to the first term referred to the scope of the definition of investment: whether all types of investments should be covered, whether direct or indirect, whether they relate to undertakings or to a particular contract, or whether arbitral tribunals should adopt a narrower definition, which refers to the degree of coverage of an investment agreement, more specifically to cross - border capital movements and foreign direct investment by enterprises, not individuals.

In order to establish the existence of a definition, one must analyze the international instruments with total or partial impact in the field, international law, the practice of dispute settlement and the link between the investment and the investor, even if there are differences in the objective pursued.

During this paper, words and expressions referring to the relations between the north-south[1], north-north states, etc. will often be used. According to the language frequently encountered[2] in international investment debates, the "northern" states mean developed, heavily industrialized states, while the "southern" states mean developing countries[3].

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[1] J.-P. Thérien, *Beyond the North – South divide: The two tales of world poverty. Third World Quarterly* 20(4) (1999), pp. 723-742. This article analyzes and compares different views on poverty made by the World Bank, on the one hand, and the UN institutions (UNDP, UNCTAD), on the other.

[2] For example, including the institutional language uses these references: MERCOSUR has as *motto*: *Nuestro norte es el Sur*, which translates: "Our North is the South."

[3] See L. Krüger, *Global Transformations and World Futures*, vol. I: *North – North, North – South*

2. Definition of international investment in international law

Within the OECD Investment Department, the experts[1] noted in the light of discussions in the Investment Committee that the definition of investor and investment is essential for the scope of the rights and obligations of investment agreements and for establishing the jurisdiction of tribunals in arbitration based on the investment treaty. A priority remark must be made, as international law does not currently provide a codified definition in this area. The above OECD analysis reiterates that: there is no single definition of what constitutes foreign investment. The international investment agreements usually define investment in very broad terms. These refer to "any type of good", followed by an illustrative but usually non-exhaustive list, which recognizes that forms of investment are constantly evolving. The contradictory discussions[2] are related to the term "investment"[3] and the qualifier "international". According to Juillard and Carreau, the term "investment" is repeatedly considered (including by doctrine) a technical term, which belongs to the economic field; so that it is difficult to formulate from a legal point of view a different definition than the one indicated by the economic factor. What is certain is that there is an international law of investment, as participants in this kind of relationship - states and legal and natural persons, have rights and obligations specified by specific instruments. Hence a multiplicity of this definition, depending on the object and purpose pursued by the legal instruments in question.

Various dictionaries and publications also contain definitions of investment. For example, the 1985 *Encyclopedia of Public International Law* (vol. 8, p. 246) defines foreign investment as a "transfer of funds or materials from one country (called a capital exporting country) to another country (called a host) in exchange for a direct or indirect shareholding in the profits of that enterprise". In our country, it is expected that the volume of the Romanian Legal Encyclopedia that will include the letter I, in progress, will contain, at my proposal, the definition given to international investment or, at least, the volume that will include the letter R to contain the definition of the report investment law, as I presented it in

and South – South Relations.

[1] See C. Yannaca-Small, L. Liberti, *International Investment Law: Understanding Concepts and Tracking Innovation*, OECD 2008, Chapter 1, pp. 1, 8.

[2] B. Legum *Defining Investment and Investor: Who is Entitled to Claim?* presentation at the Symposium *Making the Most of International Investment Agreements: A Common Agenda*, co-organizat de ICSID, OECD and UNCTAD, 12 December 2005, Paris.

[3] D. Carreau, P. Juillard, *Droit International économique* (3e édition, Éd. Dalloz, Paris, 2007), p. 403, *apud* analysis of OECD specialists cited in footnote 95: „La difficulté que l'on rencontre, lorsque l'on veut proposer une définition de l'investissement internațional, vient de la multiplicité des conceptions en cette matière – cette multiplicité des conceptions, en définitive, ne reflétant que la prolifération des sources".

this paper.

As we will see, the term investment is a basic concept used in any investment treaty and therefore it is important to understand its ramifications[1].

While some authors[2] analyze the definition of investment in relation to their complexity and interconnection, their terminology and concept, or the way it is found in international law, in international instruments, in the ICSID Convention, in jurisprudence, or in the definition given by WTO[3], other authors consider that, in general, discussions take into account the procedural or transactional dimensions and sometimes the asset in question, the term "investment" being a basic concept used differently in domestic law, in contracts and in international treaties, thus creating differences regarding the compliance and rejection of the legal protection of that asset or transaction. Lawyers, arbitrators, economists, financiers and managers can define the concept of investment in different ways[4].

2.1. Conventional tools

The multiplication of the definitions of investments results from the different sources[5] existing at this moment. Existing definitions in various categories of international instruments need to be considered.

According to UNCTAD, as a terminology, the international investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions. A bilateral investment treaty (BIT) is an agreement between two states to promote and protect investments made by investors in those states in the territory of the other state. The vast majority of IIAs are BITs. The category treaties with provisions on investment (TIP) brings together different types of investment treaties are not BITs.

Three main types of TIP can be distinguished: 1. large-scale economic treaties, which include obligations commonly found in the BIT (for example, a free trade agreement with an investment chapter); 2. treaties with limited investment provisions (for example, only those regarding the establishment of investments or the free transfer of funds related to investments); and 3. treaties containing only "framework" clauses, such as those on investment cooperation and/or a mandate for future negotiations on investment issues.

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[1] J. W. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library 2013, p. 19

[2] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press (OUP), Second edition, 2012, pp. 60-76.

[3] M. Sornarajah, *The International Law on Foreign Investment Third Edition*, Cambrige University Press, 2010, p. 267.

[4] J.W. Salacuse, *The Three Laws of International Investment*,OUP 2014, p. 4.

[5] See Ph. Khan, *Les investissements internationaux, nouvelles donnes: vers un droit transnational de l'investissement,* in Ph. Kahn, Th.Wälde (eds.), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, Leiden/Boston 2007) pp. 17-19. See also the overall conclusion drawn from *L'extension de la notion d'investissement* in J. Bourrinet (ed.), *Les investissements français dans le tiers*-monde, Éd. Economica, Paris, 1984.

In all these types of legal instruments, different definitions of the notion of investment or investor can be found.

In addition to the IIA, there is also an open category of investment-related instruments (IRIs). It includes various instruments with or without binding legal force and includes, for example, model agreements and draft legal instruments, multilateral dispute settlement conventions and arbitration rules, including definitions and rules of interpretation, documents adopted by international organizations and others.

The customary international law and the first international agreements did not use the notion of investment, but only that of *foreign property*[1] or *imported capital* or even *the property of foreign citizens with long residence*[2].

2.1.1. Definition of investment in instruments of free movement of capital

As can be seen, such instruments are the creation of developed countries and we have in mind, on the one hand, the OECD Code on the Free Movement of Capital, which was developed within this organization, on the other hand, the provisions of Community law[3], namely: articles 67-73 of the Treaty of Rome on the European Economic Community of 1958; the directives for the application of articles 67-70[4] and 73B-73H of the Maastricht Treaty, subsequently art. 56 et seq. of the Treaty on European Communities and art. 64-66 of the Treaty on the Functioning of the European Union (TFEU).

It is considered[5] that investment and the movement of capital should be liberalized, and the formulation of a definition is based on the similarity of terms used to define the notion of direct investment.

Thus, the definition of a direct investment, according to the mentioned texts, is based on the existence in close combination of the following elements:

- there must be a capital contribution in various forms;
- this contribution must allow the existence of lasting links, even if these

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[1] UNCTAD, *Scope and Definition*, UNCTAD Series on issues in international investment agreements (1999) UNCTAD/ITE/IIT/11 (vol. II).

[2] For analysis: *OECD Draft Convention on the protection of foreign property* (OECD, Paris, 1967).

[3] The basic requirement established in art. 67 para. (1) of the original Treaty establishing the European Economic Community ("the EEC Treaty") was that, during the transitional period, Member States should phase out all restrictions on the movement of capital belonging to residents in the Member States and any discrimination based on the nationality or place of residence of the parties or the place where the capital is invested, but only "in so far as is necessary to ensure the proper functioning of the common market". See the decision in *Criminal Proceedings Against Guerrno Casati*, Case 203/80, [1981] E.C.R. I-2595.

[4] The relevant Directives of 1960, 1962, 1985 and 1986 were replaced by Directive 88-361 of 24 June 1988, which is a directive implementing the articles 67, 70.

[5] See J.A. Usher, *The Evolution of the Free Movement of Capital, 2007*, Fordham International Law Journal, The Berkeley Electronic Press, vol. 31, Issue 5/2007, Article 14.

links are not legal links;

- these lasting links must be established between the investor and an enterprise, i.e. an entity engaged in an economic activity;

- the investor, due to these lasting ties, has the position to exert a real influence regarding the management of the company where he invested. The latter element is considered to provide the criterion for differentiating between direct investment and any other investment[1].

Without going into details, we mention that the *direct investment* is favored in relation to any other investment, such as, for example, the placement of a capital, the mobility of capital, the financing necessary for enterprises in the medium and long term strategies.

2.1.2. Definition of investment in their protection instruments

As mentioned above, it has been found that there is no single definition, as the object and purpose of the investment term varies depending on the instruments that contain it[2]. The very attempts to define are based, in the case of all national or international specialized works, on the same system presented in this chapter. The multitude of definitions of investment results from the proliferation of different sources. Multilateral treaties typically define the term "investment" and provide for ICSID jurisdiction.

Any international regime must have rules to determine which people and what actions are governed by the regime. A fundamental question that all governments, investors and arbitrators must answer in the application of an investment treaty is, therefore, whether the treaty applies to persons, organizations, transactions or goods wishing to benefit from its provisions. If the treaty does not apply as such, those persons, organizations, transactions and property are not protected and cannot claim the benefits of the treaty[3].

There is no doubt that a codification of these international relations was

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[1] D. Carreau, P. Juillard, *Droit internaţional économique*, 3e édition, Éd. Dalloz, Paris, 2007, pp. 404-406.

[2] D. Carreau, P. Juillard, *op. cit.*, p. 403: „La difficulté que l'on rencontre, lorsque l'on veut proposer une définition de l'investissement internaţional, vient de la multiplicité des conceptions en cette matière – cette multiplicité des conceptions, en définitive, ne reflétant que la prolifération des sources".

[3] See art. 1, Definitions, from Canada Model FIPA 2004 (For the Promotion and Protection of Investments), recently revised treaty. The definition section of this treaty provides: "Enterprise means: i) any entity incorporated or organized in accordance with applicable law, whether for profit or not, in private or governmental ownership, including any corporation, trust, partnership, sole proprietorship, joint venture or other associations". Ph. Khan, *Les investissements internationaux, nouvelles donnes: vers un droit transnational de l'investissement*, in Ph. Kahn, Th. Wälde (eds.), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, Leiden/Boston 2007), pp. 17-19. See also *L'extension de la notion d'investissement*,în J. Bourrinet (ed.), *Les investissements français dans le tiers-monde*, Éd. Economica, Paris, 1984.

required, within the global framework of international cooperation[1], but also specifically of the international investment, which is why the Multilateral Investment Agreement (MIA) was negotiated within the OECD, a codification activity undertaken in 1995 and which in the end, it failed. The MIA[2] is a complex instrument both formally and materially and remains a document that was intended to systematize and multilateralize the stipulations of multilateral conventions.

Regarding the ICSID Convention, the term "investment" is encountered, but not defined. The Convention does not provide a definition (in order not to create limitations) and the external limits of the *ratione materiae* competence of the Center are clearly provided in art. 25 para. (1). The arbitral tribunal, depending on the case, determines its own competence and qualifies a litigious situation/operation as constituting or not an investment. The freedom left to the arbitral tribunals undoubtedly entails the risk of diluting the very notion of investment in the notion of goods and the notion of investment operations in the more general contractual operations[3].

The multilateral investment promotion and protection conventions (BIT) are generally familiar with the model used by European countries, so that the notion of investment used in bilateral instruments "designates any asset, such as goods, rights and guarantees of any kind". This sentence was completed - by analytical means - stating (non-limitingly) the main goods, rights and guarantees that cover the general proposal. In this enumeration are found all the elements of property, corporeal and intangible; among tangible assets, movable assets, as well as real estate, among intangible assets, all intellectual property rights, which leads to the conclusion that in reality the instrument aims to protect all foreign assets regardless of whether or not they are investments. It was also the reason why, in its final wording, the draft MIA, after resuming that listing, added the following statement, as a result of the intervention of a Member State, "in so far as these goods, rights and guarantees must be of a investment".

In connection with the draft MIA, we note that it was negotiated within the OECD[4], being a north - north instrument and did not influence the whole of the BIT. The consolidated text of the draft MIA provided that the agreement must be accompanied by an explanatory note in terms of which an investment, in order to enter into the conventional framework, will have to combine two characteristic elements which are, on the one hand, the contribution - which it may or may not

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[1] J.W. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library, 2013, p. 158.
[2] AMI Draft: A legal entity or any other entity incorporated or organized in accordance with the applicable law of a Contracting Party, whether or not incorporated for profit, whether private or government-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or organization.
[3] A. F. Lowenfeld, *International Economic Law*, Oxford University Press, 2003, pp. 403-405, 458-461.
[4] See *OECD Benchmark Definition of Foreign Investment* (*Draft*) – 4th edition, DAF/INV/ STAT (2006)2/REV. 3, 2007.

be in the capital, and on the other hand, the investor's association with the results of the operation in both aspects - profit or loss.

2.1.3. Definition of investment in the international investment agreements

An eloquent example is the 1985 Seoul Convention establishing the Multilateral Investment Guarantee Agency (MIGA) - a member of the World Bank Group. It was founded to promote foreign direct investment in developing countries and includes clarity of legal definitions of hedged risk and chosen investment.

The Seoul Convention defines international investment in Article 12, which divides investment operations into two categories: investments that are fully eligible for collateral; investments which are not fully eligible but which may be selected on a case-by-case basis to be guaranteed by a decision of the Agency's Management Board. The definition given by the Seoul Convention of eligible investment is narrower than the definition we find in a bilateral protectable investment convention (BIT).

The eligible investments are also subdivided into: on the one hand, the investments made by way of participation in the capital of the receiving enterprise, and on the other hand, the investments made otherwise than by participation in the capital of the enterprise invested (direct investments). It is a distinction that corresponds to the difference between "equity-investments" and "non-equity-investments"[1]in English-language financial practice. More recently, the distinction between "traditional" forms of investment, in other words, "ordinary", and "new" forms of investment, in other words, "unusual" forms of investment, is also used.

Regardless of the name and qualification of the investment, the Seoul Convention lists three constituent elements of an investment:

- there must be a contribution; without input there is no investment. This contribution can be: contribution in kind, contribution in tangible goods or intangible goods;

- the contribution is lasting because the investment is not a speculative operation.

- only investments in which the investor bears at least part of the costs are taken into account, the investor having to take into account and participate in both losses and profits.

It has been observed that the international investment agreements (especially bilateral agreements and free trade agreements) contain broad definitions based mainly on advanced assets or, the international investment agreements in the services sector deal with investment from a commercial point of view, con-

[1] M. Sornarajah, *The International Law on Foreign Investment*, 3rd edition, Cambridge University Press, 2010, pp. 10-19, 188-197.

taining narrow definitions, e.g. GATS and Decision 459 of the Andean Community. The article 2 of Decision 439 defines investment as follows: "Any type of commercial or professional establishment in the territory of a Member State for the purpose of providing a service in one of the following forms:

- setting up, acquiring or maintaining a legal entity;
- the creation or maintenance of a branch or a representative office"[1].

Some agreements include both a narrow definition of enterprise-based investment (a term taken in the sense of gainful activity) in the services section, and a broader definition of assets based in the services section. The examples often encountered in the doctrine are: Free Trade Agreement - Singapore art. 22 letter d) of 2002 and the Japan-Singapore Agreement, art. 58 par. 6D. In the section on services, these two agreements define "commercial presence" as "any type of commercial or professional establishment including i) the establishment, acquisition or maintenance of a legal person or ii) the creation or maintenance of a branch of a representative office; on the territory of a Party, for the purpose of providing a service". In this regard, we note that a broader definition favors the protection of intellectual property rights to which the asset-based definition is often applied. Most service agreements contain special clauses on potential beneficiaries and recipients of these agreements, respectively. These clauses are often referred to as "refusal to grant benefits" and specify which investors and investments do not meet the conditions required to qualify for benefits under those agreements[2].

The Chile-US Free Trade Agreements 2003 (art. 10-11 par. 2), and Australia-USA (art. 11.12 par. 2) are examples that contain refusal clauses to grant advantages, which provide that the advantages may be refused to an undertaking owned or controlled by investors of a third country if that undertaking does not carry on any significant commercial activity in the territory of the party where it was lawfully established (see, for example, Article 1113 (2) of NAFTA). The Economic Reconciliation/Harmonization Agreement concluded in 2003 between the People's Republic of China and Hong Kong contains, for example, more detailed criteria for determining whether or not an undertaking carries out important trade operations, while GATS refers to important trade operations without define. One of these references can be found in the article containing the definitions developed for the purposes of the agreement [(art. XXVIII, para. (M)], the other - in the article on economic integration (art. V, para. 6). The paragraph (m) of art. XXVII, is worded as follows: "the term „legal person of another member" defines

[1] UCTAD, *Accords internationaux d'investissement dans les services*; *Etudes de la CNUCED sur le politiques en matiére d'investisssment internaţional et le développement, Nations Unies et Genéve*, 2005 p. 32.

[2] In the absence of such a clause, it becomes possible for circular operations to benefit from an international investment agreement even in the event that no major commercial operation has taken place in the territory of the other Party; is an issue that was partially addressed in the arbitration award handed down by ICSID in 2004 in the case of *Tokios Tokelés v. Ukraine*.

a legal person: i) which is constituted or organized in accordance with the legislation of that other member and which carries out important commercial operations in the territory of that member or any another member; or (ii) in the case of the provision of a service by reason of a commercial presence which is held or controlled: 1) by natural persons of that member or 2) by legal persons of that member as identified in paragraph (i)".

3. Definition of international investment in arbitral awards

The case law does not provide a uniform approach. In order to develop this analysis, a number of cases in which relevant decisions have been made are subject to observation. It should be noted that eloquent practice is not always based on ICSID rules, although it is worth noting that ICSID's work and the cases resolved by this Center have covered important aspects of international investment law and especially the issue of the definition of investment[1]. Mostly, the litigation took into account the definition of investment promoted in international conventions. A common and eloquent example of the distinction between a sale and an investment is the decision of *Romak v. Uzbekistan* (Decision of 26 November 2009). The dispute was based on the UNCITRAL rules (not ICSID), and considered that the term "investment" in an BIT should have its own meaning. It was argued that the court referred to the illustrative definition set out in the applicable treaty and also to the conclusion of a trade agreement on the same day that the treaty was signed. To identify the significance of the investment, the court turned to *Black's Law Dictionary*, but later decided to impose three criteria: contribution, duration and risk. In this context, the court assumed that the parties are free to define an investment in any way they wish. Finally, the court, by its decision, examined the three criteria and ruled that the wheat sales (referred to in the dispute) did not satisfy any of them.

Other significant cases for the definition of international investment are those in which the following decisions were pronounced: decision of April 15, 2009 in *Phoenix v. Czech Republic*, decision of April 7, 2011 in *Malicorp v. Egypt*, decision of December 1, 2010 in *Global Trading c Ukraine*, Decision of 10 July 2010 in *Fakes v. Turkey*, Decision of 23 July 2001 in *Salini v. Morocco*, Decision of 17 May 2007 in *Malaysian Historical Salvors v. Malaysia*, Decision of 6 August 2004 in *Joy Mining v. Egypt*, decision of 6 August 2003 in *SGS v. Pakistan*, decision of 11 July 1997 in *Fedax v. Venezuela*, etc.

Under the ICSID convention, the jurisprudence of arbitral tribunals specified the criteria for defining the investment - which implies a certain duration, a

[1] The Tribunal, in *CSOB v. Slovak Republic*, noted: "This statement [in the ICSID Executive Directors' Report] also indicates that investment, as a concept, should be interpreted broadly, as the authors of the Convention did not impose any restriction on its meaning ". *Ceskoslovenska Obchodni Banka AS (CSOB) v. The Slovak Republi*c, ICSID Case No. ARB / 97/4, 24 May 1999, para. 64.

certain regularity in terms of profits and added value, a risk-taking and contribution to the economic development of the territorial state. It is a solution pronounced in the case of *Fedax v. Venezuela* (Decision on jurisdiction, July 11, 1997), in which case, for the first time, the issue of definition was raised before an ICSID court by the defendant to challenge the competence of the Center in relation to art. 25 of the Washington Convention[1]. In relation to the latter, the tribunal emphasized that the operation carried out by the State of Venezuela, a promissory note, meets the investment qualification, since it is characterized by a certain duration, a regularity in terms of profit and benefit, a certain risk-taking, a substantial commitment and a certain interest in the development of the access state. The same solution was adopted in another case (*Salini Costruttorri Spa and Italstrade Spa v. The Kingdom of Morocco*, decision on jurisdiction of 23 July 2001). The bilateral Convention for the Promotion and Protection of Investments between Italy and Morocco was discussed in connection with the execution of objectives on the public works market. The jurisdiction of the tribunal was challenged, arguing on the part of the defendant that the execution of these works does not meet the constitutive elements of an investment. The tribunal had to decide whether in reality there is an investment operation according to art. 1 of the Italo-Moroccan Convention, as well as according to art. 25 of the Washington Convention. The Court of First Instance held that, in the concept of investment, that convention included any right to a contractual service of economic value, the performance of public works falling within that legal framework. Also, the Arbitral Tribunal invoking the gaps of art. 25 of the Washington Convention and based on opinions of legal doctrine found that the investment combines contributions with a minimum duration of execution, a participation in the risks of the operation and a contribution to the development of the host state. The mentioned elements were met by the investment and the works carried out in Morocco. We mention that several arbitral tribunals refused to qualify as an investment some operations that, according to the court, are not significant for the national economy[2]. A significant number of decisions in cases involving disputes arising from

[1] The Tribunal pointed out that previously in the cases *of Kaiser Bauxite v. Jamaica* and *Alcoa Mineral v. Jamaica*, the issue of the definition of investment was correctly raised and resolved at the initiative of the arbitrators themselves in the verification of their competencies, and not at the initiative of one of the parties. in order to challenge the jurisdiction of the tribunal *ratione materiae*, the investment qualification given by the applicant to promissory notes issued by Venezuela under its Public Credit Act. The Court of First Instance, on the one hand, carried out a twofold operation in order to determine whether the promissory notes constituted or were regarded as an investment, within the meaning of Article 1 of the Netherlands-Venezuela Convention. the extensive definition of this convention, and on the other hand, to ascertain to what extent the commercial document (commercial document) in question could be considered an investment within the meaning of art. 25 of the Washington Convention. The arbitral tribunal concluded that promissory notes were also an investment, not a financial arrangement based on volatile capital.

[2] ICSID, Ad Hoc Committee, Annulment Decision of 1 November 2006, *Patrick Mitchell v. DRC*, pp. 25-33, 39; May 17, 2007 sentence, *Malaesyan Historical Salbros v. Malaysia*, pp. 125-144.

the application of a particular investment treaty have also interpreted some of the common terms found in international agreements, such as the requirement that the investment be made in accordance with the laws and regulations of the host state.

Some arbitral tribunals, considering that a strictly objective definition of investment was not included in the 1965 ICSID Convention, are reluctant to consider and, in certain disputes, to impose a definition that may be applicable in all cases and in for all purposes[1].

The interpretation of the typical definition of investments found in BITs has led a number of states, both developed and developing, to define investments more clearly and in detail in international agreements. However, in the context of ICSID arbitration, there is a clear and overwhelming requirement that the investment meet both the investment criteria under the ICSID Convention and under international investment agreements, and it is not unequivocally (or exactly) specified whether those the categories of assets that have been agreed in the international investment agreements will also pass the ICSID "test".

Most arbitral tribunals have allied and promoted a very broad conception of investment, which has led them to include as an investment:

- Hotel management (ICSID 25 September 1983 decision on jurisdiction, *AMCO v. Indonesia*, paras. 37-38);

- Promissory notes (ICSID 11 July 1997, decision on jurisdiction, *Fedax NV v. Venezuela*, para. 43);

- A service contract (ICSID 24 May 1999, decision on jurisdiction *CSOB v. Slovakia*, paras. 9-89; 6 August 2003, decision on jurisdiction, *SGS v. Pakistan*, para. 135; 29 January 2004, decision on jurisdiction, *SGS v. Philippines*);

- Execution of public works, in particular for road construction (ICSID, 24 July 2001, decision on jurisdiction, *Salini Costrutorri Spa and Italstrade v. Morocco*, para. 57; 27 September 2001, decision on jurisdiction, *Autopista v. Venezuela*, para. 101) canal construction (ICSID 16 June 2006, *Jan de Nul N.V. and Dredging International N.V. v. Egypt*, para. 90) or dam construction (ICSID 22 April 2005, decision on jurisdiction of *Impregilo v. Pakistan*); - Acquisition and operation of a journalistic publication (ICSID 8 May 2008, *Pey Casado and Fondation "Presidente Allende" v. Chile*, para. 233).

The arbitral tribunals considered that they could not constitute investments:

- preparatory studies for an unrealized investment (ICSID 15 March 2002, *Mihaly v. Sri Lanka*);

- bank guarantees (ICSID 6 August 2004, *Joy Mining Machinery Ltd v. Egypt*, paras. 41-63);

- a law firm (in the absence of evidence of a real contribution to the development of the host state, ICSID Ad Hoc Committee, decision of annulment 1

[1]*Biwater Gauff Tanzania Limited v. République Tanzanie*, p. 313, 24 July 2008, *Joy Miningvc. Egipit*, pp. 51-52, 5 August 2004 and *LESI/Dipental v. Algeri*, p. 13, 10 January 2005.

November 2006, *Patrick Michell v. RDC*, paras. 25-33 and 39) [1].

All the cases mentioned above are reference cases, taken over, analyzed under different aspects and presented by most specialists.

The investment value of the preparatory works should not be underestimated either. ICSID, in its 2015 work *Practice Notes for respondents in ICSID Arbitration*, emphasizes the importance of preparatory work (travaux préparatoires) indicating: *The Vienna Convention also allows the use of preparatory work as an additional means of interpretation. It is therefore useful for both parties to the treaty to have a common set of papers prepared during the negotiations and to ensure that they are available in the event of disputes under the treaty*.

Continuing the same material, ICSID notes the importance of treaties containing sufficient rules and regulations regarding the interpretation of the terms:

The elaboration of the treaty can be supported by consulting a lawyer with experience in the field of investment law and arbitration to ensure that the language of the treaty takes into account best practices and recent cases interpreting the provisions of the investment treaty.

Once concluded, the treaty must be implemented in accordance with national and international procedures. It refers both to the ratification of the Investment Treaty and to the adoption of national implementing legislation, if necessary. States must ensure that they have taken all necessary measures to comply with the terms of the Treaty.

In the case of *Murphy Exploration and Production Company International v. Ecuador* (oil and natural gas extraction), in the opinion of the expert professor Vandevelde from 2013, it is shown that "*travaux preparatoires*" must be, in the expression of the applicable treaty, materials present in the negotiation process and available to the negotiating team[2].

In the opinion on the case, there are other interconnected issues, encountered as often in international investment disputes, as well as the interpretation of the term "investment", one of these issues being the option "fork in the road"; the rule refers to an option "expressed as an irrevocable right of choice between different jurisdictional systems. Once the choice has been made, there is no possibility to resort to any other option."[3] It follows that, in many cases, the parties to the dispute, in order to give a positive interpretation of the term *'investment*', resort to the *'fork in the road'* rule, in search of a jurisdictional system on which to base their claims.

In conclusion, it should be noted that the term "investment" can be used

[1] D. Carreau, P. Juilard, *op.cit*., pp. 412-415.

[2] The expert decided in this case that: "The documentation we have reviewed so far in this procedure is not a matter of works regarding the fork in the road clause or the specific issue of the investor's choice among the listed arbitration forums".

[3] See *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision of 31 July 2007, para. 181.

to cover the pre-installation stage, the post-establishment investment phase or both.

In the negotiations on the conclusion and amendment of international investment treaties (whether BIT or TIPs), the parties must include unequivocal clauses of interpretation, definition and concept. The recent investment treaties use a hybrid approach: The Energy Charter Treaty (ECT) provides a list of assets equivalent to the term "investment" which, according to the treaty, refers to any investment associated with an economic activity in the energy sector, over time the NAFTA (currently abandoned in favor of the USMCA. On November 30, 2018, Canada, the United States and Mexico signed the new Canada-United States-Mexico Agreement at the G20 Leaders Summit in Buenos Aires. The parties will now undertake their internal process for ratification and implementation of the USMCA) connects the assets listed in its definition of "investment" in enterprise-specific activities.

4. International investment and the person of the investor

There are two aspects to the definition of the term "investor": one is the extent to which the coverage is provided by the term "investment" and the other is the one found in the agreement to invoke the dispute settlement provisions. The way in which terms such as "investor", "national" or "company" are defined in the agreement will also have direct implications for the settlement of disputes, as it will determine who has the right to claim the protection afforded by a particular agreement. The definition of "investor" could include corporate entities (private or state), individuals (including dual citizens), joint ventures and other forms of business organizations. International investment instruments regulate all aspects and status of the investor and, because they are instruments related to international investment, also discuss the issue of investor nationality.

Regarding the latter, Dolzer and Stevens[1] point out that, in the absence of a treaty rule, the general principles of international law would apply under the rules of interpretation established by international law, in accordance with the "effective" nationality governing the person of the investor[2]. Depending on the nature of the investment made, there are four main categories of investors: private investors, the investing state, international organizations and joint ventures. These categories have been previously discussed in this paper, in the chapter on the topics of international investment law. In general, the authors treat the term "investor" as well as "investment", by reference to their nature and forms

[1] R. Dolzer, M. Stevens, *Bilateral Investment Treaties*,Martinus Nijhoff Publishers, The Hague/Boston/London, 1995.

[2] A provision of interest is contained in the 1991 BIT between Israel and Romania, which in its protocol stipulates: "in respect of natural persons, an individual possessing Israeli and Romanian citizenship, who invests in Israel, shall be considered a Romanian investor under Israeli law in force for the purposes of this Agreement."

(Jeswald Salacuse or M. Sornarajah), analyzing the investor in terms of his potential capacity as a claimant (including the right of associates of a legal person to have the status of claimant), highlighting the main issues such as migration of companies or "shoping" of jurisdiction. Other authors emphasize the tools in question. These are both non-conventional, such as resolutions of international organizations, the OECD, and conventional instruments such as the Washington Convention or nearly 3,000 bilateral agreements to promote and protect investment. All these tools do not have the same object and do not pursue the same purpose. As the definition of investment varies depending on the purpose and object, so does the definition of the investor's nationality.

4.1. Definition of investment in bilateral investment agreements

These are OECD or Community instruments and adopt a simple approach. The international investment is that which involves an international (cross-border) movement of capital that changes the balance of payments, it is enough to say that the investment is international, made by a national in the foreign territory or by the foreigner in the national territory to ensure proper application of the said instruments. In fact, the national may reside abroad or the alien may reside in the national territory; the internal law of the states belongs to the procedure of definition, the operation of legal definition of the notion of resident and non-resident.

Some bilateral investment treaties (BITs) include a single definition of the term "national" that applies to both parties.

Other BITs provide two definitions, one for one contracting party and the other for the second contracting party. This type of agreement creates several rights in favor of investors, rights that they can invoke and capitalize directly before the arbitral tribunals[1], which means that the category of those investors who will be able to take advantage of conventional protection must be precisely determined[2].

For example, the Finland-Egypt BIT states that the term "national" means: "a) In the case of Finland, a person who is a citizen of Finland in accordance with Finnish law. b) In the case of Egypt, a person who is a citizen of Egypt

[1] A. Broches, *Chairman's Report on the Preliminary Draft of the Convention*, 9 July 1964, doc. Z11, reprinted in *ICSID, Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* vol. II, (1968) pp. 557, 579-582.

[2] Such issues are discussed in arbitration proceedings: *Amco Asia Corporation, Pan American Development Ltd. and P.t. Amco Indonesia v. The Republic of Indonesia*, ICSID Decision case No. ARB/81/1, 25 September, 1 ICSID reports; *Klöckner v. Cameroon*, Award, ICSID case No. ARB/81/2, 21 October 1983, 2 ICSID reports; *American Manufacturing & Trading (AMT) v. Zaire*, Award, ICSID Case No. ARB/93/1, 21 February 1997. For a detailed analysis of the decisions rendered in these cases, see E. Gaillard, *La jurisprudence du ICSID* (Pédone, Paris, 2004) or in the online subscription publication IA Reporter.

in accordance with Egyptian law."

The bilateral conventions (BITs) provide criteria for determining whether an investor is a natural or legal person who is a national of one of the contracting parties and is entitled to the protection that these instruments offer only to investors. Only the holder of the right of protection is, according to these agreements, the natural or legal person who possesses the quality of investor. If an expropriation or nationalization measure affects the assets of legal persons and if these assets will be considered as part of an investment under the auspices of the bilateral agreement, then the shareholder and the sole shareholder possessing the status of investor will be ability to exercise protection[1].

4.2. Washington Convention establishing ICSID

The ICSID Convention is the main instrument for resolving disputes between investors and states; it shall limit the competence of its Center to disputes between a Contracting State and a national of another Contracting State and shall lay down specific rules concerning the nationality of claims. Based on the Convention, ICSID was created to resolve investment disputes that may arise between investors who are nationals of one contracting party and another contracting party. The Center must therefore be competent in relation to one or other of the disputes in order for the investor to possess the nationality of a State other than the State in dispute. In order to allow the fulfillment of this condition to be verified, article 25 (2) of the Convention lays down rules governing nationality in the ICSID system. These rules apply to both individuals and legal entities.

For the individual investor, the rule is that he, generally the plaintiff, be a national of a State party to the Washington Convention, but not a national of the State in dispute, generally a defendant. It is for the State party to the Convention of which the investor is a national to define the conditions for the attribution of his nationality, natural person[2].

Article 25 point 2, in order to avoid the abuse of rights that may result from "treaty shopping", also requires the continuity of nationality. Consequently, we consider that the natural person investor must possess the nationality of a state other than the state in dispute both when the parties have agreed to submit the dispute to the Center and when the application/action is registered.

In the case of a legal person investor, the rule is that he, in general, the claimant must be a national of a State party to the Washington Convention, but

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[1] In the matter of conventional investment law or, in other words, in the matter of investment law, the distinction on which the decision adopted by the ICJ was based in the case of *Barcelona Traction* is not relevant. It is therefore not the case in conventional investment law to determine whether the legal person and its shareholder have the same nationality or whether they are not of the same nationality *(Barcelona Traction*, judgment of 5 February 1970).

[2] See J. Charpentier, *L'affaire de la Barcelona Traction devant la CIJ, Arret du 5 fev. 1970*, AFDI, XVI 1970, p. 307 et seq.

who is not the State in dispute in general, the respondent party belongs to the State party to the Convention of which to define the conditions for granting its citizenship to the investor legal entity. These conditions must, of course, comply with the requirements of customary international law[1], although, as is well known, the requirements relating to the nationality of legal persons are less strict than those relating to the nationality of natural persons, especially as regards the excellence of the substantive nationality. The rule of continuity of nationality does not apply: it is sufficient for the investor legal person to have the nationality of a state other than the state in dispute at the time of registration of the application. However, this rule also has an exception: the parties to the dispute may agree that the legal entity investor may validly notify the Center even if he has the nationality in the dispute from the moment he can be considered a citizen of a state other than the state in dispute. exercised on him by foreign interests.

4.3. Arbitral awards and nationality of the investor

The arbitral awards handed down by the ICSID tribunals took into account issues concerning the nature of the investor (as a private or public entity), place of birth, incorporation or place of registration or denial of benefits, both in respect of natural and legal persons. in which case the place of dispatch of the management control was discussed), the latter being in a much larger number, given that most of the investments are made by legal entities. In cases relevant to this subject, decisions were taken such as: decision of 24 May 1999 in *CSOB v. Slovakia*, decision of 29 April 2004 in *Tokios Tokeles v. Ukraine*, decision of 17 March 2006 in *Saluka Investments B.V. v. Czech Republic*, decision of 2 October 2006, in *ADC v. Hungary*, decision of 11 April 2007, in *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, decision of 24 September 2008, in *Micula v. Romania*, decision of 18 April 2008, in *Rompetrol v. Romania* etc.

In all cases, two issues must be resolved by the judgment: procedural quality and jurisdiction. First, if, in the case under consideration, the claimant is a natural or legal person alleging a breach of the provisions of a bilateral investment promotion and protection agreement, he may avail himself of conventional protection, which obliges the arbitral tribunal to determine in relation to bilateral agreement if the persons concerned possess the nationality of one or other of the Contracting States. Secondly, since the dispute is pending before an ICSID court whose jurisdiction is regulated by art. 25 of the Washington Convention, the arbitral tribunal must also determine whether the conditions determining its jurisdiction are met and in particular determine whether the claimant possesses the

[1] These conditions are not specified in the Washington Convention, but it is clear that customary international law in this area must be respected, and in particular the obligation to have a substantial link of nationality established by *Nottebohm* (*Liechtenstein v. Guatemala*, ICJ, judgment of 6 April 1955).

nationality of a Member State of ICSID in accordance with art. 25 (2) (a) if it is a natural person or 25 (2) (b) if it is a legal person. In order to determine the nationality of a natural or legal person within the meaning of a bilateral agreement, it is necessary to examine the relevant provisions of this agreement, which are insufficient in themselves as they often refer to the domestic law of the contracting parties. international custom. Also, art. 25 of the Washington Convention provides some clues and lists a few exceptions, but essentially refers to the national law of the state of which the investor is a citizen. The national law must in turn be interpreted and applied by arbitral tribunals in the light of the principles and norms of international customary law.

In the case of *Champion Trading v. Arab Republic of Egypt*[1] (jurisdiction decision of 21 October 2003), three individuals and two legal entities applied to ICSID on the basis of a bilateral treaty between the United States and Egypt on 29 September 1982, requesting that that the acts of the Egyptian government violated the rights they held under the treaty. The three applicants were born in the United States to an Egyptian father and an American mother. According to Egyptian law, any person born to an Egyptian father possesses Egyptian nationality, regardless of whether the birth took place in Egypt or outside this state. The legal situation was complicated by the fact that the father renounced his nationality of origin and became an American citizen before the birth of his three sons. After examining Egyptian law, the arbitral tribunal held that the acquisition of American citizenship did not result in the loss of Egyptian citizenship and, as a result, through the automatic acquisition game, which three applicants also hold Egyptian nationality. The three applicants claimed that even if they were presumed to be holders of two nationalities, American and Egyptian, it was necessary to take into account the actual nationality link (according to international case law[2] and especially the *Nottebohm* judgment of ICJ on April 6, 1955) and, depending on this American nationality, must be taken into account (Egyptian nationality) and, as a final conclusion, being citizens of a state other than Egypt, may be litigants before ICSID. The arbitral tribunal did not allow this construction; it relied on Article 25 (2) (a) of the Washington Convention, according to which the applicant, a natural person who has two nationals, cannot validly apply to ICSID if one of those nationals belongs to the respondent State.

Regarding the determination of the citizenship/nationality of legal per-

[1] *Champion Trading Company Ameritrade International Inc., James T. Wahba, John B. ahba, Timothy T. Wahba c.Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 February 2003.

[2] Other cases where a similar problem has been addressed: *Compania de Aguas Aconquija, S.S. & Compagnie Générale des Eaux v. Argentine Republic* (the *Vivendi* case), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340; *LG & E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/01, Decision on Objections to Jurisdiction, 30 April 2004.

sons, there may be inherent difficulties such as those highlighted in the case presented in all specialized works, without exception - *Tokios Tokeles v. Ukraine*[1] (decision on jurisdiction of 29 April 2004). In fact, a Lithuanian advertising agency, Tokios Tokeles, filed a complaint with ICSID, alleging violations by the Ukrainian human rights authorities, which its Ukrainian subsidiary held under the bilateral agreement for the promotion and protection of investments[2], concluded between Lithuania. and Ukraine on 8 February 1984. Ukraine raised the objection of incompetence, stating that the applicant company did not have Lithuanian nationality as its share capital was 90% owned by natural persons of Ukrainian nationality. The arbitral tribunal, with the dissenting opinion of its chairman[3], rejected the objection of incompetence. The arbitral tribunal reached this conclusion seeking the common intention of the parties as it results from the bilateral agreement. According to art. 1 (2) (b) of the Agreement, any legal entity established in the territory of that Contracting Party, in accordance with its laws and national regulations, was to be considered as having the nationality/ citizenship of one of the Contracting Parties. This was, according to the arbitral tribunal, the situation of the Lithuanian company Tokios Tokeles. The arbitral tribunal verified its own competence to ensure that the solution adopted by the bilateral agreement complies with art. 25 point 2 (b) of the Washington Convention, which refers to national law to determine the nationality of legal persons. In the present case, the national law inclines in the direction of two criteria: the place of the registered office and the place of incorporation. In this case, both of these criteria designate the Lithuanian nationality. Article 25 (2) (b) allows the parties to the dispute to agree that a legal person belongs to a State other than the State in dispute, even if it is established in the territory of that State. In conclusion, the arbitral tribunal ruled that there was no agreement to that effect between Lithuania and Ukraine[4].

5. Domestic law and the definition of foreign investment in some states

Almost all states have their own legislation on foreign investment; there are a large number of foreign regulations governing foreign investment, each of

[1] *Tokios Tokeles v. Ukraine*,ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004.
[2] The terms used in the BIT were: „Any entity *established* in the territory of the Republic of Lithuania in conformity with its laws and regulations".
[3] The President of the General Court, P. Weil, stated: „When it comes to mechanisms and procedures involving States and implying therefore, issues of public internațional law, economic and political reality is to prevail over legal structure, so much that the application of the basic principles rules of public internațional law should not be frustrated by legal concepts and rules prevailing in the relations between private economies and juridical players", *Tokios Tokelés*, para. (24).
[4] D. Carreau, P. Juillard, *op. cit*., pp. 420-422.

which reflects the economic situation of each state, their attitude towards capital imports, strategies adopted to attract, maintain these investments and investment relations and, at the same time, to promote national policy towards foreign investment. There are also trends due to the process of global development of international integration and increased globalization, but also in the mutual exchange of information there is a certain conceptual uniformity on investment, especially international, both in domestic law and doctrine.

There are two distinct legislative approaches to defining the concept of foreign investment. Thus, in some national legislations, a synthetic definition of the notion is formulated, and in others we find only an enumeration of those activities considered to be foreign investments.

5.1. Romania

While in most countries it has been recently revised (or is under review), the domestic legislation on foreign investment, and international investment treaties have notified amending initiatives. On a similar evolutionary scale is the revision of investment policies, in line with UNCTAD guidelines[1].

In the face of these revision movements, Romania has reached the point where it must rely on comprehensive legislation, in which to find complete and harmonized regulations with the international law of foreign investments and in which to better regulate the conditions regarding the granting of certain facilities[2], in order to predict and prevent disputes, especially those resulting from the regulatory interpretation. Any refusal or delay in the field of legislative regulation of this field has negative effects equally on both the Romanian state and international investments, as the national legal framework for investments is the result of legislative and regulatory actions of states individually and whereas the contractual framework resulting from negotiations between states and investors, as well as among investors, the international legal framework has grown through

[1] UNCTAD is the acronym for the United Nations Conference on Trade and Development. As noted in the field of international investment policies, the efforts of G20 ministers adopted for the first time in July 2016 (*soft law*), in the debates and analyzes of the global investment policy conducted by UNCTAD, a set of specific principles.

[2] In Romania, in order to attract international investments, the state granted financial facilities such as: Government Decision (G.D)no. 1680/2008 for the establishment of a state aid scheme regarding the assurance of sustainable economic development; H.G. no. 753/2008 for the establishment of a state aid scheme regarding regional development by stimulating investments; G. D. no. 797/2012 on the establishment of a state aid scheme to support investments that promote regional development through the use of new technologies and job creation. IBM, Endava, DB Global Technology (Deutsche Bank), Dell, SCC Services, Telecom Global Services Center and Microsoft benefited in 2013 from financing agreements based on the state aid scheme in IT projects that create at least 200 jobs, according to government data. The total value of these investment projects exceeds 160.5 million euros, state aid which they will receive being of 67 million euros, 3151 jobs will be created in maximum 3 years from the completion of the investments.

agreements and other practices that states have developed among themselves[1].

The Romanian state must be based on unequivocal or precisely determined regulations regarding: objectives to be regulated (investor protection, economic development, job creation, technology transfer, social development, environmental protection or sustainable development), purpose and definitions (exclusions, temporary purpose, definition of investor, definition of investment or sufficient and exact provisions on concession contracts), conditions of entry (admission, freedom of establishment, sectoral restrictions, national security, public order, environmental protection, public health, restrictions on acquisition ownership of land, minimum performance requirements), registration and authorization, rights and guarantees granted to the investor (national treatment and exceptions, fair and equitable treatment, most-favored-nation clause, direct or indirect expropriation and its conditions, compensation, free transfer of capital, entry and residence of foreign personnel, access to local finances, stabilization clause), obligations of the investor (compliance with domestic law, tax and labor law obligations, corporate social responsibility, accounting and tax returns), promotion and facilitation (incentives for investment or facilities), as well as sufficient regulations on how to resolve disputes (dispute resolution at national territorial level, international arbitration and alternatives to arbitration, domestic versus international forums). The notions regarding the institutional rules are not enough either (the authority in the field, the investment promotion agencies and the one stop shop). Another aspect that needs to be well regulated in the future is the relationship with international agreements and transparency.

From the analysis of the successive evolution of the legislation, it is observed that in the 1970s the legal framework specific to that moment was created for attracting foreign capital by adopting Decree no. 424/1972 for the establishment, organization and operation of joint ventures in the Socialist Republic of Romania (Decree 424/1972 was published in the Official Gazette no. 121 of 1971). This decree regulated foreign direct investment only in the form of participation in the establishment of a new company with mixed capital, of which 51% Romanian, excluding the establishment of subsidiaries, branches or other dismemberments, there is no definition of foreign investment or their classification in investments direct and portfolio. Since that period, the number of free zones has increased internationally and the start-up of enterprises with wholly foreign capital has begun, which has determined for Eastern European countries a certain closeness to these trends, although foreign companies have realized that they will be treated by to the Romanian public authorities with more severity and that they will be forced to face the bureaucracy, more than their Romanian partners. We repeat that, usually, in Romania, before 1990, the "investments" took the form of associations (joint-venture), in which the foreign partner holds 49%, and the local one 51%.

[1] J.W. Salacuse, *The Three Laws of International Investment*,OUP 2014, p. 305.

After 1989, normative acts were adopted such as the Decree-Law no. 96/1990, published in the Official Gazette no. 37 of 1990, regarding some measures for attracting foreign capital investment in Romania and Law no. 35/1991 regarding the foreign investment regime, published in the Official Gazette no. 73 of April 10, 1991, which repealed the enunciated Decree and which included an enumeration of the activities considered foreign investment[1].

Government Emergency Ordinance (GEO) no. 31/1997 regarding the regime of foreign investments in Romania, published in the Official Gazette no. 125 of 1997, repeals the Law no. 35/1991, enumerating the modalities of the constitution of a foreign investment, regulating the activity of reinvestment of the profit, eliminating, however, the purely contractual forms of the constitution of the investments[2]. As it was easily observed from their contents, both normative acts, the Law no. 35/1991 and the GEO no. 31/1997, regulated both foreign direct and portfolio investments, without differentiating each category of foreign investments through its own legal regime. Also in 1997, the GEO no. 92/1997 on the stimulation of direct investments, published in the Official Gazette no. 386 of 1997 and approved by Law no. 241/1998 (Official Gazette no. 483 of 1998), regulated separately the foreign direct investments from the portfolio ones (indirect investments), conferring a definition.

From the point of view of international instruments, it must be taken into account the fact that both as a member of the Romanian state in the European Union (currently, the European Union appears with 0 BIT and 69 TYP of which there are 55 international agreements include provisions on investments, according to the official UNCTAD website[3]), as well as through bilateral agreements concluded in the investment field by Romania before obtaining membership, the definition of international investment is found in these instruments, according to

[1] According to art. 1 of the mentioned law, are activities through which a foreign investment can be made: the establishment of commercial companies, subsidiaries or branches, with fully foreign capital or in association with Romanian individuals or legal entities; participation in the increase of the share capital of an existing company or the acquisition of shares or shares in such a company, as well as bonds or other trade offers; concession, rental or location of the management of an economic activity, public services, production units belonging to autonomous utilities or companies; the acquisition of the property right over some movable or immovable goods, over other real rights except for the property right over the lands; acquisition of industrial and intellectual property rights; the acquisition of claims or other rights related to benefits with economic value associated with an investment; the purchase of production spaces or other buildings with the exception of dwellings, other than those auxiliary to investment, as well as their construction; contracting the execution of works of exploration, exploitation and division of production in the field of material resources.

[2] Government Emergency Ordinance (GEO) no. 31/1997 regarding the foreign investment regime in Romania, Official Gazette no. 95 of 1997, in force from 19 June 1997 to 15 December 1998, being repealed and replaced by Government Emergency Ordinance 92/1997. Subsequently, Law no. 523/2001 for the rejection of GEO no. 31/1997 regarding the foreign investment regime in Romania, Official Gazette no. 653 of October 17, 2001.

[3] See the official UNCTAD page available at: https://investmentpolicyhub.unctad.org/IIA/IiasByCountryGrouping#iiaInnerMenu, accessed on 14.03.2019.

the negotiations and intentions of the signatory parties.

In conclusion, by reviewing the current legislative framework, not only should the definition of international investment and the quality of foreign investor be reformulated, but the objectives, purpose, conditions of entry (admission, freedom of establishment, sectoral restrictions, national security, public order, environmental protection, public health, restrictions on the acquisition of land ownership, minimum performance requirements), the registration and the authorization, the rights and the guarantees granted to the investor, the obligations of the investor, the promotion and the facilitation, and the sufficient regulations on how to resolve disputes, the institutional rules and, last but not least, the relationship with international agreements and transparency.

5.2. Australia

The Australian government is pursuing a policy of encouraging international investment. The official website of the government itself points out that: Australia welcomes foreign investment. They have helped build Australia's economy and will continue to enhance the well-being of Australians by supporting future growth and innovation. The foreign investment supplement improves the domestic economy; without foreign investment, production, employment and incomes would all be lower[1]. At the same time, the official government website also provides a definition as provided for in the 1975 Law on acquisitions and foreign takeovers.

The foreign investment occurs when an individual, business or investment vehicle (such as a pension fund) from outside Australia decides to start a new business in Australia or buy property or shares in a business owned by Australians.

The foreign investment has traditionally been a part of Australia's economic development and continues to benefit Australia, including by providing capital to finance new industries and improve existing industries, increase infrastructure and productivity, and create employment opportunities.

There are two main ways in which foreign residents or companies can invest funds in the Australian economy:

• The portfolio investments refer to the acquisition of securities (such as shares or bonds) or capital and debt transactions that do not give the investor any control over the operation of the enterprise. Common examples include buying property, shares in Australian companies or government bonds through foreign pension funds or pension funds.

For example, the pension funds and the financial institutions are major portfolio investors, spreading investments in a portfolio of assets in international

[1] See *http://www.dfat.gov.au/trade/investment/Pages/ about-foreign-investment. aspx*, accessed on March 14, 2019

markets to maximize returns and balance investment risks on behalf of their members and investors.

Example of the portfolio investment in Australia: Australian Super, a well-known Australian pension fund, is acquiring shares in a number of companies listed on the New York Stock Exchange. The top five stocks in international markets are Tencent Holdings, Amazon.com, Alphatbet (Google), Oracle Corp and Alibaba Group Holding.

• The foreign direct investment (FDI) is when an individual or entity from outside Australia sets up a new business or acquires 10% or more of an Australian company and thus has some control over its operations. Common examples include setting up Australian branches of multinational companies or joint ventures between Australian and foreign companies.

Example of direct investment in Australia: at the beginning of September 2017, GFG Alliance officially concluded the trading of the acquisition of Whyalla's South Australian steel works. Operating as Liberty Onesteel, the company produces a wide range of steel products, including wire, steel rods, fittings and rails.

The following types of investments are also found in the legislative regulation:

- Derivative financial instruments; these are financial instruments that are linked to a particular financial instrument, index or commodity, through which certain financial risks can be traded on the financial markets in their own name. They allow the parties to trade specific financial risks (such as interest rate risk, currency risk, capital and commodity risk, credit risk, etc.) to other entities that are more willing or appropriate to take over or manage those risks.

- Reserve assets (recorded only for Australian investments abroad) are financial assets effectively controlled by the Central Reserve Bank of Australia.

- Other investments represent the residual category and capture all other types of investments (except reserve assets), such as currency and deposits, loans, trade credits and receipts and payments accounts.

Investor-State Dispute Resolution (ISDS) is a mechanism in a Free Trade Agreement (FTA) or investment treaty that gives foreign investors, including Australian investors abroad, the right to access an international court for the settlement of investment disputes. This mechanism is considered very useful.

To ensure that foreign investment proposals are consistent with Australia's national interest, the Australian government is reviewing major foreign investment proposals on a case-by-case basis through the Foreign Investment Review Board (FIRB). The FIRB examines significant foreign investment requests that fall within Australia's foreign investment policy and the Act on acquisitions and foreign takeovers from 1975 and makes recommendations to the treasurer, on behalf of the government, on these proposals.

The domestic legislation is balanced and based on an effective institutional framework. To ensure that foreign investment proposals are consistent with

Australia's national interest, the Australian government is reviewing major foreign investment proposals on a case-by-case basis through the Foreign Investment Review Board (FIRB). The FIRB examines significant foreign investment requests that fall within Australia's foreign investment policy and comply with the Act on acquisitions and foreign takeovers from 1975 with subsequent amendments and makes recommendations to the Treasurer, on behalf of the government, on these proposals. Therefore, international investment operations are directly supervised by the *Foreign Investment Review Board* and the *Department of Treasury*. According to the regulations in force, the competent bodies may reject foreign investment proposals if they are considered to be contrary to national interests.

The negative answer shall be sent at least 40 days after receipt of the proposal and shall relate in particular to:

- the acquisition of over 15% of an Australian company, which has a net worth of more than A $ 50 million (Australian dollars);

- the acquisition of shares smaller than 15%, but which would lead to the achievement of a proportion, owned by foreigners, of over 40% of the total shares of companies with assets of over A $ 50 million;

- the case of a foreign company wishing to own land, shares or rights over mineral reserves worth over A $ 50 million;

- arrangements requiring Australian business, valued at more than A $ 50 million, to be controlled by one or more foreigners, through the acquisition of shares, the modification of assets and the issuance of new shares, through leasing, rental, management or other forms of profit sharing.

From a procedural point of view, the Australian Central Government also issues a prior authorization if a foreign investor intends to take over an *offshore* company, whose Australian subsidiary has a value of more than A $ 50 million.

The law has been amended successively, in line with the provisions of interest in the field of taxation, treasury, criminal law and regulations specific to companies or in the field of agriculture[1] (for example, in February 2018, the Australian government launched new guidelines which clarify that foreign investors can purchase only agricultural land where there was an open and transparent sale process), so that its repeal was not imposed, instilling in investors a climate of stability and predictability.

The Australian Government's Department of Foreign Affairs and Trade

[1] Foreign-proposed investments in agricultural land (excluding foreign government investors) generally require approval if the cumulative value of a foreign person's farm exceeds $ 15 million; the exceptions apply to investors covered by international trade agreements concluded by Australia. All purchases of agricultural land by foreigners, whether they need approval or value, must be notified to the Foreign Property Registry of the Australian Tax Office, an example that should be followed by Romania. See, in this sense, the efforts of the Romanian Academy to regulate the way of acquisition and exploitation of agricultural lands by foreign investors.

produced in October 2017, through the Investment and Economy Division, a publication called *International Investment Australia 2016* which, in Section I *Definition and concepts*, details this topic, with a focus on equity investment, equities or the income obtained from these investments.

The Australian Bureau of Statistics (ABS) publishes official statistics on Australia's international investment, compiled using international standards set by the International Monetary Fund and the United Nations. The ABS publishes quarterly international investment statistics in *Balance of Payments and International Investment Position, Australia*.

5.3. China

In early 2015[1], the Chinese Ministry of Commerce (MOFCOM) launched the draft new law regulating foreign investment, in the public debate. The 3,000 delegates to the National People's Congress of China (NPC) approved the new law on Friday, March 15, 2019. The proposed law significantly reduces barriers to foreign investment, while increasing the control of foreigners trying to evade regulations on investing in small industries. The new law introduces five major changes, including new elements in the definition of foreign investment. In this regard, a broader definition of foreign investment will be used. Instead of regulating different types of foreign legal investors, the new law on foreign investment creates a new definition for the term foreign investment[2]. Foreign investment is now defined as: 1. The establishment of a trading company in China; 2. Acquisition of shares, participations, trading or voting rights in a Chinese entity; 3. Granting financing for a period longer than one year to an entity referred to in point 2; 4. Acquisition and exercise of the rights to exploit natural resources or to develop and exploit infrastructure; 5. Acquisition of land use rights or real estate rights; 6. Acquisition of control rights over a Chinese entity owned by contracts, trusts or otherwise.

In addition, when a transaction carried out outside China leads to the acquisition of control over a Chinese entity by a foreign investor, this will be considered foreign investment as well.

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[1] See, for more details, *http://www.china-briefing.com/news/2015/ 01/21/breaking-news-china-releases-draft-foreign-investment-law-signaling-major-overhaul-foreigninvestment;html#sthash.SY2Y1mHY.dpuf*, last accessed in March 2015.

[2] See the definition in the draft of the new law: „Regarding the Foreign Investor, on the one hand, the definition of "foreign investor" is based upon an "actual control" test, i.e. enterprises (whether based onshore or offshore) under the control of foreign investors will be treated as foreign investors. On the other hand, investments made by foreign investors within the territory of China but controlled by Chinese domestic investors, shall be deemed as the investment made by the Chinese investors.Regarding the Foreign Investment, it covers investments on green areas, investments through merger and acquisition, medium and long term financing, investments on exploration and exploitation of natural resources, acquiring the control over domestic enterprises via contracts or trusts etc.".

Until the emergence of this law which clarifies the definition of foreign investment, but also the definition of foreign investor, in China there were several regulations that led to a definition of foreign investment, but lacking an unequivocal codification of these terms[1]. There was, therefore, no unified legal basis. According to the official announcement by MOFCOM, the new foreign investment law is intended to introduce a series of reforms in the regulation of foreign investment, to further facilitate foreign investment in China. Following the enactment, the foreign investment law will replace the three existing foreign investment laws[2] governing the legal regime of foreign enterprises that have invested in China, and a unified basis will be created, regardless of how they are organized. The Chinese government appears to be in a hurry to pass the investment law as an olive branch for the United States amid trade war negotiations[3]. However, many in the Chinese business community see this law as a set of intentions rather than a specific set of rules. There are fears that different avenues of interpretation may be paved. Only jurisprudential practice will prove, in the coming years, the effectiveness of the new law.

It should be noted that in 1978, the Chinese state laid the foundations for a policy of reform and openness to the outside world. As a result of these policies, starting in the following decade, 1981-1990, this country benefited from more foreign direct investment than any other developing country, so that between 1993 and 1995, the flow of foreign investment to China was the second in the world, being surpassed only by foreign investments made in the United States.

In 1979, the Law on the Association between Chinese and Foreign Capital was promoted, establishing free zones, where foreign investors were given facilities to invest if they demonstrated that all production would be exported. The foreign investors could partner with Chinese to sell in the Chinese market. Proposals for such associations were considered more seriously and approved only if they served significant national interests, for which China had to seek foreign aid. Gradually, China's dependence on the world economy increased. China has increased the number of free zones, allowing enterprises with fully foreign capital to operate. However, they are still rare because: (a) foreign companies

[1] For example, see *Law of the People's Republic of China on the State-Owned Assets of Enterprises şi Provisions on the Foreign Exchange Administration of the Overseas Direct Investment of Domestic Institutions* issued by the State Administration of Foreign Exchange („SAFE"), where, in art. 2 shows that: „the term Overseas Direct Investment refers to a domestic institution's overseas formation of an enterprise or project or overseas acquisition of the ownership of, the controlling stake in, or the business management right to an existing enterprise through formation (in the form of exclusive investment, joint investment or cooperation), merger, acquisition or purchase of shares, upon the approval of the competent administrative department of overseas direct investment."

[2] Thus, the draft of the new law is intended to replace the three existing legal provisions in China at the moment: the trio of the Sino-foreign Equity Joint Venture Enterprise Law, the Sino-foreign Cooperative Joint Venture Enterprise Law and the Wholly Foreign-invested Enterprise Law as well as its implementation rules and ancillary regulations (collectively, "Three FIE Laws").

[3] According: https://www.bbc.com/news/business-47550559, accessed on 14.03.2019.

realize that they will be treated more severely by Chinese public authorities, and (b) they are forced to face more bureaucracy than their Chinese partners[1]. It should be noted that, in China, "investments" usually take the form of joint ventures, in which the foreign partner holds 49% and the Chinese partner 51%, as in Romania before 1990. The Chinese government has published, in April 2010, a document entitled "Opinions of the Council of State for further improving the activity in the field of use of foreign investments".

Broadly speaking, the document contains a tendency to treat foreign investment at the national level and favors those investments that bring very high added value, as well as more efficient operations, especially in the western and central regions of China. It should be noted that the document entitled "Opinions" of the Council of State is the basis for the next revised edition of the "Catalog of foreign investment in industry", which will provide more guidance on various types of investment. China is not a member of the WTO Government Procurement Agreement (GPA), so it does not have to open government procurement to companies outside China, although it is currently in the process of submitting a third application for GPA membership. This is a fundamental trade issue[2]. It becomes, however, an investment issue if the government discriminates against foreign investors in favor of Chinese companies. Such discrimination has taken place in China's "indigenous innovation policy", which until recently has given priority to national companies using the new technology. This policy has now been abandoned, and China has made impressive progress in developing a regulatory framework to attract and promote investment over the past three decades. Policies to encourage FDI[3] have been successful. Despite competition from other investment destinations in recent years, China continues to be cited in foreign investor surveys as a favorite destination for foreign direct investment[4].

However, following WTO accession in 2001, China turned to "national treatment" of foreign investors, which means equal treatment for foreign investors over domestic investors.

The enactment of the new regulation in the field of foreign investment means a revision of the national security system, which will lead to the consolidation and extension of the national security rules (NSR). According to the administrative regulations issued by the State Council in 2011, NSR applicable to a transaction with foreign investment is required under relatively limited conditions, such as those related to a foreign investment in a company with domestic capital in relation to the military or national defense and in connection with the acquisition by a foreign investor from a Chinese investor of a package of shares enabling control in an enterprise or in one of a number of key sectors of industry.

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[1] See G. Sonea,*Caracteristici şi orientări ale politicii Chinei în domeniul investiţiilor străine*.
[2] OECD (2003), OECD (2006) and OECD (2008).
[3] MOFCOM (Ministry of Commerce of the People's Republic of China) website: *www.fdi.gov.cn*
[4] For example, China ranked first from 2002 to 2012 in A.T. Kearney FDI Confidence Index, A.T. Kearney (2010).

Thus, the new law significantly extends the scope of the NSR to cover any foreign investment that "endangers or could endanger" national security. In this way, the range of industries subject to national security rules (NSR) is significantly expanded, although in applying the regulations in force NSR, MOFCOM has given a broad interpretation of the term "key industries" to include certain technology-related market sectors, with no apparent link with national security, in order to examine a proposed transaction considered to be "high profile" depending on the involvement of a foreign multinational or a sensitive domestic industrial sector. The new law also stipulates that an NSR decision cannot be challenged, either administratively or judicially.

Apart from the domestic legislative framework, we mention that there were definitions of investment and investor in the bilateral foreign investment treaties between China and other states[1].

In conclusion, China, through the new regulation, will continue to cautiously remove the existing monopoly in certain sectors and unify existing regulations in the field of foreign investment, successfully simplifying and crowning domestic economic reform policy.

6. Elements of doctrine regarding the definition of foreign investment

In general, this topic debates both the doctrine of the best specialists and the body of ideas, theses and certain legal studies in the university, academic space. Also in this context, the authors are reserved in presenting a subjective definition, preferring to leave the establishment of a definition at the discretion of the parties. There were concerns to analyze the matter of foreign investment as it appears from the international conventional provisions and from the international instruments of profile, as well as from the regulations belonging to the domestic law. The absence of a broad and comprehensive legal doctrine does not support the development of international investment law. The specialists generally agreed with the existence of general criteria that characterize international investment, such as the existence of a certain duration, a regularity of profit and profitability and an element of risk[2]. The economic doctrine has been concerned with the notion of foreign investment originally considered an economic concept and, as a result, there are several definitions of the term investment. Thus, in a first form, it is stated *lato sensu*: "investment represents the sacrifice of a present

[1] See e.g. BIT between China and Germany, which entered into force on 11 November 2005, *Belgian-Luxembourg-Economic Union-China treaty (Brussels, 4 June 1984 – Entry into force: 5 October 1986), New Zealand-China BIT (Wellington, 22 November 1988 – Entry into force: 25 March 1989)* or *Poland-China BIT (Beijing, 7 June 1988 – Entry into force: 8 January 1989).*

[2] See C. Schreuer, *The ICSID Convention: A Commentary*, pp. 121, 125.

consumption for a (possible and uncertain) consumption in the future"[1]. The mentioned definition allows to distinguish the main characteristics of the foreign investment, namely: duration; risk, profit and the element of foreignness, which is an essential feature of foreign investment.

The legal doctrine takes over the economic definition of investments is not beneficial for several reasons very well specified in the French doctrine: "such an approach does not take into account the function of law arising not from legislative acts, but from the normative nature of law. If there is an investment right, it is due to the fact that the states and other operators involved in the investment relations have in this field rights and obligations stipulated in the respective acts. Thus, the definition of the investment will change in relation to the content and purpose of the normative act"[2].

Other authors point out that: "the investment represents the purchase of property, shares, bonds or other goods and securities or deposits of money with financial institutions in order to ensure an income and capital increase"[3].

A large part of the doctrine (legal literature, but also domestic law) has stated that: the main ways of making an international investment are: a) the establishment in the host state of a commercial company or a dismemberment of a main commercial company; b) participation in the establishment of share capital in a company with foreign capital in any form permitted by law; c) taking over or merging with a foreign company; d) the purchase of shares or bonds on the foreign market or issued by a foreign company; e) granting a credit or loan to a foreign economic operator; f) concluding contracts involving the transfer of technologies, new knowledge, but also leasing and franchising contracts; g) the transfer of rights regarding the industrial and intellectual property.

It can be concluded that only through well-structured clauses included in international investment treaties can the terms "investment" or "investor" be defined, aspects that bring to the fore the special importance of negotiating, concluding and amending international treaties.

7. Forms of international investment

According to the previous presentation, it was observed that the launch of a definition of this type of investment is directed to international treaties (preferably a multilateral investment agreement), respecting, of course, the freedom of will of the parties, avoiding restricting the meaning of the term "international investment", the tendency being towards variety, as a result of the economic im-

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[1] C. Munteanu, C. Vaslan, *Investiţii internaţionale: introducere în studiul investiţiilor străine directe*, Ed. Oscar Print, Bucharest, 1995, p. 1; I. E. Anghel, *Investiţii străine directe în România*, Ed. Expert 2000, Bucharest, p. 39.
[2] D. Carreau, P. Juillard, *op. cit.*, p. 382.
[3] R. P. Vonica, *Dreptul societăţilor comerciale*, Ed. Lumina Lex, Bucharest, 2000, p. 346.

peratives of globalization and of the increase of the number of international transactions having as object the investments. The forms of international investment are currently reaching a wide variety, frequency and size, evolving through diversification, now reaching new forms such as joint ventures or production distribution agreements[1]. Some authors[2] point out that, unlike previous forms of contract that favored the foreign investor, modern forms of the foreign investment contract tip the contractual balance in favor of the host state.

In establishing the forms, the place of the investor's registered office or domicile (foreign or domestic investments), citizenship, resulting benefits, specific investment policies, control or cross-border movements are taken into account. The criterion of the investor's registered office or domicile is also provided by the Romanian law on foreign investments[3]. Also, investments can be classified into: a) public investments or state investments (international investment relations are established between two subjects of public international law, the host state and the international investing body, through bilateral agreements of state - state or state - international body); b) private investments (direct and portfolio investments that have a different legal regime established by regulations of domestic law, having different protection and guarantee mechanisms).

While some authors debate this topic through attempts to present certain classification criteria, other authors[4] include forms of international investment in the generic term "investment contracts", presenting an identification of these types of contracts, as well as the related arbitration practice.

The portfolio investments consist in the acquisition and holding by the investor of securities and the receipt of dividends for the invested capital. Direct investments involve the direct control of the investment owner over the enterprise or his participation in the control of the enterprise and the obtaining of the profit from the invested capital. The control over the investment is expressed in a share that reflects the investor's participation in the company's profits and losses[5].

For example, international investments can be: direct investments[6], portfolio investments, international loans (a particular type of international loan, radically distinct from other types, is the state loan, ie a loan granted to a state or a state agency), international bonds, provision of services and other loans (such as a company often sells goods on credit to a company in another state), as well as

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[1] See M. Sornarajah, *op.cit.*, pp. 116-119.
[2] *Ibidem*, p. 116.
[3] GEO no. 92/1997 on stimulating direct investments, Official Gazette no. 386/1997 approved with modifications by Law 241/1988 for the approval of GEO no. 92/1997 regarding the stimulation of direct investments, published in the Official Gazette no. 483/1998.
[4] See D. Rudolf, S. Christoph, *Principles of International Investment Law*,Oxford University Press, second edition, 2012, pp.79-86.
[5] E. Moise, *Investiţii străine directe*, Ed. Victor, Bucharest, pp. 101-133; M. Matei, *Investiţiile străine directe-funcţii şi evoluţii 1990–2000*, Ed. Expert, Bucharest, 2004, pp. 19-28.
[6] See OECD publication: *Glossary forms part of the 4th Edition of the OECD Benchmark Definition of Foreign Direct Investment*, important due to the statistical support provided.

other contractual arrangements (various long-term investment legal relationships between individuals or legal entities located in different states).

The United Nations Conference on Trade and Development (UNCTAD) considers foreign direct investment to be: "long-term investments of the parent company in the home economy in a subsidiary or branch of a host economy (1999 report p 47). According to the same document, foreign direct investment includes: equity, goodwill (for example, technology or know-how held by the foreign investor) and/or capital investments greater than 10% of total share capital, reinvested profit, etc. The UNCTAD document states that portfolio investments are those investments made in companies that do not represent 10% of the share capital. "Duration" implies the existence of a lasting relationship between the direct investor and the enterprise, but also a significant influence from the investor on the management of the enterprise"[1].

In another opinion, foreign investments can be classified into:

a) investments having a dual nature - institutional and contractual -, such as the establishment of companies with full or partial foreign capital or participation in the increase of share capital through various means;

b) investments of a purely contractual nature, among which we mention: concession contracts, rental contracts, the acquisition of tangible or intangible goods, etc. [2].

As has been observed, a certain methodology can be established for classifying an investment in one or another of the various forms it can take. There is a real tendency (see the 1965 Washington Convention for the creation of ICSID) not to promote a clear definition of foreign investment, leaving it to the discretion of arbitral tribunals, especially ICSID, while ICSID[3], through its guidelines in practice, emphasizes the importance of the existence of international treaties containing solid clauses for the interpretation of specific terms.

The solution of leaving it to the arbitral tribunals to define the foreign investment according to the pending cases may be an appropriate solution, but it may also require a unitary arbitral practice, which cannot be achieved at present. As for the role of international investment agreements, a very precise text needs to be drafted. Romanian law and Romania's conventional practice also provide examples, but we must not forget that the BIT-type formulas, promoted by the USA and Canada or the European Union, substantiate a certain perspective regarding the definition and form of investments. From the point of view of dynamics and international character, the elaboration of variants is not useful for a real impact in practice, aspects that have been observed in most specialized works.

[1] Art. 3.3; 117 *OCDE Benchmark: Definition of Foreign Direct Investment.* Fourth edition, 2008.
[2] D. Al. Sitaru, *Dreptul comerţului internaţional*, vol. I, Ed. Actami, Bucharest, 1995, p. 21.
[3] See ICSID in the paper entitled *Practice Notes for respondents in ICSID Arbitration*, 2015.

8. Sources of international foreign investment law

The importance of the sources of international investment law lies in the fact that principles of international law can be accepted only if they are based on an accepted source of public international law. Regarding the presentation of the general sources of international law, as they are established in art. 38 (2) of the Statute of the International Court of Justice, we will indicate the sources on which the principles of international law on foreign investment are based. In accordance with the provisions of art. 38, there are three fundamental sources of international law: international conventions, international custom and general principles of law recognized by states. The jurisprudence and the doctrine are not autonomous sources of international law, but are additional, secondary[1], although, in the case of the formation and evolution of international investment law, they have played a key role.

The international legal framework for investment is based on international law. As the national legal framework for investment is the result of individual legislative and regulatory action by states and the contractual framework results from negotiations between states and investors, as well as among investors, the international legal framework has grown through agreements and other practices that states have developed among themselves[2].

8.1. International conventions

As a regulatory basis for the interpretation and application of international conventions (treaties, agreements, conventions, pacts, protocols, agreements, etc.) in general, we mark the role of the Convention on the Law of Treaties concluded by States (Vienna, 1969) and the Convention on the Law of Treaties by states and international organizations (Vienna, 1986). Specifically, regional treaties such as NAFTA (currently abandoned for USMCA) or ASEAN can be exemplified, as well as sectoral treaties such as the Energy Charter, as will be set out below. It is a well-known fact that there is no multilateral international treaty on foreign investment and that such attempts have been made in the history of international relations, the first and most significant was the 1948 Havana Charter[3], which aimed to create a World Trade Organization. Other initiatives were:

[1] See I. Brownlie, *The Principles of Public International Law*, 2003, pp. 18-25.
[2] J.W. *Salacuse, The Three Laws of International Investment*, OUP 2014, p. 305.
[3] The Havana Charter succeeded in establishing general principles regarding investment and the actions or inactions of states whose violation could have attracted their international responsibility. Articles 11 and 12 of the Havana Charter provided that no State Party shall take unreasonable or unjustified measures with regard to investments and shall ensure fair and equitable treatment of investments.

(i) the creation of a code of conduct on foreign investment within the UN Commission on Transnational Corporations (United Nations Commission on Transnational Corporations: UNCTC), as developed in Chapter I, the idea being abandoned in the early 1990s due to the shift of most developing countries to economic liberalism; (ii) the attempt to adopt a multilateral investment treaty in the OECD in 1992; the issue of the adoption of such a general treaty was mandated at the second Ministerial Meeting in Singapore in 2003, and after the Ministerial Meeting in Cancun, it was removed from the agenda of the Organization due to the fervent opposition of developing countries, as I mentioned earlier. The issue of developing multilateral rules on international investment, as well as that of achieving a beneficial outcome, remains an open topic.

In the field of international investment, the guides have an amplified role as *soft law* tools. For example, the Development Commission of the International Bank for Reconstruction and Development approved on September 21, 1992, the "Guiding Principles for the Treatment of Foreign Direct Investment", which is a non-binding guide for action by States in the field. It, directly inspired by the practice of Western states and bilateral conventions, aims to encourage and protect foreign investment, promote fair and equitable treatment standards, and impose strict limits on nationalization[1].

In addition to the discrepancies in ideology and qualification of foreign investment[2], the reason for the failure of these attempts was that, once a general multilateral investment treaty was in place, states could impose higher standards and thus raise the level of protection of investments above that established by the treaty on a bilateral basis. This has also happened in the case of TRIPS, under which developed countries have negotiated bilateral agreements in the field of intellectual property, setting higher standards of protection than those set by TRIPS[3].

The international sectoral treaties (by areas) adopted within the World Trade Organization and mandated under the auspices of the Uruguay Round, contain provisions whose violation may include the international responsibility of the state for foreign investment, have been classified as sources of international investment law. :

a. GATS[4] - contains provisions on foreign investment in services, including regulations on the principles of non-discrimination and national treatment and introduces into international law the obligation of commercial presence of the investor in the territory of a State party to the Agreement[5].

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[1] N.Q. Dinh, P. Dailier, M. Forteau, A. Pellet, *Droit International Public*, 8 ed., Paris, 2009, p. 1207.

[2] Canada and France, for example, have invoked cultural criteria to prevent the American entertainment industry from entering these states and dominating their national entertainment industries.

[3] N.Q. Dinh, P. Dailier, M. Forteau, A. Pellet, *op. cit*., p. 1208.

[4] The General Agreement on Trade and Services, which entered into force in January 1995.

[5] Art. 1 of GATS.

b. TRIPS[1] - contains provisions designed to create a standard of protection to be transposed into the domestic law of States Parties. However, obligations under classical international law can be created given that most bilateral investment treaties aim at protecting intellectual property rights per se as part of foreign investment. For example, the Convention on Biological Diversity[2] addresses the issue of the use of indigenous know-how in the production of goods and creates obligations whose non-compliance also entails the international responsibility of states[3].

c. TRIMS[4] - contains provisions regarding investments that may affect or interfere with the normal course of trade. It follows from its content that it requires States Parties not to apply any national measure which is inconsistent with its provisions on national treatment or quantitative restrictions, in order to facilitate the pursuit of investment activities in accordance with the purpose and performance ceilings for which they were created.

8.1.1. International regional treaties: NAFTA

The provisions of the North American Free Trade Agreement (NAFTA) contain both conditions for pre-acceptance of a foreign investment in a host state and post-acceptance of that investment, on the international principle of security and protection of investment, including the right to repatriation of benefits and the right to transfer funds inherent in the investment (in the form of obligations under international law, the breach of which could give rise to international liability on the part of the State). NAFTA has now been abandoned in favor of the USMCA, and Canada, the United States and Mexico signed the new Canada-United States-Mexico Agreement at the G20 Leaders Summit in Buenos Aires on November 30, 2018. The parties will now undertake their internal process to ratify and implement the USMCA[5] (investment provisions are now contained in Chapter 14).

8.1.2. ASEAN agreements[6]

[1] Agreement on Trade-Related Aspects of Intellectual Property Rights).
[2] The Convention on Biological Diversity (CBD) is an international agreement, adopted at the Earth Summit in Rio de Janeiro in 1992, approved by the European Union by Council Decision 93/626/EEC on the EU conclusion on the Convention on Biological Diversity.
[3] S. Sell, *Public Law:Globalization of Intellectual Propertz Rights*, Cambridge Studies in International Relations, Cambridge University Press, UK, 2003, p. 89.
[4] The Agreement on Trade Related Investment Measures, entered into force on 1 January 1995.
[5] Available at https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/ toc-tdm.aspx?lang=eng, accessed on 13.03.2019.
[6] ASEAN is an acronym for the Association of Southeast Asian Nations and was established in 1967.

The Association of Southeast Asian Nations (ASEAN) Agreement on Investment of 26 February 2009 (effective 24 February 2012) - ASEAN Comprehensive Investment Agreement[1], the latest regional agreement in the field, aims to to increase the volume of *inter partes* investments in the ASEAN area and to attract major investments from third countries in the ASEAN area. In terms of art. 11 of the Agreement, apart from the most-favored-nation clause, it recognizes only two standards of foreign investment treatment: fair treatment, and investment protection and security. Between the obligations stipulated *expressis verbis* in art. 17 and whose non-compliance may attract the international responsibility of the state, we list: public order, public morality, protection of life and health of humans, animals and plants, conservation of non-renewable natural resources, payment and fair and effective collection of direct taxes and duties on investments in the host state. The agreement was amended by three protocols: the first of 26 August 2014 (in force) and two of 2017 that have not yet entered into force (21 September 2017 and 20 December 2017).

8.2. Bilateral Investment Treaties (BIT)

The bilateral international investment treaties are based on the same principles as those set out above with regard to multilateral ones, namely the protection and security of investments, the minimum standard of treatment or fair treatment. There are currently a total of 2932 BITs (up from 2009[2]), of which 2343 are in force[3]. The bilateral investment agreements are today the most widespread instrument of international law on foreign investment and the responsibility of states for the obligations assumed by those treaties. Specific to bilateral treaties is the umbrella clause, by which each state party to the agreement must comply with any and all obligations assumed to investors in the other state party[4].

From the point of view of public international law, UNCTAD interpreted the umbrella clauses in the sense that their language is so general that it can be interpreted as covering any obligations, of any nature, assumed with regard to investments in general. Such a clause makes the provisions of the Agreement

[1] The document is available at: http://agreement.asean.org/media/download/20140119035519.pdf, accessed March 14, 2019. Protocols with all ASEAN agreements are available at http://agreement.asean.org/home/index/10.html, accessed on March 14, 2019.

[2] UNCTAD, *World Investment Report 2005: Transnational Corporations and Internationalisation of R&D* at 24, U.N. Doc. UNCTAD/WIR/2005, U.N. Sales No. E.05.II.D.10 (2009), *http://www.law.gmu.edu/assets/subsites/gmulawreview/files/14-1/documents/WONGFinalFormatted.pdf* .

[3] According to official UNCTAD statistics available at:: *https://investmentpolicyhub.unctad.org/IIA*, accessed on March 14, 2019.

[4] Although specific to bilateral treaties, the clause can also be found in some multilateral treaties, such as the Energy Charter, adopted in 1994 and which in Article 10 (1) provide that: "Each State Party shall comply with any obligations it has assumed. o in respect of an investor or an investment of an investor in any other State Party".

subject only to the rules of public international law. This recital explains the hypothesis expressed in this paper in the subchapter on State Liability, according to which the international liability of States with respect to foreign investment may arise from a wide range of international obligations - when one of them may be violated - provided that they relate to an investment process (an investment report), within the meaning of the above definitions.

8.3. Treaties containing investment provisions (TIPs)

UNCTAD[1] is the official source for the number of these treaties and the clauses specific to international investment. Thus, it is shown that a number of 384 such treaties have been identified, of which 313 are still in force in 2019.

8.4. International custom

If a treaty enjoys widespread acceptance between states, it will be considered as representing customary international law and will have binding effect even for states that have not signed that treaty[2].

The custom in international investment law is inextricably linked to the attributes of economic power. For example, developing countries have used their numerical superiority in the UN General Assembly to incorporate these *opinio juris* in resolutions. Although there are lower categories of rules, without binding legal force, the International Court of Justice has ruled in the case of Nicaragua since 1986 that they can have a law-making effect[3].

However, the resolutions of the General Assembly related to the concept of the New International Economic Order, as we showed in one of the previous points of the paper, are either considered in general terms as *soft law* or as *lege ferenda*[4]. But, although the applicability of the customs regarding the liability of states in investment matters is extremely limited, some of the principles on which this liability is based, now codified, have a customary origin: the right to compensation for expropriation or the right to set limits and the course of foreign investment. by internal laws by virtue of the principle of sovereignty. For example, while customary international law has recognized that the entry of foreign investment into the territory of a state was a prerogative of the sovereign power

[1] See the official link: *http://investmentpolicyhub.unctad.org/IIA*, accessed on December 12, 2017
[2] See R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 1965, BYIL (British Yearbook of International Law), vol. 41, p. 275.
[3] M. Sornarajah, *op.cit.*, p. 324.
[4] In 1977, in the arbitral award in the case of *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, the arbitrator and Professor Pierre-Marie Dupuy placed the custom and, consequently, the subsequent soft law provisions on the lowest level of rules affecting international investment.

of the host state, developing states, despite economic liberalism, still seek to implement legal rules that prevent investments with potentially detrimental effect on their economies.

At first glance, the image that best represents international norms in the field of foreign investment is that of a complex mosaic[1], disputed and thirsty more than ever for simplification, although the experience gained from public international law has provided the material doctrine particularly useful for the study of the codification of the international law of foreign investments. For example, the codification efforts of the International Law Commission (ILC), including those relating to state responsibility, conventions on the law of the sea, the succession and immunity of states, and other rules of public international law, are - constituted a significant part of sources of international law of foreign investments.

It is a well-known fact that there is no multilateral treaty regulating foreign investment, and the role of international customs is apparently absent in an international society in which there is a large and rising number of bilateral and regional foreign investment treaties. But the very existence of these treaties has amplified the role of international customs in our field of analysis, especially in the matter of resolving disputes in the field of foreign investment. In this case, certain regulations on protection and liability have acquired a customary extension on other parties, who have not signed a certain bilateral foreign investment treaty. As a result, an unwritten rule for the third part of a treaty has become a general practice, relatively long and uniform, considered by states to express a legally binding rule of conduct.

8.5. Diagonal debates on the schematization and unification of the applicable norms in the field of foreign investments

From the previous exposition also resulted the current opinion of some specialists[2], according to which, for many observers, the era without feasibility of coding has passed, and the codification itself has become a contested concept, first of all, due to the failures of codification attempts. On the one hand, codification does mean a unification, systematization and standardization of international foreign investment law, considerably simplifying the rules of applicability, but on the other hand, it can also mean a restriction of the rights of participants in investment relations, by their determination to strictly comply with a certain package of applicable rules, which could affect fair and equitable treatment. Precisely for these reasons, codification, although an effective simplification measure, is increasingly controversial and left on the agenda of international society.

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[1] Di B. Saverio, *International Investment Law and the Environment*, Edward Elgar Publishing, 2013, p. 9.

[2] See, in this regard, A.K. Bjorklund, A. Reinisch, *International Investment Law and Soft Law*, Edward Elgar Publishing 2012, pp. 305-310.

The emergence of new customary rules has not reached a point of stagnation in this field full of effervescence, being far from being completed, which is why the completion of a codification becomes almost impossible. International relations in the field of foreign investment are in a continuous development and the evolutionary detachment of new actors must not be ignored, offering as an example the transnational companies TNC, thus giving birth to new customary rules of *transnational law*.

What is certain is that the way the notion is assessed depends on the circumstances and there are no commonly accepted definitions, although they appear in most bilateral agreements and other instruments related to investment protection, but in various, more or less precise wording. For example, in art. 5 para. (1) of the model bilateral investment agreement promoted by the USA stipulates that "each party must grant to the investments falling under the treaty a treatment in accordance with customary international law, including fair and impartial treatment, as well as full protection and safety" (United States BIT model 2012) and also para. (2) of the same article exemplifies the minimum treatment applicable to investments by stipulating the following: "(a) fair and equitable treatment includes the obligation not to refuse access to justice in civil, criminal, administrative courts, in accordance with the principles of a fair trial, which are found in the main legal systems of the world; (b) total protection and security means that each party shall provide such level of police protection as is required under international customary law."

8.6. General principles of law and the role of international jurisprudence

The general principles of law within the meaning of art. 38 paragraph 1 (c) of the Statute of the International Court of Justice have received increasing attention in international jurisprudence, so that numerous arbitral awards[1] can be exemplified that bring to attention various issues related to this subject. For example, in addition to the principle *pacta sunt servanda*, jurisprudence has also highlighted good faith[2], *onus probandi*[3], *nemo auditur propriam turpitudinem allegans*[4] or authority of res judicata (estoppel)[5]. In the *Chorzow Factory* case of

[1] The case of *Merrill & Ring Forestry L.P. v. Canada* (ICSID Case No. UNCT/07/1), Decision of 31 March 2010, para. 187.
[2] Case of *Phoenix Action LTD v. Czech Republic* (ICSID Case No. ARB/06/5), Decision of 15 April 2009, para. 142.
[3] Case of *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision of 8 November 2010, para. 236.
[4] The case of *Rumeli Telekom A.S. and Telsim Mobile Telecommunications Hizmetleri A.S. v. Kazakhstan* (ICSID Case No. ARB/05/16), Decision of 29 July 2008, para. 310, 323.
[5] Principle which prevents a person from asserting anything contrary to what is required by a previous action or a statement of that person or by a previous relevant court decision.

1928, the Permanent International Court of Justice (ICC) ruled that it was a general principle of law that any breach of an undertaking entails an obligation to make reparation or compensation[1].

As a general rule, the general principles of law have been used mainly, in a supplementary or complementary way, by the various arbitral tribunals, to extract rules applicable to investments, and not to the responsibility of the state as a subject of international law in this context. The tendency of these arbitral tribunals was not to preserve the interests of the state as a matter of law, but, in particular, to favor the economic climate for foreign investment, for various and often onerous reasons[2]. Their applicability regarding the state's responsibility for investments has today only a tangential, general and impersonal character, due to the development of the law of international contracts and the existence of investment treaties at state level.

Some of the decisions of the International Court of Justice have played a huge role in shaping the principles on which States' responsibility for investment is based today. For example, the *Chorzow* case grounded the principle of compensation, the *Barcelona Traction and Diablo v. Congo* cases, the principle of corporate identity and nationality. However, in the field of international law and, implicitly, of the State's liability with regard to foreign investment, the jurisprudence is only an auxiliary means of determining the rules of law and a means of finding and applying to a concrete case and only with relative effect[3].

[1] PCIJ Series A no. 17, p.29.
[2] M. Sornarajah, *op.cit.*, p. 324.
[3] D. Popescu,*op. cit.*, p. 34.

Chapter III
Bilateral investment agreements

1. Preliminary considerations

The interests of states and investors shape international investment law[1].

According to UNCTAD[2], a bilateral investment treaty (BIT) is an agreement between two countries to promote and protect investments made by investors in one state in the other.

Since the adoption of the first BIT in 1959, the number of these treaties has steadily increased. According to official statistics, the oldest known BIT is the one between Germany and Pakistan signed on November 25, 1959 (still in force), and the most recent was signed on November 1, 2017 between Rwanda and the United Arab Emirates.

The basic characteristics of BITs, including their objectives, format and the general principles underlying the agreements, have not changed significantly over the years.

The bilateral investment agreements have an increased frequency due to the simplified way in which they can be concluded compared to multilateral agreements where there are difficulties including with the negotiation phase, and the data provided by UNCTAD show the complexity of the clauses included in such agreements[3]. It was found that, through the use of negotiations and the way in which the implementation of bilateral agreements was carried out, the types of clauses and their component elements were perfected over time, allowing a clear interpretation to avoid or resolve such disputes correctly and quickly. The UNCTAD publication referred to in the previous note is illustrative in terms of the degree of complexity reached in drafting all the clauses that may be contained in a bilateral agreement. The importance of bilateral agreements is also underlined in the situation in which, within UNCTAD, the activity of transnational companies is analyzed, respectively their relationship with the investment environment[4].

The BITs models used globally have been reformed[5]to cover concerns

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[1] See J.W. Salacuse, *The Law of Investment Treaties*,Oxford International Law Library, 2013, pp. 37-40.

[2] See the official website: *http://www.investmentpolicyhub.unctad.org/IIA*, accessed on April 19, 2018.

[3] See UNCTAD, *International investement agreements: Key Issues Volume I – III*, United Nations, NY and Geneva, 2004, 2005.

[4] See, for exemple, UNCTAD, *World Investment Report, 2005, Transnational Corporations and the Internationalization of R&D*, United Nations, 2005; UNCTAD, *World Investment Report.*

[5]*FDI from Developing and Transition Economies: Implications for Development*, United Nations,

about environmental protection, human rights, economic development, international concerns, public health or social protection. The purpose of the international investment treaties was to preserve certain rules that developed countries had advanced as customary international law.

The historical evolution of these agreements has highlighted the extent of their proliferation. After the Second World War, as a result of the reconstruction process, Germany - recognized as a signatory to the first BIT - initiated the conclusion of a large number of such agreements, followed by Switzerland, France and the United Kingdom. In the publication UNCTAD: *Bilateral Investment Treaties 1959-1999*[1], it is mentioned that, at the end of the period 1960-1999, the following states appeared with a significant number of bilateral investment treaties: Germany - 124, Switzerland - 95, France and Great Britain with 92 each - China - 94, Romania - 90 and Egypt - 84. The technological progress, the economic development by raising potential business partners to a competitive economic level (see Marshal Plan), but also the need to strengthen the guarantee and protection of foreign investment have determined the negotiation and conclusion of these agreements, marking at the same time the transition from international custom to codification. In the 1980s, BITs were considered a new phenomenon on the international investment scene.

2. Bilateral agreements for the promotion and protection of foreign investment

The modern investment treaties are the product of a historical process that has gone through several phases[2]. Historically, as we noted earlier, such agreements began to emerge in the second half of the twentieth century, with the Federal Republic of Germany being the first to sign a specialized treaty with Pakistan in 1959, after which promoted a negotiation program for the conclusion of other similar agreements with other developing countries. In Europe, it can be said that a European Program of Bilateral Investment Agreements has been launched, which ensures the national treatment applicable at the stage of accessing investments in the host state, the free convertibility of the local currency, protection against expropriations, while promoting other advantageous clauses for investors.

Of the 72 BITs concluded in the 1960s, 71 had a developed state as one of the contracting parties, according to the 1998 UNCTAD report, and, over time, the involvement of developing states (South-South agreements) as signatory parties has increased. The first South - South agreement of this type was signed in

2006; UNCTAD, *Rapport sur l'investissement dans le monde, Sociétés transnationales, industries extractives et développement*, Nations Unite, 2007.

[1] Available online by accessing: *http://www.unctad.org/en/docs/poiteiiad2.en.pdf*, accessed on April 19, 2018.

[2] J.W. Salacuse, *The Three Laws of International Investment*,OUP 2014, p. 332.

1964[1]. In total, according to UNCTAD[2], there are currently 2952 BITs, of which 2367 are still in force, but only 50 contain the term "promotion" in the title, and a number of 53 BITs also contain this term in the text. Analyzing the statistical situations, one can observe the statistical structuring of the bilateral agreements by presenting the date of signing the agreement and by presenting the date of entry into force. The signing of a BIT has the effect of manifesting the intention of the host state to provide investors with an environment conducive to their investments, giving stability, transparency and predictability, but the entry into force[3] is different and dependent on ratification, and delay in ratification is not a positive signal, the provisions regarding a provisional application of the treaty being rare.[4] Article 18 of the Vienna Convention on the Law of Treaties (the obligation not to deprive a treaty of its object and purpose before its entry into force) imposes the following obligation: and for its purpose: a) when it has signed the treaty or changed the instruments constituting the treaty subject to ratification, acceptance or approval, as long as it has not indicated its intention not to become a party to the treaty; or b) when he has consented to be bound by the treaty in the period preceding the entry into force of the treaty and provided that it is not delayed without good cause.

The South-South investment agreements are distinguished from other similar instruments (especially North-South agreements) not so much in their general purpose, which is to promote and facilitate the flow of investment, but in the extent and precision of the provisions dealing with the issues. investment. The bilateral investment agreements aim to promote and protect the flow of foreign investment and, traditionally, to promote more developed countries than developing countries; such considerations lead to the observation of the impact of such agreements on the flow of investment[5]. The existing BIT models represent the concept of the promoters of these type models. These BIT models can be found on the official government websites of the states adopting the model. For example, the model promoted in the US and Canada contains clauses on the right of

[1] Protocol between the Government of the State of Kuwait and the Republic of Iraq on the promotion of the movement of capital and investment between the two States; UNCTAD, *Coopération Sud-Sud dans le domaine des accords internationaux d'investissment*, Nations Unies, 2005, pp. 5-7, quoted below, *Coopération Sud-Sud*.

[2] See the official UNCTAD website: *http://www.investmentpolicyhub. unctad.org/IIA*, last accessed March 14, 2019.

[3] An example of a BIT that did not enter into force being signed on December 8, 1978 is that between Romania and Sudan. Another example is the BIT between the USA and Haiti, which, being signed on December 13, 1983, never entered into force.

[4] The inclusion of an express provision requiring the "provisional application" of the Treaty, including its provisions on the settlement of disputes subject to the Constitution, the laws or regulations of the signatory State, was the case under article 45 of the Energy Charter Treaty.

[5] Regarding the dynamics of bilateral investment agreements concluded between developing countries and their specifics, see UNCTAD, *Coopération Sud-Sud*…, pp. 8-17.

establishment and protection, national treatment obligations and the most-favored-nation clause in the pre-establishment investment phase, admitting the possibility of each state's own exceptions, containing an article prohibiting express performance obligations, while agreements inspired by the European approach should contain rules and rules of non-discrimination[1]. We note, however, that with respect to performance obligations, the parties to any international investment agreement that are members of the WTO are subject to the strict and relevant regulations of the WTO Agreement on Trade - Related Investment Measures (MIC - TRIMS)[2].

It follows that, inter alia, the bilateral investment treaties promoted in the South - South area have certain characteristics of their own, in particular tending to emphasize exceptions (for example, for reasons of balance of payments or prudential control) and clauses called "irrevocable choice", which require investors to proceed from the outset to a choice between national and international dispute settlement mechanisms[3].

We remind you that the investment regime has been defined, in the specialized literature, as the set of norms of domestic or international law that determine the treatment applicable to international investments, from the moment of their establishment until the moment of their liquidation, and by the protection norms domestic or international law that prevent or sanction the interventions of public authorities on international investments. Investment guarantee mechanism means the set of operations that transfer the financial consequences arising from certain political risks from the investor to the specialized body of domestic or international law[4]. Even from their name of bilateral agreements for the promotion and protection of investments, it results that these two elements constitute the finality of these agreements, respectively the result of the agreement of will of the contracting parties.

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[1] A recent finding of a case of discrimination based on nationality appeared in June 2015, on the occasion of the notification to the European Commission (EC), which launched actions to sanction five EU member states, including Sweden and Romania, asking them to and annul the bilateral investment treaty drawn up before EU accession. "The role of bilateral treaties was to strengthen investor protection, for example, through expropriation compensation measures and through arbitration and investment dispute resolution procedures," the Commission said. "Since the enlargement of the EU, such" extra "insurance should not be necessary, since all EU Member States are subject to the same EU rules on the single market, including cross-border investment. Also, all EU investors benefit from the same protection due to EU rules", the Commission also specified, thus showing that the old bilateral treaties, including the one between Romania and Sweden, are no longer useful. Instead, the EU executive warns that the old bilateral treaties violate the principle of equality of investors within the EU. "By contrast, intra-EU bilateral treaties give rights, on a bilateral basis, to investors in certain Member States. According to the case law of the Court of Justice of the European Union, such discrimination based on nationality is incompatible with EU law."

[2] Official Gazette no. 360 Bis, December 27, 1994. For details see O. Crauciuc, *Dreptul internațional economic*, Ed. Silex, Bucharest, 2003, pp. 170-175.

[3] See UNCTAD, *Coopération Sud-Sud*…, p. 24.

[4] D. Carreau, P. Juillard, *op.cit.*, p. 459.

Like all international treaties, such agreements are part of the *corpus* protected by the principles of international law and, first of all, the principle *pacta sunt servanda*, one of the oldest principles that emerged with the conclusion of the first treaties recognized in Antiquity. They are also included in the modern and contemporary doctrine of international law, in the Preamble and in art. 2 para. (2) of the UN Charter, in the 1969 Vienna Convention on the Law of Treaties, as well as in the 1970 Declaration on the Principles of International Law and the Declaration of the Economic Rights and Duties of States adopted by UN General Assembly Resolutions in 1974[1].

The doctrine noted that in the last decade several studies have been conducted on the role and influence of bilateral agreements, respectively their relevance on investment promotion decisions[2]. With rare exceptions, it is found that many investors take into account the existence of bilateral agreements and their impact on foreign direct investment (FDI), including in terms of dispute settlement. They may contain provisions relating to the international settlement of disputes, but being governed, at the same time, by the domestic law of the host State or by any other national law, they do not give a foreign investor protection under international law, as is the case of bilateral agreements[3]. Compared to foreign investment contracts, the bilateral agreements provide a high degree of protection against national legislative changes that may infringe their contractual rights, through the existence of a general clause, activating state responsibility.

2.1. Types of clauses specific to bilateral agreements for the promotion and protection of foreign investment

The main provisions refer, in general, to the scope and definition of foreign investment (definition which in most cases includes tangible and intangible assets, direct investments as well as portfolio investments, existing investments, but also new investments); admission of investments; national treatment and most-favored-nation clause; fair and equitable treatment; guarantees and compensation for expropriation and compensation for war and civil riots; guarantees on the free transfer of funds and the repatriation of capital and profits; subrogation regarding insurance claims and dispute settlement provisions, both from state to state and from investor to state. Some BITs include provisions on the transparency of national legislation; performance requirements; entry and stay of foreign staff; general exceptions and the extension of national and most-favored-nation

[1] D. Popescu, A. Năstase (coord.), *Sistemul principiilor dreptului internaţional*, Academy Publishing House, Bucharest, 1986, pp. 82-85.

[2] See, for example, UNCTAD, *Attirer les investissements étrangers directs dans les Pays en developpment*, Nations Unies, 2009, pp. 25-50, further, *Attirer les Investissements*… .

[3] However, the very high degree of confidentiality of these contracts must be taken into account, which does not allow us to assess the proportion of those containing such provisions that would allow them to replace bilateral agreements.

treatment to investment entry and establishment.

According to UNCTAD statistics, the exact content of BIT provisions varies considerably, even between BITs signed by the same state, reflecting different approaches and, implicitly, different negotiating positions. Over the years, as the practice develops, some provisions tend to become more elaborate. BITs can influence the development of regional and multilateral investment instruments. Some BIT models have been prepared by different states that reflect their positions and expectations regarding international norms and standards. The BIT can also influence domestic law. It is therefore important to monitor the evolution of substantive provisions in the latest BITs.

Analyzing bilateral investment agreements in different fields and with different contracting parties, it is relatively easy to distinguish between different types of clauses and especially to be able to identify those clauses that are more common and have the largest share in regulation. An efficient and complete source of types of clauses can be found on the official UNCTAD[1] website, where you can easily perform analyzes on the detailed clauses of a specific treaty. Thus, we encounter general clauses existing in the structure of any international investment agreement: preamble, purpose and definitions, treatment standards, other clauses, exceptions, settlement of state-state disputes, settlement of investor-state disputes, institutional issues, duration, amendments and termination (including the clause often referred to as the "sunset clause").

Specifically, in detail, as has often been found in the analyzes and statistics performed on the clauses contained in the BITs, there are clauses governing:

a) admission, registration and constitution of international investments at national level; the content of the right of investors of one of the signatory states to establish their investments in the other state, part of the agreement. The dominant trend in practice has been to maintain a controlled right of registration[2] and not to extend the general positive rights of registration and incorporation, and in recent years such obligations have been included in international investment agreements, including in the BIT. In general, bilateral agreements contain a set of clauses that take into account the details related to the admission of foreign investment such as: identification of sectors of activity for foreign investment, rules on obtaining authorizations or facilitations in relations with competent authorities. Another aspect that arises in connection with the registration and establishment concerns BITs that contain a form that defines the investment covered by the agreement as being made "in accordance with the legislation of the host

[1] The link is *http://www.investmentpolicyhub.unctad.org/IIA*, accessed on March 14, 2019

[2] An example of this is the Exon-Florio Clause of US law, introduced in section 5021 of the Trade Act, amending section 721 of the Defense Production Act, passed in 1950. The clause was introduced into US domestic law in 1988. The essence of the restriction is that the President of the United States is given the power to suspend or prohibit any takeover or acquisition of companies in the United States if the operations in question threaten security.

state"[1]. This can confirm that both foreign and domestic investors must comply with local law and that only those investments that comply with local law can obtain protection under the BIT[2].

Recent trends towards more restrictive national laws and regulations could, if widely adopted, lead to a strengthening of the controlled approach to registrations.

b) treatment standards: the treatment applicable to international investments. As it turned out, there is a direction towards a single standard of regulatory treatment, based on the legitimate expectation of investors to benefit in a host state or, as the case may be, in a free trade area, from transparency, legal procedures and non-discrimination. In this regard, recourse is had to an international standard which envisages the application of national treatment for investment or the treatment of the most favored nation; thus specifying the application variants of this international standard.

c) nationalization and expropriation, the compensation granted in case of these situations; the introduction of these clauses requires that the reasons (usually of public utility and non-discriminatory) always be specified when such measures are possible, the compensation being fair and equitable, always payable in a convertible currency;

d) liquidation of investments and repatriation of capital. The clauses regulate these aspects both for the situation in which the agreement has reached the term of validity/execution, and in the situations in which certain events in the host state or in the state of the investor make the continuation of the investment impossible or risky;

e) dispute settlement - the specific clauses are included in all investment agreements and they refer either to the competence of ICSID or to other arbitration institutions such as ICC, competent to settle disputes between the investor and the host state, respectively between the two states parties to the agreement bilateral. Unlike any other field of international law, investors are usually not required to go to the national courts of a state first to resolve a complaint/claim against the government. This possibility of bypassing domestic courts can undermine the democratic process and the sovereignty of host governments. Even when an investment comes from a state that is not a party to a treaty, the investor can often simply integrate into one of the states that is a party to the desired treaty in order to obtain the protection of this agreement. This is often called "forum shopping".

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[1] For example, the BIT between Chile and New Zealand states that "investment" means any type of asset or related rights "provided that the investment has been made in accordance with the laws and regulations of the receiving contracting party".

[2] Thus, a court may refuse jurisdiction over a dispute in which the investor has acted fraudulently (obtaining an illegal investment contract) under the law of the host state, on the grounds of breach of good faith and unjust enrichment. Violations of the legislation of the host state subsequent to the registration of the investment cannot refer to the jurisdiction but only to the merits of the claim.

The collection of investment agreements developed by the United Nations Conference on Trade and Development in three volumes, published in 2004-2005[1], presents five categories or models of clauses identified in conventional bilateral investment practice:

1. "investment control", which gives the state full control over investment entry and establishment;

2. "selective liberalization", which limits entry, establishment and measures only to economies included in a "positive list", drawn up by agreement by the Contracting States;

3. the "regional industrialization program", which offers full rights to enter and establish investment, a model based on national treatment for investors from the Member States of a regional economic integration organization, provided that they are involved in the implementation of such a program;

4. "national reciprocal treatment", which offers full rights to enter and establish investment, a model based on national treatment for all natural and legal persons engaged in cross-border business from the Member States of a regional economic integration organization;

5. NT/MFN[2], which consists in combining "national treatment/most favored nation treatment". It provides full rights to enter and establish the investment, subject to the possibility of drawing up a list of industries where such rights are not applicable in practice.

The following categories of clauses can also be found:

1. Prohibitions on performance requirements: national governments have no obligation to impose requirements on foreign investors that have usually been used by industrialized states in their development, such as the requirements to use a certain percentage of local inputs in production processes, to guarantee employment in certain regions or by marginalized groups or to allow the transfer of technology. For example, Canada often uses exceptions to maintain its right to impose performance requirements in certain sectors or as part of an investment selection process, while denying the same exceptions to partners in developing countries.

2. Prohibition of capital control: these are prohibitions on a government that applies restrictions on capital flows into or out of its economy. Such restrictions are used, for example, to reduce speculative financing or to restrict the repatriation of funds to protect economic stability in the event of a financial crisis or balance of payments. Instead, the treaties normally protect the principle of free transfer of funds, giving investors the right to transfer funds related to investments in the host state. Following the recent financial crisis, it has been unequivocally established that a ban on capital controls poses serious risks to governments.

A country's internal regulations must be well-adapted and sufficient, as the main clauses that provide protection to investors in the BIT may limit the

[1] See *United Nations Conference on trade and development, International investment agreements: Key issues vol. I*, U.N. 2004, vol. II, U.N., 2004, vol. III, U.N., 2005.
[2] National Treatment: NT/Most Favored Nation: MFN.

ability of governments to encourage the potential social, economic and environmental benefits of foreign investment and to minimize any damage caused by such investment.

2.2. Treatment of investments in bilateral agreements for the promotion and protection of foreign investment

The foreign investors and their investments should be treated no less favorably than investors in the host state (although they may be treated more favorably, such as subsidies, tax exemptions or regulatory exemptions). This provision can block the various measures that most governments have historically used to support local industry or to promote regional development.

The bilateral investment promotion and protection agreements have provided for numerous regulations on investment treatment issues. Although there are differences between the European BIT models and the American model, for example, it can be stated that the most significant difference is, as mentioned above, that European models are still the premises of national control over foreign investment admission, while the American model is inclined in favor of an "open door" policy - the so-called national treatment clause in the pre-investment phase. The investment clauses provide for a non-discriminatory treatment of investments supported by the principle of national treatment, the commitment of the parties to largely coordinate their investment policies, the gradual opening of their public procurement markets and the effective protection of intellectual property rights. Several forms/standards applicable to investments have been identified both in the entry phase, in the operation phase, and in the failure phase: “fair and equitable” or “fair and impartial” treatment; "full and complete protection and security" treatment; "national treatment and most-favored-nation clause"; freedom to repatriate income and proceeds from the liquidation of the investment. The national treatment clauses are part of the standard repertoire of bilateral investment treaties[1].

There may also be problems of interpretation in this matter, and confusion may arise from the fact that some concepts and terms such as non-discrimination, fair and equitable treatment or legitimate expectations have been used for the same purpose, but in many different ways. In this context, the experts established that the answer to a series of questions such as those presented below could have a positive impact on the accuracy of the use of these terms: which host state policies can justify a differentiated treatment between foreign and domestic? Is it

[1] For a look at the different types of national treatment clauses, see *Dolzer/Stevens*, Bilateral Investment Treaties (1995), pp. 63-65. According to *Lauder v. The Czech Republic* - Decision of 3 September 2001, a discriminatory measure is one which does not provide for national treatment (para. 220). However, it is not clear whether the two standards are identical in all respects.

necessary, in this context, to distinguish between *de jure* and *de facto* discrimination? What role, if any, will be assigned to the intentions that a government pursues through the act of discriminating? What evidence is needed to prove "intent"? Does a breach of the standard occur only on the basis of differences based on nationality? What is the significance of a differentiation which is not based on nationality and which is not justified on rational grounds? When comparing the foreign investor with the domestic investor, it is necessary to identify a domestic investor who is in exactly the same type of investment, or it is sufficient to indicate an investor who is not in the same field of activity but in the same economic sector? How do we define "business" and "sector" in this context?

Many of these questions have not identified their answer in either jurisprudence[1] or doctrine, and future research will develop these topics. In particular, the issue of treatment, of the standard (or standards) applied, remains a topic that needs to be developed with due attention, individually or together with related topics belonging to this field of law, in subsequent research topics.

a) "Fair and equitable" or "fair and impartial" treatment is a standard of "absolute", "non-contingent" treatment, i.e. a standard which provides for the treatment to be given in terms whose exact meaning must be determined according to the circumstances. specific application rules, as opposed to the standards included in the principles of "national treatment" and "most-favored-nation clause", which define the treatment required in relation to the treatment of other investments. It is considered an absolute regime precisely because it is not conditioned by national legislation, but establishes that the treatment applied to foreign investments must meet certain mandatory conditions[2].

For example, art. 5, para. (1) of the US bilateral investment agreement model states that "each party shall accord to investments covered by the Treaty treatment in accordance with customary international law, including fair and impartial treatment, and total protection and safety" (US BIT model 2004) and also para. (2) of the same article exemplifies the minimum treatment applicable to investments, stipulating the following: "(a) fair and equitable treatment includes the obligation not to refuse access to justice in civil, criminal, administrative courts, in accordance with the principles of a fair trial; they are found in the main legal systems of the world; (b) total protection and security means that each party shall provide such level of police protection as is required under international customary law."

The notion of "fair and equitable" in art. 10, par. 1 of the Energy Charter Treaty is worded as follows: investments "will not be given treatment that is less favorable than that provided by international law, including through obligations

[1] See the case of *Marvin Feldman v. Mexico*, ICSID Decision of 16 December 2002, para. 171 or the case of Occidental Exploration and *Production Company v. Ecuador*, ICSID Decision of 1 July 2004, para. 173.

[2] See A.F. Lowenfeld, *op.cit.*, p. 475; M. Sornarajah, *op.cit.*, p. 204; L. Navasardyan, *op.cit.*, p. 121 and note 1.

under (international) treaties". Commenting on this text, it was stated[1] that the contracting parties to the Energy Charter Treaty (TEC) are obliged to comply with such treatment for foreign direct investment - FDI which is at least as advantageous as the treatment required by international law. In the jurisprudential context, the following formulations were observed by most specialists:

- The applicant was not provided with a "transparent and predictable framework for the development of projects and investment", the host state did not meet the standard of "fair and equitable treatment"[2];

- "It is the same in case of discriminatory treatment equivalent to a flagrant injustice on the part of the internal courts (the internal judicial process being considered as a whole)"[3];

- "Even more generally in the case of any arbitral discrimination"[4];

- "Or another transaction accepted by the investor under duress"[5].

The most comprehensive definition of "fair and equitable treatment" was given by the ICSID Tribunal, which ruled in *TecMed v. Mexico*:

"The investor expects the host state to act in a coherent, unambiguous and fully transparent manner in its relations with the foreign investor, so that the latter can know in advance not only the rules and regulations applicable to its investment, but also relevant policies and practices as well as administrative directives so as to enable it to plan its activities in compliance with this regulation (...). The foreign investor also expects the host state to behave in a coherent manner, in other words, especially not to arbitrarily reconsider the decisions or authorizations given by the state, which the investor took into account when it also undertook its commitments when it planned and started its economic and commercial operations. The investor also relied on the fact that the state will use the legal instruments that determine the actions of the investor or investment in accordance with the function normally assigned to these instruments and, in any case, in such a way that the investor cannot be deprived. of his investment without compensation"[6].

This broad view, linked to the standard/principle of "fair and equitable treatment", has led some foreign investors to invoke as their basis the protection of their interests, "their legitimate expectations". It is an old concept applied in 1905, in a dispute between France and Haiti, settled by the Permanent Court of

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[1] A.J. Belohlavek, *Protecţia investiţiilor străine directe în domeniul energiei*, Ed. C.H.Beck, Bucharest, 2012, pp. 26-27.

[2] ICSID, Decision of 30 August 2000, *Metalclad v. Mexico*, § 99-101; ICSID, Decision of May 20, 1992, *SPP v. Egypt*, para. 82-83.

[3] ICSID, Decision of June 26, 2003, *Loewen v. USA*, para. 137.

[4] ICSID, 12 May 2005, *CMS Transmission Company v. Argentina*, para. 290-295.

[5] ICSID, February 6, 2008, *Desert Line Projects LLC v. Yemen*, para. 178-194.

[6] ICSID, May 29, 2003, § 154; also ICSID (NAFTA), *Waste Management Inc. v. Mexico*, judgment of 30 April 2004, § 98; See comments on pp. 1216-1218 Nguyen Quoc Dinh, P. Dailler, M. Forteau, A. Pellet, *op.cit.*

Arbitration in The Hague[1]. The arbitral tribunal held that "it was (...) a serious fault on the part of the Haitian Government (...) to create legitimate expectations which were deceived by the act of the government itself, which caused damage for which reparation is due". It was also noted that the notion of "legitimate expectations" is also found in contemporary arbitration jurisprudence, being considered for several years as one of the full components of the principle of fair and equitable treatment[2]. However, the protection of this standard operates - according to the arbitral jurisprudence - in very strict conditions, because these expectations must be "reasonable and legitimate".

The proof of their existence must, therefore, be made with great precision[3].

b) "Full and complete protection and security" treatment. The wording of these clauses suggests that the host state has an obligation to take active measures to protect the investment from possible negative/adverse effects that may arise from private parties: demonstrators, employees or business partners, or from the actions of the host state and its organs, including its armed forces. There is an understanding that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of "due diligence", ie a reasonable degree of vigilance. Dolzer and Stevens said of the full protection and security standard: "the standard provides a general obligation for the host state to act with care in protecting foreign investment, as opposed to creating a «strict liability» that would make a state host responsible for any destruction of the investment, even if it is caused by persons whose acts could not be attributed to the state"[4]. This standard clause has traditionally been included in treaties of friendship, trade and navigation, and is now a common clause in international investment[5] protection instruments; despite its presence in the vast majority of foreign investment protection treaties, it has been easily used by investment tribunals, a conclusion confirmed by ICSID's[6] international jurisprudence. This Center considered that the standard we are referring to is in fact a manifestation of the traditional due diligence[7], obligation, the consequence of which will not be the obligation of the state "to protect foreign investment against any possible form of loss caused by persons whose acts will not could be attributed to the state"[8].

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[1] *Franța v. Haiti, Aboilard* case, arbitral award of July 26, 1905, RSA vol. XI, p. 80.
[2] ICSID, *Waste Management Inc. v. Mexic*, Decision of 30.04.2004.
[3] ICSID, *Plama Consortium Ltd v. Bulgaria*, Decision of 27 August 2008.
[4] See R. Dolzer, C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008), pp. 149, 150; R. Dolzer, M. Stevens, *Bilateral Investment Treaties* (Nijhoff, The Hague 1995), p. 60, Muchlinski, Multinational Enterprises and the Law (1999) p. 626.
[5] A.F. Lowenfeld, *op.cit.*, p. 476; M. Sornarajah, *op.cit.*, p. 205.
[6] CIJ, 20 August 1989, ELSI, Rec CIJ p. 65, § 108; ICSID, June 27, 1990, *AAPL v. Sri Lanka*, par. 47-50; ICSID, 12 October 2005, *Noble Ventures v. Roumanie* para. 164.
[7] ICSID, *ibid*. para. 73-77; ICSID (NAFTA), 26 June 2003, *Loewen v. SUA*, para. 125.
[8] UNCITRAL, 3 September 2001, *Ronald S. Lauder v. Czech Republic*, para. 308.

They can be listed: physical security/safety (protection against civil violence and protection against violence of state bodies), legal protection, liability standards, specifically: failure by the host state to fulfill its obligation to protect against insurrections or riots; lack of adequate legal protection of the investor and his investment[1].

c) National treatment and most-favored-nation clause. The foreign investors seek the non-existence of unfavorable discrimination that would put them at a competitive disadvantage. This discrimination includes situations in which competitors from other states receive more favorable treatment. The MFN standard thus helps to establish equal competitive opportunities between investors from different states and prevents the distortion of competition between investors through discrimination based on nationality.

The most-favored-nation clause, *per se*, implies international obligations and rights not only between the Contracting States and the basic treaty which includes them, but also between those Contracting States and other States on the basis of different treaties; this is not a simple clause, but a real source of international obligations other than those included in the basic treaty.

More precisely, the scope of the clause and its interpretation will depend on whether the MFN treatment refers to: investors and/or their investments or if it refers to: the post-establishment phase or both the pre-establishment and the post-establishment phase. Moreover, this basic construction includes: generic exceptions and/or state-specific exceptions, or, if this may include a specific qualification to provide certainty and guidance, facilitating interpretation, including requests provided by the contracting parties[2].

The principle of non-discrimination is frequently applied through the conventional clauses inserted in bilateral treaties, through which each contracting party undertakes to grant to the investors of the other party or parties the benefit of national treatment on the one hand, and of the most favored nation on the other side. These rules are not customary and are not binding on States in the absence of express conventional provisions. The functioning of the standard MFN treatment both as a treaty clause and as a source of international law, especially of international legal obligations, presupposes that the *ejusdem generis* principle is fulfilled (according to which the provisions of the imported treaty are "of the same type"). This principle has been dealt with by arbitral tribunals, for example in the case of *Maffezini, Suez, Vivendi v. Argentina*[3]. In determining this, the condition of "similar circumstances" may be taken into account, as well as the wording of those MFN clauses contained in the investment treaties, which tend to be

[1] ICSID, 14 July 2006, *Azurix v. Argentina*, para. 406-408; ICSID, 6 February 2007, *Siemens v.. Argentina*, para. 303.

[2] See Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, p. 13–14.

[3] ICSID case no. ARB/03/19. Jurisdiction Decision of 3 August 2006, available online at *http://www.worldbank.org/icsid*.

unconditional, reciprocal and indeterminate, all the more so as BITs have a similar framework. In these situations, the interpretation remains at the discretion of the arbitral tribunals[1].

The states that do not wish to comply with the MFN clauses are cautious during the BIT negotiations, although the most-favored-nation clause was debated in the International Law Commission (ILC) at its nineteenth session in 1967, originally entitled "most-favored-nation clause under the treaties", the title of the theme being abbreviated by the Commission at its twentieth session in 1968, under the heading "most-favored-nation clause"[2]. In 1978, at the XXXth session, the ILC completed the drafting of its articles on the most-favored-nation clause, and an inter-state convention was concluded. The Secretariat of the United Nations Commission on International Trade Law presented a note in 1982 on the issue discussed in the International Law Commission. The note includes three examples of issues of interest to international trade: a) the application of such a clause in relations concerning the economic groups of states; b) the advantages granted between the members of a customs union or of a free trade area and c) the clauses of the most favorable nation subject to a condition[3].

In 1988, both the Sixth Committee of the General Assembly and the Plenary of the General Assembly decided to give governments more time to allow them to study the draft articles, due to the complexity of the matter[4]. On 1 June 2007, at its 2929th meeting, the International Law Commission set up a working group with an unlimited number of members to examine the possibility of including the subject of the "most-favored-nation clause" in the long-term work program, establishing also the main working points, such as that of formulating comments on the standard clause of the most favored nation, which were to be developed especially starting from the examination of state practice and jurisprudence[5]. As far as the jurisprudence is concerned, the courts have different ways of interpretation, one of them being that of *Maffezini v. Spain*, a point of view promoted by the ICSID courts[6]. In the case of *Tecmed v. Mexico*, the ICSID court held that the provisions which form the essence of the contracting parties' commitment must be negotiated with each other and do not fall within the scope of the clause (judgment of 29 May 2003, para. 74)[7].

The scope of an MFN clause must be taken into account both in its coverage and in its scope, and the substantive coverage is generally determined by

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[1] Such an application was denied in the case of *Plama Consortium Limited v. Bulgaria*, ICSID case ARB/03/24, Jurisdiction Decision of 8 February 2005.
[2] See *CDI report*, 19th session, May 8-July 14, 1967, doc. A/6709/Rev.1, § 48.
[3] See Doc. A/CN.9/224, 20 May 1982.
[4] See Doc. A/43/879, November 28, 1988, pp. 2-3.
[5] See Doc. A/CN.4/L.719, July 20, 2007, pp. 1-2. The annex to this document is important, containing the synthesis of the RDI activity in the matter, pp. 3-16.
[6] ICSID, *Maffezini v. Spania,* judgment on jurisdiction, 25 January 2000, § 54-64; ICSID, *Siemens v. Argentina*, 3 August 2004, § 32-110.
[7] See M. Sornarajah, *op.cit.*, pp. 204-205.

defining the beneficiaries concerned, the phases covered by the investments and any applicable exceptions.

As far as we are concerned, we have emphasized the importance of this issue and the fact that it currently enjoys a strong concern for codification, with a view to achieving clear regulations for international practice and jurisprudence[1].

The application of the MFN resulting from the international investment treaties is achieved by interpreting in the light of the general principles of treaty interpretation. By prohibiting differentiated treatment in terms of the competitive framework, the MFN clause establishes a certain climate between the relevant actors and avoids market distortions, favoring a solid competitive environment, thus contributing to the economic objective of international investment treaties. The MFN treatment means subjecting all foreign investors to the same operating and trading rules and costs they face in their normal activities, providing the same access and market conditions, as well as opportunities[2].

2.3. Protection of foreign investments in bilateral investment promotion and protection agreements

Regardless of the differences mentioned above, the bilateral investment treaties are characterized by certain common features that allow the indication of a common denominator and also their treatment as the same type of agreements. Their essence is expressed by mutually encouraging the increase of the flow of foreign investments and the promotion and protection of investments in the territories of the host states.

Like the other issues raised, in this matter too, the very general language adopted by these treaties can give rise to significant difficulties of interpretation when trying to establish the limits of the protection afforded.

Before establishing the investment, international investors should consider the following: whether and to what extent their investment meets the relevant BIT requirements, the nature of the protection granted and whether they have the necessary nationality to benefit from a particular relevant BIT. Otherwise, the practice has shown that they often resort to measures to "dress" in the necessary nationality. It is the right of those who invest outside their home countries to look for any opportunity to protect their investments, including ensuring that any available BIT is properly activated. However, these aspects do not fall within our sphere of research, because the introductory character of this monograph cannot include special and detailed analyzes on some subjects that in themselves constitute separate research topics.

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[1] On the whole issue, see for details UNCTAD – International Investment Agreements: *Key issues*, vol. I, U.N., N.Y. and Geneva, 2004, *Chapter 9.Transfer of Funds*, pp. 257-280, in particular pp. 268-272.

[2] *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, pp. 30-33.

Returning to the analysis of these clauses, it can be seen that both the European model[1] and the US model bilateral agreement on the promotion and protection of foreign investment have in particular the protection of foreign direct investment (FDI), a type of investment involving both the capital exporting state, as well as its importing state. The investment agreements are intended to protect and encourage investment by reducing the political risks associated with the investment climate in foreign markets. These guarantee the repatriation of both initial investments and returns in case of nationalizations, expropriations and damages resulting from armed conflicts and offer foreign investors fair treatment with that received by local and third-party investors. In addition, the agreements ensure the free transfer of funds related to convertible investments at market exchange rates. The significance of modern agreements comes from the application of the arbitration clause, which obliges national governments to arbitrate internationally, unconditionally, in case of disputes with private investors. The importance of this clause will be dealt with especially in the chapter on dispute settlement.

Some of the most common protections offered to investors and their investments within the BIT are the following: (i) not to expropriate or nationalize investments, except for a public purpose, on a non-discriminatory basis and to pay prompt, adequate and efficient/effective compensation; (ii) to give fair treatment to investments and investors of the other State Party; (iii) not take unreasonable or discriminatory action against those investors; (iv) not to treat investors or their investments less favorably than the host State's own investors and their investments (known as "national treatment") or those of any third country (known as the MFN status); (v) to provide full protection and security or protection of the State from the intervention of third parties and to ensure a safe environment; and (vi) comply with the investment obligations of investors of the other State Party (also called the "umbrella clause").

In the same vein, the international law provides, in the field of investment protection, a minimum standard, orientable for any host state and from which it should not derogate: i) the domestic law must correspond/comply with the international minimum standard; ii) the measures affecting international investment must not be discriminatory; iii) the measures affecting foreign investment must not have the character of a confiscation[2]. Protection mainly includes protection against abusive measures such as expropriation and nationalization (the distinction between nationalization and expropriation does not lead to any difference in

[1] An increasing number of states have created their own model. For example, Israel is negotiating its treaties on the basis of a 2003 text model, which replaced the 1994 text. For details, see https://www.oecd.org/israel/49864025.pdf accessed on 14 March 2019. The following examples can be mentioned in the last decade: India 2003 Model BIT, Canada 2004 Model BIT, France 2006 Model BIT, Colombia 2007 Model BIT, Norway 2007 Project Model BIT, Germany 2008 Model BIT and Model United States of America 2012.

[2] For details, see D. Carreau, P. Juillard, *op.cit.*, pp. 461-482, in particular pp. 473-477.

legal regime, and these are generally analyzed as equivalent notions[1]).

It has always been considered that the state has the right extracted from its territorial sovereignty to nationalize goods belonging to its nationals and foreigners. Beyond the abusive aspect of the operation itself, it should be noted that in modern times, nationalization has received a strong political connotation, typical of the ideology of socialist orientation (transfer to the community of means of production) or nationalist ("recovery" of natural resources). The practice of these measures had a wide territorial spread: the states of Eastern Europe, the states of the third world and almost all the new states that were formed on the former colonial territories. Where appropriate, foreign nationals of the States bound by these treaties must be able to compete for privatization in the same capacity as nationals of the States concerned[2].

The nationalization/expropriation consists of a transfer of private property decided authoritatively by the state, to the state or to a public body, for reasons of public interest[3]. The result is therefore the cumulation of three conditions for nationalization: the transfer of ownership must be decided authoritatively, the beneficiary of the transfer of ownership is the state or another public body and the nationalization must be based on general political, economic or social reasons. Currently, the nationalizations have a low frequency, but have a specific character in the form of a practice called *creeping expropriations*[4]; the elimination and prevention of these actions can be achieved through the three ways of regulation known by international investment law: international agreements, state contracts and domestic law, from which it can be concluded that BITs play a very important role in protecting investments against certain measures of this type.

The Resolution no. 1803 (XVII) of the UN General Assembly is often considered to express a positive right and provides that: *the nationalization, the expropriation or the confiscation must be based on reasons of public safety or national interest, recognized as having priority over simple private interests or private, both national and foreign*.

In the matter of expropriation, the jurisprudence has known both solutions within the meaning of the mentioned text[5], and contradictory solutions, depending on the political and economic environment in which the investments were made[6], which can also be observed in the matter of non-discrimination[7].

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[1] See also art. 2 § 2, point c) of the Charter of Economic Rights and Obligations of States, 1974.
[2] See ICSID Decision, October 12, 2005, *Noble Ventures v. România*.
[3] See Tbl. Iran/USA, 14.07.1987, partial sentence, *Amoco International Finance Corporation v. Iran* - US CTR, vol. 15, pp. 222-223; Nguyen Quoc Dinh, P. Dailler, M. Forteau, A. Pellet, *op.cit.*, pp. 1222-1223.
[4] See CPJI, Judgment, May 25, 1926, Certain German Interests in Polish Upper Silesia (merits), Series A, no. 7, pp. 44; CPJI, Oscar Chinn, Hot. December 12, 1934, series A/B, no. 63, p. 27.
[5] Hague Permanent Court of Arbitration (CPA), SA, *Armateurs norvégiens*, 13 October 1992, in RSA I, p. 334.
[6] See the case law cited at N. Quoc, P. Dailler, M. Forteau, A. Pellet, *op.cit.*, p. 1223.
[7] See Arbitral Awards in *Texaco-Calasiatic* Cases, 19 January 1977, § 74; *Aminoil*, March 24, 1982,

In the matter of compensation for expropriation, the United States has promoted the standard developed and adopted by developed countries, the formula of which is in the so-called Hull Clause[1], according to which the host state is obliged to provide prompt, full and effective compensation. This formula is more flexible than the one often used in doctrine, where it is expressed in the form of prior and full compensation[2]and has the following characteristic elements: i) the time of granting compensation must not be later than when the expropriation became effective; ii) the "adequate compensation" means full compensation; iii) the "effective compensation" means the granting of compensation in a convertible currency or at least the possibility of converting the amounts received as compensation into a convertible currency.

As the doctrine found, the Hull formula was criticized in the same way as the principle of owner compensation, exemplifying the Charter of Rights and Obligations of States, which provided that "the state must pay adequate compensation". The Charter of 12 December 1974 was criticized (the customary requirement of full compensation is one of the consequences of fair and equitable treatment and full investment protection), with developing countries advancing the view that such compensation would jeopardize projects as it affects their financial capacity and "it is up to each state to determine the amount of any compensation" (UN General Assembly Resolution no. 3171 [XXVIII], para. 3), "taking into account its laws and regulations and all the circumstances which he considers relevant"(the Charter of Economic Rights and Obligations of States, art. 2, par. 2, point c). Thus, from "full" compensation, it became "fair", eventually reaching the "close compensation" standard. The standard in question was promoted especially in the UN General Assembly Resolution no. 1803 (XVII) of 1962 on the permanent sovereignty over natural resources. Significant to the analysis are also the World Bank's Guiding Principles, which, although not legally binding, contain a detailed description of the formulas presented above, but both recent BITs (hard law) and treaties containing investment provisions regulate in detail this matter. The arbitral tribunals are generally for full compensation[3] and apply the principle established by the Permanent Court of International Justice in the case of the Chorzow Plant in recent litigation[4], where there are cases in which, in the context of compensations and compound damages and other damages, generally rejected by the general international law, as in the case of *Metalclad*[5], respectively

§ 86-87.

[1] The Hull formula was developed by US Secretary of State Cordell Hull in 1938 during talks on the nationalization of oil deposits belonging to foreign investors in Mexico.

[2] See for details A. Lowenfeld, *op.cit.*, pp. 397-403.

[3] For example, Tbl. Iran-American, August 12, 1985, INA Corporation, Iran-US CTR, vol.8, pp.377–379; ICSID, 30 November 1979, *AGIP v. Congo*, 8 August 1980, *Benvenuti and Bonfant*, ICSID, 20 November 1984, *Amco Asia v. Indonesia*, § 267.

[4] For example, C.C. Stocklom, 29 March 2005, *Petrobart v. Kyrgystan*, § 430; ICSID, 20 October 2006, *ADC v. Hungary*, § 497.

[5] See NAFTA Tribunal, *Metalclad Corporation v. United States of Mexico*, no. 81, Decision of 30

in other arbitration disputes[1].

It follows that these types of agreements (effective tools in the stability of investment relations) create elements of liability under the rules of international law for cases of non-compliance with international investment protection, situations in which the foreign investor is recognized the right to act directly before the courts. if it is considered injured by violating an international, conventional or customary norm (problem that we will deal with in the chapter dedicated to the settlement of investment disputes).

3. Subrogation - rights and obligations

The main function of advanced schemes by states is to provide political support to the investor, in order to protect against risks and to ensure continued investment and avoidance of damage. If such attempts fail and the dispute is reached (following arbitration requests), the home state will be interested in recovering from the host state itself. For these reasons, BITs usually contain a provision that expressly obliges the host state of the investment to recognize to the home state the subrogation of investors' rights within the BIT. The conditions for hedging the commercial political risk should, in any case, ensure that the investor's rights to the protection of his investment, in accordance with the applicable BITs, are not lost due to the assignment or subrogation, in the same way that investors should have in view of maintaining one's own protection rights in the context of reorganization. Most modern bilateral agreements/treaties on the promotion and protection of mutual investment have included clauses on the institution of subrogation, in order to allow the applicability of the rules of international law and domestic law in the investment process. The host State of the investment regulates this operation through its domestic law, determining the incidence of the norms of international law[2].

August 2000, §§ 103–4 and 113–26; for details in this case, see A. Lowenfeld, *op.cit.*, pp. 478-479 and 483.

[1] See, e.g., ICSID, February 17, 2000, *CDSE v. Costa Rica*, § 96-106; ICSID, April 12, 2002, *Middle East Cement Shipping v. Egypt*, § 173-175.

[2] Example of a treaty provision which retains the surrogate interest of the State of origin: "If a Contracting Party or an agency designated by it pays its investor a guarantee for an investment made in the territory of the other Contracting Party, the latter shall recognize the assignment of all the rights and claims of the investor to the first Contracting Party or its designated agency, by law or legal transaction, and the right of the first Contracting Party or its designated agency to exercise, by virtue of subrogation, such a right as the investor" (Article 7 of the Germany-China ILO of 2003). Or the following example of a treaty which retains an overriding general interest treaty: "(1) Where an investor's investments are insured against non-commercial risks, any subrogation of the investor's claims under this Agreement shall be recognized by the other Party. (2) Disputes between a party and an insurer shall be settled in accordance with the provisions (of the arbitration clause) of the State investor in this Agreement" (Article 22 of the ILO Norwegian Model Project of December 2007).

The subrogation is an operation of substituting, in a mandatory legal relationship, the creditor's person by another person who paid the debt instead of the debtor, becoming the latter's creditor with all the rights that the original creditor had[1]. In terms of international investment, the subrogation is a legal act by which the investor is substituted by his home state, through his body, in his rights of claim against the host state, a claim that has as its source the failure of the host state to its commitments, as stipulated in a bilateral investment promotion and protection agreement[2]. Specifically, an international instrument, most often the BIT, stipulates that the investor will be compensated if he suffers losses as a result of a political risk that is guaranteed by the state of which he is a national, the investor subrogating his rights against host state of the investment. Through the institution of subrogation, a link is made between the security system of foreign investments, respectively the national mechanisms for guaranteeing investments and their international protection[3].

4. Other types of bilateral treaties containing provisions on international investment

These may include: the bilateral investment agreements in the field of services, the bilateral trade and preferential investment agreements or the bilateral double taxation agreements. Like regional or sectoral agreements, these types of agreements are a real support for the legalization of international relations, the rational design of international institutions meant to have special competences in this field, the dissemination of investment policies related to the political and economic effects of trade agreements and trade relations. power between states.

They generally contain clauses on: scope, implementation, institutional independence, corporate bureaucracy, dispute resolution, regional institutionalization or provisions related to their type, coverage (industry, agriculture, non-tariff barriers, technical barriers to trade) or pace of liberalization, as well as the provisions on expropriation and the resulting obligations[4]. A significant number of such agreements were inspired by NAFTA, through express regulations regarding the definition and admission of investment, national treatment and the most-favored-nation clause, expropriation, such as, for example, the Agreements concluded by Mexico with Bolivia and Chile, the Free Trade Agreement between Colombia, Venezuela and Mexico (Group of Three) or the MERCOSUR Protocol Colony. The 2004 agreement establishing a free trade area between Costa Rica,

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[1] See O. Căpăţină, B. Ştefănescu (coord.), *Dicţionar juridic de comerţ exterior*, Scientific and Encyclopedic Publishing House, Bucharest, 1986, p. 342.
[2] For details, see M. Sornarajah, *op.cit.*, p. 222.
[3] See L. Navarsadyan, *op.cit.*, pp. 146-147.
[4] CNUCED, *Coopération Sud-Sud dans le domaine des accords internationaux d'investissement*, N.U., N.Y. et Genevé, 2005, p. 33.

Chile and Mexico (CARICOM[1]) and the 1998 agreement establishing a free trade area between Chille and Mexico can be exemplified in this analysis. Their effects and impact on economic variables have been thoroughly studied by economists. Whenever different types of agreements are compared (bilateral, plurilateral, region-state type or region-region type[2]), apparently no special trends are highlighted. In particular, the bilateral trade agreements tend to cover sectors that are not included in most plurilateral agreements.

a) Bilateral preferential trade and investment agreements. The bilateral preferential trade and investment agreements - ACIP (or APCI) differ from one geographical region to another in their nature and form and have an impact on the flow of foreign direct investment - FDI to developing countries. Within ACIP there is a special category of bilateral agreements, the so-called economic integration agreements - EIA, which may contain discriminatory provisions against third countries[3].

Other bilateral trade and preferential investment agreements are only framework agreements setting out the general principles for the further development of specific agreements and implementation strategies, an example being the 2003 India-ASEAN Framework Agreement, which marks the first stage in the construction of an area of trade and investment between the two parties or the BIMSTEC Framework Agreement [4], which obliges the parties to adopt an open and competitive investment regime in order to facilitate and promote a free trade area of BIMSTEC in the future. The Economic Harmonization Agreement between the People's Republic of China and Hong Kong (China) has in Annex 6 a detailed action plan to promote and strengthen investment cooperation between the parties[5]. In Africa, the preferential agreements account for about 10% of the total South - South APCI, examples being the Economic Community of West African States - ECOWAS[6] and the Common Market of East African and Southern African States - COMESA.

b) Bilateral investment agreements in the field of services. Together with the Marrakesh Agreement on the Creation of the WTO, the General Agreement on Trade in Services - GATS[7] was adopted, which, although multilateral,

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[1] Caribbean Community: CARICOM.

[2] For a statistical analysis of regional trade treaties and preferential trade treaties, see *http://www.rtais.wto.org/UI/Public MaintainRTAHome.aspx*, accessed on March 14, 2019

[3] CNUCED, *Attirer Les Investissements Éntragers Directs Dans Les Pays En Développement: la contribution des AII*, NU, NY, et Genéve 2009, p. 53.

[4] The Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation: BIMSTEC.

[5] See CNUCED, *Cooperation Sud-Sud…*, pp. 34-35.

[6] Economic Community of West African States: ECOWAS. See Chapter III of this document.

[7] The Marrakesh Agreement on the Establishment of the World Trade Organization - WTO, of April 15, 1994, was ratified by Romania by Law no. 133 of 22.12.1994, the Official Gazette no. 260 of December 27, 1994; The General Agreement on Trade in GATS Services is set out in Annex 1B to the said Agreement and is published in the Official Gazette. no. 360 Bis of December 27, 1994, pp. 277–318. Subsequently, Romania ratified Protocol V to GATS by Law 18/13.01.1999, the Official

created a favorable climate for services through bilateral international agreements[1], thus creating the premises for stability, predictability and transparency beneficial to investments.

Bilateral agreements of this type in this category are concluded by states in order to attract foreign investment, by providing facilities such as: removing restrictions on the admission, establishment and activity of foreign subsidiaries; improving the treatment norms of foreign investors; protection of foreign investments in the face of nationalizations or expropriations, the procedure for settling disputes, guaranteeing transfers of funds; adopting a transparent, stable and predictable regulation[2].

Some bilateral investment agreements provide for specific obligations for certain service activities (US-type 2004 bilateral investment agreements on financial services), and can be identified as typological, for example, Western Hemisphere agreements (promoted by the US and Canada), European type[3] and South

Gazette no. 11/18 January 1999. The Protocol considers only the list of specific commitments on financial services such as: insurance and reinsurance services, banking and other financial services excluding insurance.

[1] The preamble to the Agreement sets out the desire to create a multilateral framework of principles and rules for trade in services, as a means of promoting the economic growth of all trading partners, to achieve a gradual increase in the level of liberalization of this trade and to achieve ensure a global balance of rights and obligations, taking due account of national policy objectives. The right of Member States to regulate the provision of services in their countries and to introduce new regulations in this regard in order to meet the objectives of the relevant national policy is recognized. It is explained in the preamble that the existing asymmetries in the degree of development of service regulations in different countries and the special need of developing countries to exercise this right, on the one hand, and the need for increasing participation of those countries international trade in services and the expansion of their exports of services, on the other hand, necessitated the adoption of this General Agreement. As a structure, the General Agreement has 6 parts and a number of annexes as follows: Part I "Scope and definitions" (art. I), Part II, "General obligations and disciplines" (art. II-XV) , regulating the following issues: most-favored-nation treatment, transparency, disclosure of confidential information, increasing participation of developing countries; economic integration; labor market integration agreements, internal regulations; recognition; monopolies and exclusive service providers; business practices; urgent safeguard measures; payments and transfers; restrictions designed to protect the balance of payments; government procurement; general exceptions, security exceptions; subsidies. Part III, dedicated to specific commitments (art. XVI-XVIII), considers access to markets; national treatment; additional commitments. Part IV, on progressive liberalization (art. XIX-XXI), refers to the negotiation of specific commitments, lists of specific commitments, amendments to lists. Part V, referring to institutional provisions, (art. XXII-XXVI), refers to consultations, settlement of disputes and execution of obligations, council for trade in services, technical cooperation, relations with other international organizations. Finally, part VI is devoted to the final provisions (art. XXVII-XXIX) and refers to the refusal to grant benefits; definitions and annexes. There are six annexes, among which we cite the Annex on the movement of natural persons, providers of services covered by the Agreement; two annexes on financial services; the Annexes on air transport services and on negotiations in the field of maritime transport services and in the field of basic telecommunications. See GATS content at: D. Carreau, P. Juillard, *op.cit.* pp. 306-337, O. Crauciuc, *op.cit.*, pp. 188-218.

[2] CNUCED, Accords internationaux d'investissement dans les services, N.U., N.Y., et Genéve, 2005, pp. 18-20.

[3] The European Commission has no mandate to negotiate investment on behalf of the members of

- South agreements.

Leaving aside the issue of the definition of investment, an issue that has been partially addressed in this paper, we refer primarily to the liberalization of investment in services, noting that in this case there is the GATS inspirational model, allowing members to grant prior rights but subject to "negative lists" often encountered in services. However, the Framework Agreement promoted by ANASE on services demonstrates that, within the regional groups of states, the parties can agree to negotiate a further liberalization of services, beyond the commitments made under GATS.

The international investment agreements on services give states the possibility to resort through reservations to otherwise prohibited performance requirements (an example is NAFTA currently abandoned in favor of the USMCA[1], which in Article 106 sets out the rules of the Agreement on performance requirements, establishing a list of prohibited requirements, for example requirements relating to exports, participation of locally sourced items in the transfer of technology or the exclusive provision of services, and Article 1108 refers to reservations concerning non-compliant measures and exceptions to four of the fundamental obligations of Investment Agreement: national treatment, most - favored - nation treatment, rules on performance requirements and rules on managers and boards). The MIC/TRIMS agreement, adopted in Marrakech in 1994, also has references to the outcome requirements. It lists and prohibits certain trade-related performance obligations, in particular those incompatible with Articles III and XI of the GATT. Please note that this agreement applies only to measures relating to investments in trade in goods (Article I) of the agreement; it does not apply directly to services. In some states, a specific prescription may arise due to the more special nature of certain services, a requirement regarding local presence. It is a kind of obligation to establish, which requires a company to register and issue a local authorization as a legal entity.

All bilateral international investment agreements in the field of services contain, in more or less detail, provisions on dispute settlement procedures resulting from the interpretation and/or execution of such agreements. We remind you that we considered it necessary for these clauses to be analyzed in a separate chapter of this monograph.

In the negative list negotiation method, states agree on a series of general obligations, then each draw up a list of all areas in which non-compliant measures are maintained[2]. In contrast, according to the positive list method, certain obligations and corresponding limitations apply only to the industries specified by each

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the Union. Thus, the Member States continue to conclude bilateral investment agreements which, however, have the same fundamental characteristics, even if a German or French model is distinguished in this respect.

[1] Available at https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng, accessed on 13.03.2019.

[2] For example, NAFTA, in the section on investment and which also covers ISD in services and a

country (GATS, the 1997 Montevideo Protocol on trade with services, under MERCOSUR and the ASEAN Framework Agreement for services[1]). Such agreements must contain specific rules with different characteristics and objectives.

Subsequent practice has shown that, after the completion of negotiations in the three categories of services mentioned (financial, telecommunications, accounting), the states can be more cautious in drafting texts specific to a given sector. The litigation (case) between the state of Mexico and a telecommunications company, settled by the Dispute Settlement Body – DSB of the World Trade Organization - WTO, in 2004 also had an influence. The conventional name of the case is the *Telmex* case. The dispute settlement panel assessed the compatibility of Mexican laws and regulations regarding the provision of public telecommunications services with Mexico's GATS commitments, including the "additional commitment" mentioned in the reference document. After analyzing several arguments, the DSB found that the State of Mexico had not fulfilled its obligations under the reference document and the annex; It was emphasized that these findings did not prevent Mexico from pursuing its development goals, and the case itself highlighted the difficulty of formulating commitments in a way that truly preserves development options[2]. The above-mentioned agreements set out specific rules for certain service activities, but other agreements may totally or partially exclude certain sectors from their scope (air transport, which is governed by previous bilateral agreements with many years, in relation to GATS, is the example most common)[3].

c) Bilateral agreements on the avoidance of double taxation. Such agreements have as their sole object the field of taxation, namely the avoidance of the same income being taxed by two or more states, and concern the distribution of exclusive or shared taxation rights between the contracting parties, containing definitions adopted by mutual agreement. These contain clauses such as: non-discrimination clauses (national treatment, not the most-favored-nation clause), provisions to combat tax evasion and clauses on arbitration and dispute settlement procedures[4]. It is true that the principle of sovereignty gives the state

number of agreements concluded with the participation of Western hemisphere states, as well as bilateral investment agreements - BIT adopts this approach.

[1] References to provisions of multilateral investment agreements or to international economic cooperation bodies should be made as those instruments guide the negotiations and, finally, the text of bilateral investment agreements promoted by the Member States of those bodies, respectively multilateral investment agreements.

[2] CNUCED, *Accords internationaux…*, *op.cit.*, p. 58.

[3] Paragraph 2 of the Annex on Air Transport Services, Annex to the GATS, provides that: "the agreement including its dispute settlement procedures shall not apply to measures affecting: a) traffic rights regardless of how they were granted; or b) services directly related to the exercise of traffic rights except as provided in paragraph 3 of this Annex", para. 3 provides that the agreement shall apply to measures affecting: a) aircraft repair and maintenance services, b) the sale or sale of air transport services; c) computerized reservation systems (CRS) services.

[4] CNUCED, *Cooperation Sud-Sud dans le domaine des accords internaionaux d'investisement* N.U., N.Y. et Geneve, 2005, p. 32.

absolute jurisdiction over its territory, but due to differences in domestic tax regulations, the need for international regulation has become necessary. The doctrine specified that double taxation occurs whenever one and the same person is subject to taxation for the same income and/or wealth in the same fiscal year by two fiscal sovereignties[1].

The double taxation has been the subject of negotiations and attempts at regulation in the form of normative acts since the League of Nations, when two draft model bilateral agreements on this issue were developed; within the concerns of the UN, the Economic and Social Council - ECOSOC, in 1953, by the Resolution of the UN General Assembly no. 486 (XVII) of July 9, 1953, recommends for developed countries to establish, unilaterally or through bilateral agreements, a fiscal regime by which the taxation of the profit obtained from international investment activities should be made only on the territory of the state on which these activities are actually undertaken.

The Convention on the Elimination of Double Taxation in Relation to the Collection of Profits of Associated Enterprises[2] was adopted in the European Community and is also valid in the European Union, and in 2006 a Code of Conduct annexed to the Convention entered into force, regulating the determination of the tax regime. which applies to the profit made by a subsidiary or other dismemberment of a company belonging to a Member State in the territory of another Member State. The first double taxation agreements, based on models developed by the OECD in 1963 and 1977, were signed between developed countries.

d) Bilateral investment agreements in the context of European Union (EU) law. The marked problems of international investment law within the EU continue to expose characteristics compatible with evolution, but also with disparate elements compatible with ambiguity and amalgamation, especially in the field of dispute settlement. One of the unresolved issues is whether bilateral investment treaties (BITs) concluded between EU Member States, in particular their dispute settlement mechanisms, are compatible with EU law[3]. However,

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[1] For details see I. Condor, *Drept Fiscal. Evitarea dublei impozitări internaţionale*, Regia M. Of., Bucharest, 1999, pp. 30-32; 35-41.

[2] Doc. 90/436/EEC in force on 1 January 1995.

[3] The European Commission has clearly stated that these provisions are contrary to EU law and in 2015 launched infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden with regard to their BITs within the EU. The Commission has stated in several investment arbitrations, in which it intervened as a third party, that it is desirable for the termination of BITs within the EU. See the partial decision in *Eastern Sugar B.V. v. Czech Republic* and Decision for jurisdiction in *Achmea B. v. Slovakia*, available at https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf and at https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf, accessed on May 5, 2016. In Romania, on February 27, 2017, the Parliament adopted Law no. 18/2017 on approving the termination of the validity of intra-EU bilateral investment treaties (BIT). The law was published in the Official Gazette no. 198 of March 21, 2017 and entered into force on March 24, 2017. The Law no. 18/2007 approves the cessation of validity by agreement of

there were other provisions that needed to be modified; the "internalisation" of non-EU BITs originally gave rise to an overlap and a potential conflict between the various protection mechanisms contained in existing agreements and those of the European single market[1] (provisions on capital transfers, state aid to foreign investors, etc.). One solution to which Member States in such a situation should have adopted an attitude of change, not the termination of an BIT, would have been to change only those clauses aimed at incompatibility with EU law, of course, only for the purpose of establishing appropriate protection standards. This amendment procedure would have been accepted in principle by the signatory states, compared to the effective cessation of the entire BIT and the resumption of negotiations that can take place over time, which creates instability for investors. In principle, the international law takes precedence[2] even within the EU - an international intergovernmental organization with a regional character and economic and political integration, given its objectives. Compared to NAFTA, as the Commission has long argued that European investors are at a comparatively disadvantaged position, alongside NAFTA investors in terms of market access, it was to be expected that with the entry into force of the Treaty of Lisbon, the EU to negotiate more strongly the investment treaties with provisions on market access or those on the pre-establishment phase, it is natural to try to narrow the differences between the BITs of EU Member States and NAFTA (currently abandoned for the USMCA[3]). Initially, the European Community was the one that, through the Commission, led and represented the interests of the Member States in the multilateral trade negotiations from the Tokyo Round to the Uruguay Round (the EU being a party to disputes with the United States before the Dispute Settlement Office - DSO).

An argument worth considering for compliance with protection standards is that most BITs concluded by EU Member States contain the most-favored-nation clause (ie the national treatment clause). For example, the German BIT model from 1998, in art. 3 para. (1) and (2), combines the most-favored-nation clause with the national treatment clause: *"(1) No State party to an agreement shall treat in its territory in a less favorable manner investments belonging to investors of the other State Party agreement than the investments of own investors*

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the parties or by unilateral denunciation of all the 22 intra-EU BITs, currently in force, concluded by Romania and listed in the Annex to the Law.

[1] See the Decision of December 11, 2013 pronounced by the Arbitral Tribunal within the International Center for the Settlement of Investment Disputes (ICSID) in the arbitration case *Micula et al. v. Romania*.

[2] From a legal point of view, such overlap creates a conflict between international law governing treaties, including BITs, and EU law. While some views show that the difficulty in resolving this issue lies in the fact that there is no higher legal rule that decides which of the two different legal orders should prevail in the event of a conflict, other views favor jus cogens, international law having the highest hierarchical normative rank.

[3] Available at https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng, accessed on 13.03.2019.

or investments of a third country. (2) With respect to investment-related activities in its territory, no State party to an agreement shall treat investors of another State party to the agreement in a less favorable manner than the investments of its own investors or those of third countries"[1]. Regarding the national treatment clause and the elimination of any discrimination, its application is related to the provisions of art. 18 of the Treaty on the Functioning of the European Union (TFEU), which prohibits any discrimination on grounds of citizenship or nationality. As an example, we cite the judgment of the EU Court of Justice in the case of *Saint Gobain*[2].

In a 2015 press release[3], the Commission states, referring to its request for the termination of some BITs, that many of these intra-EU treaties were signed in the 1990s, before the EU expanded in 2004, 2007 and 2013, being concluded mainly between states that were already members of the EU and states that, after accession, would be designated as "EU 13". The treaties were intended to provide assurances to entrepreneurs willing to invest in future EU-13 member states, at a time when private investors might be overly cautious about such investments, sometimes for reasons of political or historical order. As a result, these BITs aimed to improve the level of protection offered to investors, for example by providing for the payment of expropriation compensation and establishing arbitration procedures for the settlement of investment disputes. Following the enlargement of the Union, such "additional" insurance should no longer be necessary, as all Member States are subject to the same rules in the EU single market, including rules on cross-border investment (in particular freedom of establishment and free movement of capital). Also, thanks to European Union rules, all EU investors enjoy the same protection (for example, in terms of non-discrimination on grounds of citizenship or nationality). By contrast, intra-EU BITs grant rights, at bilateral level, only to investors in certain Member States: according to the settled case law of the Court of Justice of the European Union, such discrimination on grounds of citizenship or nationality is not compatible with EU law.

5. Conclusions

The breadth of scientific research carried out in connection with bilateral investment promotion and protection agreements is due to the multitude of these

[1] Quote from A.J. Belohlavek, *Protecţia investiţiilor străine directe în Uniunea Europeană*, C.H. Beck, Bucharest, 2011, pp. 60-61.

[2] CJEU Decision, File no. C 307/97 of 21 September 1999, *Compagnie Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen - Innestadt*, OJ, 1999, pp. 106-161. For comments and analysis, see in general the decision of the CJEU in particular para. 57-59, in A. Belohlavek, *op.cit.*, p. 64.

[3] Available at *http://www.europa.eu/rapid/press-release_IP-15-5198_ro.htm*, accessed on May 5, 2016.

instruments, their increasingly specialized/circumstantial nature in terms of objectives, and the content of clauses with different characteristics, in which almost always the technical norm is the defining element.

There is a possibility to establish what are the main provisions of an investment agreement: fair and equitable treatment, national treatment and the most-favored-nation clause, prohibition of expropriation; the free transfer of capital and, of course, where appropriate, the "umbrella" clause. These provisions are found in both preferential investment agreements and service promotion agreements, and in this respect can be considered as common clauses.

With regard to "fair and equitable treatment", it should be noted that the assessment of this term in the case-law has evolved from something representing the minimum standard in question, to an autonomous notion which extends beyond the traditional notion of minimum standard, stating that a stable legal and economic environment is an essential element of fair and equitable treatment.

As it was found, the most favored national/nation treatment is granted in similar circumstances (*like circumstances*), but also under jurisdictional aspect; thus, if a bilateral treaty does not contain the arbitration clause in favor of ICSID, but the investors of another state benefit from such a clause, the treatment of the most favored nation also extends to jurisdiction[1].

It should also be noted that most bilateral agreements provide more recently, an exception to the most-favored-nation treatment clause in the REIO (Regional Economic Integration Organization) clause - taken from the GATT model: if a state participates in the case of regional economic integration, the treatment accorded to investors of the Member States of the form of regional cooperation shall be exempt from the treatment of the most favored nation.

With regard to the "umbrella" clause, it should be noted that it provides that each party will comply with any obligation it has assumed in connection with an investment. It is clear that it is a specific way of broadening the scope of a treaty, covering virtually any contractual obligation between the state and the investor[2]. According to the OECD: the contractual provisions are "internationalized", as a breach of a contractual provision has the effect of violating the "umbrella" clause in the international treaty[3].

The European Union's position on bilateral investment agreements concluded by Member States with third countries requires a time-consuming procedure, given that the replacement of the network of national agreements can only

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[1]*Maffezini c. Spania* 2000 no. ARB/27/7, Decision on objections concerning jurisdiction 25 January 2000: although the applicant relied on the BIT between Argentina and Spain and did not specifically address the settlement of disputes, he obtained the benefit of the provisions of the Chile-Spain investment agreement containing such disputes references.

[2] See the interpretation of the clause in question in Cause *Noble Ventures inc. c. Romania*, Award, 12 october 2005, Case No. ARB01/11.

[3] OECD Interpretation of Umbrella Clauses in Investment Agreements, Working Papers on International Investment, 2006/3.

be done gradually, on a case-by-case basis, in relation to each partner third country. According to UNCTAD[1], an organization that provides official statistics in the field for both grouped and individual states, the EU is a party to 67 treaties containing investment provisions (TIPs), of which 55 are in force, the only group with concluded BITs being the Economic Union Belgium - Luxembourg (BLEU), which is a party to 90 BITs, of which 68 are in force. Currently, the Union is not a party to the BITs, although it is in negotiations with countries such as China, for example. Although EU Regulation no. 1219/2012 of the European Parliament and of the Council[2] laying down transitional provisions for BITs concluded between Member States and third countries affirms the Union's exclusive competence in this matter, including the general concept of "gradual replacement", while retaining old agreements to be gradually replaced with agreements signed by the Union, while maintaining the formal possibility that Member States may continue to conclude the BIT.

[1] See *http://www.investmentpolicyhub.unctad.org/IIA/IiasByCountryGrouping#iiaInnerMenu*, accessed on May 3, 2018.
[2] Official Journal of the European Union no. L351/40 of 20 December 2012.

Chapter IV
Principles of international investment law

1. General principles and specific principles

1.1. Introductory considerations

As in public international law, there is no hierarchy of principles in international investment law, but rather an interdependence. These principles are constantly subject to renovation and innovation, being in constant mobility, without being affected by instability, but only by a continuous evolution and transformation.

Among the principles listed are and must be found, even in the context of the reconciliation of principles, the fundamental principles of international law, a theory based on the heterogeneity of the principles of international investment law; it is well known that, for example, even if investment treaties are concluded between states, they include rights and obligations for all actors in this field, not just for states. Their heterogeneity is also generated by the inspirational field of some principles, especially in international investments where the economy is permanently combined with politics and social, so the principles can be of social, philosophical or political inspiration, this theme being a continuous research topic and scientific debate. To all this is added the fact that international investment law is in an integrated process of permanent development, whose structure appears as a complex and unitary totality of interactions between branches of law[1].

These principles are guiding precepts and aim to guide the development and application of legal rules on international investment, and can be formulated in the texts of treaties and other regulations specific to this field.

These are the support for the stability of international investment law, correcting the gap, excesses and anomalies that are naturally identified at some point in the interpretation and application of this field.

Like other areas of law, the principles of international investment law are divided into general principles and branch principles. Principles such as *pacta sunt servanda* or the principle of cooperation, responsibility or sovereign equality are general principles and hover over the entire legal norm, and the principle of

[1] The discussions were for and against the integrationist theory of public international law. In this regard, Vid Prislan, in his study Non-investment obligations in investment treaty arbitration: towards a greater role for states? deals with the principle of systemic integration (pp. 465, 466 of the volume edited by Freya Baetans: *Investment Law Within International Law: Integrationist Perspectives*, 2013). The underlying question is whether the key sub-domains of public international law, especially international investment law, are they open to cross-fertilization or do they continue to grow in autonomous regimes?

investment promotion or the principle of full protection and security are specific, guiding principles in the field of international investment.

Even the general principles are, in turn, divided into fundamental principles and ordinary principles (guiding and correcting).

1.2. Sociology, a tool for exploring and analyzing international investment law

The perspective of legal sociology contributes to the development of international investment law through its functions: descriptive, explanatory, predictive, critical and practical-operational. The value judgments, as a goal of this field, unquestionably bring representative clarifications of evolution, given the variability in time and space and of this field of law.

From a sociological point of view[1], an analysis of legal systems and institutions in this new field of law would be a large-scale study, which is why I will indicate below only one research topic that I hope will be debated and further developed in proportion to its role: legal retrosociology. In our field of analysis, as a result of the research, we observed the retrosociological phenomenon, involved in the historical phases of foreign investment, not only when discussing the assertion, refutation and reaffirmation of the principles of international foreign investment law, but also when discussing about the appearance, role and behavior of the subjects of this right. Legal retrosociology is not treated according to its importance and implications. Although there are papers debating this phenomenon in other fields such as history - mainly, retrosociology in international investment law can be easily identified from the special language used by analogy with other fields, and should be recognized more often with relevant criticism (the finding of retrosociology can be observed paradigmatically and theoretically, especially against the background of lack of inspiration, when a critical threshold is reached that requires a change of model), it already knows influences when, for example, are subjected to legal analysis marked the evolution of international law on foreign investment in: neo-imperialism, neo-colonialism, neo-corporatism, neo-liberalism, etc., covering terms for retrosociology are also considered those composed of the particle "post", for example: postcapitalism, postmodernism[2], etc.

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[1] The professor Sofia Popescu refers to a much larger number of auxiliary sciences, indicating comparative law, legal sociology, legal ethnology (which deals with the study of archaic norms and institutions), legal logic, legal psychology, legal semiotics (which studies the relationship of law with logic and language), legal semiology (part of linguistics that deals with the study of signs with applications in the legal field), legal economics (which performs an economic analysis of law, the cost of legal institutions and mechanisms).

[2] See *Geopolitica Noului Imperialism*, having them as authors I. Badescu, L.Dumitrescu and V. Dumitrascu, Ed. Mica Valahie, 2010, p. 14.

For example, as a result of developments and trends in the reform of international investment law, the efforts of specialists to reconcile its principles have been noted. It frequently discusses the affirmation, refutation or reaffirmation of specific legal principles, as well as, in the same note of synonymy, the relaunch[1], reform, contestation[2], consolidation or reconciliation[3] of the principles underlying international investment law.

Just as other areas such as geopolitics can be explored and investigated through retrosociology, so can a "screening" of the emergence and evolution of international investment law, a process based, as in the case of geopolitics, for example, on the idea of *"remnants, the repetition of states and mechanisms that make possible the epistemological phenomenon of retrotheories, that is, of the return of theoretical ideas from revolted epochs to updated empirical fields"* [4].

A development of this subject is possible only through a close collaboration between specialists belonging to both the sociological field and the philosophy of law, as well as the field of international law.

1.3. Representative examples of principles of international investment law

A novel principle in the field of international investment, but present in other areas of law such as EU law, is the imposition of the principle of legal certainty (the application of the law to a specific situation must be predictable); in the same situation is the principle of correlation of regulatory systems; however, the enshrinement of a principle of law sometimes takes hundreds or even thousands of years. A substratum principle of the existence of law does not exist because it was formulated, but was formulated because it existed[5].

In general, the following principles can be identified for which only the exhaustion of an indefinite but sufficient period of time can establish a consecration.

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[1] For an approach to the notion of relaunch see, Valentin-Stelian Bădescu *Este posibilă o relansare a aplicării principiilor generale ale dreptului şi ale echităţii în ordinea juridică a Uniunii Europene?*, in vol. III, no. 1/2014 of the Journal „Acta Universitatis George Bacovia".

[2] See L. Navasardyan, *Protecţia şi garantarea investiţiilor străine în dreptul comerţului internaţional*, Ed. Wolters Kluwer, Bucharest, 2013, Chapter 2, Section III.

[3] For an overview of reconciling the policies and principles of international investment law, see S.P. Subedi, *International Investment Law: Reconciling Policy and Principle*, Bloomsbury Publishing, 2016.

[4] See *Geopolitica Noului Imperialism*, I. Bădescu, L. Dumitrescu and V.Dumitraşcu, Ed. Mica Valahie, 2010, p. 12.

[5] Gh.C. Mihai, *Teoria dreptului*, 3rd ed., Ed. C.H. Beck, Bucharest, 2008, p. 118.

2. The principle of sovereign equality

The most important attribute of state sovereignty is economic sovereignty[1]. The Charter of Economic Rights and Obligations of States (CERDS) of 1974 adopted by the UN[2] provides in art. 2 para. (1): "*Each state has and will freely exercise permanent sovereignty, including possession, use and disposition of all wealth, natural resources and economic activities*." Article 2 para. (2) provides that: "*Each state has the right: a) to regulate and exercise authority over foreign investment within its national jurisdiction, in accordance with its laws and regulations and in accordance with its legislation and national objectives and priorities. No state will be obliged to grant preferential treatment to foreign investments; b) to regulate and supervise the activities of transnational corporations in its national jurisdiction and to take measures to ensure that these activities comply with its laws, rules and regulations and are in accordance with its economic and social policies. The transnational corporations must not interfere in the internal affairs of a host state*."

Therefore, from the point of view of the practical approach, the impact of this principle has been noted in the issue of international organizations (states are legally equal, if and to the extent that they do not agree otherwise, but often agree differently, receiving more much power even through the founding documents of international organizations), transnational corporations, concessions granted to foreign investors and the special responsibilities of highly industrialized states. For example, concessions granted to foreign investors could be more easily challenged, affected, due to the principle of permanent and inalienable sovereignty of states over their natural resources. The principle would undoubtedly influence the controversial issue of compensation in the case of nationalization of foreign property. Both international economic law and environmental protection law recognize the special responsibilities of industrialized states that partially subject different legal regimes to industrialized states and developing states. The current trend is from development to coordination to cooperation and further to an international community.

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[1] S.P. Subedi, *International Economic Law,* University of London 2007, p. 22.

[2] UN General Assembly, Charter of Economic Rights and Obligations of States: Resolution/adopted by the General Assembly, 17 December 1984, A/RES/39/163, available at: *http://www.refworld.org/docid/ 3b00eff474.html*, accessed on 17 July 2017, recalling UN Resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and Program of Action on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974 , The Charter of Economic Rights and Obligations of States and 3362 (S-VII) of 16 September 1975 on International Economic Development and Cooperation, which laid the foundations of the new international economic order.

3. The principle of cooperation

This principle was recently adopted and raised in principle in the G20 of UNCTAD in 2016. In the annotations extracted from the same official page, UNCTAD states that: "this principle stipulates that investment policies address a number of issues that could benefit from more international cooperation. The principle also argues that special efforts should be made to encourage foreign investment in the least developed countries. The home countries can support foreign investment leading to sustainable development. The developed countries have long offered investment guarantees against certain political risks in host countries or provided loans to companies investing abroad. The Multilateral Investment Guarantee Agency (MIGA) offers international investment insurance.

The principle is based on examples of states that have begun to make the provision of investment guarantees conditional on a social and environmental impact assessment.

The importance of international cooperation is also growing as more and more countries use policies aimed at promoting investment. Better international coordination is required to avoid a global race under regulatory standards or a peak race in incentives and to avoid a return to protectionist tendencies.

More international coordination, especially at the regional level, can also help to create synergies to carry out investment projects that would be too complex and costly for a single state. Another policy area that could benefit from greater international cooperation is investing in sensitive sectors. For example, recent concerns about possible land use and the exclusion of local farmers by foreign investors have led to the development by FAO[1], UNCTAD[2], the World Bank and IFAD[3] of the principles for responsible investment in agriculture (PRAI)".

[1] It is a specialized agency of the United Nations, which leads international efforts to combat hunger. Serving in both developed and developing countries, FAO acts as a neutral forum in which all states meet on an equal footing to negotiate agreements and discuss policies in this area.

[2] United Nations Conference on Trade and Development (UNCTAD). UNCTAD was established in 1964 as a permanent intergovernmental body. UNCTAD is the main body of the United Nations General Assembly dealing with trade, investment and development issues.

[3] It is an international financial institution and a specialized agency of the United Nations dedicated to the eradication of poverty and hunger within the International Fund for Agricultural Development (IFAD) for rural areas in developing countries. It was established as an international financial institution in 1977, as one of the major outcomes of the 1974 World Food Conference. Seventy-five percent of the world's poor live in rural areas of developing countries, but only 4% of official assistance for development is given to agriculture.

3.1. Principles concerning the treatment and protection of international investments

The investment protection and treatment is a traditional principle enshrined, also adopted by the G20 at UNCTAD in 2016. According to the official source, this principle recognizes that investment protection, although only one of the many determinants of foreign investment, can be an important policy tool. to attract investment. Therefore, it interacts closely with the principle of investment promotion and facilitation. It has a national component and an international component. The key elements of national protection include, but are not limited to, the rule of law, freedom of contract and access to court, and key components of investment protection that are frequently found include the principles of non-discrimination (national treatment and most-favored-nation treatment), fair and equitable treatment, protection in case of expropriation, provisions on the movement of capital and settlement of disputes.

The notions of *treatment*, *protection*, and *guarantee*, are closely linked to each other. By rules of treatment is meant, in the context of the matter we are dealing with, the set of rules of domestic law or international law that define the legal regime of international investments, and by rules of protection we mean the set of rules of domestic law or international law that prevent or sanction public violations of the existence of international investment[1]. The *guarantee mechanisms* mean all the mechanisms that transfer, from the international investor to a specialized body governed by domestic law or international law, the financial consequences resulting from the realization of certain political risks. It follows that the rules of both the domestic law of the host State and the State of origin of the investor and the rules of international law are applicable.

The host State grants or provides treatment and protection, and the State of origin exporting the investment ensures its guarantee, forming a circuit on the principle of Roman law *do ut des*, favorable or unfavorable to international investment.

3.2. Other principles that can be found in international foreign investment law

They can be enumerated: the principle of self-determination, the principle of non-recourse to force or threat of force, the principle of peaceful settlement

[1] The notions of *treatment* and *protection* were not addressed separately until a famous ruling of the International Court of Justice - ICJ, handed down in the *Barcelona Traction* case, according to which: "from the moment a state admits foreign investments or nationals foreigners, natural or legal persons, he is obliged to grant them the protection of the law and to assume certain obligations regarding their treatment ", *Belgium v. Spain*, Judgment of 5 February 1970, para. 33.

of disputes, the principle of non-interference in the internal affairs of other states, the principle of fulfilling international obligations in good faith (*pacta sunt servanda*), the principle of respect human rights and fundamental freedoms, the principle of respect for the environment and responsible investment, the principle of special international civil, criminal, tort and administrative liability, the principle of full protection and security, including the protection of legitimate expectations, the most-favored-nation principle and the principle of national treatment. fair and equitable treatment and the principle of reciprocity. The enumeration is not limiting.

The principles of this field are closely related to the protection of the state, the protection of international investors and the treatment granted. At the same time, they serve to provide a legal and interpretive basis both for completing conventional and customary law, and for covering gaps[1]. The international investment law must not be outlined in a political law, but must be outlined individually, in a well-defined codification framework, given the system of sources of this branch of law, the type of regulatory rules, the distribution of political power, the sanctions system (which is still in its infancy, the most eloquent example being the recent initiatives to establish a criminal law on international investment) and the means of resolving disputes over foreign investment.

All the principles of international investment law are the result of continuous observations, required by the regulatory requirements of international investment, having an important role in the administration of justice and dispute settlement, making up even the "spirit of the law", so the legal ideal.

3.3. Modern trends

Overcoming the doctrinal controversies[2] of the existence of general principles of international law, and given some other international instruments[3]that individually refer to fundamental principles, although we previously specified that international investment law must not be outlined in a political law, the efforts of G20 ministers generated for the first time in July 2016 (even if not by force), in the debates and analyzes of the global investment policy conducted by UNCTAD, a set of specific principles[4], which we reproduce below according to

[1] P. Guggenheim, *Traite de droit internațional public*, vol. I, 2nd ed., 1996, pp. 296-297.
[2] D. Carreau, F. Marrella, *Droit internațional*, 11ème édition, Éd. A. Pedone, 2012, p. 328.
[3] These include, in particular, the Universal Declaration of Human Rights and the United Nations Guiding Principles on Business and Human Rights, the Convention on the Establishment of the Multilateral Investment Guarantee Agency, the World Bank Guidelines for the Treatment of Foreign Direct Investment, the OECD Guidelines for Multinational Enterprises and tripartite principles on ILO (International Labor Office) multinational enterprise and social policy, as well as several WTO (World Trade Organization) agreements, including GATS (The General Agreement on Trade in Services), the TRIMS Agreement and the GPA (Agreement on Government Procurement).
[4] For annotations to these principles, access the official UNCTAD link: http://investmentpolicy

the official source[1]:

1. Investments for sustainable development. The general objective of developing the investment policy is to promote investments for inclusive growth and sustainable development.

2. Policy coherence. Investment policies should be based on a country's overall development strategy. All policies that have an impact on investment should be coherent and synergistic both nationally and internationally.

3. Government and public institutions. The investment policies should be developed that involve all stakeholders and are incorporated into an institutional framework based on the rules of law, which respects high standards of public governance and ensures predictable, efficient and transparent procedures. for investors.

4. Development of dynamic policies. The investment policies should be regularly reviewed for effectiveness and relevance and adapted to evolving development dynamics.

5. Balanced rights and obligations. The investment policies should be balanced in establishing the rights and obligations of states and investors in the interests of development for all.

6. The right to regulate. Each country has the sovereign right to establish the conditions of entry and operation for foreign investment, in accordance with international commitments, in the interest of the public good and to minimize possible negative effects.

7. Openness to investment. In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment. In addition, the issue of "openness" goes beyond establishing an investment. The trade opening can also be important; especially when the investment is significantly dependent on imports or exports.

8. Investment protection and treatment. The investment policies should provide adequate protection for established investors. The treatment of established investors should be non-discriminatory.

9. Promoting and facilitating investments. The investment promotion and facilitation policies should be aligned with sustainable development objectives and designed to minimize the risk of harmful competition for investment.

10. Corporate governance (administration) and responsibility. The investment policies should promote and facilitate the adoption and observance of international best practices on corporate social responsibility and good corporate governance.

11. International cooperation. The international community should work together to address common investment challenges for development, especially in the least developed countries. The collective efforts should be made to

hub.unctad.org/publicdocs/annotations.htm#annotation1, last accessed 17.07.2017.

[1] http://investmentpolicyhub.unctad.org/ipfsd/core-principle, last accessed 17.07.2017.

avoid investment protectionism (the definition of protectionism, according to the Explanatory Dictionary: *"represents the economic policy of a state, which seeks the temporary, partial or total protection of indigenous industry and agriculture by import, through currency restrictions"* etc.)

The official UNCTAD source also states that "these principles interact with each other and should be considered together. They can serve as a reference for the development of national and international investment policies, in line with the international commitments made and taking into account national and extensive sustainable development objectives and priorities". As a brief retrospective, UNCTAD[1] states the following: "The UN Charter (art. 55) promotes, inter alia, the goal of economic and social progress and development. The UN Millennium Development Goals call for a global partnership for development. In particular, Objective 8 encourages the further development of an open, rules-based, predictable, non-discriminatory and financial system of trade and finance, which includes a commitment to good governance, development and poverty reduction - concepts that apply equally to the system. investment. The "Monterrey Consensus" of the 2002 UN Conference on Financing for Development recognizes that countries must continue their efforts to achieve a transparent, stable and predictable investment climate, with proper respect for contracts and respect for property rights, integrated into sound macroeconomic policies and institutions that enable of the enterprises, both domestic and international, to operate efficiently and profitably and with maximum impact on development". The UN Implementation Plan in Johannesburg of September 2002, following the "Rio Declaration", calls for the formulation and development of national strategies for sustainable development that integrate economic, social and environmental issues. The Fourth UN Conference on the Least Developed Countries adopted in May 2011 the Istanbul Program of Action for the Least Developed Countries, with a strong focus on building productive capacity and structural transformation as key elements for further growth, robust, balanced, equitable and conducive to inclusion and sustainable development. Finally, the 2012 UNCTAD XIII Conference - as well as previous UNCTAD conferences - recognized the role of foreign investment in the development process and called on countries to develop policies aimed at increasing the impact of foreign investment on sustainable development and inclusive growth, emphasizing the importance of stable, predictable and favorable investment climate. Several other international instruments refer individually to fundamental principles.

[1] See the official UNCTAD page: *http://www.investmentpolicyhub.unctad.org/ ipfsd/coreprinciple*, accessed on August 30, 2017.

3.4. International law, general principles applicable to international investment law. Stability or mobility?

The principles of international investment law, like law itself, are characterized by mobility. The mobility of principles is the rule, their stability - the exception[1]. The fundamental principles of law are the basis of the branch principles, between them there is a relationship of correspondence and amplification[2]; the principles of this new branch of law are naturally related to dependence and to the general principles of other areas corresponding to society. In all cases where the assertion, refutation and reaffirmation of a principle of law is brought into question, it must first be borne in mind that the modification or abolition of a principle of law risks causing a profound disturbance in the legal order, because the fate of many legal rules is at stake[3]. In particular, in international law, it is considered that the tendency is towards the immutability of the principles, so that the international investment relations are consolidated on the basis of solid principles, which give security and seriousness to the relations specific to this law.

From a historical point of view, as the specific codification instruments of this branch of law have appeared, especially from observing the practice of regionally grouped states (for example the EU), the precision of conventional law has created a narrowing of the assertion of general principles of international law in the matter, creating a parallel between them.

The antagonism of the positions manifested by the northern states and the southern states determined that the evolution of the principles to go through certain stages such as the activation, inactivation and retroactivity of the principles. Before analyzing the respective phases, we specify that the appellations “Northern states”, respectively “Southern states” must be understood not in their strictly geographical sense, but in the sense given by political science and international economic relations, wishing that the term "Northern States" should include developed countries, and the term "Southern States" should include developing and least developed countries. In the same vein, the term "Western Hemisphere States" is also used to refer to the United States and Canada in bilateral investment agreements.

The doctrine also uses the terms affirmation, refutation (or recusal) and reaffirmation or notification, denunciation and recess, in reality these phases can be reunited in a single concept that can be called the revelation of principles, based on considerations on legal retroactivity. As the doctrine as a whole has

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[1] See R. Ploscă, *Teoria generală a dreptului*, 4th ed., 2015, Ed. C.H. Beck, University course, p. 36.
[2] I. Dogaru, *Elemente de teoria generală a dreptului*, Ed. Oltenia, Craiova, 1994, p. 115 text and note no. 10.
[3] J.L. Bergel, *Théorie générale du droit*, 5th ed., Éd. Dalloz, Paris, 2012, p. 112.

noted, the first phase is that of asserting by the northern states the general principles of international law in the treatment of international investment; a second phase, in which the southern states challenged these principles (trying to present new interpretations and principles) and the third phase, in which both the northern states and the southern states restored (reintroduced) the applicability of the general principles of international law in terms of treatment of international investment, which led to a consensus in their enunciation and application.

Revealing the principles

The attitude of the northern states, marked by the promotion of the principles by which the national norm of treatment must be corrected by the international standard, grew by formulating a theory at the end of the nineteenth century regarding the international minimum standard, according to which they should be taken into account. consider the following:

- the foreign investor must comply with the laws of the host state;
- the host state must apply the general principles of law common to civilized nations with regard to foreign nationals and foreign property, whether or not such rights were granted to its natural and legal persons;
- the alien's property could be expropriated only according to the law and only with an adequate, prompt and effective compensation;
- any measure adopted by the host state must be based on the law; the foreign investor must have access to domestic and international courts to challenge these measures;
- the contracts concluded between the host state and the private investing companies must be fully respected[1];

In the opinion of developed countries, domestic regulations must be correlated with the minimum set of rights granted to foreigners[2].

The Calvo Doctrine[3], formulated by the Argentine jurist Carlos Calvo, the Minister of Foreign Affairs of Argentina in the period 1892-1906, replaced the "international minimum standard" with the term "national standard", based on the principle of state sovereignty, but also on the following principles:

- the principle of equal treatment between residents and non-residents;
- the principle of regulation of the regime of aliens and of their property by the internal legislation of the host state;

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[1] I.Z. Farhutdinov, *op.cit.* pp. 113-114, cited in L. Navasardian, *op.cit.*, p. 31.

[2]G. Geamănu, *Drept internaţional public*, vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 330.

[3] A classic statement of the Calvo doctrine can be found in art. 27 of the Mexican Constitution (1927), which provided that: "Mexicans only by birth or naturalization or by Mexican corporations have the right to acquire ownership of land, water (…) or to obtain the concession of working mines, or for use of mineral water or fuel in the Republic of Mexico. The nation may grant the same rights to foreigners, provided they agree, before the Ministry of Justice considers them as Mexicans in respect of such property, and undertakes not to invoke the protection of their governments in this matter, under penalty of in which he does not conform, to lose the "nation" of the property thus acquired. "

- the principle of non-interference of other states in resolving disputes between the investor and the national authorities of the host state;

- the principle of exemption from liability of the host State in case the foreign investor has suffered losses due to the civil war or other acts of disorder, due to the fact that the domestic legislation does not provide such compensations to its investors.

Naturally, the Constitutions of Latin American states have taken over the principles of the "international minimum standard", expressed in terms such as: "for reasons of public necessity", "non-discriminatory nature", "adequate compensation". However, Calvo[1] considered that these principles belong to domestic law[2], and not to international law, and can only be applied by national jurisdiction.

The standard for fair and equitable treatment determined by the minimum standard, being conceived since the 1920s, some clarifications were imposed in order to eliminate the restrictive character of interpretation, so that, in 2001 and 2002, respectively, two NAFTA sentences in the case of *Pope & Talbot c Canada* (judgments of 10 April 2001 and 31 May 2002 respectively) ruled that, although there were some inaccuracies in the wording of art. 1105, it must be interpreted as imposing an obligation to grant fair and equitable treatment to investments, but the treatment in question must be designed independently of any reference to the minimum standard. With regard to national treatment, it results either from a unilateral act of the state or from a conventional act, such as establishment conventions or investment agreements (agreements) which have by far given a better delimited outline to the principle of national treatment in relations between OECD member states, being declared the principle of their own inter-regional international law in the area of OECD states.

In practice, it has been found that the State of origin may be inclined either *to preferential treatment or to differential treatment*, facts which are not

[1] The Calvo Clause is the corollary of the Calvo Doctrine. A classic example of the Calvo Clause can be found in the contract between North American Dredging Co. and the Government of the State of Mexico of November 23, 1912, which, in art. 18, provided: "The Contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the works under this contract, directly or indirectly, are considered Mexicans in all respects, in the Republic of Mexico, in regarding such activity and the fulfillment of their contract. They shall not claim (...) in respect of the interests and activity pursued under this contract, any rights or means to enforce the contract other than those granted by the Republic of Mexico, nor shall they enjoy any rights other than those that Mexicans have. Therefore, they are deprived of any rights as foreigners, and in no form is the intervention of foreign diplomatic agents allowed in any matter related to this contract".

[2] For those reasons, the Court of First Instance stated in its statement of reasons in the case of *CMS Gas Transmission Company and the Republic of Argentina (Decision of the Court of First Instance on Jurisdiction of 17 July 2003)* (Case No ARB / 01/8, 42 ILM 788): „Carlos Calvo, a distinguished Argentine jurist, the father of the Calvo doctrine and the Calvo clause, will not become an honorary citizen of the countries that have entered into bilateral investment treaties".

sanctioned by international law which, however, sanction discrimination or discriminatory treatment in the matter[1].

United Nations General Assembly Resolutions on Permanent Sovereignty over Natural Resources - Resolution no. 3281 (XXIX) of 12 December 1974, entitled the Charter of Economic Rights and Obligations of States, contains in Article 2–2 (a) a text which sought to define the rights of the State of territoriality in the treatment of international investment. It provides that each state has the right: "*to regulate foreign investment within the limits of its national jurisdiction and to exercise its authority over them in accordance with its laws and regulations and in accordance with its national priorities and objectives. No state will be forced to give privileged treatment to foreign investments*"[2]. This text grants domestic rules the regulation of the investment relationship from the moment of its establishment until the moment of its liquidation, without referring to international law, but the Charter requires states to fulfill their international obligations, leaving any state sovereign freedom to choose the investment treatment norm. which seems to him to be better adapted to "national priorities and objectives".

As initiatives to remove barriers to the movement of capital, we can exemplify the initiative of the Organization for Economic Cooperation and Development - OECD, which adopted in 1961 the Capital Liberalization Code or the US Investment Guarantee Program established by the Aliens Assistance Act, to which is added the US Program for the conclusion of investment treaties until 1948, replaced by the Program for bilateral investment treaties developed in 1983, a program which in 2004 became a new model bilateral investment treaty - BIT, currently the United States having a model of the BIT of 2012. The Charter of Havana signed on 24 March 1948 is an attempt[3] to conclude a multilateral treaty, which promotes the establishment of a specialized organization with responsibilities in the field of international investment: the International Trade Organization. The Charter did not enter into force, not meeting the number of ratifications, but also because of the US position, which did not approve the establishment of such an organization at the time, although later in the *Uruguay Round* (1986-1994), negotiations led to the establishment of the World Trade Organization - WTO.

With the establishment of the UN, Latin American states submitted a mo-

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[1] In *Oscar Chinn, Belgium v. The United Kingdom*, Judgment of December 1934, p. 87, the Permanent Court of International Justice - CPJI emphasized that "prohibited discrimination is therefore one that will be based on nationality, a differentiated treatment for individuals belonging to different national groups depending on their nationality".

[2] For details, G. Feuer, *Reflections sur la Charte des droits et des devoirs économiques des Etats*, RGDIP, 1976, p. 273; M. Virally, *La Charte des droits et des devoirs économiques des Etats*, AFDI, 1976, p. 57.

[3] See also the Inter-American Economic Agreement of Bogota, signed on May 2, 1948, which did not enter into force due to disputes between developed and developing countries.

tion to approve the "national standard" as a principle of law in international investment relations, which would replace the "international minimum standard." Thus, the Draft International Covenant on Economic, Social and Cultural Rights was reached, where, among other things, a text was inserted on the inalienability of the rights of states over their wealth and natural resources.

There was a time when there was a series of rules and principles in the field of investment relations, as emerged from the analysis of those instruments and agreements in the previous chapter. We only recall in this context the OECD instruments of June 21, 1976, the guidelines of the World Bank, the creation of the AMI and the conventional rules on the treatment of investments.

3.5. State contracts

As the method of attracting investments is interdependent with the nature of the foreign investment contract that initiated the investment process, the inclusion in state contracts of certain types of clauses outlined the contractual structure on which the theory of foreign investment protection was raised, which determined building a separate legal system to ensure the security of existing and future concession agreements. The essential clauses include the stabilization clauses (amplified by the theory of internationalization of contracts), the choice-of-law clauses based on the principle of autonomy of the parties and arbitration clauses (which tend mostly to outsource arbitrations). From a technical point of view, the wording of the clauses of such contracts indicates: (i) the objective factors that are given by the quantitative and qualitative importance of the investment, the duration or the manner in which the operation is designed, the nature of the capital contribution, the duration of the operation and (ii) subjective factors resulting from the provisions of "internationalization" of the contract: the choice of law governing the contract, how to resolve disputes (which eliminates the jurisdiction of national courts), the contracting state will prohibit unilaterally change the contract or national regulations where the investment is there.

The State contracts have a controversial regime in international investment law, being in question the affiliation of these contracts to international law. A common case in debates on this subject is that in which the Permanent Court of International Justice - PCIJ has stated (in the case of Serbian and Brazilian loans) that "any contract that is not a contract between states as subjects of international law has its foundation in a national law" [1].

Both the doctrine and the arbitral practice considered that, in the evolution of international economic relations, the involvement of the state in these relations and the use of the long-term economic development agreement as an instrument of national economic policies are the factors of a change that justifies a

[1] *France v. Brésil* şi *France v. Yougoslavie*, Decision of July 12, 1929, Series A, no. 20, p. 41.

new approach. decided by PCIJ[1].

A state contract can be defined as a contract concluded between the state or a public body (a body created by law within a state that is given control of an economic activity) and a foreign citizen or a legal person of foreign nationality[2].

The emergence of the *umbrella clause* in investment agreements has inherently generated debates about its application in practice; for example, to what extent, in the presence of such a clause, should the claim for breach of contract (*contract claim*) be raised to the rank of a treaty claim[3]? The answer must be whether, by virtue of the "umbrella clause" in the applicable APPI, the contractual claims of an investor against the host state can be resolved preferably by applying the arbitration provisions (clauses) in the APPI, rather than applying the existing dispute settlement provisions. in that contract.

Another problem analyzed was lex mercatoria, which created intense debates that developed its applicability; *lex mercatoria* was ultimately seen as material material applicable to international commercial contracts, including state contracts, in the context of international commercial arbitration[4]. *Lex mercatoria* has in common with public international law certain general principles of law such as *pacta sunt servanda* and *rebus sic stantibus*, although their fields of activity are different[5]. The debates concern whether, in the absence of any conventional instrument, national laws or regulations are not in themselves generating international obligations, especially when such laws or regulations encourage investment when one developing country or another wishes to establish or restore a climate conducive to international investment and adopt a set of measures often in a solemn form, such as an investment code[6]. "In connection with the transposition in the investment issue and the position of domestic law in this matter of

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[1] In a famous case, *Texaco Calasiatic (Topco)*, it was stated that: "the evolution that has taken place in relation to the old jurisprudence of the CPJI is that, for this, the contract could not belong to international law, as it could not be assimilated to a treaty between states, in the new conception, treaties are not the only agreements governed by this right. Moreover, they are not to be confused with treaties, agreements between states and private persons may under certain conditions belong to a particular and new branch of international law: international contract law"; *Texaco Calasiatic v. Government of the Libyan Arab Republic*, Judgment of 19 January 1977, para. 32.

[2] CNUCED, *Contrats D'Etat*, N.U., NY, et Geneve, 2004, p. 3.

[3] The decisions of the arbitral tribunals are contradictory (see *SGS c. Pakistan*, 2003 şi *SGS c. Philippines*, 2004).

[4] The literature has frequently advanced the view that international commercial arbitration as an institution faces an extraordinary challenge to develop a consistent body of international jurisprudence on *lex mercatoria*, which can be universally acceptable. This approach results from "Literature as a whole and the theoretical foundations that propose to treat *lex mercatoria* as a body of material law"; to be seenRt. Hon. Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years, in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE pp. 149, 174 n. 82 (Maarten Bos & Ian Brownlie eds., 1987).

[5] See L. McNair, *The General Principles of Law Recognized by Civilized Nations*, 32 BRIT. Y.B. INT' L L. 1, pp. 1-19 (1975) (identifying: choice of law, arbitration precedent, general principles and observance of acquired rights associated with international legal systems).

[6] *Australie c. France* şi *Nouvelle-Zelande c. France*, 20 dec. 1974, *Les affaires des essays*

the mentioned ICJ solution[1], it is the same when the unilateral act was elaborated in such conditions that they manifest the intention of the author state to commit itself to other states and, in to this end, it gives him publicity which will enable him to be brought to the notice of other states. The other states, through their own behavior, will accept that they take into account the promise that was made to them". The Guiding Principles applicable to unilateral declarations of states liable to create international obligations, adopted by the CDI in 2006, show the same[2].

4. Guarantee of international investments. Guarantee mechanisms

The most effective guarantee is the strict regulation of state responsibility, and the insurance of political risk[3] is one of the most important guarantees. The World Bank Group MIGA (Multilateral Investment Guarantee Fund) defines political risk as: political risks associated with government actions that deny or restrict the right of the investor/owner to use or benefit from its assets or reduce the value of the company. The political risks include war, revolutions, state confiscation of property, and actions to restrict the movement of profits or other income in a country.

The specialized doctrine analyzed this notion, starting with terminological clarifications, definitions and the presentation of the main guarantee mechanisms. Like any legal concept, the guarantee relates in its analysis, logically, to the sources, principles and object of the branch of law to which it belongs, this notion currently forming the subject of developments in the literature, in the legislative practice of states, but especially in international instruments. Therefore, where the responsibility of the state is highlighted, there must also be highlighted the guarantee, preferably through specific *hard law* norms.

For example, the investment guarantees cover a wide range of products and can be defined as any guarantee or insurance product that is relevant to international investments. Most OECD governments and many non-OECD governments offer investment guarantees and political risk insurance designed to meet the needs of international investors[4], depending on the interests of the type of

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nucléaires, RGDIP, 1975, p. 972.

[1] See D. Carreau, P. Julliard, *op.cit.*, pp. 491-492.

[2] See *Draft Guiding Principles, Report IX on Unilateral Acts of States, Special Rapporteur Victor Rodriguez Cedeno*, Doc. A/CN.4/569, April 6, 2006, and *Guiding Principles Applicable to Unilateral Declarations of States*, Doc. A/CN.4/SER.A/2006.

[3] According to D. Carreau, P. Juillard, *op. cit.*, pp. 515-516, there are four political risks: the risk of termination of the investment contract by the state of territoriality; the risk of disturbances of internal or external origin and which produce effects in the state of territoriality and, obviously, on the investment; the risk of non-convertibility and non-transferability, as a result of measures taken by the state of territoriality, and even the risk of deprivation of possession including measures of expropriation or nationality dictated by the host state of the investment, the state of territoriality.

[4] K. Gordon, *Investment Guarantees and political Risk Insurance: Institutions, Incentives and Development*, OECD Investment Policy Perspectives 2008, p. 2, 10. The author states that: this

investment.

The guarantees granted to the investor mainly refer to the manner in which they were observed and applied (executed): national treatment and exceptions, fair and equitable treatment, most-favored-nation clause, direct or indirect expropriation and its conditions, compensation, free transfer capital, entry and stay of foreign staff, access to local finances, stabilization clause, etc.

4.1. International investment guarantee mechanisms

The mechanisms for guaranteeing foreign investments are materialized in structures that have this objective, operate based on specific acts of establishment and are divided into national mechanisms (structures that aim to cover the risks for their own investors) and international mechanisms (internal structures that are international guarantee mechanisms and covering the risks of investors in the Member States for investments made in other Member States).

Historically, the investment guarantees first appeared in the United States (1948) and, since 1959, through the Mutual Security Act, the guarantee covering investments made in developing countries; in 1961, the investment guarantee was completed by the International Cooperation Administration, a process that continued through the Agency for International Cooperation. Institutionally, since 1971, the Overseas Private Investment Corporation - OPIC - started operating through the Foreing Assistance Act, by adding in Title IV in 1969.

According to the founding act, OPIC will not support investments that would affect the US financial situation, investments that would negatively affect the job market, violate environmental protection rules, harm health and harm national security[1].

Another example of such guarantee structures is represented by two investment guarantee mechanisms, this time French: the French Foreign Trade Insurance Company - COFACE and the French Foreign Trade Bank - BFCE, originating from the duality of legal regimes between commercial investment and industrial investment, as follows: the management of the commercial investment guarantee was provided by COFACE, while the management of the industrial investment guarantee was provided by the BFCE, with the specific competencies and purposes established by French law[2].

In Switzerland, the legislative framework governing foreign investment consists mainly of the Swiss Code of Obligations, the Lex Friedrich/Koller Act, the Securities Act and the Cartel Act. There is no verification of foreign investment and rare sectoral or geographical preferences or restrictions are imposed,

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definition is modeled on that provided in a 2005 OECD Development Center publication analyzing "development guarantees". This monograph defines a guarantee as "Guarantees and insurance against political, contractual/regulatory, credit and foreign exchange risks".

[1]*Foreign Assistance Act*, Sec. 231 para. III letters (g)-(n).

[2] For details on the French guarantee mechanism, see: D. Carreau, P. Juillard, *op.cit.*, pp. 516-520.

with the exception of performance requirements and incentives. The Swiss Investment Risk Guarantee Agency (IRG) has in its scope of eligibility: natural persons with Swiss citizenship and domiciled in Switzerland, legal persons controlled by Swiss citizens domiciled in Switzerland and, in exceptional cases, natural or legal persons they have a close relationship with the Swiss economy. The eligible investments may be equity investments in the form of a participation or direct capital injections. The scope of the Swiss Export Risk Guarantee (SERV) is: the export of Swiss consumer and capital goods, construction and engineering works and other services, project licenses and know-how agreements, goods shipped abroad or exhibited at fairs, payment guarantees and performance bonds, etc.

In Romania, the national investment guarantee mechanism is represented by Exim Bank Romania. The Law no. 96/2000, with subsequent amendments, regulates the organization and operation of Exim Bank SA.

At the international level, it was necessary to create a multilateral body for guaranteeing international investments, and attempts to do so began to appear: in 1948 the World Bank developed and proposed a document containing the guidelines for such a project: "Proposed Plan for Guaranteeing Foreign Private Investments Against Transfer Risk and Certain Other Risks"[1], which was rejected; In 1957, the Council of Europe sought to set up a body responsible for promoting economic cooperation between European and African nations (through the "Guarantee Fund and Financial Assistance" to cover European investment in Africa), a project that failed; finally, the 1950 OECD project to create a privately run investment guarantee fund could be listed, and it was left without purpose. Very common in the literature, the draft of a joint EEC/ACP guarantee system (unfinished) aimed to guarantee foreign investment in the European Community since 1970 and the countries of Africa, the Caribbean, the Pacific, and former colonial territories belonging to France, England, Spain, Portugal, Belgium and the Netherlands. However, a document containing a proposal for a Council Regulation establishing a Community private investment guarantee scheme in third countries has been finalized[2].

By the Lomé IV Convention, it was decided to abandon the joint guarantee project[3]. Several projects and research groups followed, which worked on this goal, and in 1985 the Seoul Convention was signed, establishing the Multilateral Investment Guarantee Agency, AMGI/MIGA. The following World Bank Group institutions - the International Bank for Reconstruction and Development (IBRD)

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[1] For details, see I. Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency*, Martinus Nijhof Publishers, The Hague, Boston, Lancaster, 1938, pp. 31-32.

[2] See Commission Communication to the Council, Com. (72) 1461, 20 December 1972, *Proposition d'un réglement du Conseil instituant un systéme de garantie des investissements communautaires dans les pays tiers*.

[3] See AFDI, 1987, *Chronique du droit internaţional économique*, p. 589.

and the International Development Association (IDA) together with the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC) - try to encourage private sector investment in developing countries to promote economic development, thus reducing poverty and improving people's lives. As one of the tools for attracting private investment, each institution offers guarantee products designed to mitigate certain investment risks in developing countries (the private sector).

In general, the multilateral agencies that provide risk mitigation tools are multilateral development banks and guarantee or insurance agencies affiliated with development banks. The bilateral or national agencies providing risk mitigation instruments can generally be classified into bilateral development agencies and export credit agencies (ECA); the latter include export-import banks, export credit agencies, export credit guarantee agencies, investment insurance agencies and the like. The private financial institutions are also active in lending, underwriting or buying bonds of governments, corporations and emerging market projects; a number of private sector providers of risk mitigation instruments, such as monoline insurers and policy risk insurers, offer policy risk insurance (PRI) in a similar way to multilateral and bilateral insurers. For example, in all areas of infrastructure financing, the risk reduction instruments offered by multilateral, bilateral and private institutions can be complementary and, in fact, have been used together in many project financing transactions. There are a number of examples in which private infrastructure projects have been financed by limited financing projects, and guarantees, insurance and loan support from various multilateral, bilateral and private institutions have been used for various debt tranches and equity sponsors. Specifically, the main specialized analyzes performed, as a rule, within the profile organizations, state the main multilateral instruments for risk reduction: the World Bank - the International Bank for Reconstruction and Development (IBRD) and the Association for International Development (IDA); International Finance Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA); African Development Bank (AfDB); Asian Development Bank (ADB); European Bank for Reconstruction and Development (EBRD); Inter-American Development Bank (IDB); European Investment Bank (EIB); Andean Development Corporation (CAD); Islamic Corporation for Insurance and Export Credit (CIAICE); Inter-Arab Investment Guarantee Corporation (CIAGI).

The main bilateral risk reduction instruments are: Export Development Canada (EDC) - Canada; Agence Française de Développement (AFD) - France; Coface - France; Deutsche Investitions und Entwicklungsgesellschaft mbH (DEG) - Germany; Foreign Trade and Investment Promotion Scheme (AGA) - Germany; Italian Export Credit Agency (SACE) - Italy; Japan Bank for International Cooperation (JBIC) - Japan; Nippon Export and Investment Insurance (NEXI) - Japan; Atradius Dutch State Business NV - Netherlands; The Netherlands Development Finance Company (FMO) - Netherlands; Norwegian Guar-

antee Institute for Export Credits (GIEK) - Norway; Swedish Export Credit Guarantee Board (EKN) - Sweden; Swiss Investment Risk Guarantee Agency (SERV) - Switzerland; Swiss Export Risk Guarantee (ERG) - Switzerland; Department for International Development (DFID) - United Kingdom; Export Credits Guarantee Department (ECGD) - United Kingdom; United States Agency for International Development's (USAID's) Development Credit Authority (DCA) - United States; Export-Import Bank of the United States (EX-IM Bank) - United States; Overseas Private Investment Corporation (OPIC) - United States.

These instruments have their own regulatory characteristics and work for the purpose according to the acts by which they were created.

For example, the Inter - Arab Investment Guarantee Corporation is an original creation set up by Member States, developing countries operating in the South - South; is a regional organization, created by international convention and has a personality under international law[1]. On the occasion of the conference on the industrial development of the Arab states that took place in March 1966, in Kuwait, Recommendation no. 62, which mentioned the need and benefits of setting up a corporation to guarantee Arab and foreign investments. Following negotiations to this end, a document opened for signature in May 1971, in the form of the Convention on the Establishment of the Inter-Arab Investment Guarantee Corporation. The Convention entered into force in April 1974, for an initial term of 30 years, but in 2006, with several amendments to the Convention, the article on the duration of the corporation was also amended, providing for successive extensions for similar periods of time, respectively for 30 years.

The Multilateral Investment Guarantee Agency - AMGI/MIGA[2] was established on October 11, 1985, when the Convention establishing this Agency was signed in Seoul; the convention entered into force on 12 April 1988[3]. In accordance with art. 2 of the Convention, the main purpose of the Agency is to encourage the flow of investment for productive purposes between Member States and in particular developing countries. The concrete ways of achieving the objectives by the Agency listed in par. (2) of that article confirms that these objectives have a major influence on the determination of eligible investments. The

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[1] It includes 21 member states: Algeria, Saudi Arabia, Bahrain, Djibouti, Egypt, United Arab Emirates, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Somalia, Sudan, Syria, Tunisia, Yemen ; in English, the name of the corporation is "Inter Arab Investment Guarantee Corporation" (IAIGC); In French terminology, the name is „La Compagnie interarabe pour la garantie de l'investissement".

[2] I. Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies and basic documents of the Multilateral Investement Guarantee*, Agency Martinus Nijhof Publishers, Boston, Lancaster, 1987; D. Carreau, P. Juillard, *op.cit.*, pp. 524-528; L. Navasardian *op.cit.*, pp. 268-326; A.F. Lowenfeld, *op.cit.*, pp. 489, 490-493. G. Marin, A. Puiu (coord.) *Dicţionar de relaţii economice internaţionale*, Ed. Enciclopedica. Bucharest, 1993, pp. 22-23.

[3] Romania ratified the Convention by Law no. 43/1992, Official Gazette no. 93 of April 14, 1992; see also B. Ştefănescu (coord.), *Dreptul comerţului internaţional. Documente*, Ed. Lumina Lex, Bucharest, 2003, pp. 47-89.

Convention formulates a definition of the notions of "host state" or "host government", which, according to art. 3, letter b), means a Member State, its government or any public authority of the Member State in whose territory - delimited according to art. 66 - an investment that has been guaranteed or reinsured or is intended to be guaranteed or reinsured by the Agency is to be placed[1]. The same article, at letter c), defines the notion of "developing Member State" as "a Member State which is mentioned as such in the annexed list (Annex A), an annex which may be amended or supplemented periodically by the body called the Board of Governors". The annex also includes Romania as a developing state, being included in the second category of members and subscriptions, in the first category being included the developed states (North). The MIGA Convention also regulates the legal personality of the Agency, its privileges and immunities, its organization and management, its membership, capital, resources and guarantee limits.

5. Conclusions

In this matter, the public international law has postulated principles that have been interpreted antagonistically by states as positioned as exporting or importing investment, or North states to South states.

The World Bank's Guiding Principles, the OECD draft and the principles adopted at the UNCTAD G20 have laid the groundwork for new interpretations of general principles in order to give the text of these principles a more precise, up-to-date and detailed content. Regarding the international law of foreign investments, the analysis in this paper starts from several basic principles, with universal applicability in the analyzed subject: the principle of freedom of forms and methods of investment, the principle of free access of foreign investments in all fields of economic life and the principle of non-discrimination between investors belonging to the host state and those belonging to the investing state.

With regard to the international responsibility of states with regard to foreign investment, the seat of the matter is the Draft Articles of the UN Commission on International Law, from 2002. The general international law imposes, as we have shown, certain limitations on the sovereign power of the state. on foreign investment in its territory.

"It is a huge privilege to be able to engage in transfers of tangible goods in a territory other than your own state. But through this, the citizens of a state

[1] Article 66 of the Seoul Convention envisages its territorial application; contains an extended application clause in all territories under the jurisdiction of a Member State, including territories for whose international relations that State is responsible, except those which are excluded by that Member State by written notification to the Depositary of the Convention or at the time of ratification, acceptance or repeal, or subsequently. The Colonial Clause is practically formulated differently from the old multilateral international agreements in which the former metropolises participated. The insertion of such a clause in a Convention elaborated in 1985 can be explained only by practical reasons, respectively the possibility of implanting investments for development in such territories.

can get many benefits. The companies under the jurisdiction of a state are subject to the regulatory system of that state. Under these conditions, foreign companies must accept certain restrictions in exchange for the benefit of being able to conduct their business through these companies"[1].

It should also be established that, in the matter of foreign investments, there are no instruments of international law that regulate the institution of state responsibility as such and autonomously.

However, as will be seen in the next chapter, there is a sense of déjà vu in international media on issues arising in international investment law, such as the balance between public and private interests, the proliferation of tribunals, the consistency of the solutions of the arbitral tribunals, the competence of the judges and the answer to the question whether they are really trained in the field of public international law or not[2].

[1] Judge Oda's opinion in the case ELSI-1989, ICJ Reports p. 90, *http://www.books.google.es/books?id=t6n4NeZ05sEC&dq=sornarajah+international+law+on+foreign+investments&printsec=frontcover&source=bn&hles&ei=UISHTOTtMYa6jAfr97m1BQ&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCoQ6AEwAw#v=onepage&q=sornarajah%20internaţional%20law%20on%2 0foreign%%.*

[2] Opinion delivered by Vera Gowlland-Debbas (UK), Chair of the August 20, 2008, Session of the Conference on International Foreign Investment Law, Rio de Janeiro, 2008, International Law Association, in Reports of the Seventz –Third Conference, 17-21 August 2008, published in *The International Law Association*, London, 2008, p. 812.

Chapter V
Resolving disputes in the field of international investment

1. Preliminary considerations

Traditionally, the settlement of disputes under international law has involved only disputes between states. The emergence and development of international investment law, marked by the specific activities of the main actors in this field, undertaken by individuals and corporations involved in investments, has raised the question of whether these actors should have the right to certain direct rights to resolve disputes against which carries out its activity. Under customary international law, a foreign investor must seek the resolution of such a dispute in the courts and/or tribunals of the State concerned and if such solutions fail or are ineffective in resolving a dispute - whether or not they have relevant material content, effective enforcement procedures and/or remedies or are the result of a refusal of justice[1] - diplomatic protection in the State of origin of the natural person or company concerned is requested (by refusing an appropriate remedy before its national courts , the host State may commit a violation of international law, if such denial can be shown to be a violation of international law[2]). From the presented results the mixed nature of the means of resolving the disputes regarding the investments, proof of their positioning between the international law and the domestic law; the host state subject to international law faces a private investor subject to national regulations in the home state.

As a historical route of investing disputes, since ancient times there have been and been promoted methods of peaceful settlement, as we find in ancient Greece, the city-states within it practicing arbitration for settling disputes, but the issue of settling disputes by peaceful means has developed, its particularities in the field of investments being related to the character and participants in the dispute, having as foundation the principle of peaceful settlement of disputes, principle of customary origin and whose main function is to establish procedures for peaceful settlement of international disputes[3]. Over time, the institutional framework has evolved, specific regulations for resolving disputes have emerged and

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[1] See I. Brownlie,*Principles of Public International Law*, Clarendon Press, 1998, Chapter XXII, *apud Dispute Settlement: Investor-State, UNCTAD Series on issues in internaţional investment agreements*,p. 4.

[2] See *Azanian c. United Mexican State*, (ICSID) Case no ARB (AF) 97/2, Decision of 1 November 1999.

[3] Vezi D. Popescu, A. Năstase (coord.), *Sistemul principiilor dreptului internaţional,* Academy Publishing House, Bucharest, 1986, pp. 20-22. Magdalena Lungu, *Rolul organizaţiilor internaţionale în soluţionare paşnică a diferendelor internaţionale*, Ed. Universul Juridic, Bucharest, 2010, pp. 12-13.

a certain judicial practice has been created, which is still non-unitary. The decisions rendered in recent years in international investment arbitrations have a specific structure, consist of hundreds or thousands of paragraphs[1] and the claims deduced from the arbitration reach increasingly significant values, an example being given by the arbitration decision of July 18, 2014 ruled under the UNCITRAL rules of the PCA (Hague Permanent Court of Arbitration) in the case of *Hulley Enterprises Ltd, Yukos Universal Ltd and Veteran Petroleum Ltd v. The Russian Federation*, for violations of the Energy Charter Treaty, with Yukos shareholders winning worth over $ 50 billion from the Russian Federation. Therefore, within the disputes between the states, as well as within the disputes between natural and/or legal persons or investor-state, institutions with jurisdictional and arbitral character were formed.

Of course, the Permanent Court of Arbitration and the Permanent Court of Justice are also important, but regarding the topic of this monograph we consider the methodology used for resolving disputes in the investment field and the institutional framework created by this methodology[2].

At the United Nations level, there is a constant concern to give special importance to dispute settlement procedures arising in various international instruments, including procedures relevant to all international economic relations (e.g. procedures provided for by economic and financial organizations and large numbers of international conventions and multilateral treaties which provide for the establishment of non-binding or binding procedures with reference to a judicial or arbitral institution) [3].

2. Dispute settlement mechanisms promoted under bilateral agreements on the promotion and protection of foreign investment

The recent jurisprudence of investment arbitration tribunals (under the jurisdiction of the BIT) and the European Court (within the ECHR) shows that public international law can provide an invaluable weapon both in the protection of commercial arbitration agreements and in commercial arbitral awards handed down by national courts. or courts of the states with which investors interfere[4].

[1] See PCA Decision of 18 July 2014 in the Yukos case, available at: https://www.pcacases.com/web/sendAttach/418, accessed 12 May 2018.

[2] In a monographic synthesis on the peaceful settlement of international disputes, within the Institute of Legal Research, an approach was made to the issue both in terms of interstate relations, worldwide and regional, and in terms of international economic relations. See D. Popescu, T. Chebeleu (coord.), *Soluționarea pașnică a diferendelor internaționale*, Academy Publishing House, Bucharest, 1983, p. 213.

[3] See *Manuel sur le reglement pacifique des différends entre les Etats, Nations Unies, New York, 1992*, in particular pp. 143-164.

[4] S. Fietta, J. Upcher, *Public International Law, Investment Treaties and Commercial Arbitration*: *an emerging system of complementarity?*, Arbitration International Journal (2013) 29 (2): 187-222

An important clause in the bilateral agreements mentioned is the dispute settlement clause. In general, these clauses indicate, from an institutional point of view, ad-hoc or permanent arbitration, which has provoked international discussions on the role of this arbitration as a means of resolving certain investment-related disputes: in retrospect, such debates which took place in the 1970s, especially at the UN General Assembly, between developing and developed countries, promoted documents that did not favor the establishment of an acceptable level of international standard and, more importantly, promoted in national courts, leading in many cases to the abandonment of international arbitration[1]. In fact, I have already mentioned, when I analyzed various categories of clauses contained in bilateral agreements, that such clauses on the procedure for resolving disputes between the state and the investor are more recent, beginning to be promoted in the 1980s. All bilateral investment agreements contain as a clause the requirement to settle the dispute amicably.

The bilateral agreements do not contain a definition of the international investment dispute and rarely contain provisions in this regard, such as the bilateral agreement concluded between the Romanian Government and the US Government, where art. 9 states that an investment dispute is that between a signatory party and a national or a company of the other party arising out of or in connection with: a) an investment agreement between that party and the national or company concerned; b) an investment authorization granted to such a national or company by the foreign investment authority of that party; or c) an alleged violation of any right conferred or generated by this Treaty in respect of the investment[2].

In practice, the classical definition formulated in 1924 by the Permanent Court of Justice in the reference case Mavromattis Palestine Concessionsc. The United Kingdom[3] is: "a disagreement as to a right or fact, a conflict of legal opinions or interests between two persons". The dispute must relate to the existence or extent of a right or a legal obligation or to the nature or extent of the reparation that would be made for non-compliance with a legal obligation[4].

Even if at the time of negotiating of the agreement the parties make efforts to cover any risks of non-execution or improper execution, no agreement can provide solutions for all subsequent changes, whether determined by changes

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First published online: 1 June 2013, *Published by* Kluwer Law International & London Court of International Arbitration, p. 187.

[1] We consider in particular the Resolutions of the Sixth Ordinary Session of the UN General Assembly of 1974, having as their object the Declaration on the Establishment of a New International Economic Order (Resolution No. 3210), and the Program of Action on the Establishment of the New International Order (Resolution 3202) and especially the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX) of 1974).

[2] The agreement was signed on 28 May 1992 and entered into force on 15 January 1994.

[3] *Mavromattis Palestine Concessions* (*Juridiction*), CPJI Series A/B 1924, p. 523.

[4] ICSID *Doc. R 65–6*, para. 25, 8 January 1965 in: *Adaptation and Renegotiation of Contracts in International Trade and Finance*, 1985, p. 235.

in the parties' views or interests, or by circumstances beyond their control[1].

Therefore, so far no definition of the notion of dispute has been formulated, neither at the level of international treaties nor at the level of doctrine.

In order to reach a definition, it is absolutely necessary to analyze the legal relationship of international investment law, in particular the analysis of the category of international investment relations, governed by special legal rules, the formation, modification and abolition of which are usually produced by the intervention of a legal fact and within which the parties appear as holders of rights and obligations whose fulfillment is ensured, if necessary, by the coercive force of the state.

More comprehensive would be the definition of a dispute in international investment law as any misunderstanding or disagreement on an international legal or factual issue of a legal or political nature, notified between two or more foreign investors, or between a Contracting State (or a certain public body or a certain body dependent on it[2]) and the person of another Contracting State, which are directly related to an investment.

In terms of public international law, the 1907 Hague Convention states in art. 38 that, by their nature, the international disputes can be divided into political and legal disputes. According to the Statute of the International Court of Justice (art. 36), the following categories of disputes have a legal character: the interpretation of a treaty, any issue of international law, the existence of any fact which, if established, would constitute a violation of an international obligation and the extent of compensation due for a breach of an international obligation. The UN Charter (art. 36 para. 3) distinguishes that legal disputes are resolved through specific jurisdictional means: international arbitration and international jurisdiction, and political disputes are resolved through politico-diplomatic means: negotiation, good offices, mediation, investigation and conciliation.

Both in public international law and in international law on foreign investment, there is also the category of means of resolving disputes within international organizations of a universal or regional nature[3].

Any dispute over international investment law can be settled through mediation[4], conciliation, negotiation and, finally, its settlement through international

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[1] I. Boghez, *Soluționarea diferendelor în acordurile internaționale din domeniul investițiilor*, Bucharest University of Economic Studies, doctoral thesis, June 2001, pp. 17-18.

[2] Article 25 of the Convention for the Settlement of Investment Disputes between States and Persons of Other States, concluded at Washington on March 18, 1965, to which we shall refer below, contains the wording in parentheses.

[3] A. Năstase, B. Aurescu, C. Jura, *Drept Internațional Public, Sinteze*, Bucharest, 2006, p. 315.

[4] The evolution of the choice of mediation as an alternative means of resolving disputes was noted. For example, Directive 2008/52/EC on mediation in civil and commercial matters concerning cross-border disputes was transposed into national law by 21 May 2011. According to art. 1 para. (1), "this Directive shall apply in cross-border disputes in civil and commercial matters, except for those rights and obligations which the parties may not have in accordance with the applicable law." According to art. 2, "a cross-border dispute is one in which at least one of the parties has its domicile

arbitration.

Although diplomatic protection does not seem to occupy a visible place in this matter, it should be noted that its role is particularly important, a special form of exercising diplomatic protection eventually led to the establishment of the Iranian-American Tribunal[1], which instrumented a case study of which a significant part is very relevant for international investment law.

In the content of the monograph we have already analyzed, in the chapter dedicated to bilateral agreements for the promotion and protection of investments, the models of bilateral agreement on investments. At that time, we did not refer to the clauses devoted to the settlement of disputes in investment matters precisely in order to devote a separate chapter to it. The bilateral investment agreement developed by the USA (2012) includes in detail procedural and choice aspects of the institution and arbitration rules. It allows the investor to opt (the option being final) in order to resolve the dispute between several bodies such as:

1) ICSID[2], which settles disputes in accordance with its own rules of arbitration, provided that the provisions of the 1965 Washington Convention establishing ICSID are applicable to the parties;

2) ICSID, which will apply the rules on additional facilities, provided that one of the parties is a party to the ICSID Convention;

3) Arbitration court that will apply the arbitration rules developed by UNCITRAL;

4) Any arbitration tribunal that applies its own arbitration rules, if the plaintiff and the defendant agree to choose arbitration.

We will return with an analysis regarding ICSID and also in connection with the arbitration rules developed by UNCITRAL.

The US model bilateral investment agreement on dispute resolution does

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or habitual residence in a Member State other than that of any other party on the date on which: (a) the parties decide to resort to mediation after the dispute has arisen; (b) mediation is required by the court; (c) there is an obligation to use mediation under national law; or (d) an invitation is addressed to the parties within the meaning of Art. 5".

[1] The Iran-US Tribunal was established on January 19, 1981 by the Islamic Republic of Iran and the United States of America to settle certain claims between nationals of one State Party against another State Party and certain claims between States Parties. To date, the Tribunal has completed over 3,900 cases. Currently, there are complex lawsuits before the Islamic Republic of Iran and the United States of America. The seat of this court is in The Hague. The tribunal emerged as a measure taken to resolve the crisis in relations between the Islamic Republic of Iran and the United States in November 1979, namely the hostage crisis at the US Embassy in Tehran, and the subsequent freezing of Iranian assets by the US Government. Democratic and Popular Algeria has served as an intermediary in seeking a mutually acceptable solution. After extensive consultation with the two Governments on the commitments each of them would have been willing to make to resolve the crisis, the Government of the Republic of Algeria recorded these commitments in two Declarations of 19 January 1981: the "General Declaration" and the "Settlement Declaration of disputes" statements collectively referred to as the "Algiers Declarations".

[2] For a retrospective of ICSID work, see Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres, Mairée Uran Bidegain, *Building International Investment Law: The First 50 Years of ICSID*, Ed. Wolters Kluwer, 2015.

not agree with the national court for resolving an investment dispute. The position of the American model agreement practically raises the settlement of the dispute at international level, submits it for the settlement of the norms of international law, giving the investor the possibility to resort for a better protection of his rights to international arbitration[1].

Other bodies and institutions, such as the Permanent Court of Arbitration in The Hague, which has jurisdiction to settle disputes in the field of trade or investment, are also involved in the settlement of disputes, especially as a result of the amendment (since 1993) to its rules arbitration of disputes between two parties, only one of which is a state. The 2012 Arbitration Rules were also updated in light of the 2010 revisions of the UNCITRAL Arbitration Rules and the PCA's experience with its existing procedural rules and the 1976 UNCITRAL Arbitration Rules. The 2012 PCA Arbitration Rules do not replace the previous PCA rules. which remain valid and available.

Regionally, arbitration institutions for resolving disputes between an investor and a state are those such as the Organization for the Harmonization of Business Law in Africa (OHADA), with a great novelty and to which we will later devote an analysis. By way of example, we mention the mechanisms established by: the Common Investment Convention between the Member States of the Central African Customs and Economic Union (UDEAC), the Community Investment Code of the Great Lakes Economic Community (CEPGL[2]), the Single Agreement on Arab Capital Investments in the Arab States (signed on 26 November 1980 in Amman - Jordan and governing the arbitration procedure in dispute settlement before the Arab Investment Court), the Court of Justice of the European Communities - ECJ based in Luxembourg (competent under an arbitration clause contained in a public or private law contract concluded by or on behalf of the Union) and, last but not least, the mechanism established by the World Trade Organization - WTO (competent and with investment disputes).

The bilateral agreements sometimes explicitly state that during the settlement of a dispute no objection may be invoked or raised the exception of diplomatic immunity or possibly the exception according to which the injured party has been compensated by other means[3].

The settlement of disputes between two Contracting States shall take place in a manner similar to that between the State and the investor of the other State, including the amicable settlement. In the event of a negative outcome in the use of alternative settlement methods, the Contracting Parties shall apply to

[1] For details, see: A.F. Lowenfeld, *op.cit.*, pp. 486-488.

[2] The Great Lakes Economic Community, a subregional organization, was established by the Treaty of Gisenyi, Rwanda, on September 20, 1976.

[3] For example, art. 9 para. (4) of the Bilateral Agreement between the Kingdom of the Netherlands and the Republic of Korea, Seoul, of 12 July 2003 provides as follows: "the dispute concerning the investments his immunity or the fact that the investor received, on the basis of an insurance contract, a compensation covering, in whole or in part, the losses or damages suffered".

an international forum. As a rule, bilateral agreements and regional or sectoral agreements provide that UNCITRAL rules, PCA rules, UNCLOS (United Nations Convention on the Law of the Sea) rules, etc. are applicable. For example, the PCA has among its options the applicable dispute settlement rules and the Draft International Covenant (s) on Environment and Development, a model agreement developed by non-governmental organizations to facilitate the negotiation of environmental treaties.

3. Disputes between host states and investors in the context of investment agreements and the growing tendency to resort to the arbitration of these types of disputes

The issues relevant to international investment arbitration relate to disputes over both how the parties have agreed to execute an investment agreement and how to regulate the set of clauses specific to those agreements (including the interpretation of substantive issues): admission and settlement, competition, dispute settlement *investor - state*, dispute settlement *state - state*, employment, environment, fair and equitable treatment, foreign direct investment, home state measures, host state operational measures, illegal payments, incentives granted, trade-related investment measures, most-favored-nation treatment, national treatment, social responsibility, expropriation, transfer of funds, technology and prices, or transparency. At the procedural level, dispute resolution between investors and the state interacts with issues regarding the most appropriate dispute resolution technique, with an emphasis on using the fastest, most informal and efficient method; the procedure for initiating an application; the establishment and composition of arbitration tribunals, in case this method of resolving disputes will be chosen; the admissibility of the application before such a court; the procedural and material law applicable by such a court for the conduct and settlement of the dispute; the extent to which the judgment of such a court may be considered final; execution of arbitral awards; as well as the costs of using dispute resolution mechanisms.

In the following, we will refer to some aspects and to the effects of arbitral awards both on the evolution of dispute settlement procedures based on international investment agreements[1] and on the interpretation of essential protection rules[2].

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[1] The Report of the International Law Commission, Sixty-sixth Session (5 May to 6 June and 7 July to 8 August 2014) p. 207, states that: "The interpretative weight of subsequent agreements or practices in relation to other means of interpretation often depends their specificity in relation to the treaty in question. This is confirmed, for example, by decisions of the International Court of Justice, by arbitration decisions and by reports of the World Trade Organization (WTO) groups and forums of appeal".

[2] See *Plama Consortium Limited v. Republic of Bulgaria (Cyprus v Bulgaria BIT*), ICSID Decision in Case ARB / 03/24 (ECT) (08 February 2005) and *ICSID Review – Foreign Investment Law Journal*, vol. 20 (2005), p. 262, pp. 323-324, para. 195.

In fact, the international law is so ambiguous when it comes to commercial investment arbitration that it is fair to say that investment arbitration is on the border between international law and domestic law. This hybrid nature of investment arbitration is evident in a number of ways: from the manifestation of the participants in the proceedings, from the remedies it replaces, from the reflection in its grounds of competence, from the types of claims invoked in investment arbitration and are reflected in the law applicable to the substance of the dispute[1].

As stated in the introductory chapters of this paper, it is certain that foreign investors want to ensure that, in the event of a dispute with the host state, they will have the means to resolve legal issues quickly, an effective dispute resolution process, contributing to a favorable climate for investment in the host state.

From the point of view of the proliferation of cases involving investor-state disputes based on an investment agreement, it can be said that, since the late 1990s, ICSID[2] has registered an increasing number of cases (several hundred), although the provisions on the settlement of disputes between investors and states have existed in international investment agreements since the 1960s. From 1987[3] to April 1998, only 14 cases arising from bilateral investment agreements were brought before ICSID and resulted in only two arbitral awards and two solutions. To these are added those pending in other international courts or special courts (SCC, UNCITRAL, ICC)[4]. Disputes can also arise from the execution of contracts concluded between investors and governments, complaints from governments being still very rare[5]. It should be noted that there are cases resolved either before an arbitration procedure is initiated or after it has been launched[6]. With regard to transparency, given the existence of a certain confidentiality of cases involving international investment disputes, their exact number is not precisely

[1] Ch. Schreurer, *The Relevance of Public International Law in International Commercial Arbitration,* available at *http://www.univie.ac.at/intlaw/pdf/csunpublpaper1.pdf*, accessed on March 14, 2019.

[2] The first ICSID case to appear in the center's database is *Holiday Inns S.A. (Swiss), Occidental Petroleum Corporation (U.S.) v. Morocco*, registered in 1972, case closed in 1978 by agreement of the parties.

[3] *Asian Agicultural Products LTD v. Republique de Sri Lanka*, ICSID, case no. ARB/87/3, 27 June 1990 (bilateral international agreement, United Kingdom of Great Britain and Northern Ireland and Sri Lanka).

[4] Stockholm Chamber of Commerce, ICC - Paris International Chamber of Commerce, UNCITRAL - United Nations Commission on International Trade Law.

[5] An exception is a 2003 dispute between Chile and Peru. The court was notified by Peru following a complaint filed by a Chilean company, Lucchetti (*Lucchetti S.A. and Lucchetti Peru S.A. v. Republique du Perou*, ICSID, case no. ARB/02/4). The procedure ended and the decision was made 2 years later. In other cases, states have set up commissions to resolve disputes with investors, such as the tribunal set up by the United States and the Islamic Republic of Iran.

[6] The database of the United Nations Commission on Trade and Development (UNCTAD) lists all complaints that have given rise to arbitration, including those that took place after their registration.

known[1], despite the fact that the complaint was made public (the situation of those who are entered in the register ICSID), the information concerning them is often kept to a minimum, the subject matter of which is not detailed (see ICSID database). Greater transparency of arbitration proceedings, as was the case in the North American Free Trade Agreement - NAFTA, may also be an important factor as it gives greater visibility to this means of obtaining regulation[2] and, why not, it would be a support for the unification of arbitration practice. Currently, the USMCA, the agreement that replaced NAFTA and which contains specific dispute settlement provisions in Chapter 31[3].

As with any dispute, there may be multiple arbitrage disputes over a single investment or against a given government measure (the Dahol Power dispute in India involved at least two arbitrations based on bilateral multinational agreements by the participating companies, as well as 7 others of the same type promoted by the lending bodies financing the project), or there may be a single arbitration promoted by several claimants (such as the one based on NAFTA, promoted against Mexico by individual investors in tourist real estate and against United States by more than 100 applicants in the beef and veal sector[4]).

These disputes give rise to arbitral awards[5] based on interpretations of

[1] ICSID has a public register of complaints and therefore there is no official record of all complaints filed. In some cases, investors or governments that are parties to a dispute want it to remain confidential, which makes the parties unwilling to disclose their existence.

[2] From this perspective, the recent amendment of the relevant UNCITRAL Rules is welcome. The rules on transparency were adopted by General Assembly Resolution no. 68/109 of December 16, 2013, becoming applicable from April 1, 2014. UNCITRAL rules on transparency in investment arbitration include a set of procedural rules that are intended to ensure transparency and accessibility for the public, from the beginning of arbitration proceedings until their completion. They are concentrated in 8 articles that specifically regulate: the field of applicability (if the applicability of the transparency rules arises as a result of their inclusion in an investment treaty, the parties to the dispute may not derogate from them unless the treaty allows them to do so), the publication of information at the beginning of arbitration proceedings, the publication of documents, the intervention of a third party (*amicus curiae*), observations submitted by a non-disputing party to the treaty, hearings and the depositary of published information. The rules on transparency are applicable: - to disputes based on treaties concluded on or after 1 April 2014, when the parties to the treaty in question or the parties to the dispute agree to their application; - disputes based on the arbitration clause in treaties concluded before 1 April 2014, if the parties to the dispute agree or if the parties to a treaty, both the applicant State and the defendant State have agreed, at some point after the date of April 1, 2014, on their implementation; - disputes between the investor and the state based on rules other than the UNCITRAL Arbitration Rules, as well as in ad-hoc arbitration procedures.

[3] Available at https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng, accessed on 13.03.2019.

[4] See details at UNCTAD, *Etude sur le differends entre etats et investisseurs dans le context des accords d'investissement*, N.Y. et Genéve, 2005, pp. 6-7 (forwards *Etude 2005*); in the UNCTAD database, cases between the US beef industry are grouped under a single heading. Among other things, all these cases belong to the same facts and the same agreement. On the contrary, the 7 cases concerning Dabhol Bank appear separately, because they belong to the same facts, but to different investment agreements.

[5] See Investment Arbitration Reporter (IAReporter); official link: *http://www.iare porter.com*.

legal obligations imposed by agreements, most of them bilateral international agreements. We consider that the framework of this paper is exceeded if we also deal with the issue of the financial implications of the process of resolving disputes between investors and states. However, we formulate a few considerations only to reveal the importance of arbitration practice in the matter and the material dimension of these disputes, from both perspectives: the cost of arbitration proceedings (procedural costs including arbitration fees and attorneys' fees) and claims made by judgments pronounced[1].

The publicity of cases remains an issue that opposes the request for confidentiality of the parties to the dispute, the request of third parties for transparency, justified by: the support it would provide to the creation of jurisprudence, knowledge of how to resolve disputes between investors and states, the benefits that would bring support for a good interpretation and application of international investment agreements, through the positive effects on the negotiation of new agreements and on investment policies.

3.1. Legal issues related to jurisdiction and dispute settlement procedures between investors and states

3.1.1. Defining the notions of investor and investment

Given that, in recent years, the predominant method of arbitration is that of investor-state and since the natural or legal person defined as an investor has the capacity to initiate procedures for resolving disputes between investors and states, the definition of investor and investment has been object of interpretation in certain disputes deduced for settlement by arbitration, from the point of view of the jurisdiction *ratione personae* (investor), *ratione materiae* (investment) and *ratione temporae* (when should the investment be made/when should the complaint appear?). In this sense, the arbitral practice has known differences that have started from the refutation of the procedural quality of the investor to the full recognition of this quality; the *Barcelona Traction* case is the reference example in which the court ruled as follows: "The Court may observe here that, within the limits of international law, a State may exercise diplomatic protection by any means and in any measure it deems appropriate, because it is the assertion of its own right. If the natural or legal persons on whose behalf they act consider that their rights are not adequately protected, they have no recourse under international law".

IAReporter is a news and analysis service for tracking international arbitrations between foreign investors and sovereign governments, including tracking procedural elements and rulings. IAReporter is also recommended for lawyers, professors, academics and government officials who want to keep up with the latest legal developments and political trends in investment arbitration treaties.

[1] Details at *Etude 2005*, pp. 8-11.

With the evolution and increasing number of investment agreements (especially the BIT), the quality of natural or legal investors to be part of international investment arbitrations has also been regulated. In addition to the BIT, there are several multilateral treaties, such as the USMCA[1] (which replaced NAFTA) and the Energy Charter Treaty (ECT), which contain specific provisions to this effect. The consent to investor-state arbitration can also be found in an investment agreement between the investor and the host state or in the foreign investment legislation of the host state. The investment agreements include (without specifying the percentage of participation), as previously reported, definitions of these terms which show that they have the status of investor including associations that participate by shares in the formation of a company's capital, not because they control the company, but because their actions are an investment[2].

The practice has known situations in which, in the case of subsidiaries over which there is an indirect exercise of the right of ownership and control, the shareholder in the management of the group has been granted the right to initiate arbitration proceedings under a certain BIT[3]. Other issues concern the situation of subsidiaries; according to the traditional norms of diplomatic protection, the local branch will have the nationality of the host state, and the defendant state will therefore not have the right to the protection of the state of origin of the parent company, given the mentioned nationality. Within the ICSID Convention, this potential obstacle to an effective se8ttlement of disputes can be avoided due to art. 25, paragraph 2 (b) of the Convention, which allows a local subsidiary to be considered a foreign investor, provided that it is agreed by the litigants and that it is under foreign control, but this is a fact[4].

Regarding the definition of the notion of "investment", a very good example in this regard is the case of *S.D. Miers v. Canada*, in Chapter 11 NAFTA[5].

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[1] Available at https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte /toc-tdm.aspx?lang=eng, accessed on 13.03.2019.

[2] In one case, the participation in the investment of an agreement was 17% of the investment in the host state, *CMS Gas Transmission Company v. République d'Argentine*, ICSID, case no. ARB/01/8, Jurisdiction Decision of 18 July 2003 (*BIT, USA/Argentina*) where it was found that the distinction between a minority shareholder with the right to file a complaint to arbitration and the majority shareholder or investment is increasingly much accepted in international law; also *Lanco International Inc. v. Republic of Argentina*, ICSID, case no. AR/97/6, Decision on jurisdiction of 8 December 1998 (*BIT, USA/Argentina*), in which a participation of 17% is sufficient to be considered as an investment.

[3] *Azuris Corp v. République d'Argentine*, ICSID, Case no. ARB/01/12, Decision on jurisdiction of 8 December 2003 (*BIT, SUA/Argentina*).

[4] Article 25 (2) (b) "Any legal person possessing the nationality of a Contracting State other than the State Party to the dispute on the date on which it has consented to submit the dispute to conciliation or arbitration and any legal person possessing the nationality of the Contracting State date and which the Parties have agreed, in order to attain the objectives of this Convention, to consider it as belonging to another Contracting State, by reason of the control exercised over it by foreign interests.", B. Ştefănescu (coord.), *Dreptul Comerţului Internaţional, Documente*, Ed. Lumina Lex, Bucharest 2003, p. 725.

[5] For details, see: *Etude 2005*, pp. 16-17. *S.D. Miers, Inc. Canada*, UNCITRAL, first partial

An office set up in Canada for a U.S. provider in the United States, for waste management services to be sold to the United States, was considered to be an exported service from Canada and should be considered as an investment in Canada and that the installation of a sales office and personal investment involved in commercial activity is a sufficient investment.

3.1.2. Proliferation of courts

The proliferation of international courts and tribunals can lead to *forum shopping*, to a doubling or multiplication of proceedings before different forums, to the allocation of judicial resources, as well as to the emergence of divergent or confusing solutions. Several cases have been reported, as we will develop below, which is evidence of the above: the *SGS* cases, in which two ICSID tribunals reached divergent assessments of the significance of umbrella clauses, the *Maffezini et al. Case*, in which opinions were divided. with regard to the interpretation of the most-favored-nation clause, the case of *CME/Lauder v. the Czech Republic*, in which arbitration was arbitrated under two different bilateral investment agreements, or the case of *CMS v. Argentina* and *LG & E v. Argentina*, in that there were different opinions on the state of necessity. More specifically, as an example of multiple proceedings for identical facts but with contradictory final solutions, the *Lauder cases*, in which two different investors initiated a different BIT-based arbitration procedure before different courts against the Czech Republic, for interference in their investments in the television sector. One of the investors lost the lawsuit, and another was awarded more than $ 300 million in compensation from the Czech Republic. The two tribunals considered that parallel proceedings concerning the same facts were acceptable as the parties and the two BITs were explicitly different[1]. The decisions therefore risk not having the authority of *res judicata* and the host state may lose several lawsuits, being condemned to pay multiple claims (the consequences being heavier if the host state is developing).

The issue of multiple proceedings for identical facts was set out in Chapter 11 of NAFTA, which gives courts the opportunity, for the first time, to refer cases of the same set of facts simultaneously to cases (Art. 1126 and 1117 § 3).

The avoidance of such a situation can be achieved by inserting regulations regarding the connection of cases, respectively lis pendens, through a preliminary reference system and an appeal mechanism for investment arbitration.

In any matter referred to arbitration, whether issues of jurisdiction, interpretation or substance are discussed, although there is no uniform practice, the

sentence of 13 November 2000 (NAFTA).

[1] See *Ronald S. Lauder c. République Tchéque*, UNCITRAL final judgment, 3 September 2001 (*BIT, US/Czech Republic*); CME Czech Republic, UNCITRAL partial judgment of 13 September 2001 (BIT/Netherlands/Czech Republic; *République Tchéque v. CME République Tchéque*, B.V. Stockholm Swedish Court of Appeal, Case no. T-8735-01. See also *Etude 2005*, pp. 17-18.

decisions of one arbitral tribunal are not binding on another, it should be noted that they are considered persuasive authority. As one court pointed out: "The tribunal considers that it is not bound by previous decisions. At the same time, he is of the opinion that he must pay due attention to previous decisions of international tribunals. It considered that, subject to contradictory considerations to the contrary, it had a duty to adopt the solutions set out in a number of consistent cases. It is also of the opinion that, given the particularities of a given treaty and the circumstances of the current case, it has a duty to contribute to the harmonious development of investment law and therefore meets the legitimate expectations of the community of states and investors towards the certainty of the rule of law"[1].

The courts with jurisdiction over international investment disputes should make the majority of joint efforts to contribute to the formation of "consistent case law" that would protect the coherence and predictability required by any credible and stable legal system.

3.1.3. Conflicts of jurisdiction

These procedural incidents occur in particular when, on the basis of the existence of a clause on recourse to a national court in the investment contract concluded between the investor and the host state, the possibility arises to resort to international dispute settlement mechanisms as a result of the investor's intervention, on the basis of an international investment agreement, irrelevant whether the breach of contract by the respondent host State is fundamental to the observance of the investment protection obligations contained in the agreement[2].

The obligation to comply, in international investment agreements, with all commitments and obligations under contracts or other forms of agreement between an investor, an investment and the host State is usually contained in a general clause, so that its breach becomes a breach of those agreements. Again, the reference jurisprudence does not have uniformity and generates problems of interpretation regarding the precise amplitude of these clauses[3]. This is also the

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[1] See *Saipem S.p.A. c. Bangladesh*, Decision on jurisdiction and recommendation on interim measures of 21 March 2007, ICSID Case No. ARB/05/07.

[2] See the cases solved by ICSID: Alex Genin, *Easter Credit Limited v. Republic of Estonia*, ICSID no. ARB/99/2, Judgment of 25 June 2001 BIT/USA/Estonia; *Salini Construttorri S.p.A. and Ital Strade S.p.A v. Morocco* ICSID no. ARB/00/4, Decision on jurisdiction 23 July 2001 *BIT Italy/Morocco*.

[3] In several cases, the courts examined the issue of applying the general clause. It started with two cases involving the same investor, the General Supervisory Society (SGS), but the decisions were handed down in different BITs by different arbitral tribunals, whose decisions were contradictory. In the case of *SGS v. Pakistan*, ICSID no. ARB/01/13, Decision on jurisdiction of 6 August 2003, BIT Swiss Confederation v Pakistan, the General Court held that the general clause could not be interpreted as meaning that termination of contract was automatically treated as an infringement of the law of international treaties; Conversely, in the case of *SGS v. the Philippines*, ICSID no. ARB/02/06, Decision on jurisdiction of 29 January 2004, BIT Swiss Confederation/Republic of the Philippines, the decision was delivered 6 months after the previous one and the General Court

reason why the courts have recently ruled that breaches of the obligation under which liability obligations before a tribunal to decide on an (international) agreement are to be treated as a breach of the rules of the agreement himself[1].

3.1.4. Advertising on disputes. Transparency

The transparency is a pressing issue, far from finding solutions to all the problems it imposes. When investment treaties do not contain explicit transparency obligations, researchers and arbitrators often resort to analyzing existing obligations in applicable instruments, trying to identify transparency as an essential component of either the treaty-based standard of "fair and equitable treatment", or the "minimum standard of treatment", based on customary international law, or on the general notions of international law on "good governance" and the "rule of law". Often, the existence of a dispute, documents, pleadings and decisions are not public. The principle of confidentiality on which commercial arbitration is generally based is in antagonism with the derived principle of transparency and publicity of any investment issues that governments must respect.

ICSID publishes on its official website a record of resolved or pending cases[2], and parties to ICSID proceedings always have the right to unilaterally make public their claims and other decisions, unless otherwise agreed. The procedural changes of ICSID were modeled on the trend of transparency promoted more and more acutely, allowing the publication of important excerpts on the considerations of the courts. In the same context, we can cite the collections of ICSID jurisprudence published by the University of Cambridge and, recently, the collection entitled *Building International Investment Law*. *The First 50 Years of ICSID*, published by Wolters Kluwer in 2016.

An example of transparency has been provided by NAFTA, in which case law has benefited from full transparency, based on the provisions of Chapter 11, including its official website allowing access to arbitration notifications, complaints, defenses and counterclaims, to memoranda, procedural decisions and substantive arbitral decisions and judgments[3].

Transparency of investor-state arbitration is an important component of ISDS provisions, being a subject subject to tensions arising from the mixed nature of this type of arbitration; cases such as *Methanex* and *Aguas Argentinas* have raised the issue of amicus curiae rights to intervene on behalf of the public. Transparency is considered to be a step in the process of democratization of investment

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disagreed with the analysis of its decision that, by virtue of the general clause, host has not complied with its contractual commitments constitutes a violation of the BIT. For details, see: *Etude* 2005, *op. cit*., pp. 19-21, with the cited jurisprudence.

[1] *Ibidem*, pp. 20, 29, notes 14-15.

[2] See *http://www.worldbank.org/icsid/cases/cases.htm*.

[3] See *htpp://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Inter-en.aso*, for details see: *Etude 2005*, pp. 23-24.

arbitration, contributes to the increase of democratic principles and remedies the alleged democratic deficit of investment - state arbitration.

3.2. Substantive issues addressed in resolving investment disputes

Disputes over international investment vary depending on the treaties that introduced arbitration, the complexity and the typical protection afforded by them.

3.2.1. The right of establishment

In the matter of investment admission and the right of establishment, there is no customary international law on registration, and the dominant trend in the practice of international investment agreements has been to maintain a controlled registration model. The arbitration practice does not provide a basis for examples on which an analysis could be outlined, and with regard to ICSID, the case of relevance *Mihaly International Corporation v. Sri Lanka*[1] can be exemplified, in which the issue of whether the expenses incurred with pre-investment by the applicant domiciled in the USA may be considered an investment under the ICSID Convention, benefiting from the protection of the US-Sri Lanka BIT provisions relating to default. It should be noted that NAFTA provides for the application of national treatment in the pre-establishment phase, subject to the exceptions imposed by certain host states[2]; these exceptions may allow certain sectors and industries to be exempted from default obligations.

3.2.2. National treatment

In the field of national treatment, the jurisprudence has known a series of cases that can be exemplified as useful for this analysis. As mentioned in the section on BIT clauses, one of the standards is that foreign investors should not be discriminated against by the host state (through legal, administrative, etc.). This standard is an obligation of the host states, which attracts specific sanctions to the responsibility of the state in case of non-compliance. The national treatment obligation covers the establishment, operation and liquidation of an investment and, as mentioned above, in a certain number of BITs it also applies to the pre-establishment phases[3].

For a correct identification of these types of clauses, an important role is

[1] ICSID no. ARB/00/2, Judgment of 15 March 2002 BIT/USA/Sri Lanka, para. 61. The Court of First Instance considered that the applicant had not shown that those costs were comparable to an investment, and there was no evidence that the investment was acceptable.
[2]*Marvin Roy Feldman v. Etats-Unis du Mexique*, ICSID, no. ARB(AF)/99/1, Decision on the merits on 16 December 2002 (NAFTA).
[3] See the case *Marvin Roy Feldman c. Mexic*, *op. cit.*, para. 12.3.

played by the definition of reference entities or activities for determining the type of treatment applicable, but the field of activity of domestic investors to be compared with the international one remains controversial. In *Feldman v. Mexico*[1], "similar circumstances" were interpreted as referring to the same business, namely the export of cigarettes, while the court in *Occidental v. Ecuador* generally referred to local producers, "and this it cannot be done exclusively through the exclusive approach of the sector in which this particular activity is carried out". Regarding the circumstances in which a different treatment is allowed under NAFTA, in the case of *S.D. Myers v. Canada*[2] held that the "assessment" of similar circumstances "must also take into account circumstances that would justify government regulations that treat them differently to protect the public interest." In this case, the court examined whether the domestic and foreign undertakings in question were in competitive commercial sectors and, since the Myers investment was a sales office engaged in the export of certain types of waste, and the national group was operating facilities. waste storage of the same type, it was estimated that the circumstances are similar. In *GAMI v. Mexico*[3], the court noted in paragraph 115 that the relevant measures were not directed at the foreign investor. In order to know whether the circumstances are similar, account must be taken of those which justify the existence of public regulations intended to protect the public interest. This is a thesis that was repeated in a subsequent NAFTA decision in the case of *Pope & Company Talbot, Inc. v. Government of Canada*[4].

In the case of *Marvin Roy Feldman v. Mexico*, the court accepted that the principle of national treatment is intended to ensure protection against discrimination; because the investor was a foreigner, the differences in treatment are sufficient to create the presumption of discrimination. Thus, "similar circumstances", which are often explicitly mentioned in international investment agreements, become an important principle for the application of normal national treatment. In 2004, the the court in *Occidental v. Ecuador*[5] rejected the argument that WTO case law should be applied to an BIT between Ecuador and the United States. WTO policies on competitive and substitutable goods cannot be treated in the same way as BIT policies on "similar circumstances" and added that WTO policies on competitive and substitutable goods cannot be treated in the same way as BIT policies on "similar circumstances". At the same time, the provisions on national treatment do not usually define the criteria that do not allow the similar-

[1]*Marvin Feldman v. Mexico*, Decision of 16 December 2002, 18 ICSID-Rev.- FILJ 488 (2003), para. 171.
[2]*S.D. Myers Inc. v. Canada*, the first Partial Decision of 13 November 2000, 40 ILM 1408 (2001), para. 250.
[3]*GAMI v. Mexico*, Decision of 15 November 2004, 44 ILM 545 (2005).
[4] For details, see: *Etude 2005*, pp. 33-35.
[5] See the case *Occidental Exploration and Production Company c. Ecuador*, Decision of July 1, 2004, para. 173.

ity of circumstances to be assessed, with the consequence that there is a divergence between trade and investment regulations. In view of the current divergent provisions (existence of this dual regime) of the WTO and international investment law, for the sake of clarity and predictability, most experts have proposed revising to establish a single regime, which should also create a mechanism to ensures the coherence of jurisprudence in trade and investment.

3.2.3. The treatment of the most favored nation

In 1978, the ILC adopted the Draft Articles on Most-Favored-Nation Clauses and recommended to the United Nations General Assembly that they be used for a convention on the subject. The General Assembly did not act on this recommendation and did not take any substantial action on the draft articles. The ILC's work, however, provides a general analysis of the MFN and an understanding of the *ejusdem generis* principle, which has been used for interpretation in several judicial and arbitral disputes, including recent ones. Thus, it has been ruled that the mere fact of a more favorable treatment (based on a treaty, another agreement or a unilateral, legislative or other act or even a simple practice) is all that is necessary to set in motion the functioning of this clause[1]. Despite their prevalence in investment treaties, the most-favored-nation clauses have no universal significance. Among the numerous cases brought to ICSID in recent years, two cases, *Maffezini v. The Kingdom of Spain* and *Tecnicas MedioAmbientales Tecmed S.A. c. Mexico* stands out by addressing issues related to the most-favored-nation clause. In the case of Maffezini v. Spain[2], the Argentine investor in Spain was authorized to benefit from a more favorable term provision under the *BIT Chile/Spain*, which is therefore more favorable than that provided by the *BIT Argentina/Spain*, on the basis of which the action was brought. The tribunal admitted this by applying the most-favored-nation principle in so far as it did not prevail over the governmental policy considerations of the negotiating parties. On this basis, the most favorable procedural treatment was applied. As a result of this case, three very important cases were registered in the ICSID case law for the applicability of the most favored nation treatment[3]. An ICSID tribunal[4] held that "fair and equitable treatment should be interpreted in such a way as to achieve the BIT's objective of protecting investment and creating favorable conditions for investment". The tribunal considered that the inclusion of the rules contained in other bilateral investment agreements concluded by Chile with third countries

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[1] See *Oppenheim's International Law*, edited by R. Jennings and A. Watts, Vol. I, Harlow, 1992, p. 1328.

[2] *Emilio Augustin Maffezini v. Royaume d'Espagne*: ICSID no. ARB/97/7, Decision on jurisdiction of 25 January 2000, Judgment of 13 November 2000, rectification of the Judgment of 31 January 2001 BIT, *Argentina v Spain*.

[3] See details in *Etude 2005*, pp. 35-36.

[4] *MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile*, ICSID no. ARB/01/7, Judgment of 25 May 2004, BIT, *Malaezia/Chile*, para. 104.

had been "adapted for this purpose". Other examples of relevant cases according to these aspects are: *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID case No. ARB/01/7 based by BIT Chile - Malaysia), or *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan* (ICSID case No. ARB/03/29, based on BIT Pakistan - Turkey). Examples of disputes based on the NAFTA investment chapter can be exemplified by two cases that were based on the provisions of the most-favored-nation clause. However, in the final claims of both cases, the courts rejected the applicability of these provisions to MFN: *ADF Group Inc. v. USA* (Decision of January 9, 2003), para. 136, and *Pope & Talbot Inc. v. The Government of Canada* (Decision of 10 April 2001), para. 111, 115.

In conclusion, the proper application and interpretation of a clause specific to the most-favored-nation clause in a particular case requires a careful examination of the text of that provision, carried out in accordance with the rules of interpretation of the Treaty as set out in the Vienna Convention. The *ejusdem generis* principle has been applied in the jurisprudence of international tribunals, national courts and through diplomatic practice. According to this principle, an MFN-type clause cannot attract the more favorable treatment available in other treaties than in respect of the same "object", the same "category of matter" or the same "class of matter"; the application of this principle has provided useful evidence, although it is not always simple or consistent. As mentioned above, the interpretation of this clause must always be made on the basis of the text of the provision and in accordance with the general rules of interpretation laid down in the Vienna Convention.

3.2.4. Fair and equitable treatment, full protection and security

"Investments must always benefit from fair and equitable treatment, benefit from full protection and security and must not benefit in any case from a treatment inferior to that imposed by international law", it is shown in art. II point 2 (a) of the BIT Argentina - USA. The bilateral investment agreements include, as mentioned, clauses such as "fair and equitable treatment" and "full protection and security". Regarding the meaning and interpretation of these clauses, divergent opinions were formulated in the arbitration proceedings. Among the reference cases can be mentioned: in NAFTA - *Mondev International Ltd. v. USA*, case no. ARB (AF)/99/2, Decision of 11 October 2002, para. 122, *United Parcel Service of America Inc. v. Government of Canada*, Jurisdiction Decision of November 22, 2002, para. 97, *ADF Group Inc. v. USA*, case no. ARB (AF)/00/1, ICSID, Decision of 9 January 2003, para. 199; within ICSID - *CMS Gas Transmission Company v. Argentina*, ICSID case no. ARB/01/8, Decision of 12 May 2005, para. 284[1] or *Azurix v. Argentina*, ICSID case no. ARB/01/12, Decision of

[1] "While the choice between imposing a higher standard of the treaty and that of equating it with the international minimum standard may be relevant in the context of certain disputes, the Tribunal

July 14, 2006, para. 361. It can be mentioned that the first clause has been applied in cases related to the development of bilateral investment agreements and in disputes within the competence of NAFTA. It was thus established that "fair and equitable treatment" had been applied in certain circumstances recorded by the dispute settlement body, allowing it to find that the host State had failed to fulfill its obligations, such as: refusal to renew a waste disposal permit in Mexico; the obligation to present an excessively justified amount of justification/motivation to obtain an export license in a forestry sector in Canada; the illicit transfer by a public service official of funds from a private account opened with a Spanish bank; the fact that a shipowner was not directly and completely warned about the imminent seizure of a ship[1].

It was considered that fair and equitable treatment is a principle of good faith of the host state, which must act in a coherent manner, fully transparent and unambiguous. For example, in the case of *Tecmed v. Mexico*, ICSID, the 2003 Decision states in para. 153 that: "this Arbitral Tribunal finds that the commitment to fair and equitable treatment (...) is an expression and part of the principle of good faith, recognized by international law, although bad faith is not necessary for its violation." Among the elements of this treatment can be listed, therefore: compliance with legal rules and procedures, predictability, stability, legitimate expectations, non-discrimination or transparency.

The "full and total protection and security" clause[2] granted to foreign investment applies in particular during periods of insurrection, social unrest and other public disturbances, including illegal disturbances. It covers damage or loss suffered by an investor as a result of such violent incidents, either directly as a result of government acts or as a result of a lack of adequate investment protection by civil servants or the police. There are cases in which it could be invoked as a legal measure of protection and security[3]. For example, in the case of *Saluka Investments BV (Netherlands) v. The Czech Republic*, Partial Decision of 17 March 2006, para. 484 states that: The practice of arbitral tribunals seems to indicate, however, that “full security and protection” “is not intended to cover any impairment of an investor's investment, but to more precisely protect the physical integrity of an investment against interference through the use of force". Several cases

is not convinced that it is relevant in this case. In fact, the standard of the Treaty of fair and equitable treatment and its connection with the stability and predictability necessary for the business environment, based on solemn legal and contractual commitments, does not differ from the minimum standard of international law and its evolution in customary law".

[1] For details, see: *Etude* 2005, pp. 37-41, in particular, pp. 50-51, notes 18-21.

[2] BIT Great Britain-Sri Lanka provides in art. 2 (2): "Investments of nationals or companies of a Contracting Party shall at all times receive fair and equitable treatment and shall enjoy full protection and safety in the territory of the other Contracting Party." Another example is the BIT Argentina-France, which provides in art. 5 (1): "Investments (...) shall enjoy (...) full protection and security in accordance with the principle of fair and equitable treatment provided for in Article 3 of this Agreement".

[3] See *Jack Rankin v. Iran*, the judgment of 3 November 1987, *17 Iran-United States Claims Tribunal Reports*, para. 135 and 147.

in the ICSID resolution competence are illustrative in this respect[1]. In the case of *Enron v. Argentina*, *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID (ARB/01/3), Decision of 22 May 2007, para. 286 states that: "there is no doubt that, historically, this special standard has been developed in the context of the physical protection and security of officials, employees and facilities of a company." Despite differences of opinion regarding the separation or identity of these two standards, as a conclusion in relation to those discussed, it should be noted that in resolving cases concerning such situations, arbitral tribunals have indicated that the obligation to protect full and complete security does not constitutes an obligation of result. The two standards have been interpreted by case law as interdependent, as is the example of the case of *Azurix v. Argentina* (ICSID ARB/01/12), Decision of 14 July 2006, which in para. 407 states that: "in some bilateral investment treaties, fair and equitable treatment and full protection and security appear as a single standard, in others as separate protection. The BIT falls into the latter category; the two phrases describing the protection of investments appear successively in the form of different obligations in article II.2 letter (a): "investments must always be treated fairly and equitably, with full protection and security, and (...)", or in para. 408: "the tribunal is convinced of the interdependence between fair and equitable treatment and the obligation to give the investor full protection and security. (...) It is not just about physical security; the stability offered by a secure investment environment is equally important from the investor's point of view".

3.2.5. Expropriation

The States have a sovereign right under international law to take possession of property held by their own citizens or foreigners by nationalization or expropriation for economic, political, social or other reasons. To be lawful, the exercise of that sovereign right requires, in accordance with international law, the following conditions to be met: (a) property must be taken for public purposes; (b) on a non-discriminatory basis; (c) in accordance with legal procedures; (d) accompanied by compensation (granting full compensation to the expropriated owner)[2].

Although the right of expropriation states is recognized as fundamental, the exercise of this right by states has triggered conflicts, debates and disagreements that are far from finalized, although the tone and content, together with the

[1] *American Manufacturing & Trading c. Zaire*, ICSID, case no. ARB/93/1, judgment of 21 February 1997; *Wena hotel Ltd. v. Arab Republic of Egypt*, ICSID, case no. ARB/98/4, decision on jurisdiction of 29 June 1999, decision on the merits of 8 December 2000; Decision on annulment of 15 February 2002 (BIT, *Royaume-Uni de Grande-Bretagne et d'Irlande de Nord/Republique Arabe d'Egypte*).

[2] See, in this regard, *Antoine Goetz c. Burundi*, ICSID, case no. ARB/95/3, judgment of 10 February 1999 (BIT Belgium-Luxembourg/Burundi Economic Union).

procedural means of resolving disputes, have varied significantly over time[1]. Te international investment agreements have evolved and clarified with this development and elements such as the notions of indirect expropriation (defining the types of measures that may or may not constitute indirect expropriations), the way in which compensations are established, their content and applicable standards.

The direct expropriation means a legally binding transfer of title or physical confiscation. Expropriation normally benefits the state itself or a third party mandated by the state, while indirect expropriation involves the total or almost total deprivation of an investment, but without a formal transfer of title or simply seizure[2].

The term "expropriation" is usually used in conjunction with the term "nationalization" and is often used interchangeably. For example, the Energy Charter Treaty (TEC) stipulates that investments may not be "nationalized, expropriated or subject to a measure or measures having an effect equivalent to nationalization or expropriation". As terminology, some agreements use terms synonymous with this notion, such as: confiscation, dispossession, requisition or alienation.

In the case of *Roussalis v. Romania*[3], for example, the ICSID arbitral tribunal defined direct expropriation as "a deliberate official act of taking". Another example is the case of *Burlington v. Ecuador*[4], where the arbitral tribunal formulated the following standard of conduct of the host state which constitutes a direct expropriation: "the actions of the host State represent a direct expropriation when such actions (i) deprive the investor of his investment; (ii) deprivation is permanent; and (iii) deprivation finds no justification in the doctrine of police power".

In the *Yukos* cases, the court found that the applicants' assets had been subject to measures equivalent to expropriation because "the main objective of the Russian Federation was not to collect taxes, but to bankrupt *Yukos* and capitalize on its valuable assets"[5].

Other cases concerned expropriations indirectly alleged to be caused, for example, by various environmental or public health regulations[6]. An example is

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[1] See *Expropriation, UNCTAD Series on Issues in International Investment Agreements II,* 2012, p. 16.

[2] *Ibidem*, p. 22.

[3] See *Spyridon Roussalis v. Romania*, ICSID case no. ARB/06/1, Decision of 1 December 2011, para. 327, p. 56.

[4] *Burlington Resources Inc v. Ecuador*, ICSID case no ARB/08/5, Decision on liability of 14 December 2012, para. 506, pp. 72-73.

[5] Reunited cases *Yukos: Hulley Enterprises Limited v. Rusia*, PCA case no. 226; *Yukos Universal Limited v. Rusia*; *Veteran Petroleum Limited v. Rusia*, PCA case no. 226, Final decision of 18 July 2014, para. 796.

[6] See the various requirements imposed on Philip Morris for the packaging of cigarettes adopted by the Government of Uruguay, citing public health reasons (*Philip Morris Brands Sàrl et al v. Uruguay*, ICSID case no. ARB/10/7, Decision of July 8, 2016, para. 272-307, pp. 76-88).

Ethyl Corporation v. Canada[1]; as a result, concerns have been expressed about the possibility of international investment agreements being used to limit the powers of the host state to adopt environmental, public health or other similar rules. There were also fears that the prospect of arbitrating these disputes between the investor and the states due to regulatory seizures, allegedly regulatory, would not bring a regulatory freeze, given the concern of host states exposed to liability[2].

In the NAFTA case of *Metalclad v. Mexico*, the court held that measures equivalent to expropriation include "clear or incidental interference with the use of property which results in the owner's deprivation (...) reasonable use or economic profitability of the property, even if not necessarily for the obvious benefit of the host state". The court found that, through their actions, the municipal and regional authorities prohibited the defendant from using the land contrary to the assurances given by the federal government, thus depriving the owner of the advantages he expected to obtain[3].

In *Tecmed v. Mexico*, the court emphasized the level of interpretation of the importance of the impact of the government's measure on investment, as it sought to find out whether "the negative economic impact of these actions on the investor's financial situation was so strong as to lose its full value. of his investment or to deprive him of the economic or commercial use of that investment without being entitled to any reparation"[4]. The reasoning of the tribunal was as follows: "under international law, the owner is also deprived of his property if its use or enjoyment of the benefits deriving from it has been taken away from him or if it is prejudiced to the extent that it is effectively deprived (of advantages), even if from a legal point of view, it remains the owner of the mentioned assets and insofar as this deprivation is not temporary. The intention of the public authorities is of less interest than the consequences of the measure (in other words, whether the economic value of the use, the benefit or free disposal of these assets or these rights have been neutralized or completely reduced) for the owner of these assets or the resulting advantages; the modalities of the measures entailing this loss are less important than the real effects" [5].

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[1]*Ethyl Corporation v. Canada*, UNCITRAL, Jurisdiction Decision, June 24, 1998. The reason for this lawsuit was a ban by the Canadian authorities to import a gasoline additive called MMT. The applicant, the US importer of this additive into Canada, brought an action against the law prohibiting imports, based on Chapter 11 of NAFTA. The Canadian Government settled the present case by awarding compensation of several million dollars, representing the costs and gains not realized by the applicant as a result of that prohibition.

[2] For details see: *Etude2005*, pp. 43-45.

[3]*Metalclad Corporation v. Etats Unis du Mexic*, ICSID, case no. ARB(AF)/97/1, Judgment of 30 August 2000; examination by the Supreme Court of British Columbia on 2 May 2001; additional grounds, same court 31 October 2001.

[4]*Technicas Medioambietales Tecmed S.A. v. Mexic*, ICSID, case no. ARB(AF)/00/2, Judgment of 20 May 2003 (BIT Spain/Mexico), para. 121 et seq.

[5]*Ibidem*, par. 116.

As noted, the practice of investment arbitration does not allow for an accurate assessment of indirect expropriation claims, and courts involved in resolving these types of disputes continue to tend toward a very specific analysis of the facts on a case-by-case basis. on indirect expropriation.

The new generation of investment agreements, including the investment chapters in free trade agreements, have introduced specific language and criteria to help determine whether there has been an indirect expropriation that requires compensation. These criteria are consistent with those arising from arbitral awards. At the same time, caution requires us to recognize that the list of criteria that can be identified today from state practice and existing jurisprudence is not necessarily exhaustive and may evolve[1].

4. International bodies involved in resolving investment disputes

4.1. Paris International Chamber of Commerce

The arbitration under the ICC Arbitration Rules is a formal procedure that leads to a binding decision by a neutral arbitral tribunal, which can be enforced in accordance with both domestic arbitration laws and international treaties such as the Convention from New York in 1958. The International Chamber of Commerce was created in Paris immediately after the First World War, in order to institutionalize the settlement of possible disputes arising from acts of trade with foreign elements. In 1923, the ICC established the Court of Arbitration, which soon became one of the most important arbitral tribunals for resolving disputes in international trade. The arbitration rules are those of 2012, as amended in 2017. They are in force since 1 March 2017. The most important of the 2017 amendments is the introduction of an accelerated procedure, which provides for streamlined arbitration, with a small scale of taxes. This procedure is automatically applicable in cases where the amount in dispute does not exceed USD 2 million, unless the parties decide to waive.

These provisions will apply only to arbitration clauses concluded after March 1, 2017[2]. Since 1923, the rules have been successively amended in 1955, 1975, 1988, 1997 and 1998[3]. The new ICC arbitration rules have maintained the basic characteristics of arbitration of this body and include elements on: introduc-

[1] OECD (2004), "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, *OECD Working Papers on International Investment*, 2004/04, OECD Publishing, p. 23.

[2] See the 2017 Arbitration Rules, available on the official website: *https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-englishversion.pdf.pdf*, accessed on March 14, 2019.

[3] See *Chambre de Commerce Internatonale*, Paris, juin 2003, *Reglément d'arbitrage en vigueur à compter du 1er janvier 1998*. Comments and methodology on the new rules of procedure see: Y. Derains, E.A. Schwartz, *A guide to the New ICC Rules of Arbitration*, Ed. Kluwer Law International, The Hague/London/ Boston, 1998.

tory rules of procedure (definitions, notifications and deadlines), rules on arbitration and procedure (request for arbitration, procedural documents, establishment of the arbitral tribunal, jurisdiction, place of arbitration, language, applicable rules) and provisions on the arbitral award (time limits for pronouncing, enforcing the judgment, remedies or remedies, etc.) including arbitration costs. These rules are annexed to the Statute of the ICC International Court of Arbitration, internal rules of administration and case management techniques, and emergency procedures.

We also mention that in many state contracts, the arbitration clause indicates the ICC Paris arbitration as the court, and most of the disputes involved state institutions and bodies and less governments or even states.

4.2. United States Council for International Business

USCIB (also known as ICC-USA) is the US National Committee for the International Chamber of Commerce (ICC). The USCIB Arbitration and ADR Committee serves as the point of contact in the United States for multilateral dispute resolution services within the ICC International Court of Arbitration ("ICC Court" or "Court"). Established in 1945 to promote an open trading system in the world, now among the most important pro-trade organizations, market liberalization, in the phase of appointing arbitrators, ICC - unlike other arbitral institutions - enjoys the support of committees from about 90 different states. Where it is necessary to appoint arbitrators, mediators or experts, the Court rarely makes direct appointments, instead asking the appropriate National Committee (determined by venue, applicable law and other factors) to propose the appointment of such ICC experts in a large international group of experienced people. As the national ICC committee of the USA, when the ICC Court or the ICC ADR Center requests the appointment of an arbitrator, USCIB forwards the proposal to the US nationals with the necessary qualifications for each case. This process is administered by the USCIB Arbitration Committee.

4.3. Stockholm Arbitration Institute

The Stockholm Arbitration Chamber of Commerce (SCC) provides dispute resolution services to both Swedish and international business communities. SCC has been part of the Stockholm Chamber of Commerce since 1917 and has gained extensive experience in resolving disputes, turning 100 in 2017. During this time, the SCC has become one of the world's premier institutions for East and West disputes and is today an international dispute resolution center where parties from up to 40 states choose to resolve their disputes each year[1].

[1] See the official website of this organization: *http://www.sccinstitute.com/ about-the-scc/*, accessed on May 10, 2018

According to the information found on the official website of SCC, in 1993, its first investment dispute was registered. Since then, SCC has handled a large number of investment-related disputes, primarily based on bilateral investment treaties (BITs); this is one of three possible forums for investment disputes in the Energy Charter Treaty (ECT). The role of the SCC can vary in different investment disputes. A large part of investment disputes are administered in accordance with its own arbitration rules - SCC Arbitration Rules are the third set of arbitration rules used in investment disputes, making them the second largest arbitration institute in the world, after the World Bank's International Center for the Settlement of Investment Disputes (ICSID). An important role was played by its use in resolving the differences arising from the economic relations between the USA and the USSR in 1920-1930. In 1976, a standard arbitration clause was agreed, recommended to be included in contracts concluded by American companies, but also by Western European companies in trade with Eastern European companies. We mention that the jurisdiction was also recognized by China. The role of the CCS in investment disputes also includes acting as a appointing authority under the UNCITRAL Arbitration Rules. The Arbitration Rules and the Rules for Rapid Arbitration entered into force on 1 January 2017[1]. These rules have elements of content largely aligned with the rules of international arbitration of other arbitral tribunals. The applicable law may be a national law and any principles of law may be applied. Although the Court periodically displays statistical data on the number of cases, the applicable law, the rules under which the arbitration took place, the composition of the panel, etc., the confidentiality and the conservative traditionalist character of SCC prevail, with very brief information on the content of decisions.

The rules of arbitration were successively amended in 1929, 1999, 2010 and 2017, maintaining the principle of confidentiality of arbitration. In applying the provisions of this article, the case law of the Swedish Supreme Court of Justice has made some clarifications, considering that this confidentiality refers to the fact that the public does not have the right to attend the arbitration given its private character. However, this requirement of confidentiality does not limit the parties' freedom to disclose information about the arbitration proceedings. The Court has therefore held that there is no general obligation of confidentiality in arbitration[2].

If the parties have not chosen the law applicable to the substance of the dispute, the arbitrators may apply the law which they consider most appropriate, without being obliged to have recourse to the Rules of Conflicts of Law. It is a solution that does not fit into the tradition of IAS arbitration, but has been adopted

[1] These rules are available at: *http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf*, accessed on March 14, 2019.

[2] See: Swedish Supreme Court of Justice, case *Bulgarian Foreign Trade Bank LTD v. AI Trade Finance Inc – SUA*, Decision of 27 October 2000, *http://www.chamber.se/ arbitration*.

to align with recent trends in international arbitration[1].

4.4. London International Court of Arbitration (LCIA)

On April 5, 1883, the Court of the Common Council of London set up a committee to draw up proposals for the establishment of a tribunal for internal arbitration and, in particular, for transnational commercial disputes, so that in 1892 the Court of Arbitration was established in London. In 1975, the Institute of Arbitrators (later the Chartered Institute of Arbitrators) joined the Court as an administrative body, and as a result the director of the Institute of Arbitrators became the clerk of the London Arbitration Court.

In 1981, the name was changed to the International Court of Arbitration in London, to reflect the nature of its work, which was at that time mainly international, which is why innovative rules were also adopted that year. In 1985, not far from its centenary, its innovative rules were promulgated marking the character of an international arbitration institution of the LCIA, being one of the most prestigious institutions for the settlement of international arbitrations, a model and a leader in foreign investment arbitration. especially the progressive influence of the Chartered Institute of Arbitrators (CIArb), an Institute that is empowered in training/educating arbitrators worldwide. The LCIA operates under a three-tier structure, comprising the Company (LCIA Non-Profit Association), the Court of Arbitration and the Secretariat.

The 1998 arbitration rules were significantly revised and replaced in 2014 by the adoption of a new set of rules, in order to align them with current trends and to reduce arbitration time and costs, as well as to impose certain conduct on parties and representatives. through an equidistant and efficient procedure[2]. Starting with October 2014, the insertion of the compromising agreements will follow the 2014 version of these Rules, in the absence of the contrary provisions of the parties. The court celebrated 125 years of activity.

Every two years, the LCIA publishes its statistical reports. Unlike the other Arbitration Courts mentioned in this paper, investors from almost all states appealed to the LCIA. Recently, Romania is in the process of resolving a dispute resulting from a public procurement contract in which the competence to resolve disputes belongs to LCIA. This is the situation of the Romanian Naval Authority regarding the contract signed with RIFA Holding Limited (former Ivana Holdings Limited), by which the Romanian maritime flag is ceded for 30 years to this company (the Romanian courts ruled in favor of the Romanian Naval Authority, canceling the contract, but the Cypriot company has stated that it intends to continue

[1] See I. Boghez, *Soluționarea diferendelor în acordurile internaționale din domeniul investițiilor*, Doctoral thesis, Bucharest University of Economic Studies, June 2001, pp. 112-113.

[2] The arbitral tribunal is required to act fairly and impartially (art. 14.1 of the Rules), similar provisions being found in art. 33 para. (1) of the English Arbitration Act of 1996.

resolving disputes before the LCIA).

4.5. Other representative institutions in resolving international investment arbitrations

- The Vienna International Arbitral Center (VIAC), one of Europe's leading arbitration institutions, serves as a focal point for the settlement of commercial disputes in the regional and international community. It was founded in 1975 as a permanent arbitration institution of the Austrian Federal Economic Chamber, and since then has enjoyed an increasing number of cases where actors cover a diverse range of regions: Europe, America and Asia. VIAC has administered over 1,500 procedures since its inception, being one of the most experienced arbitration centers in the region. This Center benefits from a robust global network of arbitrators with experience in international arbitration[1] under the VIAC Rules. Austria adopted the UNCITRAL Model Law as its arbitration law in 2006, with minor amendments, thus ensuring that *lex arbitri* is in line with international standards. New arbitration rules were adopted on 8 May 2013[2] and thus significantly revised the previous Rules of 2006. Currently, a new version of the VIAC Regulation on Arbitration and Mediation entered into force on 1 January 2018. This version was approved by the Extended Federal Council of the Austrian Federal Economic Chamber on 29 November 2017. This applies to all procedures that started after 31 December 2017 or will start in the future.

- The Hong Kong Center for International Arbitration (HKIAC) was established in 1985 to assist the parties in resolving disputes through arbitration and other means of resolving disputes. HKIAC international investment arbitrations operate in accordance with the rules of this center or the rules of UNCITRAL. With effect from 1 November 2013, the new Arbitration Rules entered into force, which include improvements to the procedure for linking arbitration claims, the accelerated procedure and the interim measures; the deadlines are short, given that the arbitral award will be taken within a maximum of 15 days. The 2015 procedures replace HKIAC's previous procedures for administering arbitration in accordance with UNCITRAL rules, including procedures for administering international arbitration (as of March 31, 2005). The 2015 procedures can be adopted for any arbitration of the investing state administered by HKIAC under the UNCITRAL Rules, based on a treaty that provides for the protection of investments or investors.

- The Cairo Regional Center for International Commercial Arbitration (CRCICA) is an independent international non-profit organization established in 1979 under the auspices of the Asia-Africa Legal Advisory Organization

[1] I am a member of the list of VIAC arbitrators since 2013, in which capacity I advised the parties in international investment arbitration cases.

[2] Official multilingual versions were adopted by the Extended Presidential Committee of the Austrian Federal Economic Chamber on 8 May 2013, with effect from 1 July 2013.

(AALCO), a decision taken at the 1978 Doha Session to establish regional centers. international trade arbitration in Asia and Africa. Since its establishment, CRCICA has adopted, with minor modifications, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), approved by the General Assembly of the United Nations by Resolution no. 31/98 of 15 December 1976. CRCICA amended the arbitration regulations in 1998, 2000, 2002 and 2007 to ensure that they continue to meet the needs of their users, reflecting best practices in the field of international institutional arbitration. The current CRCICA Arbitration Rules are based on the new UNCITRAL regulations revised in 2010, with minor changes coming mainly from the Centre's role as an arbitration institution and as a designating authority. The rules entered into force on 1 March 2011 and apply to arbitration proceedings commencing after that date.

4.6. United Nations Commission on International Trade Law (UNCITRAL)

It is the central legal body[1] of the United Nations system of international trade law. In disputes in which the litigants agree to settle the dispute by setting up an ad hoc arbitration, outside an arbitration institution, but which requires the use of certain rules of procedure, by virtue of the principle of autonomy of will of the parties, they have the freedom to establish these disputes rules. Such rules are those established by the United Nations Commission on International Trade Law, abbreviated UNCITRAL (which have succeeded in harmonizing the rules adopted and promoted by various arbitral tribunals, two, as I stated earlier, when I mentioned that several arbitral tribunals have changed their rules for harmonization with UNCITRAL rules). Most arbitration institutions resolve investment disputes according to their own rules of procedure, but at the request of the parties the UNCITRAL Arbitration or Conciliation Rules are used.

In 1976, the UN Commission on International Trade Law adopted the UNCITRAL Arbitration Rules (Rules of Procedure), and in 1985 it adopted a model law for international trade arbitration, which was amended in 2006[2].

In accordance with Article 1 (1), consent to arbitration using the UN-

[1] UNCITRAL formulates modern, fair and harmonized rules on commercial transactions. These include: conventions, model laws and rules that are acceptable worldwide; legal and legislative guidelines and recommendations of great practical value; up-to-date information on the jurisprudence and rules of uniform commercial law; technical assistance in legislation reform projects; regional and national seminars on single commercial law.

[2] See: *Réglement d'arbitrage de la CNUDCI* (*Version revise en 2010*); *Loi type de la CNUDCI sur l'arbitrage commercial international*, 1985, *avec les amendements adoptes en 2006*, Nations Unies, Vienne, 2008; *CNUDCI aide-mémoire de la CNUDCI sur l'organisation des procédures arbitrales*, CNUDCI, Vienne, 1998.

CITRAL Rules must be given in writing, which is necessary to ensure the recognition and enforcement of arbitral awards under the 1958 New York Convention[1].

The best known example of the use of the UNCITRAL Rules as a basis for establishing rules of procedure for the settlement of disputes arising from investments in ad-hoc arbitration is the Iran - U.S. Claims Tribunal. It is an international tribunal, established in the Hague in 1981 under an Iran-US Convention, in order for nationals of the two states to be able to apply for the 1979 Iranian Revolution. This tribunal is the first tribunal since the World War II which had a significant number of cases related to foreign investment. The decisions taken have contributed substantially to international jurisprudence on State liability for damages to aliens[2], and the jurisprudence of this Tribunal has been used and cited by the courts in relation to the settlement of disputes under investment treaties[3].

The UNCITRAL Secretariat has established a system for collecting and disseminating information on court decisions and arbitration attributions related to conventions and model laws that have emerged from the work of the Commission. The purpose of the system is to promote international knowledge of legal texts formulated by the Commission and to facilitate the uniform interpretation and application of these texts[4].

5. World Trade Organization (WTO). Dispute settlement body

The General Council agreed that the Dispute Settlement Body (DSB) should handle disputes between WTO members. The Memorandum of Understanding on Rules and Procedures Governing Disputes, annexed to the WTO, established a general mechanism, administered by a Dispute Settlement Body (DSB) under the control of the WTO's "General Council". Such disputes may

[1] Reconciliation between the UNCITRAL model and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959) was necessary. The removal of the written form from the UNCITRAL model law would have been in vain if the New York Convention had remained unchanged, maintaining the requirement of the written form of the arbitration clause. On the occasion of the 61st session, UNCITRAL adopted, on July 7, 2006, a revised version of art. 7 of the Model Law on International Commercial Arbitration, removing the requirement to have written documents for the validity of the arbitration clause. Two recommendations were also made to amend the New York Convention. See details on the whole issue at: Alina Mioara Cobuz-Bacnaru, *Arbitrajul ad-hoc, conform Regulilor Comisiei Naţiunilor Unite pentru Dreptul Comercial Internaţional*, Universul Juridic Publishing House, Bucharest, 2010, especially pp. 434-446.

[2] By 11 July 2007, the General Court had given final judgments, decisions or rulings in 3936 cases. The tribunal has been closed for further new applications by individuals since January 19, 1982. In total, it has received approximately 4,700 private applications from the United States. The tribunal ordered payments by Iran to US nationals totaling $ 2.5 billion. Almost all private claims have been resolved, but several intergovernmental complaints are still before the court.

[3] See C. Gipson & C. Drahozal, *Iran – United States, Claims Tribunal Precedent in Investor – State Arbitration*, Journal of International Arbitration, no. 23, 2006, p. 521 et seq.

[4] See the official website: *http://www.uncitral.org/uncitral/en/case_ law.html*, accessed on May 10, 2018.

arise in connection with any agreement contained in the Final Act of the Uruguay Round which is the subject of an agreement on the rules and procedures governing the settlement of disputes. The DSB has the power to set up dispute settlement groups (to set up arbitration panels), to consider issues related to arbitration, to adopt the commission (panels of arbitrators), appellate bodies and arbitration reports, to maintain oversee the implementation of the recommendations and rulings contained in such reports and authorize the suspension of concessions in the event of non-compliance with those recommendations and rulings. The trade dispute resolution is one of the WTO's main activities. A dispute arises when a member government considers that another member government is in breach of an agreement or commitment made within the WTO, and is therefore competent to dispute disputes between WTO members[1]. Thus, the WTO has one of the most active international dispute resolution mechanisms in the world: since 1995, more than 500 disputes have been brought to the WTO and more than 350 judgments have been issued[2].

The Punta Del Este Ministerial Declaration of September 20, 1986, which launched a new round of international trade negotiations - called the Uruguay Round, mentioned, among the topics of future negotiations, the settlement of disputes. Following the revision of the negotiated solutions at the December 1988 GATT Council meeting in Montreal on 12 April 1989, the GATT Council adopted a draft document on which it subsequently based its "Memorandum of Understanding on Rules and Procedures for Settlement of Disputes", which is listed in Annex 2 of the Marrakesh Agreement establishing the WTO[3].

The development and application of the dispute settlement mechanism within the WTO have led to the finding that it is necessary to introduce in the procedure the various economic and trade operators, belonging to the various WTO members, when their rights are violated by a certain member. For example, the dispute settlement body had to accept that states include in their delegations private advisers[4] or even interested third parties, such as non-governmental organizations, who will thus be able to submit their comments on behalf of these members, while "groups special rights" are entitled to request information and technical advice from any appropriate source[5].

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[1] In the case of the *United States v. Taxation of countervailing duties*, the Appellate Body stated in its report of 10 May 2000 that the DSB is a purely intergovernmental mechanism to which private individuals can only have access under the formula "*amicus curiae*", (paras. 40, 41 of the Report).
[2] See *https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm*, accessed on May 10, 2018.
[3] See the annexes to the Marrakesh Agreement on the Establishment of the World Trade Organization, ratified by Law no. 133 of December 22, 1994, the Official Gazette, Part I, no. 360 of December 27, 1994, annexes published in the Official Gazette, Part I, no. 360 bis of 27 December 1994. The official website of the WTO is: *https://www.wto.org/*.
[4] See, for example, *the Appellate Body Report of 9 September 1997* in the case of the "European Community - Regime for the sale and distribution of bananas", paras. 10-12.
[5] See *Appellate Body Report of 12 October 1998*, "US - Prohibitions on the Importation of Certain Shrimps and Certain Shrimp Products", para. 101, 104.

The average duration of the dispute at the WTO, with the exception of the composition of the commission and the translation of the reports, is about ten months. For the International Court of Justice, it is four years, for the European Court of Justice it is two years, and for NAFTA (the North American Free Trade Agreement, currently the USMCA) it is three to five years[1].

From the point of view of the procedure, the first phase of the consultations shows a special importance (they can influence the next phase of the special groups[2]); in one case, the appellate body, defining the terms of its dispute, stated: "through consultations, the parties exchange information, assess the strengths and weaknesses of their respective theses, mutually acceptable solution. The consultations give the parties the opportunity to define and circumscribe the extent of the dispute between them." [3]

The second phase of the procedure takes place in front of a special group set up ad hoc under the auspices of DSB, according to art. 6-16 and Appendix 3, of the Memorandum of Understanding. When one of the parties to the dispute requests the establishment of a panel, the complaining party will have to specify in writing both the "specific measures taken in question", which could be "any act or omission", attributable to another WTO Member State, and "the legal basis of his relationship"; the two issues will be examined separately by the panel[4].

The panel will conduct a double examination of the case, in fact and in law (Article 11 of the Memorandum of Understanding[5]), and will act with respect

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[1] For details on the organization of the size of the dispute settlement mechanism and the procedural steps, see: D. Palmeter, P.C. Mavroidis, *Dispute Settlement in the World Trade Organization. Practice and procedure, Second edition*, Cambridge University Press, 2004; World Trade Organization, *A Handbook on the WTO Dispute Settlement System*; Eric Canal-Forgues, *Le Réglement des différends a l'WTO*, 3e edit., Brylant Bruxelles, 2008; O. Crauciuc, *Dreptul Internațional Economic*, Ed. Silex, Bucharest, 2003, pp. 82-92.

[2] In fact, this aspect was also mentioned in the practice of the appellate body "all parties participating in the settlement of disputes (...) must from the outset formulate in relation to the statements and facts relating to these statements. The statements must be clearly stated and the facts must be freely presented. This must happen both during the consultations and in the more formal framework of the panel procedure. "

[3] See *Appellate Body Report for Mexico - Corn Syrup*, 21 November 2001, WT/DS/132/AB/R, para. 54.

[4] The importance of the approach is presented in the Report of the Appellate Body of 13 November 2006 in the case of the European Community - some customs issues WT/DS315/AB/R, para. 131-133.

[5] Moreover, art. 7, par. 13 of the Memorandum of Understanding states that: "The appellate body will be able to confirm, modify, reshape, the findings and legal conclusions of the panel." At first glance, it would seem that the powers conferred on a Court of Appeal in civil law systems and by the WTO Appellate Body are not too far apart. But we find that, in the jurisdictional practice of European states, the devolutive effect of the appeal is to question the work judged by the court of first instance, in order to decide again both in fact and in law; we do not have such a thing in the WTO mechanism, where the devolutive effect of the appeal is considerably restricted: "the appeal will be limited to the legal issues covered by the panel report and the legal interpretations formulated by it" - is the wording of art. 17, par. 6 of the Memorandum of Understanding.

for the right of defense, a central principle that promotes the right to a fair trial[1] through its Panel Report, limiting itself to issuing findings, suggestions or recommendations, according to the provisions of art. 19 of the Memorandum of Understanding. Approximately 2/3 of the disputes submitted to the DSB were settled amicably.

The third phase takes place before an Appellate Body, according to art. 17 of the Memorandum of Understanding, and which will in turn formulate a report. It will not re-examine the determination of the facts made by the panels as the *de facto* issues are only within their competence, but will re-examine the legal qualification of these facts[2].

The appellate body does not issue a decision, but submits a report[3] that will be submitted to the DSB for approval. For example, in a communication sent by the Appellate Body on 11 March 2015, the Appellate Body set out instructions on written submissions in appeal procedures, setting out the format and length for them and which participants and third parties must submit together with their written observations in the appeal procedures and to clarify that these summaries will be annexed, without changes, to the report of the Appellate Body.

Most of the mechanisms presented regulate mediation as a means of resolving disputes, for which the rules are presented either together with the rules of arbitration, or individually, the lists of arbitrators and those of mediators being separate.

6. Arbitration jurisdictions at regional level

At the regional level, groups of states, most often established in regional economic communities and recognizing the importance of investment and establishing a stable climate for them, have negotiated, developed and adopted treaties to harmonize their own economic legislation, but also to create a common jurisdictional framework for the peaceful settlement of disputes.

6.1. The Common Court of Justice and Arbitration of the Organization for the Harmonization in Africa of Business Law - OHADA

The Treaty on the Harmonization of Business Law in Africa (OHADA) was signed in Port Louis in October 1993 and entered into force in 1995.

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[1] See *Appellate Body Report of 6 March 2006 in the case of Mexico - tax measures relating to non-alcoholic and other beverages*, WT/DS308/AB/R, no. 45,53.

[2] See details of: *Report of 16 January 1998 on Community measures on meat and meat products (hormones)*, paragraph 132; Report of 23 September 2002 in the case of *Chile - safeguard measures applied in agriculture*.

[3] In the report, the Appellate Body will insert its findings and recommendations and, if applicable, its suggestions (art. 19 of the Memorandum of Understanding).

OHADA[1] has as specific attributions: the elaboration and adoption of common, modern and simple legal norms that are adapted to the international economic environment, as well as to the realities of its member states and the adequate training of the legal and judicial personnel and the promotion of arbitration and other alternative dispute resolution.

Historically, the Uniform Act of 11 March 1999 on Arbitration - AUA entered into force on 15 June 1999, in parallel with the arbitration system which is designed and placed under the auspices of the Common Court of Justice and Arbitration - CCJA, governed by art. 21-25 of the Treaty and by the provisions of the CCJA Arbitration Rules of 11 March 1999 for procedural modalities. The OHADA arbitration system distinguishes between ordinary arbitration governed by the Uniform Act and institutional arbitration of the Joint Court of Justice and Arbitration (CCJA), organized by the Treaty and the CCJA Arbitration Rules.

Nowadays there are numerous arbitration centers with numerous ad-hoc arbitrations. OHADA states in its submissions that: all such procedures should be in accordance with the cardinal principles of the arbitration law established by the Uniform Act of 11 March 1999[2]. The AUA, adopted on March 11, 1999, regulates traditional arbitration, so ad-hoc arbitrations and arbitrations that take place under the auspices of private or public arbitration centers that exist in the OHADA area such as: The Ivory Coast Arbitration Court (CACI) and the Mediation and Conciliation Arbitration Center of the Dakar Chamber of Commerce of Industry and Agriculture (CCIA), art. 35 para. (1) of the Uniform Act not removing the choice of other arbitration mechanisms, other than CCJA[3].

This specific CCJA-OHADA arbitration is based on the following legal instruments: the Port Louis Treaty of 17 October 1993, as revised in Quebec on 17 October 2008, including Title IV on arbitration; CCJA Arbitration Rules of March 11, 1999; Uniform Law of 11 March 1999 on Arbitration (used exceptionally if arbitration rules do not provide); Decision no. 004/1999/CCJA of February 3, 1999 on arbitration costs; Decision no. 004/99/CM of March 12, 1999 approving the Decision no. 004/1999/CCJA regarding arbitration costs; the CCJA's internal rules on arbitration of 2 June 1999 and the Rules of Procedure of 18 April 1996, revised on 30 January 2014. As Professor Pougoue stated, the CCJA's specific arbitration system "is unprecedented both in Africa and around the world".

In the composition of the International Court, this regional internationalism is limited to the signatory states[4].

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[1] The OHADA Treaty was negotiated and signed by the following African states: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo (Brazzaville), Ivory Coast, Cabon, Equatorial Guinea, Mali, Niger, Senegal, Togo. For details, see the volume of studies and comments, J. Issa-Sayegh, P.G. Pougué, F.M. Sawadogo (coord.), *OHADA, Traité et Actes uniformes, comméntes et annotés*, Ed. Juriscope, Paris, 2002.

[2] See the official website: *http://www.ohada.org/index.php/en/caarbitration-center/history*, accessed on March 14, 2019.

[3] Common Court of Justice and Arbitration (CCJA).

[4] At this level, the Court exercises administrative powers while, in order to grant exequatur, it

Both the ICC and the French Arbitration Committee are international bodies, but under private law[1]. In accordance with Article 1 of the Arbitration Rules of 11 March 1999, "the Common Court of Justice and Arbitration (...) shall exercise administrative functions in respect of arbitration proceedings in the field assigned to it by article 21 of the Treaty (...). The decisions taken by the Court in this regard, in order to ensure the successful implementation and completion of arbitration proceedings and those related to the review of arbitral awards, are of an administrative nature (...). These decisions shall be taken by the Court under the conditions laid down by the General Assembly, as proposed by the President." The CCJA, considered an arbitration center, has an institutional framework that allows it to effectively manage the arbitration proceedings conducted under its auspices.

Article 25 deals with arbitral awards to which the final authority of the res judicata is recognized in the territory of each State Party to the Treaty in the same manner as decisions rendered by national courts. Arbitral awards may be enforced by an *exequatur* decision. This article also states that only the CCJA is competent to formulate a decision in *exequatur*, stating the reasons for its refusal in 4 numbers[2].

OHADA Member States, with the exception of Equatorial Guinea, are parties to the ICSID Convention and therefore disputes concerning international investments between the host State signatory to the Convention and an investor of another nationality will be within the competence of ICSID arbitration or mediation, as set out in the rules of OHADA.

6.2. Common Convention on Investments in the States of the Central African Customs and Economic Union - UDEAC

The Convention adopted in Yaounde Cameroon was signed on 14 December 1965 and entered into force in April 1966, subsequently amended in 1992 and 1994[3], and comprises a single dispute settlement procedure resulting from

exercises jurisdictional functions (art. 25).

[1] At an international seminar in Abidjan in 2001, voices raised the issue of setting up an autonomous regional arbitration center. This proposal was not complied with, however, by creating a General Secretariat, a clear demarcation could be made between the Arbitration Center and the jurisdictional activities of the Joint Court of Justice and Arbitration. According to art. 24, before signing a partial or final sentence, the arbitrator must submit the draft to the Common Court of Justice and Arbitration. It can only propose purely formal changes.

[2] Thus, the reasons why the CCJA may refuse to adopt an *exequatur* decision are as follows: 1. if the arbitrator has ruled without an Arbitration Convention or on the basis of a null or statute of limitations; 2. if the arbitrator has ruled without complying with the task assigned to him; 3. when the principle of the adversarial procedure has not been respected; 4. if the sentence is contrary to international public policy.

[3] UDEAC was established on December 8, 1964 by the Treaty of Brazzaville, from 1964, in force

the implementation and development of capital investments[1]. Its competence[2] concerns disputes between investors from a State of origin party to the Convention and a host state of the UDEAC member investment. This convention does not create institutional arbitration bodies and opts for ad-hoc arbitration, which is why the document contains summary references on the conduct of arbitration (how to appoint arbitrators and general procedural elements), which will take place on the basis of its own procedure. or according to the procedure agreed by the parties.

6.3. Single Arab Capital Investment Agreement in the Arab States

The agreement was signed on November 26, 1980, in Amman, Jordan, and entered into force on September 7, 1981, at an Arab summit of the member states of the Arab League[3], in accordance with the objectives of the League of States Pact, the Common Defense Treaty and Economic Cooperation between the States of the Arab League, the principles and objectives set out in the Agreement on Arab Economic Action and the decisions of the Economic Council of the League of Arab States.

The January 2013[4] amendment to the Arab League Investment Agreement of 1980 aims to contribute to economic cooperation and to facilitate the coordination of investment relations between Arab states through the agreed common denominators. The amendment strengthens existing standards of investment protection and treatment (for example, the right to compensation equal to market value in cases of expropriation and free transfer of funds), introducing new ones (such as the right to fair and equitable treatment and the MFN). To ensure that its objectives are met, the amendment strengthens the role of Arab League institutions in promoting harmonized investment policies and disseminating investment information. In addition, its effective enforcement is guaranteed by improved dispute settlement mechanisms.

In the event of a dispute, the parties may appeal to the national courts or to the Arab Investment Court (AIC). The parties may also agree on any other alternative dispute resolution mechanism, ie mediation, conciliation, but also ar-

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on January 1, 1966; the Member States are: the Federal Republic of Cameroon, the Central African Republic, the Republic of the Congo, the Republic of Chad, the Republic of Gabon.

[1] See details in C.P. Buglea, *Soluţionarea diferendelor dintre state şi comercianţii de altă naţionalitate*, Ed. Hamangiu, 2006, pp. 27-39.

[2] For details, see the official website of this organization: *http://www.ceeac-eccas.org/index.php/*, accessed on May 10, 2018.

[3] The member states of the Arab League are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, Syria, Somalia, Sudan, Tunisia, United Arab Emirates, Yemen.

[4] These changes were ratified by the Member States, so Qatar ratified it by Emirate Decree no. 26/2016.

bitration. In the latter case, they may agree to present their disputes to any arbitration institution [for example, the International Center for the Settlement of International Disputes (ICSID) or the International Chamber of Commerce (ICC)]. If the parties do not agree on the rules governing their alternative dispute resolution mechanism, it will be governed by UNCITRAL rules.

The jurisdiction of the Court shall cover disputes arising out of an investment which has been made in accordance with the provisions of the Agreement between two States parties or in a State party and a public institution or organization in another State party or between two public institutions or organizations in two States parties; between one of the said parties and an Arab investor or between one of the said parties and an investment guaranteeing authority in accordance with the provisions of the Convention.

7. International Center for Settlement of Investment Disputes - ICSID

ICSID is one of the five organizations of the World Bank Group, together with the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). It provides facilities for conciliation and arbitration of international investment disputes.

It arose as a result of the 1965 Washington Convention and the Convention for the Settlement of Investment Disputes between States and Persons of Other States concluded in Washington on March 18, 1965, under the auspices of the International Bank for Reconstruction and Development - IBRD. The purpose of the Convention was to support the promotion of foreign investment by investors, individuals or legal entities under private law in host countries[1].

The ICSID dispute resolution system has unique features, with separate rules for arbitration, conciliation and fact-finding cases. The process and rules for each case are visible on the Centre's official website[2] where the following documents can be analyzed: ICSID Arbitration Convention, ICSID Conciliation Convention, ICSID Additional Arbitration Facility, ICSID Additional Conciliation Facility and Additional Fact Finding Facility (documentation) ICSID.

In addition to administering procedures in accordance with ICSID rules, the Center also handles arbitration cases in accordance with other rules, such as the UNCITRAL Arbitration Rules and ad-hoc investor-state and state-state cases. The center is also available to mediate international investment disputes under

[1] The Convention entered into force on 14 October 1966 and currently has 134 States Parties. Romania ratified the Convention by DCS no. 62/1975, Official Gazette no. 57 of June 7, 1975.

[2] See *https://icsid.worldbank.org/en/Pages/services/Case-Administration.aspx*, accessed on May 10, 2018.

other alternative dispute resolution mechanisms. In the administration of the cases deduced to its competence, the Center ensures specialized conditions. The full text of the ICSID Convention in Romanian is published on the official website of this institution[1].

According to the official information presented by the Center, every year, the Secretary General submits to the Board of Directors an annual report on the operation of the Center, for approval. The annual report provides an overview of ICSID's activities during the last fiscal year, including information on the evolution of ICSID membership and the number of cases, appointments to arbitration and conciliation committees, resolutions adopted by the Board, publications and financial statements on revenue and the Centre's expenses. The 2017 Report states that ICSID is the world leader recognized in the investor state as a dispute resolution mechanism. It has managed more than 70% of all international investment procedures. In the last year alone, ICSID has administered 343 cases[2], the most each year in its history. These cases are administered in every region of the world and are established by a diverse international group of specialized arbitrators, conciliators and members of ad hoc commissions. ICSID currently[3], has 163 signatories to the ICSID Convention, of which 154 are Contracting States to the ICSID Convention.

The ICSID Secretariat conducts the day-to-day operations of the Center and its main composition and functions are set out in the ICSID Convention (Articles 9-11) and in the administrative and financial regulations. The ICSID Secretariat is headed by the Secretary General, who is assisted by two Deputy Secretaries General. ICSID membership offers many benefits to Member States. Each member contributes to the governance of ICSID through equal representation on the Board.

From a procedural point of view, according to the ICSID Convention, arbitration is initiated by sending a request for arbitration to the Secretary-General. The request describes the basic facts and legal issues that need to be addressed and recorded, unless the dispute is manifest outside the jurisdiction of ICSID. According to the 2017 ICSID Report, in the last year, most arbitration requests have been processed on average within up to three weeks of submission to ICSID. The next procedural step is the establishment of the arbitral tribunal. ICSID arbitration rules give disputed parties significant flexibility in the number of arbitrators and the method of appointing them. In most cases, the tribunals shall consist of three arbitrators: one arbitrator appointed by each party and the third, the chairman, an arbitrator appointed by mutual agreement by the parties or by

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[1] Available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Convention-inother-Languages.aspx, accessed on March 14, 2019.

[2] See the official UNCTAD page, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement, last accessed on 10.05.2020.

[3] According to the official ICSID website available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx, last accessed on 10.05.2020.

arbitrators appointed by the parties. The parties may request the Center to assist in the appointment of arbitrators, either in accordance with a prior agreement or in accordance with the implicit provisions of the ICSID Rules. In 2017, when ICSID was invited to appoint, the Center concluded consultations with the parties and concluded appointments on average within approximately six weeks of receiving the request for appointment. The proceedings are considered to have started after the tribunal was set up. The General Court shall hold a first hearing within 60 days of its establishment in order to settle preliminary questions. The subsequent procedure usually consists of two distinct phases: a written procedure followed by hearings. After the parties present their case, the court deliberates and pronounces the decision. The ICSID decision is binding and is not subject to any appeal or other remedy, except as provided by the Convention. The Convention allows the parties to request an additional decision or a rectification of the judgment or to request a judgment for annulment, interpretation or review.

The competence of the Center is limited to disputes between a Contracting State[1] or certain public entities or bodies dependent on the State and a national of another Contracting State. In other words, the host state of the investment and the public entities or bodies dependent on the state, on the one hand, and the foreign investor, natural or legal person, on the other hand, must be taken into account[2].

Most of the bilateral treaties on the protection of investments concluded by Romania with different states contain clauses by which it is subject to the settlement of disputes within the competence of ICSID. However, the existence of these necessary jurisdiction clauses is not sufficient given that the provisions of the Convention show us that the written consent of both parties to the dispute is required.

The multilateral treaties and international instruments that refer to the competence of ICSID are mainly:

- The 1992 North American Free Trade Agreement (NAFTA) contains Chapter 11 for investment, currently replaced by USMCA 2018, which contains Chapter 14 for international investment.

- The Cartagena Agreement (Andean Pact) signed between Mexico, Colombia and Venezuela, in art. 17-18.

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[1] From the point of view of the ICSID Convention, a Contracting State is that State which has deposited its instruments of ratification, acceptance or accession and, according to art. 68 of the Convention, it shall become a State Party to the Convention within 30 days of the deposit of its instruments of ratification. According to art. 71, the status of a Contracting State shall be lost by a written notification made by the State concerned denouncing the Convention, stating that the denunciation shall take effect only 6 months after the notification and shall have no retroactive effect on the competence of the Center (article 71 and article 72).

[2] For details, see: Cristoph H. Schreuer, The ICSID Convention: Commentary, Cambridge University Press, p. 141 et seq.

- MERCOSUR, the Common Market of the Southern States, a Community established by the Treaty of 31 December 1994 between Argentina, Brazil, Paraguay and Uruguay, and subsequently Chile; article 9 of the Investment Protocol provides for the possibility for the investor to opt for one or more dispute settlement procedures, including ICSID arbitration.

- The Energy Treaty concluded in 1994 between the European Communities, today the European Union, and other states, most of them European, contains, in art. 26[1], provisions on access by consent to the ICSID jurisdiction of States Parties in relation to investors from another State Party and unconditional consent to the jurisdiction of ICSID and the Additional Facility.

From the statistical data provided by the Center, those interested can find data on the number of cases, the parties, the solutions pronounced and the object of the cases.

8. Conclusions

The type of differences existing in the investment field are different from other differences known by international relations. In general, they oppose natural or legal persons on the one hand and states on the other hand or the state-state disputes; variants were not lacking when public entities or state companies also appeared between the parties to the dispute. The importance of investment relations in the more general framework of international economic relations created this specificity of resolving possible disputes, which actually started from the fundamental principle of international law that required the settlement of disputes by peaceful means. However, as we sought to demonstrate in this chapter, but also in previous chapters, the object of international investment relations, as well as the disputes arising from these relations, have imposed special solutions over time, including the institutional aspect.

It should be noted that, in this matter, the predilection of the parties involved in the dispute was directed to the arbitral tribunal, ad hoc or institutionalized, and especially to the latter, given the speed in terms of procedure and given the fact that it is involved in resolving the dispute a deeply specialized institution. Regarding ICSID, it should be noted that the jurisprudence of this Center has clarified many disputes, problems of interpretation and elements used by the investor and the host state both in terms of their specification in bilateral contracts and in the actual investment, which is beneficial for the law. international investment both conventionally and as a "corpus" of principles and norms. It is noteworthy that, in addition to ICSID arbitration, there are also institutions at the regional level that can contribute to resolving investment disputes and, implicitly, to creating a safe climate in the region.

From a practical point of view, it is important that the parties involved in

[1] The mentioned article also stipulates the need for the written consent of the investor.

the procedure for implementing an international investment establish the conventional framework and determine the right to avoid as far as possible disputes arising out of the interpretation of established and adopted agreements and, however, the dispute arises, the parties may negotiate or obtain a speedy solution from the competent courts.

Chapter VI
Analysis of the state's responsibility for foreign investment

1. Notion and delimitations

The state's responsibility for foreign investment is an institution of international law as controversial as the legal field to which it applies. This is because there are very few issues in contemporary international law that provoke such divergent and divided opinions, such as the legitimacy of the state's power to "expropriate" property and tangible property held by foreigners on its territory and under its jurisdiction[1]. The subjects, the procedure and the regulatory limits of the exercise of this right which, *ipso facto*, constitute a violation of a positive norm of international law require certain delimitations related to: acts or facts that fall under public international law, and not a simple contract, and what are the ways of action of the state, so that the institution of international responsibility has a finality towards it in its capacity as a subject of public international law. Therefore, the facts that attract the responsibility of the state must constitute a violation of international law. The debates bring surprisingly few details to the analysis on the responsibility of states from the perspective of the investor. In most cases, the real legal question that divides arbitrators does not refer to the legislation on state liability, but to the admissibility and weight of customary law in the interpretation of treaties.

In a systematic approach and for resolving the mentioned controversy, to which this paper aims to contribute, it must be established that the state's responsibility for foreign investment circumscribes the rules of classical international law liability, whose elements apply, in particular, to foreign investment.

In these circumstances, we can define the responsibility of the state for foreign investment *as an institution of international law that establishes the consequences for a state from violating its international obligations regarding foreign investment*.

The responsibility of the state, as a general principle, intervenes in two distinct situations:

a. liability for wrongful acts or acts from the point of view of international law, which violates norms of international law, conventional or customary;

b. liability for harmful consequences resulting from activities that are not prohibited by international law (lawful activities *per se*) and which is a risk-based

[1] Judge Harlan J.'s Opinion in the case *United States v. Sabbatino*, 374, US 398/,1964, in M. Sornarajah, *The International Law on Foreign Investment*, third edition, Cambridge University Press, New York, 2010, p. 1.

liability[1].

As the general headquarters of the matter, the responsibility of the state regarding foreign investments is regulated by the provisions of the Final Draft Articles adopted by the International Law Commission in 2001[2], on the occasion of its 53rd session. On a proposal from the International Law Commission (ILC), the UN General Assembly approved by resolution the Draft Articles, while recommending that, after the solutions provided for in the draft have been confirmed by the practice of States[3], to adopt, on this basis, a General Multilateral Convention in this field[4].

With regard to the second type of liability, the International Law Commission adopted in 2001 a final draft article entitled "Prevention of transboundary damage caused by dangerous activities", which includes a number of 19 articles and was approved by the Assembly UN General.

It must be established that, in the matter of foreign investments, there are no instruments of international law that regulate the institution of state responsibility as such and autonomously. As we will see, both multilateral investment treaties and bilateral investment treaties do not contain express provisions on liability, but constitute the essence of the preconditions necessary to qualify certain acts or facts imputable to the state, in the form of obligations under international law. whose non-compliance may result in sanctions under international law. The norms regarding the invocation of liability are transposed within the investment treaties, establishing the investor as a plaintiff-entity, which excludes the direct application of the provisions of the ILC Project. The draft Articles do not have the binding force of a treaty[5], but courts and practitioners alike consider that the

[1] D. Popescu, *Drept Internațional Public*, Titu Maiorescu University Publishing House, Bucharest, 2005, p. 276; A. Năstase, B. Aurescu, C. Jura, *op. cit.*, pp. 372-373.

[2] Subsequent state practice and court rulings gave the 2001 ILC Project a more general "presumption of positivity." Analyzing objectively, the activity of the ILC is legally relevant only insofar as it either reflects or influences the creation of binding rules in international law. The inclusion of the wording of the Project in the legal reasoning of States and courts should not distract from the verification of the place and role of the ILC in the international legislative process or from the careful analysis of cases in which the wording may be questioned. particular rules, or the accuracy with which they reflect the fundamental state practice.

[3] A. Năstase, B. Aurescu, C. Jura, *op. cit.*, p. 372.

[4] The International Law Commission's project comprises a total of 59 articles, divided into four parts: 1. Liability of states for international illicit acts, 2. Content of the international responsibility of the State and the consequences of illegal acts, 3. Implementation of the international responsibility of a state, 4. General Provisions. The provisions of the Project will be analyzed during the paper, depending on their application to the field of foreign investments.

[5] M. Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 Berkeley J. Int'l Law. 142 (2010), pp. 145, 146.

Articles of Appeal "accurately reflect customary international law on state responsibility." [1]

The most important issues regarding the state's responsibility in relation to foreign investments are those of qualification, because they are the ones that determine if for a certain case it is competent, *ratione materiae*, an international or supranational court or jurisdiction, or if the effects and causal nexus of the respective situation are imputable to the state as a subject of international law, or to an agent who acted in his own name, without connection with the state authority.

Also, the specialized doctrine[2] supports in addition a hypothesis that will be analyzed in this paper: if in developed and economically stable countries, foreign investment is governed mainly by the domestic law of the host state, the situation being different in the case of developing countries, where, due to development inequalities, the investment regime is usually governed by a supranational law, decided within the international intergovernmental economic cooperation organizations[3]. This situation usually benefits the investing state, in its need for solvency and risk guarantees.

In conclusion, we can say that, in addition to the objective elements inherent in the institution of international liability, in the field of foreign investment must be met special classification criteria, which can provide answers to questions such as: which categories of investment fall within the scope of international law public and what are the obligations, in these fields, in the matter of foreign investments, which can attract the international responsibility of a state? Also, the framework for classifying foreign investment, as we will see, leads to a second conclusion, namely that the subjects to which international responsibility can be attributed, individually or simultaneously, are doubly related: we have in mind an investor or exporter of capital and a state in whose territory the investment is made, namely the host state.

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[1] See the case of *ICSID Noble Ventures Inc. v. Romania*, ICSID Decision in case no. ARB/01/11, para. 69 (Oct. 12, 2005) which states that: "While these Draft Articles are not binding, they are largely regarded as a codification of customary international law").

[2] The symposium organized by the *American Journal of International Law* in 2002 is a starting point for the analytical approach to the principle of investor responsibility. The issue was discussed by three authors. One of them, Edith Brown Weiss, criticized the Project on the grounds that it ignored existing practice which, in its view, demonstrated the right of non-state actors, including investors, to invoke state liability. David Caron expressed concern that it is possible that the courts, not applying the general provisions of the Draft to the required extent, will unconsciously annul the specially created rules, and highlighted the example of a NAFTA arbitral award on investments. Finally, James Crawford (Fifth ILC Special Rapporteur on State Accountability) supported the flexibility of the Project, indicating, in particular, that it could abandon the nature of investors' rights under special primary rules.

[3] The most conclusive examples are the ASEAN Agreements.

2. The origins and foundation of state responsibility in the field of foreign investment

2.1. From colonialism to foreign investment liberalism

Francisco de Vitoria in *De Indis* argued that, by virtue of natural law, trade is an expression of the feeling of community inherent in human nature, which is why a foreign trader must be given equal treatment with the local trader[1]. On the other hand, Emeric de Vattel[2] was one of the first supporters of granting a distinct and external treatment to foreign traders from domestic ones, considering that national and equal treatment could be too limited, too burdensome and, consequently, unacceptable and unattractive to foreign traders. Hugo Grotius's[3] exposition of this principle, along with the principle of freedom of the seas, is considered to be the catalyst that made it possible for European powers to enter Asia and Africa.

Regarding the relevance of these principles for international foreign investment law, it can be stated that the theory of differential treatment for a foreign investor is preferred by strong states and can be implemented through the mechanisms of international law. In the XVIII-XIX centuries, foreign investments, in the form existing then, were made in consideration and through the massive colonial expansion. Thus, the need for international rules on investment was minimal, and the responsibility a non-articulated institution, due to the unilateralism imposed by the imperial and colonizing entity[4].

The *new International Economic Order*, the package of norms enacted by states liberated from colonialism in the twentieth century, included a broad acceptance of the nationalization of foreign property, based on the need for economic reform and without being considered contrary to international law[5] and therefore without to attract some form of international state responsibility. However, the financial success achieved in the first decades of the twentieth century by small states such as Singapore or Hong Kong, from the activity on their territory of foreign corporations, led to a weighting of nationalization, sovereign control and a rationalization of treatment of aliens by the host state. This has led to

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[1] See F. de Victoria, Primary Professor of Sacred Theology in the University of Salamanca, *De Indis, 1532*.

[2] E. de Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, 1758.

[3] M. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies*, Harvard University, Department of History, 2002, p. 88.

[4] See S. Krasner, *Structural Conflict Third World Against Global Liberalism*, 1985.

[5] For a detailed analysis of environmental liability, see M. Duțu, A. Duțu, *Răspunderea în dreptului mediului*, Romanian Academy Publishing House, 2015.

a more pragmatic but particular attitude in the practice of states, which at the domestic level sought to find solutions to attract foreign investment for financial reasons, while at the international level they campaigned for the protection of permanent sovereignty over their natural resources in the face of new potential dangers, of the nature of colonialism.

These attitudes substantiated the emergence of the first international multilateral treaties on investment, based on the neo-liberal idea of enacting "counter-norms" to protect foreign investment from the national legislative and regulatory system in the host state. Among these treaties, it is worth mentioning NAFTA, a treaty that, initially adopted to protect investments in the US and Canadian partner state, namely Mexico, later became the basis on which certain claims against the US and Canada were based. The latter had to defend their own internal legal system on environmental issues, the implementation of which led to the breach of the obligations assumed by these states by the Treaty. In the case of *Ethzl v. Canada*, settled by international arbitration, Canada was obliged to pay compensation due to its internal rules on environmental protection, rules contrary to the NAFTA Agreement. The latter[1] did not allow the import of certain additives necessary for the production of gasoline, which in the terms of the Agreement was a violation of the provisions on national treatment (Article 1102 of NAFTA) and to facilitate the implementation of the investment requirements themselves (Article 1106 of NAFTA). Currently, NAFTA has been abandoned in favor of the USMCA in 2018[2].

The 1990s and the major budget deficits inherent in the end of the Cold War led to a new and market approach to foreign investment issues, based on liberalization. There are a number of bilateral investment treaties that contain provisions that could justify the attribution of an illegal act to a state, such as the rights of entry and establishment of a foreign investor in the host state. The creation of the World Trade Organization in 1995, a concept based on total market liberalization, was not as successful as the division of the world's economies into centers and peripheries, especially after the Asian crisis. At the 2003 Cancun Ministerial Meeting, developing countries and large importers of foreign capital proposed to consider the issue of foreign investment only in conjunction with providing legal means to hold large foreign corporations liable for damage to the host state. Because of this, the issue of foreign investment has been removed from the Organization's agenda.

Thus, the issue of state responsibility for investment remains only a briefly regulated, tangential and related, in bilateral or multilateral investment treaties, as we will see below. Thus, the positive rule, the violation of which may

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[1] See E. Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 Am. J. Int'l L. 773 (2002), Symposium: *The ILC's State Responsibility* Articles: *Introduction and Overview*; Bodanskz, Daniel; Crook, John R.

[2] Available at https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng, accessed on 13.03.2019.

give rise to State liability, is mainly established on the basis of the incidence of various institutions of international law, which may justify the attribution of an unlawful act, such as human rights or environmental obligations. For example, in the United States, the *Alien Tort Claims Act* of 1876 established the jurisdiction of American courts over violations of public international law, such as tortious liability. The U.S. courts have jurisdiction to prosecute offenses committed during the exploitation of natural resources or the construction of buiding projects by multinational corporations, but, on the basis of this act, no compensation was ever awarded and no damage attributable to a state authority was established[1].

2.2. Forfeiture of right to invoke the liability

In foreign investment arbitrations, the forfeiture of the right to invoke liability can be analyzed on three levels: the forfeiture of the state of origin to invoke liability for one's own harm, the forfeiture of the investor's rights to invoke liability, and the possibility of the state of to influence the right of the own investor to invoke liability. For example, the country of origin is harmed by violating the investment treaty and has the right to invoke liability. Considering that the right to invoke liability is a right of disposition, states may waive or suspend it, in accordance with international law, according to art. 27 (1) of the ICSID Convention. The court in *Italy v. Cuba* suggested the broader application, by analogy, of the principle of the ICSID Convention, but, during the drafting process, the suspension of diplomatic protection was considered an innovation. Subsequent practice did not generate a customary principle with wider applicability. In another sense, art. 17 of the 2006 ILC Draft on Diplomatic Protection states that "this draft does not apply in cases where it does not comply with special rules of international law, such as the provisions of the Treaty for the Protection of Investments". The investor's right to waive the right to invoke liability can be analyzed in two ways: a general one, as a right to waive the rights in the treaty; or in particular, with regard to contractual rights and the exclusive option of the forum, in particular with regard to umbrella clauses. According to the case study available to the public, no court has so far decided directly whether an investor can waive the rights in the treaty, even if there are indications for or against such a right.

The trends of recent years are some of the repudiation of internationalized investment systems. Large states, where foreign investment values are huge, prefer to stay out of international conventions. For example, Brazil is not a party to the ICSID Convention[2]. The United States maintains a unilateral policy in

[1] M. Sornarajah, *op. cit*., p. 27.
[2] For a list of Member States, see *https://www.icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx*

many respects, such as the field of human rights. The United States does not recognize, for example, the jurisdiction of the International Criminal Court. Therefore, the commitment of the international responsibility of the state itself in the matter of foreign investments is seen by the international society as a last resort solution, given the increasingly important application in international relations of the Hull[1] doctrine, according to which the foreign investor has the right to compensation. prompt, fair and adequate for the damages suffered during its investment and, after having addressed the jurisdictions of the host state, may submit the case for settlement to an international jurisdiction[2]. Although the principle applies mainly to private investment, it follows from this general principle that international investments, both for the investing state and for the host state, have a pronounced random character, based on the idea of risk, against which states take protective measures prior to the occurrence of the attributable event[3]. Only after completing this factual itinerary can we speak, as a last resort, of a responsibility of the state in the sense of classical international law, as, for example, provides in art. 64 of the ICSID Convention[4].

2.3. Calvo's doctrine and its implications for liability

The Calvo doctrine, previously presented in this chapter, or the theory of the minimum international standard, involves, on the one hand, the rule of compensation for expropriation by the host state and, on the other, the settlement of disputes by international tribunals only after domestic remedies. host would have been exhausted.

Of course, the significance of the Calvo clauses in foreign investment contracts and treaties is currently limited. This is because the doctrine itself contains an evasion of certain rules of international law in that it opposes the use of the diplomatic protection of the investing state against its nationals in the host state, as stated by the International Court of Justice in the 1989 *ELSI* case[5].

When a state waives its sovereign right to file an international complaint, it waives bilateral treaties between states on the basis of reciprocity and material

[1] Cordell Hull was US Secretary of State during the expropriations carried out by Mexico in 1938 and addressed this solution in an official letter to his Mexican counterpart: "No government in the world has the right to expropriate foreign property without a prompt, adequate and immediate compensation for this". The doctrine is commonly used today in American investment policy and is known as the Hull Doctrine on Compensation.

[2] M. Sornarajah, *op. cit.*, p.47.

[3] For example, feasibility and pre-feasibility studies.

[4] Art. 64. Any dispute between States Parties concerning the interception or application of this Convention and which is not settled by negotiation shall be submitted to the International Court of Justice at the request of either Party, unless the States Parties agree on another way of resolving the dispute.

[5] *http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=elsi&case=76&k=d8.*

agreement. The Calvo-type clauses are contested, as we have already shown, because in some cases, some contracts provide for clauses prohibiting foreign co-contractors from appealing to the diplomatic protection of their governments, stimulating in advance the inadmissibility of any international complaint[1].

However, in the matter of international state liability, the importance of the Clavo doctrine lies in the fact that, in the matter of foreign investment, it contains the principle stipulated today in the vast majority of bilateral and multilateral investment treaties, to repair the damage caused by the investing state. assumed by the international treaty. The diplomatic protection of the investing state against its nationals can suffer limitations only by introducing in the instrument of international law exclusive clauses of international arbitration.

Although it may have the effect of removing the international responsibility of states in the field of foreign investment, we agree with the view that clauses based on the Calvo doctrine have no place in the new international legal order. Therefore, I preferred to present it in the introductory part, without classifying it among the causes of removing the state's responsibility in the sense of classical international law.

2.4. The illicit international fact - the foundation of the state's liability for foreign investments

In terms of art. 1 of the Draft Articles of the ILC[2], the illicit international fact, and not the fault, constitutes the foundation of the international liability of the state[3]. For investment matters, the illicit international fact may arise from:

a) violation of an international obligation assumed by the State, on the basis of a treaty or custom, with respect to foreign investments, whether it is an investor state or a host state;

b) violation of related international obligations, i.e. those related to or arising from the actual process of foreign investment, such as those related to human rights, whether it is the investor state or the host state;

c) violation of the norms and general principles of international law, such as the rules of *jus cogens.*

The idea that attribution and violation constitute the two necessary and sufficient elements of an unlawful international act was accepted, and the existence of attribution and violation was determined in accordance with the common

[1] I. M. Anghel, V. I. Anghel, *Răspunderea în Dreptul Internațional*, Ed. Lumina Lex, Bucharest, 1998, pp. 83-84.

[2] Art. 1 - Any illicit international act of a state attracts the international responsibility of that state.

[3] The ILC opted to address the existence of an international liability only from the perspective of attribution and violation, leaving the blame and damages to the primary legislation, and the damages and complaints to the implementation of the liability. Therefore, it would be plausible that the determination of an international wrongful act of the State is in no way affected by the identity of the beneficiary of the obligation.

sense rules of Chapters II-III (apparently not until at present, no case which has referred to matters of liability of one State in connection with the acts of another State, according to Chapter IV). In order to be able to engage the responsibility of a state following the commission of an illicit international act, art. 2 of the Draft provides two conditions - the attribution and the illegality of the fact[1], which will be applied as such in the matter of foreign investments:

a) the fact, consisting in an action or an omission, is attributed to the state according to the international law;

b) the fact constitutes a violation of an international obligation in force, assumed by the respective state, an obligation which is qualified as international only in the light of international law, and not of the provisions of the domestic law of any state, regardless of whether it is an investor state or by a host state and regardless of the theory of minimum international standards that is applied by the host state, as I mentioned earlier.

As the illicit international fact and its attribution to the state in the matter of foreign investments involve delimitations based on the specificity[2] of this matter, it will be analyzed in the light of the scope of the institution of responsibility regarding foreign investments, in the following.

2.5. Scope of the institution of state liability for investments

Whether it is the investing state or the host state, certain common qualifications and general conditions need to be met in order to effectively address the issue of foreign investment liability.

3. Categories of investments subject to the rules of international law

The investments that require, on the model of the stated definitions, physical transfer of goods or equipment, constitute foreign direct investment, as opposed to portfolio investments, which represent only capital transfers for the acquisition of shares or shares in a company operating in a company. another state. When the issuing agent comes to control the receiving agent, in addition to the initial financial flow, other flows appear, many of them having a real consistency: technology flow, labor flows, managerial flows and even flows of goods and services.

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[1] In a number of cases relating to contractual matters, the courts have erroneously applied award rules to legal matters outside their jurisdiction. For example, in the case of *Nykomb v. Latvia*, tried under the Energy Charter Treaty, the court relied on award criteria to determine not only the attribution of the conduct but also the extent and breach of contractual obligations.

[2] It seems that investment courts are somewhat better prepared to accept arguments on lex specialis and award rules than inter-state settlement bodies. In the case of *United Parcel Service v. Canada*, the court ruled that the award rules reflected in art. 4 and 5 of the ILC Project were inapplicable to monopolies and state-owned enterprises, due to the *lex specialis* effect of the detailed primary obligations on those matters in NAFTA.

Often, framing an international investment in one of the two types is very difficult. There is a "gray" area between direct and portfolio investment, in which it is difficult to discern the border. The best example of this is the acquisition of shares on the international financial market. As the control package of the shares does not represent a certain fixed percentage in the total shares, but varies from case to case, the investment, in turn, will fall into one or another of the mentioned types.

In the most conventional way, US regulations and statistics include in the category of direct investments all transactions that pass from one patrimony to another more than 10% of the shares issued by a company. In France, the percentage is 20%, and in Germany, 25%. In general, the size of the share control package varies inversely with the size of the company and the number of shares issued by it[1].

3.1. The importance of classification for the institution of state liability

Due to the fact that portfolio investments are based on the investor's own risk-taking idea and due to their generally low commercial value, as opposed to direct ones, based on the idea of ownership that could have been used *ab initio* under the jurisdiction of the investor state itself, portfolio investments were not protected by customary international law, but only by the national law of the states on ordinary commercial risks.

Some doctrinal views, however, argue that there should be no such distinction between types of investment and their international treatment, both of

[1] International Monetary Fund, Balance of Payments Manual, 1980, par. 408. In Romania, according to Law no. 21 of 1996, do not constitute operations of economic concentration the situations in which: credit institutions or other financial institutions or insurance companies whose usual activities include trading and trading of securities in their own account or in the account of others temporarily hold securities of an enterprise which they have acquired for resale, provided that they do not exercise the voting rights conferred by the securities in question in order to determine the competitive behavior of the undertaking concerned or provided that they exercise those voting rights only in preparation for the transfer all or part of the undertaking concerned or its assets or the transfer of the securities in question and the transfer takes place within one year from the date of acquisition; the Competition Council may extend this term, upon request, if the respective institutions or companies can prove that the assignment was not possible, under reasonable conditions, within the established term; control, according to the provisions of art. 10 para. (1) letter b) is acquired by an undertaking whose sole object of activity is to acquire holdings in other undertakings, to manage and capitalize those holdings, without being directly or indirectly involved in the management of the undertakings concerned, without prejudice to the rights which the undertaking holds as a shareholder, provided that the voting rights attached to the shares held are exercised, in particular as regards the appointment of the members of the management and supervisory bodies of the undertakings in which it holds, only to maintain the value of the investments in question, and not to determine, directly or indirectly, the competitive behavior of those undertakings. See C. Fota, *Economie internaţională*, Ed. Universitaria, Craiova, 2001.

which are voluntarily assumed, even by states themselves and not necessarily by private entities acting in their own name[1]. The impact of this opinion on the international economic legal order is extremely small, considering that, due to the possibility of placing portfolio investments in various stock exchanges and subjecting them to a series of speculative stock exchange operations, no concrete links could be established. with the investor state to which any form of international liability should be undertaken.

Moreover, portfolio investments do not enjoy the same international treatment as direct ones. They may not constitute sources of international obligations the breach of which would involve the international liability of States unless the international treaties expressly so provide[2]. On the contrary, many of the multilateral investment treaties, such as the ASEAN Investment Framework Agreement, explicitly exclude portfolio investments from the scope of the treaty.

The cases in which the provisions of the investment treaties can be interpreted in the sense of their extension to portfolio investments exist, but are exceptional[3]. This is due to the tendency of many investment treaties, in particular those adopted by the USA, to widen the scope of investments that fall within their scope to ensure the widest possible protection of activities related to direct investment[4].

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[1] I. Brownlie, *Treatment of Aliens: Assumption of Risk and International Law*, în *International Law and Economic Order – Essays in Honor of F.A. Mann* (edited by W. Flume, J. Hain, G. Hegel şi K.R. Simmond), 1997, pp. 309-311.

[2] C. Fota, *Economie internațională*, Ed. Universitaria, Craiova, 2001, p. 102. In Romania, for example, the Competition Law was amended on June 30, 2010 by the appearance of the Emergency Ordinance no. 75 which harmonizes the national provisions with the European ones regarding the liability of the states in this field, considering that, according to the provisions of art. 5 of Regulation (EC) no. Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, as subsequently amended and supplemented, the Competition Council, together with the competition authorities of the Member States, became competent to apply art. 101 and 102 of the Treaty on the Functioning of the European Union, in individual cases, taking into account the fact that under the aforementioned regulation the Competition Council has acquired obligations whose non-compliance may lead to the European Commission initiating the procedure for possible non-compliance by Romania, as a Member State, but also essential rights regarding the competence to apply the relevant European competition provisions, in order to create the necessary procedural framework to give efficiency to the rights that the national competition authority has under European regulations, as regards anti-competitive practices with a Community dimension, which may affect trade between Member States, taking into account that, in order to be able to apply effectively at national level the provisions of art. 101 and 102 of the Treaty on the Functioning of the European Union, both from the point of view of the decisions which the national competition authority has the cooperation obligations that the Competition Council has in its relations with the European Commission and other competition authorities in the Member States, in view of the fact that these elements concern the general public interest and constitute emergencies whose regulation cannot be postponed.

[3] One of these cases is *Fedax v. Venezuela*, International Law Materials, 37-1378, 1998.

[4] K. Vandevelde, *United States Investment Treaties*, 1992, p. 61.

3.2. Liability in the light of the evolution of the concept of investment in international law

With the increase in the number of foreign investments, the variety of practical situations has led to the expansion of interpretations given to foreign investments. In the case of *Barcelona Traction*[1], the International Court of Justice has ruled that the rights of a shareholder in a company that is the subject of a foreign investment cannot be protected by the diplomatic intervention of the investing state, due to the fact that a company's shareholders cannot have interests independent of the company itself, in order to be distinctly protected by the international law. In response to this controversial opinion of the Court, in the practice of the states, the issue of shareholder protection was included in the bilateral investment treaties.

Another evolution that attracts attention is the one related to the inclusion of intellectual property rights in the sphere of foreign direct investments, which is equivalent to the extension of the scope of investment treaties to intangible goods, such as: patents, copyrights and, to a lesser extent, know-how. TRIPS[2], concluded under the auspices of the World Trade Organization, although operating on the same basis, does not offer the investor any remedy, as do general investment treaties. The right to compensation or liability of the investing state derives from the general treaties, which base the right to compensation of the investing or host state on the idea of violating a norm of international law. So far, there have been no practical cases of violations of international law on the protection of intellectual property in the practice of states.

A further extension of the scope of the concept of foreign investment refers to the rights of use acquired by the investing state in the host state, such as licenses, permits or certifications. There are bilateral investment treaties that include such references and that qualify these intangible assets as part of the investment, because they are inherent in the investment activity of the investing state and indispensable for the purpose for which the investment was made. Other extensions are based on various interpretations of the ICSID Convention, some of which relate to loans contracted by the investor state from the host state. In the

[1] 1970, ICJ reports 1. The opinion was reconfirmed by the Court in a more recent case, *Dialo*, on 24 May 2007.

[2] The Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an agreement adopted by all members of the World Trade Organization to demand the protection and enforcement of intellectual property rights. Entered into force on 1 January 1995, it is the most complex multilateral agreement on intellectual property. The agreement covers areas of intellectual property such as copyright and related rights (eg producer rights, record companies and radio and television broadcasters).

case of *Ceskoslovenska*[1], the ICSID Court considered that non-payment of a loan contracted by the investing state from the host state could be considered as part of the contracted investment, based on its opinion on the provisions of the preamble to the Treaty. In its terms, an international transaction that contributes to the economic development cooperation of the state party can be considered as a foreign investment under the Convention.

3.3. Liability by reference to the categories of specific rules of international law in the field of investments and their sources

3.3.1. Attribution of the illicit fact and the specificity of the matter of foreign investments

As a general rule, for the illicit act to be attributable to the state, it must be committed by state authorities (legislative bodies, public administration bodies or judicial bodies)[2] or by persons[3] acting on behalf of the state[4]. The state is also liable for the acts of a body of another state made available to it by that state, if the body acts in the exercise of the elements of governmental authority of the state to which it has been placed[5]. Finally, the state is responsible for all the aforementioned cases, even if the conditions of imputability are not met, but the state confirms and/or approves the respective facts as its own[6].

As it results from a series of ICSID[7]arbitration awards, the Draft Articles of the International Law Commission constitute the most complete and specific seat of the matter in terms of States' responsibility for investment, despite its general and ongoing nature of these rules, not yet constituted in an instrument of binding international law.

In the case of *Salini v. Morocco*[8], the ICSID Arbitral Tribunal ruled that all the activities of the state, regardless of the form in which that state considers to act, are imputable to that state. In the same case, the Arbitral Tribunal upheld the principle that the state is seen as a unit, regardless of its form of organization and including federal states with their various administrative and political subdivisions.

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[1] 2002, 17, ISCID; rev. 21 – *CekoslovenskaBanka v. Slovakia*, 1999, p.14.
[2] art. 4 para. (1) of the Draft Articles of the ILC.
[3] They are not organs of the state, but are empowered by the law of that state to exercise elements of governmental authority, even if they exceed the powers for which they were mandated by the state or even in contravention of the instructions given by the latter. (art. 5, 7 of the ILC Project).
[4] D. Popescu, *op. cit.*,p. 278.
[5] Art. 6 of the Draft Articles of the ILC.
[6] Art. 11 of the Draft Articles of the ILC.
[7] *Loewen v. US*,ICSID AF/98/3, 2003; *Maffeziniv v. Spain*, ICSID Case No. ARB/97/7, 2000; *Tradex v. Albania*, ICSID Case No. ARB/94/2,1996 in *Report of the Seventz Third Conference, Rio de Janeiro*, The International Law Association, London, 2008.
[8] ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001.

The arbitration decisions on investment and in which the state itself is involved have become, albeit small in number, a testing ground for the ILC Draft Articles. The biggest difficulties that will appear are those of qualification, i.e. the establishment, under art. 5 or 8 of the ILC Project, when and to what extent non-governmental persons and entities may act in the name and on behalf of the state, so as to attract its liability under international law[1].

3.3.1.1. Applicability of the International Law Commission (ILC) Project to contracts with umbrella clause

The umbrella clauses, as I mentioned earlier, are specific to bilateral treaties. However, under the auspices of a bilateral investment treaty, various investment contracts may be concluded between different entities which may or may not act on behalf of the state party to the treaty. Did the arbitral tribunals give different interpretations to the applicability of the ILC Draft to this type of contract, given the qualification difficulties that would provide the answer to the question when can a state be held liable under international law following such a contract?

In the case of *SGS v. Philippines*[2], the ICSID arbitral tribunal ruled that if the obligations assumed by the state through specific investments involve mandatory rules arising from the applicable investment law (the law of the host state), then those obligations are considered to be incorporated within the respective bilateral investment treaty and therefore the responsibility of the state can be engaged under this umbrella clause.

In matters of qualification, it must be taken into account whether the state acts as a trader, ie as a subject of private law, in which case the Draft Articles is inapplicable, or if the state acts sovereignly, by virtue of its status as a subject of international law. Only in the latter case can the draft articles become applicable. In *ElPaso v. Argentina*[3], the arbitral tribunal expressly rejected the interpretation that any breach of contract would be protected by an umbrella clause and imputable to the State, given that such a clause was contained in a bilateral investment treaty between USA and Argentina.

But, as a general rule, arbitral tribunals use in addition to bilateral investment treaties the rules themselves contained in the Draft Articles of the ILC, to qualify the conduct of states under such an umbrella clause.

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[1]*Reportof the Seventh Third Conference, Rio de Janeiro*, The International Law Association, London, 2008, p. 772.

[2]*SGS Société Générale de Suverillance S.A. c. Republic of the Philippines*, Decision on Jurisdiction, ICSID Case No. ARB/02/6, paras. 26, 157(Jan. 29,2004).

[3]*El Paso Energz Int'l Co. (US) c. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15, par. 52 (Apr. 27, 2006).

For example, in the case of *Noble Ventures*[1], the Romanian state was accused of violating the Bilateral Investment Agreement with the USA. The ICSID arbitral tribunal ruled that through the enforcement acts on the investment contracts they acted on behalf of the Romanian state, in terms of art. 5 of the Draft Articles of the ILC. Thus, when the acts of an entity are assigned to the State for the purpose of applying an umbrella clause, violations of a contract entered into by the State through the action of that entity may constitute violations of international law, violation of that umbrella clause and therefore the bilateral agreement.

In the case of *Noble Ventures*, since the arbitral tribunal ruled that Romania was not guilty of violating the investment contracts, it was not necessary for it to rule on the assumption that the umbrella clause would cover any breach of the investment contract.

Therefore, the methods of assigning and imputing the responsibility of the state are heterogeneous and appreciable not according to a general rule, which practically does not exist, but from case to case.

3.3.1.2. Attribution of the wrongful act to the host state of the investment

As we have shown above, the right of the host state to control foreign investment is practically unlimited, as an attribute of its sovereignty. However, when a state becomes a party to a bilateral or multilateral investment agreement, which usually provides for the right of entry and establishment of investors in the territory of the host state, so-called pre-establishment rights are created in favor of organizations. or nationals of the investing State. In these circumstances, the refusal of the host state to enter the investor's right of entry and establishment may constitute a violation of the international treaty itself, unless the investment for which entry or refusal is refused exceeds the subject of the concluded instrument of international law and, consequently, do not enjoy pre-entry rights[2].

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[1]*Noble Ventures, Inc. v. România*, Award, ICSID Case No. ARB/01/11(Oct. 12,2005). The American company Noble Ventures, which held the majority stake in the Resita Steel Plant (RSP), sued the Romanian state for "violation of the bilateral treaty between Romania and the USA on the protection of foreign investors in Romania". The American investor claims that during 2001, when several protest movements took place at the RSP, the Romanian state should have gotten involved and ensured its protection. In fact, the lawsuit was filed in August 2001, when Noble Ventures was still a shareholder in the Resita company. After initially claiming $ 200 million in damages, Noble Ventures increased its claims to $ 350 million. The list of accusations of the American investor also includes the termination of the privatization contract from 2002, one of the accusations being the expropriation. Two years after the privatization, the Romanian state, through the Privatization Authority, terminated the contract with the American company based on a clause that provided that, in case two successive installments are not paid, the privatization will be canceled. RSP was reprivatized in 2004 by the German company Sinara Handel, the distributor of the Russian group TMK, buying it for 1 euro.

[2] M. Sornarajah, *op. cit.*, p. 88.

Under the same conditions, when an international treaty, whether bilateral or multilateral, provides for both the right of entry and the national treatment of the host state for a foreign investment, the right of control of the investing state over its investment is practically annihilated, because the investment in question only the internal normative regime of the host state applies to it. This does not mean, of course, that the investor state cannot be blamed for an illegal international fact, as we will see in the next section.

Also, the illicit international fact attributable to the host state of the investment may just as well result from the violation of an international obligation stipulated by an extremely wide range of instruments of international law to which it is a party and not only from the treaties concluded in the field of investment. provided that such fact involves or is linked to one or more investments of the investing state.

3.3.1.3. State liability for damages caused to foreigners

The theory of the state's liability for damages caused to aliens is based on the idea that a damage caused to an alien located on the territory of the host state is a prejudice on the state of origin of the respective alien. The International Criminal Court (ICC) ruled that when, by international diplomatic or jurisdictional means, a state defends the right of a national of its own, it is in fact defending its own right and its own interests, namely the respect accorded to it by the rules of public international law[1].

In the matter of foreign investments, it may intervene in cases such as (without limiting the enumeration): non-granting of guarantees regarding expropriation, regarding the settlement of disputes, fiscal and non-fiscal incentives for foreign investors, compliance with environmental standards, the value exports (in the case of a free trade agreement), etc. [2]

However, the practical situations are extremely diverse and there are no uniform practices on foreign investment as to how to determine the damage and how to compensate the investing state for violating such guarantees in the host state.

As an example, in *Santa Elena v. Costa Rica*, the ICSID court held that: expropriation based on environmental considerations, no matter how commendable and beneficial to society as a whole, is similar to any other form of expropriation. When the property of an alien is expropriated, regardless of the domestic or international normative nature of the text of the law giving the right to expropriation, then the host state has the obligation to compensate that alien[3].

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[1]*Panevezys – Saldutisikis Railwaz* case (1939), PCIJ Series A/B no. 76, p. 16 in M. Sornarajah, *op. cit.*,p. 121.

[2] M. Sornarajah, *op. cit.*, p. 112 et seq.

[3] (2002) ICSID 15, rev. p. 72. The same passage can be found in *Tecmed v. Mexico*, 2006, ICSID, 10, p. 54.

But the obligation to pay compensation, regardless of its nature or basis, is not the same in all cases. For example, in the case of *Methanex v. United States*, the arbitral tribunal held that: "a non-discriminatory rule, created to serve a public purpose and affecting, *inter alia*, a foreign investor or a foreign investment, cannot be classified as expropriation. and may give entitlement to compensation only if there is a specific obligation on the part of the host state not to regulate and enforce such rules."[1] However, such an obligation on the part of the host state could arise only on the basis of an instrument of public international law concluded by that state in respect of investment material.

Therefore, given the variety and difference in the nature of the obligations assumed by different states regarding investments, the rule deriving from the practice in the field is that the treatment of the alien in a host state must be in accordance with an international minimum standard, which in some cases it may be higher than that granted by the host state to its own nationals[2].

3.3.1.4. Content of the international minimum standard

The content of the minimum international standard, the concept of customary origins and evolution, is difficult to identify. Beyond the principles of compensation for damages caused to aliens and those concerning the settlement of disputes by an arbitral tribunal in a third country, there are practically no other rules determining the content of this concept. The NAFTA Commission, for example, has given an interpretative statement that the "fair standards" used in the NAFTA Agreement do not imply a higher level of treatment than the minimum international standard, as recognized by customary international law[3].

In order for a state's attitude/conduct towards a foreigner to be considered a violation of the minimum international standard and consequently attract the international liability of that state, it must constitute "an act of international delinquency, bad faith, willful negligence on the part of a government (by international standards), which any reasonable and impartial judgment would classify as insufficient and biased"[4].

3.3.1.5. Attributing the illicit fact to the investing state

"A state which becomes aware that a national of its country intends to commit a crime or offense against another state or its nationals and does not prevent this fact may become liable under international law for the situation."[5]

This type of international liability has so far been implemented in two

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[1] 1999, ILM, 38, p. 708.
[2] *American Machine v. Yaire*, 5, ICSID Reports, p. 11.
[3] The same way of interpreting fair standards can be found in OECD interpretative declarations.
[4] Neer Claim, 1926. UNRIAA, p. 60.
[5] E. Jimenez de Arechaga, A. Tanzi, *International State Responsibility.*

major ways:

a) Through specific international treaties for certain areas (such as the Basel Convention on the Transboundary Transfer of Hazardous Wastes, Persons, Goods) which make the EU-wide investment environment a special framework for the interference of national attributes and supranational, integrated.

b) Regarding strictly the matter of the international responsibility of the state regarding the foreign investments, some clarifications are required:

1. EU membership does not preclude the status of states parties to various international treaties in areas such as each state's bilateral investment treaties with third countries; from this point of view, the whole mechanism of liability for investments, as described in this paper, is also applicable to EU Member States, seen *ut singuli*.

2. Violations of EU treaties, as well as other instruments of a normative nature issued in application of EU treaties, do not necessarily engage the international responsibility of the state within the meaning of classical international law. By a mere example of the regulation of the quality of proceedings before the Luxembourg Court and its jurisdiction, the Member States, as procedural subjects, cannot in any event be the subject of a dispute based on the international liability of the State within the meaning of classical international law.

3. The common commercial policy and the mechanisms of the internal market make the investment climate at European level an environment in which the attributes of sovereign and supranational nationality are applied jointly.

With regard to the latter, the common commercial policy and the internal market involve more the field of competition and the possible liability of national entities for anti - competitive practices, and not for breach of international obligations within the meaning of general international law.

The bilateral and regional trade agreements flourished in the early 1990s and became an effective alternative to the WTO for resolving international competition policy guidelines. According to UNCTAD[1], out of a total of 300 bilateral and regional trade agreements in force or under negotiation, more than 100 contain provisions on competition policy. However, in contrast to competition law in the European Union and the Association of Southeast Asian Nations (ASEAN), which promotes a high level of economic integration, the provisions of competition, in most bilateral and regional agreements, are not binding, but depend on the mutual will of the parties to have a significant effect.

However, these agreements can provide an opportunity for developing countries at the level of competition policy. In its study, the OECD (2006)[2]

[1] Garz Hufbauer Clyde, J. Kim**,** *op. cit.*, p. 20.

[2] OECD (Organization for Economic Co-operation and Development) 2006. *Competition Provisions in Regional Trade Agreements* OCDE Trade Policz Working Paper No. 31. COM/DAF/TV(2005)3/FINAL.COM/DAF/TD (2005)3/FINAL. Paris.

looked at 86 trade agreements that include competition and investment provisions, and found that about two-thirds were concluded between developing countries (called the South-South Agreements), and more than a quarter of the agreements analyzed include signatories from developing countries and industrialized economies (these agreements are called North - South Agreements)[1]. This model suggests an opportunity for developing countries to address their own political competition concerns through regional or bilateral trade agreements. From the point of view of the international responsibility of the states regarding the investments, these agreements have the value of some norms of positive law whose violation can attract the international legal responsibility of the states.

[1] The OECD (2006) also identified eight types of competition policy provisions in these 86 agreements. Not every agreement covers all eight types of competition provisions. For more details, see OECD (2006).

Chapter VII
General conclusions

The field of foreign investment is a field of international relations, in which the actions of economic, legal and especially political factors are intertwined, not always happily, despite the general tendency to move away from the sphere of political influence[1]. It is clear that a set of relations has developed, doubled by a rich jurisprudence in the general framework of international economic relations, but strongly anchored in the principles and norms of public international law[2]. The rationale exists if we consider that tools such as multi and bilateral agreements are used to implement these relations; in this respect, the new international investment law will never be able to "get rid" of its membership in international law and, especially, what is a reality, in public international law[3].

As proposals for amendments/*de lege ferenda* internationally, I bring a proposal for improvement which consists in rethinking the procedure and re-evaluating the AMI in terms of concept and content, to turn it from an unadopted project, worthless at this time, into an act international model (as are the ILO models attached to this paper), optional, but contributing to a unification of conventional practice. I remind you that in recent years the doctrine of international law has known such finalizations of international documents which, without being conventions, are promoted as guides.

This proposal is based on the finding of a large absence at international level, this being the lack of a model law in international law on foreign investment and, internally, I will further present several proposals aimed at contributing to the regulation of the legal regime of investments foreign.

With regard to my proposal to adopt a model law at international level, I also criticize the attempts to reach a hard law instrument directly. As we have shown above, efforts to adopt a multilateral foreign investment treaty[4] have failed. In 1995, the OECD initiated the development of a multilateral investment

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[1] See H. Ibrahim, I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA,*in *Investing with Confidence Understanding Political Risk Management in the 21st Century*,Kevin W. Lu, Gero Verheyen, Srilal Mohan Perera, World Bank Publications, 2009, p. 177 et seq., as well as *ICSID Revue – Foreign Investment LJ* (1986); for a skeptical point of view, see Paparinskis, *Limits of Depoliticisation in Contemporary Investor–State Arbitration*, or in James Crawford, Sarah Nouwen Bloomsbury Publishing, 2012, *Select Proceedings of the European Society of International Law*, vol. 3, 2010, p. 271.

[2] Crawford, *International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration*, in R. Hofmann and C. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (2011), p. 25.

[3] R. Hofmann, C. Tams, *International Investment Law and the Law of State Immunity: Antagonists or Two Sides of the Same Coin?, International Investment Law and General International Law*, Nomos Publishing, 2011, pp. 231-275.

[4] The draft of this document can be viewed at: *http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf*.

agreement with the aim of creating a unified international framework for international investment relations. But this document was not intended to be a model law, but was intended to be a multilateral codification, a hard law instrument. From my point of view, achieving such a result was impossible, as the sudden emergence of a multilateral agreement on foreign investment would be an *omisso medio*. The main actors in this field are not prepared for a mandatory general codification, but need the exercise of a model law. Or this very *medio* could be fulfilled, as a step towards codification, by the appearance of a *universal model law*, not only at state level or at bilateral level, as it exists at present.

According to the model laws in the field of alternative dispute resolution[1], I believe that the failed attempts to reach a multilateral agreement in the field of foreign investment could be transformed into a model law in the field of foreign investment[2], not only from the perspective of sustainable development.

In the International Institute for Sustainable Development (IISD) has been and is promoting the document A Model of International Agreement on Investment for Sustainable Development[3], which marks the first fundamental effort to review the nature and purpose of international investment agreements, as the current model was developed in almost 50 years ago.

A proposal *de lege ferenda* aims to amend existing foreign investment treaties, to which an EU Member State is a party, in line with new investment treaties that have emerged since the entry into force of EU regulations.

In addition to the fact that the current models of investment agreements only address the rights of the foreign investor, they do not provide clear regulations regarding the security of the national economy of the host state, but they do not include harmonizations with the acquis communautaire.

An eloquent example is contained in Regulation (EU) no. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for the management of financial liability related to investor-state dispute

[1] For example, the UNCITRAL Model Law on International Commercial Arbitration was drafted by UNCITRAL and adopted by the United Nations Commission on International Trade Law on June 21, 1985. Since 2006 and until today, this model law has been amended successively, now containing more provisions. detailed information on provisional measures. Model law is not binding, but states can adopt it individually by incorporating it into their domestic law (for example, Australia through the International Arbitration Act 1974, as amended, or Austria through the VIAC Arbitration Rules. The existence of such a model law has driven arbitration. The same solution is required in the field of foreign investment. Another example in this field of ADR is given by UNCITRAL Model Law on International Commercial Conciliation (2002).

[2] A successful initiative was the adoption of a model law *https://www.iisd.org/pdf/2005/ investment_model_int_ agreement.pdf.*

[3] The best-known definition of sustainable development is certainly the one given by the World Commission on Environment and Development (WCED) in the report "Our Common Future", also known as the Brundtland Report: "Sustainable development is development that seeks to meet the needs of the present without to compromise the ability of future generations to meet their own needs". To be seen *http://www.eytv4scf.net/wced-ocf.htm*.

resolution courts, established by the international agreements to which the European Union is a party. This Regulation provides that: "*Where the Union, as an entity having legal personality, has international responsibility for the treatment accorded, it shall be expected, under international law, that the Union shall pay any obligations imposed on it by a judgment and bears the costs of any litigation. However, an adverse decision may result from treatment granted by the Union itself or treatment by a Member State. Consequently, it would not be fair to pay from the Union budget the obligations established by an adversarial judgment and the costs of arbitration if the treatment was granted by a Member State, unless such treatment is required by Union law. It is therefore necessary that the financial responsibility be allocated, in terms of Union law, between the Union itself and the Member State responsible for the treatment granted, on the basis of the criteria set out in this Regulation*".

Another amendment to the bilateral agreements in question should have been implemented, but this harmonization process is delayed; it refers to the existing compliance of the BIT (in terms of their future effects) with Regulation (EU) no. Regulation (EC) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 laying down transitional provisions for bilateral investment agreements concluded between Member States and third countries. This Regulation provides: "although bilateral investment agreements remain binding on Member States under public international law and will be progressively replaced by Union agreements on the same subject, the conditions for their maintenance and their relationship with the Union's investment policy require a proper management. This relationship will evolve as the Union exercises its competence". These changes are absolutely necessary in the situation where they are not desired to be abolished, but to integrate the compatibility of their provisions with the European norm, in order to maintain them in force.

Amendments to these agreements should be based on the recognition that an investment agreement is fundamentally structured on good governance, the protection of investors' rights and the obligations and rights of the host state, and that liability is an essential part of this equation.

At the national level, as far as domestic law is concerned, the proposals of the law ferenda refer to the unification of the existing normative acts in a Code of international investments.

The Emergency Ordinance no. 92/1997 regarding the stimulation of direct investments, approved by Law no. 241/1998, text published in the Official Gazette, in force since December 30, 1997, has 18 articles, insufficient[1] for an unequivocal regulation of all aspects related to the legal regime of foreign investments in correlation with the real need for regulation in the field of the Romanian

[1] Moreover, art. 1 of this normative act stipulates that: "this emergency ordinance establishes the general legal regime regarding the guarantees and facilities that benefit investors and direct investments in Romania".

state and investors[1]. This normative act must be amended so as to include useful, complete and fully harmonized regulations with the *acquis* communautaire[2].

I again criticize the way in which domestic regulations have defined foreign investment, stressing that globally, there are numerous attempts to redefine this notion (see China's efforts to enact a new law on international investment).

In addition, while the developed states have in their regulations a balance between state responsibility and the protection of national security, these elements are almost entirely missing from the Romanian legislation regulating the legal regime of foreign investments.

It is therefore necessary to adopt a new normative act, an International Investment Code, which brings together all changes and provisions relating to investments found in Romanian legislation and which contain complete provisions on the legal regime of foreign investment, including assistance and the consular protection that the Romanian diplomatic and consular missions must grant to the national investor in need of protection on the territory of a third state, as well as a revision of the national security system in the field of foreign investments, which will lead to the consolidation and expansion national security rules, aspects that will have a significant contribution and impact in regulating state responsibility.

This code of international investment would be advisable to also contain regulations on the criminal law of foreign investment.

Another proposal of lege ferenda aims at developing the international law of foreign investments by applying the principle of L&D[3] (Law & Development) within the Romanian law school. The principle of L&D began to be successfully applied in developed countries about 30 years ago, by introducing, among other measures, new and modern law disciplines in universities, so that law students are given the opportunity to contributes concretely to the development of new branches of law.

I believe that this proposed *de lege ferenda* can also be made in Romania,

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[1] Law no. 35/1991 on the foreign investment regime was in force from April 10, 1991 to June 19, 1997, being repealed and replaced by Emergency Ordinance no. 31/1997 regarding the foreign investment regime in Romania, which was in force from June 19, 1997 to December 16, 1998, being also repealed and replaced in its turn by the Emergency Ordinance no. 92/1997. Law no. 35/1991 which had as its initial formula: "in order to attract foreign investments in Romania, this law is adopted, which includes provisions likely to provide foreign investors with guarantees and facilities, as well as the full and unlimited use of the results". Compared to these initial policies, there is a timeliness of a prudent policy, but the level of harmonization required by European recommendations and directives is still not reached.

[2] The term *Community acquis* designates all the common rights and obligations arising from the status of a Member State of the European Union. Including, in addition to the Treaties, the acts adopted by the EU institutions, the acquis communautaire is constantly evolving.

[3] See N. Scott, *The Dialectis of Law and Development*, in David M. Trubek, A. Santos (editors), *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press, 2006, p. 174 et seq.

being particularly useful for the education of future specialists and for the development of international law on foreign investment. I also formulate proposals regarding the creation of the professional framework at the level of competence of the natural and/or legal persons involved in the institutional activity.

Thus, the procedure for introducing a new course/discipline unit (UC) is part of the policies and strategies for updating the content of the curriculum, in accordance with the requirements of the national system, new acquisitions in the field of basic sciences, professional needs of the graduate and with the institutional educational objectives, but also with the globalization tendencies of the foreign investment problems and of the specialized education. The procedure is based on: the Status of the teaching staff, the Education Law, the University Charter, the internal documents of curricular development and the institutional process of quality management. All these make it possible to introduce as an optional or special discipline the study in the Romanian Law Faculties of the international law of foreign investments. Obviously, from the aspect of the Romanian doctrine in the matter, this fact would be a fulfillment of the researches carried out in the more and more specialized fields governed by the international law and by the international relations.

In connection with the above aspects, at international level, for example, the Faculty of Law in Helsinki (University of Helsinki, Finland) has among the main disciplines of study international[1] law with the subdisciplines: Human Rights, International Trade Law, International Investment Law , International Environmental Law and Humanitarian Law. In the case of Finland, the legislation allows the reunification of two higher education institutions, for the preparation of a certain category of students. This possibility can also provide Romania with a model of cooperation that can often be used in our field of analysis. For example, Turku Law School (TLS) is a cooperation organization involving the two universities in Finland: the Faculty of Law and the Turku School of Economics and the Faculty of Law of Akademi Åbo University. One of the main objectives of this cooperation is to combine the resources of these institutions, in order to offer foreign students[2] a wide range of high quality law courses taught in English.

In the United Kingdom, law schools have successfully implemented the new discipline of international foreign investment law with unexpected success.

UCL Faculty of Laws, founded in 1827, offers its students course modules both as a study discipline in international law and as master studies. At the

[1] They consider that international law has seen an impressive expansion in its evolution; Another corollary of this is that international law is no longer just a concern for diplomats, politicians and judges, but also a concern for social law lawyers, human rights activists, environmental campaigns and various other advocacy groups. criticizes different types of social privileges and disadvantages in terms of international law.

[2] As Åbo Akademi University and University of Turku are two different universities, they also have separate registers for students. Students must have separate ID numbers for both universities if they intend to attend courses at both programs.

international university level, all universities, especially the prestigious ones (Cambridge University, Oxford University) have in their master's programs the international law of foreign investments treated as an individual discipline. The Faculty of Law at Oxford University[1] includes, as a subdiscipline of public international law, the study of international foreign investment law. It should be noted that in all prestigious law faculties the international law of foreign investments is studied, separately or only within the public international law, and not within other disciplines that we could expect, such as: International economic law, European law or International trade law, these disciplines being considered insufficiently comprehensive for the subdiscipline of international foreign investment law.

In summary, it can be seen that the legal regime of foreign investment can evolve only through a cooperation in this field of all specialists to strengthen legislative, economic and social cohesion, by creating a comprehensive legislative framework, as well as through the promotion of appropriate government policies.

[1] See the official Oxford Faculty of Law website: *https://www.law.ox.ac. uk/admissions/options*.

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