Cristina-Elena Popa Tache

Legal treatment standards for international investments. Heuristic aspects

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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*. Cristina Popa Tache is *Vice-president of the European Association of Banking and Financial Law – Romania*, arbitrator and mediator registered in the lists of *VIAC - Vienna International Arbitral Center* and works as editor-in-chief for *International Investment Law Journal* and *Banking and Financial Law Review*, 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 co-editor with the French professor Thierry Bonneau of the volume *Innovation and Development in Business Law*, Adjuris – International Academic Publisher, Bucharest, Paris, 2021. She is author of the monographs *Introduction to International Investment Law*, Adjuris – International Academic Publisher, Bucharest, Paris, 2020 and *Dreptul internațional al investițiilor. Coordonate (International investment law. Coordinates)*, Coresi Publishing House 2019. Cristina - Elena Popa Tache is 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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List of acronyms

APEC - Asia–Pacific Economic Cooperation
BIT - Bilateral Investment Treaty
DIAE - Division on Investment and Enterprise (UNCTAD)
DTT - Double Taxation Treaty
EFTA - European Free Trade Association
EPA - Economic Partnership Agreement
FDI - Foreign Direct Investment
FET - Fair and Equitable Treatment
FTA - Free Trade Agreement
FTC - Free Trade Commission
GATT - General Agreement on Tariffs and Trade
GATS - General Agreement on Trade in Services
ICJ - International Court of Justice
ICSID - International Centre for Settlement of Investment Disputes
IIA - International Investment Agreement
ILC - International Law Commission
IMF - International Monetary Fund
ISDS - Investor–State Dispute Settlement
MFN - Most-Favoured-Nation Treatment
MIA - Multilateral Investment Agreement
NAFTA - North American Free Trade Agreement
NT - National Treatment
OECD - Organisation for Economic Cooperation and Development
REIO - Regional Economic Integration Organization
RTA - Regional Trade Agreement
TNC - Transnational Corporation
UNCITRAL - United Nations Commission on International Trade Law
WTO - World Trade Organization

Introductory considerations

International investment law is, like everything representing law, a self-organized structure, characterized by the investment legal system that is self-determined according to its specificity, and through this creation, the system itself is subject to mobility. Therefore, as stated in the doctrine, international law of foreign investment consists of the rules of general international law, the general standards of international economic law, as well as of distinct rules specific to its field[1].

Discussing the standards of legal treatment for international investment, means subjecting the law branch in its entirety to research.

Representing the most comprehensive part, of particular importance for international investment law, treatment standards continue to generate a series of differentiations whose understanding and approach often require the analysis of the starting points that led to the emergence, by division, of this branch of law.

The specificity of this branch of law consists in the emphasis on its fundamental concepts, essentializing what determines the whole, being considered as a science of essentialization and, ultimately, the role of any method of scientific research is to analyze, discover and highlight what this branch of law represents, as a whole, what determines it, the connections of this ensemble with other sciences, the composition and structuring of the system and the substantiation of the connections between its components.

[1] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Ed. Oxford University Press (OUP), second edition, 2012, Chap. I, p. 2.

Chapter I
History

The standards of legal treatment of international investments settled with the individualization of international investment law. Their appearance took place gradually, depending on the path marked by the stages of emergence and evolution of the legal regime of foreign investment, from the legal phenomenon to the branch of law, from trade in general to foreign investment in particular. Francisco de Vitoria, in *De Indis*, presented trade as an expression of the feeling of community - by virtue of natural law - inherent in human nature, which is why a foreign trader must be given equal treatment with the local trader[1]. A historical step of reference also belongs to Emeric de Vattel[2], considered to be one of the first followers of granting a distinct and external treatment to foreign traders compared to local ones, considering that national and equal treatment could be too limited, too burdensome and, consequently, unacceptable and unattractive to foreign traders, a principle also expressed by Hugo Grotius[3], at the same time as the principle of freedom of the seas.

In the past, the law of sociability was considered a natural law not only for individuals but also for the states[4]. As man advances towards civilization, his needs increase, and as these cannot always be satisfied with the products and industry of his country, he is obliged to resort to neighboring countries, so that it may be said that relations between states are born of the particular needs of individuals[5]. This is in fact the first brick in the wall of international investment law. This fact was observed[6] in a report to King Henri IV of France, which pointed out that *since the things that peoples need are spread unevenly on the surface of the earth, peoples must be in constant contact with each other*[7].

Although for a long time, the specialty literature authors noted that states

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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 Publishing House, Department of History, 2002, p. 88.

[4] See Henry Bonfils, Paul Fauchille, *Manuel de Droit International public (Droit Des Gens*), Ed. A 3-a, Arthur Rousseau Publishing House, 1901, pp. 3, 4.

[5] See G. Meitani, *Curs de drept internațional public/Public international law course*, Al.T. Doicescu Publishing House, 1930, p. 3.

[6] Maximilien de Béthune, Baron of Rosny and Duke of Sully, 1559-1641, became close to Henri de Navarra at an early age, later becoming his most valuable adviser and government minister.

[7] See Bonfils and Fauchille, *op.cit.*, p.11; Louis Renault, *Introduction à l'étude du droit international,* L. Larose Publishing House Paris, 1879, pp. 5 and the following.

initially had only the ability to trade with each other, so no law was considered, however, it was later mentioned that *states can enter into such relations, recognizing this ability to others in their territory, each state having, by virtue of its right of conservation and development, the right to regulate trade. There followed a period in which it was pointed out that a state, taking into account its interests, could stop the entry into the country of foreign products that would compete with domestic products or could stop the export of goods necessary for the development of that country*[1].

The First World War generated a valuable doctrine precisely because at that time, specialists brought into discussion the most important problems of the society, trying to codify it. So, after the end of the war in 1918, it became clear that it was no longer a simple skill of states to trade, but real law, as Meitani points out in his course[2], emphasizing that US President Woodrow Wilson spoke of the abolition, as far as possible, of economic barriers and the establishment of equal conditions for all nations, in the 14 points in the famous Wilsonian declaration of the joint session of the Congress of January 8, 1918. In his speech, Wilson actually tried to establish a project, viable for the restoration of peace in Europe after the end of the First World War. Subsequently, the 1922 Cannes Conference decided to convene a Conference in Genoa to try the economic reconstruction of Europe: the Genoa Conference was an economic and political conference convened in Genoa, Italy in 1922 (April 10 - May 19) at which representatives of 34 states took part to discuss the financial problems that arose after the end of the First World War. An interesting fact is that certain standards of treatment of international investment developed to date, evolved from their forms at the beginning in certain clauses contained in the Peace Treaties of 1919. In some of these, the defeated states were required, between 3 and 5 years, to give the Allies' transit trade equal treatment with non-reciprocal nationals[3]. Under such conditions and under the Open-Door Policy created at the initiative of the United States in 1900, Meitani[4] shows that since his time (in the interwar period), there could be no question of the trade monopoly of one state to another or the colonial system according to which, the metropolises forbade their colonies the right to trade with other states outside the metropolis.

In the eighteenth and nineteenth centuries, the expansion of colonialism marked the form of foreign investment since then, by the fact that it was not intended to create international rules on foreign investment in such an environment conducive to unilateralism imposed by the imperial and colonizing

[1] See G. Meitani, *op. cit.*, p. 122.
[2] G. Meitani, *op. cit.*, pp. 122-123.
[3] See Paul Fauchille, *Trăité de droit internaţional public*, Lib. A. Rousseau Publishing House Paris, 1922, p. 286, *apud* G. Meitani, o*p. cit.,* p. 123.
[4] G. Meitani, *op. cit.*, p. 123.

entity[1]. In fact, in the context of colonialism, responsibility in the field of foreign investment was a non-articulate institution.

1. The historical impact of economic liberalization

Another disseminayed theory was that as long as states adopt the system of free trade, trade treaties are not very important[2]. According to Professor Meitani[3], *these treaties usually included what was called the most favored nation clause, under which a state that concluded an older treaty is sure to enjoy all the favorable conditions it would obtain another state, through a newer convention*. One of the examples meant to support the understanding of this type of clauses is the following: *assuming that a treaty is concluded between Romania and Hungary, which stipulates that for a commodity a tax of 5 lei/kg must be paid, if this treaty includes the most favored nation clause and if later another treaty intervenes between Romania and Bulgaria, which provides that for the same goods instead of paying 5 lei/kg to pay only 3 lei/kg, then Hungary, by virtue of the most favored nation clause, will also pay 3 lei/kg as Bulgaria pays, although in the agreement with Hungary the tax provided was 5 lei. By art. 264 of the Versailles Treaties, Germany undertook to admit this customs clause to the allied and associated states. Such trade treaties existed at all times, a model being the one concluded in 1703, the so-called Treaty of Methuen[4] between Portugal and England, a treaty that is considered to have served as a model. Closely related to*

[1] See S. Krasner, *Structural Conflict Third World Against Global Liberalism,* University of California Press Publishing House, 1985, pp. 110-126.
[2] See Jan de Louter, *Le droit international public positif*, Vol. I, Oxford, 1920, p. 533, *apud* G. Meitani, *op. cit.,* p. 197.
[3] G. Meitani, *op.cit.,* pp. 197-198.
[4] The Treaty of Methuen was a military and trade treaty between England and Portugal that was signed in 1703 as part of the Spanish War of Succession. The name comes from Lord Methuen, the main negotiator from England. The Treaty provided that no tax higher than the tax levied on an equal quantity of French wines could be levied on Portuguese wines (*but see below*) exported to England and that no English textile exported to Portugal would be taxed, regardless of the geopolitical situation in each of the two nations (to ensure that England would continue to accept Portuguese wine during periods when it is not at war with France).

trade treaties, are treaties relating to customs[1] and monetary[2] unions.

With the *New International Economic Order,* the states liberated from colonialism in the twentieth century enacted a set of rules that included an obvious tendency toward the possibility of nationalizing the foreigners' properties, justified by the need for economic reform and without being considered contrary to international law, therefore no form of international state responsibility developed. It should be noted that through the Declaration of the International Legal Union of 11 June 1919 it was provided that the states have the following duties: to maintain international relations based on justice and fairness; to observe the rules of international law; to comply with the treaties; to execute arbitral awards in good faith; not to resort to arms before seeking to end the conflict by peaceful means; to join forces to prevent, avoid or stop wars and to participate in the creation, operation and development of all international services. The Covenant of the League of Nations[3] also provides some duties of the states, reproducing the provisions of the declaration of the International Law Association. States are liable for non-compliance with their obligations. It has even been asserted that universal justice binds all states to comply with their obligations and are liable for damages caused as individuals to each other[4]. *If the citizens of a state suffer damage as a result of the state's agents, foreigners must address the competent authority in the same way as the citizens of that state do. If a prefect (*in this example the prefect being the symbol of public administration) *does not respect his duties and does not grant compensation to a foreigner, the latter has the right to address the same authority that the citizen addresses if such prefect does not take into account his rights and only in case of denial of justice, when the authorities of the country would not like to take such a request into account, and he should address it to the diplomatic agent of the country in order*

[1] The German Customs Union (known as the German Zollverein, "customs" (zoll) and "group" (verein)) was an economic bloc composed of German states, formed in order to regulate tariffs and economic methodology within the Union. Established by a series of treaties, the German Customs Union entered into force on January 1, 1834. The foundations of the Union were formed in 1818, when a number of customs unions were made up between the 37 states that existed on the current territory of Germany. In 1866, the German Customs Union included most German states. The German Customs Union was the first union in history in which a number of sovereign states entered into a strictly economic union, without founding political or federal unions simultaneously with the economic union. The German Customs Union created a larger market for German goods, harmonizing total economic unification by systematizing Member States' tax codes.

[2] The Latin Monetary Union (French: Union monétaire latine, with the logo: UML) was created in the 19th century in an attempt to unify several European currencies into a single currency, which could have circulated in all Member States, at a time when most national currencies were still made of gold and silver. It was founded in 1865 and abolished, de facto, on January 1, 1927.

[3] The Covenant of the League of Nations or the Statute of the League of Nations was the fundamental document by which the League of Nations was founded.

[4] See P. Fauchille, *op. cit*., p. 281 and the following.

to satisfy him[1]. In the session of the Institute of International Law held in Neuchatel in 1900[2], Paul Fauchille proposed that as an occupational risk exists and is recognized, a risk which he calls "state risk" in favor of foreigners and by virtue of which the foreigners would be compensated, should be recognized, if it is found that no mistake, recklessness or negligence can be imputed to them[3]. It should be noted that in Romania, art. 11 of the Constitution of 1923, the Civil Code of that period and art. 6 of the Law for the Acquisition of Nationality of 1924, admitted to foreigners all the rights enjoyed by Romanian citizens, except the cases where the law provided otherwise, or, according to G. Meitani, the law provided otherwise in very few cases; thus foreigners could do any act of trade, they could set up industrial establishments, obeying the regulations and laws of the state. According to Article 9 of the 1923 Constitution, foreigners in Romania enjoyed the protection conferred by law on persons and property in general[4], a trend that included more and more states. In this context, the weighting of nationalization, of sovereign control and of rationalization of the treatment provided to foreigners by the host state, settled and began to evolve due to the financial successes achieved in the first decades of the twentieth century by small countries such as Singapore or Hong Kong, as a result of the activation of foreign corporations on their territory, which triggered a more pragmatic particular attitude on the part of the states concerned, based on financial considerations, which are in fact the beginnings of promoting and protecting foreign investment, despite the general attitude maintained internationally for the protection of their permanent sovereignty over their natural resources facing new potential dangers such as colonialism, which led to the emergence of the main sources of international investment law - the first multilateral international treaties on the subject - built on the neo-liberal idea of "counter-norms", which should protect international investments from the national legislative and regulatory system of the host state. An example of a generally recognized reference in the doctrine is NAFTA (replaced by the USMCA[5]), a treaty that, like many of its successors,

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[1] G. Meitani, *op. cit*., p. 80. According to Meitani, the Assembly of the League of Nations designated the council in 1924 to appoint a commission of experts to investigate what issues of international law could be resolved through agreements between states, including the issue of state liability to foreigners for damages suffered in the territory of a state by persons and their property, matters contained in a report according to which the state is liable only for unlawful acts contrary to international law, customs or a treaty. This report was then sent together with the draft convention to all states that were to express their views before the conference. The Romanian Government in its reply seemed to share the provisions contained in the report, adding that it must admit the equality of the foreigners before the courts and the abolition of the judicatum solvi bail (Raport du Comité d'experts pour la codification du Droit international du Conseil dela S.N., pp. 90-105 and 20-4).

[2] Details available at: https://www.idi-iil.org/fr/sessions/neuchatel-1900/?post_type=publication, accessed on 02 March 2021

[3] See P. Fauchille, *op. cit*., pp. 581 and the following apud in G. Meitani, *op. cit.*, p.79.

[4] See G. Meitani, *op. cit.*, pp. 260, 261.

[5] 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.

was initially adopted to protect investment in the US and Canadian partner states, Mexico, and later became the legal basis on which certain claims against the United States and Canada were founded). For example, in the case of the *Ethyl v. Canada*[1] arbitration, Canada was required to pay damages because of its internal environmental rules, which are contrary to NAFTA[2]. The latter 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 the national treatment (Article 1102 of NAFTA) and on facilitating the implementation of the investment requirements themselves (Article 1106 of NAFTA). Now, NAFTA was abandoned in favor of the USMCA in 2018[3], but the clauses from Chapter 11 can be found among the clauses in Chapter 14.

2. From liberalization to state liability

Another new approach to foreign investment, based on liberalization, emerged in the 1990s, following the major budget deficits inherent in the end of the Cold War, which led to the inclusion in investment treaties of 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, did not have the success expected because of the continuous division of the world's economies in centers and peripheries, especially after the Asian crisis. The topic of international investment was removed from the Organization's agenda when in 2003, developing countries and large states importing foreign capital proposed within the Cancun Ministerial Meeting, the treatment of international investment only in conjunction with the regulation of legal means to attract liability of large foreign corporations for damage caused to the host state.

Furthermore, the issue of state responsibility for investment remained briefly regulated in bilateral or multilateral investment treaties, which is still a topic that is the subject of many debates unfinished by any *hard law* regulation. Thus, the positive rule whose violation may lead to state liability is mainly

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The USMCA retains the key elements of this trade relationship and includes new and up-to-date provisions aimed at addressing trade issues in the 21st century and promoting new opportunities.

[1] *Ethyl Corporation c. Canada,* UNCITRAL, *Decision on jurisdiction,* June 24, 1998. The reason for this lawsuit was a ban by the Canadian authorities to import a gasoline additive called MMT. The claimant, 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, awarding compensation of several million dollars, representing the costs and gains not realized by the claimant, as a result of the said prohibition.

[2] NAFTA is the acronym for *North American Free Trade Agreement* (Spanish *Tratado de Libre Comercio de América del Norte, TLCAN*; French *Accord de libre-échange nord-américain, ALÉNA*) which was signed on December 17, 1992 between the USA, Canada and Mexico.

[3] Available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between, accessed on 24 Feb. 2021.

established on the basis of the impact of various institutions of international law, which may justify the attribution of an illegal act, such as human rights or environmental obligations, with an impact on international investment. For example, in the United States, the *Alien Tort Claims Act* of 1876 established the jurisdiction of American Tribunals over violations of public international law, such as tortious liability. U.S. Tribunals have jurisdiction to prosecute offenses committed during the exploitation of natural resources or during the construction of conception projects by multinational corporations, but on the basis of this act, no compensation has ever been awarded and no damage attributable to a state authority has been established[1].

The expansive promotion of the principles by which the national norm of treatment must be corrected by the international standard (to which the attitude of the Northern states is added), led to the formulation of a theory at the end of the 19th century regarding the international minimum standard:

- 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 nationals and legal entities;
- the foreigner's property could be expropriated only according to the law and only with an adequate, prompt and effective compensation;
- the measures adopted by the host state must be in accordance with the law; the foreign investor must have access to domestic and international Tribunals to challenge these measures;
- the contracts concluded between the host state and the private investing companies must be fully respected[2];

According to public international law, domestic regulations must be also correlated with the minimum set of rights granted to foreigners[3], preferably under the corollary of the economic sovereignty of states. It can be said that the economic sovereignty of states is a combination of the opportunities they have in making individual decisions on issues related to the development of their economies, because only a sovereign state can protect its national and economic interests and the interests of its citizens from home and from abroad, in reality, all the states being, to a greater or lesser degree, intermediaries between global and national economies[4].

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[1] M. Sornarajah, *op. cit*., p. 27.
[2] I. Z. Farhutdinov, *Economic sovereignty of the state in the context of globalization,* Law and Safety, 3(28), 2008, pp. 113-114, quoted in L. Navasardyan, *Protecţia şi garantarea investiţiilor străine în dreptul comerţului internaţional/Protection and guarantee of foreign investments in international trade law*, Wolters Kluwer Publishing House, 2010, p. 31.
[3] G. Geamănu, *Drept internaţional public/International public law*, vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 330.
[4] See M. V. Ershov, *Economic sovereignty of Russia in the global economy*, Ekonomika Publishing House, 2005, p. 283.

The Calvo[1] doctrine replaced the "international minimum standard" with the term "national standard", based on the principle of state sovereignty, but also on the following principles that were consolidated over time as principles of international investment law:

- the principle of equal treatment between residents and non-residents;
- the principle of regulation of the regime of foreigners and of their property by the internal legislation of the host state;
- 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 exoneration of liability of the host state in case the foreign investor 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.

As an effect of the relationship of international law to domestic law, by which more and more states adopted the theory that treaties are part of domestic law, the Constitutions of Latin American states took over the principles of "international minimum standard", expressed in terms such as, "of public necessity reason", "non-discriminatory character", "adequate compensation." However, Calvo[2] considered that these principles belong to domestic law[3], and not to international law, and can only be applied by national jurisdiction. He said the rules governing a state's jurisdiction over foreigners and the collection of compensation should apply equally to all nations, regardless of size. In addition,

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[1] It was formulated by the Argentine jurist Carlos Calvo, the Minister of Foreign Affairs of Argentina in the period 1892-1906 in his *International Law of Europe and America in Theory and Practice* (1868). 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 they do not comply, to lose the 'nation' of the property thus acquired".

[2] 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".

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

he asserted that foreigners who owned property in Latin American states and who had claims against the governments of such states should exercise their rights before the Tribunals of those nations instead of diplomatic intervention. According to the doctrine, the nations were not allowed to use armed force to collect debts they had to recover from other nations. For example, a Calvo clause in a contract between the government of a Latin American state and a foreigner one, stipulates that the latter unconditionally agrees to the settlement within the state concerned of any dispute between the contracting parties.

The Calvo Doctrine was essentially reaffirmed by the Drago Doctrine, articulated by the Argentine Foreign Minister Luis María Drago in 1902[1].

The standard for fair and equitable treatment determined by the minimum standard, being conceived since the 1920s, there were some clarifications 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 the national treatment, it has its source either in a unilateral act of the state or in a conventional act, such as establishment conventions or investment conventions (agreements) which have broadly given a better delimited outline to the principle of national treatment in the relations between OECD member states, being declared principle of an own international inter-regional law in the area of OECD states[2].

Although the practice of Tribunals designated to settle investment disputes is unstable, its analysis has shown that the state of origin may be prone to either *preferential or differential treatment, facts that are not* sanctioned by international law that penalizes discrimination or discriminatory treatment in the matter[3].

An important source is the United Nations General Assembly

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[1] At that time, Venezuela had outstanding debts to Britain, Germany and Italy, which threatened armed intervention for collection purposes. Drago advised the US government that "public debt cannot provoke armed intervention or even effective occupation of the territory." This statement against European intervention in America is consistent with US policy, as set out in the Monroe Doctrine (1823) and the Roosevelt Corollary (1904); finally, the US government approved the amended version of Drago at the Second Hague Peace Conference (1907) in the form adopted as the Porter Convention on Limitation of Employment for the Recovery of Contract Debts. Although the United States opposed European intervention in America, it reserved the right, often used, to intervene by force in any Latin American state where conditions seemed to threaten US interests.

[2] See Cristina Elena Popa Tache, *Dreptul Internațional al Investițiilor. Coordonate/ International Investment Law. Coordinates*, Epublishers Publishing House 2019, p. 217.

[3] In the Judgment in the case *Oscar Chinn, Belgia v. UK,* Judgment of December 1934, p. 87, Permanent Court of International Justice - CPJI emphasized that "prohibited discrimination is therefore one that will be based on nationality, which would lead to differential treatment for individuals belonging to different national groups according to their nationality."

Resolutions on the permanent sovereignty of natural resources. Resolution no. 3281 (XXIX) of 12 December 1974, entitled *Charter of Economic Rights and Duties of States*[1], 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[2], a text by which domestic rules are given the regulation of the investment relationship from the time of its establishment until the time of its liquidation, without reference to international law, but the Charter requires states to fulfill their international obligations, leaving any state ultimate freedom to choose the treatment of international investment that seems better adapted to "national priorities and objectives":

Art. 2: 1. *Each state has and freely exercises its permanent sovereignty, including the possession, use and disposal, over all its assets, of natural resources and economic activities*.

2. *Each State has the right to:*

(a) *regulate and exercise authority over foreign investment in its national jurisdiction in accordance with its laws and regulations and in accordance with its national objectives and priorities. No state will be obliged to grant preferential treatment to foreign investment*;

(b) regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with the laws, rules and regulations and comply with its economic and social policies. Transnational corporations must not interfere in the internal affairs of a host state. Each state should, with full respect for its sovereign rights, cooperate with other states in the exercise of the right provided for in this paragraph;

(c) Nationalization, expropriation or transfer of ownership of foreign property, in which case the state adopting such measures should pay adequate compensation, taking into account its relevant laws and regulations and all circumstances that the state deems relevant. In any case, where the issue of compensation gives rise to a dispute, it shall be settled in accordance with the domestic law of the nationalizing state and its Tribunals, unless it is freely and reciprocally agreed by all states concerned that other peaceful means must be sought, on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

Regarding the history of today's standards on the transfer of funds, 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 Program

[1] Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2778/download, accessed on 24 Feb. 2021.

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

Investment Guarantee Act established by the Foreigners Assistance Act, to which the US Program is added, for the conclusion of investment treaties until 1948, replaced by the Program for bilateral investment treaties drawn up in 1983, a program which since 2004 became a new model of bilateral investment treaty - BIT[1], currently the US having a 2012 BIT model[2]. Recently, in March 2021, a guide based on UNCTAD's investment policy framework for sustainable development was published: *International Investment Agreements and their Implications for Tax Measures: What Tax Policymakers Need to Know*[3]. The IIA reform process[4] was facilitated by UNCTAD research on intergovernmental processes and toolkits such as:

- Sustainable development investment policy framework (Investment policy framework; UNCTAD, 2015b), and

- Reform package for the IIA regime (UNCTAD, 2018c). UNCTAD proposed concrete solutions for modernizing older generation IIAs. To this end, it launched the IIA Accelerator of Reform (UNCTAD, 2020a) to accelerate the reform of the prevailing unbalanced provisions in the existing IIA stock, a guide focusing on the tax implications of the most relevant IIA provisions: what needs to be known about non-reformed prevailing clauses in the older generation IIA agreements, as well as the options available to reform these clauses and address those risks. Although at national level several states created their own BIT model, at bilateral level[5], there is currently only one bilateral BIT model (Belgium-Luxembourg Economic Union Model BIT - 2019) and a number of four plurilateral international treaty models, on investment (the most recent being SADC - South African Development Community - Model BIT 2012). Attempts to reach a multilateral agreement failed. The Havana Charter, signed on March 24, 1948, is an attempt[6] to conclude a multilateral treaty, which promoted the establishment of a specialized organization with responsibilities in the field of international investment as well: the International Trade Organization. The Charter did not enter into force, not reaching the number of ratifications, but also because of the US position, which did not approve the establishment of such an

[1] BIT is the acronym for Bilateral Investment Treaty.

[2] In April 2014, the United Nations Conference on International Trade Law (UNCITRAL) adopted new transparency rules for treaty-based state-investor arbitration (ISDS), conducted in accordance with UNCITRAL international arbitration rules. For the first time, the public has access to most of the information on ISDS (Investor-state dispute settlement) applications submitted to UNCITRAL. Previously, information on ISDS arbitrations under UNCITRAL was available to the public only if the parties to the dispute authorized the publication.

[3] Available on the official UNCTAD page International investment agreements and their implications for tax measures: what tax policymakers need to know (unctad.org), accessed on 03 March 2021.

[4] IIA is the acronym for International Investment Agreements.

[5] According to UNCTAD, material available at: https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements, accessed on 03 March 2021.

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

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 motion for the approval of the "national standard" as a principle of law in international investment relations, which would replace the "international minimum standard."

Thus, a period followed, in which a series of norms and principles appeared in the matter of investment relations, a process in which an important role belonged to NGOs, this being a preponderant technical role, separate from politics, with particularly useful results in intergovernmental cooperation. Within this technical role, as in the case of chambers of commerce, other examples can be given such as: International Air Carrier Association (IACA) or Association of International Road Carriers (AIRC), Business and Industry Advisory Committee: BIAC, *Trade Unions Advisory Committee: TUAC*, or the Multinational Enterprise International Investment (MEII). 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, as the global market is in need for uniform standards[1].

In conclusion, over time, treatment standards have been subject to transit tensions. For example, the International Bank for Reconstruction and Development approved on September 21, 1992, the "Guidelines for the Treatment of Foreign Direct Investment", which is a non-binding, *soft law* guide to action by states in the field, inspired directly from the practice of Western states and bilateral conventions, and aims to encourage and protect foreign investment, promotes fair and equitable treatment standards and imposes strict limits on nationalizations[2].

It was found that, in addition to discrepancies in ideology and qualification of foreign investment[3], the reason for the failure of these attempts was that, once a general multilateral investment treaty was in force, the states could impose higher standards and could raise thus, the level of investment protection above that established one by a treaty on bilateral bases. This is the

[1] 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.

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

[3] 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.

case with TRIPS[1], when inspired by them, developed countries negotiated bilateral agreements in the field of intellectual property, setting higher standards of protection than those set by TRIPS[2] which contain provisions meant to create a standard of protection transposable in the domestic law of the component states. As with other treaties, obligations under traditional international law can be created given that most bilateral investment treaties aim to protect intellectual property rights *per se* as part of foreign investment. For example, the Convention on Biological Diversity[3] addresses the issue of indigenous know-how use in the production of goods and imposes obligations whose non-compliance also entails the international responsibility of the states[4].

The historical path got to the conclusion that these standards are very flexible and dynamic and they evolve over time. The emergence and proliferation of bilateral agreements on the promotion and protection of foreign investment, the inclusion of investment treatment standards in the body of these treaties, and the development of dispute settlement procedures for litigations arising from the application of these standards indicate that these standards will be more precise and, as a result, they are not static; they evolve[5]. In all of this, legal scientific research plays a key role because any codification activity must be scientifically substantiated. Any codification policy must ensure a balance between the diachrony and the synchrony of international investment law (between the dynamics and the statics of this law).

[1] TRIPS is the acronym used in this monograph for Agreement on Trade-Related Aspects of Intellectual Property Rights.
[2] N.Q. Dinh, P. Dailier, M. Forteau, A. Pellet, *op. cit*., p. 1208.
[3] 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.
[4] S.Sell, *Public Law: Globalization of Intellectual Propertz Rights*, Cambridge Studies in International Relations, Cambridge University Press, UK, 2003, p. 89.
[5] Ansari Mahyari, A. & Raisi, *International standards of investment in international arbitration procedure and investment treaties,* Revista Jurídicas*, 2018*, *15* (2), 11-35. DOI:10.17151/jurid. 2018.15.2.2.

Chapter II
The issue of treatment standards from the point of view of the regulatory requirement

The legal system is permeable to the environment "absorbing external shocks by feedback on the causes[1]". Although receptive to the backdrop as a source of information, the legal system of international investments is normatively closed, being in the presence of a normative restriction and a cognitive affirmation.

For these reasons, the analysis of international investment treatment standards follows the reference to regulatory law (e.g., regulatory autonomy, political space, flexibility to introduce new regulations) or reference to social investment issues (e.g., human rights, work, health, CSR, poverty reduction).

When the evolution of international investment law takes place, the turbulent political-socio-economic framework that this legal system, as an organized structure, should regulate, determines its development only if the major changes configured by a reform (or revolution) trigger the very change in the form of the investment legal system itself.

Constituting itself in a creation of a social body, the international law of investments give life to its creators by conceiving the social body and its purpose, both through the mediation of social bodies and through the intrinsic purposes of the investment legal system.

As in the case of other branches of law, the unity of the legal system is given by the coherence, systematization but also by the hierarchy of its components. The multitude of antagonistic notions existing in international investment law enhances the risk of altering its homogeneity. The antinomies, also noted in the case of this branch of law, are inevitable. *Here is, for the action of the law, a stream of mistakes that can be reduced to a minimum, without ever being completely cleaned out*[2].

Kant established the existence of four antinomies[3] which, in his opinion, are proper only to human reason[4]:

1. The world is finite in time and space, the world is infinite in time and

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[1] See in this regard, I. Dogaru, D. C. Dănișor, Gh. Dănișor, *General theory of law*, second edition, C.H. Beck Publishing House, Bucharest, 2008, pp.49 and the following.

[2] M. Nordau, *Minciunile convenționale ale civilizației noastre/The conventional lies of our civilization*, translation after the 14th German edition of M. Cantianu, Bucharest, Publishing House of Socec & Co Bookstore, 1921, p. 142.

[3] Antinomy, antinomies, feminine noun - Contradiction between two seemingly just or necessary principles, positions, conclusions or laws. - From the French *antinomie*, the Latin *antinomia*.

[4] Read *Mic dicționar filosofic*/Small Philosophical Dictionary, State Publishing House for Political Literature, Bucharest.

space;

2. Everything in the world is simple and indivisible; there is nothing simple in the world, everything is complex and divisible;

3. There is freedom in the world; there is no freedom in the world; everything is necessary;

4. There is a primary cause of the world; there is no primary cause of the world.

It is therefore appropriate that the law be based on a unitary content, at least jurisprudential because "neither can laws be designed to cover all cases that occur each time, but it is sufficient to contain cases that happen most of the time[1]."

1. Application of investment treaties in domestic law

This is relevant because the treatment standards of international investments make up the largest and most important part of the body of treaties. The relationship between international investment law and the domestic law of host states or investors' origin countries can be explored in the light of theoretical approaches related to monism and dualism, which have their origins in the conceptions on the nature of the two legal orders.

The theory of monism assumes that this system of law has a unique character, being made of international law and domestic law.

From the point of view of theoretical foundations, Lauterpracht and Oppenheim relate monism to the general concern of the law for to the wellbeing of individuals: the international legal order has as fundamental point "the sense of morality and justice based on human rights and the welfare of individuals[2]." Oppenheim argued that the origin of international law and domestic law is a common one, from the concept of justice and the rule of law[3].

In the Kantian view, law is a set of rules that prescribes rules of conduct that must be observed, a theory also supported by Kelsen as starting from the fundamental notion of basic norm[4] (which can be the principle of sovereignty or the rule according to which states must behave as they normally do) underpinning international law, and indirectly, constituting the mainstay of domestic law. From this basic norm, the principle of effectiveness which underlies the law of revolutionary organs of a state to be creators of law, also derives[5].

In addition to this monism with the primacy of international law (according to which international law is part of domestic law *per se*, without the

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[1] *Neque lege sita scribi possunt, ut omnes casus qui quandoque inciderit comprehendantur, sed sufficit ea quae plerumque accidunt contineri* (Julian), Digestele lui Iustinian/The digest of Justinian, the first book, translated by T. Sâmbrian, Universitaria Publishing House, Craiova, 2002, p. 81.
[2] H. Lauterpacht, *International Human Right,* Oxford Publishing House, 1950, p. 29.
[3] L. Oppenheim*, International Law: A Treatise*, Longman Publishing House, London, 1967, p. 47.
[4] H. Kelsen, General Theory of Law and State, London, 1945, p. 363.
[5] Ibidem.

need to incorporate it into domestic law as it is a higher legal order that has priority in case of conflict with domestic rules[1]), there also existed a theory of monism with the primacy of domestic law (Bonn school) based on state sovereignty and the doctrine of state self-limitation[2], theories that can be supplemented in the case of international investment law.

In the dualist doctrine, the system of international law is separate from the system of domestic law, without influencing each other, without possibility for one of the two legal systems to prevent from the application, a norm of the other[3]. Although the differences lie in the sources, there is a set of regulated relationships and of the substance subject to regulation, in particular, the rule of international law has been issued to apply to states and it must be adapted to be applicable to subjects of domestic law, individuals and legal entities[4].

2. Considerations on the prevalence of legal principles over treatment standards

The term "principle" comes from the Latin word "principium" which can mean beginning, origin, having the consideration of a fundamental element. The principle has no origin, while the origin of the standards is represented by the principles, because everything is born out of principle, but the principle cannot be born of anything[5]. In our field of reference, most of the time, the standards bear the names of the principles from which they were born.

The fundamental principles of law are the basis of the branch principles, and between them there is a relationship of correspondence and amplification[6]; the principles of this new branch of law are also naturally related to dependence on the general principles of other areas corresponding to the society. Regarding the relevance of these principles to international foreign investment law, it was observed that in general, the theory of differential treatment for a foreign investor is preferred by strong states and it can be implemented through the mechanisms of international law.

As a theoretical importance, the treatment standards in international investment law are overpassed by a double dialectic: external and internal, as well

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[1] H. Kelsen, *Principles of International Law*, 2nd ed., London, 1966, pp. 557-559.
[2] E. Kaufmann, *Volkerrecht und Landesrecht,* 1897, p. 69 and M. Wenzel, Juristische Grunbegriffe, Berlin, 1920, p. 20.
[3] See I. Gâlea, *Analiza critică a normelor Constituției României referitoare la relația dintre dreptul internațional și dreptul intern/ Critical analysis of the norms of the Romanian Constitution regarding the relationship between international law and domestic law*, Annals of the University of Bucharest, 2009, p.22.
[4] D. Anzilotti, *Cours de droit international*, Sirey Publishing House, Paris, 1925, p. 63.
[5] *Principii autem nulla est origo; nam ex principio oriuntur omnia ipsum, ipsum autem nulla ex re alia nasci potest.* Cicero, Tusculanae, disputationis.
[6] I. Dogaru, *Elemente de teoria generală a dreptului/ Elements of the general theory of law*, Oltenia Publishing House, Craiova, 1994, p. 115 text and note no. 10.

as the principles:

- The external dialectic aims at the dependence of the investment treatment standards on the set of social conditions, on the structure of the society as a whole;

- The internal dialectic concerns the sum of the internal links that characterize this legal system of international investments, the link and the interferences between the components of this system.

The practical importance of studying the treatment standards of international investments can be seen on two levels:

- In terms of identifying and establishing the guideline for the whole legal system, with the power to influence the activity of the legislator, and

- In terms of the administration of justice by practitioners of international investment law, who must know and understand both the letter and the spirit of this branch of law.

The result of the action of the principles of this field of law is the very certainty of the law[1].

In the legal sense, law represents the totality of the legal norms destined to regulate the conduct of the human subjects whose observance can be ensured, if necessary, by the coercive force of the state[2], the subjective law being protected by the legal norm in force.

International investment treatment standards[3] represent or should represent the direct effect of the principles of international investment law, thus being their expression, with a pronounced logical affinity between them. Specifically, they are not confused with the principles, but they are the practical reflection at the level of rights and obligations, applicable to the performers in this field, in the highlight of the theoretical-practical aspect, having a customary origin, as well as the principles underlying their development. Therefore, each principle of law has a standard or a set of standards, proportional to its importance and scope, but the standards of treatment have the function of protecting international investment from the national legislative and regulatory system of the host state without affecting the balance between rights and specific obligations. Following this logic and analyzing the situation of the latest investment treaties, it turns out that there is an insufficiency in the preponderance of treatment standards, compared to the principles, much more numerous and constantly expanding, of this field of law.

The provisions of the body of treaties on investors and investment

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[1] In the sense of a guarantee given to individuals against the sometimes unpredictable nature of coercive rules and against the congruence of the legislative system. Nicolae Popa, *Teoria generală a dreptului/General theory of law*, Titu Maiorescu University Publishing House, 2002, p.111.

[2] Gh. Mihai, *Teoria dreptului/The theory of law*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, p. 1.

[3] Standard, standards, neutral noun (in Romanian, *translator's note*) - Norm or set of rules governing the standardization operation. Mandatory rule to which a product must correspond; standard.

treatment are intended to prevent possible restrictive behavior of the host government and to impose discipline on its governmental actions and to achieve this objective, the treaties define a set of standards against which host states must comply in their attitude in the legal relations they have with investors and their investments.

Until the increasing compartmentalization of treatment standards in the new treaties, bilateral investment treaties presented, at the beginning[1] of their emergence, an article or two on treatment standards, most often, that single article contained several different treatment standards.

For example, regarding the evolution and dynamics of the inclusion of treatment standards in BITs, examining the oldest known BIT between Germany and Pakistan since 1959, compared to its 2009 version which remained only signed, without coming into force, it can be seen from UNCTAD statistics that the 1959 bilateral investment treaty contained only a somewhat brief representation of investment treatment standards, as follows:

National treatment (NT): Type of NT clause:
Post-establishment
Reference to "like circumstances" - No.
Most Favored Nation (MFN) treatment: MFN clause type:
Post-establishment
Exceptions to the MFN obligation
Economic integration agreements - No.
Tax treaties - No.
Procedural Issues (ISDS) - No.
Fair and equitable treatment (FET): Type of clause FET - None.
Qualified FET. By reference to international law - Not applicable.
By listing FET items (exhaustive or indicative list) - Not applicable.
FET Modifiers - Not applicable.
Full protection and security[2]:

[1] Started relatively recently because, according to official statistics, the oldest known BIT is the one between Germany and Pakistan signed on 25 November 1959 (still in force), recently replaced by the one signed in 2009. See: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping, accessed on 10.04.2021.

[2] *Article 3. (1) Investments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party. (2) Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law. (3) Nationals or companies of either Party who owing to war or other armed conflict, revolution or revolt in the territory of the other Party suffer the loss of investments situate there, shall be accorded treatment no less favourable by such other Party than the treatment that Party accords to persons residing*

Prohibition of unreasonable, arbitrary or discriminatory measures - Yes.
Expropriation. Indirect expropriation mentioned
Defined indirect expropriation - No.
General regulatory measures - No.
Mandatory WTO compliant licenses - No.
Protection from strife. Specifications:
Relative right to compensation. MFN and NT
Absolute right to compensation in certain circumstances - No.
Transfer of funds. Includes transfer of funds - Yes[1].
Exceptions to the obligation to transfer funds
Balance of payments exception - No.
Other specific exceptions (e.g. to protect creditors, etc.) - No.
Prohibition of performance requirements (PR). No explicit PR clause.
PR clause type - Not applicable.
Umbrella clause - Yes[2].
Entry and sojourn of personnel (subject to local laws) - Yes.
Senior management (nationality) - No.

At present, the new series of investment treaties considerably covers treatment standards, in direct proportion to their dynamics.

In conclusion, the actions of the state which do not comply with the standards included in the treaties constitute infringements of the treaties involving the international liability of the offending state which may be obliged to pay compensation for the damage caused. In order to protect foreign investors against risks, in particular against political risk arising from the placement of their assets under the jurisdiction of a host state, investment treaties stipulate obligations regarding the treatment that host states must provide to investors and their

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within its territory and to nationals or companies of a third party, as regards restitution, indemnification, compensation or other considerations. With respect to the transfer of such payments each Party shall accord to the requests of nationals or companies of the other Party treatment no less favourable than is accorded to comparable requests made by nationals or companies of a third party.

[1] Article 4: Either Party shall in respect of all investments guarantee to nationals or companies of the other Party the transfer of the invested capital, of the returns therefrom and in the event of liquidation, the proceeds of such liquidation. Article 5: If a claim arising out of a guarantee given for an investment is brought against a Party, the latter shall without' prejudice to its rights under Article 11, be authorised, on the conditions stipulated by its predecessor in title, to exercise the rights having devolved on such Party by law or having been assigned to it by the predecessor in title (devolved interest). As regards the transfer of payments to be made by virtue of the devolved interest to the Party concerned, paragraphs (2) and (3) of Article 3 as well as Article 4 *mutatis mutandis* shall apply.

[2] Article 7: If the legislation of either Party or international obligations existing at present or established hereafter between the Parties in addition to the present Treaty, result in a position entitling investments by nationals or companies of the other Party to treatment more favourable than is provided for by the present Treaty, such position shall not be affected by the present Treaty. Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.

investments. Although treaties do not usually define the meaning of the treatment, that term in its usual dictionary meaning includes the actions and the behavior taken towards another person. In other words, by concluding an investment treaty, a state makes promises about the actions and behaviors it will take towards the investments and investors of the treaty partners[1], and the obligations thus self-assumed by states generate considerable legal effects, all the more so as, to a certain extent, the legal norm is created by the political power, and any codification is, from this point of view, a compromise between political tendencies and the expression of the general will.

[1] See J.W. Salacuse, *The Law of Investment Treaties,* Oxford International Law Library 2013, p. 205. In the same context, the author exemplifies by reporting the example of Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic, ICSID Case no. ARB/03/19 (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v. Republic of Argentina), where the Court of First Instance defines treatment as follows: "The word *treatment* is not defined in the text of the Treaty. However, the usual meaning of this term in the context of investment includes the rights and privileges granted and the obligations and duties imposed by a contracting state in respect of investments made by investors covered by a treaty". Decision on jurisdiction, 3 August 2006.

Chapter III
From the concept of standard to that of standard of treatment of international investments derived from the principles specific to the field and their brief classification

Universal civilization, world trade tends towards a uniformity of organization[1].

According to the Black's Law Dictionary, page 1535, standard means a model accepted as correct by custom, consent or authority. The objective standard (1915) means a legal standard that is based on conduct and perceptions external to a particular person. Subjective standard (1915) means a legal standard that is specific to a particular person and is based on the person's individual vision and experiences.

According to the Cambridge Dictionary[2], treatment means *the way you deal with or behave towards someone or something* or *the way something is considered and examined.*

Merriam - Webster Dictionary[3] presents the definition of the term *treatment* as *the act or manner or an instance of treating someone or something: such as*: a) *conduct or behavior towards another*; b) *the action or manner of dealing with something (such as a topic) often in a specified way.*

According to Oxford Learners Dictionaries[4] treatment means *a way of behaving towards or dealing with a person or thing.*

The definition of the term "standard" can be found in the Cambridge Dictionary[5] as follows: as a noun: *a level of quality; a moral rule that should be obeyed; a pattern or model that is generally accepted.*

As an adjective: *usual rather than special, especially when thought of as being correct or acceptable*; *usual or expected; not involving something special or extra*; *something that others of a similar type are compared to or measured by, or the expected level of quality*; *an official rule, unit of measurement, or way of operating that is used in a particular area of manufacturing or services*.

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[1] See de Louter, *op. cit.*, Vol. II, p.531.

[2] Cambridge Dictionay is available online at: https://dictionary.cambridge.org/dictionary/english/treatment, accessed on 15 Jan. 2021.

[3] Merriam Webster Dictionary is available at: https://www.merriam-webster.com/dictionary/treatment, accessed on 15 Jan. 2021.

[4] Oxford Dictionary is available at: https://www.oxfordlearnersdictionaries.com/definition/american_english/treatment, accessed on 15 Jan. 2021.

[5] Cambridge Dictionary is available at: https://dictionary.cambridge.org/dictionary/english/standard, accessed on 15 Jan. 2021.

Merriam - Webster Dictionary[1] defines "standard" as: as a noun, *something established by authority, custom, or general consent as a model for example: Criterion*; *a structure built for or serving as a base or support*. As an adjective, *constituting or conforming to a standard especially as established by law or custom*.

Oxford Learners Dictionaries[2] present the "standard" as: *a level of quality, especially one that people think is acceptable*; *a level of quality that is normal or acceptable for a particular person or in a particular situation*; *a level of behaviour that somebody considers to be morally acceptable*.

From the point of view of the general theory of law, regarding standards, we observe that they are part of the classification of legal norms, in relation to the degree of precision and specificity, ie in relation to that criterion by which legal norms are classified into strict norms of law and directives or standards. While strict rules of law are rules of strict interpretation (such as the rules in tax laws that accurately determine taxable income and the amount of tax) that do not allow the claimant to reproduce them by interpretation, directives or standards are rules containing criteria for judging the actions of the subject[3]. From this point of view, investment treaties have the character of mixed legal rules.

As it is known, the treaty means the legal act, whatever its name or form, which records in writing an agreement at state, governmental or departmental level, with the aim of creating, amending or extinguishes legal or other rights and obligations, governed by public international law and recorded in a single instrument or in two or more related instruments[4]. *All relative rights, far more numerous than fundamental ones, arise from international treaties[5] aimed at establishing binding relations between states[6]*. The same is the case with investment treaties, therefore governed by public international law as well, the object of which is interstate relations, but being subsumed to the object of international investment law, and relations between states and international organizations, as well as some qualities of subject of law of individuals in the field of human rights.

As in public international law there are two parts with their own problems: the general part and the special part, and the treatment standards are included in the treaties as general or specific, divisions to which are added, of course, that of specialized matters, each corresponding to a certain legal

[1] Merriam Webster Dictionary is available at: https://www.merriam-webster.com/dictionary/standard, accessed on 15 Jan. 2021.
[2] Oxford Dictionary is available at: https://www.oxfordlearnersdictionaries.com/us/definition/english/standard_1, accessed on 15 Jan. 2021.
[3] These are known since Roman law and are taken over by modern law; for example, the rule of good faith or the standard of a diligent person.
[4] Definition contained in Law no. 590 of 2003, regarding the treaties, published in the Official Gazette no. 23 of January 12, 2004.
[5] See De Louter, *op. cit.*, Vol. I, pp. 466, 467, *apud* G. Meitani, *op. cit.*, p. 166.
[6] See G. Meitani, *op. cit.*, p. 166.

technicization, such as: political cooperation and economic cooperation, etc. Deriving from the same logic, we can assume that the treatment standards included in an investment treaty also borrow the features characteristic to public international law (which governs them): they are coordinating in relation to domestic law, as is public international law[1]; they are binding as the law that governs them[2] and are heavily politicized. All these aspects tend to regulate the legal force of the treatment standards. The incursion of the international legal order into domestic law is becoming more and more a reality and is achieved through:

- Use of treaties - laws (instruments of common law for several states) that regulate rights and obligations directly to individuals;
- The penetration of its nationals and legal entities (companies) in the international order as a subject;
- The Romanian legal system, for example, considers that treaties are part of domestic law, according to Article 11 of the Romanian Constitution[3].

Today, international investment treatment standards are, or should be, component parts of the content provisions of the body of texts of international or national legal acts, if implemented.

In general, international investment treatment standards can be used either through direct application or through a process of amending an international standard to suit national or regional conditions, so that the adoption and the adaptation of international treatment standards results in the creation of equivalent national investment treatment standards, which are substantially the same as international standards in their technical content, but which may have (i) certain editorial differences and (ii) differences resulting from conflicts of government regulations or requirements specific to industry caused by fundamental climatic, geographical, political, sociological, technological or infrastructure factors or from the stringency of safety or security requirements that a particular standard authority considers appropriate[4].

The emergence of international investment treatment standards is tantamount to overcoming barriers in international investment law caused by differences in regulations and standards developed independently and separately by each nation, national or international standardization organization or company.

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[1] See G. Geamănu, *Dreptul internațional contemporan/Contemporary international law*, Didactic and Pedagogical Publishing House, Bucharest, 1975, p. 99.

[2] Regarding the discussions involved in this feature, I, Dogaru, D.C. Dănișor, Gh. Dănișor, *Teoria Generala a Dreptului/General Theory of Law,* 1999, Scientific Publishing House, p. 252.

[3] Art. 11 - International law and domestic law: (1) The Romanian state undertakes to fulfill exactly and in good faith the obligations incumbent on it from the treaties to which it is a party. (2) The treaties ratified by the Parliament, according to the law, are part of the internal law. (3) If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution.

[4] See the page: https://en.wikipedia.org/wiki/International_standard, accessed on 05 Jan. 2020.

The general treatment standards apply to all facets of the activities of an investment in the host state, being embodied in a minimum treatment standard (MTS). These include government commitments to provide investors even in clothing with fair and equitable treatment, full protection, security and treatment in accordance with international law. Most treaties include a minimum standard of treatment (MST) that requires the host state to treat foreign investors according to an indefinable standard, such as "fair and equitable" treatment. Traditionally, this type of treatment is applied only to extreme cases of ill-treatment.

Specific treatment standards refer to particular aspects related to an investment, such as money transfers, expropriation and investor rights in times of war, revolution or civil unrest[1].

1. International investment treatment standards, obligations self - imposed on states by treaties

As international investment law is detached from public international law, it brings up the matter of state liability mainly from the perspective of how they understand to fulfill their obligations set out in investment treatment standards. In this context, however, unlike international trade law where all the protagonists, including states (acting in accordance with *de jure gestionis*) are on an equal footing, in relations of public international law, the state acts with sovereign power under the rule *de jure imperii*. The issue of state responsibility for international investment has not yet managed to reach a clear and unequivocal way of regulation, although when states engage in investment relations by developing various rules (such as tax or customs), they act sovereignly on the basis of *de jure imperii*. It also does the same when it enters into relations with international governmental organizations of economic nature, such as regional and world economic organizations[2].

Through investment treaties, states representing parties undertake to comply with treatment standards, which results in the states' liability for breach of these particular, self-assumed obligations, since, while international investors are not party to these treaties, in all cases, the consent of the third country is required, except for the "stipulation for another" which has given rise to contradictory interpretations, in the matter of the constitution, modification or extinguishment of an obligation.

In general, in case of establishing an obligation, the conditions provided in art. 35 of the Vienna Convention of 1969 are: (i) the intention of the parties to

[1] UNCTAD, *Bilateral Investment Treaties 1995 – 2006. Trends in Investment Rulemaking,* 2007, p. 28.
[2] See I. Gâlea, *Dreptul tratatelor/The law of treaties*, C.H. Beck Publishing House, 2015, p. 155-160.

constitute an obligation on a third party; (ii) acceptance is express and in writing[1]. The initiative of the International Law Commission to propose a common rule for the revocation of rights and obligations was noted: the consent of the third state would have been required, unless it was established that the right would have been revocable[2]. Governments expressed views according to which the parties' possibility to revoke or amend the stipulation in favor of a third party by giving that state a "veto"[3], should not be restricted. It is considered that the interpretation of this rule should be in the sense of those adopted by the rapporteur Waldock: a presumption of revocability of the right that can be overturned by: a) bilateral agreement or b) establishing by the text of the treaty the intention contrary to the parties[4]. Situations unregulated by the Vienna Convention have been identified, in which incompatibilities may arise between obligations in relations with third parties (a state assumes an obligation to state A, and subsequently assumes an obligation to state B, incompatible with the former). And this issue falls within the sphere of international responsibility of states. This creates a problem of incompatibility. In order to identify the notion of "incompatibility", the jurisprudence of the Tribunal of Justice of the European Union was considered relevant, pursuant to art. 351 para. 2 TFEU, which stipulates the obligation of the member states to "eliminate incompatibilities" in relation to European Union law in treaties concluded with third countries. Thus, in a case involving the incompatibility of provisions in agreements on mutual promotion and protection of investments, the Tribunal decide, "the prerogatives of the Council, which are represented by the unilateral adoption of restrictive measures in relation to third states in a matter which is identical or in connection with those governed by a previous agreement concluded between a member state and a third country, shows an incompatibility with that agreement, because, first, the agreement does not contain a provision enabling the member state to exercise its rights and to fulfill its obligations as a member of the Community and, secondly, there is no mechanism under international law to make this possible[5]."

In conclusion, in order to protect foreign investors from the political risk arising from the placement of their assets under the jurisdiction of a host state,

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[1] See Official Records, 1969, Plenary, 59 f, para. 5, it follows that the requirement of written acceptance has been added to the text of the Convention on the proposal of the delegation of Cambodia.

[2] Yearbook of the International Law Commission, 1964, vol. II, p. 184

[3] See Draft articles of the International Law Commission, p. 230, VI Report of the special rapporteur H. Waldock, doc. A/CN.4/186 and Add. 1, 2/Rev.1, 3-7, Yearbook of the International Law Commission, vol. VI, pp. 70-72, comments released by Israel, USA, UK, Pakistan. The Netherlands upheld a presumption in favor of the irrevocability of the law.

[4] See I. Gâlea, *Dreptul tratatelor/The law of treaties*, C.H. Beck Publishing House, 2015, p. 160.

[5] C-205/06, Commission v. Austria, 2009, Repertory of the Court of Justice, 1-01301, para. 37; C-249/06, Commission v. Sweden, Directory of the Court of Justice, 1-01301, C-118/07, Commission v. Finland, 2009, Directory of the Court of Justice 1 - 10889; Commission v. Ireland, 2006, Repertory of the Court of Justice, 1-4635, para. 154.

investment treaties impose obligations[1] on host states regarding the treatment they must grant to hedged investments and investors.

2. Principles of international investment law, aspects of dynamics of standards

As presented above, international investment treatment standards contain self-imposed obligations by states through investment treaties. These standards are rooted in the principles of international investment law.

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[2].

All economies have made binding commitments through investment treaties. These treaties generally apply to the actions of all governmental entities, regardless of the level of government (central, regional, local) and regardless of the branch of government (executive, legislative and judicial) but regardless of the status of the host state, whether North or South, the administrative problems that arise with the establishment of an international investment are largely similar.

In addition to the costs and time allotted, both excessive, the adaptation of domestic law to international law and, in particular, the regulation of a sufficient legislative framework to cover the main problems encountered in this field remain to be regulated.

Infringements of an investment treaty are highly serious. If a government entity takes a measure contrary to the obligations contained in an investment treaty, the action can generate significant sanctions, especially onerous for the government that has not met a certain standard of treatment, which affects the reputation of the state as a place for foreign investment, with particularly serious consequences in the future.

In order to ensure that government actions comply with its obligations under the investment treaty, it is essential that government officials at all levels and in all branches of government should be aware of the obligations of the government in investment treaties; to understand the link between treaty obligations and the development and implementation of internal policies; and to make sure that there are timely communications and consultations within the government regarding the usance of these obligations to any investor and investment decisions.

From an administrative point of view, the main objective is the administrative implications generated by the regulation or non-regulation of the legislative assembly with an impact in this field and based on an unequivocal and

[1] See N.J. Calamita*, Handbook on Obligations in International Investment Treaties,* 2020, APEC Committee on Trade and Investment (CTI) Publishing House, p.51.
[2] P. Guggenheim, *Traité de droit international public,* vol. I, second edition, 1996, pp. 296-297.

precisely determined normative in terms of: 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 (terms, admission, costs, freedom of establishment, sectoral restrictions, national security, public order, environmental protection, public health, restrictions on the acquisition of land ownership, 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, settlement, free transfer of capital, entry and residence of foreign staff, access to local finances, stabilization clause), investor obligations (compliance with domestic law, tax and labor law obligations, corporate social responsibility, accounting and tax statements), promotion and facilitation (investment incentives or facilities), and sufficient regulations on how to resolve disputes (settlement of disputes at national territorial level, international arbitration and alternatives to arbitration, domestic forums versus international forums). The notions regarding the institutional rules are not enough either (the authority in the field, the investment promotion agencies and one stop shop). Another aspect that needs to be well regulated in the future is the relationship with international agreements and transparency as well as the conditions for granting facilities[1]. Their implementation from an administrative point of view continues to be a challenge for every state, because, viewed as a reflection, they should be visible, in harmony with normative regulations, together with: the principles of organization and functioning of public administration, public administration, executive power, forms of activity of public administration, responsibility and accountability of civil servants, public administration authorities, administrative acts, public office. The combination of these pieces into a legal mechanism or, better said, the assembly between international investment law and administrative law is an outpouring of sources of legislation, jurisprudence and doctrine, trialism of great utility for evolution and reform.

3. Administrative problems

Facing these review movements, administrative law and administrative issues arising at almost all levels, including the institutional ones, encounter the manifestation of a particularly active role conferred by this unprecedented

[1] See Cristina Elena Popa Tache, *Administrative Review and Reform Movements from the Perspective of International Investment Law,* in *Administrative Law and Public Administration in the Global Social System, Contributions to the 3rd International Conference. Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective, October 9, 2020, Ed. ADJURIS – International Academic Publisher***,** pp. 212-218.

moment, in which states and investors must rely on a comprehensive legislation, in which to find complete regulations, harmonized with the international law of foreign investments.

The predominant conception today accepts, along with states, the existence of other subjects, based on the theory of plurality of subjects[1] and a good regulation at the level of domestic law, especially at the level of the host state, given by the norms of administrative law, represents a binder and a direction that can change or control the geography of international investment.

The norms of administrative law may refer to the administrative activity of the host state, of international organizations[2] or of local communities and may regulate: the organization of the authorities and the institutions of central or local public administration; the functioning of public administration authorities; the relations of public administration authorities with foreign investors, individuals and non-governmental organizations; the institution of administrative litigation; the patrimonial responsibility of the public administration authorities, as well as the administrative (contraventional) responsibility of the nationals and legal entities, foreign investors. This type of responsibility is of major importance in the relationship between states and the other subjects of international investment law.

Exempli gratia, the role of the host state, as a traditional subject of international law, is paramount in the treatment of investments and administrative implications are initiated even by the definitions of this standard, including the most comprehensive definition of "fair and equitable treatment" that belongs to the ICSID Tribunal, in the case of *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 the relevant policies and practices as well as the pertinent administrative directives, so as to enable him to plan his 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 he also undertook his commitments when he planned and started his 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 of the 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*

[1] A. Preda-Mătăsaru, *Tratat de Drept Internațional Public/Treaty of Public International Law,* second edition, 2006, Lumina Lex Publishing House, Bucharest, p. 93.

[2] See *Resolution adopted by the General Assembly on 9 December 2011* [*on the report of the Sixth Committee (A/66/473)*] 66/100. The articles of this document apply to the international responsibility of an international organization for an unlawful international act.

of his investment without compensation[1]*."*

Another example is given by the most important attribute of state sovereignty: economic sovereignty[2]. The Charter of Economic Rights and Obligations of States (CERDS) of 1974 adopted by the UN[3] provides in Article 2 paragraph (1): "*Each state has and will freely exercise permanent sovereignty, including possession, use and disposition over all wealth, natural resources and economic activities*." Article 2 paragraph (2) provides that: "*Each state has the right: a) to regulate and exercise authority over investments within its national jurisdiction, in accordance with its laws and regulations and in accordance with its legislation and national objectives and priorities. No state shall be obliged to grant preferential treatment to foreign investment; b) regulate and supervise the activities of transnational corporations in its national jurisdiction and take measures to ensure that these activities comply with its laws, rules and regulations and are in line with its economic and social policies. Transnational corporations must not interfere in the internal affairs of a host state.*"

Last but not least, we have to mention that one of the principles of international investment law is the principle of international administrative liability, implicitly the patrimonial liability of the public administration authorities of the host state or, in very rare cases, of the home state of foreign investors, as well as administrative liability (contraventional) of investors, individuals and legal entities.

The principle of international administrative liability is found along with the principle of self-determination, the principle of non-recourse to force or threat of force, the principle of peaceful settlement of disputes, the principle of non-interference in the internal affairs of other states, the principle of good faith fulfillment of international obligations *(pacta sunt servanda)*, the principle of respect for human rights and fundamental freedoms, the principle of respect for the environment and responsible investment, the principle of special international civil, criminal and tort 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 promoting international investment, fair and equitable treatment and the principle of reciprocity. The enumeration is not limiting.

There are many different factors that affect the situation in which foreign investors decide to make investments. While trade factors tend to be the most important, foreign investors are likely to consider other factors, such as ease of doing business, available infrastructure and the legal system of the economy in

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[1] ICSID, 29 May 2003, § 154; also, ICSID (NAFTA), *Waste Management Inc. c. Mexico,* decision on 30 April 2004, § 98.

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

[3] 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, accessed at dated 10.04.2021

which the investment is made.

An international investment treaty is a treaty concluded between economies (usually two, sometimes several) for the purpose of promoting and protecting foreign investment. These usually take the form of bilateral investment treaties (BITs) or, increasingly, investment chapters found in free trade agreements (FTAs).

They create obligations for the government of the investment economy ("host economy") to treat foreign investors in accordance with the specific standards set out in the treaty.

Investment treaties almost always give foreign investors the right to seek compensation against the host economy for breaching the treatment standards contained in the treaty.

In general, the underlying obligations of the host economy include:

a. The requirement of "non-discrimination"

b. The requirement for "fair and equitable" treatment

c. The requirement to ensure "full protection and security"

d. Prohibition of illegal expropriation

e. Obligation to "honor commitments"

f. Guarantee of free transfer of funds related to investments

The analysis of these treatment standards will be performed in the following chapters.

4. Specific provisions in international investment treaties (IIAs)

BITs can influence the further development of regional and multilateral investment instruments, as in the case of TRIPS, when, inspired by them, developed countries have negotiated bilateral agreements in the field of intellectual property, as we highlighted at the end of the first chapter of this paper, setting higher standards of protection than TRIPS which contain provisions designed to create a standard of protection to be transposed into the domestic law of states parties. Some BIT models have been prepared by different states that reflect their positions and expectations regarding relevant international norms and standards. The BIT can also influence domestic law. Therefore, it is important to monitor the evolution of substantive provisions in the most recent 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 with 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,

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

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").

In conclusion, the provisions on treatment standards are part of the category of content provisions of these treaties and, as it turns out, there is a move towards a single regulatory treatment standard, based on the legitimate expectation of investors to benefit in a host or, as the case may be, in a commercial area free of transparency, legal proceedings and non-discrimination. In this regard, it is used an international standard which envisages the application of national investment treatment or the most favored nation treatment and thus the options for applying this international standard are stated. With regard to nationalization and expropriation, these clauses are always accompanied by the underlying reasons (usually of public utility and non-discriminatory nature), when such measures are possible, the compensation being fair and equitable, always payable in a convertible currency.

In case of liquidation of investments and repatriation of capital, specific standards are included in the body of treaties through clauses regulating these aspects both for the situation in which the agreement reached the term of validity/ execution, and in situations where certain events in the host or investor state make it impossible or risky to continue the investment.

Each international investment treaty contains, for the most part, specific clauses regulating the standards of treatment, in addition to the provisions on purpose and definition, exceptions, how to settle disputes (which is often presented differently for state-state and for investor-state disputes), institutional issues, duration, amendments and termination, configured according to the legal policy, in particular, by those guiding ideas that determine the orientation of the law in the process of its elaboration, development and application[1]. It was found that in the process of codification attempts, in essence, the problems were generated not by the particular interests of the subjects of this branch of law, but were determined by overlapping systems of law, which must lead to the use of the typological method[2] in formal investigations. Of course, also in this matter, the principle must be taken into account, in relation to which, on the occasion of any codification, the principle of hierarchy of norms, implicitly of normative acts,

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[1] See P. Pescatore, *Introduction à la science du droit,* Centre universitaire de l'État, Luxembourg, 1978, p. 232: *Conceived as a science and as a legal political art, it is the ability to conceive and formulate the guiding ideas that determine this orientation of law.*

[2] Because standards are provisions of content in investment treaties, in the negotiations on them, other criteria are added such as: belonging to a pool of legal civilization (see René David, *Grand sistemes de droit contemporains*, Dalloz Publishing House, Paris, 1978) and/or the degree of dependence on the typology of social organization systems (see J. Poirier, *Introduction à l'appareil Juridique – Tipologie des systèmes juridiques*, Ethologie Generale, Encyclopedie de la Pleiade, Paris, 1968, p. 1102).

must be respected, and for the same type of normative acts, contradictions will be avoided. The examples of jurisprudence were presented as pointed up, and for a better understanding of each standard, the cases solved in favor of investors were chosen, because it was found that in most cases, the rejection had as main reason the insufficiency of the evidence presented by investors or the finding of prescription of the right to action, not the actual non-existence of violations of these standards, which urges increased caution of states in the treatment of international investment.

Chapter IV
The main standards of treatment of international investments

In this area of novelty and reform, many of the questions have not identified their answer in either jurisprudence[1] or doctrine, and future research will develop these topics, especially the issue of the protective role of the treatment of international investment, of the standard (or standards) applied, which remain topics that need to be developed with due attention, individually or together with related topics belonging to this field of law, in further research studies.

In the process of *setting* these standards, a very important role belongs to the general principles of administrative law. The study of social reality, the finding of interdependence and the need for cooperation between states and individuals, could lead to the creation of effective bodies in the manifestation of this role. The general principles of European administrative law are systematized into four groups: 1) trust and predictability; 2) openness and transparency; 3) responsibility; 4) efficiency and effectiveness[2].

The standard of fair and equitable treatment, as well as the standard of full protection and security, are independent and absolute, as there are no special conditions for their implementation by the host state. The other standards such as national treatment and most favored nation standards are contingent or relative, as their application depends on the host state's conduct towards other investors.

1. "Fair and equitable" or "fair and impartial" treatment

It is an "absolute", "non-contingent" treatment standard, i.e., a standard that provides for the treatment to be given in terms whose exact meaning must be determined according to the specific circumstances of application, as opposed to the "national treatment" and "the most favored nation clause", which define the necessary treatment in relation to the treatment granted to other investments. As we mentioned, it is considered an absolute regime precisely because it is not conditioned by national legislation, but it establishes that the treatment applied to

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

[2] See Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public/Administrative law. Fundamental issues of public law,* University course, C.H. Beck Publishing House, 2016, pp. 808-810.

foreign investments must meet certain mandatory conditions[1].

1.1. Analysis of investment treaties

In this context, it was pointed out a fact, observed by most specialists in this field, that the way in which this standard is assessed depends on the circumstances, and there are no commonly accepted definitions, although they appear in most bilateral agreements and in other instruments on protection of investments, but in various wordings. For example, in art. 5 para. (1) of the US model of bilateral investment agreement states that "each party shall grant to the treaty-related investments a treatment in accordance *with the customary international law*, including fair and impartial treatment, and 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 Tribunals, in accordance with the principles of a fair trial which are encountered 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 customary international 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 granted treatment that is less favorable than that provided by international law, including through obligations under (international) treaties". Commenting on this text[2], it was stated that the contracting parties to the Energy Charter Treaty (ECT) are obliged to comply with such a treatment for foreign direct investment - FDI that is at least as advantageous as the treatment imposed by international law.

1.2. The jurisprudential context

In practice there have been observations such as:

- The claimant 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"[3];

- "It is the same in case of discriminatory treatment equivalent to a flagrant injustice on the part of the internal Tribunals (the internal judicial process

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[1] See A.F. Lowenfeld, *International Economic Law,* ed. 1, Oxford University Press Publishing House, 2002, p. 475; M. Sornarajah, *The International Law on foreign investment,* third edition, Ed. Cambridge University Press, 2010, p. 204; L. Navasardyan, *op.cit.*, p. 121 and note 1.

[2] A. J. Belohlavek, *Protecţia investiţiilor străine directe în domeniul energiei/Protection of foreign direct investment in energy*, C.H. Beck Publishing House, Bucharest, 2012, pp. 26-27.

[3] ICSID, The decision of August 30 2000, *Metalclad v. Mexic,* § 99-101 (Metalclad Corporation v. The United Mexican States, ICSID Case nr. ARB(AF)/97/1); ICSID, Decision of 20 May 1992, *SPP v. Egypt*, para. 82-83 (Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case nr. ARB/84/3).

being considered as a whole)"[1];

- "Even more generally in the case of any arbitral discrimination"[2];
- "Or another transaction accepted by the investor under duress"[3].

Recently, in 2016, in Glencore International and C.I. Prodeco v. Colombia (I) - Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia[4] (I) (ICSID Case No. ARB/16/6), resolved in favor of the investor, the decision of 27 August 2019 states that: *In the absence of any additional guidance in the treaty itself, it is generally accepted that the obligation to provide fair and equitable treatment (FET) contained in a treaty is a requirement for host states to comply with a certain standard of conduct towards protected investors. The fair and equitable standard is a legal concept which, although usually still undefined, has a content which can be determined by the rules of interpretation of the VCLT (Vienna Convention), aided by the case law of international tribunals. A host state violates such a minimum standard and implies international liability if its actions (or, in certain circumstances, omissions) violate certain adequacy thresholds or contravene the basic requirements of the rule of law, causing harm to the investor (para. 1308).*

The obligation to provide FET binds the state and can therefore be violated by the behavior of any branch of government. In principle, the FET standard can be violated, among other things:

- by the executive or administrative branch or its separate agencies, by administrative acts directly concerning the investor or investment;

- through the judicial system of the state, as a whole, when it commits a denial of justice;

or

- by legislation or regulation of general application that modifies the applicable legal framework to the detriment of the investor or investment (para. 1309).

Another comprehensive definition of "fair and equitable treatment" was given by the ICSID Tribunal, which ruled in *TecMed v. Mexico* case: *The investor expects the host state to act in a coherent, unambiguous and complete manner, totally transparent in his relations with the foreign investor, so that the latter can know in advance not only the rules and regulations applicable to its investment,*

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[1] ICSID, The decision of June 26, 2003, *Loewen v. USA*, para. 137 (Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case nr. ARB(AF)/98/3).

[2] ICSID, 12 May 2005, *CMS Transmission Company v. Argentina*, para. 290-295 (CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case nr. ARB/01/8).

[3] ICSID, 6 February 2008, *Desert Line Projects LLC v. Yemen*, para. 178-194 (*Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case nr. ARB/05/17).

[4] The complaints concerned a breach of fair and equitable treatment/Minimum standard of treatment, including requests for rejection of justice, arbitrary, unreasonable and/or discriminatory measures arising from the government's alleged unlawful interference with the coal concession contract, including the initiation of contesting the validity of changes agreed by the parties in 2010 and imposing royalties that are supposed to exceed what is due in the contract.

but also the relevant policies and practices as well as administrative directives, so as to enable him to plan his 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 he also undertook his commitments and when he planned and started his 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[1].

This broad view, linked to the standard of "fair and equitable treatment", led some foreign investors to invoke "legitimate expectations" as a basis for protecting their own interests. In the above case - Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia (I) (ICSID Case No. ARB/16/6) - Arbitrator Oscar M. Garibaldi agreed to the use of the term "legitimate expectations" only on the understanding that it means the same as "reasonably objective expectations". Mr. Garibaldi did not accept the applicability of any undeclared criteria of legitimacy other than objective reasonableness. In his view, the term "legitimate expectations", although commonly used, is singularly unfortunate, as "legitimate" presupposes a criterion of legitimacy which is not always made explicit in the discussion of expectations protected by the FET standard. In ordinary language, a reference to "legitimacy" implies, expressly or tacitly, a legal, political, moral, religious, etc. criterion. The use of the term "legitimate expectations" without anchoring it to a criterion of legitimacy based on objective reasonableness leaves the term open to redefining by changing the criterion of legitimacy to include or exclude expectations (for moral, political, religious or other reasons) and thus it distorts the original meaning of the term. Mr. Garibaldi understands that when an investor's expectations began to be considered a factor in the FET analysis, the initial idea was to refer to an investor's reasonable expectations, i.e. the expectations that an (objective) investor would have with ordinary caution, distinguished from the real expectations of a certain investor. He believes that this is still the right concept and this is his understanding of the term "legitimate expectations".

In the present case, the Tribunal stated Schreuer's theory[2]:

It is unlikely that a view will prevail that sees each and every violation of

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[1] ICSID, 29 May 2003, § 154 (Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case nr. ARB (AF)/00/2); also, ICSID (NAFTA), *Waste Management Inc. v. Mexico*, decision of 30 April 2004, § 98 (Waste Management, Inc. v. United Mexican States, ICSID Case nr. ARB(AF)/98/2); See comment on pp. 1216-1218, Dinh Nguyen Quoc, Dailier Patric, Forteau Mathias, Pellet Alain, *Droit International Public*, 8eme ed., Paris, 2009.

[2] See Ch. Schreuer, *Fair and Equitable Treatment: Interactions with other Standards*, *Transnational Dispute Management*, Vol. 4, Issue 5, 2007, p. 20 (Doc. RL-56)

a contract as a breach of the FET standard. Where the outer limits of FET with regard to contracts will be drawn is another matter. A formal repudiation of the contract by way of a sovereign act may not be the best criterion. In fact, an action that abrogates a contract through an act of puissance publique would probably more accurately be described as an expropriation. A more relevant test for the violation of the FET standard with respect to contracts would be whether the investor's legitimate expectations regarding a secure and stable legal framework are affected. Not every violation of a contract would trigger a finding to this effect [...].

Legitimate expectations are an old concept applied in 1905, in a dispute between France and Haiti, settled by the Permanent Tribunal of 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, 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 jurisprudence of the arbitration - in very strict conditions, because these expectations must be "reasonable and legitimate".

Other cases:

In the case of Murphy Exploration & Production Co. v. Ecuador (2017)[3], ruled in favor of the investor, the Tribunal considered that the 50% fee did not violate the standard of fair and equitable treatment, as it did not "fundamentally alter" the balance of rights agreed with Ecuador in the service contract. It was unreasonable for the investor not to expect any government response to the sharp rise in oil prices. Still, when the fee was raised to 99%, the Tribunal found that Ecuador breached the standard of fair and equitable treatment, in breach of the claimant's legitimate expectations. According to the Tribunal, "[…] not only has this development fundamentally changed the nature of [the contract], but it has taken place in the context of an increasingly hostile and coercive investment environment."

In Micula v. Romania (2013)[4], ruled in favor of the investors, the Tribunal decide that, although in general an investor cannot reasonably expect the law prevailing at the time of making the investment to remain unchanged over the life of the investment, in some cases, if the host economy has taken action

[1] *France v. Haiti*, case *Aboilard*, arbitral judgment of 26 July 1905, RSA vol. XI, p. 80.
[2] ICSID, *Waste Management Inc. v. Mexico*, Decision of 30 Apr. 2004 (Waste Management, Inc. v. United Mexican States, ICSID Case nr. ARB(AF)/98/2).
[3] Murphy Exploration & Production Company – International v. The Republic of Ecuador (II) (PCA Case No. 2012-16), The final decision of 10 February 2017.
[4] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case nr. ARB/05/20, The final decision of December 11, 2013 with the separate opinion of the professor Georges Abi-Saab.

that creates a legitimate expectation that the law will not change, then the investor may have reason to claim the host economy that subsequently acts differently. Romania created a legitimate expectation that the incentives will be available in substantially the same form as they were initially offered (for a period of ten years). First, the purpose and structure of the legislation, which were communicated to the investors, was to attract investment by creating an expectation that the benefits would be in force, substantially, in the same form for a period of ten years. Second, the benefits of the legislation were available only to investors who qualified by applying through an administrative process and met certain requirements.

The tribunal found that the host government was liable for revoking specific representations on which the investor relied in making the investment decision.

In the case of Crystallex International Corp. v. Venezuela (2017)[1], ruled in favor of the investor, the Tribunal found, as in the case of Micula previously exposed, that the government returned to specific representations given to an investor, which gave rise to receivables. In this case, the Ministry's letter of May 2007, which gave permission to start operations, created legitimate expectations on which Crystallex relied and acted. By acting in a different way from the one expected by the investor, Venezuela frustrated those legitimate expectations and therefore violated the treaty. Finally, Venezuela was forced to pay the investor $ 1.2 billion plus interest and costs related to the process.

One case based on the absence of a due process (the investor was denied the due process) was Dan Cake (Portugal) S.A. v. Hungary (2016)[2]. Due to very short and legally inefficient deadlines imposed by the national Tribunal in the event of *Danesita*'s bankruptcy case, the investor became the subject of liquidation proceedings in the Hungarian Tribunals, missing the possibility of reorganization. Reviewing the individual requirements imposed by the Tribunal, the Tribunal concluded that "common sense prevails", "it seems almost impossible to meet them within 15 days", it demonstrated "a lack of understanding by the national Tribunal" of the main underlying facts and were "more than surprising", reasons for which the Tribunal concluded that the actions of the national Tribunal represented a denial of justice and a breach of the relevant treaty.

In the case of Cervin Investissements SA v. Costa Rica (2017)[3], settled in favor of the investor, the dispute was triggered by the fact that, under Costa

[1] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case nr. ARB(AF)/11/2 in the Decision of April 4, 2016.
[2] Dan Cake v. Hungary - Dan Cake (Portugal) S.A. v. Hungary (ICSID Case nr. ARB/12/9), Decision of 21 November 2017, and Decision of 25 February 2020.
[3] Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, ICSID Case nr. ARB/13/2, Decision of 7 March 2017, with separate opinion on costs issued by Ricardo Ramírez Hernández.

Rican law, the regulator should have resolved the investor's request within eight days, but he resolved it in two years and four months, which is why the Tribunal decide that, although not any breach of the administrative procedure would be punishable under an investment treaty, in this case the extent of the delay led to a breach of the fair and equitable treatment obligation.

Another reference case was Clayton et al. v. Canada (2015)[1], a dispute arising from a project to operate a mining quarry and a maritime terminal was rejected by the government following an environmental assessment process, in which the Tribunal decide that non-compliance with appropriate decision-making procedures can lead to breaches of investment treaty commitments. The Environmental Assessment Commission adopted, without notification to the investor, an "unprecedented approach" to the revision of the project by amending it according to a criterion that had not been previously identified and was not found in the Commission's terms of reference.

Another case concerning the lack of transparency in legal proceedings or actions of the host economy was Técnicas Medioambientales SA v. Mexico (2003)[2]. The tribunal invested in resolving this dispute ruled that an investor has the right to expect the government to act in a transparent, unambiguous manner. If the government acts without transparency, ambiguity or inconsistency, it can violate the obligation to provide fair and equitable treatment.

In Metalclad Corp. v. Mexico (2000)[3], the Tribunal found that the lack of clarity in the law of the host economy could give rise to claims of breach of the investment treaty. In this case, Mexican law did not specify whether the local government had the authority to apply for the additional building permit or whether it had the authority to deny the investor the permit. Consequently, Mexico breached its obligation to provide fair and equitable treatment.

In Deutsche Bank AG v. Sri Lanka (2012)[4], the dispute was triggered by the economic crisis that led the investor to take certain financial measures. The Central Bank of Sri Lanka launched an investigation into the agreement with Deutsche Bank, eventually issuing a "stop-payment" order, which prohibits subsequent payments under the agreement. The Tribunal decide that governmental power should be used for the purpose given to it by law and should not be exercised as a pretext for other reasons. In this case, it was found that the investigation conducted by the Central Bank was undertaken for improper reasons and in bad faith, serving as a pretext for issuing an order, to stop the

[1] Bilcon of Delaware et al v. Government of Canada, case PCA nr. 2009-04, Compensation decision of January 10, 2019.
[2] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case nr. ARB (AF)/00/2, Decision of 29 March 2003 in favor of the investor.
[3] Metalclad Corporation v. The United Mexican States, ICSID Case nr. ARB(AF)/97/1, Decision of 30 August 2000 in favor of the investor.
[4] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID, case nr. ARB/09/2 in the Decision of 31 October 2012, with the separate opinion of Makhdoom Ali Khan, resolved in favor of the investor.

payment. This was not based on transparency and it deprived the investor of a fair trial, with the final report being prepared within just 24 hours and containing findings to which the claimant did not have the opportunity (real time required) to respond.

Another case in which the Tribunal sanctioned arbitrary, disproportionate treatment in which the actions of the host economy were classified as arbitrary, disproportionate and inconsistent was Occidental Petroleum Corp. v. Ecuador (2012)[1], in which it was decided that the Government should not act in a way that can be characterized as disproportionate. In this case, the sanction applied to the investor (termination of a concession, amounting to many hundreds of millions of dollars) was disproportionate to the wrong actions of the investor (failure to notify). Similarly, the sanction was disproportionate to the effectiveness of any "message of discouragement" that Ecuador intended to convey to the wider community of oil and gas companies in the economy. As a result, Ecuador breached its obligation to provide fair and equitable treatment.

Regarding the meaning and interpretation of these clauses, divergent opinions were formulated in the arbitration proceedings. Among the reference cases, it can be mentioned: within 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, par. 284[2] or *Azurix v. Argentina*, ICSID case no. ARB/01/12, Decision of 14 July 2006, para. 361. It may be noted that the first clause was applied in cases relating to the conduct of bilateral investment agreements and in disputes within the jurisdiction of NAFTA. It was thus established that "fair and equitable treatment" was applied in certain circumstances registered by the dispute settlement body, allowing it to find that the host state had not fulfilled 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 unlawful 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

[1] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on jurisdiction dated 9 September 2008, dissenting Opinion of Professor Brigitte Stern (Decision on jurisdiction), Award dated 5 October 2012, Dissenting Opinion of Professor Brigitte Stern (Award), decided in favour of investor.

[2] "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 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."

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 shows 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, it can be listed, therefore: compliance with legal rules and procedures, predictability, stability, legitimate expectations, non-discrimination or transparency.

In conclusion, the "fair and equitable treatment" standard sets a minimum level of treatment to be granted to protected investors and their investments and non-compliance is the most common type of breach of the treaty by governments. The principle of trust (legitimate expectation) and the principle of legal security play an important role. Any individual who finds himself in a situation where the administration provided him with precise assurances, giving rise in his mind to well-founded hopes, is considered to have acquired a legitimate confidence in the administration's action[2]. As indicated above, what constitutes "fair and equitable treatment" is determined by analyzing all the circumstances of a particular case. Differences in the content of the treaties on the wording of this standard give rise to problems of interpretation which are, in most cases, resolved by the Tribunals involved in resolving such disputes. It can be concluded that an exact wording contained in the treaties is essential for the interpretation and application of this standard, in particular due to the possibility to identify a number of circumstances that were taken into account in finding a fair and equitable treatment, such as:

a. the fundamental change of law contrary to legitimate expectations (ie, if there has been a fundamental change in investments that is contrary to the legitimate expectations of the investor).

b. verifying the existence of the situation in which the host economy returned or not to specific representations made to the investor on which it relied in making the investment decision;

c. the existence of the premised situation in which the investor was denied the right to a lawsuit or access to justice;

d. lack of transparency in specific procedures or actions of the host economy;

e. acts of harassment, coercion, abuse of power or misconduct exercised

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[1] For details, see: *Étude* 2005, pp. 37-41, respectively, pp. 50-51, notes 18-21.

[2] Arrêt du Tribunal de première instance (première chambre élargie) du 16 octobre 1996, Efisol S.A. c. Commission des Communautés européennes. Règlement (CEE) no.594/91 sur les substances qui appauvrissent la couche d ozone – Attribution de quotas – Licences d'importation – Refus d octroi – Demande en indemnité – Protection de la confiance légitime. Affaire T – 336/94. *Recueil de jurisprudence 1996*, page II-01343, *apud* Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public/ Administrative law. Fundamental issues of public law,* University course, C. H. Beck Publishing House, 2016, p. 812.

by the host economy; and

f. whether the actions of the host economy can be labeled as arbitrary, disproportionate or inconsistent.

The examples presented above illustrate how these circumstances may arise in real situations, and the proof of existence, of meeting these conditions must, therefore, be made with great precision[1].

2. "Full protection and security" treatment

This standard of treatment covers protection against physical or legal violations of the host state against international investors, thus creating an obligation[2] for the host state not to directly harm investors/investments by acts attributable to the state and to protect investors and investments against private actions (in the course of civil upheavals, as well as the actions or inactions of the host state, its organs or agents), all the more so as various institutions of administrative law are organized in compliance with the principles of legitimate expectations and legal certainty. The principle of legal security concerns the very security of the legal circuit. When the administrative decision does not respect the external limits established by law to the discretion of the administration or, in other words, when the administration orders a legal effect not provided by law, the excess of power occurs[3]. This standard appears in different formulas ranging from the most commonly used "full protection and security" to "most constant protection", "protection and security" or "full legal protection and full legal security".

Often, the standard of full protection and security is regulated in treaties or established by case law in reporting or together with the standard of fair and equitable treatment, in particular as regards the assessment of their circumstances.

2.1. Analysis of investment treaties

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. Bilateral investment agreements include, as mentioned, clauses such as "fair and equitable treatment" and "full protection and security". The wording of these clauses suggests that the host state has an

[1] ICSID, *Plama Consortium Ltd c. Bulgaria*, The decision of August 27, 2008 (Plama Consortium Limited v. Republic of Bulgaria, ICSID Case nr. ARB/03/24).

[2] The measures that a host state has applied can only be problematic if it causes "*intolerable consequences"* (see G. Cordero Moss, *Full protection and security* in A. Reinischs (ed.), *Investment protection standards*, OUP, 2008, p. 139. In this case, too, the arbitration practice was uniform in its assessment that the measures taken by a host state should be reasonable in the circumstances.

[3] Cătălin-Silviu Săraru, *op. cit.*, 2016, pp. 811, 813.

obligation to take active measures to protect the investment from possible negative/adverse effects that may come from private parties: demonstrators, employees or business partners, or from the actions of the host state and its organs, including its armed forces.

An interesting example is the Japan-Morocco BIT signed on 08 Jan. 2020:

Article 4. General Treatment

1. Each Contracting Party shall in its Territory accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

Note: The Contracting Parties confirm their shared understanding that "customary international law" generally and as specifically referred to in this Article results from a general and consistent practice of States that they follow from a sense of legal obligation. The Contracting Parties also confirm that the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

2. For greater certainty, a change of the regulation of a Contracting Party does not constitute by itself a violation of paragraph (1).

3. It is understood that: fair and equitable treatment includes the obligation of the Contracting Parties to guarantee access to the Tribunals of justice and administrative tribunals and not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process of law; and full protection and security requires each Contracting Party to ensure the necessary level of police protection required under customary international law.

4. Neither Contracting Party shall, within its Territory, in any way impair investment activities of investors of the other Contracting Party by unreasonable, arbitrary or discriminatory measures.

In the doctrine, there is a sense that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of "due diligence", i.e. a reasonable degree of vigilance. Dolzer and Stevens said about the full standard of protection and security: "*the standard provides a general obligation for the host state to act with care in protecting foreign investments, as opposed to creating a 'strict liability' that would make a host state responsible for any destruction of the investment, even if caused by persons whose acts could not be attributed to the state*."[1] This standard clause has traditionally been included in treaties of friendship, trade and navigation, and is now a common clause in international investment protection instruments[2].

[1] 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.

[2] A. F. Lowenfeld, *op. cit.*, p. 476; M. Sornarajah, *op. cit.*, p. 205.

2.2. The jurisprudential context

Being present in the vast majority of foreign investment protection treaties, it was easily identified by investment tribunals, a conclusion confirmed by ICSID's international jurisprudence[1]. This Center considered that the standard we are referring to is in fact a manifestation of the traditional *due diligence* obligation[2], 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 be able to be attributed to the state[3]", such as: security/ physical safety (protection against civil violence and protection against violence of state organs), legal protection, liability standards, specifically: failure by the host state to protect against insurgencies or riots[4]; lack of adequate legal protection of the investor and his investment[5].

However, the "full and complete protection and security[6]" clause granted to foreign investment applies in particular during periods of insurrection, social unrest and other public upheavals, including illegal ones. It covers damage or loss suffered by an investor as a result of such violent incidents, either directly due to government acts or as a consequence of lack of adequate protection of investment by civil servants or the police.

The obligation to ensure full protection and security generally requires the host economy to exercise vigilance and diligence with regard to the physical protection of investments and investors, taking into account the circumstances and resources of the host economy.

Recently, in Cengiz İnşaat Sanayi ve Ticaret AS v. Libya, ICC Case No. 21537/ZF/AYZ, settled in favor of the investor in 2018, summarizing, the

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[1] CIJ, 20 August 1989, ELSI, Rec CIJ p. 65, § 108; ICSID, 27June 1990, *AAPL c. Sri Lanka*, para. 47-50 (Asian Agricultural Products Ltd. v. Republic of Sri Lanka, case ICSID nr. ARB/87/3); ICSID, 12 October 2005, *Noble Ventures c. Roumanie* para. 164 (Noble Ventures, Inc. v. Romania, ICSID Case nr. ARB/01/11).

[2] ICSID, *ibid*. para. 73-77; ICSID (NAFTA), 26 June 2003, *Loewen c. SUA*, para. 125 (Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case nr. ARB(AF)/98/3).

[3] UNCITRAL, 3 September 2001, *Ronald S. Lauder v. Czech Republic*, para. 308.

[4] ICSID, 27 June 1990, *AAPL v. Sri Lanka*, para. 72 (Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3); ICSID, 8 December 2000, *Wena Hotels v. Egypt*, para. 84 (Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4); ICSID, 21 February 1997, *AMT v. Zair*, § 6.02 and following (American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1).

[5] ICSID, 14 July 2006, *Azurix v. Argentina*, para. 406-408 (Azurix Corp. v. The Argentine Republic, ICSID Case nr. ARB/01/12); ICSID, 6 February 2007, *Siemens c. Argentina*, para. 303, (Siemens A.G. v. The Argentine Republic, ICSID Case nr. ARB/02/8).

[6] 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".

Tribunal concluded that the regular Libyan army and militias that were part of the insurrectionary movement and that were then controlled by the government, robbed and caused physical damage to the main camps in Cengiz Libya. Under the rules of international law assignment, the Libyan State must assume responsibility for such conduct, which infringed the FPS standard guaranteed in the applicable BIT Article 2 (2) (para. 435 of the Decision[1]).

The positive obligation that the FPS standard imposes on the state is an obligation of the means - not of the result. The question which the Tribunal answered was whether the Libyan government exercised reasonable vigilance to protect Cengiz's investments in the Southern Region, taking into account the state's means and resources and the political and general security situation in Libya (para. 437).

In summary, Libya failed to provide any security to the two main camps, an investment worth nearly $ 90 million, full of valuable machinery and equipment, located in the southern region were subject to an increased risk of attack. Libya did not deploy any regular army units, police forces or government-controlled militias to protect such assets (para. 438).

The Tribunal concluded that Libya also violated the second stage of the FPS standard: it failed to provide government protection to the two main camps, at a time when there was a heightened security deficit in the south of the country. This failure facilitated the action of civilian crowds that were repeatedly able to assault the main camps, looting equipment and destroying facilities (para. 442).

The Tribunal also concluded that the Libyan army and militias controlled by the Libyan army caused physical damage to the main settlements in Cengiz Libya, looted machinery and equipment and eventually took control of the Sebha main camp and that Libya failed to provide armed protection, or the protection of the militia or police to the main camps, further facilitating the fact that civilian mobs stormed the facility (para. 451).

This conduct, which is attributable to the Libyan state, involves a breach of the positive and negative obligations of the FPS standard provided for in Article 2 (2) of the BIT.

As regards the manner in which the Tribunal determined the compensation for the damage caused by Libya to the investment, the legal standard chosen by the it was not disputed by the parties: the principle of full reparation of the damage caused, firmly established in jurisprudence, starting with PCIJ decision in the case of Chorzow Factory[2], where the PCIJ established that reparation was an essential and coherent principle of customary international

[1] Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf, accessed on 09 March 2021.

[2] There was a state - state type case, *Germany v. Poland (1927) P.C.I.J, Case concerning the Factory at Chorzow (Germany v. Poland), PCIJ, Claim for Indemnity (Jurisdiction), July 26, 1927, Series A, No. 9 (1927), Doc. CL-80.*

law and should be applied even in the absence of any specific provision enacting an obligation in the treaty underlying the dispute.

It is a principle of international law that a breach of an undertaking implies an obligation to make good reparation. Reparation is therefore an indispensable complement to the failure to apply a convention, and it need not be mentioned in the convention itself (para. 568 and the following). The principle of full reparation, as adopted by the Chorzow Factory decision, was subsequently codified in the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

According to the ILC Draft Articles, the State responsible for an unlawful international act is under an obligation to compensate for the damage caused by it, to the extent that such damage is not repaired by restitution. The compensation shall cover any financially assessable damage including loss of profit to the extent that it is established.

Other cases:

In the case of Ampal-American Israel Corp. v. Egypt (2017)[1] the Tribunal decide that due diligence for the host economy means taking reasonable steps in response to warnings. In this case, the security situation at the time of the attacks was difficult due to ongoing political events in Egypt and the region, and as a result, armed militant groups took advantage of political instability. Yet, although Egypt could not have prevented the first attacks on the pipeline - of which it was not warned - those attacks "should have been seen as a warning by the Egyptian state, in the sense that further attacks could arise if the appropriate security measures were not taken and implemented." Nevertheless, Egypt did not take "any concrete measure" to protect the pipeline from further attacks and, as a result, breached its obligation.

In Copper Mesa Mining Corp. v. Ecuador (2016)[2], the Tribunal decide that the guarantee of "full protection and security" requires the host economy to exercise reasonable diligence. In this case, Ecuador made no effort to assist the investor in gaining access to the place/land on which the investment was to be developed, in order to carry out the activities necessary for its environmental impact study. On the contrary, by issuing a resolution prohibiting anyone from accessing the site, including the investor, Ecuador has given "legal force to the factual effect of the physical anti-mining blockade" on the concession. In doing so, Ecuador made it impossible, both legally and physically, for the investor Copper Mesa to complete the environmental impact study, leading to the loss of its investment.

There are other cases too in which this standard could be invoked as a

[1] Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case no. ARB/12/11, Decision of 1 February 2016, and Decision of 21 February 2017.

[2] Copper Mesa Mining Corporation v. Republic of Ecuador, case PCA no. 2012-2, Decision of 15 March 2016, pronounced in favor of the investor.

legal measure of protection and security[1]. For example, in the case of *Saluka Investments BV (Netherlands) v. The Czech Republic*, the 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 by force." Several cases in the ICSID resolution competence are illustrative in this respect[2]. 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, from a historical point of view, this special standard was developed in the context of the physical protection and security of the officers, employees and facilities of a company." Despite differences of opinion regarding the separation or identity of these two standards - fair and equitable treatment and full protection and security - as a conclusion in relation to those discussed, we must reiterate that in resolving cases concerning such situations, arbitral tribunals have indicated that the obligation of full and total security protection does not constitute 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 two sentences describing the protection of investments appear successively in the form of different obligations and the same decision concludes, "investments must always be treated fairly and equitably, they must enjoy 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".

In conclusion, as we have shown in the introductory part of this standard, arbitral tribunals often extend the standard of full protection and security to legal violations[3], the connection between the standard of full protection and security and legal protection being shown in para. 613 of the partial Decision in *CME v. Czech Republic (case CME Czech Republic B.V.- The Netherlands v. The Czech*

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[1] See, *Jack Rankin c. Iran*, judgment of 3 November 1987, *17 Iran-United States Claims Tribunal Reports*, para. 135 and 147.

[2] *American Manufacturing & Trading v. Zaire*, ICSID, case nr. ARB/93/1, judgment of 21 February 1997; *Wena hotel Ltd. v. Republique Arabe d'Egypte*, ICSID, case nr. ARB/98/4, *Decision on jurisdiction of 29 June 1999, decision of the court of 8 December 2000; decision for annulment of 15 February 2002* (BIT, *Royaume-Uni de Grande-Bretagne et d'Irlande de Nord/Republique Arabe d'Egypte*).

[3] See declarations pronounced in: *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Decision, 13 September 2001, para. 613; *Sempra Energy International v. Republica Argentina*, ICSID Case nr. ARB/02/16, Adjudication, September 27, 2007, para. 323.

Republic, based on UNCITRAL rules, Czech Republic - Netherlands BIT of 1991, settled in favor of the investor) as follows:

The host state is obliged to ensure that neither by amending its laws nor by the actions of its administrative bodies, the security and the protection agreed and approved for the investments of the foreign investor are withdrawn or devalued.

The major concern in the field remains the reconciliation of individual legal rights to protection with the requirements of an effective and efficient administration. At the administrative level, i.e., at the point of degeneration of some actions or inactions of the states that turn into violations of the standards of protection discussed, the discretionary power of the administration is not to be confused with the arbitrary; in French law, discretionary power evokes, *lato sensu*, the freedom of decision and action of the executive in law. It represents for the administration, the freedom of appreciation, action and decision[1]. In the German doctrine, the notion evokes for the administration a possible and necessary margin of conduct in the application of the law. Establishing the mode of action in a concrete case is not only influenced by legality causes but also by opportunity causes[2].

According to arbitration practice, in proving a breach of the full standard of protection and security, investors must provide sufficient evidence that the host state encouraged such breaches, contributed or failed to apply reasonable measures to protect the interests of an international investor.

3. National treatment (NT) and most favored nation clause (MFN)

International investors aim at the absence of unfavorable discrimination that would put them at a competitive disadvantage and try to avoid these situations in which competitors from other countries receive more favorable treatment.

3.1. Analysis of investment treaties

Investment treaties generally contain non-discrimination obligations regarding the treatment of investors and protected investments. There are two non-discrimination obligations: "national treatment" and "most favored nation treatment."

The MFN standard thus helps to establish equal competitive opportunities between investors from different states and prevents the distortion

[1] See Cătălin-Silviu Săraru, *op. cit.*, 2016, p. 811.

[2] J. Schwarze, *Droit administratif europeen*, Bruylant Publishing House,1994, pp. 274-294, *apud* Cătălin-Silviu Săraru, *op. cit.*, 2016, p. 811.

of competition between investors through discrimination based on nationality.

The MFN treatment provision has the following main legal characteristics[1]:

• It is an obligation based on treaties; therefore, it must be included in a specific treaty.

• It requires a comparison between the treatment given to two foreign investors in like circumstances.

• It is therefore a relative standard and should be applied to similar objective situations.

• An MFN clause is governed by the ejusdem generis principle, in the sense that it can only be applied to issues that belong to the same subject or the same category of subjects to which the clause refers.

• MFN treatment operates without prejudice to freedom of contract and, therefore, states have no obligation under the MFN treatment clause to grant special privileges or incentives granted by contract to an individual investor or to other foreign investors.

• In order to establish a violation of the MFN treatment, a less favorable treatment must be found, based on/or coming from the nationality of the foreign investor.

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.

A recent example of MFN clauses is provided by art. 3 from BIT Georgia - Japan[2]:

1. Each Contracting Party shall in its Territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to investors of a non Contracting Party and to their investments with respect to investment activities.

2. For greater certainty, the treatment referred to in paragraph 1 does not encompass international dispute settlement procedures or mechanisms under

[1] See *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nation 2010, pp. 13,14.

[2] Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6078/download, accessed on 09 March 2021.

this and any other international agreement.

3. The provisions of this Article shall not be construed so as to oblige a Contracting Party to extend to investors of the other Contracting Party and to their investments any preferential treatment by virtue of any existing or future regional economic integration union or customs union to which the former Contracting Party is a party.

The principle of non-discrimination is frequently applicable through the conventional clauses inserted in bilateral treaties, whereby 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 hand. These norms are not customary and are not binding on states in the absence of express conventional provisions. The functioning of the MFN standard 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 was dealt with by arbitral tribunals, for example in the case of *Maffezini v. Spain*[1] and *Suez, Vivendi v. Argentina*[2]. In determining this, the condition of "like circumstances" may be taken into account, as well as the wording of those MFN clauses contained in the investment treaties, which tend to be 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[3].

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 atmosphere between the relevant actants and avoids market distortions, favoring a reliable competitive environment, thus contributing to the economic objective of international investment treaties. 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 conditions of access and market conditions, as well as opportunities[4].

States that do not wish to comply with the MFN clauses exercise caution during the BIT negotiations, although the most-favored-nation clause was

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[1] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case nr. ARB/97/7.

[2] Suez, Sociedad General de Aguas de Barcelona, S. A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case nr. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Re public). Decision on jurisdiction of 3 August 2006, available online at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/121/suez-and-vivendi-v-argentina-ii-, accessed on 06 March 2021.

[3] Such an application was denied in the case *Plama Consortium Limited c. Bulgaria*, ICSID Case ARB/03/24, Decision on jurisdiction of 8 February 2005.

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

debated in the International Law Commission (ILC) at its nineteenth session in 1967, this concern initially bearing the title "most-favored-nation clause under treaties", the title of the theme being abbreviated by the Commission at its twentieth session in 1968, under the heading "Most-favored-nation clause"[1]. In 1978, at the 30th 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[2]. 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[3]. On 1 June 2007, at its 29th 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, also establishing the main points of work, 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[4].

3.2. The jurisprudential context

As far as the jurisprudence is concerned, the Tribunals have different ways of interpretation, one of them being that of *Maffezini v. Spain*, a point of view promoted by the ICSID Tribunals[5].

In White Industries Australia Limited v. The Republic of India, a case settled by ICC in favor of the investor under UNCITRAL rules, concerning infringements of Australia - India BIT (1999), by the Decision of 30 November 2011, the Tribunal found the infringement Article 4 paragraph 2 of the BIT - the "most-favored-nation" clause - which states that, "a contracting party shall at any time treat investments in its territory on a basis no less favorable than that granted to investments of investors in any third country."

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[1] See *CDI (ILC) Report*, session XIX, 8 May-14 July 1967, doc. A/6709/Rev.1, § 48.
[2] See Doc. A/CN.9/224, 20 May 1982.
[3] See Doc. A/43/879, 28 November 1988, pp. 2-3.
[4] See Doc. A/CN.4/L.719, 20 July 2007, pp. 1-2. The annex to this document is important, containing the summary of the CDI activity in the field, pp. 3-16, *apud* Cristina Elena Popa Tache, *Dreptul Internațional al Investițiilor. Coordonate/International Investment Law. Coordinates*, Epublishers Publishing House 2019, p.165.
[5] ICSID, *Maffezini c. Spania*, ruling on jurisdiction, 25 January 2000, § 54-64; ICSID, *Siemens v. Argentina*, 3 August 2004, § 32-110.

In this regard, White states, "each contracting state shall maintain a favorable environment for investment in its territory by the investors of the other contracting state, in accordance with Article 4 (5) of the Agreement between the Republic of India and the State of Kuwait for the mutual encouragement and protection of investments, 27 November 2001 ("India-Kuwait BIT")."

White also argued that a delay of more than nine years in a party's request to implement an international arbitration decision in a country party in the New York Convention is an unacceptable delay according to the objective and international standards and, consequently, India's failure to enforce the arbitral Decision is a breach of its obligation to provide "effective means of asserting receivables and enforcing rights" in respect of White's investments.

With regard to India's assertion that Article 4 (2) of the BIT does not incorporate Article 4 (5) of the BIT India-Kuwait, as this would: (a) fundamentally undermine the BIT's carefully negotiated balance; and (b) be contrary to the BIT's emphasis on domestic law; the Tribunal agreed with White that none of these arguments were sustainable.

Given the question whether the protection provided by the MFN clause in the BIT India-Kuwait should be limited due to the BIT's "strong emphasis" on India's domestic law, the Tribunal accepts as appropriate the approach suggested by Stephan Schill[1], who proposes that: "The only relevant factor is whether the MFN treatment is applied or whether it is subject to an explicit or implicit exception. In addition, the distinction between specifically negotiated provisions and other provisions would introduce different classes of provisions during the same period of the treaty ... [there is no] room for the creation of a specific class of "specifically negotiated" provisions in the basic treaty, which is in itself immune to circumvention by more favorable treatment granted to a third party to the BIT, unless such provisions can be interpreted as constituting an exception to the MFN treatment."

Finally, as foreshadowed, the Tribunal considered that it would be inappropriate to retain, as an exception to the MFN's treatment, the BIT's references to domestic law (paras. 11.1, 11.2).

In the case of *Tecmed v. Mexico*, the ICSID Tribunal held that the provisions which form the essence of the contracting parties' commitment must be negotiated between them and do not fall within the scope of the clause (judgment of 29 May 2003, para. 74)[2].

The connection between the MFN clause and the non-discrimination obligation also requires the host economy to grant protected investments and investors treatment that is no less favorable than the treatment it grants to

[1] Stephan W Schill, *Multilateralizing Investment Treaties through Most-Favourite-Nation Clauses,* Ed. Cambridge University Press, 2009, in *The Multilateralization of International Investment Law* (Cambridge International Trade and Economic Law, pp. 121-196). Cambridge: Cambridge University Press. two:10.1017/CBO9780511605451.005.

[2] See M. Sornarajah, *op.cit.*, pp. 204-205.

investments and investors of any third country in like circumstances.

In the case of Bayindir Insaat Turizm v. Pakistan (2009)[1], the "most-favored-nation" clause forced Pakistan to treat the investor no less favorably than it treated other foreign investors in the way Pakistan exercised its rights under government contracts. Nonetheless, as regards the facts of this particular case, the investor failed to demonstrate that it was in fact treated differently from foreign investors in similar situations.

In 1978, the ILC adopted the Draft of articles (*Draft Articles on Responsibility of States for Internationally Wrongful Acts)* on the 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 established 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[2]. 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 Medio Ambientales Tecmed S.A. v. Mexico* stands out by addressing issues related to the most-favored-nation clause. In the case of *Maffezini v. Spain*[3], the Argentine investor in Spain was authorized to benefit from a more favorable term provision under the *BIT Chile/Spain*, i.e., more favorable than that provided by the *BIT Argentina/Spain*, on the basis of which the action was filed. 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[4]. An ICSID[5] tribunal considered that "the fair and equitable standard of treatment must be interpreted in a way that allows the BIT's objective to be achieved as favorably as possible, which is to protect investment and create favorable conditions for

[1] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, case ICSID no. ARB/03/29, Decision of 27 August 2009.

[2] See *Oppenheim's International Law*, edited by R. Jennings and A. Watts, Vol. I, Harlow, 1992, p. 1328.

[3] *Emilio Augustin Maffezini v. Royaume d'Espagne*: ICSID case nr. 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/Spania.*

[4] See details in *Etude 2005*, pp. 35-36.

[5] *MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile*, ICSID case no. ARB/01/7, Judgment of 25 May 2004, BIT, *Malaezia/Chile*, para. 104.

investment". The tribunal considered that the inclusion of the rules contained in other bilateral investment agreements concluded by Chile with third countries 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 Tribunals rejected the applicability of these provisions to MFN: *ADF Group Inc. v. USA* (Decision of January 9, 2003), par. 136, and *Pope & Talbot Inc. c. 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 one 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 Tribunals 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 attempts, 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.

The outlook 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 defining the beneficiaries concerned, the phases covered by the investments and any applicable exceptions. As far as we are concerned, we emphasized the importance of this issue and the fact that it currently benefits from a strong concern for codification, with a view to achieving clear regulations for international practice and jurisprudence[1].

4. National treatment

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[2].

[1] For the whole issue, see UNCTAD for details – International Investment Agreements: *Key issues*, vol. I, U.N., N.Y. and Geneva, 2004, *Chapter 9. Transfer of Funds*, pp. 257-280, and pp. 268-272.
[2] See *Marvin Roy Feldman v. Mexic* case, *op. cit.,* para. 12.3.

4.1. Analysis of investment treaties

National treatment clauses are part of the standard repertoire of bilateral investment treaties[1]. Foreign investors seek the non-existence of unfavorable discrimination that would put them at a competitive disadvantage. This discrimination may include situations in which competitors from other states are treated more favorably[2] and the standard itself requires the states not to treat investors or their investments less favorably than the host state's own investors and their investments.

In BIT between Georgia and Japan, signed on 29 Jan. 2021, art. 2 shall provide: 1. 1. *Each Contracting Party shall in its Territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and to their investments with respect to investment activities.*

2. Paragraph (1) shall not be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of investors of the other Contracting Party in its Territory, provided that such special formalities do not impair the substance of the rights of such investors under this Agreement.

The standard of the national treatment results either from a unilateral act of the state or from a conventional act, such as establishment conventions or investment conventions (agreements) which have by scope given a better delimited outline to the principle of national treatment in relations between OECD member states, being declared principle of its own international inter-regional 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 sanctioned by international law which, however, sanction discrimination or discriminatory treatment in the matter[3].

From a historical perspective, 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

[1] For a look at the different types of national treatment clauses, see *Dolzer/Stevens*, Bilateral Investment Treaties (1995), pp. 63-65. According to the Decision of *Lauder v. Czech Republic* - The decision of 3 September 2001 is a discriminatory measure which does not provide for national treatment (para. 220). However, it is not clear whether the two standards are identical in all respects.
[2] See Cristina Elena Popa Tache, *Introduction in International Investment Law*, Adjuris – International Academic Publisher, 2020, pp. 120-150.
[3] In the Judgment in the case *Oscar Chinn, Belgium v. UK*, The December decision 1934, p. 87, Permanent Court of International Justice – PCIJ stressed that "prohibited discrimination is therefore one that will be based on nationality, which would lead to differential treatment for individuals belonging to different national groups depending on their nationality."

stipulates 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."[1] This text grants domestic rules the regulation of the investment relationship from the moment it is established until its liquidation, without reference 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 it to be better adapted to "national priorities and objectives".

With the establishment of the UN, the Latin American states submitted a motion for the approval of the "national standard" as a principle of law in international investment relations, which would replace the "international minimum standard", and in the following period, a series of rules and principles appeared on investment relations, recalling in this context the OECD instruments of 21 June 1976, the guiding principles of the World Bank, the creation of the MIA and the conventional rules on investment treatment.

4.2. The jurisprudential context

National treatment has been the subject of much controversy. Thus, the jurisprudence has known a series of cases that can be exemplified as useful for this analysis. As we have already mentioned in the part reserved for the analysis of the BIT clauses, one of the standards is that foreign investors should not be subject to discriminatory treatment by the host state (through legal, administrative, etc. decisions).

For a correct identification of these types of clauses, an important role is 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*[2], "like circumstances" was interpreted as referring to the same business, ie the export of cigarettes, while the Tribunal from *Occidental v. Ecuador* generally referred to local producers, "and this cannot be done solely 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*[3] it was established that the

[1] 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, *apud* Cristina Elena Popa Tache, *op. cit.*, 2019, p. 218.

[2] *Marvin Feldman V. Mexico*, The decision of December 16, 2002, 18 ICSID-Rev.- FILJ 488 (2003), para. 171.

[3] *S.D. Myers Inc. v. Canada*, the first partial Decision of 13 November 2000, 40 ILM 1408 (2001), para. 250.

"assessment" of like 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 Tribunal went into more detail to find out if the domestic and foreign enterprise in question is situated in competitive commercial sectors and, as Myers' investment was a sales office operating in the export of waste of a certain type and the national group operated waste storage facilities of the same type, it was assessed that the circumstances are similar. In *GAMI v. Mexico*[1], the Tribunal stated 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. It is a hypothesis that was repeated in a subsequent NAFTA decision in the case of *Pope & Company Talbot, Inc. v. Gouvernement du Canada*[2].

In the case of *Marvin Roy Feldman v. Mexico*, the Tribunal acknowledged that the principle of national treatment was 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, "like circumstances", which are often explicitly mentioned in international investment agreements, become an important principle for the application of normal national treatment. In 2004, the Tribunal for *Occidental c. Ecuador*[3] rejected the argument that WTO case law should be applied to a BIT between Ecuador and the United States. The Tribunal noted that, although the WTO refers to "similar products", BIT addresses "like circumstances" and added that WTO policies on competitive and substitutable goods cannot be treated in the same way as BIT policies on "like circumstances." At the same time, the provisions on national treatment do not usually define the criteria that do not allow the similarity of circumstances to be assessed, consequently, a divergence is found 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 ensure the coherence of jurisprudence in trade and investment.

A recent case concerning the finding of a violation of the national treatment standard according to Cyprus - Libya BIT (2004), resolved in favor of the investor, is Olin Holdings Ltd v. Libya, ICC Case No. 20355/MCP. By decision of 25 May 2018, the Tribunal took into account the following:

Articles 3.1 and 3.2 of the BIT Cyprus-Libya:

1. *Once a Contracting Party has admitted an investment in its territory in accordance with its laws and regulations, it shall accord to such investment*

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[1] *GAMI v. Mexico*, The decision of November 15, 2004, 44 ILM 545 (2005).
[2] For details, see: *Étude 2005*, pp. 33-35.
[3] See the case *Occidental Exploration and Production Company c. Ecuador*, Decision of 1 July 2004, para. 173.

made by testers of the other Contracting Party treatment not less favourable than that accorded to investments of its own investors or of investors of any third State, whichever is more favourable to the investor concerned.

2. *Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards to their management, maintenance, use, enjoyment, expansion or disposal of their investment, treatment not less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable to the investors concerned.*

In its analysis, if Libya violated Article 3 of the Cyprus-Libya BIT, the Tribunal researched whether Libya granted Olin a treatment less favorable than it had given its domestic investors, namely OKBA and Al-Aseel (para. et seq.).

In Total S. A. v. Argentina Republic[1], the Tribunal considered that discriminatory treatment could be demonstrated if the investor proves that the state treated persons in like circumstances differently. In essence, the Tribunal found that:

In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of "like situation" or "similarly-situated" is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner. This is inherent in the very definition of the term "discrimination" under general international law that: "Mere differences of treatment do not necessarily constitute discrimination…discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way." [R. Jennings, A. Watts (eds.), Oppenheim 's International Law, ninth edition. (Longman, 1992), Vol. I, p. 378]. (underlined) The elements that are at the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case.

Para 203. *Consequently, if the claimant can prove that he was treated less favorably than a similarly situated person, then there would be discriminatory treatment, unless the defendant can prove that such different treatment was justified*[2].

Para 204. *Therefore, in assessing the alleged violation of Article 3 of the BIT Cyprus-Libya in the present case, the Tribunal must answer three questions:*

(1) *Has the claimant Olin demonstrated that OKBA and Al-Aseel were in like circumstances?*

(2) *Has the claimant shown that Libya treated Olin less favorably than*

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[1] Total S.A. v. The Argentina Republic, ICSID Case nr. ARB/04/01, Decision on liability of 27 December 2010, paragraph 210 (emphasis added).

[2] Andrew Newcombe & Lluis Paraded, *Law and Practice of Investment Treaties - Standards of Treatment*, Ed. Wolters Kluwer, 2009, p. 162.

OKBA and AI-Aseel?

(3) *If the answer to these two questions is yes, has the respondent demonstrated that the difference in treatment is justified?*

In para 205 et seq. The tribunal finds that Olin, OKBA and Al-Aseel operate in the same business sector, namely the daily market and juices in Libya. The fact alleged by the claimant was not disputed by the respondent. Olin, OKBA and Al-Aseel are also very closely located on the map of Tripoli, in the same industrial area. The fact that those factories operated in the same commercial sector was, in the Tribunal's view, an appropriate reference[1], reinforced by the existence of a similar location, and therefore the Tribunal found that Olin, OKBA and Al-Aseel were in like circumstances.

Analyzing the facts in order to identify like circumstances, the Tribunal found that Olin was clearly operating in less favorable circumstances than its competitor Al-Aseel, which received a formal and definitive expropriation exemption from the Libyan government since July 2008.

As regards OKBA, although the exact date on which the company was formally exempted from expropriation was unknown to this Tribunal, both the claimant and the respondent agreed that the Libyan government exempted Al-Aseel and OKBA in like circumstances. The Tribunal, noting that Olin did not receive a formal and definitive exemption from demolition and intervention, similar to those granted to OKBA and Al-Aseel, concluded that the claimant was treated less favorably than his two national competitors.

Therefore, the Tribunal considered that the claimant had not shown that the difference between the treatment accorded to Olin and the treatment accorded to its domestic competitors was justified. Consequently, the claimant failed to fulfill his task of proof in that regard.

In the light of the above, the Tribunal found that Libya treated Olin less favorably than its own investors, namely OKBA and Al-Aseel, and therefore infringed Article 3 of the BIT Cyprus-Libya.

Other cases:

Also, in Clayton et al. v. Canada (2015)[2] the Tribunal concluded that there was a breach of the provisions of non-discrimination in the treaty. The subject of the lawsuit was the Canadian government's rejection of a project to operate a quarry and a maritime terminal in the Canadian province of Nova Scotia as a result of environmental assessment procedures. Foreign investors argued that the project was subject to a stricter revision standard than that used in the review of similar projects by Canadian investors (usual procedures for projects involving

[1] See Campbell McLachlan, Lawrence Shore & Matthew Weiniger, *International Investment Arbitration - Substantive Principles*, Oxford University Press Publisher, 2007, p. 253.

[2] Clayton, Bilcon of Delaware Inc. v. Government of Canada, PCA (Permanent Court of Arbitration is providing administrative support in this arbitration, which is being conducted under Chapter Eleven of the North American Free Trade Agreement), case nr. 2009-04, the Decision of January 10, 2019.

quarries and sea terminals in ecologically sensitive areas).

The Tribunal decide that the unfavorable treatment of a foreign investor in circumstances similar to those granted to a domestic investor is likely to infringe the "national treatment" standard. The analysis of the arbitration practice shows that there have been other cases in which domestic investors have been given more favorable treatment, in which Canada has not been able to demonstrate that there is any justification for the different and less favorable treatment of foreign investors.

In Corn Products International v. Mexico (2008)[1], the Tribunal decide that a discriminatory ground is not necessary for a government measure to violate the standard of "national treatment." In this case, it did not matter that the Mexican government did not intend to discriminate against the foreign investor, but it was sufficient for the investor to show that the negative effects of the tax were felt exclusively by the producers of HFCS (corn syrup sweetener with high fructose content), for the benefit of cane sugar producers, most of whom were owned by Mexico. In so ruling, the Tribunal held that Mexico adopted a 20% levy on any beverage using a sweetener which is not made from cane sugar. The investor claimed that as a result of this tax, the soft drink bottlers who were his customers switched from HFCS to sugarcane sweeteners, thus eliminating their market.

In conclusion, the national treatment obligation requires the host economy to grant protected investments and investors treatment that is no less favorable than the treatment given to national investors/investments in like circumstances; as found, the most-favored-nation treatment is granted in like circumstances, and as regards the MFN standard, from a jurisdictional point of view, if a bilateral treaty does not contain the arbitration clause in favor of ICSID, but investors from another state benefit from such a clause, the treatment of the most favored nation extends, as far as the jurisdiction is concerned as well[2].

5. Expropriation

States have a sovereign right under international law to take ownership of their own citizens or foreigners (including international investors) through 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

[1] Corn Products International, Inc. v. United Mexican States, ICSID Case nr. ARB (AF)/04/1, the decision of August 18, 2009, together with the separate opinion of the professor Andreas F. Lowenfeld.

[2] *Maffezini v. Spain* 2000 nr. ARB/27/7, Decision on objections concerning jurisdiction 25 January 2000: although the claimant relied on the BIT between Argentina and Spain and did not specifically refer to the settlement of disputes, he obtained the benefit of the provisions of the Chile-Spain investment agreement containing such references.

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, usually compensation by reference to "market value")[1].

Any expropriation that does not meet these conditions will violate the obligations of the host economy under international law.

5.1. Analysis of investment treaties

Although the expropriation right of states is acknowledged as fundamental, the exercise by states of this right triggered conflicts, debates and disagreements that are far from finalized, although the tone and content, together with the procedural means of resolving disputes, varied. significantly over time[2]. From the analysis of all investment treaties, it can be seen that international investment agreements evolved and became clear with this development, including elements such as notions of indirect expropriation (defining the types of measures that may or may not constitute indirect expropriations), how the compensations are established, their content and the applicable standards.

For example, Article 6 of the BIT Brazil - India called Investment Cooperation and Facilitation Treaty (signed on 25 Jan. 2020), contains the following provisions:

Direct expropriation

6.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "expropriate") of the other Party, except;

a) for reasons of public purpose[3];

b) in a non-discriminatory manner;

c) on payment of effective and adequate[4] compensation, according to paragraph 6.2; and

d) in accordance with the due process of law.

Such compensation shall:

a) be paid without undue delay;

b) be at least equivalent to the fair market value of the expropriated

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[1] See in this regard, *Antoine Goetz v. Burundi*, ICSID, case nr. ARB/95/3, *Sentence of February 10, 1999* (BIT Belgia-Economic union Luxemburg/Burundi).

[2] See *Expropriation, UNCTAD Series on Issues in International Investment Agreements II,* 2012, p. 16.

[3] The treaty states that: *For the avoidance of doubt, where India is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in its l aw relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such law.*

[4] The footnote states that the treaty states that: *For the avoidance of doubt, where Brazil is the expropriating Party, for the expropriation of property that is not performing its social function, in accordance with its Constitution and other applicable legislation, compensation may be paid in the form of debt bonds.*

investment, immediately before the expropriation takes place but not beyond thirty (30) days prior to the date of expropriation, plus interests at a rate determined according to market criteria, accrued since the expropriation date until the payment date, according to the legislation of the Host State;

c) not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value; and

d) be completely payable, freely exchanged into a convertible currency and freely transferable, according to Article 9[1].

For greater security, the treaty provides that it only covers direct expropriation, which occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or direct seizure.

Non-discriminatory regulatory measures of a party or measures or decisions by the judicial organs of a party that are designed and enforced to protect legitimate public interests or public purpose objectives, such as public health, safety and the environment, shall not constitute expropriation on the basis of the article set out above.

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[1] Each Party shall permit all funds of an investor of the other Party related to an investment in its territory to be, in compliance with applicable domestic procedures established by its regulations, freely transferred and on a non-discriminatory basis. Such funds may include: a) contributions to capital; b) profits, dividends, capital gains and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment; c) interest, royalty payments, management fees, and technical assistance and other fees; d) payments made under a contract, including a loan agreement, directly related to the investment; and e) payments made pursuant to Articles 6 and 7.

9.2. Nothing in this Treaty shall affect the right of a Party to adopt temporary regulatory measures, in a non-discriminatory manner, concerning the balance of payments in a balance of payments crisis, nor will it affect the rights and obligations of the Parties as members of the International Monetary Fund contained in the Articles of the Agreement of the International Monetary Fund, in particular exchange measures which are in conformity with the Agreement of the International Monetary Fund.

9.3. The adoption of temporary restrictive measures for transfers in case of the existence of serious balance of payments difficulties must be non-discriminatory and in accordance with the Articles of the Agreement of the International Monetary Fund.

9.4. Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through application of its law, including actions relating to: a) bankruptcy, insolvency or the protection of the rights of the creditors; b) compliance with judicial, arbitral or administrative decisions and awards; c) compliance with labour obligations; d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; e) issuing, trading or dealing in securities, futures, options, or derivatives; f) compliance with the law on taxation; g) criminal or penal offences and the recovery of the proceeds of crime; h) social security, public retirement, or compulsory savings schemes, including provident funds, retirement gratuity programs and employees insurance programs; i) severance entitlements of employees; j) requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party; and k) in the case of India, requirements to lock-in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy, where applicable, provided that, any new measure which would require a lock-in period for investments will not apply to existing investments.

From the definitions extracted from the main sources of this theme, it results that direct expropriation means a mandatory legal transfer of the title of ownership or its 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[1].

The term "expropriation" is usually used in conjunction with the term "nationalization" and is often used interchangeably. For example, the Energy Charter Treaty (ECT) 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 treaties use terms synonymous with this notion, such as: confiscation, dispossession, requisition or alienation.

5.2. The jurisprudential context

In the case of *Roussalis v. Romania*[2], 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*[3], 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 amount to a direct expropriation when such actions (i) deprive the investor of his investment; (ii) deprivation is permanent; and (iii) deprivation finds no justification within the doctrine of police powers."

The most recent case in which the Tribunal found violations of treatment standards for both direct and indirect expropriation is the case of Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, in which, by Decision of 15 March 2016, the Tribunal decide in favor of the investor, finding that there was no doubt that indirect expropriation was governed by Article VIII (1) of the treaty and by international law. The judgment of the Tribunal also states that illegal expropriation is not limited to direct expropriation, limited to the obvious takeover of physical property or the formal transfer of the title of ownership to movable or immovable property. Since many Tribunals ruled on a similar wording, measures other than an effective taking or a formal transfer may amount to "measures having an effect equivalent to ... expropriation", in the words of Article VIII (1) of the treaty[4] it is clear that indirect expropriation requires a substantial deprivation of economic use and investment benefit,

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[1] *Expropriation, UNCTAD Series on Issues in International Investment Agreements II, 2012,* p. 22.
[2] See *Spyridon Roussalis v. Romania*, ICSID Case nr. ARB/06/1, The decision of December 1, 2011, para. 327, p. 56.
[3] *Burlington Resources Inc v. Ecuador*, ICSID Case nr. ARB/08/5, Decision on liability of 14 December 2012, para. 506, pp. 72-73.
[4] For an example, see *Tecmed v Mexico* paras 113-114.

including their elimination. As regards the burden of proof, the Tribunal set out its considerations in accordance with the general principle of international law stating that the claimant has to prove the extent of his damage within the meaning of Article VIII (1) of the treaty in respect of the expropriation of his Junín and Chaucha concessions (the subject of the complaint was talking about affecting a number of three concessions that represented the investment: Junin, Chaucha and Telimbela). In view of the decision of the Tribunal to reject, as regards liability, the claimant's claim for the Telimbela concession, it can be disregarded for the present purposes.

Paragraph 7.23 of the judgment of the Tribunal raises the issue of assessing the amount of compensation and states that as regards establishing as accurately as possible the dates of direct and indirect expropriation in accordance with Article VIII (1) of the treaty, the Tribunal decide: (i) 3 November 2008 for the Junín concessions and (ii) June 30, 2009 for the Chaucha concession. However, these different data are not directly relevant to the Tribunal's decisions on compensation.[1]"

The Tribunal encountered difficulties in assessing the damages in this case, most of which being generated by the different assessment reports submitted by the parties in the arbitration file. These difficulties did not prevent the Tribunal from making such an assessment of the relevant evidence presented in this arbitration.

In paragraph 7.26 of the judgment, the Tribunal stated that it was certain that there was no doubt that the claimant suffered injury in itself. What is uncertain is the proven extent of the legal damage, quantified as compensation payable by the respondent, frequent aspects in investment disputes. As argued in Vivendi v. Argentina, the Tribunal faced similar difficulties with regard to the issue of quantifying the loss: "However, there are useful proofs in evidence; and it is well established that if the damage cannot be repaired with certainty, it is not a reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; damage resolution is not an exact science.[2]"

Being a common problem in investment arbitrations, other arbitral awards confirmed this pragmatic approach, preventing the rejection of a claim due to lack of certainty or difficulty in assessing it[3]. For this reason, rather than seeking to assess the evasive loss of an opportunity to the extent permitted by international law, the Tribunal preferred here to select the alternative method of assessing the claimant's proven costs. As it can be understood even now, the evaluation date is not significant for this approach to compensation.

As regards the Junín concessions and the Chaucha concession, it was

[1] For an example, see *Tecmed v. Mexico* paras 113-114.
[2] *Vivendi v. Argentina* para 8.3.3.
[3] For example, see *Southern Pacific Properties (Middle East) Ltd. v. The Arab Republic of Egypt*, ICSID Case nr. ARB/84/3, The decision of May 20, 1992 ["*SPP v Egypt*"] para 215; *Rumeli v Kazakhstan*, Decision of the Ad-hoc Committee, para 144.

found that such expenses could no longer be proved and were completely lost to the claimant. For the purposes set out, the Tribunal did not distinguish between direct and indirect expropriation in respect of the claimant's concessions. By selecting this approach, the Tribunal intended to restore the claimant to the previous status quo, to the point where he had never been an investor in the Junín and Chaucha concessions. Anything else was considered mere speculation which could not compensate the claimant for the loss of his investments under Article VIII (1) of the treaty or, more specifically, would not amount to the necessary reparation under the general principle set out in the Chorzów case, previously applied in this case of the Tribunal which, for an illegal expropriation (direct or indirect), also applied the general principle established by the Chorzów case, which provides for full reparation.

Other cases:

In the case of Rusoro Mining Ltd. v. Venezuela (2016)[1], the Tribunal found that each host economy has the right to expropriate an investment, but this must be done in accordance with all the criteria set out in the relevant investment treaty. Here, although the expropriation was properly carried out for a public purpose, in a manner compatible with the proper process and without discrimination, Venezuela also failed to meet the criterion that the investor will be paid the fair market value of its investment, the decree expropriating the government setting a limit on the amount of compensation available to investors, resulting in the payment of compensation less than the market value. Accordingly, the Tribunal decide that Venezuela did not comply with the requirements for legal expropriation.

"Indirect" expropriations occur when, even if the legal ownership has not been transferred from the investor to the government, the government has taken measures that have the effect of depriving the investor of economic use and the benefit of the investment.

In the case of RosInvestCo UK Ltd. v. Russia (2010)[2], the Tribunal found that the actions of the Russian Government erased the value of Yukos and constituted an indirect expropriation. Although Yukos appeared to have engaged in questionable tax activity, the Tribunal noted that "the main objective of the Russian Federation was not to collect taxes, but rather to bankrupt Yukos and appropriate the valuable assets." The Tribunal therefore found that the imposition of a retroactive VAT charge by the Tax Inspectorate was disproportionate and could not have been expected by Yukos. Moreover, Yukos bankruptcy proceedings, which led to the auction of Yukos' assets, took place "under questionable circumstances." Finally, there was evidence that Yukos officials were intimidated and harassed during this period.

[1] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case nr. ARB(AF)/12/5, Final decision August 22, 2016, resolved in favor of the investor.

[2] RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction dated October 2007, Final Award dated 12 September 2010, decided in favour of investor.

With regard to the *Yukos* cases, the Tribunal found that the claimants' assets were 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.[1]"

In the case of Ampal-American Israel Corp. v. Egypt (2017)[2], the Tribunal decide that the termination of the contract, which was the main asset of EMG (East Mediterranean Gas Company SAE), was unfair and constituted an indirect expropriation. In this case, the contract did not allow termination only for non-payment of an invoice, and the termination was a "disproportionate act", given that the value of the unpaid invoice was for a small amount compared to the potential economic value of contract execution (billions of dollars).

Other cases concerned expropriations indirectly alleged to be caused, for example, by various environmental or public health regulations[3]. An example is *Ethyl Corporation v. Canada*[4]; as a result of this case, concerns were expressed about the possibility of international investment agreements being used to limit the powers of the host state to adopt rules in the field of environment, public health or other similar sectors. There were also fears that the prospect of arbitrating these disputes between the investor and the states due to alleged regulatory seizures would not be able to bring a regulatory freeze, given the concern of host states exposed to liability[5].

In the case of *Metalclad v. Mexico* under NAFTA, the Tribunal held that measures equivalent to expropriation include "clear or incidental interference with the use of property which has the effect depriving the owner ... the use or economic profitability of the property reasonably, even if not necessarily for the obvious benefit of the host state." The Tribunal 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

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[1] Reunited cases *Yukos: Hulley Enterprises Limited c. Rusia*, case PCA nr. 226; *Yukos Universal Limited v. Rusia*; *Veteran Petroleum Limited v. Rusia*, case PCA no. 226, The final decision of July 18, 2014 para. 796.

[2] Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case nr. ARB/12/11, Decision on jurisdiction of 1 February 2016, as well as the Decision of 21 February 2017.

[3] 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 nr. ARB/10/7, The decision of July 8, 2016, para. 272-307, pp. 76-88).

[4] *Ethyl Corporation c. Canada*, UNCITRAL, *Decision on jurisdiction*, 24 June 1998. The reason for this lawsuit was a ban by the Canadian authorities to import a gasoline additive called MMT. The claimant, the US importer of this additive into Canada, brought an action against the law prohibiting imports, an action 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 claimant, as a result of that prohibition.

[5] For details see: UCTAD, *Accords internationaux d'investissement dans les services; Études de la CNUCED sur le politiques en matiére d'investissment internațional et le développement, Nations Unies et Genéve*, pp. 43-45.

the owner of the advantages he expected to obtain[1].

In *Tecmed v. Mexico*, the Tribunal emphasized the level of interpretation related to the importance of the impact of the government's measure on investment, as it sought to determine whether "the negative economic impact of these actions on the investor's financial situation was so strong as to lose the full value of his investment or to deprive him of the economic or commercial use of that investment without being entitled to any reparation"[2]. The Tribunal's reasoning was as follows: "Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.[3]"

As it has been found, the practice of investment arbitration does not allow a uniform practice regarding indirect expropriation claims, and the tribunals involved in resolving these types of disputes continue to tend towards a very specific analysis of the facts on a case-by-case basis with regard to the ruling on indirect expropriation.

As found in the above cases, the practice of investment arbitration does not allow for a precise assessment of indirect expropriation claims, and the tribunals involved in resolving these types of disputes continue to tend towards a very specific analysis of the facts on a case-by-case basis with regard to the ruling on indirect expropriation, for the reasons that the state is not a guarantor of profitability; not all government actions that result in a loss of value or profit constitute an expropriation, even if that loss is substantial; depending on the circumstances, in cases where government actions have seriously affected the value of an investment, certain criteria may be applied which may lead to the identification of a particular case of 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

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[1] *Metalclad Corporation c. Etats Unis du Mexic*, ICSID, case nr. 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.

[2] *Technicas Medioambietales Tecmed S.A. v. Mexic*, ICSID, case nr. ARB(AF)/00/2, *Judgment on 20 May 2003* (BIT Spain/Mexico), para. 121 and the following.

[3] *Ibidem*, para. 116.

necessarily exhaustive and may evolve[1].

6. Prohibition of performance requirements

Conceptually, performance requirements are conditions imposed on investors, host states requiring to meet certain specified objectives in terms of their operations in the territory of the host state[2], being in fact *means of selecting* foreign investors, materialized in measures by which investors are required to behave in a certain way or to achieve certain results in the host state. While these performance requirements are considered by investors to influence the way they choose to conduct their investment activities, host countries consider it appropriate to ensure that investments make an efficient and maximum contribution to development and are aligned with the national objectives and priorities of the host state. Governments have no obligation to impose requirements on international investors, which seems to be more of a capability claimed as opportunity.

6.1. Analysis of investment treaties

Most 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 treatment to investment entry and establishment.

According to UNCTAD statistics, the content of BIT provisions varies considerably, even between BITs signed by the same state, reflecting different approaches and, implicitly, different negotiating positions. Restrictions on performance requirements contained in investment treaties range from a limited restriction to very broad bans[3]. Over the years, in parallel with the development of the practice, some provisions tended to become more elaborate.

In this way, BITs can influence the development of regional and multilateral investment instruments. These performance requirements have been used by industrialized states in their development (continuing to be controversial due to the very fine lines between discriminatory treatment and some performance requirements imposed on international investors), such as: requirements to use a certain percentage of products or local services in

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[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 United Nations Conference on Trade and Development [UNCTAD], 2003, p. 2, *apud* Suzy H. Nikièma, *Performance Requirements in Investment Treaties Best Practices Series - December 2014,* International Institute for Sustainable Development (IISD) Publishing House, p. 4.

[3] An example list of BITs that limit or prohibit PRs includes: India-Kuwait BIT (2001), Article 4.4; Japan-India Comprehensive Economic Partnership Agreement (CEPA 2011), Article 89; BIT El Salvador - Peru (1996); BIT Bolivia - Mexico (1995); BIT Dominican Republic - Ecuador (1998); Chile-Mexico Free Trade Agreement (1999).

production processes, to guarantee employment in certain regions or to allow the transfer of technology, therefore to engage in training programs for the labor force or to develop the capacities of suppliers of goods and services; to carry out a certain level of research and development activity in the host state; to carry out social and environmental actions; to form a joint venture with national investment partners; to hold a minimum level of shares in the company's capital; to establish the investment activities or the decision-making center in a given region; to be limited to a certain volume or quantity of sales of goods or services on the national market or to export a certain level of locally produced goods.

Some BIT models have been prepared by different states, most models being established at the national level, although there are cases where these models are established bilaterally or even plurilaterally[1], respectively regionally, reflecting their positions and expectations regarding international norms and standards in the area. The BIT can also influence domestic law.

For example, in the model of the US 2012 bilateral investment treaty[2], art. 8 provides that:

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking[3]:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional

[1] According to UNCTAD, there is currently only one BIT model established at the bilateral level (Belgium-Luxembourg Economic Union Model BIT – 2019) and a number of four models of plurilateral international investment treaties (the most recent being SADC - South African Development Community - Model BIT 2012) material available at: https://investmentpolicy.unctad. org/international-investment-agreements/model-agreements, accessed on 03 March 2021.

[2] The 2012 US BIT model incorporates various additions that were not found in the 2004 model. It is noted that the new provisions extend the limitations of performance requirements if the host state seeks to condition the benefits to investors when using local technology.

[3] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purposes of paragraph 1.

market or to the world market; or

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party12[1]; or (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology, so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party[2].

Point 3 of the BIT Model emphasizes that: a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

Point (b) contains the exceptions to the above provisions, in the sense that paragraph 1 (a) (f) and (h) do not *apply to: (i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws[3].*

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[1] For purposes of this Article, the term "technology of the Party or of persons of the Party" includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

[2] Point 2 of the BIT model in question provides: 2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement: a) to achieve a given level or percentage of domestic content; b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

[3] The Parties recognize that a patent does not necessarily confer market power. Next, the BIT model details:

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs. (e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

In general, states can use these clauses depending on when they are applied: pre-establishment and not after the investment, because, as we presented in the introductory part, bridges can be created to discriminatory treatment. Excluding this standard from the scope of the NT and MFN standards means that pre-establishment PRs could be imposed on domestic investors, and the MFN clause would not allow more favorable provisions to be imported from other treaties.

There are many views according to which it is the sovereign choice of states to allow or prohibit the use of such clauses in treaties and, in the event of a ban, states have alternatives anyway such as: restricting mandatory performance requirements without restricting the non-mandatory ones or only those prohibited by the WTO through appropriate references to TRIMs may be restricted; excluding NT and MFN treatment from the scope of the ban on performance requirements; the choice of the sectors to which the ban on performance requirements applies or not; reviewing old performance requirements; the specific exclusion of certain categories of performance requirements from the scope of the prohibition or the exclusion of the standard from the investor-state dispute settlement mechanism[1].

6.2. The jurisprudential context

Investment arbitrations in which Tribunals have found violations of this standard are few and most known cases have been based on NAFTA. To present an overview of Tribunal decisions regarding the prohibitions of performance requirements, a reference case is the case of Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (I) (ICSID Case No. ARB (AF)/07/4), settled in favor of the investor, based on NAFTA (1992).

The details about the investment in this case are given by the indirect controlling interest in two companies: Hibernia Management and Development Co. and the Terra Nova Oil Development Project, engaged in two oil development projects off the coast of Newfoundland and Labrador in Canada.

In summary, the dispute consisted of claims arising from changes in the regulatory regime applicable to the exploitation of two oil fields off the coast of Newfoundland and Labrador in which the claimants invested, in particular, the imposition of R&D requirements by the Canadian province of Newfoundland.

By its majority Decision[2], the Tribunal found that the 2004 Guidelines applied by the host state to the projects infringed Article 1106 of NAFTA and

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(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

[1] Suzy H. Nikièma, *Performance Requirements in Investment Treaties Best Practices Series - December 2014,* International Institute for Sustainable Development (IISD) Publishing House, p. 19.

[2] Decision available online at: https://www.italaw.com/sites/default/files/case-documents/italaw4399_0.pdf, accessed on 12 March 2021.

that this "gave rise to a right to claim compensation". Thus, the Tribunal ordered Canada to pay the investors Mobil Canada and Murphy Oil CDN $ 10,310,605 and CDN $ 2,273,635 respectively as compensation for additional interest expenses at the 12-month LIBOR rate of the Canadian dollar + 4%, composed monthly, of on July 23, 2012 until the date of the judgment, plus the compensation to be paid by Canada to Mobil Canada and Murphy Oil in the amount of CDN $ 3,582,408 and CDN 1,127,612 as deficit compensation.

It was also agreed that the parties would bear their own legal and other costs in connection with this proceeding and would bear the costs of arbitration equally.

It has been observed that in all these cases, the existence of these standards may create legal obligations on international investors or their investments which may lead to sanctions applied by the host state in case of non-compliance.

Recently, in the case of Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/12/5, settled in favor of the investor by Decision of 22 August 2016, the Tribunal found that BIT Canada - Venezuela is applicable, Bolivarian Republic (1996).

At the time Rusoro made their investments, the export of gold was regulated by a Resolution of the Banco Central de Venezuela (BCV), Resolution no. 96-12-02 (BCV Resolution 1996). The general principle set out in this resolution was that of freedom of export:

Article 1 - Export operations of gold and its alloys are permitted, in both coins and bars, melted or refined, manufactured or otherwise, under the terms and conditions set out in this resolution.

At the time the investment was established, the only requirements for Venezuelan gold producers to export gold were:

- registration of the gold producer in a special register held by BCV;
- a (non-discretionary) authorization of BCV and
- that at least 15% of the total production be sold on the private domestic market.

In 2003, the Bolivarian Republic faced a situation in which the reduction in oil exports caused a shortage of foreign currency; in response, it decided to impose an exchange control regime in order to guarantee the stability of the Venezuelan currency. This was achieved through an "Agreement" between BCV and the Government of Venezuela, which was then published in the Official Gazette and became binding ["Convenio Cambiario No.1"].

The BCV resolution of June 2009 reaffirmed the BCV resolution of April 2009, but *only for private gold-producing companies*: it reiterated the rule that these companies had to sell 70% of their gold production on the domestic market - 60% BCV and 10% to private buyers; only up to 30% of the production could be exported, subject to the discretionary authorization of BCV; in the absence of such an authorization, that percentage had to be sold to BCV. These requirements

were followed by some more relaxed measures until 2009 when other requirements were imposed that had a significant impact on the business model of gold producers in Venezuela. The impact was such that, two months after the adoption of the BCV Resolution in June 2009, Minister Sanz himself wrote to the BCV President, suggesting an amendment to art. 2 of the BCV Resolution of June 2009. Minister Sanz's proposal was that the established domestic and export sales requirements be applied uniformly to private and state-owned companies. However, BCV did not take any immediate action - in fact the rules were not changed until July 2010. Prior to that, the exchange control regime was even stricter and the exchange market was closed.

On 17 August 2011 (one year after the publication in the Official Gazette of the BCV Resolution of July 2010 and the amendment to Foreign Exchange Agreement No. 12), President Chávez publicly announced the immediate nationalization of the Venezuelan gold mining industry, with the stated aim of combating illegal mining. President Chávez was quoted in the press as saying that in the coming days the Bolivarian Republic will adopt "a decree to take over the gold sector", which still remains in the hands of a "mafia and smugglers".

Finally, Venezuela claimed that Rusoro violated the regulations of the Mining Law by not reporting and accounting for its alleged domestic sales or the final destination of the gold produced, thus fueling an illegal export trademark. Still, Venezuela failed to demonstrate that Rusoro did not own and exploit their investments in Venezuela in accordance with the law (Venezuela), as provided in art. I (f) of the treaty.

In its decision, the Tribunal decide in favor of the investor with regard to the issue of the standard of performance requirements (para. 588 et seq.), finding that the 2010 BCV Resolution was incompatible with the BIT and a violation of paragraph 6 (d) from the annex to the BIT.

In so ruling, the Tribunal applied Paragraph 6 (d), which forms an integral part of the BIT, prohibiting the Contracting Parties from applying any of the following requirements in relation with (i.e., the post-establishment regulation of that investment): "Prohibited requirements shall include restrictions on exports or sales for export by a product undertaking, whether specified in terms of certain products, in terms of the volume or value of the products […]."

The BCV resolution of July 2010 was obviously incompatible with the simple wording of paragraph 6 (d): the resolution creates a "requirement" to be implemented by BCV in the post-investment phase, restricting the export of to an undertaking [Ie Rusoro's Venezuelan subsidiaries] of their products "in terms of volume" - exactly what Article 6 (d) prohibits. It should be recalled that the 1996 BCV Resolution has already created a legal regime limiting gold exports to 85% of production and the July 2010 BCV Resolution has only increased the export restriction to 50% of production and this increase is incompatible with Article 6 (d) of the treaty.

Nevertheless, the Tribunal found that, by issuing the 2010 BCV

Resolution, the Bolivarian Republic imposed an increased restriction on the volume of gold exports and that such an increase violated Article 6 (d) of the BIT Annex[1].

To conclude, the Tribunal stated that, "Gold is a very special commodity, closely linked to the financial sovereignty of nations, and the value of gold companies is affected by the intensity of regulatory measures adopted by host states." (para. 753) and ordered Venezuela to pay total compensation in proportion to the damage caused by the expropriation of USD 966 500 000 and to pay the damages due to Rusoro for Venezuela's infringement of Article 6 (d) of the BIT Annex, in the amount of $ 1,277,002.

In addition, the Tribunal decided to award Rusoro interest on the amounts of compensation and damages (i.e., USD 967,777.002723), accrued between 16 September 2011 and the date of actual payment, calculated at the interest rate p.a. (calculated at an interest rate p.a. equal to USD LIBOR for one-year deposits, plus a margin of 4%, with a minimum of 4% p.a., to be compounded annually), to which it added USD 3,302,500 as arbitration costs.

In view of the way in which disputes concerning certain performance requirements have been resolved, as well as the textual analysis of how this standard has been taken over in investment treaties or in those containing investment provisions, it follows that the prohibition of requirements performance has evolved from broad provisions to increasingly precise and detailed provisions[2]. Nonetheless, such measures have the potential to be used successfully when they are well developed, giving the possibility for their host states to use them for the progress of development goals, *but only if they respect the lessons taught by the arbitration practice*.

The most common performance requirements are export requirements, local interest requirements, trade balancing requirements, restrictions on domestic sales related to export performance, technology transfer requirements and exclusive supplier requirements.

Given the scenario in which performance requirements are properly formulated and applied, the standard on the prohibition of performance requirements will evolve positively as these requirements become effective tools to maximize the economic, environmental and social benefits of foreign investment.

As we have shown in point 4.6, there is no obligation under international law to include a PR clause in a BIT. Such an approach, being a skill and not an

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[1] See the Decision of 22 August 2016 in this case, available at: https://www.italaw.com/sites/default/files/case-documents/italaw750 7.pdf, accessed on 12 March 2021

[2] Barton Legum, *Understanding Performance Requirrements Prohibitions in Investment Treaties* in *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2007,* Arthur W. Rovine Publishing House, Brill 2008, p. 59, *apud* Barton Legum, Ioana Petculescu, *Performance Requirements. Mobil v. Canada, ICSID Case nr. ARB(AF)/07/4*, in *Building International Investment Law: The First 50 Years of ICSID*, Ed. Kluwer Law International, 2016, p. 428.

obligation of the states, would be in support of an economic policy adapted to the circumstances of each state and would simplify the application of this standard by simple and certain formulations, a solution that comes to support as well the settlement of disputes that could be the subject of violations of this standard of treatment. On the other hand, the inclusion of such coherent, simple and unequivocal clauses should be done in all BITs, which logically creates a scenario that is not easy to implement.

In conclusion, more and more investment treaties and free agreements that include investment protection chapters contain this standard or, less frequently, provisions developed in accordance with the prohibitions of TRIMs, and therefore it is possible that future ICSID practice or other Tribunals competent in this matter, to find an increasing number of cases in which investors claim to have violated such prohibitions. With regard to performance requirements, as in many other areas of international investment law, Tribunals invested with such actions will open new avenues in the development of case law designed to shed light on the application of these prohibitions.[1]

7. Umbrella clause

An umbrella clause is listed among the investment treatment standards and is that provision, which is part of the structure of investment treaties, which provides, in essence, that a state must honor any commitments it has made to an investor, ensuring that the host economy will meet the commitments it has made on an investment. These clauses are sometimes referred to as "umbrella clauses", as in several cases they have been interpreted as bringing the investor contractual commitments of the host state under the umbrella of protection of the treaty. If an umbrella clause is associated with a stabilization clause in an investment contract or in the domestic law of the host state, a strong combination is formed to prevent government actions that are inconsistent with the stabilization provision, and when the government of a host state breaches its contractual commitments to an investment, breach of these contractual commitments may also constitute a breach of a standard of protection consisting in its umbrella clause obligations under an investment treaty.

7.1. Analysis of investment treaties

Therefore, specific to bilateral treaties is *the umbrella clause*, by which each state party to the agreement must comply with any and all obligations

[1] Vezi Barton Legum, Ioana Petculescu, *Performance Requirements. Mobil v. Canada, ICSID Caz nr ARB(AF)/07/4*, in *Building International Investment Law: The First 50 Years of ICSID*, Ed. Kluwer Law International, 2016, pp. 428,429.

assumed towards investors from the other state party[1]. 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 a treaty subject only to the rules of public international law. Some tribunals have been very open about the admission and effects of umbrella clauses and have even taken into account general government statements about an investment, while others have argued that only specific agreements in which it is inserted in writing this standard could be covered. As a result, many states have decided not to include such provisions in future treaties and others have decided to use terminology to ensure that only investment-specific written agreements can be invoked. In this sense, there are many parallels with the concept of legitimate expectations associated with the issues of fair and equitable treatment, and regardless of the approach, the international responsibility of states for foreign investment can arise from a wide range of international obligations - when one of them can be violated - provided that they are related to an investment process (an investment report), within the meaning of known definitions.

The first appearance of the "umbrella clause" as a distinct investment protection clause can be found in art. 4 of the ABS - the draft international convention of 1956-1959 for the mutual protection of private property rights in foreign countries[2]:

To the extent that better treatment is promised to foreign nationals than to nationals, either under intergovernmental or other agreements, or by administrative decrees of one of the High Contracting Parties, including the most-favored-nation clauses, such promises shall prevail.

This approach was reformulated in the draft Abs-Shawcross Convention of 1959 on Foreign Investment (Article II)[3]: *Each Party shall at all times ensure compliance with any commitments which it may have made in connection with investments made by nationals of any other Party*.

Following these codification attempts, the clause was included in the first BIT between Germany and Pakistan in 1959 (Article 7): *Either party must comply with any other obligations it has assumed in terms of investments by the citizens or companies of the other party.*

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[1] 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) provides 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".

[2] H. J. *Abs, Proposals for Improving the Protection of Private Foreign Investments,* in *Institut International d'Etudes Bancaires, Rotterdam, 1958, apud* A.C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, *Arbitration International 2004, Vol. 20, No. 4, n. 2*.

[3] The text of the Abs-Shawcross Project is reprinted in UNCTAD *International Investment Instruments: A Compendium in United Nations*, New York, 2000, Vol. V. p. 395.

This standard was also included in the Draft OECD Convention on the Protection of Foreign Property of 1967 (Article 2) which provided that*: Each Party shall at all times ensure compliance with its commitments in relation to the property of the nationals of any other Party.*

The notes and comments accompanying this draft convention described this article as "an application of the general principle *pacta sunt servanda*" in favor of the property of the citizens of another party and their legal successors in law, unless the agreement expressly excludes it."

In the 2008 BIT model of Great Britain, the clause appears as follows: art. 2 (2): *Each Contracting Party shall comply with any obligations it has assumed with respect to the investments of nationals or companies of the other Contracting Party.*

We reiterate that the use of such a clause is a specific way of broadening the scope of a treaty, covering virtually any contractual obligation between the state and the investor[1]. According to the OECD: contractual provisions are "internationalized", as a breach of a contractual provision has the effect of violating the "umbrella" clause in the international treaty[2].

The clause has an impact on *state contracts*, defined as contracts concluded between the state or a public body (body created by law within a state that is given control of an economic activity) and a foreign citizen or a legal entity (company) of foreign nationality[3].

Some treaties allow the use of international arbitration for "any matter" related to an investment or in connection with alleged breaches of contracts or other agreements between the host state and the investor, and investor-state dispute resolution can be a very expansive tool for investors, the treaties giving the investors an automatic right to use international arbitrage.

It was noted that the emergence of *the umbrella clause* in investment agreements has inherently generated debate on 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[4]? In answer to this question, emphasis was placed on the assumption that, under the "umbrella clause" in the applicable treaty, a contractor's contractual claims against the host state may be settled, preferably, by applying the arbitration provisions (clauses) of the Treaty, as regards the application of the provisions on the settlement of disputes existing in that contract.

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[1] See the interpretation of the clause in the case *Noble Ventures inc. v. Romania,* Decision of 12 October 2005, delivered in the case nr. ARB01/11.

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

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

[4] The decisions of the arbitral tribunals are contradictory (see *SGS v. Pakistan,* 2003 and *SGS v. Philippines,* 2004).

7.2. The jurisprudential context

The Tribunals have held very different views on how a state commitment should be defined, from general government statements about an investment to specific written agreements or legislation.

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, such as the *Maffezini*[1] case, in which opinions were divided into regarding the interpretation of the most-favored-nation clause; the case of *CME/Lauder v. the Czech Republic* (*conducted on the basis of UNCITRAL*), in which the arbitration was arbitrated under two different bilateral investment agreements or the case of *CMS v. Argentina*[2] and *LG & E v. Argentina*[3], in which there were differing views on the state of necessity. More specifically, as an example of multiple proceedings for identical facts, but with conflicting final solutions, the *Lauder*[4] case, in which two different investors engaged in 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[5]. As a result of such situations, judgments may not have the authority of *res judicata*, but the avoidance of such a situation can be achieved by using regulations on connection of cases, respectively *lis pendens*, through a preliminary reference system and a mechanism appeal for investment arbitration.

Recently, in the case of Strabag SE v. Libya, ICSID, No. ARB (AF)/15/1, tried under the BIT between Austria and Libya in 2002, the Tribunal decide in favor of the investor by Decision of 22 June 2020[6].

In paragraph 159 of its judgment, the Tribunal stated that this problem could not be resolved by comparing the number of judgments expressing one opinion or another and that, as both sides have acknowledged in their arguments, it is important how this clause is expressed in a particular treaty.

Therefore, the significance of Article 8 (1) of the treaty relied on in this

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[1] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case nr. ARB/97/7.

[2] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case nr. ARB/01/8.

[3] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case nr. ARB/02/1.

[4] Ronald S. Lauder v. The Czech Republic, case conducted according to UNCITRAL rules.

[5] See *Ronald S. Lauder c. République Tchéque,* UNCITRAL final decision, 3 September 2001 (BIT, USA/ Czech Republic); CME République Tchéque, UNCITRAL partial decision on 13 September 2001 (BIT/Netherlands/Czech Republic); *République Tchéque v. CME République Tchéque,* B.V. Court of Appeal Stockholm Sweden, case nr. T-8735-01. Also see *Étude 2005,* pp. 17-18.

[6]The decision of the ICSID Tribunal is available here: https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf, accessed on 13 March.2021.

case was ultimately considered a matter of interpretation of the treaty and the Vienna Convention (VCLT) was applied.

Article 31 of the VCLT requires that the language of a treaty be interpreted "in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The Tribunal assessed the terms used in the composition of the umbrella clause relied on in the light of the fact that the language of the treaties should, in principle, be taken at face value and that its usual meaning should not be altered or conditioned without clear justification.

Furthermore, the language must be assessed in the light of the related provisions of the treaty and the purpose set out in its Preamble, "the desire to create favorable conditions for greater economic cooperation between the contracting parties ...".

The Tribunal began the interpretation by observing the term "it", finding that the usual meaning of this term refers to "each Contracting Party", in this case Libya, stating that "Libya" does not mean exclusively its Government because such approach would not take into account the fact that, as mentioned in the commentary to Article 5 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("ILC Articles"), the states may operate through "parastatal entities, which exercise elements of governmental authority instead of state bodies [...]." Therefore, the Tribunal considered that the term "this" does not only mean the Government of Libya, but may also include other Libyan bodies, so *this issue must be considered in light of the protracted conditions of insecurity in Libya since 2011. A compelling body of evidence, adduced by both Parties, shows that since the revolutionary hostilities in 2011, conditions in Libya have been characterized by recurring events of intensive fighting between rival groups, widespread violence, and the widespread breakdown of State authority*.

As a practical matter, there is not today, and has not been for some years, the possibility for Claimant to pursue its claims in Libyan courts in tranquility and safety.

Indeed, during the July 2018 Hearing, one witness was unable to travel to Tunis by air due to the suspension of Libyan Airlines Service precisely because of a conflict between rival factions seeking control of the airline (para. 196).

Having held that the status of the Libyan tribunals remained very critical, the Tribunal decide that it had jurisdiction over the claimant's contractual claims and replaced the Libyan tribunals with a ruling in this case, considering that it was obliged to settle the dispute comprehensively. as the Libyan tribunals would have done. Accordingly, it was for the Tribunal to rule on the contractual issues raised by the claimant, although the defendant argued in that regard that "most Tribunals considered an umbrella clause, such as Article 8 (1), does not turn simple contractual claims, such as those in this case, into breaches of the treaties",

recalling in support of its arguments cases such as Joy Mining v. Egypt[1], Toto v. Lebanon[2], El Paso v. Argentina[3], Pan American v. Argentina[4] and SGS v. Pakistan[5].

Regarding the value of the precedent in the jurisprudence of this field, in any issues brought to arbitration, whether issues of jurisdiction, interpretation or substance are raised, although there is no uniform practice, as there is no power of the precedent, the decisions of an arbitral tribunal are not mandatory for another, it should be noted that they are considered persuasive authority. The tribunals have ruled that they are not obliged to rely on the precedent, stating that due regard must, however, be given to previous decisions of international tribunals, acknowledging that they may base some considerations on the solutions set out in a number of representative cases. "Subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[6]"

The privilege of the investor to waive the right to invoke liability can be analyzed in two ways: a general one, as a privilege to waive the rights of the treaty; or in particular, with regard to contractual rights and the exclusive option of the forum, especially with regard to umbrella clauses. According to the set of cases available to the public, no tribunal 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.

Applicability of the ILC Draft to contracts with umbrella clause

The umbrella clauses, as I mentioned earlier, are specific to bilateral treaties. Yet, 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. Have the arbitral tribunals given different interpretations to the applicability of the ILC Draft to this type of contracts, given the qualification difficulties that would provide the answer to the question of *when a state's international liability can be incurred following such a contract?*

In the case of *SGS v. Philippines*[7], the ICSID Arbitral Tribunal decide

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[1] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case no. ARB/03/11.
[2] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case no. ARB/07/12.
[3] El Paso Energy International Company v. The Argentine Republic, ICSID Case nr. ARB/03/15.
[4] Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case no. ARB/03/13.
[5] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case no. ARB/01/13.
[6] See *Saipem S.p.A. v. Bangladesh,* Decision on jurisdiction and recommendation on interim measures on 21 March 2007, case ICSID no. ARB/05/07.
[7] *SGS Société Générale de Suverillance S.A. c. Republic of the Philippines,* Decision on jurisdiction in the ICSID Case nr. ARB/02/6, paras. 26,157 (Jan. 29,2004).

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 that 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, i.e., as a subject of private law, in which case the Draft articles are 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.

Arbitral awards differ from case to case, as in *El Paso v. Argentina*[1], the arbitral Tribunal explicitly 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 included in a bilateral investment treaty between the 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.

Another reference case is *Noble Ventures*[2] *v. Romania*. The Romanian state was accused of violating the Bilateral Investment Agreement with the USA and the ICSID Arbitral Tribunal decide that by 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, by violation of that umbrella clause and therefore of the bilateral agreement. In the case of *Noble Ventures*, since the Arbitral Tribunal decide 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.

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[1] *El Paso Energz Int'l Co. (US) v. Argentine Republic,* Decision on jurisdiction in the ICSID Case nr. ARB/03/15, para. 52 (Apr. 27, 2006).

[2] *Noble Ventures, Inc. v. România,* ICSID Case nr. ARB/01/11 (Decision of Oct. 2005). The American company Noble Ventures, which held the majority stake in the Reşiţa Steel Plant (CSR), 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 CSR, 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 company from Reşiţa. 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. CSR was reprivatized in 2004 by the German company Sinara Handel, the distributor of the Russian group TMK, buying it for 1 euro.

Given the different interpretations expressed by the arbitration practice, prudence requires the recognition that it cannot be concluded as far as the precise interpretation of the clause is concerned, as the case law is constantly evolving. Inserting a clear language in the new treaties and establishing such precise clauses as possible would be a welcome and much needed development. We reiterate that from the overall cases under analysis, the methods of assigning and imputing state responsibility are heterogeneous and appreciable not according to a general rule, which practically does not exist, but from case to case, an evolutionary process that continues to be necessary.

Other cases

In Société Générale de Surveillance S.A. v. Paraguay (2010)[1], the arbitral Tribunal interpreted the umbrella clause contained in the applicable treaty as covering the commitments contained in the government's contract with SGS. As a result, the government's breach of its obligations under the contract (refusal to pay invoices) also constituted a breach of its obligations under the investment treaty.

In conclusion, although the breach of a contract does not give the right to invoke the protection of the treaty in accordance with international law, the addition of an umbrella clause in an investment treaty creates the following possibilities:

• This usual restriction is removed by the treaty expressly stating that a breach of an investment contract is considered a breach of the BIT.

• It removes the obligation of the investors to use only the dispute settlement clauses in an investment contract (which, for example, may give exclusive jurisdiction to local tribunals).

• International investors are given the opportunity to exercise their rights before an international arbitration body, such as the International Center for the Settlement of Investment Disputes (ICSID), a mechanism preferred by investors over other tribunals, due to the host state's attitude towards ICSID decisions, due to the fact that ICSID is part of the World Bank Group, and the host state's failure to comply with an ICSID decision, may jeopardize the state access to World Bank funding or international credit in general.

8. Transfer of funds

The importance of protection standards in the transfer of funds is highlighted especially during economic crises, mainly due to the fact that the undesirable effects of an economic crisis affect the monetary system of states differently. In some states[2], the experience of past crises has shown the

[1] SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case no. ARB/07/29, Decision of February 10, 2012, ruled in favor of the investor.

[2] For example, on the effects of the 2001 economic crisis that affected Argentina, see the case of El Paso Energy International Company v. The Republic of Argentina, ICSID case no. ARB/03/15.

emergence of social unrest caused by recession and unemployment, which have led to widespread violence in some cities. In these cases, complementary currencies were found, which aggravated the problem of foreign exchange flows in the national economy of the states affected by the crisis, resulting in a lack of confidence in the foreign exchange system, materialized in the action of citizens who began to withdraw money from banks. to turn it into different currencies or coins. To these problems the declining value of the shares of many companies is added, as well as difficulties in paying debts. However, the measures taken by the states affecting investors are proportionally reflected in the measures that foreign investors must take in accordance with the legal system in which the company has been incorporated. For example, the mere fact that shares are devalued does not entitle a minority shareholder to an action under an investment treaty (it must be borne in mind that such a consequence would be detrimental, as a multitude of causes would arise as a result of each economic fluctuation caused by policy changes in a state, this chaos not being the desired result by the parties to an investment treaty), while if the company had been expropriated, the minority shareholder would be entitled to compensation for diminishing their shares[1].

It should be noted *ab initio* that transfer obligations under investment agreements do not prevent a host state from maintaining restrictions on the ability of its residents to invest abroad. Thus, when a resident tries to buy foreign exchange, the host state may impose certain amount limits after which he may request written proof of the purpose of the payment before providing the foreign exchange, so as to ensure that the foreign exchange will not be transferred by the resident for the purpose of making his own foreign investment (for example, making a deposit in an offshore bank account[2]). In this chapter, the specific clauses for the transfer of funds from the body of foreign investment treaties will be exemplified.

Therefore, the transfer provisions aim to protect investors' expectations regarding the free and unrestricted transfer of funds to and from the host state in order to maintain their operations[3]. They are designed to guarantee the investor's ability to transfer funds in a convertible currency without undue delay. Most investment treaties contain a general obligation to allow protected investors to

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Faced with these problems, the government abolished the foreign exchange system and began a program designated as "pesification" (from the name of the currency) of the economy. The claimant claims that these measures affected his rights under the US-Argentina Bilateral Investment Treaty. The claimant based his claim on an infringement of those rights.

[1] In Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case nr. ARB/87/3, it was considered that the physical or intangible assets of a local company could not be protected by a foreign minority shareholder.

[2] *Transfer of Funds. UNCTAD Series on issues in international investment agreements*, series produced by a team led by Karl P. Sauvant, Khalil Hamdani and Pedro Roffe, United Nations, New York and Geneva, 2000, p. 42.

[3] See Sabahi B., Rubins N. and Wallace D. Jr., *Investor-State Arbitration*, Oxford University Press, 2nd ed., 2019, para. 20.09.

make transfers to and from the host economy related to an investment. The types of transfers protected under an agreement depend to a large extent on the type of investments covered and on the nature of the obligations that apply to those investments. It is generally considered that the right to restrict the transfer of funds falls within the sovereignty of the states under the general principles of international law[1]. This means that, unless otherwise provided in the treaties, imposing restrictions on the transfer of funds is not an illegal act at international level, as it is part of the government's right to regulate and protect its financial and monetary system.

8.1. Analysis of investment treaties

Most existing modern investment treaties contain transfer provisions. Some treaties guarantee transferability for both incoming and outgoing transfers. When not specified, it is reasonable to assume that transferability is also guaranteed for incoming and outgoing transfers. Still, some treaties only guarantee outgoing transferability.

With regard to the liquidation of investments and the repatriation of capital, the clauses in the international investment treaties regulate these issues both for the situation where the agreement has reached the expiration/execution period and in situations where certain events in the host state or the investor state make impossible or risky the continuation of the investment.

As found, although these provisions, including other types of reporting and screening requirements are generally permitted in investment agreements, the comprehensive agreements also contain an interpretation/clarification to the effect that such a reporting requirement should not give rise to "unjustified delays" in making transfers and should not otherwise be used by a host state as a means of circumventing the transfer obligations set out in the agreement.

Many international investment treaties contain clauses regulating financial services specific to this area, an eloquent example being the GATS[2] treaty which has as its object the protection of financial services by liberalizing the provision of cross-border services.

From this point of view, investment liberalization presupposes that investment is an integral part of the service itself[3]. For example, to the extent that a member restricts his residents in obtaining loans from non-residents, a member's

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[1] Dolzer R. and Schreuer, C., *Principles of International Investment Law*, Oxford University Press Publishing House, 2nd ed., 2015, pp. 212-216.

[2] The General Agreement on Trade in Services is a treaty of the World Trade Organization that entered into force in January 1995 following the Uruguay Round negotiations.

[3] See *Transfer of Funds. UNCTAD Series on issues in international investment agreements*, series produced by a team led by Karl P. Sauvant, Khalil Hamdani and Pedro Roffe, United Nations, 2000, p. 31.

commitment to allow other members' banks to provide cross-border lending services to its citizens would require a relaxation of that restriction. Similarly, if a member also makes a commitment to allow non-resident banks to provide cross-border depository services, such a commitment would oblige the member to liberalize any restrictions it may have imposed on residents' ability to have accounts abroad. As it can be seen from its content, in these respects, GATS serves its members to liberalize the achievement of both internal and external investments. The analysis of the content of this treaty shows, subject to important exceptions, that members must refrain from imposing restrictions on international payments and transfers associated with current and capital transactions that are covered by specific commitments made by a particular member. With regard to cross-border trade in services, this rule would serve, for example, to liberalize both the interest and the main part of the repayment of consumer loans to a foreign bank. Thus, according to the provisions of the GATS on this standard, internal and external service-related transfers are covered by the treaty if the cross-border movement of capital is an essential part of the service itself. Thus, a member must allow the non-resident bank to pay the amount it has agreed to lend to a local consumer; the consumer must also be free to transfer the amounts he wishes to deposit to a non-resident bank.

Examples of clauses on fund transfer standards in investment treaties

Today, according to UNCTAD, 173 treaties specific to international investment out of a total of 2,576 contain explicit clauses on the transfer of funds, as well as exceptions to its specific obligations, including exceptions to the balance of payments[1] (external) or other specific exceptions.

The 2017 Investment Agreement between the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations (ASEAN) of 2017 states:

Article 12. Transfers

1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its Area. Such transfers include:

(a) contributions to capital, including the initial contribution;

(b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;

(c) proceeds from the total or partial sale or liquidation of any covered investment;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 10 (Expropriation and Compensation) and Article 11 (Compensation for Losses or Damages);

[1] The balance of external payments is a system of accounts that includes the synthesis of economic and financial transactions of an economy with the rest of the world, over a period of time.

(f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and

(g) earnings and other remuneration of personnel engaged from abroad in connection with that covered investment.

2. Each Party shall allow such transfers relating to a covered investment to be made in a freely usable 19 currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to any of the following:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offences and the recovery of the proceeds of crime;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings; (f) taxation;

(g) social security, public retirement, or compulsory savings schemes;

(h) severance entitlements of employees; and

(i) requirement to register and satisfy other transfer formalities imposed by the Central Bank or other relevant authorities of a Party.

4. Nothing in this Agreement shall affect the rights and obligations that apply to the Parties under the 20 Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 13 (Temporary Safeguard Measures) or at the request of the IMF.

Article 13. Temporary Safeguard Measures

1. A Party may adopt or maintain measures not conforming with its obligations under Article 3 (National Treatment) relating to cross-border capital transactions and Article 12 (Transfers):

(a) in the event of serious balance of payments and external financial difficulties or threat thereof; or

(b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular monetary and exchange rate policies.

2. The measures referred to in paragraph 1 shall:

(a) be consistent with the Articles of Agreement of the IMF;

(b) avoid unnecessary damage to the commercial, economic and financial interests of another Party;

(c) not exceed those necessary to deal with the circumstances described in 21 paragraph 1; (d) be temporary and phased out progressively as the situation specified in paragraph 1 improves; and

(e) be applied such that any one of the other Parties is treated no less favourably than any other Party or non-Party.

3. Any measures adopted or maintained under paragraph 1 or any changes therein shall be promptly notified to the other Parties.

With regard to Romania, two bilateral investment treaties have been identified that contain clauses such as those containing conditions and standards of treatment of the transfer of funds, which currently, although still in force, coexist with which are to be replaced and which have been concluded by the European Union[1].

The EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (EU-Kazakhstan EPCA, 2015) contains the following terms of reference:

1. Without prejudice to the measures adopted by the European Union, each Contracting Party in whose territory investments have been made by the investors of the other Contracting Party shall grant to those investors the free transfer of payments related to such investments, after fulfilling all fiscal obligations, but not exclusively, regarding:

(a) capital and additional funds necessary for the maintenance and expansion of the investment;

(b) returns;

(c) the amounts related to the loans contracted or other contractual

[1] Also, another treaty applicable to Romania is the Trade and Economic Agreement between Canada and the European Union (Canada - EU CETA, 2016), which contains the following provisions:
Article 8.13. Transfers
1. Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay in a freely convertible currency and at the market rate of exchange applicable on the date of transfer. Such transfers include: (a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment; (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, or other forms of returns or amounts derived from the covered investment; (c) proceeds from the sale or liquidation of the whole or a part of the covered investment; (d) payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a loan agreement; (e) payments made pursuant to Articles 8.11 and 8.12; (f) earnings and other remuneration of foreign personnel working in connection with an investment; and (g) payments of damages pursuant to an award issued under Section F.
2. A Party shall not require its investors to transfer, or penalise its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party.
3. Nothing in this Article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offences; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; and (e) the satisfaction of judgments in adjudicatory proceedings.

obligations assumed, for investment;

(d) the proceeds of the sale in whole or in part, the disposal or liquidation of an investment;

(e) any compensation due to an investor under Article 5 of this Agreement;

(f) earnings and other rewards of personnel employed abroad related to investments.

Transfers will be made without restrictions or delays free of charge in convertible currency, provided that all legally due obligations are met.

2. Without prejudice to paragraph 1 of this Article, either Contracting Party may, financially or in exceptional economic circumstances, including in the event of serious balance of payments difficulties, impose such restrictions. in accordance with its national law and in accordance with the articles of agreement of the International Monetary Fund.

3. Unless otherwise agreed with the investor, transfers shall be made in accordance with the national law in force of the Contracting Party in whose territory the investment was made, at the exchange rate applicable on the date of the transfer.

4. Without prejudice to paragraphs 1 and 2 of this Article, a Party may prevent a transfer to be made by means of a contract, in a fair, non-discriminatory manner and in good faith. the national laws of his State concerning:

a) Bankruptcy, insolvency or protection of creditors' rights;

b) Issuing or trading in securities;

c) Offenses;

d) Reports on transfers of fault or other monetary instruments;

e) Ensuring the execution of Tribunal decisions.

It should also be mentioned in this context the Code of Liberalization of Capital Movements of the Organization for Economic Co-operation and Development (OECD) which requires the free transfer of all amounts related to international investments, including diagonally including investments made by a non-resident in the host state and to investments made by residents of the host state abroad.

As I mentioned, some treaties contain exceptions that allow the imposition of "prudential measures" that limit free transfer in order to maintain the security and integrity of financial institutions, the financial system and capital markets. Treaties may also allow for "temporary guarantees", such as capital controls and exchange restrictions, adopted by the host economy to protect the host economy's monetary reserves and currency.

8.2. The jurisprudential context

The practice has seen a number of disputes aimed at banning capital

control. These are bans 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, based on the interconnection between standards, treaties normally protect National Treatment: NT/Most Favored Nation: MFN, the principle of free transfer of funds, giving investors the right to transfer funds related to investments from the host state. In the wake of the recent financial crisis, it has been unequivocally established that a ban on capital controls poses serious risks to governments.

From the examples of clauses containing such a standard, it can be summarized that the flows to which the free transfer guarantee generally applies include (but are not limited to): profits, interest, dividends and other current investment income; the funds needed to finance an investment; proceeds from the sale or liquidation, in whole or in part, of an investment; contract payments, management fees and royalties; loan payments or salaries and other remuneration received by citizens of the home economy of the investment and who have obtained the necessary work permits in connection with an investment.

Recently, in the case of Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID No. ARB/13/1, under the BIT Pakistan-Turkey (1995), ruled in favor of the investor by Decision of 22 August 2017 (in which case Pakistan subsequently settled the dispute in 2020 on the merits of this arbitration award but also in the context of pre-existing allegations of corruption against the claimant), the arbitral Tribunal decide unanimously (para. 1081): (i) that it has jurisdiction over Karkey's claims; (ii) that Pakistan has expropriated Karkey's investment in Pakistan and breached its obligation under Article III BIT; (iii) that Pakistan has violated the right of the investor Karkey to the free transfer of his investment, in breach of Article IV of the BIT. Accordingly, the Tribunal ordered Pakistan to: (iv) pay to the investor Karkey termination fees in the amount of USD 149,802,431, plus compounded interest of 12% per annum from March 30, 2012 until the date of full payment; (v) pay to Karkey for outstanding bills the amount of USD 28,923,000, plus interest of 12% compounded annually from March 30, 2012 until the date of full payment; (vi) pay to Karkey compensation for mobilization and transportation fees for Kaya Bey in the amount of USD 566,000, plus interest of 12% compounded annually from March 30, 2012 until the date of full payment, plus other compensation and arbitration costs related to the claims admitted following this arbitration.

In so analyze, the Tribunal took into account the following:

Pakistan detained three ships belonging to Karkey, releasing the fourth (i.e., Kaya Bey) only after Karkey exercised his rights and obtained a Tribunal order requiring his release.

According to Karkey, by detaining the ships, Karkey has breached his obligations under Article IV of the Treaty, which allows the investor to freely transfer his investment.

Against these claims, Pakistan claimed that Article IV of the Treaty refers exclusively to the free transfer of funds and therefore does not extend to physical assets, which Karkey rejected.

Article IV (1) of the above-mentioned treaty requires each party to the treaty to "allow in good faith that all transfers relating to an investment be made freely and without unreasonable delay in and within their territory." The definition of "investment" under Article I (2) of the treaty includes "movable and immovable property". In addition, the provision lists only examples of transfers in a non-exhaustive manner.

Paragraph 655 of the Decision states that: *In view of the above, and considering that Lakhra's initiation of the Sindh High Court proceedings, the Sindh High Court's arrest of the Vessels and freeze on Karkey's bank accounts all follow from the Supreme Court's finding that the 2009 RSC was void ab initio – which is acknowledged by Pakistan – the Tribunal finds that Pakistan has also breached its obligation under Article IV(1) of the Treaty by depriving Karkey of the free disposal of its assets (i.e. Vessels) part of Karkey's investment under the Contract, including by violating Karkey's right to transfer assets related to its investment "without unreasonable delay."*

Moreover, even accepting for the sake of discussion the literal interpretation that Pakistan wants to give to Article IV (1) of the Treaty, it is not disputable that by detaining the Kaya Bey, Pakistan made its sale impossible and thus did not allow the transfer of any proceeds resulting thereof. (para. 656).

Other cases:

In the case of Valores Mundiales S.L. v. Venezuela (2017)[1], the Tribunal found that in 2008, Venezuela prevented one of the subsidiaries from transferring investment income to investors. Under Venezuelan law, investors wishing to purchase foreign currency were required to first update their foreign investment administrative registration with the relevant Venezuelan authority, SIEX, which rejected their requests for updates without justification, so that the Tribunal found that Venezuela violated its obligation to allow the free transfer of funds related to an investment.

Another case often presented is Von Pezold et al. v. Zimbabwe (2015)[2], in which the Tribunal found that Zimbabwe refused to release the foreign currency that investors needed to repay the foreign currency loans associated with their investment, thus forcing them to exchange some of their profits obtained in US dollars, with Zimbabwean dollars, which was a breach of Zimbabwe's obligation to allow the free transfer of investment-related funds under the relevant investment treaty.

In conclusion, the treatment of transfers under existing international

[1] Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, ICSID Case nr. ARB/13/11, Decision of July 25, 2017, decided in favor of the investor.

[2] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award dated 28 July 2015, decided in favour of investor.

agreements is largely shaped by the general objectives of an agreement and, more specifically, by the interconnection with other international investment treatment standards and by the design of the other obligations it establishes, identifying clauses specifying the type of underlying investments to be covered under the agreement, but also clauses specifying the nature of the obligations that will apply to these investments.

9. Senior management or the standard of treatment in terms of management staff (nationality)

Investment treaties generally include provisions that allow the foreign investor to hire staff from the home state of other states. The protective role of this standard is to give investors maximum flexibility to hire staff and managers with the best qualifications internationally. The clauses identified in the treaties are worded in such a way that these provisions allow for the employment of both senior management and other highly qualified employees, although, as regards this standard, the inherent interconnection with the other standards means that the many times, by imposing performance requirements, investors will have to train their staff. It follows that the wording of such clauses is relevant to governments seeking to promote higher levels of competence transfer.

The concept of "senior management" is interpreted in different ways; while some interpretations refer only to members of the management body, so for those in executive positions, other interpretations refer to staff at a hierarchical level immediately below that of the executive body in executive positions (for example, the so-called MB-1 level), provided that these persons are involved in the day-to-day management of the institution.

According to the current mapping of UNCTAD, there are 194 treaties out of 2,576 investment treaties containing this clause, to which some existing treaty models worldwide are added. Of course, a broader coverage of this issue in the treaties is preferable, because the issue of the investor's nationality and, implicitly, its rights and obligations, manifests certain difficulties especially in the case of a dispute in which the issue of establishing procedural capacity arises. Through the management of a contracting party in an investment legal relationship, a direct or indirect control is exercised. That is why there is the importance of sufficient regulation, so that the competent tribunals resolve a dispute over international investment law and base their judgments on a specific and unequivocal set of rules.

9.1. Analysis of investment treaties

Therefore, the Investment Treaties stipulate that by including in the operation and organization of a subject of international investment law - whether it is a subject of traditional or hybrid international law or becoming specific to

this new field - none of the contracting parties shall require that an undertaking of that contracting party which is the investment of an investor of the other contracting party appoint, as directors, managers or members of the boards of directors, persons of a certain nationality.

For example, the 2012 US BIT Model provides in Article 9:

Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 24.1 of the US BIT model allows a claimant to submit a request for investor-state arbitration in his own name or on behalf of an enterprise that is a legal entity that the claimant owns or controls directly or indirectly. *Such a claim may allege that the respondent state has breached: a) an obligation under Articles 3 through 10, (national treatment, MFN treatment, minimum standard of treatment, expropriation, transfers, performance requirements, senior management and boards of directors, publication investment laws and decisions); b) an investment authorization; and c) an investment agreement and that the claimant (or his company, as the case may be) has incurred loss or damage by reason of, or arising out of, that breach.* The model does not authorize investor-state arbitration for breaching the provisions governing investment and the environment, as well as investment and labor.

BIT Korea-Japan, in art. 8.3 contains a provision on senior management and boards of directors*: Neither Contracting Party shall require that an enterprise of that Contracting Party that is an investment of an investor of the other Contracting Party appoint, as executives, managers or members of boards of directors, individuals of any particular nationality.*

9.2. The jurisprudential context

The arbitral awards handed down by the ICSID tribunals dealt with issues concerning the nature of the investor (as a private or public entity), the place of birth, of incorporation or place of registration or denial of benefits, both in respect of nationals and legal entities (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. Some cases raised issues related to or adjacent to the violation of this standard; in these cases, decisions were made such as: the decision of 24 May 1999 in CSOB v. *Slovakia*, the decision of 29 April 2004 in *Tokios Tokeles v. Ukraine*, the 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 the case of Antoine Biloune and Marine Drive Complex Ltd (MDCL). v. Ghana Investments Center (GIC) and the Government of Ghana (1988), conducted under UNCITRAL rules and ruled in favor of the investor, the Tribunal concluded that the actions of the Government of Ghana and GIC constituted a violation of the following provisions of the Agreement: "22. Subject to the provisions of the [Ghana Investment] Code: (a) no enterprise approved under the Code shall be expropriated by the Government; (b) no person who owns, whether wholly or in part, the capital of an enterprise approved under the Code shall be compelled by law to cede his interest in the capital to any other person."

The tribunal did not make a clear distinction between the damages suffered by the company (by virtue of the expropriation of its contractual rights under the project) and the damages suffered by the shareholder Biloune by losing the value of his shares in the company. The tribunal calculated only the amounts invested by Mr Biloune and did not examine or quantify the company's losses or the manner in which Mr Biloune became a shareholder in MDCL.

In all cases, this standard was analyzed in close connection with two aspects: procedural legitimation and competence. First, if, in the case under consideration, the claimant, national or legal entity alleging breach of the provisions of a bilateral investment promotion and protection agreement, 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 may be pending before an ICSID Tribunal 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 is a national of a Member State of ICSID under Art. 25 (2) (a) if it is a natural person or 25 (2) (b) if it is a legal entity. International investment instruments regulate all aspects and status of the investor and, because they are international investment instruments, also discuss the issue of investor nationality. Regarding the latter aspect, Dolzer and Stevens[1] point out that, in the absence of regulation in treaties, 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. 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.

In general, the authors of specialty literature treat the term "investor" as

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

well as the term "investment", by referring to their nature and forms (Jeswald Salacuse or M. Sornarajah), analyzing the investor in the light of his potential capacity as a claimant (admitting even the right of the associates of a legal entity (company) to have the quality of claimant), highlighting the main issues such as the migration of companies or "shopping" of jurisdiction. Other authors emphasize the tools in question. These are both unconventional, such as resolutions of international organizations, the OECD, and conventional instruments such as the Washington Convention or the nearly 3,000 bilateral investment promotion and protection agreements that do not have the same object and purpose. As well as the definition of the investment that varies depending on the purpose and object, so the definition of the investor's nationality will be adapted, including by reference to the aspects regarding the *senior management* clause.

In order to determine the nationality of a national or legal entity (company, organization) within a bilateral agreement, it is necessary to examine the relevant provisions of the treaty, which are insufficient in themselves as they often refer to the domestic law of the contracting parties which, in turn, is subject to customary corrections of customary international law. Also, Article 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 national. National law must in turn be interpreted and applied by arbitral tribunals in the light of the principles and norms of customary international law. In the case of foreign investment, "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].

The concept of *senior management* also has a special influence on the methodology of classifying an investment in familiar variants, and the delimitation and the definition of this concept must be done specifically to remove any doubts, depending on the field in which the investment took place. However, as long as a comprehensive definition of foreign investment is not promoted, logically, this has repercussions of a domino effect both on the investment classification methodology and, above all, on the importance of the existence of international treaties containing reliable clauses of interpretation of specific terms.

Also, the management characteristics of the investing entities have a special impact in the matter of the competitive control and of the existing regulations in this matter. In general, the size of the share control package[2] varies

[1] Art. 3.3; 117 *OCDE Benchmark: Definition of Foreign Direct Investment. Fourth edition,* 2008.
[2] International Monetary Fund, Balance of Payments Manual, 1980, para. 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 the trading and negotiation of securities in their own account or in the account of others temporarily hold securities of an enterprise acquired for resale, provided that they do not exercise

inversely with the size of the company and the number of shares issued by it[1]. Investments that require, on the model of the stated definitions, physical transfer of goods or equipment, constitute foreign direct investments, as opposed to portfolio investments, which represent only capital transfers for the acquisition of parts or shares in a company operating in another state. When the issuing agent comes to control the receiving agent, in addition to the initial financial flow, there are also: technology flow, labor flows, managerial flows and even flows of goods and services.

It should be noted here too that the existence of the senior management clause is inextricably linked to the other investment treatment standards. 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 of the shares, but varies from case to case, the investment, in turn, will fall into one or another of the mentioned types. The International Monetary Fund qualifies foreign investment as a transfer of goods in order to obtain and hold for a significant period of time control over an economic entity in an economic system different from that of the investor, the latter aiming to obtain profit through the management of the entity created[2].

In terms of liability, doubts were raised as to the significance of this concept when comparing the Opinion of the European Central Bank (ECB) of 8 November 2017 (CON/2017/46) with the Decision of the Tribunal of the European Union on the adjacent cases[3] on April 24, 2018. While in its opinion, the ECB supports the introduction of certain changes to the concept of senior management in order to clarify the distinction between the governing body and

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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 these 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 of the date of acquisition; the Competition Council may extend this period, upon request, if the respective institutions or companies can prove that the transfer was not possible, under reasonable conditions, within the established period; control, according to the provisions of art. 10 para. (1) letter b), is acquired by an enterprise whose sole object of activity is to acquire participations in other enterprises, to manage and capitalize those participations, without being directly or indirectly involved in the management of the enterprises concerned, without prejudice 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 of the investments in question, and not to determine, directly or indirectly, the competitive behavior of those undertakings.

[1] C. Fota, *Economie internațională/International economy,* Sitech Publishing House, Craiova, 1996, p. 76.

[2] See Cristina Elena Popa Tache, *op. cit.,* 2019, p. 339.

[3] Related cases thus identified: T-133/16 la T-136/16 (Caisses régionales de crédit agricole mutuel Alpes Provence, Nord Midi-Pyrénées, Charente-Maritime and Brie Picardie against the European Central Bank).

senior management, in the above-mentioned decision, the Tribunal seems to conclude that senior managers correspond to executives of the governing body[1].

According to Article 3 (7) of the Capital Requirements Directive[2] (CRD IV), the concept of a *governing body* means "the body or bodies of the institution, which are appointed in accordance with national law, which are empowered to establish the institution's strategy, objectives and general direction; supervises and monitors the decision-making management and include the persons who effectively lead the activity of the institution."

According to Article 3, point 9 of CRD IV "senior management" means those natural persons who perform executive functions within an institution and who are responsible and accountable in front of the management body for the day-to-day management of the institution.

In its reply, the European Banking Authority states the following: *Recital 5 of Delegated Regulation (EU) no*. 604/2014 of the Commission explains that "*Members of the management body have the ultimate responsibility for the institution, its strategy and activities and therefore are always able to have a material impact on the institution's risk profile. This applies both to the members of the management body in its management function who take decisions and to members of the supervisory function who oversee the decision-making process and challenge decisions made*." Recital 6 states that *"The senior management and senior staff responsible for material business units, for management of specific risk categories such as liquidity, operational or interest rate risk, and for control functions within an institution are responsible for the day-to-day management of the business, its risks, or its control functions. This includes the responsibility for making strategic or other fundamental decisions on the business's activities or the control framework applied. The risks taken by the business and the way they are managed are the most important factors for the institution's risk profile."* Based on the above, the definition of senior management does not exclude that a member of the governing body would belong to senior management and vice versa. On the contrary, as the decision in related cases T-133/16 to T-136/16 of the EU Tribunal confirms, only members of the management body who are also part of the credit institution's senior management may be appointed as persons [who] actually run the business of the institution.

As stated in Delegated Regulation (EU) 604/2014, senior management is responsible for the day-to-day management of the business, its risks or its control functions. This includes the responsibility to make strategic or other fundamental decisions regarding the company's activities or the control framework applied, which leads us to conclude that the term also covers persons employed at a hierarchical level below that of the management body, to the extent that these persons exercise executive functions and are responsible for the day-to-day

[1] See https://www.eba.europa.eu/single-rule-book-qa, accessed on 11 April 2021.

[2] The directive is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0036, accessed on 16 March 2021.

management of the institution.

In conclusion, the term "senior management" in CRD IV includes natural persons who perform executive functions within an institution and who are responsible and accountable to the governing body for the day-to-day management of the institution and are not limited to persons who are members of the management body in its management position (executive directors), but also include persons at a hierarchical level immediately below whom they report directly to the management body in its management function.

In its reply, the European Banking Authority also stated that these opinions were drawn up by the general Directorate for financial stability, financial services and the capital markets union, and that only the Tribunal of Justice of the European Union can provide definitive interpretations of EU law.

Chapter V
Generic conclusions

The study of standards serves as a tool to understand trends in the development of IIA[1], as well as the possibility to assess their protective role, the prevalence of policies of different approaches and the identification of examples of treaties useful to doctrine and practice in this field, method of legal conductivity towards a better development and evolution of the means of investment protection.

A complete analysis of the treatment standards of international investments can be performed only by a close correlation because the singular existence of a standard specific to this field is excluded from the start.

One of the important features of bilateral and regional investment agreements is that they establish obligations regarding the treatment of a host state to foreign investors, thereby understanding the treatment of investors of another state (the country of origin of those investors). 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. The importance of establishing and existence of eloquent and integrated treatment standards is a condition for survival under international economic crises.

[1] Acronym used for International Investment Agreements.

Annex 1
Case study.
Generic conditions for the cross-border banking between Member States of the European Union. The example of the international investor Revolut Bank UAB

Any type of foreign investment, including those belonging to investors from the Member States of the European Union, operates in compliance with certain conditions and standards of legal treatment established by international law. This study includes a case example of the conditions for establishing a foreign investment in the financial - banking field in two EU Member States: Romania (EU Member State since 1 January 2007 and pending for acceding to the Schengen Area) and Lithuania (EU Member State since 1 May 2004 and member of the Schengen Area since 21 December 2007). It is a recognized fact that, following the entry into force of the Lisbon Treaty, FDI[1] is now within the exclusive competence of the EU[2]. The Treaty recognizes that this new EU competence is a double challenge, on the one hand, for the management of (existing) bilateral investment treaties and, on the other hand, for defining a European investment policy that meets the expectations of investors and beneficiary states, but also to the EU's foreign policy objectives and broader economic interests. The United States and Canada are among the first countries to adapt their BIT[3] models to limit interpretive capacity through arbitration and ensure better protection of their public intervention space.

1. Brief history

Recently, a Lithuanian bank started operating in Romania, which generated a series of discussions on the formalities and authorizations that this Lithuanian investor should fulfill in order to establish his activity in Romania, having in whereas both the home state of this investor and the host state are members of the European Union. At the proposal of the Bank of Lithuania, the European Central Bank granted in 2018 a credit institution authorization to Revolut Technologies UAB, through which it acquired the right to accept deposits and offer loans. Also in 2018, the Central Bank of Lithuania issued an electronic money institution authorization for another company, namely Revolut Payments UAB, an investor that is part of the Revolut Ltd. Group (start-up

[1] FDI - Foreign Direct Investment.
[2] The EU is the acronym for the European Union.
[3] BIT is the acronym for Bilateral Investment Treaty (s).

established in 2015). For its operation under these conditions, the Bank of Lithuania, as the competent supervisory authority, notified the NBR[1] of the provision of services directly on the territory of Romania by Revolut Bank, on March 4, 2020, so that the banking activities that this institution can carry out credit in Romania are those that have been the subject of notification.

2. The identification as a foreign investor of a banking institution having the nationality of an EU Member State of origin – Lithuania

Generic, all the conditions under which a foreign investor may establish and carry out his investment in the territory of a host State must be examined also in the light of the existence or non-existence of any investment promotion and protection treaty between the State of origin and the Host State, establishing in particular the treatment of investors, subject to the general conditions under which any international investor shall be entitled to operate under international investment law. As we demonstrate in this monograph, the specificity of this branch of law lies in the emphasis on its fundamental concepts, essentializing what determines the whole, being considered a science of essentialization and, ultimately, the role of any method of scientific research is to analyze, discover and emphasize the links of this together with other sciences, the composition and structuring of the system and the substantiation of the joints between its components, because international investment subsists in all components of society.

Globally, there are traditional, indissoluble links between foreign investment and banks, especially at the institutional and economic level. For example, the 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, soft law guide to action by directly from the practice of Western states and bilateral conventions, and aims to encourage and protect foreign investment, promote fair and equitable treatment standards and impose strict limits on nationalizations[2].

In the mission of the normative regulations of harmonization with the international movements in the field, the related study of the international law of investments with the banking and financial law is required.

This is demonstrated by the work of the World Bank, within which ICSID operates - the most important institution for resolving foreign investment disputes. The launch of the International Center for the Settlement of Investment

[1] NBR is the acronym for National Bank of Romania. Information on EU credit institutions can be consulted on the NBR website (Registers and Lists section) in the "List of credit institutions that have notified the NBR of the provision of services directly on the Romanian territory".

[2] N. Q. Dinh, P. Daillier, M. Forteau, A. Pellet*, International Public Law*, 8th ed., Paris, 2009, pp. 1207.

Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA) further complemented the Bank Group's ability to connect global financial resources to the needs of developing countries.

Since the establishment of the World Bank, the banking regulatory system has had a significant impact on international investment regulations, a phenomenon that has been reversed.

These are the reasons why any analysis of the conditions under which the pre-establishment, establishment, development and termination of a foreign investment of banking type takes place, must be carried out in accordance with the regulations of international law on investment relations.

The agreement between the Government of Romania and the Government of Lithuania on the promotion and mutual protection of investments in force since 15/12/1994 and until now[1], establishes the legal regime of protection and promotion of foreign investments between the two states, starting from the definitions of the terms "investment" and "investor", as follows:

(I) The term "investor" means:

a) in respect of Romania, natural persons who, in accordance with Romanian law, are considered to be its citizens; (ii) in the case of the Republic of Lithuania, individuals who, in accordance with the law of the Republic of Lithuania, are considered to be nationals and persons without citizenship residing permanently in the territory[2] of the Republic of Lithuania.

(b) any entity, including companies, corporations, business associations and other organizations, that are properly constituted or organized in accordance with the law of that Contracting Party and have their registered office, together with the actual economic activities in the territory of the same Contracting Party.

(c) any entity or organization established under the law of a third State which is directly or indirectly controlled by natural persons, as referred to in point (a) of this paragraph, of that Contracting Party or by entities established on territory of that Contracting Party.

2. The term "investment" includes any type of asset and in particular, though not exclusively:

a) movable and immovable property, as well as any other real rights, such

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[1] See the official UNCTAD page: https://investmentpolicy.unctad.org/international-investment-agreements/countries/174/romania, accessed on 22.03.2021. The Investment Treaty Mapping Project (IIA) is a collaborative initiative between UNCTAD and universities around the world to map their content and the resulting database serves as a tool to understand trends in IIA development, assess the prevalence of different policy approaches and to identify examples of treaties.

[2] According to this Treaty, the term "territory" means: *(i) in respect of Romania the territory of Romania, including its territorial sea, as the exclusive economic zone over which Romania exercises sovereignty, sovereign rights or jurisdiction in accordance with its domestic and international legislation on the exploration and exploitation of nature, biological resources; and minerals present in the sea waters, the seabed and the subsoil of these waters; (ii) in respect of the Republic of Lithuania, the territory of the Republic of Lithuania, including the territorial sea and any maritime or submarine area in which the Republic of Lithuania may exercise, in accordance with international law, the right to explore, exploit and conserve the seabed, subsoil and natural resources.*

as easements, mortgages, security rights, pledges:

b) shares, parties or any other type of participation in companies;

c) claims for money or any rights over any performance of economic value;

d) intellectual and industrial property rights, such as copyrights, patents, industrial designs, trademarks or trade names, trade names: know-how and customers, as well as other similar rights recognized by the laws of the contracting parties;

e) concessions under public law, including concessions for the search, extraction or exploitation of natural resources, as well as all other rights granted by law, by contract or by decision of the authority in accordance with the law.

The two states also agreed that any change in the form in which the asset is invested or reinvested will not affect their investment character, provided that such change is made in accordance with the laws of the host state.

This bilateral treaty also provides that the term "incomes" means amounts obtained from an investment and, in particular, although it does not exclusively include profits, interest on dividends, capital gains, royalties or other commissions.

Regarding the treatment given to investments, Romania and Lithuania established in art. 3 of the same Treaty that each Contracting Party shall protect in its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not affect, by unreasonable or discriminatory measures, the management, maintenance, use, possession, extension, the sale or liquidation of such investments.

Each Contracting Party shall ensure fair and equitable treatment in its territory of the investments of the investors of the other Contracting Party. Such treatment shall not be less favorable than that accorded by each Contracting Party to investments made in its territory by its own investors in accordance with the laws and regulations of that Contracting Party or than that accorded by each Contracting Party to investments made in its territory by investors from any third country if the latter treatment is more favorable.

Also, the most-favored-nation clause shall not be construed to oblige a Contracting Party to extend to investors and investments of the other Contracting Party the advantages resulting from any existing or future customs or economic union or free trade area or other form of trade regional economic cooperation to which either Contracting Party is or becomes a member. No such treatment shall relate to any advantage which either of the Contracting Parties grants to investors of a third State under a double taxation agreement or other reciprocal tax agreements.

Each Contracting Party in whose territory the investors of the other Contracting Party have investments shall grant to those investors the free transfer of payments without delay in respect of such investments, in particular those funds arising from: (a) returns in accordance with Article 1 (3) of this Agreement;

(b) the amounts of loans or other contractual obligations assumed for the investment; (c) receipts from the total or partial sale, alienation or liquidation of an investment; (d) capital and additional amounts for the maintenance or extension of the investment; e) the compensation provided for in Article 5 of this Agreement; f) the earnings of natural persons referred to in Article 1 (1) (a) of a Contracting Party who is authorized to work in connection with an investment in the territory of the other Contracting Party in accordance with the laws and regulations of that Party contracting.

Point 2 of the same article provides that transfers are made in a freely convertible currency at: the effective exchange rate for current transactions at the date of the transfer, unless otherwise agreed with the investor.

It should be noted that this BIT between Romania and Lithuania includes in article 13 the sunset provision according to which stipulates, in the conditions of termination of the treaty, the term within which the parties can avail themselves of the provisions of the treaty, as follows: the agreement will remain in force for other periods of 10 (ten) years, unless either Contracting Party is officially notified of the termination to the other Contracting Party at least six months before the expiry of the Agreement. In the event of official notification of the termination of this Agreement, the provisions of Articles 1 to 12 shall continue to be effective for a subsequent period of ten years for investments made prior to the official notification.

3. Discussion on the effects of the Agreement on the termination of bilateral investment treaties between the Member States of the European Union on the treatment and protection of investments between Member States

Prior to these analyzes, it is necessary to analyze the statement contained in the introductory part of the Agreement in question.

Is it or is it not a theoretical error manifested by the provision: "HAVING in mind the rules of customary international law as codified in the Vienna Convention on the Law of Treaties (VCLT)"?

This statement may generate some theoretical confusion, being recommended to replace the term "codified" with the term "recognized" or by deleting the final part of the statement: "as codified by the Vienna Convention on the Law of Treaties", or by dividing the content of the thesis above in two distinct points.

Codification, according to all the established definitions, means systematization and reunification in a code of the legal norms from a certain branch of law. Or, if customary international law were codified, then it would no longer be a custom but would turn into another source of international law: the treaty. At the moment of codifying an aspect of customary international law, it disappears, it moves from the sphere of customary international law, to the sphere

of treaties, of international conventions, general or special, which establish expressly recognized rules as provided by art. 38 of the State of the International Court of Justice. A codification, thus an inclusion of a rule in the treaty, can become a rule of customary international law[1] for non-signatory third parties to that treaty.

Customary international law is an aspect of international law that involves the principle of custom. Along with the general principles of law and treaties, custom (a practice generally accepted as the rule of law) is considered by the International Court of Justice, specialists, the United Nations and its member states to be among the primary sources of international law.

The Vienna Convention on the Law of Treaties (1969) does NOT codify the rules of customary international law, emphasizing even in its content: Affirming that the rules of customary international law will continue to govern matters not governed by the provisions of this Convention.

Moreover, the Vienna Convention of 1969 itself uses the term "recognized" when referring to the rules of customary international law in art. 38: Rules of a treaty which become binding on third countries by the formation of an international custom - None of the provisions of Articles 34 to 37 precludes a rule laid down in a treaty from becoming binding on a third State as a customary rule of international law recognized as such.

For these reasons, the confusion arising from the interpretation of the statement in the Termination Agreement to which we have referred should be remedied. The fact that it is not codified is part of the essence of customary international law. A provision of a treaty may be a rule of customary international law for third parties, i.e., for non-signatories to that treaty.

In addition to some such errors, another aspect needs to be considered: the entry into force of this Agreement can generate, at least temporarily, some problems of legal treatment of foreign investment, as the standards desired by investors and clearly set out in the BIT whose termination is ordered, are not to be found in other EU provisions, which is why it was stated in the preamble to this Termination Agreement that: Member States and the Commission will intensify their discussions without delay, in order to better ensure full protection, solid and effective investment in the European Union[2].

All these negotiations would have been advisable to be initiated before the entry into force of the Termination Agreement because the absence of a

[1] From the point of view of public international law, the custom consists of a practice (behavior) of states of general character, relatively long and repeated by them in international relations and considered by them as the expression of a legal rule, mandatory for those states.

[2] According to art. 17 of the Termination Agreement, in accordance with their own constitutional requirements, the Contracting Parties may decide to apply this Agreement provisionally. The Contracting Parties shall notify the depositary of such a decision. 2. Where both Parties to a bilateral investment treaty have decided to apply this Agreement provisionally, the provisions of this Agreement shall apply to that Treaty within 30 calendar days of the date of the most recent decision on provisional application.

protection at least equal to that agreed by previous BITs will lead some investors to change their investment geography in other non-EU countries, where they will find more favorable treatment (freedom of establishment).

It should be noted that, as provided for in the Termination Agreement, when exercising one of its fundamental freedoms, such as the freedom of establishment or the free movement of capital[1], investors from the Member States act within the scope of Union law and therefore enjoy the protection of those freedoms and, where appropriate, the relevant secondary legislation, the Charter of Fundamental Rights of the European Union and the general principles of Union law, which include in particular the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations. Case C-390/12 Pfleger, paragraphs 30 to 37). Where a Member State implements a measure, which derogates from one of the fundamental freedoms guaranteed by Union law, that measure falls within the scope of Union law and the fundamental rights guaranteed by the Charter also apply (CJEU judgment in Case C-685/15 Online Games Handels, paragraphs 55 and 56).

Therefore, even if the BIT will be closed bilaterally between Romania and Lithuania, the standards of treatment and protection of investments are maintained in the above conditions, as they not only become for third parties, where they are not codified between Member States, rules of customary international law, but for the time being, are substantive issues that will not be affected because the Termination Agreement states in its preamble that: this agreement is without prejudice to the question of compatibility with EU treaties of substantive provisions of bilateral intra-EU investment treaties.

The main purpose of the termination agreement is to establish the starting conditions for the dispute settlement mechanism and it clearly states that: The Contracting Parties confirm the understanding that the arbitration clauses are contrary to the EU Treaties and are therefore inapplicable. As a result of the incompatibility between the arbitration clauses and the EU Treaties, from the date on which the last party to a bilateral investment treaty became a Member State of the European Union, the arbitration clause in such a bilateral investment treaty cannot serve as a legal basis for arbitration proceedings.

In conclusion, as regards the standards of treatment accorded to international investments, they remain enshrined, where the BIT come to an end, under customary international law.

[1] The TFEU does not define the notion of "movement of capital". In the absence of a definition, the Court of Justice of the European Union has ruled that the definitions included in the nomenclature annexed to Directive 88/361/EEC can be used to define this notion. According to these definitions, cross-border capital movements include: foreign direct investment (FDI); real estate investments or acquisitions; investments like shares, bonds, treasury bills, trust units; granting loans and credits; other operations involving financial institutions, including capital operations, such as endowments, inheritances, donations, etc.

4. Standards of legal treatment applicable to international investments

As noted from the BIT content between Romania and Lithuania, the parties must comply with certain conditions regarding the treatment and protection of investments established in their territories, so as not to create discriminatory treatment and therefore not to impose additional burdensome conditions on investors in which to carry out its activity.

As we showed in the content of this monograph, according to public international law, domestic regulations must be correlated with the minimum set of rights recognized to foreigners, preferably under the corollary of the economic sovereignty of states. It can be said that the economic sovereignty of states is a combination of the opportunities they have in making individual decisions on issues related to the development of their economies, because only a sovereign state can protect its national and economic interests and the interests of its citizens and from abroad, in reality, all states being, to a greater or lesser degree, intermediaries between global and national economies.

Although the practice of courts designated to settle investment disputes is unstable, its analysis has shown that the State of origin may be inclined to either preferential or differential treatment, which are not sanctioned by international law which penalizes discrimination or discriminatory treatment in the matter.

The provisions of the body of treaties on investors and investment treatment are intended to prevent possible restrictive behavior of the host government and to impose discipline on its governmental actions and to achieve this goal, the treaties define a set of standards against which host states must adhere comply in their attitude in the legal relations they have with investors and their investments.

More specifically, the actions of the State which do not comply with the standards included in the Treaties constitute infringements of the Treaties involving the international liability of the offending State which may be obliged to pay compensation for the damage caused. In order to protect foreign investors against risks, in particular against political risk arising from the placement of their assets under the jurisdiction of a host State, investment treaties stipulate obligations regarding the treatment that host States must accord to investors and their investments. Although treaties do not usually define the meaning of treatment, that term in its usual dictionary sense includes the actions and behavior it will take towards another person. In other words, by concluding an investment treaty, a state makes promises about the actions and behaviors it will take towards the investments and investors of the treaty partners, and the obligations thus assumed by states generate considerable legal effects, all the more so much to a certain extent, the legal norm is created by political power, and any codification is, from this point of view, a compromise between political tendencies and the expression of the general will.

Therefore, imposing certain performance requirements on the international investor Revolut Bank UAB, such as obtaining additional authorizations that are not or would not be required of an investor in the same situation, creates the premises for discriminatory treatment, all the more so as the Lithuanian banking institution past the establishment phase. In general, states can use these clauses depending on when they are applied: pre-established and not after the investment has been made, because, as we have pointed out, bridges can be created towards discriminatory treatment. Excluding this standard from the scope of the NT (national treatment) and MFN (most-favored-nation clause) standards meant that pre-established PRs (performance requirements) could be imposed on domestic investors, and the MFN clause it would not allow more favorable provisions to be imported from other treaties, which would create chaos.

5. European Banking Union. The example of Revolut Bank UAB and the mechanism of cross-border banking in the European Union

The authorization procedure in the Member States of the European Union (EU), as currently regulated, is based on the provisions of the TFEU, which contains provisions on the functioning of the internal market between Member States, in which the free movement of goods, persons, services and capital is ensured. Like any treaty on the treatment of foreign investment between Member States, it prohibits any restrictions on the freedom of establishment, which is the right of all international investors - natural and legal persons in the EU - to establish and operate in other Member States.

In response to the recent financial crisis, the European Commission has pursued a number of initiatives to create a safer financial sector for the single market. These initiatives form a single guide - which is the foundation of this banking union - for all financial actors in the 27 EU countries and include: stronger prudential requirements for banks; improved protection for depositors and management rules of banks with difficulties.

As it is known, therefore, on the basis of the European Commission's roadmap for the establishment of the banking union, the EU institutions have agreed to set up a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) for banks. Although the Banking Union applies to euro area countries, it can be joined by non-euro area countries.

The Single Supervisory Mechanism (SSM), one of the two existing pillars of the Banking Union, became operational on November 4, 2014. It is a banking supervision system set up by eurozone states to strengthen the resilience of European banks. The SSM is composed of the European Central Bank, which has received, for the first time, responsibilities for prudential control and the national supervisory authorities of those states. The ECB directly supervises 115

significant banks (holding 82% of euro area banking assets), determined on the basis of criteria made public, while less significant banks continue to be supervised by the competent national authorities in cooperation with the ECB. Within its powers, the ECB has the authority to grant and withdraw licenses to all banks operating in countries covered by the MSU.

According to the available information presented by the European Commission, it presented a proposal for a European Deposit Insurance Scheme (EDIS) in November 2015 covering stronger and more uniform insurance for all retail depositors in the banking union. The first two pillars of the banking union - the SSM (the single supervisory mechanism is a new banking supervision system for Europe and comprises the ECB and the national supervisory authorities of the participating countries) and the MRS (the single resolution mechanism, which is based on the "single regulation" EU or on the common financial regulatory framework) - are now in place and fully operational[1].

Within this Banking Union, the SSM gives the European Central Bank certain supervisory tasks over the EU financial system. It should be noted that Revolut was authorized by the ECB.

As noted, the main instrument for the completion of the single market was the Second Bank Consolidation Directive of 15 December 1989, now taken over with amendments to Directive no. 2013/36/ EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (also transposed into Romanian law), introducing two fundamental principles: mutual recognition of authorizations and state control. The European Banking Union now represents the transfer of responsibility for national banking policy to the EU level in several EU Member States, initiated, as we presented earlier, in 2012 in response to the euro area crisis.

On the basis of this Directive, Member States have established that certain activities/investments, including investments in the banking field (listed in Annex 1 to Directive 2013/36/EU) may be carried out in their territories under the right of establishment and services, both by establishing branches and by providing services directly by any credit institution authorized and supervised by a competent authority in another home Member State, provided that such activities are included in the authorization. Therefore, among the members of the European Union, as is the case exemplified in this study, any credit institution that has the nationality of an EU Member State and has a “single bank authorization” or “European passport” can operate freely, not being required to apply for an authorization from the host State authority to carry out cross-border banking services, the authorization issued by the State of origin being sufficient, which is strengthened by the control of the State of origin by which the supervisory authority of that State which issued the operating license has the

[1] In October 2017, the European Commission issued a Communication calling on the European Parliament and the Council to make rapid progress in adopting these measures and to complete all parts of the Banking Union architecture.

power to supervise prudential conduct of its national banks for operations in other European Economic Area (EEA) countries.

This set of rules provides legal and administrative standards to regulate, supervise and govern as efficiently as possible the financial sector in all EU countries, a set of rules that includes capital requirements, recovery and resolution processes and a harmonized system of national deposit guarantee schemes.

Given the time when the necessary authorization mechanism for Revolut Bank UAB was discussed, it should be noted that from mid-2020, the Single Supervisory Mechanism and the Single Resolution Mechanism are based on the EU's "Single Regulation" or the common framework for financial regulation. Until October 2020, the geographical area of the Banking Union was identical to that of the euro area. Other non-euro EU Member States[1] may join the Banking Union in a procedure known as close cooperation.

The single regulation is a name for EU rules that collectively govern the financial sector across the European Union[2].

6. Conclusions

Considering all European regulations, Revolut Bank UAB can operate in our country only on the basis of the authorization (license) issued to it by the European Central Bank and the notification of the supervisory authority of the state of origin. According to public international law, any regulations in the field must be correlated with the minimum set of rights recognized to foreigners and especially with the standards of treatment granted to international investments, preferably under the corollary of the economic sovereignty of the states.

[1] Bulgaria and Croatia initiated requests for close cooperation in July 2018 and May 2019 respectively. Following the formal approval of these requests in June 2020, the European Central Bank started supervising the main Bulgarian and Croatian banks on 1 October 2020.

[2] The provisions of the Single Regulation are set out in three main pieces of legislation: 1. The Capital Requirements Regulation and Directive (also known as CRD IV; Regulation (EU) No. 575/2013 of 26 June 2013; Directive 2013/36/EU of 26 June 2013), which implements the capital requirements capital Basel III for banks. 2. Deposit Guarantee Directive (DGSD; Directive 2014/49/EU of 16 April 2014), which regulates deposit insurance in the event of a bank's inability to pay its debts and recovery. 3. BRRD Directive 2014/ 59/EU of 15 May 2014, which establishes a framework for the recovery of credit institutions and investment firms at risk of failure.

Bibliography

1. T. Affaire, *Recueil de jurisprudence* 1996.
2. D. Anzilotti, *Cours de droit international*, Sirey Publishing House, Paris, 1925.
3. A. J. Belohlavek, *Protecţia investiţiilor străine directe în domeniul energiei/ Protection of foreign direct investment in energy*, C.H. Beck Publishing House, Bucharest, 2012.
4. Henry Bonfils, Paul Fauchille, *Manuel de Droit International public (Droit Des Gens)*, third edition, Arthur Rousseau Publishing House, 1901.
5. N. J. Calamita*, Handbook on Obligations in International Investment Treaties,* 2020, APEC Committee on Trade and Investment (CTI) Publishing House.
6. Rene David, *Grand sistemes de droit contemporains*, Dalloz Publishing House, Paris, 1978.
7. Jan de Louter, *Le droit international public positif*, Vol. I and II, Oxford, 1920.
8. N. Q. Dinh, P. Dailier, M. Forteau, A. Pellet, *Droit International Public*, 8 ed., Paris, 2009.
9. I. Dogaru, *Elemente de teoria generală a dreptului/Elements of the general theory of law*, Oltenia Publishing House, Craiova, 1994.
10. I. Dogaru, D. C. Dănișor, Gh. Dănișor, *Teoria generală a dreptului/General theory of law*, second edition, C.H. Beck Publishing House, Bucharest, 2008.
11. R. Dolzer, M. Stevens, *Bilateral Investment Treaties*, Nijhoff Publishing House, Hague 1995.
12. R. Dolzer, C Schreuer, *Principles of International Investment Law*, OUP Publishing House, Oxford 2008.
13. R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press (OUP), second edition, 2012.
14. M. V. Ershov, *Economic sovereignty of Russia in the global economy*, Ekonomika Publishing House, 2005.
15. Z. Farhutdinov, *Economic sovereignty of the state in the context of globalization,* Law and Safety, 3(28), 2008.
16. Paul Fauchille, *Trăité de droit internaţional public*, Lib. A. Rousseau Publishing House Paris, 1922.
17. G. Feuer, *Reflections sur la Charte des droits et des devoirs économiques des Etats*, RGDIP, 1976.
18. C. Fota, *Economie internațională,* Universitaria Publishing House, Craiova.
19. I. Gâlea, *Analiza critică a normelor Constituției României referitoare la relația dintre dreptul internațional și dreptul intern/Critical analysis of the norms of the Romanian Constitution regarding the relationship between international law and domestic law*, Analele Universității din București/ Annals of the University of Bucharest, 2009.
20. I. Gâlea, *Dreptul tratatelor/The law of treaties*, C.H. BECK Publishing House, 2015.
21. G. Geamănu, *Dreptul internațional contemporan/Contemporary international law*, Didactic and Pedagogical Publishing House, Bucharest, 1975.
22. G. Geamănu, *Drept internaţional public/International public law*, vol. II,

Didactic and Pedagogical Publishing House, Bucharest, 1983.
23. P. Guggenheim, *Traite de droit internaţional public,* vol. I, second edition, 1996.
24. 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.
25. R. Jennings and A. Watts, *Oppenheim's International Law,* 9th edition, Volume 1 Peace*,* Edited by Robert Jennings, Arthur Watts KCMG QC, 2008, DOI:10. 1093/law/9780582302457.001.0001.
26. E. Kaufmann, *Volkerrecht und Landesrecht,* 1897, Juristische Grunbegriffe Publishing House, Berlin, 1920.
27. H. Kelsen, *General Theory of Law and State*, London, 1945.
28. H. Kelsen, *Principles of International Law*, 2nd ed., London, 1966.
29. H. Lauterpacht, *International Human Right,* Oxford, 1950.
30. Barton Legum, *Understanding Performance Requirrements Prohibitions in Investment Treaties* in *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2007,* Arthur W. Rovine Publishing House, Brill 2008.
31. Barton Legum, Ioana Petculescu, *Performance Requirements. Mobil v. Canada, ICSID Case no. ARB(AF)/07/4*, in *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International Publishing House, 2016.
32. A.F. Lowenfeld, *International Economic Law,* ed. 1, Oxford University Press, 2002.
33. Campbell McLachlan, Lawrence Shore & Matthew Weiniger, *International Investment Arbitration - Substantive Principles*, Oxford University Press Publishing House Publishing House, 2007.
34. Ansari Mahyari, A. & Raisi, *International standards of investment in international arbitration procedure and investment treaties,* Jurídicas magazine*, 2018.*
35. G. Meitani, *Curs de drept internaţional public/Public international law course*, Al. T. Doicescu Publishing House, 1930.
36. Gh. Mihai, *Teoria dreptului/The theory of law*, third edition, C.H. Beck Publishing House, Bucharest, 2008.
37. G. Cordero Moss, *Full protection and security* in A. Reinischs (ed.), *Investment protection standards*, OUP, 2008.
38. Peter T. Muchlinski, *Multinational Enterprises and the Law*, Oxford International Law Library Publishing House, 2nd edition, 2007.
39. L. Navasardyan, *Protectia şi garantarea investiţiilor străine în dreptul comerţului internaţional/Protection and guarantee of foreign investments in international trade law*, Wolters Kluwer Publishing House, 2010.
40. Andrew Newcombe & Lluis Paraded, *Law and Practice of Investment Treaties - Standards of Treatment*, Wolters Kluwer Publishing House, 2009.
41. Suzy H. Nikièma, *Performance Requirements in Investment Treaties Best Practices Series - December 2014,* International Institute for Sustainable Development (IISD) Publishing House.
42. M. Nordau, *Minciunile convenţionale ale civilizaţiei noastre/The conventional lies of our civilization*, translation after the 14th German edition of M. Cantianu, Bucharest, Socec & Co Bookshop Publishing House, 1921.
43. L. Oppenheim*, International Law: A Treatise*, Longman, London, 1967.

44. P. Pescatore, *Introduction a la science du droit,* Centre universitaire de l'Etat, Luxembourg, 1978.
45. J. Poirier, *Introduction à l'appareil Juridique – Tipologie des systemes juridiques*, Ethologie Generale, Encyclopedie de la Pleiade, Paris, 1968.
46. Cristina Elena Popa Tache, *Dreptul Internațional al Investițiilor. Coordonate/ International Investment Law. Coordinates*, Epublishers Publishing House, 2019.
47. Cristina Elena Popa Tache, *Administrative Review and Reform Movements from the Perspective of International Investment Law,* in Julien Cazala, Velimir Zivkovic (eds.), *Administrative Law and Public Administration in the Global Social System,* Contributions to the 3rd International Conference. Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective, October 9, 2020, Adjuris – International Academic Publisher, 2020.
48. A. Preda-Mătăsaru, *Tratat de Drept Internațional Public/Treaty of Public International Law,* second edition, Lumina Lex Publishing House, 2006.
49. Louis Renault, *Introduction à l'étude du droit international,* L. Larose Publishing House Paris, 1879.
50. B. Sabahi, N. Rubins, and D. Jr. Wallace, *Investor-State Arbitration*, Oxford University Press, 2nd ed., 2019.
51. J.W. Salacuse, *The Law of Investment Treaties,* Oxford International Law Library, 2013.
52. Karl P. Sauvant, Khalil Hamdani and Pedro Roffe, *Transfer of Funds. UNCTAD Series on issues in international investment agreements,* United Nations, New York and Geneva, 2000.
53. Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public/ Administrative law. Fundamental issues of public law,* University course, C.H. Beck Publishing House, 2016.
54. Stephan W Schill, *Multilateralizing Investment Treaties through Most-Favourite-Nation Clauses,* Cambridge University Press Publishing House, 2009.
55. Ch. Schreuer, *Fair and Equitable Treatment: Interactions with other Standards*, *Transnational Dispute Management*, Vol. 4, Issue 5, 2007.
56. J. Schwarze, *Droit administratif europeen*, Bruylant Publishing House, 1994.
57. S. Sell, *Public Law: Globalization of Intellectual Property Rights*, Cambridge Studies in International Relations, Cambridge University Press, UK, 2003.
58. A.C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, Vol. 20, Arbitration International 2004.
59. M. Sornarajah, *The International Law on foreign investment,* third edition, Cambridge University Press, 2010.
60. S.P. Subedi, *International Economic Law*, University of London 2007.
61. 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.
62. F. de Victoria, Primary Professor of Sacred Theology in the University of Salamanca, *De Indis*, *1532*.
63. M. Virally*, La Charte des droits et des devoirs économiques des Etats*, AFDI, 1976.
64. H. Waldock, *Draft Articles on Responsibility of States for Internationally Wrongful Acts Yearbook of the International Law Commission, vol. VI*.
65. International Law Commission, *Draft Articles on Responsibility of States for*

Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html, accessed 10 April 2021.
66. H. Waldock, *Yearbook of the International Law Commission,* Vol. II, 1964.
67. CNUCED, *Contrats D'Etat,* N.U., NY, et Geneve, 2004.
68. *Mic dicţionar filosofic/Small philosophical dictionary,* State Publishing House for Political Literature, Bucharest, 1954.
69. *OECD Interpretation of Umbrella Clauses in Investment Agreements*, Working Papers on International Investment, 2006/3; Official Records, 1969.
70. UCTAD, *Accords internationaux d'investissement dans les services; Etudes de la CNUCED sur le politiques en matiére d'investissment internaţional et le développement, Nations Unies et Genéve.*
71. UNCTAD, *Bilateral Investment Treaties 1995 – 2006. Trends in Investment Rulemaking,* 2007.