International investment protection in front of the states role in crisis times to managing disputes

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Motto:
„National and international investment policies can and should contribute to combating the devastating economic and social effect of the pandemic. Above all, they can stimulate the production of medical equipment and medicines, facilitate administrative procedures, provide equity to companies in difficulty and ensure that foreign procurement is not contrary to the national public interest."
Dr. Mukhisa KITUYI, Secretary General at UNCTAD[2]

Abstract

International investment law has regulatory features, especially in the area of international investment protection and dispute settlement, in the violation case of these rights. Any force majeure situation or fortuitous event (pandemic and the economic crisis generated by it) represents, in this field, an escalation of situations with conflict impact, for the solution of which the main actors must adapt their capacity and regulations. In this context, a higher risk of disputes must be taken into account. Although many governments are trying to find a balance between protecting public health and economic interests, the pandemic creates unprecedented risks for foreign investors around the world, the effects of which will be visible in the coming years. The competent courts are beginning to have an extremely difficult task of analysis and deliberation, which will oscillate between recognizing and respecting the exercise of significant discretionary state power in response to public health problems and between sovereign measures taken by states in response to pandemics or in other similar cases, measures which may violate the protection of foreign investment contained in international investment agreements, if they are discriminatory or disproportionate. To conduct this study we used recognized descriptive, explanatory and predictive research methods, specific to the criteria imposed by international investments, such as: (1) the temporal criterion, (2) the reactivity criterion and (3) the intrinsic characteristics of the method.

Keywords: *investment protection, pandemic, state, foreign investment.*

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[2] Dr. Mukhisa Kituyi, Secretary-General of UNCTAD, states: *National and international investment policies can and should contribute to tackling the devastating economic and social effect of the pandemic. Above all, they can incentivize production of medical equipment and drugs, facilitate administrative procedures, provide equity capital to struggling companies and ensure that foreign takeovers are not contrary to the national public interest.*

1. Preliminaries

From a statistical and historical point of view, the classic scenarios of economic crises are in W (with ups and downs). This pandemic is considered by foreign investors a serious threat, which leads them to identify new scenarios for saving investments, including by changing the geographical points chosen for the international investment. The investors have the opportunity to protect their investments against undue state interference in this time of crisis through a careful analysis of how their investments are structured, taking into account the possibility of restructuring their investments to maximize protection under an IIA[3]. Most foreign investors do not accept certain restrictions or concessions in exchange for the benefit of being able to run their business, which is correct, because each of them is the owner of their own investment *landschaft* that suits those investments. In this context, a higher risk of disputes must be taken into account. Among the causes of dispute are mainly the violation of the standards of treatment that should be given to the international investments.

2. Protection of international investments

The developing countries have adopted and promoted various legal instruments, such as multilateral investment codes and bilateral investment protection and promotion treaties (BIT), to attract foreign direct investment, which is a trend under which states must be more proactive and aim for globalization to promote a sustainable system of international foreign investment law[4]. Regarding the international law of foreign investments, the analysis in this paper starts from several basic principles, with universal applicability in the analyzed subject: the principle of freedom of forms and methods of investment, the principle of free access of foreign investments in all areas of economic life and the principle of non-discrimination between investors belonging to the host state and those belonging to the investing state. The failure to comply with any of these principles will lead to disputes.

In times of crisis, security and investment protection face dramatic national security. The exceptions contained in the special clauses of international agreements do not preclude compliance with the principles and standards of protection. The bilateral international investment treaties are based on the same principles as those set out above with regard to multilateral ones, namely the protection and security of investments, the minimum standard of treatment or fair treatment. The bilateral investment agreements are today the most widespread

[3] AII is the acronym used in this material for international investment agreements.

[4] W. Alschner, E. Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, July 18, 2013, in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives*, CUP 2013, p. 11; C. E. Popa (Tache), *Individualization and development of international investment law as the third millennium law field*, „Juridical Tribune – Tribuna Juridica", Volume 9, Issue 3, December 2019, p. 587, 588.

instrument of international law on foreign investment and the responsibility of states on the obligations assumed by those treaties. This type of agreement creates several rights in favor of investors, rights that they can invoke and capitalize directly before the arbitral tribunals[5], which means that the category of those investors who will be able to take advantage of conventional protection must be precisely determined[6]. The obligations under traditional international law can be created given that most bilateral investment treaties aim at protecting certain rights (such as the protection of intellectual property rights *per se*) as part of foreign investment. For example, the Convention on Biological Diversity addresses the issue of the use of indigenous know-how in the production of goods and creates obligations whose non-compliance also entails the international responsibility of states[7].

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

In the same vein, the international law provides, in the field of investment protection, a minimum standard, orientable for any host state and from which it should not derogate: i) domestic law must correspond/comply with the international minimum standard; ii) measures affecting international investment must not be discriminatory; iii) measures affecting foreign investment must not have the character of a confiscation[8]. The protection mainly includes protection against abusive measures such as expropriation and nationalization (the distinction between nationalization and expropriation does not lead to any difference in legal

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

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

[7] S. Sell, *Public Law: Globalization of Intellectual Propertz Rights*, Cambridge Studies in International Relations, Cambridge University Press, UK, 2003, p. 89.

[8] For details, see D. Carreau, P. Juillard, *Droit International economique 3e edition*, Éd. Dalloz, Paris, 2007, pp. 461-482, in particular pp. 473-477.

regime, and these are generally analyzed as equivalent notions[9]).

It follows that these types of agreements (effective tools in the stability of investment relations) create elements of liability under the rules of international law for cases of non-compliance with international investment protection, situations in which the foreign investor is recognized the right to act directly before international courts, if he considers himself injured by a violation of an international, conventional or customary norm.

The protection of international investments is a subject that needs to be developed by paying considerable attention to research directions that mainly include: the role of customary international law on the protection of foreigners; diplomatic protection; the forerunners of modern investment treaties; the colonial origins of investment protection; the connection with the development of the general regulation of the settlement of international disputes; international state contracts; the early emergence of the BIT, decolonization and the attempt to create a new international economic order; the emergence of ways/mechanisms for resolving disputes between investors and state and the emergence of a distinct regime of international investment and its hybrid character.

3. The "umbrella" clause

Specific to the bilateral treaties is the umbrella clause, by which each state party to the agreement must comply with any and all obligations assumed to investors in the other state party[10].

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 kind, assumed with regard to investments in general. Such a clause makes the provisions of the Agreement subject only to the rules of public international law. The general principles of law within the meaning of art. 38 paragraph 1 (c) of the Statute of the International Court of Justice have received increasing attention in international jurisprudence, so that numerous arbitral awards[11] can be exemplified that bring to attention various issues related to this subject. For example, in addition to the principle *pacta sunt servanda*, the jurisprudence also highlighted good faith[12], *onus probandi*[13], *nemo auditur propriam turpitudinem allegans*[14] or authority of res

[9] See also art. 2 § 2, point c) of the Charter of Economic Rights and Obligations of States, 1974.

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

[11] Case *Merrill & Ring Forestry L.P. v. Canada* (ICSID Case No. UNCT/07/1), Decision of 31 March 2010, para. 187.

[12] Case *Phoenix Action LTD v. Czech Republic* (ICSID Case No. ARB/06/5), Decision of 15 April 2009, para. 142.

[13] Case *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision of 8 November 2010, para. 236.

judicata (estoppel)[15]. In the case of *Chorzow Factory* in 1928, the Permanent International Court of Justice (ICC) ruled that it was a general principle of law by which any breach of an undertaking entails an obligation to make reparation or compensation[16].

With regard to the "umbrella" clause, it should be noted that it provides that each party will comply with any obligation it has assumed in connection with an investment. It is clear that this is a specific way of broadening the scope of a treaty, covering virtually any contractual obligation between the state and the investor[17]. According to the OECD: the contractual provisions are "internationalized", as a breach of a contractual provision has the effect of violating the "umbrella" clause in the international treaty[18].

4. Fair and equitable treatment

Regarding "fair and equitable treatment", it should be emphasized that the assessment of this term in case law has evolved from something representing the minimum standard in the matter, to an autonomous notion that extends beyond the traditional notion of minimum standard, passing through the statement that a stable legal and economic environment is an essential element of fair and equitable treatment.

The notion of “fair and equitable” in art. 10, para. 1 of the Energy Charter Treaty is worded as follows: investments "shall not be accorded treatment which is less favorable than that provided for by international law, including by obligations under (international) treaties". Commenting on this text[19], it was stated that the contracting parties to the Energy Charter Treaty (TEC) 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. In the jurisprudential context, the following formulations were observed by most specialists:

– the applicant was not provided with a "transparent and predictable framework for the development of projects and investment", the host state did not meet the standard of "fair and equitable treatment"[20];

– "it is the same in case of discriminatory treatment equivalent to a

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[14] Case *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan* (ICSID Case No. ARB/05/16), Decision of 29 July 2008.

[15] Principle that prevents a person from asserting anything contrary to what is required by a previous action or a statement of that person or by a previous relevant court decision.

[16] PCIJ Series A no. 17, p.29.

[17] See the interpretation of the clause in question *Noble Ventures inc. c. Romania*, Award, 12 October 2005, Case Nr. ARB01/11.

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

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

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

flagrant injustice on the part of the internal courts (the internal judicial process being considered as a whole)"[21];

– "even more generally in the case of any arbitral discrimination"[22];

– "or another transaction accepted by the investor under duress"[23].

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

"The investor expects the host state to act in a coherent, unambiguous and fully transparent manner in its relations with the foreign investor, so that the latter can know in advance not only the rules and regulations applicable to its investment, but also relevant policies and practices as well as administrative directives, so as to enable it to plan its activities in compliance with this regulation (...). The foreign investor also expects the host state to behave in a coherent manner, in other words, especially not to arbitrarily reconsider the decisions or authorizations given by the state, which the investor took into account when it also undertook its commitments when it planned and started its economic and commercial operations. The investor also relied on the fact that the state will use the legal instruments that determine the actions of the investor or investment in accordance with the function normally assigned to these instruments and, in any case, in such a way that the investor cannot be deprived of his investment without compensation"[24].

This broad view, linked to the standard/principle of "fair and equitable treatment", has led some foreign investors to invoke as their basis the protection of their interests, "their legitimate expectations". It is an old concept applied in 1905, in a dispute between France and Haiti, settled by the Permanent Court of Arbitration in The Hague[25]. 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[26]. However, the protection of this standard operates - according to the arbitration jurisprudence - in very strict conditions, because these expectations must be "reasonable and legitimate".

The proof of their existence must, therefore, be made with great precision[27].

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[21] ICSID, Decision of 26 June 2003, *Loewen v. SUA*, para. 137.

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

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

[24] ICSID, 29 May 2003, § 154; also, ICSID (NAFTA), *Waste Management Inc. v. Mexic*, the judgment of 30 April 2004, § 98; See comments Nguyen Quoc Dinh, P. Dailler, M. Forteau, A. Pellet, *Droit international public*, 8th ed., L.G.D.J., 2009, pp. 1216-1218.

[25] *Franța v. Haiti*, Case *Aboilard*, the arbitral award of 26 July 1905, RSA vol. XI, p. 80.

[26] ICSID, *Waste Management Inc. v. Mexic*, Decision of 30.04.2004.

[27] ICSID, *Plama Consortium Ltd v. Bulgaria*, Decision of 27 August 2008.

5. "Full and complete protection and security" treatment

The wording of these clauses suggests that the host state has an obligation to take active measures to protect the investment from possible negative/adverse effects that may come from private parties: demonstrators, employees or business partners, or from the actions of the host state and its organs, including its armed forces. There is an understanding that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of "due diligence", i.e. a reasonable degree of vigilance. Dolzer and Stevens said of the full protection and security standard: „The standard provides a general obligation for the host state to act carefully in the protection of foreign investment, as opposed to creating a 'strict liability' that would make a state host responsible for any destruction of the investment, even if it is caused by persons whose acts could not be attributed to the state"[28]. 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[29]; despite its presence in the vast majority of foreign investment protection treaties, it has been easily used by investment tribunals, a conclusion confirmed by ICSID's[30] international case law. This Center considered that the standard we are referring to is in fact a manifestation of the traditional *due diligence*[31] obligation, the consequence of which will not be the obligation of the state „to protect foreign investment against any possible form of loss caused by persons whose acts will not could be attributed to the state"[32].

They can be listed: physical security/safety (protection against civil violence and protection against violence of state organs), legal protection, liability standards, specifically: failure by the host state to fulfill its obligation to protect against insurrections or riots[33]; the lack of adequate legal protection for the investor and his investment[34], all of which also enjoy applicability in the current crisis caused by the pandemic.

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[28] 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, Peter T. Muchlinski, *Multinational Enterprises and the Law*, Oxford University Press, 1999, p. 626.

[29] A. F. Lowenfeld, *International Economic Law*, Oxford University Press, 2003, p. 476; M. Sornarajah, *The International Law on Foreign Investment*, Cambrige University Press, 2010, p. 205.

[30] ICJ, 20 August 1989, ELSI, Rec ICJ p. 65, § 108; ICSID, 27 June 1990, *AAPL v. Sri Lanka*, para. 47-50; ICSID, 12 October 2005, *Noble Ventures v. Roumanie* para. 164.

[31] ICSID, *ibid*. par. 73-77; ICSID (NAFTA), 26 June 2003, *Loewen v. SUA*, para. 125.

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

[33] ICSID, 27 June 1990, *AAPL v. Sri Lanka*, para. 72; ICSID, 8 December 2000, *Wena Hotels v. Egipt*, para. 84; ICSID, 21 February 1997, *AMT v. Zair*, § 6.02 et seq.

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

6. The connection with the investment guarantee

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

The notions of treatment and protection, and guarantee, are closely linked to each other. By the *rules of treatment* is meant, in the context of the matter we are dealing with, the set of rules of domestic law or international law that define the legal regime of international investments, and by the *rules of protection* we mean the set of rules of domestic law or international law that prevent or sanction the public violations of the existence of international investment[35]. *The guarantee mechanisms* mean all the mechanisms that transfer, from the international investor to a specialized body governed by domestic law or international law, the financial consequences resulting from the realization of certain political risks. It follows that the rules of both the domestic law of the host State and the State of origin of the investor and the rules of international law are applicable.

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

This issue is particularly important and is directly related to the means of resolving disputes, because, as we will see below, the violations of one or more rights or non-compliance with one or more such obligations converge on disputes that need to be resolved. The acts of establishment and organization of international investment guarantee institutions provide, among the ways of resolving disputes, the authority (court or tribunal) invested with these settlement powers. In international conventions, the main institution is ICSID (International Center for the Settlement of Investment Disputes), and at national, bilateral or regional level, the tendency is to form a special department to resolve these disputes, despite the fact that investors prefer the competence of a neutral,

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

independent institution.

The MIGA Convention, *exempli gratia*, provides that ICSID is the one empowered to settle disputes (art. 57 and Annex II): *The parties to a dispute within the scope of this Annex shall endeavor to resolve this dispute through negotiations, before seeking conciliation or arbitration. The negotiations will be considered exhausted if the parties have failed to reach an agreement within 120 days of the date of the request to enter into negotiations*. At the same time, the Convention shows in art. 11 what are the risks covered:

a) Subject to the provisions of sections b) and c) below, the Agency may guarantee eligible investments, against damages resulting from one or more of the following types of risks:

(i) Currency transfer risk

Any introduction - attributable to the host government - of restrictions on the transfer, outside the host country, of its own currency into a freely usable currency or another currency convenient to the holders of the guarantee, including the absence of action by the host country government within a reasonable period of time, to request such an investor for such a transfer;

(ii) Expropriation and similar measures

Any legislative or administrative action or omission attributable to the host government, which has the effect of depriving the holder of the security of ownership or control or a substantial benefit of his investment, except for non-discriminatory measures of general application, which governments normally take for regulatory purposes economic activity in their territories;

(iii) Breach of contract

Any suspension or breach by the host government of the contract with the guarantor, when: a) the holder has not resorted to a judicial or arbitral tribunal to make a claim for suspension or breach of contract; or b) a decision of such a forum is not submitted within this reasonable time which will be stipulated in the guarantee contracts in accordance with the Agency's regulations; or c) such a decision cannot be enforced; and

(iv) War and civil unrest

Any military action or civil disturbance in the territory of the host country, to which this convention will not be applicable according to the provisions of art. 66.

b) At the joint request of the investor and the host country, the Governing Board may, by special majority, approve the extension of the scope of risks covered by this article to specific non-commercial risks other than those referred to in section a) above, but in no case the risk of currency devaluation or depreciation.

Enumerative, in addition to ICSID, the international bodies involved in resolving investment disputes are: Vienna International Arbitral Center (VIAC), Paris International Chamber of Commerce (ICC), United States Council for International Business (USCIB), Institute of Arbitration of the Stockholm Chamber of Commerce (SCC), the London International Court of Arbitration (LCIA), the

Hong Kong Center for International Arbitration (HKIAC) and the Cairo Regional Center for International Commercial Arbitration (CRCICA).

In the present conditions, the main institutions with a role in resolving investment disputes, have adapted their activity using the online possibilities of case management. For example, VIAC - the first international arbitration institution in Central and Eastern Europe, states that case management is fully operational thanks to the electronic case management system introduced in 2019. VIAC encourages parties to submit all written documents and any supporting documentation, including witness statements and expert reports, preferably by electronic means, in accordance with article 12 para. 2 of its Rules of arbitration. For any court to settle investment disputes, neutrality, efficiency and applicability are important in any case, because only a system that offers these benefits is attractive to foreign investors.

7. Conclusions

The Government measures that are unreasonable, disproportionate, arbitrary or discriminatory may trigger disputes, in violation of specific treaty provisions on investment protection and promotion, valid treaty claims, reasons why states and investors need specialists with experience in ISDS (investor-state dispute settlement).

In conclusion, measures adopted by a State in a situation of force majeure should comply with the conditions imposed by international law and laid down in the terms of investment treaties provided that such measures are not applied in a manner which constitutes a means of arbitrary discrimination. or unjustified. All remedies related to any crisis situation, whether caused by a pandemic or other force majeure, start from the premise included in the IIA (International Investment Agreements), according to which each contracting party will encourage and it will create stable, fair, favorable and transparent conditions for investors of other Contracting Parties to invest in its area.

„It is a huge privilege to be able to engage in transfers of tangible goods in a territory other than your own state. But through this, the citizens of a state can get many benefits. The companies under the jurisdiction of a state are subject to the regulatory system of that state. Under these conditions, foreign companies must accept certain restrictions in exchange for the benefit of being able to conduct their business through these companies”[36].

It should also be established that, in the matter of foreign investments, there are no instruments of international law that regulate the institution of state responsibility as such and autonomously.

[36] Judge Oda's opinion in the case ELSI-1989, ICJ Reports p. 90.

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