Individualization and development of international investment law as the third millennium law field

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Abstract

Approaching such a subject is undoubtedly of particular scientific interest, contributing to the clarification of several aspects regarding the content and delimitation of international investment law, with an emphasis on the law and doctrine of international law, but also on the jurisprudence of international courts. The originality and scientific innovation resides in the way of approaching the research of the legal regime of foreign investments, both from the point of view of interdisciplinarity, interference and interconnections between the fields of incident law, as well as by identifying a coagulating, unifying factor – t he international justice and the mechanisms that are put into operation. This approach calls for the creation of a learning mechanism, of study within the university framework of the discipline of International Investment Law and the deepening of the specific notions and problems within some master programs.

Keywords: *foreign investments, research, new field of law, interconnections.*

JEL Classification: K11, K23, K33

1. Introduction

This paper is about one of the newest, *if not actually the newest field of law,* foreign investment law, and it intends to bring a new topic to the forefront of Romanian law research, one that faces certain legislative ambiguities and incongruences, marked by concerns regarding the current doctrine and practices, closely interdependent with business law, according to the principle that any development required multiplication.

This opens the way for new research areas, such as: applicable law, the admission, the selection and the treatment of foreign investments; the specificity of settling differences in the field of international investments; the state's responsibility regarding international investments and the duties of investors; defining and redefining some terms, such as international investment by means of a dedicated language; the development of the institutional framework and capacities in the field of international investments; drawing up a Code for International Investments; a refocus on the adoption of a Multilateral Agreement; themed research at the initiative of the researchers; supporting the Romanian research participation in international programs in the field concerning the legal regime of foreign investments. The Economic Studies Academy and the Law Research Institute of the Romanian Academy allow and encourage the international

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promotion of the Romanian scientific identity and their recognized expertise allows the orientation towards internationally competitive fringe research, towards subjects that have potential both theoretically, as well as on a practical level from a national point of view (actual requirements and realistic offers), the expansion of interdisciplinary and multidisciplinary research, while also maintaining a 'free of constraint' area that is specific to academia, that fosters pure fundamental research, a permanent source of scientific development.

Last but not least, this endeavor encourages the creation of a teaching and study mechanism for the discipline International Investment Law within the university framework and a more thorough understanding of the specific notions and issues as part of some master programs.

All these things are complex challenges, both from a theoretical and a practical point of view, but the importance and contemporaneousness of the field, as well as the general interest are sufficient motivations to support the approach.

2. The importance of researching foreign investments through the lens of international law

The object of this study is the announcement and presentation of international investment law in its current stage and the end purpose is not to direct analysis towards certain ideologies, but towards knowledge. Why is it necessary to have a connection between international investments and law? Only law can, within the specific or purposefully created institutional framework, define and regulate the rights, obligations and the investment legal ratio, to settle contentions regarding foreign investments, to direct, control and encourage international capital flows, to improve or reduce the predictability of investment-related transactions or to increase or reduce the costs associated to an international investment.

The efficiency of the law in influencing human behavior demands more than written legal regulations. It demands institutions. According to Douglass C. North, recipient of the Nobel Prize for Economy in 1993, institutions 'are human-made constraints that give structure to the political, economic and social interactions"[2].

The legal regime of foreign investments is in a constant evolution flow, but it does not follow a preset path[3]. International investment law contains the general international law norms, the general standards of the international economic law, as well as distinct norms that are specific to the field[4]. One of the 1988 editions of the famous scientific journal called *Revue Générale de Droit*

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

[3] Regarding the evolutions of the legal regime of international investments, see E. Alvarez, K.P. Sauvant, K.G. Ahmed, G.P. Vizcaino (eds), *The Evolving International Investment Regime: Expectations, Realities, Options*, Oxford University Press, 2011.

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

International Public states that: "International trade is a pure fact, but a fact that has created international law in its entirety"[5]. This statement confirmed even as far back as 1988 the importance of the international economic relations that are equally made up of relations that involve states and private companies, commercial and financial trades. Within the bigger picture of international relations, the economic dimension was naturally added to the "traditional" international relations (the political[65] and military ones), which is a feature of the international system in which states, international organizations and public and private bodies operate.

After analyzing the international economic law issues, Romanian doctrine has come to affirm that the formulation of a connection between the worldwide economic dimension and the legal dimension is necessary[7]. In this regard, it was stated that the international economic order starts with international economic relations, to which a political ordering dimension is added, meaning that a policy is applied in relation to the economic relations within a certain market. Since the rules applicable to international economic relations really do have a dynamic and heterogeneous character, the term "ordering" was mostly used, since these rules have the quality of adapting to various evolutions and situations "either through interpretation, or through a modification of the application sphere or by identifying new exceptions"[8].

From certain points of view, the normative dimension of the international economic order surpasses international trade law[9], since not only the contractual intercompany relations are taken into account. The same phenomenon is observed in private international law, in the way that both private persons and state interaction with the legal norms. In this regard, we can quote a statement made by Phillip Jessup, a judge with the International Court of Justice (CIJ): „International law increasingly becomes more a sort of transnational law, meaning an integrated body of regulations taken from the international and internal law, which regulates the conduct of states and people, the competition and the operation of markets, the circulation of public and private assets".

3. The individualization of international investment law

We must admit that economic integration is the moving force behind a considerable part of today's public international law, since the traditional concepts of this law were used to create legal structures that represent instruments of economic integration and market relation regulation, integration that happens both on a regional level (EU), as well as on a world level (WTO). Also, "international

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

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

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

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

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

law conserves its regulatory function, meaning that when a norm is drawn up or consecrated as common law, a "limitation" of the margin of the economic actions of state and non-state players takes place"[10].

In relation to this evolution of international relations and to the branches of law existing at a certain time, some concepts appeared, promoted especially by developing countries, concepts regarding the occurrence and requirement to promote a new type of international law, opposed to the classic one, that also take into account, in principle, the normative interest complex of this large category of states and that could be considered an "international development law"[11]. In the same context, it was stated, during the mentioned period, that a new international economic order should have a new international law, which could have a determining part in the building of this order. In this regard, the starting points were the well-known documents adopted by the General Meeting of the UN in 1962 through Resolution no. 1803 (XVII) on permanent sovereignty over natural resources and in 1974 through Resolution no. 3281 (XXIX) on the Chart of economic rights and obligations of the states[12]. However, international investments and regulatory norms in public international law can separate the purposes of the involved branches of international law from a causal point of view, as well as the distinct characteristics of the investment relations. While the regulatory norms of public international law in this field are quite neutral in regards to the interaction between most branches of international law, generally, the investment tribunals are trying to promote the fundamental objective of the investment law, especially the increase of foreign investment flows. Despite the fact that international public law usually grants a preference to the fundamental human rights and to those relating to international peace and security (investment tribunals very rarely faced such superior international law norms), international investment law is a sub-branch of international public law, especially due to the pedestal that this new branch of law is put on, a pedestal that has the privilege of being made up from specific international treaties (or that include specific provisions) that govern international investment law relations.

Initially, the doctrine[13] launched a debate regarding whether an autonomous discipline named international economic law appeared, or a new general international law applicable to economic relations was born. Currently, we are dealing with an autonomous discipline: international foreign investment law, due to the rapid evolution of this new branch of law. An important role in this matter was played by the successive editions of some authors that, even since the

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

[11] For details, see Gr. Geamănu, *Drept internațional public*, vol. II, ed. Didactică și Pedagogică, Bucharest, 1983, pp. 346-374.

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

[13] Also see *The First Report of the ILA Committee on the International Law of Foreign Investment*, Toronto, 2006, in *Ila Report of the Seventy-Seccond Conference, Toronto 2006*, London, ILA, 2006, p. 410 and the following.

'70s, have published monographies under the name of international economic law[14]. As a side note, a comprehensive formula that defines international economic law was the one formulated by Andreas F. Lowenfeld, according to whom the international economic law encompasses the norms of international law that regulate the international legal order and economic relations between the states, specifying that the term can include a vast array of norms that vary from international public law to commercial law aspects, the regime of foreign investments, tax issues etc.[15]. Regarding the different fundamental characteristics of the international investment relations, one must mention that, while the fundamental assumption of international public law is sovereign equality, the legal relations between host states and foreign investors are asymmetrical, because host states are in a superior position, as they may influence both the internal law, as well as the relevant norms of international law (generally through their participation in the negotiation and signing of the BIT or TIP international treaties, treaties that decide rights and obligations for third party foreign investors).

The conceptual analyses carried out as regards the international economic law were completed with the conclusion that, although it contains a very vast regulatory area, it is founded on the international public law, as a sub-branch of this law. This seems logical, given the contents of international economic law, which proves its nature as international law. Even the fact that norms of internal law are often referred in the international economic law means that the ways of applying international norms in actual economic relations (well determined) are considered, which shows exactly this nature as international law. In this context, one can quote the norms regarding the obligations of the states to observe the provisions of the General Agreement on Tariffs and Trade (GATT), the provisions of the General Agreement on Trade in Services (GATS) and the norms on the mutual promotion and protection of the investments guaranteed through relevant internal norms.

In the context of the development of international economic law, a series of norms and principles inspired by the international law were promoted in the investment field, going as far as creating some bodies and institutions that guarantee or settle the disputes in this field. This evolution has determined some doctrine-related statements, which claimed the appearance of an international foreign investment law that must be treated separately in specialized papers[16].

4. Conclusions

At this time, debates regarding this new field of law no longer regard its existence or inexistence, but are concerning, for instance, the reformation of the law for the protection of foreign investments or the relationship between

[14] For instance D. Carreau, P. Juillard, T. Flory, *Droit International Économique*, 2e ed., LGDJ, Paris, 1980, as well as the following editions.
[15] A. Lowenfeld, *International Economic Law*, ed. 1, Oxford University Press, 2002, p. 3.
[16] M. Sornalajah, *The International Law on Foreign Investment*, Cambridge University Press, 2e ed., 2004.

investments, the environmental concerns or the durable development of local communities, as reformation possibilities that have appeared out of the current tensions around international law.

Therefore, we are in the presence of international investment law, a new branch of law that has surpassed the stage of trying to justify its presence and, through an accelerated development, has reached the stage of remodeling. The current remodeling will reach its maturity in the third millennium if international public law experts and business law experts become aware that they need to cooperate in an exigent manner.

Bibliography

1. A. Lowenfeld, *International Economic Law*, ed. 1, Oxford University Press, 2002.
2. A. Nastase, B. Aurescu, I. Gâlea, *Drept Internațional Contemporan. Texte esențiale*, Ed. Universul Juridic, Bucharest, 2007.
3. A. Năstase, *Dreptul Internațional Economic II. Soluționarea diferendelor în cadrul organizațiilor economice internaționale*, Ed. Monitorul Oficial, Bucharest, 1996.
4. A. Năstase, I. Gâlea, *Dreptul internațional economic*, Ed. C.H. Beck, Bucharest, 2014.
5. D. Carreau, P. Juillard, *Droit International Économique*, 3e éd., Éd. Dalloz, Paris, 2007.
6. D. Carreau, P. Juillard, T. Flory, *Droit International Économique*, 2e ed., LGDJ, Paris, 1980.
7. E. Alvarez, K.P. Sauvant, K.G. Ahmed, G.P. Vizcaino (eds), *The Evolving International Investment Regime: Expectations, Realities, Options*, Oxford University Press, 2011.
8. Gr. Geamănu, *Drept internațional public*, vol. II, ed. Didactică și Pedagogică, Bucharest, 1983.
9. J. Touscoz, *Droit International*, PUF, Paris, 1993.
10. J.W. Salacuse, *The Three Laws of Investment Treaties*, The Oxford International Law Library, 2013.
11. M. Koskenniemi, *What is International Law For?*, in M. Evans, *International Law*, OUP, Oxford, 2nd ed., 2006.
12. M. Sornalajah, *The International Law on Foreign Investment*, Cambridge University Press, 2e ed., 2004.
13. R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press (OUP), second edition, 2012.
14. S. Schill, *The Multilateralization of International Investment Law*, Cambridge University Press (CUP), 2009.