The strategic importance of international investments in the field of mining and international law[1]

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"Minerals and metals are essential for modern living. Access to and affordability of mineral raw materials are crucial for the sound and sustainable functioning of the world economy and modern societies[3]*."*

Abstract

Worldwide, the entrance restrictions for foreign investment were eliminated or restricted in a wide range of industries, especially mining (among other fields such as aviation, financial services, real estate). Foreign investors still remain reluctant to placement of investments in developing countries, shall be required also to seek host countries with a certain degree of stability in the existence of international treaties on investment In conclusion, it is emphasized that the investment environment must substantiate its order and hierarchy on a set of regulations with a mandatory character, as the soft law regulations, such as conduct codes of the transnational companies, the project of articles regarding the responsibility of states of the International Law Committee, the arbitrage practices (that does not admit precedents) or other acts without mandatory force have proven insufficient. An especially important role is played by the common effort of experts to expose all the forceful positions, as well as the vulnerabilities of all the actors involved in international investments, so that, through a full and objective analysis of these aspects, firm regulatory solutions may be extracted.

Keywords: *foreign investment, mining, international treaties, national security*.

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[3] Támas Hamor, *Statement on behalf of the European Union and its 27 Member States*, Intergovernmental preparatory meeting of the 19th Commission on Sustainable Development, Mining Session, CSD 19 IPM Draft statement on Mining (New York, 2 March 2011). The document is available on the official Internet page: http://www.un.org/esa/dsd/resources/res_pdfs/csd-19-ipm/2march/PM/eu.pdf, accessed on 04.04.2017.

1. Introductory considerations

International investments are a pro-eminent topic on nowadays political, economic, financial, social and cultural agendas. International transactions in the field of foreign investments have been, are and will continue to be under expansion, especially in the last decades, during which period foreign investments have diversified, while their frequency has intensified as a side effect of globalization. If in 1996 there still were voices that claimed both that "there is no doubt that direct foreign investments have joined international commerce as a main engine of globalization", as well as that a "a growing symbiosis and an integrated relationship between commerce and investments[4]" has been observed, today it is certain that any analysis of the foreign investments is not complete until it is made through the lens of international public law. Jacques Percebois[5] has characterized mondialization (a term preferred to that of globalization) as a transnational decision network, a concept mirroring the investment action. According to UNCTAD, globalization is a product of deregulation[6]. Continuous unity for economic efficiency raises new issues regarding deregulation and investment promotion. "Globalization is simultaneously a cause and a result of the movement to conclude international treaties regarding investments between nations[7]". Mining investments, although they occupy a reduced percentage on a global level, are still classified at the top of special importance investments due especially to their side effects on the global economy, on the environment, on human rights and, last but not least, on international law. However, the boom of foreign investments in mining projects over the last 2 decades, is only a herald of the global competition for access to mineral resources in the decades to come[8].

In the transactional theory and practice, it has been established that direct foreign investments and portfolio foreign investments are governed by the legal regimen of international investments, naturally, without going into debates regarding the distinction between the two types of investments, their relevant characteristics and the marking of the "grey area". Among these there exists a large variety of other contractual relations, especially long term mining claim agreements that are legally considered as "investments" to the extent that a contractual party/partner invests capital and important financial resources in such a

[4] See the presentation of Renato Ruggiero – general manager, in 1996, of World Trade Organization (WTO) – during the UNCTAD seminar regarding direct foreign investment and the multilateral commerce system, which took place in Geneva on February 12, 1996.

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[6] In the World Investment Report for 2016, UNCTAD focuses on the tendencies of direct foreign investments (ISD) on a global, regional and national level and on the measures that are being implemented to improve its contribution to the development.

[7] Jeswald W. Salacuse in *The Law of Investment Treaties***,** Second edition 2015, Oxford International Law Library, p.33.

[8] Richard W. Roeder, *Foreign Mining Investment Law. The Cases of Australia, South Africa and Colombia*, Springer International Publishing, Switzerland, 2016, p.1.

joint venture, naturally with the purpose of obtaining a profit. Mining and development agreements, with their variances generated by the existence of other contractual relations that can be considered international investments, are such public service claim agreements between persons and entities based in different states. These concession contracts have the legal nature of administrative contracts[9] in which the national public interest prevails.

At European Union level, the concession law aims to open public procurement procedures to competition for all businesses across the European Union. The role of European Union regulation from the economic aspirations is to overcome national borders by giving freedom of movement to economic operators and, on the other hand, to prohibit discrimination between public and private operators[10].

2. The international context, nature and strategic importance of investments in mining

It must be specified that, generally, investment treaties have avoided offering a list of the investments that are included under their protection, but it can be said that they have offered an open definition, in order to allow the future evolution of investment transactions. Presenting this definition means that any transaction will be protected through a treaty only if it fulfils the definition established in an investment treaty. Once this kind of international protection and regulation is set, each investor and each state must enter into this kind of investment with the knowledge that the protection granted through international law is conditioned by the legality of that investment. Depending on this aspect, each party must play its part in this system, using the force positions it occupies in the opportune situations.

Budgetary restrictions and lack of financing determines the states that own such mining resources to look for strong foreign investors for long term associations. Most times, mining operators are state owned and, due to a lack of financial funds required for the necessary modernizations and for the mining, the states decides to close down the mines[11]. On a global level, entry restrictions for foreign investments have been eliminated or reduced[12] in many industries,

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[9] About the features of administrative contracts see Cătălin-Silviu Săraru, *Capacitatea autorităţilor/ instituţiilor publice de a încheia contracte administrative*, „Dreptul", no. 1/ 2010, p. 111, 112.

[10] Concerning EU competition policy and State aid incompatible with the EU internal market see Cătălin-Silviu Săraru, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in Cătălin-Silviu Săraru (editor), *Studies of Business Law - Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, pp. 39-48.

[11] This was also the case in Romania, where, through the Mining Law no. 85 of 2003 and through several Governmental decisions, the definitive closing of 556 mines/quarries was approved. Also, starting in 1998, within the limit of assigned funds, closing and reclamation works have been contracted for 295 mines and quarries; out of these, up to 31.12.2011, 192 objectives have been accepted after the closing and reclamation works were finalized, plus another 53 that were partially accepted.

[12] According to the World Investment Report 2016, document issued by UNCTAD.

especially in mining (besides other fields, such as aviation, financial services, real estate).

Still, foreign investors are reserved when it comes to investing in developing states, as they are forced to look for host countries with a certain degree of stability regarding the existence of international investment treaties. For instance, investors are cautious and exercise a thorough due diligence when the time they choose for such an investment coincides with the modification of international treaties, such as the renegotiation of NAFTA or the termination of treaties regarding investments between intra-European states, for example. Despite this, terminations of investment treaties have happened more often since 2015 and up to the present day and investors are aware that, by virtue of the survival clause, investments that have been made before the termination of these international agreements regarding investments will remain protected over periods between 10 and 20 years, depending on the relevant provisions of the agreements and their termination conditions. Regulation, interpretation and applicability issues appear especially when these aspects are not specifically regulated in the content of the treaties that are terminated[13], so investors that find themselves in such situations are forced to invoke the protection of general rules of international law, because using the legislation of host countries cannot guarantee impartiality (fairness). For instance, in the case of Lucchetti v. Peru[14], the BIT (Bilateral Investment Treaty) between Chile and Peru was applied, on the condition that it does not apply to the disputes that have occurred before it coming into force. In this case, the local authorities of the host country have issued a series of administrative measure that led to them refusing or even withdrawing the authorizations and operational licenses of investors a few days before the bilateral treaty came into force. The investors successfully challenged the previous administrative actions that took place before the BIT came into force through legal proceedings. Despite this, the Court found that the dispute had occurred before the BIT came into force and declined its competence. Therefore, the timing of the dispute is not the same as the timing of the events that led to the dispute.

In the following pages, this study undertakes to approach the general relevance issues in this field, highlighting certain milestones. The issues that are being tackled are not strictly applicable, but are extended to related investment categories. The paper refers to mining operations, despite their reduced percentage in the international investments, since this is an important field due to its social effects, its environmental impact and its relation with the security strategies of each state.

[13] According to Law no. 18 of March 24, 2017, Romania will terminate through consent of the parties or through denunciation 22 treaties regarding investments concluded with EU member states, among which the Agreement between the Government of Romania and the Government of the United Kingdom of Great Britain and Northern Ireland regarding the mutual promotion and protection of investments, signed in London on July 13, 1995, ratified through Law no. 109/1995, published in the Official Gazette of Romania, Part I, no. 273 of November 23, 1995.

[14] Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. **v.** The Republic of Peru, ICSID Case No. ARB/03/4.

States usually draw up their own mining development strategies, over periods of approximately 20-25 years, so that the involved factors can include: responsible governmental bodies, research/development/innovation institutes, professional organizations, syndicates etc. and, naturally, the business environment.

The concept of national and regional security, especially over the last decade, is no longer strictly limited to the military field, as it was extended to some other fields that have been included in the public policies of a state. Thus, securing the access to strategic mineral resources has become a reference term in the relations between states, as specified in the document with the title "Strategic Concept. For the Defence and Security of the Members of the North Atlantic Treaty", adopted by state presidents and government leaders in Lisbon in 2010. The risks and threats related to the access to energy and non-energy strategic resources are becoming increasingly varied. The accelerated increase of the global mineral resource consumption has gradually determined the "controlled" restriction of supply sources and the limitation of the number of suppliers, which reignited the debate regarding the appearance of monopolies and oligopolies. As to the conduct and activity of international investors, there is a fear that they might determine their originating states to interfere with the internal policies of the host states in order to institute a favourable political climate for themselves, as it has happened in the course of history. The most conclusive examples date back to the colonial era; the role that companies such as the British East India Company have played in the imperial history is still being evoked; the Battle of Plassey was a decisive victory of the British East India Company over Bengal and its French allies on June 23, 1757. The battle consolidated the presence of the company in Bengal[15] over the following one hundred years and it was later extended to cover a large part of India.

A recent example of such interference is the situation in Chile, which lead to the overthrowing of the government of president Allende. He decided to nationalize[16] the copper mines without providing compensations. It must be specified that the Allende nationalization has affected three major mines in Chile; these were, in fact, independent, standalone settlements, with their own towns to accommodate the workers, their own water and energy supply sources, their own schools, shops, railroads and, in certain cases, even their own police force. Witnessing this nationalization and considering that certain urgent measures were

[15] This statement is also applied to the Battle of Buxar, on October 22, 1764, between the forces of the British East India Company, led by Hector Munro, and the army of the Bengal leader. The battle was a decisive victory for the British East India Company.

[16] The nationalization of the copper industry in Chile, commonly described as the "Chilenización del cobre" was the progressive process (1950-1975) by which the Chilean government acquired control of the major foreign-owned section of the Chilean copper mining industry. It involved the three huge mines known as 'La Gran Mineria' and three smaller operations. The Chilean-owned smaller copper mines were not affected. The process started under the government of President Carlos Ibáñez del Campo, and culminated during the government of President Salvador Allende, who completed the nationalization.

required, the foreign corporation and the states they were based in got involved in the military coup d'état that followed and in the replacement of the Allende government with a right-wing dictatorship that was favourable to external businesses. This precedent created a general fear that the situation could happen again in other states.

From a human rights perspective, there have been theories that multinational corporations[17] have formed alliances with the local authorities, in order to be sure that governments favourable to foreign investments are kept in power even with recourse to repression measures. The key to the problem that was described can be only a consolidation of the national security limited to this purpose and with observance of the international regulations and the maintenance of a correct balance between obtaining the necessary influence to operate like an effective investor in the host state and not intervening in the political business of the host state, although many transnational companies have turnovers that surpass the GDP of many states, as I mentioned in a previous study, which proves that they have the resources and the required influence to achieve their important economic purposes.

All these elements exercise a direct influence over the economic security, in which case the mining industry development strategy of a state evidently becomes a component of the national security. The worldwide decrease of the number of mineral and energy resources suppliers, in the condition of increased demand from the great consumer systems, has led to the political redefinition of these resources as "georesources"[18]. To all these, we add the increased potential of riots, strikes and civil strife due to establishing a mining investment in a host state, but also as an effect of the way[19] in which the foreign investor or the host state fulfils its undertaken obligations or exercises its granted rights.

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[17] Multinationals, operating in many countries, acquire a true "international personality". They conclude contracts with states for the exploitation of local national treasures, contracts that sometimes have the meaning of genuine "agreements" to determine the conditions for achieving certain economic exchanges (such as the "oil agreements" of the early 1970s between the cartel of oil companies and exporting states, As well as steel self-imbalances agreements between representatives of the European and Japanese steel producer associations and the US Government – see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016, p. 755.

[18] Quote taken from the *Mining resources strategy of Romania 2012-2035*, a document drafted by the Romanian Ministry of Industry and Resources, available at the official web address: http://www.minind.ro/resurse_minerale/Strategia_Industriei_Miniere_2012_20 35.pdf , as accessed on 04.04.2017.

[19] In the case of Nicaragua, the International Court of Justice has repealed the argument used by the US, that the increased influence of the communist power in Nicaragua was a matter concerning all the states in the region. The Court has shown that, in accordance with international law, it is forbidden that a state dictates the economic system that another state should use.

3. Observations regarding the pre-negotiation, negotiation and renegotiation of the agreement with the host state, sine qua non instruments

There are two stages that are relevant for the handled topic: the pre-negotiation and the negotiation of the agreement, sometimes subjected to renegotiation. For a productive negotiation with states, the international investors must have a minimum level of preparedness and due diligence when engaging in such actions and they must take into account the rules described in the following, as principles.

A signed agreement does not automatically create an international business relation that will play out by itself. The best solutions for the parties involved in international mining investments are those that are derived from knowledge of the "rules of the game", of the terms and conditions specific to the mining operations, within the limitations of the applicable laws and special regulations. In the case of long-term transactions, the parties are trying to create a business relation that is as stable as possible, a complex set of interactions characterized by cooperation and a maximum degree of trust. As it is well known in this context, a negotiator will also have to find an answer to a host of basic non-legal and non-contractual questions. What is the power and resource ratio that the parties rely upon? How well do the parties know one another? What is the mechanism that can be used to promote and facilitate communications, including after the agreement is signed? Is the agreement between the parties balanced and mutually advantageous? How could the parties be determined to mutually understand and observe their interests, values and culture in a serious manner[20]? The attitudes, interests and other characteristics of an individual are also quite different from those of the group that it belongs to. For instance, the "average" Japanese tends to favour more indirect methods of communication and negotiation, but each individual Japanese person could favour any one of a complete array of negotiation styles[21]. Also, the resources of the parties involved in this kind of negotiation are different. However, access to rich resources during a negotiation does not automatically equal a greater power of persuasion.

An international mining investment is a continuous negotiation. This conclusion can be drawn from the fact that the parties must not be convinced that the negotiation process is finalized when all the details are set or when the agreement is concluded or signed. Such an international agreement is a continuous negotiation between parties to the transaction, in order to adapt their relation when

[20] Understanding and respecting the culture and tradition of the negotiation partner must be applied with mathematical precisions, as it is a *sine qua non* condition. There are considerable negotiating differences between the partners in South America, Europe or Asia. These differences could explain why, for instance, Asian people tend to set aside more time for the preliminary negotiations, while Americans want to get through this first phase as quickly as possible.

[21] See Roger Fisher, William Ury and Bruce Patton, *Getting to Yes*, second edition by Fisher, Ury and Patton, Random House Business Books, 1991, p. 80.

facing the public opinion, generally negative and cautious towards any mining conditions, to adapt to the rapidly changing international environment, to the inconsistent governmental policies, or to civil strife, political change, military interventions, currency fluctuations or technological changes. For instance, a frequent problem encountered during the negotiations and the subsequent operations is the failure to understand the meaning of the terms "mineral resources" or "mineral reserves", based upon scientific evidence and what the "contributing factors" used for reaching estimations are[22]. No negotiation can predict all the eventualities that may require the parties to meet, therefore the parties must be opened to any (re)negotiations throughout the duration of the investment. In conclusion, it may be said that negotiation is a fundamental tool for the management of investments. Therefore, during the lifecycle of any business, three types of negotiations may be encountered: during the decision-making process, while managing the business, during the repair and settling of disputes. The negotiation in the public sector presents its own special issues: in a private organization, identifying the managers that control the negotiation and that make the final decisions is easy, while in the public sector there often are more than one decision makers involved, which often leads to unstable situations.

Accepting the risk of changing circumstances. Most modern agreements deny the possibility of change. Despite the fact that a negotiation is defined as an ample cooperative process, the parties rarely offer this type of adjustments as a response to changing circumstances, and this very presupposition of contractual stability has proven to be false over time. For instance, while most agreements in the field of mining presume that the agreement (mining claims are generally concluded) will last for at least 20 years, the usual duration of these claims reaches limits comprised between 50 and 99 years, but they rarely remain unchanged. A method of regulating the problem is to expressly provide in the agreement the possibility of renegotiations at defined intervals, for certain issues that are especially sensitive to changing circumstances, thus resorting to a periodical "X-ray" of the investment. Therefore, the initial regulation of the possibility of renegotiations (redoing business) becomes more plausible than carrying out such operations at a certain time in the future, according to the perspective of one of the parties, which, theoretically, should have the initiative, an initiative that could easily generate a hostile environment for the partners.

Granting the preliminary negotiation the importance that it deserves. The initial stage of each international business negotiation is the preliminary negotiation, a stage during which the parties draft a potential agreement, outline the investment, decide whether they wish to negotiate all aspects: the exact topic of the negotiation, how the deal will play out, etc. This stage is essential for the parties to get to know one another. Even during this stage, the negotiation space is obtained through a conscious exaggeration of their own interests. However, as determining element, the preliminary negotiation stage, as well as the due diligence phase, is

[22] Craig B. Andrews, *Getting to yes. The Practitioners Guide to Negotiating Mining Investment Agreements. Lesson from Ecuador,* Fairfax, Virginia USA, 2012, p. 23.

characterized through the collection of information and the efforts each party used to evaluate the other. The purpose is for both parties to reach the decision to negotiate an agreement with one another or for one of the parties to inform the other, directly or indirectly, that it does not desire to continue the discussions.

The healthy measure of resorting to experts in the negotiating context. Experts, formally called mediators or counsellors, can often help the two parties in the decision-making or management (team or individual) process and they can negotiate and "repair" the negotiations by building and maintaining partnerships. Specialists[23] have found the existence of an asymmetry between the way governments negotiate and the way that foreign investors do. For instance, when certain companies track down long-term international business relationships that require a high degree of cooperation, such as mining investments, they can hire a counsellor to develop and guide a program for building/consolidating relationships, which may include restricted meetings for department and individual groups, common workshops, familiarization sessions and problem-solving, all these in the preconfiguration stage of the investment. For instance, the agreement may provide that, in case a dispute cannot be settled on an operational level, the management of the two parties will engage in negotiations to resolve the issue. It is well-known that any negotiation is based upon three criteria: quality, cost, effectiveness. Once the upper management of the two parties comes to an understanding, they may serve as mediators for their subordinates or, further on, for the other party or even for the host state, determining them to change their behaviour and attitudes in relation to such interactions.

When negotiations fail, the parties may resort to the dispute resolution mechanism chosen for most situations: international commercial arbitrage. The parties invoke arbitrage when they consider that the business cannot continue, many times without previous counselling, although this alternative method of dispute resolution is costly, contradictory and often lengthy. The question the parties must ponder is: is there "life" beyond the arbitrage? Practice has proven that the result of an arbitrage often is the termination of the business relationship and not its reinforcement. I reiterate that, traditionally, companies involved in an international business dispute have not actively sought out the help of mediators or other third parties. They have tried to settle the issue themselves, at first, through negotiation, and when they considered that that has failed, they immediately proceeded to arbitrage. Various factors explain their failure to try out mediation, although information and regulations regarding mediation are available in most arbitrage courts: the lack of knowledge regarding the mediation and the availability of mediation services, and also a preference for the contradictory procedure, during which the parties are assisted and represented by lawyers that manage evidence in this trial-like environment in which the parties are no longer partners, but are called plaintiff and defendant.

[23] *Idem*, p. 54.

Many arbitrage institutions, such as the International Chamber of Commerce and the International Centre for Settlement of Investment Disputes[24], offer a service known as counselling, which is normally governed by a set of distinct rules. Furthermore, the United Nations Committee for International Commercial Law (UNCTAD) has drafted a set of conciliation rules that the parties can use without referring to an institution.

4. Observations regarding the existing circumstances or that can occur during a mining investment; the sovereignty of the state and the means of compulsion of the foreign investors

In order to attract foreign investments, host states become involved in various commitments and facilities offered to the foreign investors in the mining field. Some of these are found in unilateral acts, such as the legislation in the field of investments, licenses and authorizations, while others are less formal government actions, such as verbal statements of governmental officials and promises regarding the investments that are made public by the government in the press or in promotional literature. Investors rely on such commitments when making decisions regarding the investment of their capital in a host state. The real intentions of the host state are of essential importance for the profitability of an investment and, sometimes, for its survival. In reality, modifying circumstances occur that can radically change the course of an investment, even causing its sudden termination. Thus, an agreement for the development of a mining operation concluded with a foreign investor by a government can be cancelled by the following government, due to a change of the policy or of the economic and environmental conditions. For instance, a government may grant the right to operate a waste storage facility to a foreign investor and then cancel it the following year, due to a modification of the environmental laws. Such changes in the attitude of the host state towards foreign investors, with direct impact over the contractual expectations have been called by Raymond Vernon[25]: "non-functional transactions" or "obsolescing bargains".

In certain cases, the involved parties try to use certain "tricks[26]". The party that notices such initiatives regularly has two options, generated by a desire to save

[24] Another institution that continues to consolidate its position through its activity, seriousness and professionalism is VIAC – Vienna International Arbitral Centre that offers both arbitration rules, as well as mediation; its lists of experts can be viewed online.

[25] Vernon, in 1971, used the expression *obsolescing bargains*, that has made its way into the legal dictionaries (see Black's Law Dictionary, 10th edition), to refer to that situation in which multinationals or investors invest heavily in a business on the territory of a host country, but after that the host country begins to transfer the investment or benefits from the investors to the state, so that what seemed like good business at first becomes an unprofitable venture for the investor through this action of the host state.

[26] A case that shed light over some tricks of host state officials, although not in the mining field, but applicable, as a tactic, to this field, is that of Global v. Ukraine (Global Trading Resource Corp.

their investment: to respond in force, using fighting means, or to respond in a conciliatory manner, trying to settle reactions, sometimes going as far as offering no response, in the hope that this conflict or dispute will stop[27].

The cause of the obsolescence of these transactions has more to do with two main factors: (1) the modification of the circumstances that affect the investment and (2) a decrease in the negotiating power of the investor after the investment has been done. In regards to the first factor, the states, as well as all rational private parties, will generally continue to observe their obligations, to the extent that the perceived net benefits of the execution surpass those of defaulting. The historical context regarding the evolution of mining investment and the rationality of the market economy has proven that when, regardless of the reason, a state decided that the net costs of the execution are still greater than the perceived net benefits, the result will usually be a rejection of the obligation or at least a renegotiation request. The business segment of this area has not known any other directions, which leads to a predictability that acts in favour of the well-informed investor. For instance, a developing state that is attracted to a mining project proposed by a foreign mining company, due to a lack of funds and motivated by the perspective of high incomes that could benefit its economy, may very easily commit to a mining development agreement, even in an accelerated manner; however, after a few years have passed, in case the incomes to not fulfil the expectations of the government[28] or if another mining company promises higher incomes, the government will cancel the agreement.

During the previously described operation, states take into account their own costs and benefits, without balancing them with the expenses and benefits of the international investor in mining. Before beginning the actual activity, investors first bring, in most cases, the means of transport, they install the drilling and operational platforms and, most often, they have to replace the conveyors, elevators and machinery, with or without installation (equipment, lines and technological plants that can only operate after the installation works are provided).

Therefore, generally, in the procedural stage, the expenses for construction, installation and assembly works, as well as those meant to acquire machines and means of transport, including the expenses for creating new assets, for developing, updating or reconstructing the existent ones, also taking into account the value of the services connected to the transfer of ownership over the existing assets and the

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and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11). The case approached the sale of chickens to a company in the US by a state entity of Ukraine. The plaintiff underlined the special circumstances in which the sale agreements were concluded. The prime-minister of Ukraine asked the US Embassy to identify adequate foul exporters in the US in order to reduce the increase of internal foul prices in Ukraine. The purpose of the program for importing foul in order to determine the decrease of internal prices was to promote the economic development of Ukraine. The state committed to honour its contractual commitments.

[27] Roger Fisher, William Ury and Bruce Patton, *op. cit.*, 1991, p. 64.

[28] In case it reaches the conclusion that the entire cost of doing so will not surpass the advantages that come from a new commitment.

plots of land bought from other units (commissions, taxes for authenticating certain documents and expenses related to the transport or loading/unloading etc.).

However, most of the times, the value of the plots of land and of the assets of the host state that have been used (or that were acquired from other companies), the acquisition of objectives that are under execution, including geological works or the value of contributions and amounts granted in advance to third parties are not recognized as investments.

A second factor that contributes to the obsolescence/unprofitableness of state enterprises is the decline of negotiation power of the investor after an investment has been carried out. When it proposes an investment, the investor has a certain amount of negotiation power to ensure a favourable treatment and conditions for its investments, founded on the desire of the government to attract investments. Despite this, once the investor has invested and placed its capital under the sovereignty of the host state, the negotiation power of the host state is diminished, and the commitment risks becoming non-functional. Therefore, all foreign investors are facing a fundamental issue: how can they consolidate their amount of negotiation power? How can they be certain that host states will continue to observe commitments they undertook when the investment was made? One of the solutions that they might choose in this scenario could be that of increasing the costs charged in the host state for failure to fulfil the commitments, thus leading to a default of the treaty that is the object of the investor-state arbitrage, as well as any other applicable mechanism available on the basis of the treaty. Also, the state should consider the negative impact on the investment climate. From the point of view of a foreign investor, raising such costs through provisions of the treaty is an incentive for the host countries to fulfil their obligations when facing opposite pressures. Furthermore, by granting through a treaty the right of using an investor-state arbitrage to an individual investor leads to an increase of the negotiation power of the investors in their relation with the host government and it may have an effect over the continuous observance of their obligations to the state. As a consequence, the decision whether or not to continue to observe the obligations in relation to a certain investment, at least in theory, it should include in its calculation all the significant costs in the case of defending or losing an investor-state arbitrage. In many situations, the mining investor, as employer of a large number of employees, can threaten massive layoffs[29]. In the case of disputes, foreign investors respond to the host state with certain restrictions, when facing the position of power that states adopt in certain cases[30]. Another

[29] An example in the investment field can be made of the case of the Micula brothers v. the Romanian state, a classical dispute wherein the investors, expecting financial facilities and tax exemptions from the state, state that they will lay off personnel in 2011, which would have affected some 4,000 employees in the production and distribution fields, on a national level.

[30] Restrictions regarding the resource assignment decisions. The second in terms of importance, the operational standard is that most governments are not free to assign various production factors, such as the capital, labour force or technology. Private companies may decide who to hire and who to lay off, what equipment to buy and what not to buy, depending on their point of view, as this is an aspect that has an impact over the profitability of their company. Governmental departments

example of restriction is the fact that governmental agencies and departments must track the objectives that the lawmaker specified for them. Companies exchange products and strategies in accordance to the market demands, whereas governmental departments or agencies cannot change their objectives with such ease. An example that is often used is that of the Ford Motor Company, that, when it realized that the vehicle named Edsel, launched in 1957, was a failure on the market, stopped producing it in 1959[31]. Due to this kind of decision-making policies, Ford still is a strong competitor on this market segment. Experts have shown that, if Ford had been a governmental department, it might still be producing the Edsel to this day.

Due to these reasons, a large number of investment treaties contain provisions, commonly called "umbrella clauses[32]", whose only purpose is to ensure that these performance results of enterprises will be observed by the state[33] as part of the treatment owed to the investors.

Despite prolonged negotiations have been carried out, specialized projects have been drafted and strict commissioning mechanisms have been put into place, on the basis of which the parties have solemnly signed and stamped governmental agreements, many times the parties are put in the position of returning to the negotiation table in order to renegotiate their agreements. Therefore, a key challenge in negotiation with foreign governments it not obtaining the agreements, but maintaining the things that have been won/negotiated by the investor though its agreements. In this regard, the world has witnessed the renegotiation of the agreements regarding mineral and oil products in the 1960s and 1970s, many times facing nationalization initiatives of the host countries that threatened

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may often adopt similar decisions, in accordance to the politically imposed standards. Since governmental business entities are usually subsidized by the state treasury and are controlled by government officials, their main purpose cannot be maximizing profit, as is the case of private companies, but the advancement of their social and political purposes. For instance, in the case of the production joint-venture between a company in the US and a foreign state capital company, when the demand for the product has dropped, the reaction of the US partner was to lay off some employees. Despite this, the state-owned company under governmental control, regardless of the reduced profitability, rejected this solution in order to prevent an increase of the unemployment in its country.

[31] Tom Dicke, *The Edsel: Forty years as a symbol of failure*, Journal of Popular Culture, 43(3), 2010, pp. 486–502.

[32] Commonly known as "umbrella clauses", these provisions generally say that "each contractual party must observe any obligation regarding the investments of the investors of the other contractual party". Similar clauses may be found in multilateral agreements, such as the Energy Charter Treaty and ASEAN. The NAFTA chapter regarding investments (Chapter 11) does not contain any umbrella clause.

[33] Thus, depending on the exact terms of the umbrella clause and according to international law, states undertake to observe state mining claim agreements to operate public services, governmental permits/authorizations, to operate waste storage facilities, to offer the tax exemptions promised in the foreign investment codes, even the statements made by ministers to the investors during the investments. Many countries have viewed the consequences of such a standard treatment as a huge, undesirable and unjustified intrusion in what they consider their natural right to regulate the people and the activities on their land.

expropriations, the staggering of loans in the 1980s due to the debt crisis in developing countries, the restructuring of governmental infrastructure projects as an effect of the financial crisis in Asia at the end of the 1990s and the renegotiation of a series of transactions following the Argentinean collapse at the beginning of this century.

The renegotiation risk for apparently definitive agreements is especially present when interacting with governments, due to a variety of reasons. Governments often reserve the right to unilaterally modify the agreements for reasons related to the protection of national sovereignty, national security or public welfare. As the Arbitrage court has shown in its ICSID decision, given in Vivendi[34]: "A state may infringe on a treaty without infringing on an agreement and vice versa[35]". More than that, the usual means of appeal in a court of law for infringement on the agreement may be unavailable or ineffective against governments that choose to adopt such positions. The changing nature of the political imperatives may determine governments to change their position on agreements that they have previously concluded. An extreme situation that any foreign investor may face is expropriation. In this regard, international law has always recognized the power of the state, as issuing source, to take properties away, at least for public reasons and with payment of reparations. Indeed, this power, derived from the state's sovereignty over all things within its borders, is an essential attribute of state sovereignty. In fact, a state cannot exercise this power in way that is valid in itself[36]. Justifying this principle is the fact that the fundamental purpose of a state is to protect the public interest of its citizens and, should such interest be adequately protected through nationalization, the state must be free to follow such a course of action. Due to their prevalence in relations with governments, the negotiators must understand the forces that cause renegotiations, the nature of the renegotiation process, as well as the best methods for renegotiating offers.

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[34] Vivendi v. Argentina (II) Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (former Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II) (ICSID Case No. ARB/03/19).

[35] The infringement of state agreements and of other obligations of the investors is not usually considered a breach of international law. In the case of loans in Serbia, the International Permanent Court of Justice stated that "any agreement that is not an agreement between states, in their quality of international law subjects, is based upon the internal legislation of those countries". More recently, in Noble Ventures v. Romania, a case which involves alleged infringements of an agreement regarding the privatization of a Romanian steel producing enterprise, an ICSID court stated that: "the well-established rule of international general law, that, under normal conditions, is *per se* an infringement of an agreement by a state, does not directly create the international responsibility of the state". With reference to Chapter three of the Projects of articles of the International Committee, regarding the responsibility of the state, adopted in 2001.

[36] Throughout the world, as has happened, for instance, in Albania or in Zambia, when the political opposite took a certain turn, when the pressures become too high to withstand, the governments that concluded the agreements will seek ways to cancel or redo these agreements to satisfy their own political interests. Therefore, it is important that foreign investors include in their negotiation mechanisms strategies that cover this risk.

5. Conclusions

The investment environment must substantiate its order and hierarchy on a set of regulations with a mandatory character, as the soft law regulations, such as conduct codes of the transnational companies, the project of articles regarding the responsibility of states of the International Law Committee, the arbitrage practices (that does not admit precedents) or other acts without mandatory force have proven insufficient. An especially important role is played by the common effort of experts to expose all the forceful positions, as well as the vulnerabilities of all the actors involved in international investments, so that, through a full and objective analysis of these aspects, firm regulatory solutions may be extracted. Negotiation, in all of its stages, is presently a singularly important solution and when its importance is not taken into account, the consumption of resources assigned for dispute resolution reaches maximum levels and overshadows the real economic purpose of foreign investors.

International investment law cannot go through a reformation stage until all the actors have known in detail and analyzed the advantages and disadvantages of their own role (including those that come from numerous disputes), and adapting the law, especially in international law, as is the case for many of its other branches, will most certainly be done in this field as well, as a situation that is different from that of other branches of law cannot be created, as in the case of the international investment law being impacted by legal retro sociology that also impacts the other branches. All these aspects make us return to the providential solution of adopting mandatory regulations in this field, so that the force of renegotiations or restrictions that the parties use does not usurp the force of the special mandatory regulations. Disputes in this field unavoidably lead to this progress, while the subjects of the law feel, more powerful than ever before, the need to use and observe hard law regulations that could support them in focusing their resources on the essential activities that they were incorporated for.

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