Principles of international law of investments, recognition and trajectory[1]

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Abstract

The international law of foreign investments is in a process of permanent emerging, whose structure appears as a complex and unitary multitude of interactions between the branches of law and its evolution is inspired by sociology, philosophy, politics and economy. These principles are guiding precepts and guidance aimed at drawing up and application of legal norms on international investments and can be formulated in the text of the Treaties and other regulations in this field. These are the support of the stability of the international law of investments, correcting the discrepancies, excesses and anomalies that are naturally identified at a certain moment in the interpretation and application of this new field of law. The existence of the general principles has a prominent role in the transition periods of law and in the hierarchy, the harmonization and the compatibility of different legal systems.

Keywords: *foreign investments, protection, treatment and guarantee, principles.*

JEL Classification: K22, K33

1. Introductory considerations

Similar to public international law, the international law of investments does not have a hierarchy of principles, but rather an interdependence of the said principles. These principles are subject to permanent renovation and innovation, as they are under permanent change, however without being affected by instability, but only by continuous evolution and transformation.

The principles mentioned above include and must also include with regard to the reconciliation of principles, the fundamental principles of international law, a theory that relies on the eclecticism of the principles of the international law of investments; a familiar circumstance is the case when, for example, even if the treaties on investments are executed between states, they include rights and

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obligations for all specific players of the field, not only for the states. Their eclecticism is also generated by the inspirational range of some principles, particularly within international investments, where the economics are permanently intertwined with politics and the social side, the principles can be of social, philosophical or political inspiration, as this is a subject of perpetual scientific research and debate. All of the above are added with the fact that the international law of investments is in an integrated process of permanent origination, with a structure that appears as a complex and unitary entirety of interactions between the legal branches[3].

These principles are guiding precepts and are intended to guide the preparation and application of legal rules on international investments, as they can be phrased in the wording of treaties and other specific regulations of this field. They are the cornerstone of stability of international law of investments, correcting the deficiencies, excesses and anomalies identified naturally at a particular time in the interpretation and application of this field.

Similar to the other branches of law, the principles of international law of investments are divided in general principles and specific principles. Principles such as *pacta sunt servanda* or the principle of cooperation, responsibility or sovereign equality are general principles and cover the entire field of legal normativity, and the principle of promoting investments or the principle of complete protection and security are specific guiding principles, included in the field of international investments.

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

2. Sociology, an exploration instrument and the review of the international law of investments

The perspective of legal sociology contributes to the development of the international law of investments by means of its functions: descriptive, explicative, predictive, critical and practical-operational. Judgments, as purpose of this field, bring undeniable representative evolution clarifications, given the time and space variability of this field of law.

Sociologically[4], a review of legal systems and institutions regarding this new field of law would involve a wide survey, and this is also the reason why I

[3] The debates have been for and against the integrationist theory of the international public law. In this regard, Vid Prislan, in his study *Non-investment obligations in investment treaty arbitration: towards a greater role for states?* deals with the principle of systemic integration (pp 465, 466 of the volume edited by Freya Baetans*: Investment Law Within International Law: Integrationist Perspectives* 2013. The basic question is whether the key sub-areas of the public international law, particularly the international law of investments, are open for cross fertilisation or if they are still developed in autonomous conditions?

[4] Professor Sofia Popescu refers to a much higher number of auxiliary sciences, indicating comparative law, legal sociology, legal ethnology (which deals with the study of regulations and archaic institutions), legal logic, legal psychology, legal semiotics (which deals with the law

shall only point out a single research topic which I hope it becomes debated and developed subsequently according to its role: retro-sociology.

Our field of review, as a result of research, also noticed the retro-sociological phenomenon involved in the historical phases of foreign investment, not only when it addresses the affirmation, information and reaffirmation of principles of the international law of investments, but also when it debates the occurrence, role and behaviour of subjects of this law. Legal retro-sociology is not dealt with the importance and implications it deserves. Although there are papers that debate this phenomenon in other fields such as history – mainly retro-sociology in the international law of investments can be easily identified from the special language used in analogy with other fields, and should get more acknowledgment, together with the relevant critique (the acknowledgement of retro-sociology can be noticed according to the paradigm and theory, particularly on the background of lack of inspiration, when a critical threshold is reached and a pattern change is required), as it is already influenced when, for example, the legal review is focused on the circumstances that marked the evolution of the international law of foreign investments in: neo-imperialism, neo-colonialism, neo-corporatism, neo-liberalism etc., inclusive terms for retro-sociology are also considered those that include the 'post' prefix, e.g., post-capitalism, postmodernism[5] etc.

For example, as a result of the evolution and trends of reformation of the international law of investments, specialists made efforts to deal with the reconciliation of its principles. There are frequent debates on the affirmation, information or reaffirmation of specific principles of law, and in the same synonymy environment, debates include the relaunch[6], reformation, challenge[7], consolidation or reconciliation[8] of principles that represent the basis of the international law of investments.

Just as other fields, such as geopolitics, can be explored and investigated by retro-sociology, a "screening" can be performed with regard to the occurrence and evolution of the international law of investments, a procedure based - similar to geopolitics - on the idea of "remanences, the repetition of circumstances and mechanisms that facilitate the epistemological phenomenon of retro-theories,

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relations with logic and language), legal semiology (part of linguistics that deals with the study of signs with application in the legal field), legal economy (that performs an economic analysis of law, the cost of institutions and legal mechanisms).

[5] See *Geopolitica Noului Imperialism,* authored by I. Badescu, L. Dumitrescu, and V. Dumitrascu, Mica Valahie Publishing House, 2010, p. 14.

[6] For an approach of the term of relaunch, see Valentin-Stelian Bădescu, *Este posibilă o relansare a aplicării principiilor generale ale dreptului şi ale echităţii în ordinea juridică a Uniunii Europene?*, in Volume III, no. 1/2014 of Acta Universitatis George Bacovia magazine, George Bacovia University of Bacau.

[7] See Lusine Navasardyan, *Protection and Guarantees for Foreign Investments in International Commercial Law*, Wolters Kluwer, 2013, Chapter 2, Section III.

[8] For a general opinion on the reconciliation of policies and principles of international law of investments, see Surya P Subedi, *International Investment Law: Reconciling Policy and Principle,* Bloomsbury Publishing, 2016.

meaning the return of theoretical ideas from revolute ages of updated empirical fields[9]."

A development of this subject is only possible with a close cooperation between specialists that belong both to sociology and to legal philosophy, and to the field of international law.

3. Representative examples of principles related to the international law of investments

A novelty-like principle in the field of international investments found in other legal fields such as the EU law, is the imposition of the principle of legal certainty (application of law to a specific circumstance must be predictable); the same applies to the principle of correlation of regulation systems; however, the consecration of a principle of law takes even thousands of years. An underlying principle of the existence of law does not exist simply because it had been phrased, but it had been phrased because it existed[10] .

Generally, the following principles can be identified where only the lapse of an undetermined, yet sufficient, period of time can establish consecration:

***a. The principle of sovereign equality*.** The most important principle of state sovereignty is the economic sovereignty[11]. The Charter of Economic Rights and Duties of States (CERDS) of 1974 passed by the UN[12] indicates under art. 2 (1): "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities" art. 2, para. 2 stipulates that: "Each State has the right: (A) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment; (B) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State."

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[9] See *Geopolitica Noului Imperialism,* authored by I. Badescu, L. Dumitrescu, and V. Dumitrascu, Mica Valahie Publishing House, 2010, p. 12.

[10] Gheorghe C. Mihai, *Teoria dreptului*, Edition 3, C.H. Beck Publishing House, p118.

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

[12] UN General Assembly, Charter of Economic Rights and Duties of States: Resolution passed by the General Assembly, 17 December 1984, A/RES/39/163, available on: http://www.refworld. org/docid/3b00eff474. html, accessed on 17 July 2017, reiterating the UN Resolutions 3201 (S-VI) and 3202 (S-VI) dated 1 May 1974, which include the Declaration and Action programme for the establishment of a new international economic order, 3281 (XXIX) dated 12 December 1974, Charter of Economic Rights and Duties of States and 3362 (S-VII) dated 16 September 1975 on international development and economic cooperation, which created the foundation of the new international economic order.

Therefore, from the point of view of the practical approach, the impact of this principle was noted in the issue of international organisations (States are legally equal, if and in the extent, they do not agree otherwise. They often agree otherwise, granting more power to states in the founding documents of international organisations), of transnational corporations, concessions granted to foreign investors and special responsibilities of industrialised states. For example, concessions granted to foreign investors may be easier to challenge and hinder due to the principle of permanent and inalienable sovereignty of States with regard to their natural resources. The principle would undoubtedly influence the controversial issue of compensation in case of nationalisation of foreign property. The international economic law and the environment protection law acknowledge the special responsibilities of industrialised states that subject partially different legal conditions to industrialised countries and to developing countries. The current trend is of development from coordination to cooperation and further to an international community.

b. The principle of cooperation. This principle had been recently adopted within the G 20 in UNCTAD in 2016. The notes extracted from the same official page of UNCTAD indicate that: "this principle considers that investment policies approach a series of issues that may benefit from more international cooperation. The principle also claims that special efforts should be taken to encourage foreign investments in the least developed countries. Countries of origin may support foreign investments to lead to sustainable development. For a long time, developed countries have been offering guarantees against political risks in host countries or granted loans to companies that invest abroad. The Multilateral Investment Guarantee Agency (MIGA) offers insurance of investments on international level.

The principle is based on examples of countries that started to condition the provision of investment guarantees on the evaluation of the social and environment impact.

The importance of international cooperation also increases in the circumstances that an increasing number of countries uses policies focused on the promotion of investments. Better international coordination is required to avoid a global race based on regulatory standards or a top race in incentives and to avoid the return of protectionist trends.

More international coordination, particularly on regional level, can also contribute to the generation of synergies for investment projects that would be too complex and costly for a single country. Another field of policies that may benefit from better international cooperation is investment in sensitive areas. For example, recent efforts on potential exploitation of land and exclusion of local farmers by foreign investors led to the development of principles for responsible agricultural investments (PRAI) by FAO[13], UNCTAD[14], World Bank and IFAD[15]."

[13] Food and Agriculture Organization of the United Nations (FAO; French: Organisation des Nations unies pour l'alimentation et l'agriculture, Italian: Organizzazione delle Nazioni Unite per l'Alimentazione e l'Agricoltura; Romanian: Organizația Națiunilor Unite pentru Alimentație și Agricultură). A specialised agency of the United Nations Organisation that leads international

c. Principles related to the treatment and protection of international investments. Protection and treatment of investments represent a traditional and consecrated principle also adopted by G20 in UNCTAD 2016. According to the official source, this principle acknowledges that the protection of investments, despite being only one of the numerous determinant factors of foreign investments, can be an important policy instrument to attract investments. Therefore, it interacts closely with the principle of promotion and facilitation of investments. There is a national component and an international component. The essential national protection elements include, among others, the rule of law, contractual freedom and access to courts of law. The key components of the protection of investments frequently found include the principle of non-discrimination (national treatment and the treatment of the most favoured nation), fair and equal treatment, protection in case of expropriation, dispositions in the circulation of capital and effective settlement of litigations.

The terms of *treatment,* and *protection,* and *guarantee* are tightly related to each other. *Rules of treatment* means, in the context of the subject dealt with, the set of national law or international law that defines the legal condition of international investments. In the same context, *rules of protection* mean the set of national and international laws that prevent or penalise public harm against the existence of international investments[16]. *Guarantee mechanisms* mean the assembly of mechanisms that transfer, from the international investor to a specialised entity of national or international law, the financial consequences arising out of the realisation of particular political risks.

The above indicate that the rules of national law of the host state, respectively the state of the investor, and the rules of international law are applicable on this subject.

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efforts to fight hunger. Active both in developed and in developing countries, FAO operates as a neutral forum where all nations meet as equal to negotiate agreements and debate policies.

[14] United Nations Conference on Trade and Development (UNCTAD). The United Nations Conference on Trade and Development was established in 1964 as a permanent intergovernmental body. UNCTAD is the main entity of the General Assembly of the United Nations that deals with issues related to trade, investments and development.

[15] International Fund for Agricultural Development (IFAD) (French: Fonds international de développement agricole; FIDA) (Italian: Fondo Internazionale per lo Sviluppo Agricolo; Romanian: Fondul Internațional pentru Dezvoltare Agricolă). This is an international financial institution and a specialised agency of the United National Organisation focused on the eradication of poverty and hunger within the International Fund for Agricultural Development (IFAD) for the rural areas of developing countries. It had been established as an international financial institution in 1977 as one of the major results of the World Food Conference in 1974. Seventy-five percent of the world's poor live in rural areas in developing countries, but only 4% of official assistance for development is earmarked for agriculture.

[16] The terms of *treatment* and *protection* have not been approached distinctively until a famous resolution of the International Court of Justice – ICJ, awarded in the *Barcelona Traction* case, according to which: "from the moment when a State admits on its territory foreign investments or foreign nationals, natural or legal entities, the said state must provide them with legal protection and undertake particular obligations with regard to their treatment", *Belgium vs. Spain*, Resolution dated 05 February 1970, paragraph 33.

Basically, *treatment and protection of international investments* are defined by national law, particularly the national law of the territorial state of investment, therefore the host state. The instability characteristic to the 60's – 70's of the past century, pregnant in the legal order in a very high number of states that requested investments determined the trend for international coverage, hence resorting to international rules by the multiplication of conventional treatment and protection of these investments. With regard to the *guarantee of investments*, this is also specific to national law, but this time it is the internal order of the investor's state of nationality, and not the internal order of the state where the investment is performed. *The host state provides or ensures treatment and protection*, and *the national state that exports investment provides its own guarantee*. This creates an environment based on the Roman Law rule *do ut des*, favourable or unfavourable to international investment. The internationalisation of treatment and protection laws is a favourable issue, but a potential internationalisation of guarantee mechanisms without an internationalisation of regulations we mentioned with regard to treatment and protection would be definitely detrimental to the investment environment[17].

d. Other principles found in the international law of foreign investments. The following can be emphasised: the principle of self-determination. The principle of not resorting to force or threatened use of force, the principle of peaceful settlement of differences, the principles of non-intervention in the internal affairs of other states, the principle of observance of international obligations in good faith (*pacta sunt servanda*), the principle of observance of human rights and fundamental freedoms, the principle of protection of the environment and of responsible investments, the principle of special civil, criminal, tort and administrative international responsibility, the principle of complete protection and security, including the protection of legitimate expectations, the principle of the most favoured nation and the principle of national treatment, the principle to promote international investment, fair and equal treatment and the principle of reciprocity.

The list is not limited to the above.

The principles of this field are in tight correlation with the protection of the state, protection of international investors and the applied treatment.

The principles are used to establish a legal and governance foundation both to supplement conventional and common law, and to cover deficiencies[18].

The international law of investments must not take the shape of political law but must be outlined individually, within a properly separated codification framework, given the system of sources of this field of law, the type of regulatory rules, the distribution of political power, the system of penalisations (which is still taking shape, the most eloquent being the recent initiatives to establish the criminal law of international investments) and the means to settle litigations related to foreign investments.

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[17] *Ibid,* p. 460.

[18] P. Guggenheim, *Traite de droit internațional public*, Vol. I, Edition 2, 1996, pp. 296-297.

All principles of the international law of investments are the result of continuous observation, requested by the regulatory requirements of international investments. They have an important role in the administration of justice and settlement methods for litigations. The legal principles constitute the very "spirit of the law", hence the legal ideal.

4. Modern trends

Going outside the doctrine[19] controversies of the existence of the general principles of international law, and considering a few other international instruments[20] that refer individually to fundamental principles, although it was stated above that the international law of investments must not take the shape of political law, the efforts of Ministers of the G20 generated for the first time in July 2016 (even if without binding force), in the debates and reviews of the global investment policies performed by UNCTAD, a set of specific principles[21], which we list below according to the official source[22]:

1. Investments for sustainable development

• The general target of the preparation of the investment policy is to promote the investment for a favourable growth of inclusion and sustainable development.

2. Policy coherence

• Investment policies should rely on the global development strategy of a country. All policies that impact the investments should be coherent and synergetic on national and international level.

3. Governance and public institutions

• Investment policies should be developed to involve all stakeholders, embedded in an institutional framework based on the rule of law), to meet high standards of public governance and ensure predictable, effective and transparent procedures for investors.

4. Preparation of dynamic policies

Investment policies should be reviewed regularly for effectiveness and relevance, and adapted to the evolution of development dynamics.

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[19] Dominique Carreau et Fabrizio Marrella, *Droit international* - 11ème édition, éditions A. Pedone 2012, p. 328.

[20] They include in particular the Universal Declaration of Human Rights and Guidelines of the United National Organisation on business and human rights, the Agreement for the establishment of the Multilateral Investment Guarantee Agency, guidelines of the World Bank on the treatment of direct foreign investments, OECD Guidelines (Organisation for Economic Co-operation and Development) for multinational enterprises and the Tripartite declaration of principles on multinational enterprises and social politics of the ILO (International Labour Office) and multiple agreements related to WTO (World Trade Organization) including GATS (The General Agreement on Trade in Services), TRIMS Agreement (Agreement on Trade-Related Investment Measures) and GPA (Agreement on Government Procurement or the Agreement on Public Procurement).

[21] For the notes to these principles, see the official link UNCTAD: http://investmentpolicyhub. unctad.org/publicdocs/annotations. htm#annotation1, last accessed on 17 July 2017.

[22] http://investmentpolicyhub.unctad.org/ipfsd/core-principle, last accessed on 17 July 2017.

5. Balanced rights and duties

• Investment policies should be balanced in the establishment of rights and duties of the States and investors in the interest of development for all parties.

6. The right to regulate

• Each country has the sovereign right to establish the entry and operating conditions for foreign investments, according to international commitments, in the interest of public assets and to minimise potential negative effects.

7. Opening towards investments

• According to the development strategy of each country, the investment policy should establish open, stable and predictable entry conditions for investments.

Moreover, the issue of "opening" exceeds the establishment of an investment. The opening of trade can also be important, particularly when the investment depends significantly on imports or exports.

8. Protection and treatment of investments

• Investment policies should offer proper protection to established investors. The treatment of established investors should be non-discriminatory.

9. Promotion and facilitation of investments

• Policies to promote and facilitate investments should be aligned with the sustainable development objectives and designed to minimise the risk of competition harmful to investments.

10. Corporate governance (administration) and responsibility

• Investment policies should promote and facilitate the adoption and observance of the best international practices on corporate social responsibility and good corporate governance (administration).

11. International cooperation

• The international community should cooperate to approach the common investment challenges in terms of development, particularly in the developing countries. Joint efforts should be taken to avoid the protectionism of investments (definition of protectionism according to the Explanatory Dictionary: it represents the economic policy of a state that pursues the temporary, partial or total protection of indigenous industry and agriculture by the application of high customs tariffs for imported goods, foreign currency restrictions, etc.).

The official source UNCTAD also specifies that "these principles interact with each other and should be considered together. They can be used as reference for the preparation of national and international investment policies, according to international commitments made and considering the national objectives and priorities and, by extension, of sustainable development". As a brief retrospective, UNCTAD[23] specifies as follows: "The UN Charter (article 55) promotes, among others, the objective of economic and social progress and development. Millennium Development Objectives of the UN require a global partnership for development. In particular, objective 8 encourages continuous development of an open commercial and financial system, based on rules, predictable, non-

[23] See the official page UNCTAD: http://investmentpolicyhub.unctad.org/ipfsd/core-principle, last accessed on 30 August 2017.

discriminatory, and financial, which includes a commitment for proper governance, development and decrease of poverty - concepts that apply equally to the investment system. "The Monterrey Consensus" of the UN Conference on funding for development of 2002 acknowledges that the countries should continue their efforts to achieve a transparent, stable and predictable investment climate, with the appropriate observance of contracts and observance of property rights, integrated in solid macroeconomic policies and Institutions that allow enterprises, both domestic and international, to operate effectively and profitably, with maximum impact on development. The UN application plan from Johannesburg, in September 2002, as a result of the "Rio Declaration", involves the phrasing and preparation of a national strategy for sustainable development, to integrate the economic, social, and environment issues. The fourth UN Conference on the least developed countries adopted in May 2011 the Istanbul action programme for the least developed countries, with a strong emphasis on the building of productive capacities and structural transformation as essential elements for the achievement of a more robust, balanced growth, fair and favourable to inclusion and sustainable development. Last, UNCTAD Conference XIII in 2012 - together with prior UNCTAD Conferences - acknowledged the role of foreign investments in the development process and requested the countries to prepare policies aimed at the enhancement of the impact of foreign investments on sustainable development and inclusive growth, emphasising the importance of stable, predictable, and favourable investment conditions. A few other international instruments refer individually to fundamental principles.

5. Conclusions

The existence of general law principles has a prominent role in the law transition periods and in the harmonisation and compatibility of different legal orders. In the field of foreign investments, with an upward evolution of players and which feels the need to guide the behaviour of such subjects and to regulate the social relations by multilateral codification, the contemporaneous international society must know a particular legal order and a particular rigour and hierarchy of written regulations.

As a conclusion, the principles are a source of positive law if they are acknowledged and consecrated by written rules or even by the common law tradition. Any new or existing legal system, particularly the international investment system, must be coherent, therefore its regulations must not contradict each other at the same time and in the same respect, and such regulations must be convergent and rely on a series of principles, depending on the complexity and heterogeneity of the field.

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