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INTERACTIONS BETWEEN THE STATE AND FOREIGN INVESTORS IN ENVIRONMENTAL AND PROPERTY PROTECTION

The article presents the forms of interaction in terms of foreign investment with reference to the protection of property interests on the one hand and the protection of environmental interests on the other. The need to protect investors' assets from expropriations directly related to the state's environmental interests has emerged relatively recently, but the parties to bilateral or multilateral agreements have included provisions that protect the given values. Addressing the issue in the light of the respective agreements is a welcome thing for both the host state of investment and the investing state, each creating its own levers of protection of due interests. The effectiveness of these provisions and the settlement of disputes arising from them remain at the discretion of the parties in most cases, but the mechanisms provided offer some additional guarantees to be able to make progress in both investment and environmental protection.

Keywords: environmental protection, investments, expropriation, environmental clause, property, public interests.

INTERACȚIUNILE STATULUI ȘI A INVESTITORILOR STRĂINI ÎN MATERIE DE PROTECȚIE A MEDIULUI ȘI A PROPRIETĂȚII

Articolul prezintă formele de interacțiune în materie de investiții străine cu referire la protecție intereselor de proprietate pe de o parte și protecția intereselor de mediu pe de cealaltă. Necesitatea protecției bunurilor investitorilor de exproprieri legate nemijlocit de interesele statului legate de mediu au apărut relativ recent, dar necătând la asta părțile în cadrul acordurilor bilaterale sau multilaterale au inclus prevederi ce ocrotesc valorile date. Abordarea problematicii prin prisma acordurilor respective este un lucru binevenit atât pentru statul gazdă al investițiilor cât și pentru statul investitor, creându-și fiecare pârghii de protecție a intereselor cuvenite. Eficiența acestor prevederi și soluționarea litigiilor apărute în baza lor, rămân la discreția părților în majoritatea cazurilor, dar mecanismele predispușe oferă anumite garanții suplimentare pentru a putea progresa atât pe domeniul investițional cât și protecția mediului.

Cuvinte-cheie: protecția mediului, investiții, expropriere, clauza de mediu, proprietate, interese publice.

Introduction. A rather interesting problem that occurs relatively frequently is the cause of negative effects on the environment through the investment activities of domestic or foreign entrepreneurs. These situations are not foreign to us, manifested by the fact that some entrepreneurs want to make large investments to create certain factories, plants or other buildings that involve the occupation of large areas of land and the mass production of pollutants, but offer in exchange certain social benefits and lead to the satisfaction of public interests - such as the creation of new jobs, the development of infrastructure, the contribution through taxes and so on. One such recent project is the "German Village" which involves a real estate project for 5,000 inhabitants, with infrastructure, facilities and architecture in line with all contemporary standards with an area of over 800 thousand m², [1] but for its realization it was necessary to change the destinations of the lands owned by Băcioi village, from the agricultural ones to those destined for constructions [2]. Respectively, when we talk about projects of such proportions, they come directly with various forms of pollutants and another factor is the change of land use - where agricultural land is considered to be a natural resource with a high degree of protection. And what do we do with the right to a healthy environment that is ensured through the prism of art. 37 of the Constitution? This will surely be violated for the neighbors at least during the construction. These issues have been on the agenda of environmental bureaucrats and environmental associations since the early 1990s, but the need for such investment and infrastructure projects is necessary or even vital for the development of the state. Therefore, certain rigors and requirements were demanded, which subsequently took their place in the agreements concluded between investors and state authorities, which aim to protect citizens' rights to a healthy environment but also to protect the parties to the contract, especially the investor, to satisfy their personal interest.

Results obtained and discussions.

These types of clauses and ideas emerged as a first attempt at international level in terms of raising environmental issues in the development of the OECD Criteria for Multinational Enterprises by 1991 and in the negotiation of the North American Free Trade Agreement and the inclusion of the environmental clause in Chapter 11, 1994. This article will focus on existing contractual clauses in international investment agreements and national forms of contracts between investors and the state in relation to environmental objects or environmental protection, as well as the methods provided for in the settlement of disputes arising from these clauses.

A dilemma consisting in the elaboration of international investment treaties is for the countries, ensuring the protection of investors and at the same time offering a special flexibility in the design of new policy documents [3, p. 76]. Countries that are treated as a source of investors want to include in them as many forms of protection as possible for their agents, and countries that are seen as recipients of investments want to maintain their autonomy in making decisions in various fields, but at the same time ensuring some stability with regard to be attractive in terms of investment.

In order to proceed with the methods that are being introduced to protect both the investment capital and the national interests of the host state in investment treaties, it is necessary to give a characteristic of what they entail and what their role is. It should be noted that the essence of these Agreements is as mentioned above, the existence of certain insurances for both its subjects and in this case, we have two forms of them, namely the part representing the investors and the part representing the investment. As previously stipulated, there may be several parties to these types of treaties, but later, due to the essence of the act, the participants, depending on the circumstances, acquire one or the other quality.

The second important element is determining what the investment entails. The sub-

ject of investment agreements - that is, investments, are generally very extensively defined by these treaties. Definition that goes beyond the essence of any idea and concept of ownership defined by most national laws. This is done in order to avoid expropriation in the light of national law. From the point of view of environmental interests, it is quite important to what extent such notions could be extended so as not to arouse the curiosity of national authorities for dispossession on the basis of environmentally harmful activities [3, p. 77]. Their acceptance, however, is manifested by the subsequent granting of operating permits, the conclusion of public-private partnership agreements or concessions. These forms are considered investment and force national authorities to compensate those given in the event of expropriation. As a manifestation of these ideas, we refer to art. 2 letter c) of the law of expropriation for a cause of public utility No. 488 of 08-07-1999 *“patrimonial and personal non-patrimonial rights, directly related to inventions that can contribute considerably to ensuring the defense and security interests of the country”*. Therefore, the expropriation that will have as such objects can be carried out only in the way provided by law and which involves a legal procedure and fair compensation. Carrying out other actions that lead to the investor's deprivation of his investments on the basis of environmental damage will be considered illegal or abusive. In most agreements of this kind, the notion of investment is usually treated in any form possible with a subsequent listing of certain actions, concrete activities to exemplify these situations. The idea of this wording is to prevent investors from protecting all assets that could be considered theirs, due to restrictive national regulations such as interpretations of property rights. As a consequence, standard formulations found in investment agreement models such as Germany (2008), France (2006) and Italy (2003) provide for the extension of the notion of investment to such actions and objects as exploration, growth or

cultivation, extraction or exploitation of natural resources and cover such concessions regardless of their form, guaranteed by law, administrative act or contract. Although it is clear that the language used allows investors to benefit from concessions on fishing, mining of natural resources, water extraction, as well as land and water treatment activities for agricultural purposes, it is less clear whether allows to emit pollutants, to use environmentally harmful chemicals in the production process or of building permits and contracts [3, p. 78].

A closer example for us, to determine and shape the idea of investment is the Moldova-EU Association Agreement, which in essence has several components related to policies, but primarily is an agreement to promote free trade between these two entities - so it is safe to assume that we are in the presence of an agreement that also establishes investment relations. The intention of the parties regarding the investment subject is present practically in each important compartment of the agreement such as art. 77 letters c and d, 88 letter b, 98 and others.

The definition of the investment term in this agreement according to the general rule set out above is very ambiguous and extensive. The agreement speaks of the term investment in several articles of the document designating several forms of activities and various objects. The most relevant article to observe a certain outline of this notion is art. 265 on the movement of capital, namely *“With regard to transactions on the capital and financial account of balance of payments, from the entry into force of this Agreement, the Parties shall ensure the free movement of capital relating to direct investments, including the acquisition of real estate, made in accordance with the laws of the host country, investments made in accordance with the provisions of Chapter 6 (Establishment, Trade in Services and Electronic Commerce) of Title V (Trade and Trade-related Matters) of this Agreement, and the liquidation or repatriation of invested capital and of any profit stemming*

therefrom". We notice a certain enumeration of the goods that could be considered as investments made by the representatives of a party, but again we do not have a clarity that would imply these objects in full. We have another example in the case of the Agreement between the Government of Canada and the Government of the Republic of Moldova for the promotion and protection of investments (2018), where in art. 1 entitled definitions we also have that of investments "*investment means: (a) an enterprise; (b) a share, stock, or other form of equity participation in an enterprise; (c) a bond, debenture, or other debt instrument of an enterprise; (d) a loan to an enterprise; (e) notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located; (f) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; (h) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under: (i) a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession; or 4 (ii) a contract where remuneration depends substantially on the production, revenues or profits of an enterprise; (i) intellectual property rights; and (j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose;*" [4]. In this context, it is correct to mention the Law on investments in entrepreneurial activity no. 81 of 18.03.2004, which stipulates that investments are "*all (active) assets deposited in the entrepreneurial activity on the territory of the Republic of Moldova, including on the basis of the financial leasing contract as well as within the public-pri-*

vate partnership in order to obtain income" which again shows an extensive perception of the notion. It is therefore relevant to mention once again that the treatment of investments in this way implies the widest possible protection of the objects / goods offered by investors and a certain branching of them depending on the effects it produces, so that they are safe in the interference of the state in their activity.

The importance of determining the concept of investment for us is to show the need to cover a wider spectrum offered by any type of legal institution to cover the concept of ownership. But in the end, this notion remains to be determined by the parties in case of a conflict, because only in such situations is observed the desire of one party to identify the actions of the other not to be covered by the signed investment agreement. When such situations arise, the concept will be largely determined by the arbitration court that will resolve the dispute, and the basis for its determination will be the concrete situation and all the circumstances that led to the dispute. The criteria for determination are diverse and range from restricting the notion to broadening it. It is for these reasons that the 2012 Bilateral Investment Treaty Model (ILO) of the United States seeks to clarify these criteria and interpretations in the footnote to Article 1. "*Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law.*" [5, p. 3]. That wording emphasizes that in the event of a dispute, the form of determining whether the investor is right or not will be the national law of the host country. Therefore, the extensive wording in the agreements providing for investments is of no value if the national

legislation of the host country does not provide regulatory support.

The most important issue for investors is how not to run out of capital invested in the business and the business itself. Therefore, the situation previously analyzed regarding the notion has a role of not including the respective objects in the light of the national mechanisms of deprivation of property or expropriation. But if these mechanisms are not successful, international bilateral or multilateral investment agreements also provide for certain special clauses regarding the application of expropriations by the host state.

Any form of expropriation, which involves the transfer of title from one subject to another, is prohibited by customary international law [3, p. 82] only on condition that it was made in the public interest, without discrimination and with due compensation. Considering that the public interest can also be one of ensuring a healthy environment, it is obvious our interest in formulating ideas in that compartment.

If the part that comes with the investments is more interested in the formulation of the investment definitions, then in the case of the expropriation the host part is more interested. The meticulousness of the host state in the wording of the expropriation is argued by the fact that in the event that it occurs, it will have all the leverage to defend itself in the event of a dispute. The most dangerous thing for investors is in fact the nature of indirect expropriation. Indirect expropriation as analyzed by doctrinaires is a simple form of loss of ownership by forcing the owner to cede ownership based on certain criteria. If in the case of expropriation for public utility it takes place according to the public interest, according to a legal procedure and with a well-defined compensatory mechanism, well in the case of indirect expropriations it takes place without compensating the owner of the goods. From the perspective of national law, such examples could be formulated in terms of institutions such as

confiscation or requisition. This fact is very clear in Annex B to the United States Model Bilateral Investment Treaties: "*The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and the character of the government action.*" [5, p. 41]. We observe the concrete delimitation after which, in the case of the respective model, the parties intend to analyze the situation of indirect expropriation in case it takes place. Also, here an important factor is the formulation of the following idea "*Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*" [5, p. 41]. We note that direct reference is made to circumstances that could remove the circumstances that characterize the existence of an indirect expropriation, and direct reference is made to such things as public order, public health and environmental safety. This concept is reflected in most bilateral or multilateral investment agreements and we return to an example from the recent agreement signed by the Republic of Moldova and Canada where in Annex b.10 which interprets the forms of expropriation mentions in letter (c) [4] practically the same phrase delimited above, with special emphasis on the nature of the possibility of the existence of an expropriation based on the need of the state to ensure environmental protection.

These were the forms of state protection offered in the light of investment agreements on the issue of expropriation. But here the

protectionist measures do not end. It was previously stipulated that environmental clauses be included in all capital and investment agreements. These clauses have a dual role, to address the issue of the existence of environmental issues in the first place and secondly the commitment of the parties to be aware of the legislation and environmental protection rules that may intersect with investment activities. The environmental clause in the investment treaties wants to mention the importance of these issues and the fact that attracting investment and the investors themselves will not be able to enjoy certain facilities in this field manifested by the lighter attitude of the host state towards investors. This clause is enshrined in all modern investment treaties and the R.M-EU Association Agreement is worded as follows. "1. *The Parties recognize that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labor law. 2. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labor law as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory. 3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labor law, as an encouragement for trade or investment.*" [6 art. 371]. The intention of this article is quite clear in order to reaffirm the above. The parties are required to comply with national environmental regulations and have no right to negotiate the reduction of the protection of a healthy environment provided by these regulations through other investment blackmail mechanisms. That clause comes first and foremost to defend those national values and established principles in matters relevant to the protectionist activity of the state.

The forms of these clauses are largely similar in most investment agreements. The model of the United States of bilateral investment treaties comes to reconfirm our state-

ments "*The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws.*" [5, p. 17] and we have the same rhetoric in the Investment Agreement between the Republic of Moldova and Canada in art. 15 "*The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding the encouragement.*" A Party may make a written request for consultation with the other Party on any matter arising under this Article. The other party shall respond to a request for consultations within the prescribed period. Thereafter, the parties shall consult each other and endeavor to reach a mutually satisfactory resolution.

Although special importance is given to the negotiation of investment treaties, in case law and doctrine, the issue of indirect expropriations is a persistent one in investment law cases. The latest developments in this area show a trend in this area to show a manifestation of the restriction of the discretion of the courts and the extension of the freedom of states to regulate the activity of investors without having a responsibility to compensate. But at the same time the practice is very diverse and a precedent has not yet been set which has shown certain stability in the matter [3, p. 99]. The current trends in dispute settlement practices on this subject are relatively insignificant, although this question has been around for more than 20 years. Several litigations have

been initiated by investors against Spain (PV Investors v Spain - UNCITRAL, Charanne v Spain - Stockholm, Isolux v Spain - Stockholm, etc.), Czech Republic (Antaris v Czech Republic - UNCITRAL, Natland v Czech Republic - UNCITRAL, Voltaic v Czech Republic - UNCITRAL, etc.) and Italy (Blusun v Italy - ICSID) under the Energy Charter Treaty on support for renewable energy production and two cases against Canada under NAFTA which also cover renewable energy tariffs, which could be a positive basis for identifying certain rigors and principles for resolving environmental issues and the effects of expropriation attached to them, but unfortunately these cases do not yet have a clear purpose and the very process of examining them is one without much information. As we see, the international tribunals that are empowered to resolve such conflicts do not yet have a clarity regarding the rigors of expropriation attributed by the state and the manifestation of these rigors. In this context, it would be beneficial to mention the case of Avia Invest SRL v. Republic of Moldova, which takes place at the International Arbitration in Stockholm for the concession contract of Chisinau International Airport. The majority holder of the share capital of this enterprise is of Cypriot origin and R.M. signed a bilateral investment treaty with Cyprus in 2007, respectively as a legal basis and additional protection for the given company, this agreement also intervenes in case of its examination in arbitration. It is relevant to note that this treaty does not contain an explicit environmental protection case, as stated earlier in the paper, but the agreement contains the obvious

expropriation clause which is formulated in the sense discussed above. Although the case is much more complex and addresses some other issues, I considered it necessary to mention it and the forms of protection of the interests of the parties in that dispute.

Another question is whether the practice of international arbitration tribunals is clearly inconsistent and has few other characteristics, why the parties who have been harmed do not address themselves to defend their interests through other instruments as previously stipulated by the ECtHR. The main differences would be that in order to access the ECtHR it is necessary to exhaust all the ordinary remedies concerning the matter in question and after their exhaustion the process of examining the application can be a very long one. International arbitrations, on the other hand, are convened at the request of the parties, require much more significant investment but provide a faster outcome in resolving the issue requested by the parties. That is why they are often used to solve such problems.

In conclusion, it would be fair to mention that the issue of environmental protection is also present in the case of investment agreements between states that involve certain patrimonial actions that denote the existence of a property and that this issue is treated relatively seriously by the parties, with regard to issues arising in connection with the existence of certain disputes concerning environmental clauses or expropriations related to unfavorable conditions created by investors in breach of environmental legislation.

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