Ranking of Treatment Standards in International Investments

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Abstract

Representing the most comprehensive part, of particular importance for international investment law, treatment standards continue to generate a number of differentiations, for whose comprehension and approach is often required to analyze the starting elements that led to the emergence, by splitting, of this branch of law. The provisions on investors and investment treatment in treaty bodies are intended to prevent possible restrictive behavior of the host state government and to impose discipline on its governmental actions, and in order to achieve this objective, the treaties define a set of standards with which host states must comply in their attitude in legal relations with the investors and their investments. This study highlights the rank of treatment standards in international investments as a concept and not as a listing, being used in this context, comparative and quantitative methods, with some tangential elements of maieutics specific to the philosophy of law for the continuous evolution of the particular legal phenomenon.

Keywords: *treatment standard in investments, principles, international law, foreign investment.*

JEL Classification: K11, K23, K33, E50

1. Preliminaries

Do treatment standards in international investment represent or should they represent the direct effect of the principles of international investment law and are therefore their expression, given the obvious logical affinity between them? In particular, they are not mistaken for the principles but are the practical expression at the level of rights and obligations, applicable to the actors in this field, in the looking glass of the theoretical-practical aspect, having a customary origin, just as the principles underlying their becoming. Therefore, each principle of law corresponds to a standard or set of standards, proportionate to its importance and scope. Following this logic and analyzing the situation of the latest investment treaties, henceforth, there is a lack in the preponderance of treatment standards, compared to the ever-expanding principles of this area of law.

2. Considerations on the prevalence of the principles of law over treatment standards. Some definitions identified in the main dictionaries

The term "principle" comes from the Latin word "principium" which can mean *beginning*, *ancestry*, having the connotation of *fundamental element*. The principle has no origin, whereas the origin of the standards is the principles, for everything is existing

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as a result of principle, but it cannot be born of anything[2]. In our field of reference, standards are often named after the principles from which they were born.

The fundamental principles of law form the basis of branch principles, between which there is a relationship of correspondence and amplification[3]; the principles of this new branch of law are naturally dependent as well upon the general principles of other areas corresponding to the society.

As theoretical importance, the treatment standards in international investment law are traversed by a double dialectic: external and internal, just like the principles:

- external dialectics aims at reliance of treatment standards in investment on all social conditions, on the structure of society as a whole;

- internal dialectics aims at the set of the internal links that characterize this legal system of international investment, the binder and the interference between the components of that system.

The practical importance of studying international investment treatment standards can be approached on two levels:

- in terms of identifying and establishing the guideline for the entire legal system, with the power to influence the work of the lawmaker and

- in terms of the administration of justice by practitioners of international investment law, who must know and understand both the letter and the spirit of this branch of law.

The result of the action of the principles in this area of law is the very certainty of the law[4].

The generic definition of international investment treatment standards has starting points similar to the principles from which they derived.

Generally speaking, according to Cambridge Dictionary[5], "treatment" means *the way you deal with or behave towards someone or something or something* or *the way something is considered and examined.*

Merriam - Webster Dictionary[6] presents the definition of the term "treatment" as *the act or manner or an instance of treating someone or something: such as: conduct or behavior towards another; the action or manner of dealing with something (such as a topic) often in a specified way.*

According to Oxford Learners Dictionaries[7] "treatment" means *a way of behaving toward or dealing with a person or thing.*

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[2] *Principii autem nulla est origo: nam e principio oriuntur omnia, ipsum autem nulla ex re alia nasci potest.* Marcus Tullius Cicero, Tusculanae Disputationes I. (para 53-54), p. 62.

[3] I. Dogaru, *Elemente de teoria generală a dreptului [Elements of General Theory of Law]*, Ed. Oltenia, Craiova, 1994, p. 115 text and note no. 10.

[4] In terms of guarantee given to individuals facing the sometimes-unpredictable nature of coercive rules and versus the congruence of the legislative system. Nicolae Popa, *Teoria generală a dreptului [General Theory of Law]*, Ed. Univ. Titu Maiorescu, Bucharest, 2002, p.111.

[5] See Cambridge Dictionary, available online at: https://dictionary.cambridge.org/dictionary/english/treatment, accessed on 15.Jan.2021.

[6] See Merriam - Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/treatment, accessed on 15.Jan.2021.

[7] See Oxford Learners Dictionaries, available at: https://www.oxfordlearnersdictionaries.com/definition/american_english/treatment, accessed on 15 Jan.2021.

According to the Explanatory Dictionary of the Romanian language[8], "standard" means a *norm or set of norms governing the standardization operation. Mandatory norm to which a product must correspond, reference.*

The definition of the term "standard" is found in the Cambridge Dictionary[9] as follows: as a noun: *a level of quality; a moral rule that should be obeyed; a pattern or model that is generally accepted.* As an adjective: *usual rather than special, especially when thought of as being correct or acceptable; usual or expected; not involving something special or extra; usual or expected; not involving something special or extra; something that others of a similar type are compared to or measured by, or the expected level of quality; an official rule, unit of measurement, or way of operating that is used in a particular area of manufacturing or services.*

Merriam - Webster Dictionary[10] defines "standard" as: as a noun, *something established by authority, custom, or general consent as a model or example*: *criterion; a structure built for or serving as a base or support.* As an adjective, *constituting or conforming to a standard especially as established by law or custom.*

Oxford Learners Dictionaries[11] presents the "standard" as: *a level of quality, especially one that people think is acceptable; a level of quality that is normal or acceptable for a particular person or in a particular situation; a level of behaviour that somebody considers to be morally acceptable.*

According to *Blacks Law Dictionary[12],* "standard" means a model accepted as correct by custom, consent or authority. Objective standard (1915) means a legal standard that is based on the conduct and external perceptions of a particular person. Subjective standard (1915) means a legal standard that is specific to a particular person and is based on the individual vision and experiences of the person.

From the point of view of the general theory of law, as far as standards are concerned, we note that they are part of the classification of legal rules, in relation to the degree of concision and specificity, that is to say, in relation to that criterion by which legal rules are classified in strict rules of law and directives or standards. While the rules of strict law are rules of strict interpretation (such as the rules of tax laws which accurately determine taxable income and the amount of tax), which do not authorize the person applying them to express them by interpretation, directives or standards are rules which contain criteria for judging the subject's actions[13]. From this point of view, investment treaties are of a mixed legal nature.

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[8] See *Dicționar explicativ al limbii române/ Explanatory Dictionary of the Romanian language* (second edition, revised and enlarged), Romanian Academy, Institute of Linguistics, Ed. Univers Enciclopedic Gold, 2009, available at: https://dexonline.ro/definitie/Standard, accessed on 15.Jan.2021.

[9] See Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/standard, accessed on 15.Jan.2021.

[10] See Merriam - Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/standard, accessed on 15.Jan.2021.

[11] See Oxford Learners Dictionaries available at: https://www.oxfordlearnersdictionaries.com/us/definition/english/standard_1, accessed on 15.Jan.2021.

[12] For more than a century *Black's Law Dictionary*® has been the standard for the language of law. Today it's the most widely cited law book in the world. Edited by Bryan A. Garner, the 9th edition, 2009 (Ed. West) is the most comprehensive law dictionary ever published; see p. 1535.

[13] These are known since Roman law and are taken over by modern law; for example, the rule of good faith or the standard of a diligent person.

3. The emergence and development of standards in the body of the investment treaties

Francisco de Vitoria, in *De Indis,* argued that, by virtue of natural law, trade is an expression of the community sentiment, inherent to human nature, therefore a foreign trader must be treated in equal terms as a local trader is treated[14]. On the other hand, Emeric de Vattel[15] was one of the first followers of granting a distinct and external treatment to foreign traders reported to domestic traders, on the grounds that the national and equal treatment might be too limited, too burdensome and, consequently, unacceptable and unattractive to foreign traders. Hugo Grotius's[16] presentation of this principle, together with the principle of freedom of the seas, is regarded as the catalyst that made possible the entry of the European powers into Asia and Africa.

As far as the relevance of these principles to international foreign investment law is concerned, it can be said that the theory of differential treatment for a foreign investor is preferred by strong states and it can be carried out through the mechanisms of international law. In the 18th and 19th centuries, foreign investment, in the form that existed at the time, was also made in consideration and through the massive colonial expansion. Thus, the need for international rules on investment was minimal, and the liability, an unarticulated institution, due to the unilaterality imposed by the imperial and colonizing entity[17].

The New International Economic Order, the package of rules enacted by the states liberated from colonialism in the 20th century, contained a broad acceptance of the nationalization of the properties of foreigners, based on the need for economic reform, without the latter being considered contrary to international law[18] and thus without attracting any form of international responsibility of the state. However, the financial success achieved in the first few days of the 20th century by small states such as Singapore or Hong Kong, from the activity on their territory of foreign corporations, led to a weighting of nationalization, of the sovereign control and to a rationalization of the treatment granted to foreigners by the host state. This led to a more pragmatic but particular attitude in the practice of the states, which, at the domestic level sought to find solutions to attract, for financial reasons, foreign investment, while at international level they used to campaign to protect permanent sovereignty over their natural resources facing new potential dangers, such as colonialism.

These attitudes have underpinned the emergence of the first multilateral international investment treaties, based on the neo-liberal idea of edicting "counter-norms" to protect foreign investment against the national legislative and regulatory

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[14] See F. de Victoria, Primary Professor of Sacred Theology in the University of Salamanca, *De Indis*, Ed. Ernest Nys**,** 1532.

[15] E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, vol. I, Ed. Londres, 1758.

[16] M. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies*, Ed. Harvard University, Department of History, 2002, p. 88.

[17] See S. Krasner, *Structural Conflict Third World Against Global Liberalism,* Ed. University of California, 1985.

[18] For a thorough analysis of environmental liability, read M. Duţu, A. Duţu, *Răspunderea în dreptul mediului* [*Liability in Environmental Law*], Ed. Romanian Academy, 2015.

system in the host state[19].

As is well known, a treaty means the legal act, regardless of name or form, which records in writing an agreement at state, government or departmental level, with the aim of creating, modifying or extinguishing legal or other rights and obligations governed by public international law and recorded in a single instrument or in two or more related instruments[20]. This is also the situation in the case of investment treaties, which are therefore also governed by public international law, the object of which is interstate relations, but they are subsumed to the subject of international investment law and in the case of relations between states and international organizations, as well as in the case of some subject of law qualities of individuals in the field of human rights.

As in public international law two parties with their own problems are distinguished: the general part and the special part, the treatment standards are included too in treaties as general or specific, divisions to which, of course, that of specialized subjects is added, each corresponding to a certain technicalisation, such as: political cooperation and economic cooperation. Springing from the same logic, we can assume that the treatment standards included in an investment treaty also lend the characteristic traits of the public international law (which governs them): they are coordinating in relation to national law, as it is the public international law[21]; they are binding as the law governing them[22] and are highly politicized. All these aspects tend to regulate the legal force of the treatment standards. The foray of the international legal order into national law is becoming more and more a reality and is achieved by:

- use of treaties – laws (common law instruments for more states) governing rights and obligations directly to individuals;
- by entering the natural or legal person into the international order as a subject;
- the Romanian system of law, for example, considers that the treaties are part of national law, according to article 11 of the Romanian Constitution[23].

Today, the standards for the treatment of international investments are, or should be, component parts of the content provisions of the body of the texts of international or national legal acts, in the event of implementation.

The international law on foreign investment consists of the rules of general international law, the general standards of international economic law, as well as distinct rules specific to its field[24].

In general, international investment treatment standards can be used either by

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[19] See Cristina Popa Tache, *Introduction to International Investment Law*, Ed. ADJURIS – International Academic Publisher, Bucharest, 2020, p. 176.

[20] Definition contained in Law no. 590 of 2003, on treaties, published in the Official Gazette no. 23 of January 12, 2004.

[21] See G. Geamănu, *Dreptul internațional contemporan [Contemporary International Law]*, Didactic and Pedagogical Publishing House, Bucharest, 1975, p. 99.

[22] On the discussions involving this feature, I., Dogaru, D.C. Dănișor, Gh. Dănișor, *Teoria Generală a Dreptului [The General Theory of Law],* 1999, Scientific Publishing House, Bucharest, p. 252.

[23] Art. 11 - International law and domestic law: (1) The Romanian State undertakes to fulfill exactly and in good faith the obligations incumbent on it from the treaties to which it is a party. (2) The treaties ratified by the Parliament, according to the law, are part of the internal law. (3) If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution.

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

direct application or by a process of amending an international standard to suit national or regional conditions, so that the adoption of international treatment standards results in the creation of national standards for the treatment of equivalent investments, which are substantially the same as international standards in the technical content, but which may have (i) editorial differences in appearance and (ii) differences resulting from conflicts in government regulations or industry-specific requirements caused by fundamental, geographical, political, sociological, technological or infrastructure climate factors or the strictness of safety or security requirements that a particular standard authority deems appropriate.

The general treatment standards apply to all facets of the activities of an investment in the host state, and are materialized into a minimum standard of treatment (MST). These include government commitments to provide investors even in clothing with fair and equitable treatment, full protection, security and treatment in accordance with international law. Most treaties include a minimum standard of treatment (MST) that requires the host state to treat foreign investors according to an indefinable standard, such as "fair and equitable" treatment. Traditionally, this type of treatment is applied only to extreme cases of ill-treatment.

Specific treatment standards relate to particular issues related to an investment, such as money transfers, expropriation and investor law in times of war, revolution or civil unrest[25].

4. The issue of treatment standards in terms of regulatory requirement in relation to return to its cornerstones

Representing the most comprehensive part, of particular importance for the international investment law, treatment standards continue to generate a number of differentiations for whose understanding and approach is often required to analyze the starting elements that led to the division of this branch of law.

To discuss the treatment standards of international investment is to subject the law branch as a whole to research.

International investment law is, like everything that constitutes the law, a self-organized structure, characterized by the legal system which determines itself according to its specificity, and through this work, the system itself is subject to mobility.

The legal system is environmentally permeable "absorbing external shocks by backward action on the causes[26]". Although responsive to the environment as a source of information, the legal system of international investment is normatively closed, being in the presence of a normative restriction and a cognitive affirmation.

For these reasons, the analysis of the treatment standards in international investments follows the reference to regulatory law (e.g. regulatory autonomy, political space, flexibility to introduce new regulations); reference to social investment issues (e.g. human rights, labor, health, CSR, poverty reduction).

When the evolution of international investment law is carried out, the political-socio-economic framework causing the unrest that this legal system, as an organized

[25] UNCTAD, *Bilateral Investment Treaties 1995 – 2006. Trends in Investment Rulemaking,* 2007, p. 28.
[26] See in this regard, I. Dogaru, D.C. Dănișor, Gh. Dănișor, *Teoria generală a dreptului* [*General Theory of Law*], 2nd edition, Ed. C.H. Beck, Bucharest, 2008, pp. 49 and following.

structure, should regulate, determines its development only if the major changes configured by a reform (or revolution) trigger even the change in the form of the investment legal system itself.

By constituting itself in a creation of a social body, international investment law gives birth to its creators by generating the social body and its purpose, both by mediating social bodies and by mediating the intrinsic goals of the investment legal system.

As with other branches of law, the unity of the legal system is given by the coherence, systematization and ranking of its components. The multitude of antagonistic notions existing in the international investment law may potentially alter its homogeneity. The antinomies, also noted in the case of this branch of law, are inevitable. Here, for the action of the law, a source of mistakes that can be reduced to a minimum, without ever being completely dried up[27]. Kant established the existence of four antinomies[28] which, in his opinion, are unique only to human reason[29]:

1. The world is finite in time and space, the world is infinite in time and space; Everything in the world is simple and indivisible; in the world there is nothing simple, everything is complex and divisible;

2. There is freedom in the world; there is no freedom in the world; everything is necessary;

3. There is a primary cause of the world; there is no primary cause of the world.

It is therefore appropriate that the law should be based on a forgotten content, at least jurisprudence-like, since "even laws cannot be designed in such a way as to encompass all cases that happen each time, but it is sufficient to contain cases that happen most of the time[30]".

5. Conclusions

The emergence of international investment on treatment standards is tantamount to a way to overcome barriers to international investment law caused by differences in regulations and standards developed independently and separately by each nation or international organization.

The provisions in the treaty bodies on investors and treatment investment are intended to prevent a possible restrictive behavior of the government of the host state and to impose discipline on its governmental actions, and in order to achieve this objective, the treaties define a set of standards with which host states must comply in their attitude in their legal relations with their investors and their investments.

Until the increasing division of treatment standards in new treaties, bilateral

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[27] M. Nordau, *The Conventional Lies of Our Civilization/Minciunile convenţionale ale civilizaţiei noastre*, translation after the 14th German edition by M. Cantianu, Bucharest, Ed. Socec Bookstore & Co, 1921, p.142.

[28] A contradiction between two apparently equally valid principles or between inferences correctly drawn from such principles.

[29] See *Mic dicţionar filosofic* [*Brief Philosophical dictionary*], State Publishing House for Political Literature, Bucharest, 1954, p. 24.

[30] *Neque lege sita scribi possunt, ut omnes casus qui quandoque incederit comprehensive, sed sufficit ea quae plerumque accidunt continari.* (Julian), *The Digest of Justinian, Volume 1,* translation by T. Sâmbrian, Ed. Universitaria, Craiova, 2002, p. 81.

investment treaties presented, at the beginning[31] of their advent, an article or two on treatment standards, most of the times, that single article contained several different treatment standards.

As it has been found, the practice of investment arbitration does not allow a precise assessment of treatment standards to be carried out, and the courts entrusted with the resolution of these types of disputes continue to tend towards a very specific analysis of the facts on a case-by-case basis with regard to the ruling on these issues.

The new generation of investment agreements, including the chapters on investment in free trade agreements, has introduced specific language and criteria to help determine whether a breach of the treatment standards has occurred. These criteria shall be consistent with those arising from arbitral decisions. At the same time, prudence requires us to admit that the list of criteria that can be identified today from state practice and existing jurisprudence is not necessarily exhaustive and can evolve[32].

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[31] Started relatively recently because, according to official statistics, the oldest known BIT is the one between Germany and Pakistan signed on 25 November 1959 (still in force), recently replaced by the one signed in 2009. See: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping, accessed on 15.Jan.2021.

[32] OECD (2004), "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law", *OECD Working Papers on International Investment*, 2004/04, OECD Publishing, p. 23.

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