Forest Concession in Romania and Brazil

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Abstract

The Romanian Forestry Code regulates the principle of conserving the biodiversity of forest ecosystems, by inserting sustainable management measures: the establishment of protected natural areas, ecological reconstruction, regeneration and forest care. The concession contract is not, in itself, a way of sustainable forest management, as is the case in other countries. Thus, the objective of this study is to analyze the legislation specific to the forestry field from the perspective of the concession contract, by identifying regulations that would be an example of good practice. In this sense, we have identified the regulations in Brazil, given the measures that this country has partially managed to implement for the protection of forest lands, as a model that will be followed in the near future, by the Romanian legislator. The comparative method of the legislation of the two countries aims to determine the deficiencies of this law from the perspective of the impact that the conclusion of a forest concession contract may have on the concessioned property itself, as well as the way in which the public interest is respected. The identification of sustainable management criteria, according to which the exploitation of public or private forest land is assigned, is an essential element to be taken into account in the case of a concession, in order to develop legislative proposals to improve the legal framework by which the principle of conserving the biodiversity of forest ecosystems should be applied. A particularly useful aspect for further research would be to address the issue in terms of international investment law.

Keywords: *forest concession, agreement, management, natural resource.*

JEL Classification: K23, K33, K39.

1. General presentation

According to art.11 paragraph (3) of the Forestry Code of Romania, with subsequent amendments and completions, "the state-owned forest fund cannot be concessioned, except for the lands related to the assets sold by the National Forests Authority - Romsilva".

Romanian law therefore assimilates the forest concession to the concession of public property, but which it regulates through a special normative act, taking into account the derogatory regime, of the public property forest fund.

The application norms, approved by Order no. 367/2010 for approving the concession value, the calculation method and the payment method of the royalty obtained from the concession of state-owned forest lands, related to the assets sold by the National Forests Authority - Romsilva, as well as and the model concession contract, details the calculation of the forest concession fee, as well as other rules specific to the forest concession. The same norms include in Annex no. 3, a model of the forest land concession contract, which initially referred to the provisions of the former Government Emergency Ordinance no. 54/2006 regarding the concession of public goods.

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The object of the forest concession is therefore the exploitation of land in the public domain, in order to sell by the concessionaire, the assets exploited by deforestation. The decision of the sale of the asset by the concessionaire must be brought to the notice of the grantor, this sale being the cause of termination of the forest concession contract, according to art. 11 paragraph (1) letter f) of the norms approved by Order no. 367/2010.

In a study-synthesis of foreign legislation on forest concession in the tropics[2], forest concession contracts were classified into two categories: forest use contracts, which involve deforestation and/or the right to use public forest land, respectively service contracts forest management.

The first category of concession contracts involves, in addition to the right to deforestation, the obligation of forest management, including reforestation or other environmental protection measures. Forest concessions are concluded between the state, the owner of the forest land or a private owner, on the one hand, and an individual, a government agency or corporation, community or cooperative on the other. A special importance was given to the forest concessions that are exercised on the public forest lands, the concession contracts being concluded between the state and the corporations from the private sector. This type of concession also involves the production of forest and non-forest products that are distributed on the market. However, governments do not have the capacity to carry out such deforestation operations, the creation of forest products and the management of forest services (ecotourism and recreation). As a result, governments can outsource forest protection management to communities in exchange for the right to deforestation and the production of forest goods[3].

The legal regime on forest exploitation has been inspired from the legislative point of view by the doctrine and practice regarding the concession of oil and minerals. The justification could be that such a concession cannot have as its sole object only the patrimonial exploitation of forests, "once the ecology and the conservation of the natural balance have received the character of a true service of public interest"[4].

The assimilation of the forest concession to a public service concession seems opportune in the context of the obligation to execute a forest sustainability management activity, which is necessary especially due to the long principal period of the contract. Thus, regarding the concession of tropical forests, the remodeling of the contract is promoted by incorporating the new forest products and the values of environmental protection, but also the benefits of the community that lives from the forest[5].

The concession of forest use is a form of exploitation of the public property, by consuming its substance, like the situation of mineral resources. However, the legal nature of the forest concession is not close to the concession of public works, as the exploitation of forest wood does not lead to the accomplishment of a public work[6].

In the province of Quebec, Canada, concessions have been awarded for forestry

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[2] John Andrew Gray, *Forest Concession Policies and Revenue Systems: Country Experience and Policy Changes for Sustainable Tropical Forestry*, World Bank Publications, Washington DC, 2002, p.10.

[3] Ibid, p.11.

[4] André de Laubadére, *Droit administratif general*, Librairie générale de droit et de jurisprudence, Paris, 1999, vol. I., p.45.

[5] John Andrew Gray, *op. cit*., p. 20.

[6] In the European area, public works are explicitly listed in Annex II to European Council Directive 93/37/EEC, and do not include logging works.

and mining of public goods. The forest concession did not transfer to the concessionaire a right of ownership over the land, but rather an exclusive right to obtain a permit to cut wood within the limits of the concession. By amending the Land and Forests Act in 1974, the legislature allowed the Minister of Energy and Resources to revoke existing forest concessions in exchange for a guarantee of wood supply on public land, in the form of a "right to cut down." In 1985, there was an abolition of all forms of security of supply in timber, and it is now possible to grant forestry on public forests and replace them with forest management contracts[7].

In South America, the legislation has undergone several changes, mainly due to the need to reconcile the interests of the communities located in the exploited areas with the private interest of the concessionaires, especially with regard to the equatorial forests and the natural resources of the subsoil[8].

2. Some provisions on forest exploitation in Romania and Brazil

Art. 26 of the Romanian Forestry Code regulates the principle of biodiversity conservation of forest ecosystems, by inserting sustainable management measures: the establishment of protected natural areas, ecological reconstruction, regeneration and care of forests. However, the concession contract does not involve such measures from the concessionaire, according to the Romanian Forestry Code.

The management regime refers only to the categories of protected natural areas, according to the Government Emergency Ordinance no. 57/2006 regarding the regime of protected natural areas, conservation of natural habitats, wild flora and fauna[9]. According to art. 26 paragraph (1) of this normative act, for the lands from protected natural areas owned under concession, "the concessionaires will receive compensations for the observance of the restrictive provisions from the management plan of the protected natural area". The concession contract is not, in itself, a way of sustainable forest management, as is the case in other countries.

We will exemplify the situation of Brazil, in terms of the measures that this country has partially managed to implement for the protection of forest lands, as a model that will be followed in the near future, by the Romanian legislator.

According to Article 3A of the Forestry Code of Brazil[10], the exploitation of forest resources on land can be exercised only by indigenous communities in a sustainable forest management regime, to satisfy subsistence and in compliance with the law.

In its original form, Article 5 (b) of the Brazilian Forestry Code provided that the government would create a national forest authority, at central and local level, for economic, technical and social purposes, including for the protection of areas reserved

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[7] René Dussault, Louis Borgeat, *Traité de droit administratif,* Presses de l'Université Laval, Quebec, 2éme edition, vol. 2, 1986, p. 166.

[8] In terms of the "size" of the concession, in Cameroon, the 10 largest concessions hold 50% of the forest area, and the largest concession covers 650,000 ha. In Gabon, 12 of the largest concessions hold 21% of the state's total forest area. The largest concession owned 699,000 ha. In Indonesia, out of 557 concessions in 1989, covering 58.8 ha, the first four concessions owned 9.87 million ha, the equivalent of 17% of the concession area. For details, John Andrew Gray, *op.cit*., p.22 and the following.

[9] Published in the Official Gazette of Romania, Part I, no. 442 of June 29, 2007.

[10] Law no.4771 of 15 September 1965.

for forested and which are not intended to achieve these purposes. National parks were also set up to protect flora and fauna and use them for educational, recreational or scientific purposes. By Law no. 7875 of November 13, 1989, art. 5 was amended (which initially prohibited any form of exploitation of natural resources in national, state or local parks, sn), so that it was provided: "except for the entrance fee for visitors, whose income will be allocated at least 50% to the maintenance and inspection fund, as well as to improvement works, any form of exploitation of natural resources in parks and biological reserves created by the state under this article is prohibited". By Law no. 9985 of July 18, 2000, this article was repealed, this time without any change.

The consequence is that the exploitation has been extended also in the protected areas, the exploitation limits being relaxed. By art.15 of the Forestry Code, it is forbidden to empirically explore the natural forests originating in the Amazon basin, which can be used only in accordance with the technical and management license plans, for one year.

In the southern areas of Brazil, covered by Brazilian pine forests, deforestation was prohibited in order to completely eliminate the forests, being allowed only a rational exploitation of them, ensuring constant conditions of development and production in good condition [art. 16 letter c)]. However, this article was also repealed, being replaced by other legal provisions, entered into force by Provisional Measure (provisional normative act) no. 2166-67 of 24 August 2001[11], repealed in its turn by Law no. 12265/2012 (Forestry Code of Brazil). An interesting criterion of sustainable management, based on which the exploitation of a forest land in the public or private domain is assigned, is that of establishing the intensity of exploitation compared to the bearing capacity of the forest fund [art. 31 para. (1) point 3 of Law no. 122651/2012][12].

At present, forests and other forms of vegetation, except those in areas of permanent conservation, as well as those that are not subject to limited use or specific legislation[13], are susceptible to suppression, provided that the minimum legal reserve is respected: a) 80% in rural property or possession located in a forested area of the Amazon; b) 35% in rural property located in the savannahs of the Amazon[14].

According to art.47 of the Forestry Code, all concession contracts will be amended and revised to be in accordance with the provisions of this law (unilateral amendment).

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[11] http://www.planalto.gov.br., accessed on 7 November 2020.

[12] According to art.20 of Law no.12.651/2012, in order to sustainably manage the state-owned forest vegetation (legal reserve), it is prohibited to exploit for commercial purposes, by consuming the substance of forest vegetation. Sustainable management policy allows indigenous peoples to exploit up to 20 million forest vegetation in their own interest. "Legal reserve" is defined by the same law as that area located in the hearth of a rural property or possession, in order to ensure a sustainable economic use of natural resources, assist the conservation and rehabilitation of the ecological process and promote the conservation of biodiversity and flora, wildlife.

[13] The permanent conservation area is synonymous with the protected natural area under Romanian law. It means that area of virgin forest vegetation or not, subject to environmental protection regulations: conservation of water resources, land, geological stability and biodiversity, conservation of fauna and flora, ensuring the well-being of human communities.

[14] John Andrew Gray, *op. cit*., p. 20. The author states that the best term for the forest tenure arrangements (forest tenure arrangements) would be between 15 and 20 years, renewable at intervals of 5-10 years. Thus, it is mentioned that, with regard to tropical forests, the short duration of the concession is identified as one of the reasons why the concessionaires are not willing to practice forest sustainability management. On the other hand, a longer, safer concession would provide the necessary incentives for such sustainability, but the rainforest would not have time to regenerate.

3. Forest concession in Brazil

Law no. 11.284 of March 2, 2006 regulates in art. VII, the notion of forest concession as the onerous delegation, granted by the grantor, of the right to exercise sustainable forest management for the exploitation of forests and services, to a management unit, by tender - legal entity, consortium - which meets the requirements of the offer and which has the capacity to perform it at its own risk and for a specified period. According to art. 4 III, the sustainable management of public forests also includes the forest concession including natural or planted forests. The publication of tender documents for each lot of forest concession must be preceded by public hearings, by regions, held by the management body, without prejudice to other forms of public consultation. The units published in the Annual Concession Plan are eligible for the granting of the concession.

The object of the concession is the exploitation of forest products and forest services specified in the contract, by public forest management units, registered in the cadaster of public forests and included in the group of forest concessions.

According to art. 17 of the law, it is forbidden to grant for the benefit of the concessionaire any of the following rights: the right of real estate or the right of pre-emption, access to genetic resources for research and development, exploitation of mineral resources, use of water resources, exploitation fishery resources or wildlife.

According to art. 30 of the law, there are essential clauses for the concession contract: "the object, specifying the executed products and services, of the management unit; the period within which the concessionaire may initiate the implementation of the operation; environmental actions in the concession area; actions designed to benefit the local community undertaken by the concessionaire; the rights and obligations of the grantor and the concessionaire, including those relating to the needs for modernization, improvement and extension of equipment, infrastructure and facilities; the guarantees offered by the concessionaire; contractual and administrative penalties regarding the concessionaire and the form of application; cases of termination of the contract; reversible goods, concessionaire bonus criteria that achieve better socio-environmental performance indices; how to resolve contractual differences".

Logging follows the same regime, itself being inspired by traditional states (for example, the equatorial forests of South America) from a legislative point of view in the doctrine and practice of oil and mineral concessions.

4. Concessions, state contracts and international law

As it is known, foreign investments can also be of a purely contractual nature[15], among which we mention: concession contracts, rental contracts, the acquisition of tangible or intangible assets, etc.

While some authors debate this topic through attempts to present certain classification criteria, other authors[16] include forms of international investment in the

[15] See Dragos-Alexandru Sitaru, *International Trade Law*, vol. I, Actami Publishing House, Bucharest, 1995, p. 21.

[16] See Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law,* Oxford University Press, second edition, 2012, pp.79-86.

generic term "investment contracts", presenting an identification of these types of contracts, as well as the related arbitration practice.

As the method of attracting investments is interdependent with the nature of the foreign investment contract that initiated the investment process, the inclusion in state contracts of certain types of clauses outlined the contractual structure on which the theory of foreign investment protection was raised, which determined building a separate legal system to ensure the security of existing and future concession agreements. The essential clauses include the stabilization clauses (amplified by the theory of internationalization of contracts), the choice-of-law clauses based on the principle of autonomy of the parties and arbitration clauses (which tend mostly to outsource arbitrations). From a technical point of view, the wording of the clauses of such contracts indicates: (i) the objective factors that are given by the quantitative and qualitative importance of the investment, the duration or the manner in which the operation is designed, the nature of the capital contribution, the duration of the operation; (ii) subjective factors resulting from the provisions of "internationalization" of the contract: the choice of law governing the contract, how to resolve disputes (which eliminates the jurisdiction of national courts), the contracting state will prohibit unilaterally change the contract or national regulations where the investment is there[17].

State contracts have a controversial regime in international investment law, being in question the affiliation of these contracts to international law. A common case in debates on this subject is that in which the International Court of Justice - CPJI has stated (in the case of Serbian and Brazilian loans) that "any contract that is not a contract between states as subjects of international law has its foundation in - a national law"[18].

However, in support of the interpretation of the term investment that appears in the content of international treaties, concessions are inserted among the forms that an investment can take, along with turnkey construction contracts, building, management, production, agreements revenue sharing and other similar contracts.

5. Conclusions

The mineral resources of a country are the most important reserves that it has, they do not belong to certain times, but to whole generations. Being exhaustible, the most important thing is for the state to use them consistently. On the other hand, we appreciate that always, the concession involves more than the concession of public property, being closer to the concession of public services, in the context of the obligation to perform a sustainability management activity of affected communities, which is necessary mainly due to in principle the long period of the contract[19].

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[17] See Cristina Elena Popa (Tache), *Dreptul internațional al investițiilor. Coordonate,* Ed. Epublishers, Bucharest, 2019, pp. 220, 221.

[18] *France v. Brésil* and *France v. Yougoslavie,* Decision of July 12, 1929, Series A, no. 20, p. 41. For a comment on this decision see Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, Bucharest, 2009, p. 93.

[19] Cătălina Georgeta Dinu, *Contractul de concesiune*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2016, p. 128.

theory of foreign investment protection was raised, which determined building a separate legal system to ensure the security of existing and future concession agreements[20].

Topics such as the interpretation of international treaties, including international investment treatment standards, remain open to research, without neglecting the theory of "relational" contracts - a theory that approaches the contract from a predominantly socio-economic perspective, almost unknown to the Romanian legal environment and insufficiently researched at international level.

In this way, an interpretative methodology (to fill the gaps) of integrated approach of the two instruments - the contract and the general treaty - can be built in a way that achieves a more sustainable balance between competing public and private interests. Strengthening the cooperation of the parties would contribute to the success of their concession and to the development of the host state. These are neglected priorities of international investment regulations, but they will nevertheless be part of the mission of international investment law.

Bibliography

1. Dinu, Cătălina Georgeta, *Contractul de concesiune*, 2nd ed., Ed. C.H. Beck, Bucharest, 2016.
2. Dolzer, Rudolf & Schreuer, Christoph, *Principles of International Investment Law,* Oxford University Press, second edition, 2012.
3. Dussault, René & Borgeat, Louis, *Traité de droit administratif*, Presses de l'Université Laval, Quebec, 2nd ed., vol. 2, 1986.
4. Gray, John Andrew, *Forest Concession Policies and Revenue Systems: Country Experience and Policy Changes for Sustainable Tropical Forestry*, World Bank Publications, Washington DC, 2002.
5. Laubadére, André de, *Droit administratif general*, vol. I, Librairie générale de droit et de jurisprudence, Paris, 1999.
6. Popa Tache*,* Cristina Elena, *Dreptul internațional al investițiilor. Coordonate,* Ed. Epublishers, Bucharest, 2019.
7. Popa Tache*,* Cristina Elena, *Introduction to International Investment Law*, Adjuris – International Academic Publisher, Bucharest, 2020.
8. Săraru, Cătălin-Silviu, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, Bucharest, 2009.
9. Sitaru, Dragos-Alexandru *International Trade Law*, vol. I, Actami Publishing House, Bucharest, 1995.

[20] See Cristina Elena Popa Tache*, Introduction to International Investment Law*, Adjuris – International Academic Publisher, Bucharest, 2020, p. 124.