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Investor-state disputes and the TTIP – is it a new challenge for corporate responsibility?

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Abstract

In the broad context of responsible management, and corporate responsibility, the present paper studies the general issue of conflicts between private investors, and governments, with a particular focus on the investor-state dispute settlement through international arbitration. On the grounds of empirical research published by other scholars, particularly by Susan D. Franck, and Barbara Koremenos, the paper aims at explaining theoretically the underlying economic motives of the recent surge in the number of internationally arbitrated, investor-state disputes, and at predicting its future developments. Additionally, the theoretical findings are applied to evaluate some of the possible, institutional outcomes of the prospective Transatlantic Trade and Investment Partnership. The general conclusion is that not only isn't the international arbitration of investor-state disputes a threat to democracy, but also said arbitration helps to redress past infringements to public sovereignty.

Keywords: *corporate responsibility, public sovereignty, institutions, investor-state disputes*

Introduction

Responsible management, and corporate responsibility are both normative, and empirical issues. The normative approach assesses the deontology of corporate responsibility, with the three historically important orientations: liberal, welfarist, and technocratic. The liberal approach assumes that the main responsibility of the corporation is to assure predictable return on the capital invested, without any particular social responsibility concurring with that basic mission. The welfarist standpoint sees the corporation as the guarantor of a certain number of jobs, and its social responsibility refers mostly to social stability connected with the very existence (and the exact geographical location!) of said jobs, with a possible help to the less fortunate members of society. The concept of Corporate Social Responsibility, which mostly takes the actual form of variously orchestrated charity, seems to be rooted in that welfarist view. Finally, the technocratic approach to the corporation accounts for the fact that business structures are tightly interconnected with infrastructural facilities, which, in turn, are vital for the security and stability of modern societies. The managerial concept of operational risk, born in the world of banking, and having successfully migrated into the broad universe of business organization, seems to reflect the actual measure of that technocratic grasp of corporate responsibility.

The empirical insight focuses on the actual patterns of corporate responsibility, and their evolution over time. A significant facet of that empirical view is the question about the possible future changes in the patterns of responsible management. One could ask, for example, whether we live in a *de facto* corporate social order, namely whether corporations rule the today's world, or if they will possibly rule the world of tomorrow. From another perspective, one could ask whether opportunist, socially irresponsible strategies of corporations can lead to durable, social change, with a weakening of public sovereignty, and democracy. The answer to such broad questions far exceeds the scope of a research paper like this one. Yet, a partial answer focused upon a particular field of social life is possible.

If you want to see the possible changes, follow the critics, namely the critics of corporate governance and corporations in general. The investor-state dispute settlement (**ISDS**),

which we define as the institution of international arbitration between private investors and their host states, treated as equals, is one of the main concerns from the part of various anti-corporatist movements. That general concern, expressed abundantly in mass media, finds its reflection in scientific, mostly legal research too (e.g. Guzman 1997-1998[1]; Coe 2006[2]; Burke-White 2008[3]; van Aaken 2008[4]). The main lines of criticism are: lack of transparency, doubtful impartiality of arbiters, systematic enforcement of corporate claims against legitimate governments, and a clear asymmetry at the detriment of developing countries. In Europe, that issue is currently associated with a significant, institutional change to come, namely the Transatlantic Trade and Investment Partnership, or TTIP. In Europe, the TTIP is likely to bring the most dramatic liberalization of trade and investment flows since the creation of European Union. It brings a growing concern about the possible imbalance in economic power between the American corporations, and the European governments. The TTIP is likely to adopt the already classical pattern of protection for investors, with international arbitration among the main procedural rights.

The very institution of investor-state dispute settlement, on the grounds of international treaties, is not quite new. First, let's trace the broad context. Since the 1960s, and maybe even earlier, foreign direct investment has been a major factor of economic development. Governments have developed a whole range of institutional tools to attract foreign investors. "Institutional" means that besides incidental actions (e.g. occasional privatisation), some more durable patterns of public policies (e.g. legal rules) have emerged. International treaties are among the most salient examples of institutional changes directed specifically on attracting foreign investors. The typical, legal construct that governments use consists of a certain number of bilateral investment treaties (BIT), which, in turn, refer to a set of rules contained in multilateral treaties. In order to encourage foreign investors, governments give them legal guarantees, or rights, both substantive and procedural. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the

[1] Guzman, A.T., 1998, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, Virginia Journal of International Law, vol. 38, 1997-1998, pp. 639 - 688

[2] Coe, Jack J. Jr, 2006, Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership, Kansas Law Review, vol. 54, pp. 1339 - 1385

[3] Burke-White, William W., The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, University of Pennsylvania, Research Paper no. 08-01, also available at the Social Science Research Network: http://ssrn.com/abstract=1088837

[4] van Aaken, A., 2008, Fragmentation of International Law: The Case of International Investment Protection, University of St. Gallen Law School, Law and Economics Research Paper Series Working Paper No. 2008-1

ICSID Convention or the Convention), dating back to 1966, seems to be an institutional milestone for ISDS. Around that date, and after, both bilateral, and multilateral commercial treaties used to encompass a typical set of rights that governments guarantee to foreign, private investors. Those rights are both substantive, and procedural. Their general principle is that of a treatment not less favourable, from the point of view of the private investor, than the treatment available under international law (Guzman 1998; Franck 2008). The procedural rights cover the possibility of having recourse to international arbitration between the government, and the private investor, should all the national legal means have been exhausted. A good example is Article 9 of the Georgia / Greece Bilateral Investment Treaty:

"ARTICLE 9

Settlement of Disputes between an Investor and a Contracting Party

1. Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.

2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.

Each Contracting Party hereby consents to the submission of such dispute to international arbitration.

3. Where the dispute is referred to international arbitration the Investor concerned may submit the dispute either to:

a) the International Centre for the Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington D.C. on 18 March 1965, for arbitration or c[o]nciliation, or

b) an ad hoc arbitral tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L.).

4. The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law. The awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law.

5. During arbitration proceedings or the enforcement of the award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has

received compensation under an Insurance contract in respect of all or part of the damage."

If a social phenomenon is growing in importance, like the one presently discussed, there has to be some kind of logic to that. In other words, just saying that the growth of ISDS is a threat to democracy, and thus implicitly treating the phenomenon at hand as random, or conspiracy-based, seems irrational. There probably is an underlying social change, and the presently growing wave of ISDS is very much likely to be a symptom of what legal scholars call "system building" (Nottage 2006[5]; Bjorklund 2009[6]; Schill 2011[7]). One should keep in mind that ISDS is closely linked to two, quite young social phenomena. On the one hand, since the 1950s, we have been witnessing a steady growth of both foreign direct investment, and financial markets as a whole. On the other hand, the combination of post-colonial, and post-communist geopolitical changes gave rise to the emergence of new countries, mostly developing ones, with some of them having already passed, or just passing into the category of emerging markets. Those new countries became the hosts of significant foreign investment, which was accompanied by the corresponding, both qualitative, and quantitative development of financial markets. A completely new economic structure had thus emerged, and it keeps on calling for relevant legal regulations. In the overall dynamics of BIT signed, two waves are to notice: the big, post-colonial one in the 1960s and 1970s, followed by a second, slightly smaller, post-communist one at the beginning of the 1990s. Both waves had a common denominator: legitimacy of the newly emerged governments was significantly broader than their actual economic power. What those governments desperately needed was capital, to ground their political power. On the other hand, both waves corresponded to a significant change in the global economic landscape. The 1970s brought both a liberalization of financial markets, and a first, significant economic shock after the Second World War, namely the oil crisis. Both factors contributed to awaken the investor's interest in the assets located in newly emerging, developing countries. Another financial crisis, and a resulting a reshuffling of financial markets marked the early 1990s. Once more, new directions of foreign investment, namely the emerging,

[5] Nottage, L., 2006, The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration, Sydney Law School, Legal Studies Research Paper no. 06/51, also available at the Social Science Research Network: http://ssrn.com/abstract=838028

[6] Bjokrlund, A., 2009, The Emerging Civilzation of Investment Arbitration, Penn State Law Review, vol. 113:4, pp. 1269 - 1300.

[7] Schill, Stephan W., 2011, System-Building in Investment Treaty Arbitration and Lawmaking, German Law Journal, Vol. 12 No. 05, pp. 1083 - 1110

post-communist countries, attracted the attention of private capital. Thus, each wave of new BIT signed corresponded to a wave of structural change in the global, capital market. The factor of time is capital here. Most legal institutions that make the foundations of the current social order are hundreds of years old, with some of them, like the basic rules of civil law, tapping their intellectual content out of the Ancient Rome's tradition. In the light of that legal tradition, the completely new challenges of international commercial law are barely a blink. Legal rules take time to adapt.

Susan D. Franck, in two consecutive papers (Franck 2008[8], 2009[9]) brings an interesting, quantitative insight into the observable patterns in both the initiation of investor-state disputes, and their resolution. A majority of claims come from the U.S. nationals, and, in general, from those of the developed countries. Conversely, respondent governments are those of developing countries, yet they are the relatively wealthier ones, not the strictly spoken Low Income countries. Among the several hundreds of bilateral investment treaties in force, only a few dozens seem to give systematic rise to investor-state disputes, the NAFTA treaty, as well as the U.S. – Argentina bilateral one, largely leading. Despite the critics against the impartiality of arbiters appointed by international organizations, institutionalized arbitration, and more specifically that under the auspices of ICSID (International Centre the Settlement of Investment Disputes) seems to prevail substantially over the *ad hoc* arbitration tribunals. Less than 40% of disputes seem to end up with the investor winning, and almost 60% of cases lead to a legal victory on the part of the government sued. The settled cases (i.e. without award for any of the parties, and without *de facto* legal victory for any of them) are rather an exception. Investors seem to be much more successful in the jurisdictional phase, whilst governments tend to win more frequently in the merits' phase. In the damages' phase, results are mixed. As a rule, the damages actually awarded to private investors are several times lower than their claims, on average 2 cents awarded on every dollar claimed. A significant majority of ISDS claims is related to businesses in the energy sector, and that of infrastructural services (e.g. water supply).

[8] Franck, Susan D., 2008, Empirically Evaluating Claims About Investment Treaty Arbitration, North Carolina Law Review, vol. 86, pp. 1 - 86
[9] Franck, Susan D., 2009, Development and Outcomes of Investment Treaty Arbitration, Harvard International Law Journal, Vol. 50, pp. 435 - 489

Both the above-mentioned Susan D.Franck's research, and the recent data published by UNCTAD (2013[10]) suggest a rapidly growing number of investor-state disputes. In 2012, 58 new treaty-based disputes were initiated, the highest number ever. In order to assess, whether that recent surge in ISDS predicts the advent of "corporate world", one should keep in mind a basic rule of research: as ISDS is treaty-based, one should study both ISDS as such, and the treaties that ISDS is based on. International cooperation in the broad sense is regulated by some 50 000 treaties, mostly bilateral, registered with the United Nations. Only about 50% of them have any provisions for the resolution of disputes. Strong empirical evidence allows concluding that external delegation (i.e. delegation of dispute resolution to external legal bodies, like arbitration tribunals) is used, as a legal device, whenever the signatory governments face important uncertainty. Said uncertainty regards both the state of the world in general, and the way that the given field of international cooperation will develop (Koremenos et al. 2001[11]; Koremenos, Snidal 2003[12]; Koremenos 2007[13]).

The present paper attempts to develop a theoretical framework, to demonstrate that what some call "an eruption" of ISDS combines long-term trends of legal changes with the somehow unique, and shorter in range outcomes of the post-colonial, and post-communist geopolitical changes. That theoretical development is astride economic sciences, law, and politics.

The theoretical perspective

We start with a basic assumption that any hierarchical, social structure – states and corporations included - is able to sustain itself over long periods of time if it has both legitimation, and economic power. Legitimation is defined qualitatively, and quantitatively. On the one hand, it is a set of basic rights, and a set of actions to which the government is entitled. On the other hand, the qualitative scope of legitimation can be translated into some kind of quantitative index. Legitimation is grounded both in past

[10] UNCTAD (United Nations Conference on Trade and Development), 2013, Recent Developments in Investor-State Dispute Settlement (ISDS), Issues Note no.1, May 2013

[11] Koremenos, B., Lipson, Ch., Snidal, D., 2001, The Rational Design of International Institutions, International Organization, vol. 55, pp. 761– 799.

[12] Koremenos, B., Snidal, D., 2003, Moving Forward, One Step at a Time, International Organization, vol. 57, pp. 431– 444.

[13] Koremenos, B., 2007, If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?, Journal of Legal Studies, vol. 36, January 2007, pp. 189 - 212

communicative, political action (Habermas 1975[14], 1979[15], 1996[16]), and the actual, normative quality of the social order in place (Rawls 1999[17]). Economic power is grounded in the actual control over flows and balances of capital, both financial and physical. That definition of economic power is mostly based upon the agency theory, known from the new institutional school in economics, and created essentially to explain the behaviour of corporations (see: Berle, Means 1932[18]; Wilson 1968[19]; Berhold 1971[20]; 1973[21]; Jensen, Meckling 1976[22]; Fama, Jensen 1983[23]).

Of course, defining political power with reference to economic power is also very much related to the works of Karl Marx. In that Marxist, social mechanism of capital transfer, the powers of public agents have the social role of quasi-property rights. The constructive possession of capital by public agents relies on the general principle of the sovereignty of the state. It is probably the strongest possible case of constructive possession. Besides the powers expressly written in the law, there is a whole set of discretional powers. The latter emerge whenever the law allows decisional freedom to public agents, either on purpose, or by unwanted collision of legal rules. Those discretional powers are directly proportional to the amount of capital that public agents have possession of within their discretional freedom. Thus, it is to assume that the distribution of discretional public powers across the social system significantly influences the set of property rights.

For any social agent, governments included, legitimacy and economic power can remain in three possible relations to each other. The hypothetical, perfect state of nature is equilibrium, in which economic power is just what the social agent needs to fulfil their legitimate rights and prerogatives, and, correspondingly, the actual legitimation is just what is needed in order to exploit the economic power at hand. With a hint of simplification, real political power is to find in that equilibrium zone, or at least in the zone of legitimation and economic power overlapping each other. Legitimation changes

[14] Habermas, J., 1975, Legitimation Crisis, translated by T.McCarthy, Boston, 1975
[15] Habermas, J., 1979, Communication and the Evolution of Society, translated by T.McCarthy, Boston 1979
[16] Habermas, J., 1996, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy, MIT Press, Cambridge, Massachussets, translated by William Rehg, Second Printing
[17] Rawls, J., 1999, A Theory of Justice. Revised Edition, The Belknap Press of Harvard University Press, Cambridge, Massachusetts
[18] Berle, A., A., Means, G.,C., 1932, The Modern Corporation and Private Property, New York, Macmillan Publishing Co, 1932
[19] Wilson, R., 1968, On the Theory of Syndicates, Econometrica, vol. 36 (January), pp. 119-132
[20] Berhold, M., 1971, A Theory of Linear Profit Sharing Incentives, Quarterly Journal of Economics, vol. LXXXV (August), pp. 460-482
[21] Ross, S., A., 1973, The Economic Theory of Agency: The Principal's Problems, American Economic Review, vol. LXII (May), pp. 134-139
[22] Jensen, M.,C., Meckling, W.,H., 1976, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, Journal of Financial Economics, (October), vo. 3, no. 4, pp. 305 - 360
[23] Fama, E.,F., Jensen, M.,C., 1983, Separation of Ownership and Control, Journal of Law and Economics, Vol. XXVI, June

slowly, at the pace of legal change, which can take hundreds of years in some cases, decades at best. Conversely, economic power changes quickly, sometimes within weeks. Governments can acquire or lose economic power significantly faster than they can change the scope of their legitimacy, as the former is very much in the swift hands of the executive power, whilst the latter depends mostly on the much steadier actions of the legislative and judiciary branches.

If we attempt to see political power in quantitative terms, we can speak of a certain amount of it, possible to achieve through various combinations of legitimation, and economic power. Thus, some kind of indifference curve may be traced, showing various possible structures of a given amount of political power, regarding its footing in legitimation, and in the control of capital.

When the mutual proportions between the amount of economic power, and the scope of legitimation slide out of a reasonably defined neighbourhood of equilibrium, two types of disequilibria can arise. Firstly, there can be economic power without or with very little legitimation. In this case, the given social entity controls an amount of capital, and has an amount of economic power significantly beyond the scope of legitimation. This is the case of Ali Baba's treasure. It gives significant, discretional power, but it is likely to destabilize the whole social structure. Secondly, there can be legitimation combined with disproportionately weak economic power. The given social agent is legitimately allowed to do things that he has no sufficient capital to perform. If the latter case is that of the government, there is an objectively observable need to acquire more capital in order to assure an economic power, which would be at least in correspondence with the scope of legitimation, possibly even greater.

A government with a legitimation exceeding its real economic power can acquire capital through three possible ways. It can forcefully take the possession of some assets, by sovereign decision, in the limits allowed by legitimation, of course. Let's call it "sovereign acquisition". The imposition of taxes is a classical example of that way, whilst the nationalisation of property rights is a more drastic one. The second possible path is public borrowing, whilst privatisation of assets is the third one.

Those three forms of increasing economic power confer to the government economic power of uneven quality, so to say. They have their mutual dynamics, too. The greater the gap between legitimation, and economic power, and, consequently, the lesser is the government's real political power, the lesser is the capacity for sovereign acquisition. If

we don’t have money to pay the wages of qualified clerks, we cannot hope to impose really collectable taxes. The lesser the capacity for sovereign acquisition, the lesser the capacity for public borrowing: money is lent mostly to those, who can pay it back with interest, hence who can efficiently impose and collect taxes. Those, whose ability to do so is doubtful, have significantly harder access to debt. If the gap between legitimation, and economic power is really wide, sovereign acquisition and public borrowings are quite limited ways to reduce it. Privatisation is frequently the name of the game in such situations.

Sovereign acquisition may increase the scope of legitimation, the same as public borrowing. With increasing tax revenues, and a good borrowing capacity, the government may claim some fields of social cooperation, for example through systematic public procurement, as it is the case in the sector of healthcare. Conversely, privatisation is likely to severe some fields of social action from the scope of the government’s legitimation[24]. Thus, if we have a government in real need of economic power with quite a broad legitimation, yet poor in capital, a political time bomb starts ticking. Privatisation is likely to become massive, and irrational in terms of price, at which assets are transferred to the private sector. The price is to be understood broadly, not only as the lump sum of money paid by the private acquirer, but as the total balance of mutual obligations on the part of, respectively, the government, and the private investor. Politically forced, hasty privatisation leads to bad deals, which ultimately will bring a pressure on both the scope of legitimation, and the amount of economic power held by the government. Finally, the government comes to a point, where further loss of legitimation, inclusive of further privatisation, can lead it not to being a government anymore, and possibly to the disintegration of the state itself (e.g. Sudan). At this point, two alternative scenarios arise: entrenchment or reclaiming. The government can lock itself in that quite unimpressive ivory tower of residual sovereignty, and accept the position of barely a player among others. On the other hand, the government may attempt to reclaim some of the previously privatized assets. Reclaiming in this case is a broad concept, covering both the property rights strictly spoken, and the obligatory rights connected to some assets. The strategy of entrenchment is that of a weak government, which actually cannot fully enforce the rule of law, hence cannot properly

[24] The course of social changes in Central and Eastern Europe is a good example of the latter mechanism. Massive privatization at the beginning of the 1990s seems to have permanently removed most fields of doing business from the scope of legitimation of the previously omnipresent governments.

protect property rights. Some investors may be expropriated, or otherwise disadvantaged at the benefit of some others, the tougher, smarter, and ones that are more influential. Yet, the government in place, as weak as it is, provides at least the simulacrum of legality to those unfair private deals. Should the reclaiming strategy dominate in public policy, the government is bound to take steps that put a clear brake to the amount of profits possible to make in connection with the previously privatized assets. Anyway, some private investors are hurt, and some arise.

That entire theoretical construct, as presented above, allows hypothesizing that both the recent surge in the number of investor-state disputes, and the specific quantitative pattern of these disputes are the delayed outcome of forceful, frequently irrationally quick privatisation, which was supposed to support the frail political position of newly emerging, post-colonial, and post-communist governments with additional capital. Investor-state disputes seem to result mostly from either local struggles for power between private investors, poorly legitimized by local governments, or from active attempts, from the part of said local governments to regain the right to dispose of at least some of the previously privatized assets.

Illustrative case studies

In the realm of investor-state disputes, the cases against Argentina as respondent are almost a separate category. Both the sheer number of cases (more than 40), and their saliently repetitive characteristics make it a textbook-like example. In the early 1990s, the government of Argentina conducted an extensive privatisation in many sectors of the economy, energy and infrastructure included. The admission of foreign investors, and extensive foreign indebtedness of the government allowed the country as a whole to perform a civilizational leap forward. The so-called Convertibility Plan of 1991 pegged the Argentinian peso to the U.S. dollar, which, combined with privatization, created a unique opportunity for foreign investors: assets were much cheaper than in the developed countries, but the dollarized internal market almost guaranteed high returns on investment (see for example: Sturzenegger, Zettelmeyer 2006[25]). Some ten years later, about the year 2000, a combination of external shocks and bad economic policy

[25] Sturzenegger, F., Zettelmeyer, J., 2006, Debt Defaults and Lessons from a Decade of Crises, The MIT Press Cambridge, Massachusetts London, England, pp. 165 - 202

triggered a deep economic crisis, and great political instability. As addressing those exceptional circumstances, the government in place took several steps aiming both at giving a new kick to the sluggish economic growth, and at calming social unrest. One of the steps consisted in the so-called "pesification" of the economy (i.e. in backing off from the parity to U.S. dollar), and in freezing, temporarily, the prices of basic goods. Only then, the authorities realized how extensive were the rights that their predecessors had granted to foreign investors, and how brutal a reduction of those rights was necessary to implement the strategy designed for coping with the economic crisis. Some experts state firmly that the steps taken were justified by exceptional circumstances, and stayed within the limits of reasonably understood, public sovereignty (see for example: Burke-White 2008[26]). Yet, an avalanche of disputes ensued, some of them landing at the level of international arbitration. Arbitration tribunals, whilst keeping quite a distanced position as for the specific claims for damages from the part of particular claimants, kept a noticeably uniform line of thinking as for the conflict between private rights of the investors, and public sovereignty. That line of thinking resulted generally in adjudicating merits in favour of the claimants. One, illustrative case is that of *Sempra Energy International (Claimant) vs Argentine Republic (Respondent)*, brought before the International Centre for Settlement of Investment Disputes[27]. The privatisation of the gas transportation and distribution facilities that took place in Argentina since 1989 through 1992, in some cases extending through 1996, went as far as guaranteeing to foreign investors non-decreasing, real selling prices to their customers. In the course of arbitration, the temporal horizon of these guarantees came into discussion, and the Claimant brought forth a very strong argumentation that the guarantee of prices was, in fact, ever lasting (!). No government can reasonably guarantee to a private investor, especially in the field of basic utility supplies, an ever-lasting margin of profitability. It is a breach to the basic logic of market economy. As assessed from the today's point of view, such a guarantee is at the limit of economic sanity, thus at the limit of the government's rational legitimacy, yet it was effectively given at the beginning of the 1990s. The actual revolt against that mechanism of non-decreasing profits started in the judiciary field of the Argentinian state, with court injunctions (2000[28]), and later took

[26] Burke-White, William W., The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, University of Pennsylvania, Research Paper no. 08-01, also available at the Social Science Research Network: http://ssrn.com/abstract=1088837
[27] ICSID Case no. ARB/02/16
[28] Judicial injunction of August 2000 (Resolution 3480/00)

the form of policies at the governmental level. The arbitration tribunal, under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), had a hard case there. On the one hand, the economic common sense vigorously revolts against ever-lasting profit margins, as contrary to the logic of competitive markets. On the other hand, any tribunal has to apply law in the first place. Both general regulations, and individual contracts in this case strongly advocated in favour of those guaranteed prices. The final award attempted at being equitable, by adjudicating merits mostly in favour of the Claimant, yet reducing the awarded damages to the strict minimum possible. Prof William Burke – White, for example (Burke-White 2008[29]) expressed a very strong view that this, as well as other awards adjudicated by arbitration tribunals under the auspices of the ICSID tend to violate the sovereignty of the Argentine Republic. The author of the present paper argues that the breach of sovereignty had taken place many years earlier, as those incredibly unfavourable contracts were signed, with the corresponding general regulations being enacted. Moreover, that breach to sovereignty was not the work of any international arbiter, but of the same Argentinian government that conducted the massive privatisation at the beginning of the 1990s. Later on, successive Argentinian governments have been trying to reclaim that lost legitimacy, and, on the whole, they have been quite successful. Decisions of the ICSID tribunals, with significant merits awarded to various private claimants, and actual damages reduced to minimum, create a path of accomplished facts, through which the Argentinian state is progressively reclaiming the previously lost assets.

Argentine is a category in itself, and, in a general manner, illustrates the case of active reclaiming, from the part of the government, of the previously lost sovereignty, in connection with inconsiderate privatisation. Now, let's turn our attention somewhere else, to cases that enter into the "entrenchment" type of behaviour from the part of the government. An illustrative case is that of Ioannis Kardassopoulos and Ron Fuchs, as Claimants, against the Republic of Georgia, as the Respondent[30]. This is maybe an even more striking example of the lengths, to which an emerging government can go in order to acquire at least some economic power. In 1991 and 1992, the newly created Republic of Georgia struggled for both international recognition, and at least minimum internal coherence. At that very moment, the Claimants managed to sign, with the government of

[29] Burke-White, William W., The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, University of Pennsylvania, Research Paper no. 08-01, also available at the Social Science Research Network: http://ssrn.com/abstract=1088837
[30] ICSID Case Nos. ARB/05/18 and ARB/07/15

the young republic, an incredibly advantageous contract, granting them, with a truly minuscule financial involvement from their part, the actual monopoly for the exploitation, and exportation of the domestic resources of oil, and natural gas. From the today's perspective, the contract was something of a miraculous deal for the Claimants; so miraculous that in normal, political circumstances no company, even among the biggest boys at the playground (e.g. BP or Shell) couldn't dream about anything even close to the terms of that contract. A witness statement, heard during the arbitration, is particularly illustrative for the circumstances, in which the contract was signed. The statement in question is that of Mr. Nanikashvili, a Georgian-born businessman living in Israel, who described the situation in the newly independent Georgia. For the sake of keeping the factual strength of the testimony, it is reported literally here below.

"After Soviet Union split, it appear vacuum in the system of the fuel and energy, because every country, they own Transneft, they own oil field, and before everything was concentrate in the centre: export in the centre, budget from the centre, everything from the centre. And suddenly there is no centre, you are alone. So they don't have any contract, and this was the beginning; because of this, there was need for foreign investors there. This was the beginning, either way they cannot work. I tell you one more thing, very important. Please, it's important. Even big companies like Lukoil, when they appear, they don't know how to open a letter of credit. Only the – it was vacuum, you must understand. I'm not saying they are dangerous in the country, it really was financial vacuum: no banks giving, no banks contact. So they really need. It's not because they were stupid, no, they were very clever people, but they need to begin. Even me when I begin to learn, someone teach me this business. I do no learn myself".

As the Georgian political structure acquired more of a standing, successive governments took steps to back off from the contract with the Claimants. Finally, using the procedural faults, which really took place at the moment of starting the Claimants' business in Georgia, the government annulled the core component, namely the Deed of Concession granting the access to the local mineral resources, and to the corresponding infrastructure. Yet, at the difference of the Argentinian cases, here the government didn't really reclaim the privatized assets as such; what took place was rather the legitimation, from the part of the government, of other private entities taking the business out of the Claimants' hands. A similar situation, i.e. an example of the entrenchment strategy from the part of the government, occurred in the case of OKO Pannki OYJ, VTB Bank AG, and Sampo Bank PLC vs the Republic of Estonia[31]. Here, we have a privatised fishing

[31] ICSID Case No. ARB/04/6

company, whose assets were transferred to the private investor without the debts that had been burdening them before the privatisation. This is a classical case of the government voluntarily entrenching itself in quite a narrow scope of political power, and endorsing the liabilities, which should have been paid by the private investor.

As one considers the case of Europe Cement Investment & Trade (Claimant) vs. the Republic of Turkey (Respondent)[32], we have a stable democracy, namely Turkey, with public sovereignty resting on a relatively well-balanced neighbourhood of equilibrium between legitimation, and economic power. The capacity of the government for both sovereign acquisition, and public borrowing is noticeable, and sustainable. In such a case, when facing such a stable state, private investors have little possibility to acquire public assets in a way that could seriously threaten public sovereignty.

Moreover, there are actual cases of investor-state disputes, which demonstrate that even a relatively frail democracy can adopt a relatively sound policy as for treating private investors. With enough consideration as for the negotiation of contracts, and their implementation, a young government can attract private investors, and keep the winning hand in the possible investor-state disputes. Lebanon is a good example, with the highly illustrative case of Toto Construzioni Generali (Claimant) vs. the Republic of Lebanon (Respondent)[33].

Conclusion: the TTIP and investor-state disputes

Let's return to the question, whether the prospective signing of the Transatlantic Trade and Investment Partnership, inclusive of the currently used dispositions as for the investor-state disputes, is a threat to democracy and public sovereignty. In a general manner, it doesn't seem to be. As demonstrated above, investor-state disputes as such do not impend public sovereignty. On the contrary, they contribute to building a relatively coherent system of rules as for settling the conflicts, which, in turn, result from previous breaches to public sovereignty. The TTIP, once it acquires any binding force, will involve mature, stable democracies. Even the youngest members of the European Union, namely the post-communist democracies of Central Europe, seem stable enough, at present, so as to avoid inconsiderate, massive privatisation. Thus, the main factor that

[32] ICSID Case No. ARB(AF)/07/2

[33] ICSID Case No. ARB/07/12

could lead to a loss of sovereignty via business combinations seems very unlikely to play any role.

What's important to understand in the context of that general conclusion is that the good faith from the part of private investors, inclusive of corporate responsibility, is not really important in that respect. Whether the big, transnational corporations be responsible or irresponsible in their strategies, the key factor of public sovereignty vis a vis those strategies is the proper balance between legitimation, and economic power of the governments in place. In political terms, we are talking about the balance of powers, and of efficiency, between respectively, the legislative, and the executive branch of the government. Especially, a weak legislative, coexisting with a highly efficient, and autonomous executive branch, can create dangerous disproportions between legitimation, and economic power. In the general case of European governments, the most likely to happen is the Ali Baba's syndrome. If the executive branch is in the actual possession of valuable assets, with the legislative lagging behind as for sovereign supervision, abusive transfers of property rights may take place. That, in turn, can ultimately lead to lost disputes against private investors.

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