Yesterday and Today for State Contracts – *Explicationibus* on the Routes of Administrative Law and Public International Law

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Abstract

The dynamic intersection between administrative law and public international law in the context of state contracts leads to a more adequate analysis of the evolution of the legal framework from historical perspectives to contemporary practices. Our mode of study deepens the complex relationship between these two legal fields, with an emphasis on the transformations and legal mechanisms that have governed state contracts over time. For the development of this study, the analytical approach and the comparative approach were applied through the analysis of the legal text, jurisprudential concepts with critical discussions, the analysis of the jurisprudence as well as the descriptive approach to describe the researched phenomenon.

Keywords: *international investments, state contracts, international law, administrative law, state immunity.*

JEL Classifications: K33, K38

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1. Introduction

The evolutionary path of the generic name "state contracts" made the relationship between the citizen, other entities and the state increasingly contractual. In many states, relationships based on these contracts have developed and been classified in different ways, depending on the nature of the object of the contract. Over the time, in step with developments in international economic law, state contracts have undergone various disciplinary redirections, which are more or less sufficient and not at all static, and which are still felt today. This unsteady feature may influence fairness and justice if the "disciplinary membership" of state contracts is not uniformly recognised either by its hybridity or by the scope of international law.

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2. Materials and methods

This study aims to identify, first of all, the most precise coverage area for what we mean by "state contract" and secondarily, through the specific methodology we will use, to mark the influences that international law gave or not this very chameleon type of contract. How international economic law was and is influenced by these developments, we will try to discover in the content of this material. For the elaboration of this article, we used qualitative and quantitative meta-analytical research methods, from the perspective of the authors' ethos, based on primary and secondary sources, relevant to our subject.

3. Results and discussion

At the conjunction of imprecision and interpretation, the courts will be confronted both with exceptions to jurisdiction and with the limits of applicable law. For example, the new term "transnational law" has been attributed in theory to the governance of state contracts considered as contractual legal relationships between a state and a subject of domestic law in another state[3]. According to Philip Jessup transnational law includes "all rules governing actions or events that transcend national borders"[4]. In his view, national and international law would be part of it to the extent that they have these effects and could address both public (state and governmental) and private (non-state, civil society) actors[5]. These debates have been marked by the characteristics of transnational law among which we report: 1) the extension of jurisdiction beyond the borders of national states, which has implications for individuals, corporations, public or private agencies and organisations; 2) regulation guaranteed neither by national state agencies nor by international legal institutions or instruments such as treaties or conventions; or 3) a hybrid regulatory space which does not yet (fully) exist but for which a need is felt in cross-border interactions[6]. The diversity contained in what we mean by state contracts has also contributed to this framing: from loan or financing agreements or financial collaboration with other states or international financial organisations, to contracts for the concession or lease of goods or services belonging to public property or public procurement contracts. In these situations, differences must be made at the level of the branch, always following the question: is the law considered applicable a branch of law in its recognised sense or not?

A series of discussions on the life of state contracts had as its historical turning point the moment of state corporations, recalling the process of the break-up of the state sector through privatisation in Western Europe followed by Central and Eastern Europe

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[3] See R. Miga-Beșteliu, *Public International Law*, vol. I, 3rd ed. C.H. Beck, Bucharest, 2014, p. 3.

[4] C.P. Jessup, *Transnational Law (Extracts)*, in *Philip C. Jessup's Transnational Law Revisited-On the Occasion of the 50th Anniversary of its Publication*, C. Tietje, A. Brouder, K. Nowrot (eds.), Halle-Wittenberg: Martin-Luther-Universität, 2006, pp. 45-55.

[5] C. Tietje, K. Nowrot, *Laying Conceptual Ghosts to Rest: The Rise of Philip C. Jessup's "Transnational Law" in the Regulatory Governance of the International Economic System*, in *C. Tietje, A. Brouder, K. Nowrot* (eds.), *op. cit*., 2006, pp. 17-43.

[6] Cristina Elena Popa Tache, *Introduction to International Investment Law*, Ed. Adjuris International Academic Publisher, 2020, Bucharest, Paris, Calgary, p. 13.

in areas where it was desired to encourage foreign investment[7]. In this way foreign investors were able to access important sectors of certain economies, and they concluded (state) contracts in sectors controlled by state corporations/enterprises mainly through joint ventures. This was the moment that opened the door to bilateral investment treaties[8]. States entered the sphere of international trade more strongly in the 20th century, mostly in the form of state corporations, as contractual partners with similar bodies in other states and with foreign individuals and legal entities[9]. State corporations were seen as entities with a certain specificity in the "factory" of international relations[10]. Prior to this time, as early as the 19th century, there were concession contracts which are in fact the still living ancestors of today's state contracts. These concessions concerned mining, oil exploitation or public services such as the construction of railways, bridges, tunnels, etc.[11] They were succeeded by investment contracts as modern forms of state contract, which are constantly developing.

The emergence of grounds for disagreement between foreign investors and states has raised many issues of international investment law, especially as attempts have been made to invoke state sovereign immunity, leading to further discussions of fair and unfair along these lines. In this matter, a guiding role is played by the principles of public international law and how they have evolved driven by case law, treaties, international customs and even contracts because these principles are in a continuous development and in direct relation with the rights and obligations of states[12]. Thus, I was able to discover a logical and interesting evolutionary link between state immunity and the way these contracts have been viewed over the ages. Although state contracts (administrative contracts or hybrid contracts) still have a controversial regime in international investment law, being in question the belonging to international law, we will see below some bridges to immunity that bring guidance to these crossroads, come to clarify some issues and bring clarifications to what historically was or was not right[13] .

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[7] See S. Ogden, R. Watson, *Corporate performance and stakeholder management: balancing shareholder and customer interest in the U.K. privatized water industry*, Academy of Management Journal, vol. 42, No.5, 1999, pp. 526-538.

[8] According to official statistics, the oldest known BIT is that between Germany and Pakistan signed on 25 November 1959 (still in force).

[9] See Howard Bowen, *Social Responsibilities of the Businessman, New York: Harper*, 1953, pp. 183-188; Murray, K. and Montanari J, *Strategic Management of the Socially Responsible Firm: Integrating Management and Marketing Theories*, Academy of Management Review vol.11, No.4, 1986, pp. 815-827.

[10] G.I. Tunkin, *Theory of International Law Harvard University Press*, 1974, pp. 305, 344.

[11] Arnaud de Nanteuil, *Droit international de l'investissement*, Troisième édition, Editions Pedone, 2020, pp. 25-38 and Carmen Tamara Ungureanu, *Contractul internationalul de investiții: contract de stat*, Analele Științifice ale Universității "Al. I. Cuza" Iași, Tom Lxiii, Juridical Science, 2016, no. Ii, p. 6.

[12] *Lex mercatoria* has in common with public international law certain general principles of law such as *pacta sunt servanda* and *rebus sic stantibus*, although their fields of activity are different. See L. McNair, *The General Principles of Law Recognized by Civilized Nations*, 32 BRIT. Y.B. INT' L L. 1, pp. 1-19 (1975) (identifying: *choice of law*, arbitral precedent, general principles and respect for vested rights associated with international legal systems).

[13] A case frequently encountered in debates on this subject is the one in which the International Court of Justice - ICJ - stated (in the case of the Serbian and Brazilian loans) that "any contract which is not a contract between States as subjects of international law has its basis in a national law". See France v. Brésil and France v. Yugoslavia, Judgment of 12 July 1929, Series A, No. 20, p. 41. In a famous case, Texaco Calasiatic (Topco), it was stated that: "the development which has occurred in relation to the old case-law of the International Court of Justice is that, for the latter, the contract could not belong to international law, since it could not be assimilated to a treaty between States; in the new conception, treaties are not the only

This pendulum between yes and no has in fact older roots in relation to state immunity as a multifaceted attribute (not only of jurisdiction, although this has a stronger impact), aspects that shed light on these controversies and even allow us to assess as correct or incorrect some practices. This also leads to some differences between state contracts in communist and capitalist regimes. It has been noted that the doctrine of state immunity has been divided into two main doctrines, namely, the doctrine of absolute immunity and the doctrine of restrictive immunity (this is a twentieth century approach to sovereign immunity, which states that acts of states are divided into acts of sovereign authority *acta jure imperii*, i.e. governmental activities of the state, and acts of governing authority *acta jure gestionis*, i.e. commercial acts of the state)[14]. International economic relations, the development of investment treaties and the emergence of powerful new players in international society (such as transnational corporations) have spurred states to participate in various ways in global commercial activities[15]. From the distinction between acts of a sovereign character and acts of a commercial character, it has become increasingly clear that immunity has been activated only in respect of acts arising from the exercise of sovereign power, it being understandable that states cannot invoke immunity for commercial activities or over commercial assets, and the prevailing view has remained that states can do two kinds of acts: political and non-political[16]. Since the inter-war period, the debate has been in favour of the theory that the state can also do acts that a private individual would do[17]. In these situations, it was stated that "there is no danger of foreign courts intervening and investigating the lawsuits that would arise between the state and private individuals"[18] because the state, on this occasion, "acts by obliging itself towards the other parties as a mere private individual and its independence cannot be raised as a shield under which it can ignore the claims of its creditors[19]. Immunity has long been referred to as independence and those set out in the above passage were substantial exceptions to the rule of state immunity[20].

agreements governed by that law. Moreover, they are not to be confused with treaties; agreements between States and private persons may under certain conditions belong to a particular and new branch of international law: international contract law"; Texaco Calasiatic v. Government of the Arab Republic of Libya, Judgment of 19 Jan. 1977, para. 32. Both doctrine and arbitral practice have considered that, in the evolution of international economic relations, the involvement of the State in these relations and the use of the long-term economic development agreement as an instrument of national economic policies constitute factors of change justifying a new approach, i.e. the elimination of the solution decided by the ICJ.

[14] See Fox, H., *Privileges and immunities of the head of a foreign state and ministers,* in I. Roberts (Ed.), Satow's diplomatic practice, Oxford University Press, 2009, pp. 171-192; Ernest Toochi Aniche and John Martyn Chamberlain, *A critical examination of the British municipal court rulings on cases of international immunity: Revisiting the imperatives of politics of international law*, Cogent Social Sciences, 2:1 online, 2016, DOI: 10.1080/23311886.2016.1198523, apud Cristina Elena Popa Tache, *State Immunity, Between Past and Future*, 2023 1(18) Access to Justice in Eastern Europe 97-110. https://doi. org/10.33327/AJEE-18-6.1-a000121.

[15] The main source of English law on state immunity is the State Immunity Act 1978, which gives effect to the restrictive doctrine.

[16] George Meitani, *Curs de drept internațional public*, Ed. Al.T. Doicescu, Bucharest, 1930, pp. 92,93.

[17] G. Meitani, *Curs...*, p. 93.

[18] Ibid, p. 94, note 2.

[19] Piédelièvre R., *Précis De Droit International Public, Ou, Droit Des Gens*, Volume 1, 1894, F. Pichon, Paris, p. 266. The manuscript has been reconstituted and republished following serious damage. It was republished by Nabu Press on February 22, 2012, although there have been other editions republished by other publishers.

[20] Cristina Elena Popa Tache, *State Immunity, Between Past and Future*, 2023 1(18) Access to Justice in

As long as, despite all these developments, neither the theory nor the relevant case law has moved state immunity into an area of legal certainty, the category of state contracts is unlikely to be resolved very soon from the point of view of the governance of public international law. In my article on immunity, I set out the Yukos case where some national courts have to decide that state immunity does not preclude the possibility of those national courts referring to international law when determining the legal obligations of their own governments under such rules. This concerns the enforcement of decisions rendered in the Yukos cases[21].

Currently, faced with imprecise regulations, interested parties resort to state contracts in which they insert immunity waivers, called waivers, under certain very precise conditions, among which we can mention: the inclusion of the waiver in all transaction documents; it must be accepted by all states or state entities that could be part of the transaction or that own assets relevant to the transaction; and it must be an express and clear waiver of both immunity from suit and immunity from execution.

Even if at the definitional level, there have been some differences on the issue of whether or not a state contract is governed by public international law, the close link between it and immunity or investment treaties, come to implicate public international law to a considerable extent. In the domestic law of some States, the definitions contained directly in the normative acts have been to remove this type of contract from the area of public international law. With regard to these, we note that the Law on Treaties No. 590/2003 defines state contract in Art. 1 lit. (o) as follows: "an agreement concluded by the Romanian State or Government, as well as by ministries or other authorities of the central public administration with another State, government, international organisation, respectively with financial institutions or other entities which are not subject to international law in the economic, commercial, financial and other fields and which is not governed by public international law"[22] .

4. The distinction between state contracts and treaties

The question arises as to whether agreements between states always take the form of an international treaty or whether there can also be agreements of a contractual nature between states? Several opinions were expressed in the doctrine[23]. Thus, in one

Eastern Europe 97-110. https://doi.org/10.33327/AJEE-18-6.1-a000121.

[21] Case No 2005-04/AA227 *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA, 18 July 2014) <https://pca-cpa.org/en/cases/61> accessed 26 January 2023, was decided in 2014 in favour of Yukos. See Katharine Gemmell, 'UK Court Restarts Yukos Award Suit Against Russia' (*Bloomberg*, 26 October 2022) <https://www.bloomberg.com/news/articles/2022-10-26/uk-court-restarts-50-billion-yukos-award-suit-against-russia?leadSource=overify%20wall> accessed 26 January 2023. The decision of the Dutch Supreme Court was given in the case ECLI:NL:HR:2021:1645, Russian Federation v. Veteran Petroleum Ltd., Yukos Universal Ltd. and Hulley Enterprises Ltd, decision available in Dutch here: Case No 20/01595 ECLI:NL:HR:2021:1645 (Supreme Court of the Netherlands, 5 November 2021) <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2021:1645> accessed 26 January 2023. Enforcement of the arbitral award proved very difficult. The shareholders of the former Yukos company sought enforcement of assets of the Russian Federation located on the territory of the U.K. *Yukos Capital Sarl v. OJSC Rosneft Oil Co* [2012] EWCA Civ 855 <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1182&opac_view=6> accessed 26 January 2023. Rosneft is the Russian company that absorbed all Yukos assets.

[22] The Law on Treaties was published in the Official Gazette No. 23 of 12 January 2004.

[23] See I. Dogaru (coord.), *Drept civil. Contractele speciale*, Ed. All Beck, Bucharest, 2004, p. 982.

conception it is shown that agreements between states always take the form of treaties regardless of their content and purpose.

In another opinion, it was appreciated that the will of the signatories has a decisive role in deciding whether or not the law applicable to the agreement is international law, except when the object of the agreement is about sovereignty. If the parties agreed that domestic law would apply to the agreement, then it was a contract. When the object of the agreement concerned sovereignty, it was necessarily a treaty[24].

In a third conception, it was considered that the difference is given by the object of the international agreement. Thus, when the object of the agreement refers to domestic law, it is a contract.

In another opinion, it was considered that the positioning of an agreement in the scope of contracts or treaties must be investigated in the analysis of the effects of the agreement[25].

Beyond these controversies, it is generally appreciated that agreements concluded by administrative authorities or public bodies from different states or agreements concluded between a private person and a state are not in principle assimilated to international treaties[26], therefore having a contractual, public or private nature.

Many times, on the basis of a neighborhood treaty concluded between two states, which includes regulations of principle in all areas of interest for them, agreements and contracts are subsequently concluded that develop collaboration in a limited area. Thus, cross-border cooperation between Romania and Ukraine is regulated by the Treaty on good neighborly relations and cooperation between the two states, signed in Constanta on June 2, 1997, ratified by Romania through Law no. 129/1997[27]. Based on the Good Neighbor Treaty, cooperation agreements were concluded in various fields with an impact on cross-border cooperation, such as the Agreement between the Government of Romania and the Government of Ukraine regarding cooperation in the field of border water management, signed in Galati on September 30, 1997, ratified of Romania through Law no. 16/1999[28]. The agreement stipulates that contracts can be concluded between the two governments with the object of the conditions for the realization of the projects regarding the works on the border waters and water management measures that are of mutual interest (art. 8 and 9). These will be administrative contracts[29].

A problem discussed in the doctrine of public international law is that of multinational enterprises and the law applicable to "transnational" contracts"[30].

Multinational companies, acting in many countries, acquire a true "international personality". They conclude contracts with the states for the exploitation of local national wealth, contracts that sometimes have the meaning of real "agreements" for establishing

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[24] J. Verhoeven, *Traités ou contrats entre États? Sur les conflits de lois en droit des gens*, Clunet, 1984, p. 21.

[25] L. Richer, *Droits des contrats administratifs*, 3e èdition, L.G.D.J, Paris, 2002, p. 12-15.

[26] D. Alland, *Droit international public*, Presses Universitaires de France, Paris, 2000, p. 220.

[27] Published in the Official Gazette no. 157 of July 16, 1997.

[28] Publlished in the Official Gazette no. 13 of January 19, 1999.

[29] See C. S. Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, Bucharest, 2009, pp. 90-94.

[30] See D. Carreau, *Droit international*, 7e Édition, Les Editions Pedone, 2001, Paris, pp. 31-57, 181, 182, 452.

the conditions for carrying out certain economic exchanges (such are the "oil agreements" from the beginning of the 1970s between the cartel of oil companies and the exporting states, as well as self-restraint agreements in the field of steel between the representatives of European and Japanese steel producers' associations and the US government).

Multinational companies have become essential actors in contemporary international society, being a special kind of "subjects" of international law. However, classic international law - which still prevails - does not recognize these enterprises to the extent that it only recognizes public and non-private subjects. However, these classic legal categories are obviously not adapted to take into account the role of "multinationals", given that they pay exclusive attention to the author of the act and not to its content[31]. It is obvious that "multinationals" do not conclude "treaties" in the formal sense of the term, however, on a material level, are the documents that these companies conclude with states so different, in terms of content, from traditional international agreements?

In the classic jurisprudence of the Permanent Court of International Justice[32] (CPJI, created in 1920 by the League of Nations) and its successor, the International Court of Justice (ICJ, created in 1946), there are several relevant cases. Thus, in the Case of Serbian and Brazilian Loans from 1929, the CPJI showed that "any contract that is not a contract between states as subjects of international law is based on national laws." However, in the "Dupuy sentence" the CPJI showed that this wording is not strict, therefore not excluding the possibility that international law can regulate this type of situation in the case of conventions or customs that establish common rules in the matter.

In the Anglo-Iranian Affair of 1952, the ICJ stated: "the fact that this concession contract was the subject of a report by the Council of the League of Nations and is found in its archives, does not transform the act into a treaty binding the government of Iran to the government of Great Britain Britain;the concession contract binds the Iranian government to the British concessionaire company; the British government is not a party to the contract and therefore cannot use its diplomatic relations against Iran". In conclusion, the jurisprudence of the CPJI and ICJ has consistently ruled that conventional acts are subject to one or another of the following legal regimes: in the case of "conventions between states" the rules of public international law will apply; in the case of conventions between "other persons" national laws will apply, the difficulty of determining the applicable national law being resolved by virtue of the principles of private international law (conflict of laws). It was constantly refused to consider a third legal order, not having recognized the status of a subject of international law for multinational enterprises. In the doctrine it was appreciated that international law should

[31] Ibid, p. 31, 32.

[32] Romania had a prominent representative at the Permanent Court of International Justice in the person of Demetru Negulescu. He was a judge at the Permanent Court of International Justice (1921-1940), in which capacity he brilliantly represented Romania during the entire period of operation of this court that preceded the International Court of Justice. In this capacity, unmatched until now by another Romanian jurist, he participated in the adoption of some decisions in famous cases of the CPJI: "Mavrommatis Concessions", "Certain German interests in Silesia", "Jurisdiction of the European Commission of the Danube", Chorzow Factory ", "The Free Zones of Upper Savoie and the Gex District", "The Case of Oscar Chinn" and others. Demetru Negulescu was a Doctor of Law at the University of Paris (1900), judge at the Bucharest Court (1901-1908), professor of international law at the Faculty of Law of the University of Bucharest, professor at the Hague Academy of International Law and at the Institute of Higher International Studies from Paris.

know and regulate the status of multinational enterprises in order not to lose contact with the contemporary economic reality[33].

The question of the superiority of international law is relatively frequently asked regarding international contracts concluded between a state and multinational enterprises ("State contracts"). Although, as we have seen, in international jurisprudence it has been consistently stated that these contracts are subject to the national law of the contracting state, international courts have emphasized that this state cannot unilaterally modify the clauses of the contract by virtue of its sovereignty, given the imperative of applying the principle "*pacta sunt servanda*" (observance in good faith of assumed obligations), fundamental in public international law. Thus, in jurisprudence[34] it was noted that the modification of international concession contracts decided unilaterally by the states is contrary to international law and opens the possibility of requesting an adequate reparation of a nature to incur the international responsibility of the countries that made a mistake.

5. Conclusions

This type of definitions may be open to criticism in that it creates difficulties for international investors (and others) seeking investment treaty protection whereby their investments are protected and promoted at the level of the host state or home state of the investor. A *state contract* can be defined as a contract concluded between the state or a public body (a body created by law within a state to which control of an economic activity is conferred) and a foreign national or a legal person of foreign nationality[35].

Legal personality under international law is also very important in specific relationships. This is another issue that requires attention because if in a state contract the main partner is a traditional subject of international law, as states are, then it is very possible that the contract is concluded under the cover of a treaty such as investment treaties, and in this way public international law becomes increasingly applicable because the principles, sources, subjects, functions, liability and even some elements of content of the states involved in international investment come into play. State immunity itself is an evolving feature of legal personality. Even when acting de *jure gestionis the* state cannot be considered as acting only for itself because administrative law comes to establish clear rules (the state contract being an administrative contract like public law, which I will develop in an article based on this extended abstract together with elements of typology of state contracts, applicable law or very fine limits between some breaches such as treaty or contractual[36].

All these considerations will, by their very existence, give some direction to

[33] D. Carreau, *op. cit.*, p. 32.

[34] See the Serbian and Brazilian loan affair of 1929 when the CPJI found non-compliance with the clauses inserted in the loan contract concluded between the two governments; The El Triumfo case of 1902 which opposed before an arbitration commission, the United States and Salvador, the arbitrators appreciating the latter country's non-compliance with the concession contract - cases cited by D. Carreau, *op. cit.*, p. 452.

[35] UNCTAD, *State Contracts*, U.N., NY, and Geneva, 2004, p. 3.

[36] Alongside these, discussions may revolve around the idea of global administrative law or public international law vis-à-vis public international law. At the same time, in terms of the fine lines of demarcation mentioned above, we need to consider both the avoidance of the "Prince's rule" and the consideration of the umbrella clause in investment treaties (where they exist) according to which the treaty is breached if the investment contract (state or private) has been breached in any way.

modern developments in state contracts which will continue to be an interesting research topic for theory and practice.

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