

## Public Interests, Private Disputes: Investment Arbitration and the Public Good

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**ABSTRACT:** *This paper seeks to investigate the bases for resistance to arbitration in general -and investor arbitration in particular- focusing on the way in which arbitral tribunals deal with notions of public interest and the public good. The paper hypothesises that while courts have within their terms of reference the capacity to consider notions of public interest, arbitral tribunals do not. It is this core difference in the scope of decision making between the two bodies that could render privately organised dispute resolution unsuitable for disputes that have public aspects, like investor-state disputes. The paper discusses the meaning of public interest and the public good as found in the literature. It then proceeds to consider how tribunals in the investment field have dealt with these concepts. This leads to a conclusion urging not abandonment of arbitration as a component of dispute resolution, but caution. It is argued that unchecked growth in private dispute resolution can threaten perceptions of legitimacy and democratic accountability. The paper adopts a socio-legal methodology in considering the effect of legal mechanisms on social and political phenomena. It is also informed by a law and economics methodology in addressing impacts of dispute resolution mechanisms on economic efficiency. The contribution of the paper rests on theorising motivations for resistance to private dispute resolution, a topical issue in light of the TTIP debate.*

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### 1. INTRODUCTION

Dispute resolution methods have always been a rather esoteric lawyer concern, rarely coming to the forefront of public debate. This has recently changed due to the proposal that an Investor State Dispute Settlement (ISDS) clause is included in the Transatlantic Trade and Investment Partnership (TTIP) the United States and Europe are currently negotiating. Suddenly, who is responsible for adjudicating disputes seems as important, or worthy of discussion, as the outcome of any decision making. The ISDS proposal has motivated a large number of commentators, activists and NGOs to become very involved in a discussion on the role of courts versus private tribunals and has revitalised campaigns against investor arbitration. Such campaigns are not new, as concern about entrusting large private-public disputes to private decision makers has always raised concerns. Nonetheless, we are currently in a political environment where resistance to globalisation (to use this rather old fashioned term) or global

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capitalism (to use a trendier one) seems to involve increasingly debates as to the place of tribunals and courts in a democratic society. Is it a good idea to allow disputes between (usually) large multinationals and (often) small states to be settled by arbitration? Is it sensible to allow for private resolution of disputes with a public element? Is it desirable to de-localise disputes that have implications for public policy? Is it democratically acceptable that private, contractually based bodies determine the boundaries of sovereign discretion?

This paper seeks to unpack the basis for resistance to arbitration in general -and investor arbitration in particular- focusing on a single key issue that often gets obscured in the reciprocal shouting match that has engulfed the TTIP debate. This issue is the way in which arbitral tribunals deal with notions of public interest and the public good. The hypothesis of the paper is that while courts have within their terms of reference the ability, indeed the obligation, to consider notions of public interest, arbitral tribunals do not. It is this core difference in the scope of decision making between the two bodies that could render privately organised dispute resolution unsuitable for disputes that have public aspects, like investor-state disputes.

The paper offers a presentation of the meaning of public interest and the public good as found in the literature. It then proceeds to consider how tribunals in the investment field have dealt with these concepts. This leads to a conclusion urging not abandonment of ISDS as a component of dispute resolution, but caution. The result of this study is that unchecked growth in private dispute resolution can threaten perceptions of legitimacy and democratic accountability long before it actually limits sovereign discretion beyond the point that states can determine and defend notions of the public good.

## 2. PUBLIC INTEREST

Before engaging in a reflection on the appropriate forum for deciding disputes with a public element, we need to define what we mean by this public element. What does it mean to say that an issue is one of public interest or concerns the common good? Indeed the very concept of public interest has been characterised as nebulous<sup>1</sup> and subjective, allowing anyone to project their own views and pre-conceptions. The above is complicated even further by the inconsistent use of the terms public interest and public good, that most accept as synonymous (as is the case with this paper). A standard view of the public good as a normative concept denotes goods that serve everyone in a community and its institutions, transcending particular groups and generations.<sup>2</sup> A discussion of public interest and good often becomes a journey of discovery of public values. William Eskridge has written that public values are legal norms and principles that form fundamental underlying precepts for our polity-background norms that contribute to

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<sup>1</sup> Frank J. Sorauf, 'The Public Interest Reconsidered', *The Journal of Politics*, 1957, 19(4): 616-39, at 618.

<sup>2</sup> Amitai Etzioni, 'The Common Good', in Michael T. Gibbons, (ed.), *The Encyclopedia of Political Thought* (1<sup>st</sup> ed., John Wiley & Sons, 2015), 1-7, available at <https://icps.gwu.edu/sites/icps.gwu.edu/files/downloads/Common%20Good.Etzioni.pdf> (accessed 16 March 2016).

-and result from- the moral development of our political community. Public values appeal to conceptions of justice and the common good, not to the desires of just one person or group.<sup>3</sup>

Perhaps one way to define the public interest or good (used here as being synonymous) is by distinguishing them from individual rights and liberties. The pluralist tradition of political science (largely adopting the assumptions of neoclassical economics) tends to diminish the importance of the public interest, and in some cases criticises such a notion as implicitly anti-democratic.<sup>4</sup> Criticizing top-down notions of the public interest and the common good as inviting authoritarianism at the expense of democracy is in fact common. Such logic has been often encountered in the process of post-communist transformation. For example, taking Adam Smith's theory of the 'invisible hand' of the market and employing it to public institutions even led the reform team that dominated policy making after 1991 in Russia to suggest that the laws of the market could be used to resolve the administrative chaos of the Russian state (at the initial phases of transition to a market economy) by encouraging competition between state institutions.<sup>5</sup> This curious regulatory arbitrage, as it is called, is seen by some as a superior way to achieve socially beneficial outcomes rather than relying ~~on~~ in a democratic state –or a paternalistic ruler- that promulgates rules. It has been argued<sup>6</sup> that the tug of war between private interest groups produces public policy superior to anything that would be reached by the state enforcing its own formulation of the public interest.

This paper adopts the view that the public good is something that can legitimately be determined by a government having a democratic mandate to govern. Indeed, such capacity for the sovereign is assumed by courts when they have to determine issues of public policy, as they seek to discover the objectives of the legislator in promulgating rules. The multiple interpretations of the public interest and its uses inevitably become more specific in the context of dispute resolution. We now turn to the way the courts and subsequently tribunals have interpreted these notions, starting with an investigation of the tension that exists between judicial decision making and sovereign discretion.

### 3. DISPUTE RESOLUTION

What should the role of dispute resolution in relation to state action and sovereign discretion be? Taking a restrictive view of the role of the state (as the facilitator of market processes), suggests a particular attitude on the part of institutions involved in dispute resolution. This is consistent with a neoclassical view of regulation which focuses on market failure and sees the role of government as mitigating such failure or alternatively, in the absence of inefficiencies, as designing the least-costly methods of redistributing resources.<sup>7</sup> In such an environment,

<sup>3</sup> William N. Eskridge Jr., 'Public Values in Statutory Interpretation', *University of Pennsylvania Law Review*, 1989, 137(4): 1007-104, 1008.

<sup>4</sup> Amitai Etzioni (2015), *supra* note 2, at 4.

<sup>5</sup> Ioannis Glinavos, *Neoliberalism and the Law in Post Communist Transition: The Evolving Role of Law in Russia's Transition to Capitalism* (Abingdon, Oxford, UK: Routledge, 2010), 95.

<sup>6</sup> Frank J. Sorauf, 'The Conceptual Muddle', in Carl J. Friedrich (ed.), *Nomos V: The Public Interest* (New York: Atherton Press, 1962), 183-90.

<sup>7</sup> Harry Trebing, 'Regulation of industry: an institutionalist approach', *Journal of Economic Issues*, 1987, 21 (4): 1707-35, 1716.

courts are preoccupied with assuring the legitimacy of state assertion of power. This was true in the era of the New Deal in the USA, as Rabin suggests<sup>8</sup>, but it was also true in the pre financial crisis period (before 2008) in the domain of investor protection. In investment cases specifically, a discourse on rights -and by extension legitimate expectations- dominates thinking, with the state usually portrayed as the aggressor and the investor as the victim of any changes in policy. This is not to say that the above is not factually true in many cases, yet it is misleading to view rights (for the investor) and the public good (for the state) as mutually exclusive, as the examples discussed below demonstrate.

The ideas outlined so far suggest that courts act as defenders of private interests against state intervention, but is this assumption borne out by the evidence? US case-law predating the Second World War demonstrates that while a sovereign right to regulate was asserted in principle, it is also clearly delineated. Those in charge of dispute resolution between states and investors therefore were singularly focused on controlling the extent of state power over private parties. The emphasis of adjudication, much as it is today, was on the protection of ‘rights’. This conception of rights therefore could be used to chip away at sovereign authority and regulatory autonomy, when it was seen as a threat to market activity and choice. The impression of the courts as protectors of private rights vis-à-vis state imposition is not true of all courts in all circumstances however, especially in what is perhaps mis-perceived as the height of laissez-faire before the onset of the New Deal in the 1930s in the USA.<sup>9</sup> Two examples, from US courts, help illustrate why viewing courts in the early 20<sup>th</sup> century as guardians of private rights should not be interpreted as an exclusion of notions of the public good from judicial thinking.

In *Munn v. Illinois*,<sup>10</sup> the court noted that a grain warehouse firm stood in the very gateway of commerce and took a toll from all who passed, and as such their business was a legitimate target for regulation. The court referred to English common law, quoted Lord Hale<sup>11</sup> and established what has come to be recognised as the public utility principle.<sup>12</sup> This suggested that when one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. The court noted that the right to regulate may not be made so by the Constitution or a statute, but it is by the facts. Implicit in this judgment was a view of law as something more than a dispute settling mechanism. Law came to be seen as a dynamic tool of social control and a facilitator of economic progress.<sup>13</sup> In *Nebbia v. New York*,<sup>14</sup> the Supreme Court in the spirit of *Munn* argued in favour of a wide scope for legitimate government intervention in the market, stating that even in industries that are not public utilities, the public interest still dictates their behaviour: The phrase ‘affected

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<sup>8</sup> Robert Rabin, ‘Legitimacy Discretion, and the Concept of Rights’, *Yale Law Journal*, 1983, 92(7): 1174-88, at 1176.

<sup>9</sup> Ioannis Glinavos, *Redefining the Market-State Relationship* (Routledge, 2013), at 69.

<sup>10</sup> *Munn v. Illinois* (1877) 94 US 113

<sup>11</sup> Hale, Lord Chief Justice. *De Portibus Maris*, 1 Harg.Law Tracts 78.

<sup>12</sup> William H. Melody (ed.), *Telecom Reform: Principles, Policies and Regulatory Practice* (Lyngby: Technical University of Denmark, 1997), at 12.

<sup>13</sup> Morton J. Horwitz, ‘The historical foundations of modern contract law’, *Harvard Law Review*, 1974, 87(5): 917-56.

<sup>14</sup> *Nebbia v. New York* (1934) 291 US 502.

with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. The court also noted that so far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. We can conclude therefore that while US courts always served the role of the guardian of private rights on the basis of the constitution, they still retained the ability to consider and give legal effect to public law interests including notions of the public good.

By fast-forwarding from the beginning of the 20<sup>th</sup>, to the start of the 21<sup>st</sup> century, one could argue that an attitude to rights and limits on sovereign power had hardened in the pre-financial crisis years (from the neoliberal revolution of the 1980s till the middle of the first decade of the new century). Nonetheless, this seemed to come to an abrupt end with the financial crisis in 2008. It is proposed here that the demands of crisis response propelled thinking to a new era of concern for the public interest. Indeed history (at least jurisprudentially) seems to repeat itself, with the current debate on rights and state power mimicking that of the Public Interest Era of the 1970s in the USA. Mirroring perhaps the lack of significant reactions to the creation of regulatory agencies, like the Environmental Protection Agency in the early 1970s in the USA, there were few challenges, at least initially, to the (albeit modest) desire to regulate in the immediate aftermath of the financial crash in 2009-10.

A known example of this 'return' of regulation was the enactment of an extensive financial regulatory reform bill, named the Dodd-Frank Act. In some respects this Act set apart the reaction of the United States from that of Europe, where changes have been less wholesale, perhaps understandably considering the disorganising effects of the sovereign debt crisis that has plagued Europe since 2010. By the time of its final passage, the Dodd-Frank Act included provisions that affected virtually every financial market and amended existing or granted new authority and responsibility to nearly every federal financial regulatory agency in the US.<sup>15</sup> In this case, as in many others internationally after 2008, concerns about public interest outweighed debates as to private rights in an environment where the state had to step in to salvage the financial sector from the very consequences of the abuse of its private prerogatives. Perversely however, while in the 1970s in the USA the wider acceptance of the legitimacy of state intervention came with increased scrutiny from the courts, who sought to ameliorate the effects of expanding regulatory power through renewed emphasis on rights and due process,<sup>16</sup> the same cannot be said about modern dispute resolution institutions.

It is argued here that in the current dispute resolution environment, the role of limiting the scope of state intervention vis-à-vis private parties is no longer taken up by courts in national jurisdictions, but it has been usurped by or entrusted (depending on your viewpoint) to investment tribunals in international fora. What we have therefore is a shift since 2008 in both

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<sup>15</sup> Baird Webel, 'The Dodd-Frank Wall Street Reform and Consumer Protection Act: Issues and Summary', Congressional Research Service, *CRS Report for Congress Congressional Research Service, No. R41350*, 29 July 2010, at 3.

<sup>16</sup> Robert Rabin (1983), *supra* note 8, at 1182.

our understanding of regulation (and regulatory capacity) and in our view of the appropriate body to safeguard private rights against state incursion. The acceptance of wider regulatory capacity (necessary as a response to acute economic crisis, albeit in opposition to a neoliberal view of the state) has come with the counterbalance of non-national protection of rights through tribunals. The crucial question that arises from the above hypothesis is this: Are tribunals capable of determining questions of public interest, and if they are is this a democratically acceptable choice? It is to answering this question that the remainder of the paper is devoted to.

#### 4. PUBLIC ISSUES, PRIVATE TRIBUNALS

We have moved a long way from the view of Scrutton LJ in *Czarnikow*<sup>17</sup> where he railed against arbitration declaring ‘*there must be no Alsatia in England where the King's writ does not run*’. Perhaps however the very explanation for the appetite for ISDS is its capacity to create legal spaces outside the reach of national authorities. From the point of view of business, ISDS is a necessary tool in a menu of adjudication options that includes (but is not limited to) national courts in any country. While the efficiency of the court systems in developed states is not in question, investors may still prefer arbitral tribunals due to their ability to bind governments to future commitments, severed from the dangers of democratically mandated changes of course. If we are using ISDS in the developed economy context to protect against policy reversals, are we using it to set limits to government discretion and by extension democracy? This concern is often voiced with anger from NGOs, political parties and activists fighting against the TTIP. This part of the paper focuses precisely on these questions.

##### The problem of public interest issues in ADR

	Private Issues	Public Issues
Dispute Resolution in Courts	Inefficient for parties	Efficient for public
Dispute Resolution in Tribunals	Efficient for parties	Inefficient for public

The above chart offers a visual representation of the problem of balancing private and public interests in a dispute resolution matrix. While public dispute resolution via courts ensures public interests are considered, it can be inefficient for parties. On the other hand, privately organised dispute resolution has higher chances of being efficient for the users of the services (arbitration), but is inefficient in considering wider issues, like the public good. Through their power of judicial review, courts have a legitimate capacity to overturn legislative enactments that violate important public values. Even if an enactment is not invalidated, the process of constitutional adjudication generates a useful dialogue about what kind of political community a country aspires to.<sup>18</sup> This capacity is absent in tribunals, which are limited by their narrow

<sup>17</sup> *Czarnikow v Roth, Schmidt & Co.* [1922] 2 KB 478 (CA), 489.

<sup>18</sup> Dora M. Gruner, ‘Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform’, *Columbia Journal of Transnational Law*, 2003, 41(3): 923-60, at 929.

terms of reference to consideration of treaty provisions (in the case of ISDS) and contractual rights.

Dispute resolution focused on contractually defined rights can lead to tribunals bypassing public considerations, not due to ideological blindfolds, but due to the narrow terms of reference of their appointment. Is this something we ought to be concerned about, or is it inherent in the process of private dispute resolution? After all states voluntarily choose to sign treaties containing arbitration clauses that limit -as a consequence- sovereignty. Jaffe<sup>19</sup> wrote that property (of which contract and the right to contract, is an aspect) equips the possessor with great powers of exclusion-enforced or sanctioned by the law- not in any way depending on consent, and this power to exclude is a source of regulating others' conduct, either as it prescribes complete exclusion or participation on terms. Viewed this way, this is a problem we ought to be thinking about in relation to investor-state contracts. In fact, concern about the exclusionary power of private deals is nothing new and an issue well explained in the literature. For Hale, for instance,<sup>20</sup> markets are areas of volitional and not voluntary freedom. He suggests that a free market is a legal construct that allows choices within a specified framework that is characterised by coercion.<sup>21</sup> The exclusionary and relational nature of property means that markets allow freedom while at the same time applying coercion. Markets, according to Hale (structures of rights that are constituted in particular ways) are therefore sites in which power is exercised (structures of mutual coercion). From this perspective, securing existing rights through private dispute resolution merely serves to secure very particular structures of power rather than to maximise some notion of economic 'efficiency'.

It could be argued that international arbitration (of the commercial and investment varieties) increasingly addresses the problem of traversing the public/private divide in a move of self-constitutionalization. As David Schneiderman has suggested,<sup>22</sup> it is not so much the constraints of national laws on government powers that determine the shape of the state-market relationship currently, but constraints imposed by international legally binding obligations. The centrality of private property rights in modern economic organization results in a necessarily liberal interpretation of the state-market relationship and leads to an international legal regime increasingly geared towards the protection of investor expectations. This is amplified when definitions of private rights are found in international treaties, and then protected and enforced by private tribunals.

The following question emerges from the above: Does recourse to arbitration mean that matters of public law and the public interest will be ignored by adjudicators who are more at home considering private law matters? Can an arbitrator, for instance, legitimately bring human rights standards to bear on his or her reading of the contract? If so, what strength should those

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<sup>19</sup> Louis L. Jaffe, 'Law Making by Private Groups', *Harvard Law Review*, 1937, 51(2): 201-53.

<sup>20</sup> Robert L. Hale, 'Coersion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly*, 1923, 38(3): 470-94.

<sup>21</sup> Paddy Ireland, 'Property and Contract in Contemporary Corporate Theory', *Legal Studies*, 2003, 23(3): 453-509, at 489.

<sup>22</sup> David Schneiderman, *Constitutionalizing Economic Globalization Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008)

rights be given if they compete with the objectives sought by the agreement?<sup>23</sup> According to Renner<sup>24</sup> arbitral practice gradually establishes a hierarchy of legal norms that integrates both transnational and domestic public policy concepts. This hierarchy of norms forms the core of an emerging constitutional order beyond the nation-state. This should not be viewed as necessarily anti-democratic. However, the possibility of opting out of the domestic legal system by way of private agreements raises questions with a view to public-policy concerns. While domestic courts are bound to national public policies and constitutions, the status of public policy in international arbitration as a private justice system is highly disputed. Thus, the opting out of the legal system by private actors going to arbitration may very well entail – or even be aimed at – a simultaneous opting out of regulation. Under the conditions of a fierce competition between domestic legal systems and alternative dispute-resolution mechanisms, there is concern that this might lead to a race to the bottom between courts and tribunals with regard to public-policy standards. For example, there is already discussion of whether expanding notions of what constitutes expropriation (in tribunals) have a dampening effect on state desire to regulate.<sup>25</sup> Admittedly however the evidence is inconclusive.

Van Harten cautions<sup>26</sup> against arbitrators autonomously resolving core questions of public law for reasons of accountability. Whether legislation is discriminatory, whether regulation leads to expropriation, whether a court decision is unfair or inequitable is something that can be dealt with within a national legal system, but arguably not by a private tribunal. The difficulty here is not that these issues cannot be resolved by international adjudication but that they will be resolved by a private adjudicator without adequate supervision by public judges. This lack of judicial supervision renders the arbitrator's interpretation of public law – itself a fundamentally sovereign act – unaccountable in the conventional sense. While it could be argued that for instance commercial tribunals are accountable via domestic court supervision, the need for judicial deference built into the international system for the recognition and enforcement of arbitral awards, renders such supervision minimal. Further, there is significantly less opportunity for oversight of the work of investment tribunals. Van Harten argues that arbitration advocates cannot have it both ways. To be accountable, tribunals must at least be subject to judicial review for errors of legal interpretation, as well as errors of jurisdiction and procedural impropriety.

Are we correct then in assuming that a focus on contracts or treaties necessitates abandonment of concern for the public good? Leader argues<sup>27</sup> that the public law role of the arbitrator is easily obscured if one concentrates on those arbitral decisions that have pitted the investment contract against external considerations that the contract does not specifically include. At that point, the arbitrator has to decide whether he is to be faithful to the document

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<sup>23</sup> Sheldon Leader, 'Human rights, risks, and new strategies for global investment', *Journal of International Economic Law*, 2006, 9(3): 657-705, at 684.

<sup>24</sup> Moritz Renner, 'Towards a Hierarchy of Norms in Transnational Law?', *Journal of International Arbitration*, 2009, 26(4) : 533-55.

<sup>25</sup> Ioannis Glinavos, 'Investor Protection v. State Regulatory Discretion', *European Journal of Law Reform*, 2011, 13(1): 70-87.

<sup>26</sup> Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2008), at 156.

<sup>27</sup> See Sheldon Leader, *supra* note 23, at 686.



he is charged with giving effect to, or to cede to the external demands of the state wishing to override that agreement. This has happened in those situations<sup>28</sup> of direct expropriation via nationalization, raising issues concerning appropriate compensation. It is true that in such cases arbitrators seem to treat these expropriations as a violation of a commercial contract and do not accept the state's political prerogatives to be relevant to its obligation to respect that agreement. One could argue, however, it is not right to see this as the adoption of a private law perspective.

On the contrary, the primary reason given by arbitrators<sup>29</sup> for enforcing stabilization clauses is that doing so is good for the country and its people, since otherwise investors would not be willing to risk their funds. Developing the ratio from these cases, one could even argue that instead of being associated with substantive goals or policies, the public interest is better understood as capable of being served through the settlement of the dispute itself, via peaceful, orderly, predictable means<sup>30</sup>. Indeed, one could see arbitration as an integral part of a modern system of dispute resolution, and the arbitrator as woven into a general system of law governing investor rights and obligations. To paraphrase Judge Lumbard,<sup>31</sup> an arbitrator is an instrument of national policy, he is not a mere private person, but rather one acting on behalf of the people who must take into account public rights. This argument serves to break down the distinction between private and public law as regards to dispute resolution. Yet, who entrusts the arbitrator with such a role? Why should the public in a democratic polity put its faith on private adjudicators? What happens if the people have a different vision of what is in the public interest than a neoclassical orthodoxy focused on improving the investment climate? Perhaps the independence (or detachment) of arbitrators from the state is what we are seeking by trying to insulate judges and courts from politics and political objectives.

If we consider the independence of courts and judges as a cardinal element of a democracy, the greater insulation of judges from the various pressures of power could lead to better decision making. Independence provides judges with the opportunity to shape social decisions without some of the biases and pressures that distort other institutions.<sup>32</sup> If this is true of judges, it must also be true for arbitrators, who are twice removed from national centres of power. This is a valid argument that requires examination. We do this by moving on to consider some contemporary examples of the attitudes of courts and tribunals to decision making when the issue involves directly the capacity of a sovereign to determine and pursue actions in the public good.

## 5. CONTEMPORARY EXAMPLES

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<sup>28</sup> *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, YCA 1979, at 177, para. 55.

<sup>29</sup> *Revere Copper and Brass Inc. v. Overseas Private Investment Corp* 17 ILM at 1342-43

<sup>30</sup> See Frank J. Sorauf (1957), *supra* note 2, at 638.

<sup>31</sup> Karl Klare, 'The Public/Private Distinction in Labour Law', *University of Pennsylvania Law Review*, 1982, 130(6): 1358-422, at 1366.

<sup>32</sup> Neil K. Komesar, 'Exploring the Darkness: Law, Economics and Institutional Choice', *Wisconsin Law Review*, 1997, No 3: 465-74.

One way of edging towards an answer to the question of whether tribunals are capable of taking into consideration the public good -in ways that approximate the courts- is to consider the example of claims relating to sovereign debt restructures. A case in point is Greece. A large number of investors in Greek government bonds lost almost half the value of their investment when Greece implemented a haircut in 2012 through a Private Sector Involvement (PSI) deal. This arrangement which sparked parallel actions in domestic courts and investment tribunals, can serve as a good testing ground for an assessment of arguments based on public interest in different dispute resolution fora. We first look at actions in the national courts.

Once it became obvious that the Greek government did not intend to offer any relief to small-holders, 7000 of them joined a class suit against Greece arguing expropriation under the Greek Constitution and violations of Human Rights provisions under the European Convention of Human Rights. These arguments were tested in the Greek Council of State<sup>33</sup> in March 2013 and were rejected, with the court arguing that any losses were not due to a state act and finding no violations of Article 1 of the Protocol to the European Convention of Human Rights (ECHR).<sup>34</sup> Foremost in the Court's thinking was the belief that Greece was battling a national emergency, taking measures in the public interest. This is consistent with the way other courts have dealt with the issue of expropriation. The general principles to be applied in determining whether or not there has been a violation of Article 1 of the Protocol to the ECHR were set out in *James v United Kingdom*.<sup>35</sup> The judgement of national authorities on whether an alleged taking of property was in the public interest will be respected unless it was manifestly without reasonable foundation. It is also examined whether a reasonable relationship of proportionality exists between the means employed and the aim sought to be realised, meaning that a fair balance must be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The balance would not be fair if the applicant had to bear an individual and excessive burden, according to the court in *James*. Further, while the taking of property without payment reasonably related to its value would normally constitute a disproportionate interference, this should not be interpreted as requiring the state to compensate for all actions affecting property entitlements. Only claimants arguing for deprivation of possessions will be entitled to compensation, and the threshold for such a finding is a high one as the measure in question must completely remove any economic value from the affected right<sup>36</sup>. In the PSI case, the Greek court concluded that the loss resulting from the haircut, while significant, did not reach the threshold required for deprivation to be established. The Court also found that a claim of expropriation under a Germany-Greece 1961 Bilateral Investment Treaty (BIT), as argued by some claimants, was not established for the same reasons.

Would an investment tribunal reach the same conclusion, affording the same deference to national authorities and their interpretation of what is in the public interest? It is argued here

<sup>33</sup> Decision 1116-1117/2014 (21.3.14) of the Greek Council of State, (Συμβούλιο Της Επικρατείας).

<sup>34</sup> Ioannis Glinavos, 'A New Era in Investor-State Dispute Settlement: Arbitrating the European Crisis', *Corporate Disputes*, 2015, Issue 1: 60-4.

<sup>35</sup> *James v United Kingdom*, 1986, 8 EHRR 123.

<sup>36</sup> See Ioannis Glinavos (2011), *supra* note 25, at 80.

that the national emergency argument that was so convincing to the Greek Court may be less so to a tribunal. The International Court of Justice (ICJ), for instance, has stated<sup>37</sup> that international law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. One of the basic requirements is that the change of circumstances must have been a fundamental one, meaning that changes of circumstances must imperil the existence or vital development of the state. In light of these stringent standards, it is very rare for international tribunals to grant relief to a treaty party on the basis of a fundamental change of circumstances, such as a national economic emergency, as Argentina discovered to its detriment in its post default arbitrations. An ICSID Tribunal in *CMS Gas Transmission Co. v. Argentina*<sup>38</sup> argued for instance that it did not have jurisdiction over measures of general economic policy adopted by a nation state and could not pass judgement on whether they are right or wrong. This finding links with the argument made earlier that it is not the lack of a desire to consider notions of public interest, but the different terms of reference of tribunals that preclude them from doing so. It seems that while a national court may have a certain perspective of the gravity of a national calamity, the same cannot be said of an investment tribunal.

The focus on treaty rights leads to the general acceptance of the fact that expropriations outside the scope of a state's police powers (referring to public health, safety and welfare) will entail an obligation to compensate, notwithstanding the public interest considerations behind the state's action or the fact that such action is lawful. In *Cia del Desarrollo de Santa Elena SA v Republic of Costa Rica*<sup>39</sup> the tribunal decided that the public purpose (in this case protecting the environment) for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The tribunal then went on to state that expropriatory environmental measures are similar to any other expropriatory measures that a state may take in order to implement its policies. The tribunal concluded that where property is expropriated, even for purposes ~~mandated by domestic or international policies~~, the state's obligation to pay compensation remains; a conclusion at odds with court decisions on similar matters that offer a wider scope for discretion<sup>40</sup>.

Yet, a perception of tribunals as solely focused on private rights to the exclusion of all else is not universally borne out by the evidence. To return to the Greek example, a recent ICSID decision on jurisdiction<sup>41</sup> to hear a PSI related claim showed that tribunals will not always accept to hear the substantive claims, and will not always be happy to expand definitions of private rights to the detriment of sovereign discretion. The tribunal argued that they should not lightly expand the language of a treaty so as to extend protections, where there is no indication that the State parties intended to do so. The tribunal went on to conclude that neither

<sup>37</sup> *United Kingdom v. Iceland*, 2/2/1973

<sup>38</sup> *CMS Gas Transmission Co. v. Argentina* (ICSID ARB/01/8).

<sup>39</sup> *Cia del Desarrollo de Santa Elena SA v Republic of Costa Rica* (2000) 15 ICSID Rev 169.

<sup>40</sup> Ioannis Glinavos (2011), *supra* note 25, at 75

<sup>41</sup> *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID ARB/13/8).

of the claimants against Greece was an investor with an investment as defined in the relevant BITs. We will soon have more opportunity to see whether court and tribunal views of the appropriateness of state responses to economic emergency converge as more cases have been lodged with ICSID challenging Greece's recent actions, including the PSI deal<sup>42</sup>. The author is not optimistic however that tribunals will significantly diverge from the earlier precedents of detaching definitions of public interest, from -treaty compatible- changes of circumstances.

## 6. CONCLUSION

The discussion in this paper suggests that some sort of public law role is inevitable for tribunals -in both investment and commercial arbitrations- but how is it to be achieved? Arbitration is a fact of life and a core component of a modern and efficient system of dispute resolution, anywhere in the world. Arbitration can provide a route around institutional inefficiencies in developing states and can promote a healthy investment climate and policy sustainability in developed ones. The acceptance of arbitration as a positive inclusion to our menu of dispute resolution options however does not change the fact that some aspects of decision making, especially those with a public element, are not addressed adequately. How can we ensure that arbitration can stay relevant and help parties resolve disputes effectively without undermining the notions of transparency, legitimacy and democratic accountability that we hold dear?

This paper demonstrates that a lot of resistance to arbitration in general -and investor arbitration in particular- is ill-informed, or in any case based on brittle empirical bases. Nonetheless, there is no escaping the juridical truth that while courts have within their terms of reference the capacity to consider notions of public interest, arbitral tribunals do not. The discussion leads to the conclusion that concern about corroding effects of arbitral expansion on perceptions of legitimacy and sovereign discretion should be taken seriously. Unchecked growth in private dispute resolution can threaten perceptions of legitimacy and democratic accountability. This can take place long before sovereign discretion is limited beyond the point that states can determine and defend notions of the public good. This paper arrives at this conclusion resting on a methodological acceptance of the role of the state as the legitimate interpreter of notions of the public good, indeed the argument here accepts there can be such a thing as a public good. This may entail a rejection of the more extreme strands of economic theory, but it is widely shared<sup>43</sup>.

If we accept arbitral decision making as a fact of life and seek to protect its presence in the domain of dispute resolution, how can we simultaneously protect state sovereignty in determining the public interest and defending public goods? Commercial arbitration in this respect does not present us with great problems. Truly de-localised arbitration is a rarity, with most tribunals operating within a framework of law as determined by the seat of arbitration and national statutes. The concern is in the field of investment arbitration. In that domain, one solution would be to insert a public law role that protects regulatory discretion through revision

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<sup>42</sup> *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic* (ICSID ARB/14/16).

<sup>43</sup> Ioannis Glinavos (2013), *supra* note 9, Chapter 1.

of BITs, or via creating an investment court that can ensure transparent checks and balances on arbitral decision making. This is precisely the motivation behind the European Commission's proposal for an Investment Court to oversee ISDS under the proposed TTIP<sup>44</sup>. Could this work? Considering the above discussion, yes it could, but at a high cost, risking robbing both the arbitral process of its advantages, and states of their discretion.

There is a much simpler solution. This could be the continued promotion of alternative dispute resolution and arbitration in the commercial field, with a simultaneous scaling back of investment arbitration in agreements between developed economies. The literature on the benefits of ISDS is perhaps convincing for deals between corporates and developing nations with weak judicial institutions. It is less convincing in the context of developed states. Inserting an ISDS clause in the TTIP can only have one purpose, restricting sovereign discretion in order to ensure policy consistency, regardless of the effects this can have on democracy, accountability, transparency. There is no reason to reinvent the wheel through an investment court in order to allow tribunals to wade into cross-Atlantic disputes. Our respective court systems (USA and EU) are perfectly capable of doing that, and keep definitions of the public interest within established juridical frontiers. Is this retrograde? Don't we have agreement on ~~the~~ our basic commercial aspirations and a common understanding on the role of dispute resolution between the USA and Europe? This paper argues that we do not. If we do, for example, share views on the appropriateness of private dispute resolution universally, why does the USA embrace mandatory consumer arbitration clauses<sup>45</sup>, while Europe shudders in horror at their mention?

We can conclude by reinforcing the point that unchecked growth in private dispute resolution can threaten perceptions of legitimacy, transparency and democratic accountability. We should protect sovereign discretion so that national courts can still determine and defend notions of the public good. This does not make us enemies of arbitration, modernity, capitalism. It just makes us prudent.

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<sup>44</sup> European Commission, 'EU finalises proposal for investment protection and Court System for TTIP', Press release, Brussels, 12 November 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm) (accessed 18 March 2016).

<sup>45</sup> Ioannis Glinavos, 'We hope we never have a dispute', 15 March 2016, available at <https://iglinavos.wordpress.com/2016/03/15/we-hope-we-never-have-a-dispute/> (accessed 18 March 2016).