The capacity of transnational corporations to create their own legal status

in the scope of European Union's law

(Zdolność korporacji transnarodowej do kształtowania własnego statusu prawnego

w świetle prawa Unii Europejskiej)

SUMMARY

Rozprawa doktorska przygotowana w Katedrze
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The thesis argues that transnational corporations have acquired the power to create their own legal status in the international law by successful influencing primary rules of the legal order. It could only happen at cost to the host state's regulatory autonomy. In order to attract foreign capital mostly but not only the emerging countries have granted large private entities capacities to take advantage of the broad legal output, including international human rights. By the way, taking advantage of the rights seems to be not enough compensated by legal commitments providing the so-called government gap.

The thesis offers a legal language approach to the complex issue of transnational mode to make business by large corporations. Taking a look from the Polish perspective it was necessary to make the research in the scope of the European Union's law, as the Union creates the framework for entering into and executing economic contracts in the member states (i.e. by securing free capital movement). Moreover, the Treaty of Lisbon empowered the European Union to negotiate and conclude trade agreements with third parties, including direct investment treaties.

Originating from the initial assumptions the selected issues were subject to a legal-dogmatic research. The reason is that doctrinal legal scholarship reflects normative complexity of any given legal order, including international soft law. To prove comprehensively the proposed thesis it was needed to research the European Union's and the Polish domestic law as well as the international investment arbitration, using comparative method as well. The conclusions drawn from all the research have taken the shape of general statements, providing a kind of a hands-on lesson.

Main issues considered in the thesis are:

1. elevating investment agreements to international law sources by applying powerful clauses of treatment (chapter II);
2. doctrine notion of legal means to protect foreign direct investor's property
better than the domestic ones (chapter III);

(3) transnational attitude to pursue investment claims by global corporations, including the promotion of specific international arbitration rules and the viability to shop investment treaties (chapter IV).

The issues above provide for a comprehensive concept of transnational mode to protect private assets and to solve disputes with the host state. To understand this concept, it was right to describe first the way the transnational corporations come to existence and operate. Some place was devoted to introduce the accompanying issues of regulatory weaknesses of the international investment law and the lack of a common investment treaty.

State contracts as long-term investment agreements between a foreign private party and the host state can be elevated to an international legal source. Under those circumstances the corporation's contract rights are protected with greater normative force by treating the state's obligations significantly more indelible comparing to the domestic approach. As a result, it affects the regulatory autonomy of the host state constricting thus the citizens' capacity to self-govern. By differentiating the state contracts and the purely domestic public contracts the state's commitments made in favour to transnational corporations are suddenly without a good reason in a position above the domestic legal order. It constricts domestic entrepreneurs as well. Obviously, it is a legitimate objective of transnational corporations to secure their interests by all possible means as long it is based on incontestable legal theories and pursued with respect for the clearly expressed host state's will.

Investment contracts contain a few guarantees for the protection of the private property against the host state's lawless acts. The umbrella clause equalizes state's obligations to execute the state contract properly with the international principle of *pacta sunt servanda* appealing to a definite bilateral investment treaty (BIT). Any
breach of the contract obligation equals to the breach of international law by the state party. Even more powerful effect grants the fair and equitable treatment clause (FET), allowing the arbitration tribunals to derive international protection against expropriation, arbitrariness or discrimination acts by the host state. So long as the contract qualifies to be covered as an investment, the investment treaty insulates private agreements from any significant breach or diminution by contrary law of the host state.

What is important, private tribunals tend to widen treaty protection for transnational corporations' property at all levels of the state activity: legislative, executive and judicial. The foreign investor is given security especially from the expropriation without compensation under certain conditions and the guarantee to be treated fair and equitable. It requires to provide a level of protection not only higher than the national treatment standard, but also to abandon the conception of property protection developed by the most states. Even good will regulations undertaken in the public interest by host state need - according to the investment arbitration jurisprudence and doctrine - to be appropriately compensated where they amount to an expropriation or in many cases even if they only frustrate investor's legitimate expectations of the investment profitability.

The generally accepted by international tribunals expansive theory of property at work afford transnational corporations significantly broader protection than the domestic ones. Moreover, the foreign property protection is extended to assets of any kind. Once the arbitration tribunals find investment contracts with the state entitled to international protection under the treaty, they mostly adjudicate claims based on highly state-adverse private property theories. It surely hinders the state's capacity to regulate law, as well as it shows the real influence of the large private corporations on their legal position under the rules both of the domestic and the international law.
Transnational aspects of investment arbitration make a challenge for the jurisprudential approach to international law. Specific arbitration proceedings in accordance with ICSID (International Centre for Settlement of Investments Disputes) rules provide the most palpable expression of this challenge. The roots are to be traced back to the doctrinal and adjudicatory recognition that state contracts are entitled to treaty protection elevating them to the rank of public international law. One cannot fail to take note of the extraordinary scope of property protection in investment arbitration or the recognition of changing the corporate nationality (treaty and forum shopping) in order to benefit from a more advantageous investment treaty.

To sum it up, the transnational corporation is no longer at the mercy of the state of it's nationality as regards the protection of it's rights and interests while making foreign investments. It can effectively protect itself by internationalizing state contracts and taking advantage of third parties' treaties. The research of the thesis led to the conclusion that transnational corporations appear as to some extent autonomous actors having the power to enforce directly international law and indirectly domestic and European law.

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