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QUANTIFYING THE ABUSE POTENTIALITY IN THE INVESTOR TREATY PROTECTION REGIME (ICSID CONVENTION): THE INVESTMENT FUND CASE STUDY

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Glossary

ACIA – ASEAN Comprehensive Investment Agreement
AIF – Alternative Investment Fund
AIFM – Alternative Investment Fund Managers
ASEAN – Association of Southeast Asian nations
BIT – Bilateral Investment Treaty
CSSF – Commission of Financial Sector Surveyance (Luxembourg)
ECHR – European Court of Human Rights
ELTIF – European Long-Term Investment Fund
ESMA – European Securities and Markets Authority
FCP – Contractual Investment Fund
FDI – Foreign Direct Investment
FET – Fair and Equitable Treatment standard (BIT treaty right)
FPI – Foreign Portfolio Investment
FTA – Foreign Trade Agreement
ICISD (Convention) – International Convention for Settlement of Disputes
ICSID (Centre) – International Centre for Settlement of Investment Disputes
ISDS – Investor to State Dispute Settlement
ISIN – International Securities Identification Number
IVSC – International Valuation Standards Commission
MC – Management Company
NAV – Net Asset Value
NCA – National Competent Authority
PRIIP – Packaged Retail and Investment Insurance Products
RAIF – Reserved Alternative Investment Fund (fr. *Fond d'investissement alternatif réservé*)
RCS – National Registry of Commercial Entreprises (fr. *Registre de Commerce et des Sociétés)*
SICAF – Closed-Ended Investment Fund (fr. *Société d'investissement à capital fixe)*
SICAR – Investment Fund in Risk Capital (fr. *Société d'investissement en capital à risque)*
SICAV – Open-Ended Investment Fund (fr. *Société d'investissement à capital variable)*
SIF – Specialised Investment Fund (fr. *Fond d'Investissement Spécialisé*)
UCITS – Undertaking for Collective Investment in Transferable Securities
UNCTAD – United Nations Conference for Trade and Development
UNIDROIT – International Institute for the Unification of Private Law

INTRODUCTION

Abuse is an elusive legal phenomenon. The latter is omnipresent in any legal regime transgressing into the improper exercise of rights distributed to individuals. Virtually no legal right is immune from abuse. Its continuous presence is proven to deform the law by decreasing legal certainty.

Reasonably, not a single legislator wishes the fruits of its work, i.e. law and legal rights, to be abused by the end consumers. Therefore, the latter is sanctioned by every legal regime. However, eliminating the abuse in its entirety proves no success.

"There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."[1]

The latter deduction implies that as much as the potentiality of a normative use is present, the potentiality of abuse of any legal right remains. Put differently, it is another side of the same coin where any legal right distributed by law is subject to a two-fold modality of use: normatively (according to the law's objectives) and abusively (contrary to the law's objectives).

"Every rule has a background justification – sometimes called a rationale – which is the goal that the rule is designed to serve."[2]

In turn, the combination of human motives ignites the individual's decision to act in either manner. For instance, the right to compensation is exercised with the ill-founded motive to profit from the justice system. The latter motive is contrary to what was initially envisaged by the legislator. Hence, it manifests the presence of abuse.

"The doctrine of abuse of rights prohibits the exercise of a right for purposes other than those for which the right was established".[3]

Notably, the individual motives driving the specific right exercise are not static but are subject to continuous change, transformation and disappearance. Practically speaking, the contradictory motive driving the abuse of rights at a particular moment may evaporate or transform into a normative behaviour igniting the legitimate exercise of the same legal right.

The said variability implies the legal phenomenon of abuse to carry the potentiality feature. In particular, if the human rationales are subject to change, the exercise of a legal right ignited by the said rationales is also variable. Consequently, the assumption of the right exercise being subjected to a two-fold modality pre-determines the existence of risk – the risk of a specific right to be abused.

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[1] Hersch Lauterpacht, "Development of International Law by the International Court" (1958), p. 164

[2] Frederick Schauer, "Thinking Like a Lawyer" (2009) Harvard University Press, p. 15

[3] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) 2017, Award, para 540

Giddens mentions that scientific exploration of risk in law is often left mute by legal scholars.[4] There are more than one legal and non-legal factors triggering the individual to resort to abuse: personal motives, the ethical level of permissibility installed by the specific legal environment, the commercial benefits and others. As a result, the feature of abuse potentiality remains largely challenging to precise.

The given Thesis accepts the challenge by setting the academic goal of quantifying the abuse potentiality on a measurable scale. The fulfilment of the said research goal is dependent on two principal pillars. First, the tailor-made methodology proposed in the current work. Second, rendering the academic exploration of abuse potentiality in the strictly defined legal environment comprising three distinct elements:

1. the investment protection regime elaborated under the International Convention of Settlement of Investment Disputes (ICSID),
2. the five case scenarios of abuse adjudicated by investment tribunals and,
3. the investment fund as an actor of abuse.

The rationale for selecting the mentioned elements forming one legal dimension of the current research derives from the specific reasons explained below.

First element: the investment protection regime as a venue of abuse

The investment protection regime is established by the International Centre for Settlement of Investment Disputes Convention (ICSID)[5] and further reinforced by the Bilateral Investment Treaties (BITs) [6] concluded between the agreeing States. On the one side, the said agreements facilitate the inflow of capital from private investors for the benefit of the host State. On the other side, the investors are given the right to initiate the investment arbitration against the host State outside its internal adjudicatory system in case of assets expropriation (directly or indirectly).

The latter legal regime represents the most abstract, non-nation-specific legal environment that is, research-wise, comfortable for exploring the legal phenomenon of abuse potentiality. As mentioned by *Gibson*, it is "…[a]*n 'ethical no man's land', a space between the formal regulation of national laws…"*[7] allowing to not disturb the process of legal analysis from the rest of the non-legal factors and country-specific legal impetus. Hence, the results of abuse analysis in the said legal dimension are neutral to all legal regimes. In turn, the said neutrality offers the benefit of universally recognised outcomes of research work performed within the proposed legal regime.

[4] Anthony Giddens, "Risk and Responsibility" (1999), p. 1
[5] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)
[6] For example, BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995)
[7] Catherine Gibson, "The Role of Professional Ethics in Procedural Fairness", *in "Procedural Fairness in International Courts and Tribunals"*(2015), p. 205-206

Second element: the five case scenarios as a context of abuse

The five case scenarios of abuse selected in the current research perform the contextual function. Namely, by allowing to analyse the legal phenomenon of abuse in connection to the conditions of its most frequent occurrence based on several subject matters: abuse out of treaty shopping, abuse out of numerosity aspect (claims multiplication), abuse out of provisional measures, abuse related to criminal investigations and abuse appearing out of damages valuation.

In this vein, the investment protection regime represents the general legal environment, whereas the five-case scenarios imply the "natural habitats" of the abuse within its most frequent settings. Therefore, approaching the examination of abuse and its potentiality within the said settings' forum allows for infusing the research with contextuality and pertinence.

At the same time, the abuse appearance, reasoning and sanctioning may differ depending on the case scenario at review. For these reasons, the current dimension of the legal research comprises five distinct case scenarios with the objective of providing a conceptually diverse understanding of the latter legal phenomenon in pertinence to its frequent settings of occurrence.

Third element: the investment fund as an actor of abuse

Lastly, the investment fund as an actor of abuse had been selected to bring novelty to the research. Namely, to explore the jurisdictional standing of the latter in terms of investment/investor validity for the investment protection regime.

The investment fund is a legal entity designed for the collective pooling of capital from the wider public in exchange for the fund's shares/units. The collected capital is further re-invested in the assets outlined by the fund's investment policy. As an actor of abuse, the latter is born out of a distinct EU legal regime comprising unique legal specificities that are subsequently imported as "regulatory baggage" into the investment protection regime.

For example, according to the respective legal and regulatory framework, the investment fund (its specific type) is subject to a minimum capital requirement, i.e. EUR 1,250,000[8]. Consequently, the home State legislation's minimum capital requirement put on the investment fund immediately develops a distinct legal specificity differentiating the latter from the rest of the investors participating in the investment protection regime. The requirement imposed by the home State law remains pending when the fund enters the investment protection regime by initiating the arbitration dispute. The presented specificity forms the fund's legal identity, subsequently distinguishing it from the rest of the investors having no obligation to raise EUR 1,250,000 of minimum capital.

At first glance, the decision to analyse the investment fund as an actor entering the investment protection regime unneceserirally complicates the research. In particular, several legal specificities deriving from the investment fund law are to be considered when analysing the abuse potentiality within the limits of the investment protection regime.

[8] For example, Journal officiel du Grand-Duché de Luxembourg, Law of 23 July 2016 on reserved alternative investment funds (RAIF) (2016), Article 25

However, what appears to be a complication, in general terms, is academically beneficial for the purposes of the given research aiming to precise the legal phenomenon of abuse on the example of a unique actor comprising distinct regulatory background. The legal specificities unique to the investment fund are viewed to impact the investment protection regime in a specified manner. The latter's impact will reveal how the abuse potentiality risk is affected in comparison to the rest of the investors possessing no such specificities.

Therefore, although being legally eclectic (combining two distinct legal regimes), the current research develops the added value in the form of delimitation and contextualisation of abuse potentiality quantification in relevance to one distinct actor. The latter's legal identity comprising patent specificities is used to estimate the abuse potentiality in separation from the rest of the investors. Hence, offering a higher level of precision.

Overall, the combination of these three elements represents a single legal dimension within which the research is to occur. Namely, the latter allows setting the clearly defined borders necessary for delimiting the research and reaching a maximum level of precision when quantifying the abuse potentiality on the example of (1) neutral-to-all investment protection legal regime, (2) tested in five case scenarios of abuse and (3) performed by one defined actor – the investment fund.

Methodology. The author envisages reaching the above-mentioned research goal by applying specific research methodologies.

- *Case analysis method*

The case analysis will be the primary and foremost methodology to be used. Considering the current field of research to be based on many arbitration disputes at review, the author will analyse and systematise the recurring arbitration case practice. This will be done to collect the parties' argumentation, analyse the tribunals' awards, and distil the legal principles deriving from the arbitration disputes to benefit the given research.

Besides, considering that the investment protection regime enjoys no continuous doctrinal pattern of abuse conceptualisation due to the absence of a permanent adjudicatory body, the case analysis of the varying number of arbitration disputes provides a more comprehensive understanding of the latter legal phenomenon. This is to be understood under the principle that the more arbitration disputes are reviewed by applying the case analysis method, the better it is to draw a more wholesome image of abuse in the investment protection regime.

- *Comparative method*

The method of comparative analysis is expected to be frequently used, namely, for juxtaposing the arguments and motives of the disputing parties within the limits of one specific arbitration dispute at review. Besides, the comparative analysis method will also be used when comparing the disputes consisting of the evident example of abuse and legitimate use of investment rights concerning identical legal issues and topical categorisation. The mentioned methodology will also be applied when comparing the Bilateral Investment Treaties. For example, reviewing the approach towards specifying the legal regime for the term "investment" and "investor".

In this vein, the comparative research analysis method plays the role of an instrumental legal device necessary to be applied permanently. It is the most frequent method when reviewing the research question related to a double modality of the right exercise, i.e. normative and abusive use of treaty rights.

- *The historic analysis (travaux preparatoires review)*

The *travaux preparatoires* method is expected to be used when reviewing the intentions for concluding the ICSID Convention by the agreeing States. The given method will also be briefly used for reviewing the Agreeing States' intentions when drafting the BITs in the context of the specific case review by the investment tribunals.

In this vein, the author will correlate the research objectives with the analysis of the historic exponential. This will allow tracing the rationale and teleology of particular shifts in approaches influencing the objects of the current research. For instance, identifying the historical and teleological reasons explaining the absence of the definition of the term "investment" in the ICSID Convention.

- *Dualist methodology*

Another prominent method will concern the principle of dualism and its practical application to the process of abuse review by investment tribunals. Namely, researching the potentiality of auxiliary help of the institute of the legitimate use of investment treaty rights for the benefit of better and more efficient identification of investors' abusive motives when exercising the investment treaty rights.

The author will juxtapose the reviewed examples of abuse deducted from a specific case scenario against the pertinent example of a normative use of the same treaty right deriving from the case scenario similar by facts. The comparison of one against another is expected to lower the veil of elusiveness surrounding the legal phenomenon of abuse.

- *The analogy method*

Witnessing the evident shortcomings of the investment protection regime related to the absence of a continuous doctrinal pattern and a rotating pool of arbitrators resolving the one-time disputes, the author aims to cure the gaps in abuse conceptualisation appearing as a result of the said specificities *via* the analogy method. Namely, by consulting the most relevant legal regimes and their approaches towards conceptualising the legal phenomenon of abuse. The given methodology will offer the benefit of gap-filling[9] when reviewing the latter phenomenon in more detail. Besides, consulting the case practice of the relevant legal regimes, i.e. ECHR Court, will

[9] Wolfgang Alschner, "Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes" (2022) Oxford University Press, Chapter 2 Change as Gap-filling

also aid when reviewing the arbitration case practice lacking homogeneity in legal interpretation, i.e. opposing awards.

- *Quantitative abuse potentiality estimation method*

The given method is tailored explicitly to reach the research objective of the current Thesis – to quantify the abuse potentiality by investment funds participating in the investment protection regime on the example of five case scenarios. The given method relies on analysing the investment fund's legal specificities (regulatory basis) by theorising how the qualitative feature of abuse, i.e. potentiality, is influenced by the said specificities compared to the rest of the investors participating in the investment protection regime. The details of the given method will be explained in the final part of the Thesis.

Shortcomings. The expected shortcomings standing in the way of the given research are well-identified.

Foremost, this includes the privacy clause leading to the inability to reveal the details of the investment dispute resolution process. The given shortcoming is to be cured by increasing the number of disputes to be reviewed as well as borrowing certain conceptualisations of abuse by analogy from other pertinent adjudicatory systems, i.e. ECHR Court[10].

Another evident shortcoming is the politicisation of the given field appearing in the context of reformation attempts initiated by the key stakeholders (the EU[11] and the private initiatives[12]). This results in existential questioning of the entire investment protection legal regime and its future place in the international legal order, i.e. intra-EU BITs terminations.[13]

To battle the given shortcoming, the author will concentrate on reviewing the existing case practice and treaty analysis without resorting to interviewing or inquiring the already mentioned stakeholders (the EU representatives and heads of private initiatives, i.e. lobbying groups) representing the proponents or opposition to the investment protection regime. This, in particular, is explained by the objective of having no intentions of projecting either of the sides of any of the political visionaries and resorting to a purely legal analysis.

The legal phenomenon of abuse is often perceived from one conceptual angle: restricted behaviour infusing the legal regime with uncertainty. The latter approach narrows the theoretical margin for considering the said legal phenomenon from other conceptual angles, including its potentiality. As a result, the author finds fewer academic sources for developing the research related to the given matter. In particular, discussing or scientifically exploring other pertinent features of abuse.

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[10] For example, see The European Court of Human Rights (ECHR), Practical Guide on Admissibility Criteria (2021) related to conceptualising the legal phenomenon of abuse.

[11] European Union, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union OJ L 169 (2020)

[12] See, for example, European Federation for Investment Law and Arbitration (EFILA); See website: https://efila.org [last accessed 10 December 2022]

[13] For example, Joseph Mamounas, "ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change" (2014)

The given shortcoming is to be treated by consulting academic resources from other fields aimed at explaining the legal phenomenon of abuse through the perspective of various scientific angles, i.e. political science (Knight[14], Berman[15]), psychology (Housel[16]), economics (Pauwelyn[17], Posner[18] and Alschner[19]). As well as consulting the national legal systems and their parts most pertinent to the objectives of the current research conceptualisations, i.e. EU Law[20] and Luxembourg Civil Code[21]. The said approach expands the comprehension of such a legal phenomenon as abuse. Consequently, developing a wholesome understanding of the latter.

Another shortcoming of the mentioned research derives from the particularity of the legal design of the investment protection regime. Namely, the absence of a permanent adjudicatory body consisting of a set of predefined arbitrators. The prevailing majority of arbitrators charged with resolving the dispute are appointed on a one-time basis by the disputing parties. As soon as the dispute is resolved, the tribunal dismisses itself. This renders the investment arbitration field to be inconsistent.

Therefore, the argumentations and the judgements of continuously rotating arbitrators may not coincide with the previously decided awards or even contradict them. "[T]*he two tribunals reached completely opposite conclusions with regards to the evaluation of the same facts"*.[22] The given shortcoming transforms into the absence of a stable and consistent doctrinal pattern conceptualising the abuse in a way that is picked up and enhanced by further tribunals. This leaves the author unable to scientifically precise the concept of abuse on a universal basis, rendering the latter more elusive in the investment protection regime than in any other regime.

To cure the given shortcoming, the author will compare the said abuse conceptualisation against the other legal regimes most relevant to the current one. Namely, the one established on the basis of the ECHR Convention. The reason for academically relying on the ECHR derives from evident similarities pertinent to both. In particular, the two legal regimes offer an international adjudicatory avenue for resolving the disputes between private individuals and the State by reviewing, among others, the abuse of procedural rights.

As a result, the ECHR Court may often coincide with the doctrinal studies about the legal phenomenon of abuse rendered by the investment tribunals. At the same time, the ECHR Court benefits from being the sole and permanent adjudicator. This may offer an advanced conceptualisation of abuse compared to the investment protection regime relying on one-time

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[14] Jack Knight and Melissa Schwartzberg, "Political Legitimacy " (2019) New York University Press

[15] Mitchell Berman, "Abuse of Property Right Without Political Foundations: A Response to Katz" (2014)

[16] Morgan Housel, "The Psychology of Money: Timeless lessons on wealth, greed, and happiness" (2020)

[17] Joost Pauwelyn, "The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement" (2013)

[18] Richard Posner, "The Economics of Justice" (1983) Harvard University Press

[19] Wolfgang Alschner, "Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration" in Theresa Carpenter (ed), *in "The Use of Economics in International Investment Disputes: Liability and Damages"*(2017) Cambridge University Press

[20] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014)

[21] Journal officiel du Grand-Duché de Luxembourg, Civil Code , Article 6-1

[22] Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 16

tribunals. The importation of the latter knowledge may be useful for conceptual gap-filling, i.e. extending the conceptualisation of abuse and the methodology for its detection for the benefit of the current research. [23]

Lastly, the decision to resort to intersectoral research comprising two distinct legal regimes may result in a conceptual break (polarisation) of the Thesis into two autonomous parts: the study on abuse in investment arbitration and the exploration of the investment fund legal and regulatory framework with deducting its legal specificities.

To cure the given shortcoming, the author will reference the preceding parts of the research and explain the rationale and academic necessity for interconnecting the two fields. This will be done when advancing in the research progress. For instance, underlining the difference between the investment fund and the rest of the investors participating in the investment protection regime with a view of delimiting the current research and achieving a higher level of precision of abuse when examining its legal feature of potentiality.

Added value. The Thesis sets the straightforward and practical goal of analysing the legal phenomenon of abuse from a less explored point of view, i.e. potentiality. The innovativeness of the given research is further enhanced by estimating the abuse potentiality on the example of the investment fund – the newly emerging actor in the investment protection regime.

The latter actor is different from the rest of the investors in part of having to comply with numerous legal requirements imposed by its local legal regime. These requirements are pertinent to the collective investment activity and originate from a strictly regulated legal regime developed at four distinct levels (Lamfalusy report)[24]. The said legal and regulatory framework produces the list of the investment fund specificities that will tested in the five case scenarios with the objective of estimating the abuse potentiality.

Therefore, the value of the given Thesis provides a two-fold benefit. On the one side, it is the advancement and further progress in precising the legal phenomenon of abuse by estimating its non-conventional feature of potentiality. Fulfilling the said objective is expected to offer a better legal inventory for tackling the investors' abusive behaviours in part of projecting its risk of occurrence by the arbitrators.

On the other side, it is laying the path for better jurisdictional standing of investment funds participating in the investment protection regime. This includes examining the legal specificities of the latter actor and its aptitude for fulfilling the treaty requirements, examining the taxonomy of investments produced by the latter and the regulatory obligations adhering to the treaty definition. The said exploration is deemed to clarify the latter's legal standing when involved in investment arbitration.

[23] Wolfgang Alschner, "Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes" (2022) Oxford University Press, Chapter 2 Change as Gap-filling

[24] Alexandre Lamfalussy and others, Final Report of The Committee of Wise Men on The Regulation of European Securities Markets (2001)

The fulfilment of the said goals altogether is expected to further facilitate the academic discussion on innovating new legal remedies aimed at curing the abuse's adverse legal effects in the investment protection regime and other related fields.

Research plan. Reaching the mentioned goal requires an orderly and logical process of analysis where every deducted piece of knowledge is to be further applied. In the given Thesis, the research roadmap comprises five distinct steps interconnected by the smaller cap goals.

STEP 1: **to preliminary review the investment fund legal regime.**

The first part of the Thesis is designed to lay down the general and specific aspects of investment fund law. The said step is expected to offer the readers the necessary legal background to advance further in the current research. In particular, to introduce the public engaged in reviewing the Thesis with the principles of collective investing and the legal specificities deriving from the latter activity. These legal specificities will be further tested in five case scenarios of abuse with a view of estimating the abuse potentiality in comparison to the rest of the investors.

STEP 2: **to define the term "investment" and "investor".**

The given step is to lay the theoretical foundations of the Thesis. Namely, to conceptualise the term "investment" and "investor" to the needs and specificities of the current research. The given objective correlates with the selected choice of the Thesis – estimating the abuse potentiality done by the investment fund. Hence, it is to be answered whether the investment protection regime based on the ICSID Convention includes the investment fund and the investments rendered by the latter in its scope.

Besides, the wholesome exploration of the two mentioned terms is necessary to develop a theoretical background to further review the investment arbitration case practice in detail. Hence, the two-folded objective deriving from the mentioned step represents the academic basis on which the Thesis will advance its further goals.

STEP 3: **to scientifically define the legal phenomenon of abuse from a theoretical point of view.**

The given part will conceptualise the legal phenomenon of abuse from the theoretical point of view. Namely, this will be done by academically deconstructing the given legal phenomenon and exploring its pertinent elements. This includes the legal device of abuse detection and the subsequent methods utilised to identify the abuse in the investor's reasoning and argumentation. The teleological interpretations of abuse and the external factors influencing the latter to appear.

Besides, the author will also look at how the investors' motives ignite the legal right to be exercised abusively and the principal categories of abuse, i.e. evident and non-evident abuse. In this vein, the wholesome understanding of the legal phenomenon of abuse aligns with the Thesis's research objectives and allows to examine further how investment tribunals conceptualise abuse.

Under the already mentioned principle of duality, where any legal right is to be either used normatively or abusively, the author will further review the legal phenomenon of a normative use of rights in the investment protection regime. This will include the analysis of the good faith principle understood within the limits of the investment protection regime and how the investors' legitimate motives reflect on the regulator's objectives in distributing the mentioned rights. Furthermore, the author will specify the factors igniting investors' legitimate exercise of investment protection rights, i.e. triggers and motives.

In this vein, the Thesis approaches the task of precising the concept of abuse in the investment protection regime by juxtaposing the latter against the normative use of treaty rights. Comparing two phenomena allows underlining better the legal curves of abuse that are often faded in colour when attempted to be covered up by investors alleging for protection of treaty rights.

STEP 4: **to academically examine how the treaty right is abused and used in a normative way in five case scenarios.**

The given part will further apply the deducted theoretical knowledge about the normative and abusive use of treaty rights in five pre-defined case scenarios. The author will examine how abuse appears, is motivated and revealed by investment tribunals on specific case examples. Hence, rendering the said analysis a practical exploration of abuse in five predefined settings.

Following the previously mentioned duality approach, the explorations will be done against the case examples of the normative use of treaty rights. The given approach will aid in better reflecting on abuse that is often non-evident in the investor's argumentation and is left unnoticed by the opposing party and the arbitrators.

The given step is expected to reveal the distinct abuse features for every case scenario. Namely, to point out how the abuse appears, reasoned and revealed in correlation to the specificities deriving from the mentioned case scenarios. In this vein, the abuse phenomenon will be tested in varying contexts: from provisional measures to the damages valuation stage. Each of the said scenarios experiences the abuse occurrence differently.

STEP 5: **to quantify how the investment fund's legal specificities impact the abuse potentiality in the previously analysed five-case scenarios**

Lastly, the author will resort towards specifying the legal methodology designed in the current Thesis for quantifying the abuse potentiality. This will be done by relying on the deducted investment fund specificities tested in five case scenarios of abuse and performed by a single actor of abuse, i.e. investment fund.

In particular, the Thesis will assume that the rest of the non-investment fund investors represent an X rate of abuse potentiality. Then, each of the deducted investment fund specificity will be appointed a distinct abuse risk level ranging from -1 (positive decrease of abuse potentiality), 0 (no evident influence) and +1 (a negative increase of abuse potentiality). The divided sum of all the deducted valuations will reveal how abuse potentiality is decreased/remains with no change/increased compared to the rest of the investors participating in the investment protection regime and assumed to have the standard abuse potentiality risk level at an X rate.

As a result, the given exploration is expected to answer whether the investment fund comprising its unique legal specificities, has a higher, lesser or identical potentiality to abuse the investment treaty rights in comparison to the rest of the investors assumed to have the X rate.

PART I: INVESTMENT FUND LEGAL REGIME OVERVIEW

Introduction

The Thesis will debut from laying down the overview of the EU investment fund legal and regulatory framework as well as the legal design of specific fund types in Luxembourg[25]. It is a preliminary part designed to equip the readers with the investment fund law background necessary for further research advancements.

The undertaking for collective investing (UCI), i.e. investment fund, does the activity of collective pooling of capital to further reinvest into specified assets. [26] The latter is not an undertaking that follows commercial or industrial purposes; instead, it is an investment company.[27] The fund's units or shares are distributed among the investors in exchange for invested capital.

The investment fund activity is subjected to a specified legal regime based on competence sharing[28], namely, the regulatory right is shared between the EU and its Member States (Luxembourg) under the EU-wide principles of proportionality and subsidiarity[29] where the EU founding treaties had established an EU legal order becoming "…[a]*n integral part of the legal system of Member States"*[30].

However, the investment fund born out of the said legal regime is subject to investor treaty protection when investing its capital in foreign jurisdictions under the International Convention on Settlement of Investment Disputes (ICSID Convention) and specific Bilateral investment Treaty at Review (BIT) at review.
This implies that the ordinary investor within the limits of the investment protection regime is radically different from the investment fund. The latter, in order to be authorised/registered, is subject to additional requirements presented below:

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[25] The latter jurisdiction is viewed as number one for estbalishing an investment fund in Europe. For example, see Association of the Luxembourg fund industry (ALFI), "Annual Report 2021-2022" (2022), p. 14; See also European Court of Auditors, "Special report: Investment funds. EU actions have not yet created a true single market benefiting investors" (2022), p. 7-8
[26] See a definition of the investment fund (general definition) by Danielle Sougne, Rafik Fisher and Claude Kremer, "Fund Industry in Luxembourg" (2016) Larcier Business, p. 20
[27] European Securities and Markets Authority (ESMA), "Guidelines on key concepts of the AIFMD" (2013), p. 12-15
[28] European Union, Treaty on European Union (TEU) OJ C 326 (2012), Article 4
[29] Ibid, Article 5; See also ibid, Protocol 2
[30] *Flaminio Costa v E.N.E.L. (Case 6-64)* (European Court of Justice (CJEU)) 1964, para 7

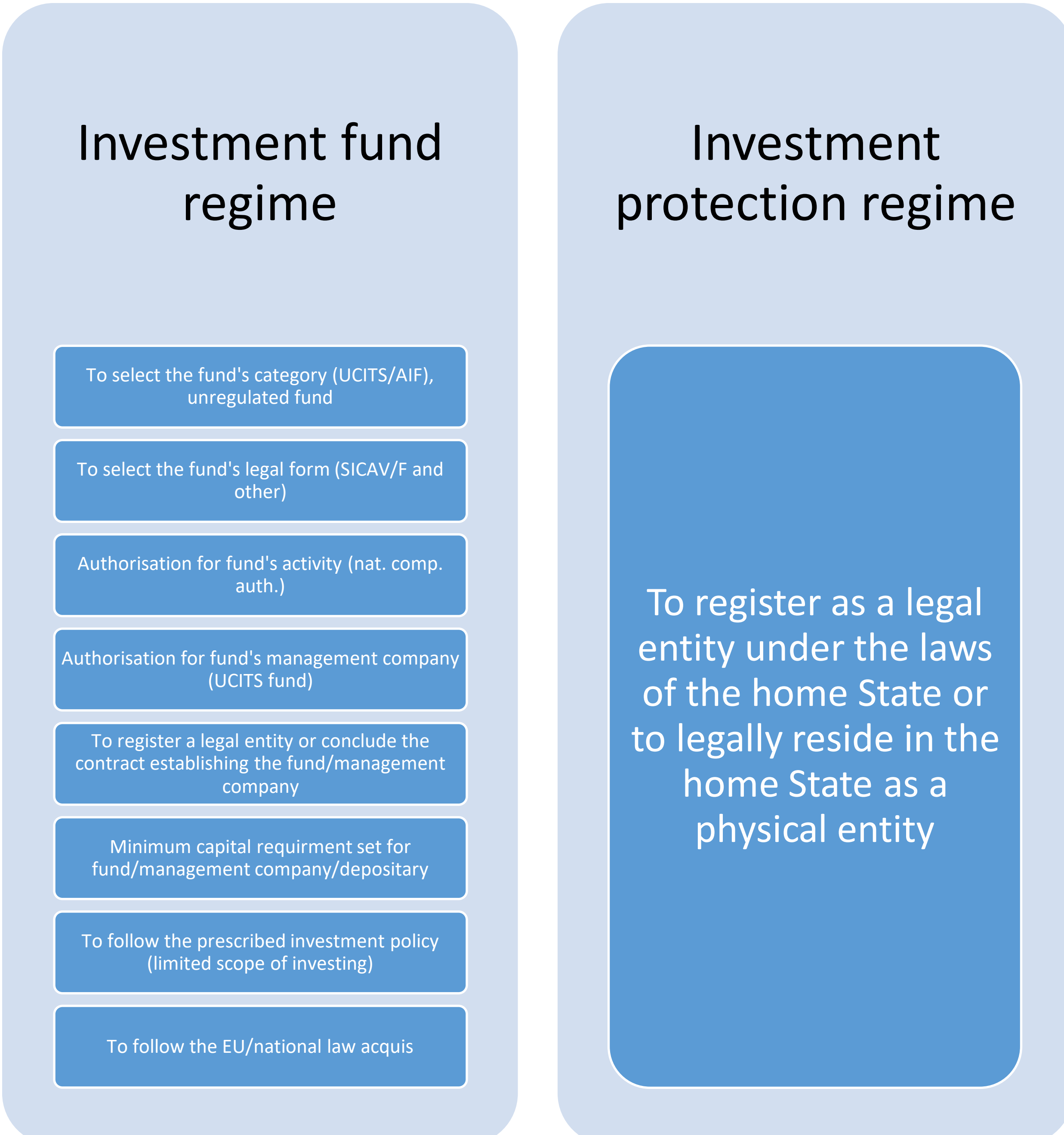

Image 1. Source: author's illustration

Evidently, although a party to the investment protection regime, the investment fund follows its own set of regulatory standards and performs the investing activity differently. Namely, by pooling the capital altogether and strictly following the fund's investment policies and legal requirements that vary extensively for every fund at review. Highlighting the said specificities in the given Thesis is necessitated by the objective of estimating the abuse potentiality relevant to the investment fund exclusively.

Therefore, the objective of the given part is to deduct the investment fund's legal specificities for their analysis and further application towards the phenomenon of abuse potentiality in the investment protection regime. Namely, to estimate whether the specificities pertinent to investment funds as the newly appearing actor to the investment protection regime cause, if any, the effect over the phenomenon of abuse and its subsequent potentiality of appearance in the relevant case practice. Differently said, to estimate how and to what degree the investment fund specificities change the abuse potentiality in the investment protection regime. This will be done *via* the avenue of examining the investment fund legal regime from now on.

Lamfalussy process

The research about investment funds concerns the interplay between the EU and the national legal frameworks targeted by the Lamfalussy report (2001). The latter divides all the regulatory acts implementing the investment fund legal regime into four principal groups (levels). The approach represents the investment fund's pillar system.[31] Viewing the entirety of acts through a four-level system benefits in reaching a comprehensive outlook over the investment fund legal regime.

The Level 1 acts represent the principal legislative acts adopted by the EU in light of introducing the general skeleton of the investment fund field. For example, setting the definitions, objectives, and principles on which the investment fund legal regime functions, i.e., basic law. For these reasons, the latter is commonly adopted by two principal legislative bodies of the EU: the European Parliament and the Council of the European Union (co-legislative procedure). The power given to Parliament and Council to adopt these laws stems from the EU founding Treaties (TFEU[32] and TEU[33]). The two principal Level 1 acts in the investment fund law are Directive 2009/65/EC on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[34] and Directive 2011/61/EU on alternative investment fund managers[35] (AIFMD)[36]. Each of them establishes a distinct category of funds to be reviewed further.

The Level 2 acts take the form of technical measures aimed at implementing/updating the Level 1 legislation. For these purposes, the Commission, as an executive body of the EU, issues the so-called non-legislative delegated and implementing acts designed to reform or update the existing legal regime.

[31] Duncan Alford, "The Lamfalussy Process and EU Bank Regulation: Another Step on The Road to Pan-European Regulation" (2006), p. 403; See also CSSF referring to Lamfalussy process in Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 08/339 (2008), p. 3
[32] European Union, Treaty on the Functioning of the European Union (TFEU) OJ C 326 (2012)
[33] European Union, Treaty on European Union (TEU) OJ C 326 (2012)
[34] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009)
[35] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011)
[36] Ibid

"A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act."[37]

When vested with the power to adopt the Level 2 acts, the Commission fulfils the task of implementing the legislative initiatives deriving from Level 1. The given process is done in full cooperation with the EU Parliament. The Commission informs the latter about the implementation progress and specificities appearing along the way.[38]

An example of the Level 2 act is the Commission Regulation implementing the UCITS Directive (Level 1) regarding key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website.[39] Another example of the Level 2 act is the Commission Delegated Regulation 231/2013, setting the rules for calculating the leverage the Alternative Investment Fund (AIF) may employ[40] upon such conditionality provided by the AIFM Directive.[41]

"Given that it is possible for an AIFM to employ leverage and, under certain conditions, to contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFMs employing leverage…".[42]

Levels 3-4 descend to the European Securities Market Authority (ESMA)[43] and national competent authorities (CSSF in Luxembourg) charged with fulfilling the obligations and tasks deriving from the Level 1 and 2 acts: to enforce and to monitor.

In this vein, ESMA sets down the technical standards and guidelines necessary for the coherent and balanced activity of the investment fund markets at the level of the national jurisdictions while mediating with the EU. The acts issued by ESMA follow the principle of "comply or explain".[44]. Namely, the Member States are to comply or provide the substantiated reasons for non-compliance.[45]

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[37] European Union, Treaty on the Functioning of the European Union (TFEU) OJ C 326 (2012), Article 290(1)

[38] Ibid, Article 290(2); See also Alexandre Lamfalussy and others, Final Report of The Committee of Wise Men on The Regulation of European Securities Markets (2001), p. 6

[39] European Union, Commission Regulation implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website OJ L 176 (2010)

[40] European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Section 2

[41] Dirk Zetzsche (ed), *The Alternative Investment Fund Managers Directive* (Wolters Kluwer 2020), Chapter 19 (Brokerage)

[42] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Preamble (49)

[43] European Union, Regulation 1093/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) OJ L 331 (2010)

[44] For example, see https://www.esma.europa.eu/document/comply-or-explain-table-gr-io-arrangements [last accessed 16 November, 2021]; See also the latter's mention by the CSSF at Commission de Surveillance du Secteur Financier (CSSF), STOR Survey (2019-2020), p. 13

[45] See, for example, European Securities and Markets Authority (ESMA), "Guidelines on key concepts of the AIFMD" (2013), IV Compliance and reporting obligations, para 7,8

It is worth mentioning that the national legal regimes may develop other fund structures not covered by the UCITS or AIFM Directives (Level 1), i.e. non-UCITS or non-AIF funds. For example, the SOPARFI (fr. Société de Participations Financiéres; eng. Society of Financial Participation) investment vehicle in the form of a commercial company governed by the Luxembourg law of 10 August 1915[46]. The latter is off the CSSF's regulatory radar and falls for a distinct legal and tax regime.

Besides, the Level 1 Directives include the distinction between the EU and national law for regulating the investment fund field, i.e. shared competence. For these reasons, the *de minimis* rule or opt-ins are to be found in the text of the said Directives.[47]

Following the explanation of the EU's acts taxonomy, the author will approach further the discussion related to the investment fund legal regime through the prism of the Lamfalussy report. The latter decision is motivated by the said taxonomy being an unavoidable framework for reviewing the investment fund legal regime comprising of the EU and national law *acquis*. Besides, it also offers the practical benefit of clarity and hierarchical order.

The further part will review the first step in the investment fund law taxonomy – the Level 1 Directives setting up the legal regime for two principal fund categories: Undertaking for Collective Investing in Transferable Securities (UCITS) and Alternative Investment Fund (AIFM).

Undertaking for Collective Investment in Transferable Securities (UCITS)

The Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) is the Level 1 law establishing the legal and regulatory framework designed for investment funds investing in a specified scope of eligible assets. The given Directive had been transposed into Luxembourg law by adopting the Luxembourg Law of 2010 on undertakings for collective investments (Part I)[48] (hereinafter UCI Law). The UCITS Directive provides a legal regime for the fund's management company (investment actor), the depositary (investment actor) and the fund's capital (investment product).

See how the latter defines the UCITS:

"For the purposes of this Law, and subject to Article 3, UCITS means an undertaking

- *"with the sole object of collective investment in transferable securities and/or in other liquid financial assets referred to in Article 41(1)", of capital raised from the public and which operate on the principle of risk-spreading, and*

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[46] Journal officiel du Grand-Duché de Luxembourg, Law of 10th of August 1915 concerning the commercial enterprises (Fr. Loi du 10 août 1915 concernant les sociétés commerciales) (1915)

[47] For example, the opt-in mentioned in European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 43 concerning marketing the AIF shares/units to retail clients.

[48] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Part I

- with units which are, at the request of holders, repurchased, directly or indirectly, out of this undertaking's assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to any such repurchase."[49]

According to the predefined investment policy laid down by the UCITS Directive and further transposed by the Luxembourg UCI Law 2010, the UCITS shall invest in a vast but limited category of eligible assets listed in the said Directive (Article 50). This includes the transferable (marketable) securities[50], units or shares of other UCIs, deposits, and financial derivative instruments, i.e. futures, money-market instruments and other financial instruments directly mentioned in the given list.[51]

See the Article 1 of the UCITS Directive:

"UCITS means an undertaking with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of capital raised from the public and which operate on the principle of risk-spreading"[52]

Nevertheless, the limited scope of eligible assets is not the only distinctive criterion for the UCITS category of funds. Having at heart the objective of investor protection, the EU regulator also limits portfolio management to several pre-defined rules.[53] This includes the proportion of the invested capital in the same asset, the risk-spreading rules and a list of prohibitions of certain types of operations (uncovered sales[54] or short selling[55]).

For example,

"A UCITS may invest no more than 10% of its assets in transferable securities or money market instruments issued by the same body. A UCITS may not invest more than 20% of its assets in deposits made with the same body."[56].

[49] Ibid, Article 2(1)(2)

[50] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 2(1)(n)

[51] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 41

[52] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 1(a); Importantly, the category of assets eligible for investing by the UCITS fund had witnessed the noticeable evolution in part of encapsulating the assets other than transferable, despite the Directive's name (Undertaking for collective investing in transferable securities).

[53] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 41(2), Article 42-46

[54] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 19(3)(d)

[55] European Union, Regulation on short selling and certain aspects of credit default swaps OJ L 86 (2012), Article 2(1)(b)

[56] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 43

The UCITS fund shall also define its investment strategy and adhere to the latter in compliance with the EU regime implemented by the UCI Law. The information on objectives, the risk strategy[57] , and all other relevant key points[58] necessary for investors to make a conscious decision before investing their capital in exchange for the fund's shares/units must be compulsorily included in the prospectus. The latter is used for marketing the UCITS shares/units across the EU[59] or for other specified purposes, i.e. merger with other UCITS[60].

The given rules stem from Level 1 and Level 2 acts. In turn, ESMA and the Luxembourg national competent authority (Commission de Surveillance du Secteur financier in Luxembourg (CSSF)) issue the Level 3-4 guidelines and recommendations aimed at clarifying the way how the above-mentioned requirements are to be reached. For instance, specifying the particularities of the risk-spreading rules.[61]

The fulfilment of the above-mentioned conditions related to assets eligibility, risk spreading, and other pertinent requirements mentioned by the UCITS Directive and UCI Law (Part I) result in authorisation from the CSSF. Obtaining the latter manifests the permission to pursue the investment fund activity by the designated fund: "…[n]*o UCITS shall pursue activities as such unless it has been authorised…"*[62](Article 5).

The requirements set by the UCITS Directive (Level 1) manifest the *de minimis* rules further implemented and monitored by ESMA and national competent authorities (Level 3-4 guidelines and recommendations). Namely, Article 1 mentions the States are free to set stricter requirements provided they do not contradict the provisions of the said Directive and are of a general nature.[63]

Consequently, the combination of the mentioned requirements stemming from the respective legal acts, in essence, form the borderlines of the specifically distinguished category of investment funds, i.e. UCITS. Article 5 of the UCITS Directive obliging to follow all those necessary rules defines the UCITS fund's "legal identity" that is different from all other investors participating in the investment protection regime and not exposed to the mentioned conditionalities. In turn, deducting the said differences is necessitated by the objectives of the current research aiming to precise the legal phenomenon of abuse *via* the avenue of delimiting the scope of analysis to the investment funds only.

Alternative Investment Fund (AIF)

Alternative Investment Fund represents a second pillar in the fund's legal structure typology. Put differently, it is the second leg in the EU taxonomy of principal categorisation of investment

[57] Ibid, Article 47(3)
[58] Ibid, Article 45(3)
[59] Ibid, Article 54
[60] Ibid, Article 67
[61] Commission de Surveillance du Secteur Financier (CSSF), Frequently Asked Questions concerning the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment (2020), Version 8, p. 11
[62] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 5
[63] Ibid, Article 1 (7)

funds. The latter is based on the Directive 2011/61/EU on alternative investment fund managers[64] (AIFMD) (Level 1) transposed in the Law on Alternative Investment Fund Managers (2013)[65], the 2010 Law on UCI (Part II)[66], as well as the law on the investment vehicles adopted by the national legislator (to be reviewed further on), i.e. specialised investment funds (SIF)[67], risk funds (SICAR)[68], reserved alternative funds (RAIF)[69] and others.

Importantly, unlike the UCITS Directive aimed at defining the legal regime of the UCITS fund in its entirety (fund product and actors, i.e. the fund manager and depositary), the Directive on Alternative Investment Fund Managers is designed to specify the legal regime of the investment actors of the AIF only, i.e. management company and depositary.[70] As mentioned by ESMA, the AIFM Directive "…[p]*uts in place a comprehensive framework for the regulation of alternative investment fund managers within Europe. The extensive requirements with which AIFMs must comply are designed to ensure that these managers can manage AIFs on a cross-border basis and the AIFs that they manage can be sold on a cross-border basis."*[71].

The AIFM Directive represents the *de minimis* rules subject to further strengthening by the ESMA[72] and MS[73]. This allows reaching further harmonisation of the legal regime, taking into account the particularities of the varying EU MS legal regimes.

Differently said, the principal goal of the AIFM Directive is to lay down "…[t]*he rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union"*[74]. Instead, a brief mention of the definition of the AIF fund is made in Article 4:

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[64] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011)

[65] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013)

[66] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010)

[67] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007)

[68] Journal officiel du Grand-Duché de Luxembourg, Law of 15 June 2004 relating to the Investment company in risk capital ("SICAR") (2004)

[69] Journal officiel du Grand-Duché de Luxembourg, Law of 23 July 2016 on reserved alternative investment funds (RAIF) (2016)

[70] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Preamble (10): This Directive does not regulate AIFs. AIFs should therefore be able to continue to be regulated and supervised at national level. It would be disproportionate to regulate the structure or composition of the portfolios of AIFs managed by AIFMs at Union level and it would be difficult to provide for such extensive harmonisation due to the very diverse types of AIFs managed by AIFMs.; See also Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), p. 67

[71] European Securities and Markets Authority (ESMA), Questions and Answers. Application of the AIFMD. (ESMA34-32-352) (2021)

[72] For example, European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 31(5)

[73] For example, ibid, Article 28(1)(c)

[74] Ibid, Article 1

"…[a]*lternative investment funds (AIFs)" means undertakings for collective investment, including investment compartments thereof, referred to in Article 4(1)(a) of Directive 2011/61/EU, which:*

1. *(a) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and*
2. *(b) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC".*[75]

The decision to define the AIF through the UCITS Directive and the Article 5 requirement reflects the AIF's fund standing as an antipode to the UCITS fund, the second pillar of a two-pillar principal categorisation of investment funds. Hence, the UCITS's antipode is defined as to be the one that is devoid of UCITS specificities. Namely, the risk-spreading rules, the compulsory capital exposure to a specific type of assets and others. Logically, the AIF's distinctive feature is sourced from the absence of the need for obtaining the fund's authorisation (Article 5 UCITS Directive).

The AIF fund, not constrained by Article 5, has the discretion to invest virtually in any asset[76], with no limitations pending for UCITS funds, i.e. risk spreading, transferable securities only and others.[77] This also reads from the naming of an AIF fund implying its alternativeness to UCITS.

At the same time, the doctrinal opinion stands on the idea that the alternative investment fund industry faces "*UCITS-ization*" [78]in part of having a "…[f]*ull range of regulations that are well known from the UCITS regulations, including regulations on the structure, financing and internal organisation"*[79] (the given aspects will be reviewed further on when discussing the fund's structural organs, i.e. depositary and management company/manager).

The Level 3 act (ESMA Guideline on AIFM Directive[80]) further defines the AIF by examining the key elements mentioned in Article 4 AIFM Directive. Namely, by specifying the notion *"raising capital*"[81], "*number of investors*", [82] and "*defined investment policy*" [83] used in the AIFMD definition.

[75] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 1(18a)
[76] Provided no national law limitations are pending.
[77] Unless limited by the national law.
[78] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), Klebeck Ulf and Eckner David, Chapter 3: Interplay Between the AIFMD and the UCITSD, p. 70
[79] Ibid, Klebeck Ulf and Eckner David, Chapter 3: Interplay Between the AIFMD and the UCITSD, p. 70
[80] European Securities and Markets Authority (ESMA), "Guidelines on key concepts of the AIFMD" (2013)
[81] Ibid, p. 32; See also the finalised definition: "The commercial activity of taking direct or indirect steps by an undertaking or a person or entity acting on its behalf (typically, the AIFM) to procure the transfer or commitment of capital by one or more investors to the undertaking for the purpose of investing it in accordance with a defined investment policy should amount to the activity of raising capital mentioned in Article 4(1)(a)(i) of the AIFMD."
[82] Ibid, p. 18, para 84; See also: "…[E]SMA still considers that in order to ensure certainty and consistency in the application of the AIFMD, the element to be taken into consideration is the existence of a restriction to raise capital from a single investor."

Importantly, as an exception rule, the AIFM Directive does not apply to management companies managing the AIFs and consisting of AIFM investors only.[84] In other words, there is no reason to apply the AIFMD rules to those management companies managing the AIFs in which only the AIFM invest. The latter exception is made to avoid the double regulatory pressure on management companies.

According to the AIFM Directive, the fund shall employ an investment policy coherent with the EU fund law (Level 1-2) and other pertinent legislation at the national level. The Directive defines the fund through the conditionality of raising the capital and its further investment following a precisely defined investment policy selected by the fund's administration.[85] The latter comprises several elements relating to the use of borrowed capital (leverage requirements)[86], the redemption of shares[87], remuneration of the management company[88] and others.

The Commission (Level 2) further specifies the *de minimis* requirements *via* the avenue of delegated acts for the mentioned elements of investment policy[89], i.e. setting the maximum level of leverage to borrow by the AIF[90]. The national regulator and the national competent authority (Level 4) may further specify the requirements for the investment policy within the legal dimension of its jurisdiction, i.e. setting the methodologies for calculating the imposed maximum level of leverage.[91]

The combination of the said elements underlines the investment fund legislation to be strongly intertwined, i.e. defining the AIF fund by mentioning the UCITS Article 5 requirements, as well as subject to continuous change and nuancing at four distinct regulatory levels. The given deduction is necessary for contrasting the distinct differences between the two reviewed legal regimes and the unique regulatory background of the investment fund compared to the rest of the investors participating in investment arbitration.

Investors to investment funds

The above-mentioned discussion inevitably leads to analysing the investor profile subscribing to the two principal categories of the funds installed by the Level 1 UCITS and AIFM Directives. Considering the mentioned investment funds to carry their inherent differences, the subscribers

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[83] Ibid, p.20, para 95; See also ESMA's clarification of the mentioned notion: "…[E]SMA decided to add an anti-circumvention provision in order to avoid a situation in which leaving full discretion to make investment decisions to the manager of an undertaking might be used as a means to circumvent the provisions of the AIFMD".

[84] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Art 3(1); See also Werner Haslehner (ed), *Investment Fund Taxation. Domestic Law, EU Law, and Double Taxation Treaties* (Wolters Kluwer 2018): Riassetto Isabelle, Introduction to Investment Funds Law (Chapter 1), p. 18

[85] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(a)(i)

[86] Ibid, Preamble (50), (78); Article 4(1)(v)

[87] Ibid, Article 21(3)(c)

[88] Ibid, Preamble (29)

[89] For example, see ibid, Article 4(3)

[90] Ibid, Article 15(4)

[91] Journal officiel du Grand-Duché de Luxembourg, Law of 20 May 2021 (2021), Article 34(1)(6), 46 (3)(15), 59(10)

to the units or shares of the said funds are expected to be also different in various aspects reviewed further on.

The investment fund legal regime categorises the investors participating in collective investment schemes into several legally distinct groups: professional and retail investors.

UCITS funds: all types of investors, regardless of their background (zero restriction policy).

AIF funds: professional investors only (except AIFM Directive Article 43 conditionality[92]).

In defining the term "professional investor", Article 4(1)(ag) of the AIFM Directive provides the reference to the Annex II of the MIFID I Directive (no longer in force)[93]:

"professional investor" means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC[94]

Further on, the MIFID II Directive (Level 1) lays down the basis for the given categorisation, where the entirety of investors is divided into retail clients (investors) and professional clients (investors)[95].

"Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs."[96]. The given groups also encapsulate the entities authorised to operate in the financial markets, i.e. credit institutions, pension funds, insurance companies, or physical persons having substantial knowledge of finance, performing a substantial amount of transactions, and working in the finance sector.

In turn, a retail client is instructed by law to be someone who is not a professional client.[97] Logically, the investment fund legal regime approaches the categorisation of investors under the principle of extrapolation used to categorise the investment funds: dividing into two principal categories and defining these categories *via* antagonism, i.e. retail investor is someone who is not professional.

The rationale behind the given decision derives from the objectives mentioned in the MIFID II Directive. Namely, to protect the client's assets[98]and reach market integrity and a certain level of

[92] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 43
[93] European Union, Directive 2004/39/EC on markets in financial instruments (MIFID I - no longer in force) OJ L 145 (2004), Annex II
[94] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(ag)
[95] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 4, Annex II
[96] Ibid, Annex II
[97] Ibid, Article 1(11)
[98] Ibid, Preamble (52)

prudence in the financial markets.[99] The latter is confirmed by the reform of the MIFID Directive aimed at enhancing the financial market's resistance in light of the newly appearing challenges. For example, the adoption of the MIFID II Directive (Level 1) had been viewed as a response to "…[t]*he weaknesses exposed in the functioning and transparency of the financial markets…"*[100]. The limitations applicable to the investors in participating in certain collective investment schemes and specific investment instruments are part of the above-mentioned objective.

It is worth mentioning that the AIFM Directive (Article 43) mentions the modality offered to the Member States, allowing retail investors (clients) to subscribe to financial instruments marketed by the AIFs.[101] In the given conditionality, the Member States are also given the discretion to impose stricter than AIFM Directive requirements within their jurisdiction.[102] The State's decision to market the AIF's investment product to retail investors is compulsorily mentioned to the European Commission and ESMA.

When providing retail investors with the discretion to acquire the professional investment instruments marketed by the AIF, the possibility of enhancing the legal regime is envisaged to avoid the discrepancies influencing the sound and prudent functioning of the financial markets. For instance, the CSSF Regulation N15-03 lays down several requirements for a foreign AIF before marketing its shares to retail investors in Luxembourg.[103] This includes an obligation to obtain the CSSF's authorisation[104] and to be registered in the specified list[105]. The market authorisation request shall also have the AIF's annual report, the AIF's certificate from its home MS affirming the latter is authorised and is subject to permanent supervision, as well as the draft agreement to be entered between the foreign AIF and the Luxembourg paying agent and others, i.e. all the necessary information is to be compulsorily translated in either of the Luxembourg official languages.[106] Notably, the marketing of AIF units to retail investors is also subject to conditions laid down by the Luxembourg Law of April 8, 2011, on consumer protection[107].

The investors of the fund are also given the right to information. The UCITS Directive establishes the requirement for pre-contractual information to be offered to investors, i.e. Key Investor Information Document (KIID)[108]. Besides, there must also be access to a specified

[99] Ibid, Preamble (53)
[100] Ibid, Preamble (4)
[101] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Art. 43(1)
[102] Ibid, Art. 43(2)
[103] Commission de Surveillance du Secteur Financier (CSSF), Regulation N° 15-03 laying down detailed rules for the application of Article 46 of the law of 12 July 2013 on alternative investment fund managers on the marketing of foreign alternative investment funds to retail investors in Luxembourg (2015)
[104] Ibid, Article 4(3)
[105] Ibid, Article 4(2); See also Journal officiel du Grand-Duché de Luxembourg, Law of 19 December 2002 on the Trade and Company Register (RCS) and on bookkeeping and annual accounts of companies and amending certain legal dispositions (2002)
[106] Commission de Surveillance du Secteur Financier (CSSF), Regulation N° 15-03 laying down detailed rules for the application of Article 46 of the law of 12 July 2013 on alternative investment fund managers on the marketing of foreign alternative investment funds to retail investors in Luxembourg (2015), Article 5(1)
[107] Journal officiel du Grand-Duché de Luxembourg, Law of 8 April 2011 on consumer protection (2011)
[108]European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Section 3

prospectus[109], including the price of units/shares[110], the fund's constitutive documents and the reports (yearly/half-yearly)[111].[112] The AIFM Directive imposes requirements on disclosing key investor information for AIF funds.[113] At the same time, the funds distributing the Packaged Retail and Investment Insurance Products (PRIIP)[114] to retail investors fall under the PRIIPS Regulation from January 2023 in part of having an obligation to offer to its potential customers a mandatory, pre-contractual standardised disclosure document made for offering the essential key-investor information about the PRIIP, i.e. risks and rewards[115].

"While the UCITS regulators are inter alia driven by the need for a high level of retail investor protection, the AIFMD lays down the conditions subject to which AIFMs may market the units or shares of AIFs to EU professional investors only"[116]

Therefore, as a participant in the current legal regime, the investor receives the regulatory impetus from Level 1 acts in part of being categorised (MiFID II Directive) and limited with access to specified products (exemption Article 43 AIFMD). In turn, at the national level, the regulator develops further specifications deriving from transposed Directives (Law 2010 in UCI (Part I, II) or Law 2013 on AIFM), the CSSF Circulars and Regulations, i.e. Regulation 15-03 and, finally, the laws establishing the national fund types that extend the regulatory treatment of investors to a specified fund type, i.e. SIF law[117], RAIF law[118] or SICAR law[119] (to be reviewed further). As a result, the hierarchically placed taxonomy of legal acts and national laws combined manifests the wholesome regulatory treatment of investors in investment funds.

At this point, it is already possible to suggest the investment fund legal regime to represent an organised in a legally strict manner regime. The latter represents the "silo"[120] approach aimed at developing the regulatory clusters with universally used definitions, approaches and interpretations of specific legal terms utilised in the said cluster. In the investment fund law, the "silo" approach is evident on several distinct legislative levels (Lamfalussy process) and within the scope of specific fund categories and types, i.e. UCITS and AIF, EUVECA[121], ELTIF[122] and

[109] Ibid, Art. 75
[110] Ibid, Art. 76
[111] Ibid, Art. 75
[112] Werner Haslehner (ed), Investment Fund Taxation. Domestic Law, EU Law, and Double Taxation Treaties (Wolters Kluwer 2018); Riassetto Isabelle, Introduction to Investment Funds Law (Chapter 1), p. 22
[113] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 23
[114] European Union, Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs) No 1286/2014 (2014), Article 4
[115] Ibid, Section II
[116] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), Klebeck Ulf and Eckner David, Chapter 3: Interplay Between the AIFMD and the UCITSD, p. 66
[117] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Article 2(1)
[118] Journal officiel du Grand-Duché de Luxembourg, Law of 15 June 2004 relating to the Investment company in risk capital ("SICAR") (2004), Article 2
[119] Ibid, Article 2
[120] Alain Strowel and Grégory Minne (eds), *L'influence du droit europeen en droit economique* (L'arcier 2022): Riassetto Isabelle, Pour un *Single Rulebook* unique en droit européen des fonds d'investissement, p. 303-305
[121] European Union, Regulation 345/2013 on European venture capital funds OJ L 115 (2013)
[122] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015)

EUSEF[123]. Hence, questioning the necessity for codifying the investment fund law in its entirety, i.e. Single Rulebook. [124]

The said legal rules stem from the imperative of public order leaving a narrow margin to extending or modifying how the investment fund industry is regulated. The latter is evident from a complex legal construct setting clear borderlines between the funds' categories, providing an exhaustive list of permitted activities, and developing a multi-layered legal and regulatory framework targeting the supervision of the investment fund industry on four distinct levels (Lamfalussy process).

However, the above suggestion is only based on a general overview of the principal legislative acts, primarily deriving from Levels 1 and 2, without considering the very structure of the investment fund. Hence, the further part will explore the given matter in more detail by deducting the investment fund's legal specificities in the context of its potentiality for abuse of the investment protection regime.

Fund compartments

Considering that the investment fund shares are marketed to the broader public (retail and professional clients), it is reasonable to expect that they also adapt their offers to fit the varying needs of investors. For these reasons, the fund's structure may consist of several compartments, i.e. sub-funds.[125] The fund consisting of several compartments is often referred to as an umbrella fund.[126] The latter comprises two or more compartments investing in one or more classes of homogenous assets under varying investment policies.[127] In this vein, the homogeneity of assets implies that the UCITS fund shall invest in only UCITS-compliant types of assets. Consequently, the AIF fund cannot comprise compartments that follow the investment policies set by the UCITS Directive due to the apparent requirement for authorisation (UCITS Directive Article 5), contradicting the AIF's definition[128]. The fund's structuring in varying compartments, i.e. divided into sub-funds, rests with the latter's discretion, provided no contradiction to the legal regime is in place, i.e. the above-mentioned example.

"In principle, various legal systems put sub-funds on an equal footing with "complete" funds and tend to govern details only to ensure equal treatment of investors at the stage where they will be changing sub-funds"[129]

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[123] European Union, Regulation 346/2013 on European social entrepreneurship funds OJ L 115 (2013)

[124] Alain Strowel and Grégory Minne (eds), L'influence du droit europeen en droit economique (L'arcier 2022): Riassetto Isabelle, Pour un *Single Rulebook* unique en droit européen des fonds d'investissement, p. 317; See also Jesper Hansen, "Market Abuse Case Law - Where Do We Stand With MAR?" (2017), p. 367

[125] For example, see a direct mention of the given modality in the Level 1 act: Article 1: "Member States may allow UCITS to consist of several investment compartments"; See also AIFM Directive (Level 1), Article 4 specifying: "AIFs means collective investment undertakings, including investment compartments thereof…"

[126] For instance, see the mention of umbrella fund structures by the CSSF https://www.cssf.lu/en/2022/07/global-situation-of-undertakings-for-collective-investment-at-the-end-of-may-2022/ [last accessed 28 July 2022]

[127] Isabelle Riassetto and Michel Storck, "Les compartiments d'OPC entre indépendance et dépendance", *in "Droit bancaire et financier Mélanges AEDBF-France VII"*(2018) Revue Banque Edition, p. 351

[128] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 1(18a)

[129] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), p. 44

Each of the sub-funds shall have its distinct specialisation. For example, the fund is set up for investing in developing South Asia and South American markets. Consequently, the fund may consist of two distinct sub-funds having a separate regional specialisation, i.e. the South Asian sub-fund and the South American sub-fund.

Regardless of how many compartments the UCITS fund comprises, investing activity is only possible in the assets recognised as eligible under the UCITSD. Besides, "…[f]*or UCITS having different investment compartments, the key investor information to be provided to investors subscribing to a specific investment compartment, including how to pass from one investment compartment into another and the costs related thereto;".*[130]

The reason the fund is subdivided into compartments may vary considerably, i.e. geography, types of assets, currency, level of risk and others. Every fund compartment is given a unique ISIN number[131] – International Securities Identification Number.[132] The latter aids in identifying the specific compartments to fit the client's investment preferences.

The number of compartments the fund may comprise is not limited as long as there is at least one. From the perspective of the legal regime, the fund is treated as one legal entity disregarding the number of compartments the latter may have. The liquidation of the investment fund's compartment will not lead to the fund's liquidation under the auspices of which the compartment had been established. This implies that the fund compartment cannot exist on its own.

However, a certain independence/autonomy of compartments is still to be traced, especially in its investment policy, accounting and incomes. Namely, the subscriber to a specific compartment of an investment fund is only the beneficiary of that specific compartment, not the fund entirely.[133]

The legal relations between the investors of one fund but different compartments are set by national law. For example:

"The rights of investors and of creditors concerning a compartment or which have arisen in connection with the creation, operation or liquidation of a compartment are limited to the assets of that compartment, unless a clause included in the constitutive documents provides otherwise.

The assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, the operation or the liquidation of that compartment, unless a clause included in the constitutive documents provides otherwise.

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[130] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 78(7)(b)(i)

[131] See official website https://www.isin.org [last accessed 9 March 2022]

[132] Isabelle Riassetto and Michel Storck, "Les compartiments d'OPC entre indépendance et dépendance", in "Droit bancaire et financier Mélanges AEDBF-France VII"(2018) Revue Banque Edition, p. 354

[133] Ibid, p. 355

For the purpose of the relations between investors, each compartment will be deemed to be a separate entity, unless a clause included in the constitutive documents provides differently."[134]

Following the principle of consistent legal application and the maximum harmonisation rules (UCITS funds), the national regulator often mentions the specific legal provisions applicable to the fund and its compartments.[135] The given approach allows for enhancing legal clarity by specifying the scope of the application.

Master-feeder structure

Apart from investing in the specified assets sought by the predefined investment policies, the investment funds also enjoy the modality of investing in other investment funds. Namely, the legislator recognises the right of the fund to purchase the shares/units of another fund. For instance, the UCITS Directive mentions the fund's authorisation to invest in another UCITS fund by subscribing or purchasing the units or shares.[136] The latter activity may be done with two distinct objectives: (1) the investing purposes and (2) for pooling assets and/or transferring the capital from one fund to another. The investment fund regulator specifies the latter objective as an activity related to the master-feeder modality.

In this context, the feeder fund is the one investing 85% or more of its assets into another fund or investing 85% or more of its assets into several funds having identical investment strategies or having exposure of 85% or more of its assets to such a fund.[137]

The UCITS Directive defines the master fund through three distinct aspects: (1) has among its unit-holders at least one feeder UCITS; (2) is not itself a feeder, and (3) does not hold units of a feeder UCITS.[138] Instead, the AIF legislation defines the master fund in a less restrictive manner: *"'master AIF' means an AIF in which another AIF invests or has an exposure in accordance with point (m)"* [139] – the point "m" concerns the 85% rule mentioned above.[140]

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[134] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Article 71(5)

[135] For example, see Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 63, 65; See also European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Preamble (27)

[136] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 50(1)(e)

[137] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(m); See also European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 58(1)

[138] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 58(3)

[139] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(y)

[140] See also European Securities and Markets Authority (ESMA), "Guidelines on key concepts of the AIFMD" (2013), p. 18 related to considering the aspect of "number of investors" for the purpose of the AIF definition under the master-feeder structure.

The recognition of the given modality, where one fund invests a substantial amount of its capital into another, identifies the capital flows between the mentioned funds. In particular, for tackling the potential money laundering activities by targeting the end-beneficiaries. In this relation, the funds participating in the given modality are subject to additional regulatory requirements[141] related to reporting the supplementary information to the national competent authority and potential investors in both categories of funds: UCITS[142] and AIF[143]

The rules of risk spreading laid down by the UCITS Directive[144] would logically oppose the master-feeder modality. For these reasons, an implicit provision mentioning the possibility of derogation is found:

"A feeder UCITS is a UCITS, or an investment compartment thereof, which has been approved to invest, by way of derogation from Article 2(2), first indent, Articles 41, 43 and 46, and Article 48(2), third indent of this Law, at least 85% of its assets in units of another UCITS or investment compartment thereof (the "master UCITS")."[145]

In turn, the AIF funds participating in the master-feeder modality shall also be subject to certain limitations related to marketing its investment products: *"Where the EU AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM."*[146]

Mechanisms of capital pooling for master-feeder structures

The actual incorporation of assets is done in two distinct ways leading to different legal implications. Namely, the property rights for the assets of the feeder fund may be passed to the master fund (entity pooling). This results in the above-mentioned assets being placed within the limits of one legal entity, i.e. investment fund.

Instead, virtual pooling is a more elaborate process deriving from the master-feeder fund's activity where the actual ownership of the pooled assets remains with the initial beneficiary: the capital is invested by independent funds following one policy instructed by the master fund. In this way, all the funds participating in joint investing remain independent. The existence of the said approach is reasoned by potential hardships arriving out of tax and legal-related reasons.

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[141] European Union, Commission Directive 2010/42/EU as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure OJ L 176 (2010)

[142] For example, Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 82(2); See also ibid, Article 159(3)(c); See also Commission de Surveillance du Secteur Financier (CSSF), Master / Feeder Structures - FAQ (2013)

[143] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 6(3)(b), Article 21(1)(a)

[144] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Chapter 5

[145] Ibid, Article 77(1)

[146] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 31(1)

The developed information technologies will co-manage the funds despite being owned separately. The latter practice is not applicable for UCITS as the requirements for portfolio diversification are still pending should there be no "actual" pooling of the assets.[147] However, it is recognised as permissible for the AIFs where no requirement on portfolio diversification is in place.

Importantly, both funds (master and feeder) shall also conclude a contractual agreement (entity pooling) specifying the transfer of the assets.[148] The process of investment pooling overall offers some benefits from the economy of scale perspective. Namely, the negotiating power when possessing a bigger pool of assets, easier administration leading to lower costs and subsequent minimisation of brokerage fees.

In this vein, the regulator's master-feeder modality offered to investment funds transforms into unique legal specificity. Namely, it represents the legally validated process of pooling the capital of several investment funds for sourcing the investment power of the end beneficiaries of the made investment.

The legal consequences of such specificity imported into the investment protection may raise reservations related to complications in identifying the jurisdictional standing of investors resorting to capital pooling *via* virtual asset pooling. The mentioned modality may coincide with the reviewed case scenario of abuse *via* claims multiplication. The case scenario of assets pooled only virtually may result in multiplying the claim in investment arbitration with a view of procedural pressuring the host State.[149]

Therefore, the author deems the given specificity as relevant and actual for the current research and as one that shall be considered when estimating the abuse potentiality from the side of the investment fund field on the investment protection regime.

Fund form

Following the previously reviewed matter of the fund's compartments and master-feeder structures, it appears academically important to provide the theoretical background underpinning the fund's two principal forms in which the latter may register itself. Namely, (1) in the form of a legal entity or (2) based on a contract/trust law

Both of the Level 1 acts mention the said two-fold modality:

[147] Association of the Luxembourg Fund Industry (ALFI), "Master-feeder structures: made in Luxembourg" (2010), p. 1-4; See also Investment Management Association, "Pooling: how can fund managers respond efficiently to different investor needs?" (2005)

[148] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Preamble (51-55)

[149] Zoe Williams, "The Political Economy of Investment Arbitration" (2022) Oxford University Press, p. 44-57

The UCITS Directive: *"The undertakings referred to in paragraph 2 may be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies)."*[150]

The AIFM Directive: mentions the modality for the fund to be constituted as a contract or a legal entity, as well as any other form of the fund provided by the national legal regime of MS[151]: "…[u]*nder the law of contract, under trust law, under statute, or has any other legal form."*[152]

The Level 1 Directives[153] are further implemented by Level 2.[154] In this vein, the AIF fund administration is required to wrap the investment product (fund)[155] into a specified legal form: (1) registering an investment company (legal entity based on statute)[156], (2) concluding the contract amongst the investors that are regulated by the said contract/trust law (fiduciary distributing units instead of shares), or (3) establishing the fund in any other legal form provided by the national legal regime of the MS and not contradicting the Level 1 acts[157].

Instead, the UCITS fund is limited to be wrapped in the following legal forms: (1) investment company (legal entity based on statute) and (2) concluding the contract amongst the investors that are regulated by the said contract/trust law (fiduciary distributing units instead of shares).

The author excludes the AIFMD conditionality *of* "…[a]*ny other legal form…"*[158] from the current research and concentrates on reviewing the two principal fund forms applicable to both fund categories: (1) investment company based on statute and (2) contract fund based on contract/trust law.

Fund as an investment company (based on the statutes)

According to Article 27 (2) of the UCITS Directive: *"Member States shall determine the legal form which an investment company must take".* As AIFMD does not regulate the product, the legal form of an AIF depends on national law.

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[150] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 1(3)

[151] For example, the 2010 UCI Law (Article 27) mentions the SICAV (fr. société d'investissement à capital variable) legal form available to investors to use for setting up a fund as a Luxembourg legal entity.

[152] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 2(2)(b)

[153] For example, see European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Preamble (27); See also European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Preamble (4)

[154] For example, see European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Chapter 11

[155] Unless the fund is self-managed, in that case, it is the investment product (fund) and the actor (management company) to acquire single legal form.

[156] Not to be confused with European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(k) discussing the fund's authorisation/registration to be obtained from the national competent authority.

[157] Ibid, Article 2(2)(b)

[158] Ibid, Article 2(2)(b)

In Luxembourg, the investment fund can be established as a company under the rules of the statute - the investment company. Depending on the type of UCI, the investment company may either be a SICAV – an open-ended investment fund structure (fr. *Société d'investissement à Capital Variable*) (UCITS) or SICAF – a closed-ended investment fund structure (fr. *Société d'Investissement à Capital Fixe*) (UCITS and AIF).

Further on, the Luxembourg legislation (Law of 10th of August 1915)[159] provides a spectrum of legal forms available to investment companies established under Luxembourg UCI Law 2010 (UCITS (part I) and AIF (part II)). The company's legal forms are not explicitly designed for the needs of the investment funds but are commonly used by commercial enterprises – they represent the legal cover necessary to wrap the investment product.

This includes the Public Limited Company (*fr. société anonyme - SA*), where the shareholders of investors are limited with the liability towards the legal entity in the amount of the purchased shares.[160] Partnership Limited by Shares (fr. *société en commandite par actions - SCA*)[161] where the ownership of shares is freely transferable[162] and the owners of shares are responsible in solidarity.[163] Limited Partnership (fr. *société en commandite simple* - SCS) subdividing the partners into general and limited partners where the limited partners are responsible only to the point of their ownership. Instead, the general partners are responsible in solidarity with other general partners of the same SCS.[164]

The given discussion represents the general taxonomy of commercial companies. However, one should consider the *lex specialis* related to a specific fund type and certain derogations from the above-mentioned rules. In particular, the specific provisions may be limiting. For example, the law on Specialised Investment Funds (SIF) provides the following: *"SICAVs are subject to the general provisions applicable to commercial companies, as far as it is not waived by this law."*[165] Further on:

"*As regards SICAVs which adopted the form of a public limited company, a partnership limited by shares or a cooperative in the form of a public limited company, the convening notices for the general meetings of shareholders may set out that the quorum of the presence at the general meeting be determined according to the shares issued and outstanding at midnight on the fifth day prior to the general meeting (Luxembourg time) (referred to as "Record Date"). The rights of a shareholder to participate in a general meeting and to exercise the voting right attached to*

[159] Journal officiel du Grand-Duché de Luxembourg, Law of 10th of August 1915 concerning the commercial enterprises (Fr. Loi du 10 août 1915 concernant les sociétés commerciales) (1915)
[160] Ibid, Section IV
[161] Ibid, Section V
[162] See official website https://guichet.public.lu/en/entreprises/creation-developpement/forme-juridique/societe-capitaux/seca.html [last accessed 10 March 2022]
[163] Journal officiel du Grand-Duché de Luxembourg, Law of 10th of August 1915 concerning the commercial enterprises (Fr. Loi du 10 août 1915 concernant les sociétés commerciales) (1915), Article 102
[164] Ibid, Section III
[165] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Article 26

his shares are determined according to the shares held by this shareholder at the Record Date."[166]

At the same time, Luxembourg's SIF law may provide an extended list of what could be viewed as an investment company with a variable capital (SICAV) within the limits of the said law:

- which have adopted the form of a public limited company, a partnership limited by shares, "a limited partnership, a special limited partnership," a limited company or a cooperative in the form of a public limited company,
- the exclusive object of which is to invest their funds in assets in order to spread the investment risks and to ensure for their investors the benefit of the results of the management of their assets, and
- the securities "or partnership interests" of which are reserved to one or several well-informed investors, and
- the articles of incorporation "or partnership agreement" which provide that the amount of capital shall at all times be equal to the net asset value of the company.[167]

Importantly, the presented fund's legal form does not contravene the investor's rights deriving from the Level 1-2 acts, i.e. right to invest, right to information and others. Instead, the selection of either fund form will influence the investor's rights under the national legal regime in part of the limited or full liability.

All funds in the form of an authorised/registered legal entity are to be compulsorily enlisted in the Trade and Companies Register (fr. Registre de Commerce et des Sociétés, hereinafter RCS).[168] This and other requirements, i.e. fund prospectus's language, stem from national law and form the country-specific rules to be compulsorily considered.

Fund under contractual form/trust law

The contractual form of the fund implies the latter to be founded based on a written agreement instead of an investment company's statute (no legal entity). The UCITSD (Article 1(3) and AIFMD (Article 2(2)(b) provide the two-fold modality of an FCP fund: (1) established under the contract or (2) based on Luxembourg trust law. Hence, the Law of 27th of July 2003 (Trust law) may be followed by the parties setting up the contractual fund.[169]

The said fund will be represented by the management company (investment actor) managing and distributing the fund's units (investment product) appearing out of a contractual agreement. In Luxembourg, the contractual fund (fr. *Fond commun de placement – FCP*) is regulated by the

[166] Ibid, Article 26(4)
[167] Ibid, Article 25 (Part I)
[168] Journal officiel du Grand-Duché de Luxembourg, Law of 19 December 2002 on the Trade and Company Register (RCS) and on bookkeeping and annual accounts of companies and amending certain legal dispositions (2002)
[169] Journal officiel du Grand-Duché de Luxembourg, Law of 27 July 2003 (Trust law) (2003)

UCI Law 2010 (lex specialis) as well as Law on Commercial Enterprises *(lex generalis)*[170]. The 2010 Law mentions the subscribers to the fund's units are "…[j]*oint owners who are liable only up to the amount contributed by them…"*[171].

The absence of a legal entity in the form of an investment company does not imply the FCP fund is not duly registered for the investment protection regime, i.e. to be considered a duly registered investor. In particular, the contractual investment fund is matriculated in the national registry of commercial enterprises (*fr. Registre de commerce et des sociétés* – RCS) [172] . It is viewed as a legal entity for the purposes of the national legal regime. FCP's registration on the basis of the notary deed in the RCS stands as a condition for being considered duly registered for the investment protection regime purposes, i.e. being duly registered according to the home State's law.

An important aspect is the property regime of the invested capital raised out of collective investing. Unlike the legal entity distributing its shares, the subscribers to the FCP fund, based either on the contract or the trust law, will receive the units (the contractual agreement does not produce the company's shares). According to the general principles of law, the said units imply the fund's property is separated from investors by the management company holding the title to the invested assets, i.e. *sui generis* legal regime.[173] This is confirmed by the UCI Law 2010, specifying that *"Neither the holders of units nor their creditors may require the distribution or the dissolution of the common fund."*[174] The Level 1-2 acts do not provide further specifications about the given matter. This is left for the national legislator of the MS.

Instead, the investment protection regime views the rest of the investors as either a duly registered legal entity or a physical person legally residing in the host State. This implies the difference between the two legal regimes developing into a potential specificity.

Fund supervision

The given part will review the essential function of the investment fund legal regime – regulatory supervision.

The NCA renders the external supervision. The given institution carries the public function of sound supervision of the financial sector, including the investment funds as the participants in the given market. In Luxembourg, the CSSF exercises administrative power by ensuring that the

[170] Journal officiel du Grand-Duché de Luxembourg, Loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises et modifiant certaines autres dispositions légales (2002), Article 10, 30
[171] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 5
[172] Journal officiel du Grand-Duché de Luxembourg, Loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises et modifiant certaines autres dispositions légales (2002), Article 10
[173] Isabelle Riassetto and Michel Storck, "Les compartiments d'OPC entre indépendance et dépendance", in "Droit bancaire et financier Mélanges AEDBF-France VII"(2018) Revue Banque Edition, p. 351-373
[174] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 12

investment fund legal regime actors adhere to all the regulatory requirements on both the EU and national levels.

This, foremost, concerns granting/withdrawing authorisations offered to the fund actors and fund products [175] in exchange for fulfilling or failing to fulfil the regulatory requirements, notably the minimum capital requirement.

For the UCITS, the CSSF grants authorisation for the fund[176] (investment product) and the management company of the latter (investment actor).[177] For the AIF funds, it is only the management company that is subject to authorisation/registration. The AIF managers may be authorised or registered, depending on the assets under management[178].

The AIFM Directive and Luxembourg Law provide the modality for AIFM to be exempt from authorisation if managing: "…[o]*ne or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF".*[179]

After the authorisation is granted, the CSSF continues to render permanent supervision of investment fund activity by evaluating the submitted reports and performing on-site inspections. This manifests the direct and implied supervision (up-to-bottom approach) where CSSF intervenes and surveys **externally**. The said mechanism represents the first leg of control.

Instead, the supervision is also done *via* a bottom-to-up approach by relying on the fund's structural organs. As already mentioned, the investment fund legislative framework obliges the fund to consist of two principal organs compulsorily: the management company and the depositary.[180] Apart from performing their implied functions, i.e. management and safe-keeping, they also act on behalf of the CSSF, ensuring the fund's **internal** adherence to the subsequent regulatory requirements. For these reasons, the given part will further evaluate these two organs in more detail.

[175] Journal officiel du Grand-Duché de Luxembourg, Law of 23 December 1998 establishing a financial sector supervisory commission (Consolidated version) (1998), Article 1; See also Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 1(1)

[176] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 5(1)

[177] Ibid, Article 5(2)

[178] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 3(2); See also European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 2(1)

[179] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 3(1); See also Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 3(1)

[180] Importantly, the investment fund law also comprises other actors not mentioned in the given research, i.e. fund auditors. In this context, see Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 21/789 (2021) related to engaging to the fund auditing the statutory approved auditors.

Management Company / Manager

The management company performs an important function of the investment fund – managing the latter's assets. The latter function is granted/withdrawn upon the NCA's authorisation: "*The duties of the management company or of the depositary in respect of the common fund shall cease:…(d)where the authorisation of the management company or the depositary has been withdrawn by the competent authority…"*[181]. Alternatively, "…[n]*o UCITS shall pursue activities as such unless it has been authorised…"*.[182]

The management function is essential to all the fund structures with no exception, be it a UCITS or an AIF fund. Within the legal taxonomy of the EU law, the term management company is attached to a UCITS fund. The AIFM Directive utilises the notion of an AIF manager. The legal regime also provides the modality for a single management company to manage the assets of both fund categories (UCITS and AIF) at once. The latter is often referred to as Super ManCo.

Depending on the fund's legal nature, the latter may be managed externally or internally. Namely, the fund is either managed by an external management company or the fund's internal managing body (less frequent[183] in Luxembourg). In the latter mode, the managers are limited to managing the fund's assets only, whereas external management companies have no such limitation[184]. Notably, the external management company is compulsory for the FCP fund form due to specificities of its structure, i.e. no legal entity[185], as well as for investment companies which deliberately opted to be not self-managed.

Depending on how the management is rendered, certain specificities in regulatory treatment are applicable. For example, the 2010 UCI Law (Article 27) provides that the SICAV, with no designated management company, shall have capital of no less than EUR 300,000. Instead, the SICAV with a designated management company shall reach the capital of EUR 1,250,000 within six months following the authorisation of such SICAV.[186]

In turn, shall the SICAV opt to be self-managed (no designated management company), "…[t]*he dirigeants of the SICAV shall be of sufficiently good repute and be sufficiently experienced in*

[181] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 21

[182] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 5

[183] See the official website where currently only one UCIT fund is authorised in Luxembourg as self-managed: https://www.cssf.lu/en/2022/07/investment-fund-managers/ [last accessed 26 July 2022]

[184] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 6(3); European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011); See also Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 17 directly specifying the modality for managing more than one fund by the external management company.

[185] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 7

[186] Ibid, Article 27(1); See also European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 28

relation to the type of business carried out by that company. To that end, the name of the dirigeants and of any person succeeding them in office shall be communicated forthwith to the CSSF…"[187].

The said considerations draw the principal difference of how asset management function is rendered: externally or internally. The latter analysis will concentrate on specificities related to the two principal categories of funds, i.e. UCITS and AIF and consequent regulatory requirements sought from the management companies.

UCITS management company

The Level 1 UCITS Directive defines the management company as follows:

"'[M]*anagement company' means a company, the regular business of which is the management of UCITS in the form of common funds or of investment companies (collective portfolio management of UCITS)".*[188]

In this context, the national competent authority grants the authorisation to the UCITS fund, approving the management company of such fund to manage the specified UCITS. [189] In this context, the UCITS Directive mentions the requirements for authorisation (Chapter III) transposed in the 2010 Law on UCI (Part IV, Chapter 15).

The authorisation given to the UCITS management company means the latter follows all the regulatory requirements. For the UCITS fund, this would be the already mentioned rules related to risk-spreading, investing the capital in specified by-law assets only and other UCITS-specific rules.

In order to be authorised, the MC shall fulfil a set of conditions. This comprises the minimum capital of the external management company (at least EUR 125,000)[190], the sufficiently good repute of persons conducting the management[191], the clear organisational structure of the management company[192] and others.

The list of functions the management company performs on behalf of the UCITS fund is mentioned in Article 6 and Annex II of the UCITS Directive implemented in the 2010 Law on

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[187] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 27(1); See also European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 28

[188] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 2(1)(b); See also the transposed law Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Chapter 15, Articles 101-124-1

[189] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 5(2)

[190] Ibid, Article 7(1)(a)

[191] Ibid, Article 7(1)(a)(ii)

[192] Ibid, Article 7(1)(a)(iii)

UCI. This includes investment management, administration (accounting, customer inquiries, valuation and pricing, regulatory compliance monitoring, unit-holder register maintenance, income distribution, unit issues and redemptions, contract settlements and record keeping), and marketing.[193] Hence, the three distinct categories of functions are to be deducted: (1) investment management, (2) administration[194] (3) marketing of the UCITS units or shares. [195]

By way of derogation, the management company may also be authorised to perform investment services in addition to the management of UCITS: (a) management of portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Annex I, Section C to MiFID Directive; and (b) as non-core services: (i) investment advice concerning one or more of the instruments listed in Annex I, Section C to MiFID Directive; (ii) safekeeping and administration in relation to units of collective investment undertakings.[196]

The management company shall also follow the requirements related to all the UCITS management companies deriving from the UCITS Directive (Chapter III) as well as national provisions (Chapter 15 of the UCI 2010 Law, CSSF Circular 16/698 and others). In this vein, the management company shall also respect the rules of conduct[197] and organisational requirements[198].

For instance, the management company shall be: "…[s]*tructured and organised in such a way as to minimise the risk of UCITS' or clients' interests being prejudiced by conflicts of interest between the company and its clients, between two of its clients, between one of its clients and a UCITS, or between two UCITS."*[199]

In addition, respect the hierarchy of norms[200] related to risk management of the company being separate from the rest of the structure. [201]

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[193] Ibid, Annex II
[194] The latter category lays the following functions: legal and fund management accounting services, customer inquiries, valuation and pricing, regulatory compliance monitoring and others.
[195] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Annex II
[196] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Annex I
[197] European Union, Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company OJ L 176 (2010)
[198] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 10, 12
[199] Ibid, Article 12(1)(b)
[200] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 37
[201] Commission de Surveillance du Secteur Financier (CSSF), Regulation No 10-4 as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (2010), Article 13(3)(b)

"Management companies shall establish and maintain a permanent risk management function. The permanent risk management function referred to in paragraph (1) shall be hierarchically and functionally independent from operating units."[202]

The already mentioned CSSF Circular 18/698[203] sets the procedural mechanisms for the Investment Fund Managers (IFM) to control the internal processes of the fund: regulatory compliance, risk management and internal audit (through the fund's structural organs, i.e. management company, depositary). The results of the controls are to be summarised by the designated persons of the management company and further communicated to the fund's governing body and the CSSF in writing. [204]

"In accordance with CSSF Regulation 10-4 and Delegated Regulation (EU) 231/2013, every IFM must establish and maintain operational a permanent compliance, risk management and internal audit function."[205]

Besides, the MC shall also respect rules of conduct set up by the national competent authority that shall compulsorily include the following elements from the UCITS Directive: acting honestly, with due skill, employing the procedures and resources effectively, trying to avoid the conflict of interests, complying with all the regulatory requirements.[206]

Level 2 regulations further implement the said rules.[207] The management company of the specific fund performs the function of indirect control instructed by the national competent authority (bottom-to-up approach).[208] The fund's managers are to compulsorily communicate to the CSSF the reports in writing on how the investment fund complies with the regulatory requirements, how the risk management is done and what the results of internal auditing are.

In this way, the investment fund management company renders the fund's internal control with subsequent reporting to the national competent authority, i.e. CSSF's internal agent. This allows reaching the fund's enhanced conformity with the regulatory requirements continuously.

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[202] Ibid, Article 13

[203] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/698 (2018)

[204] Ibid, para 163

[205] Ibid, para 162

[206] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009); See also Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 111; See also Commission de Surveillance du Secteur Financier (CSSF), Regulation No 10-4 as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (2010), Articles 25-26

[207] For example, see European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012); See also European Union, Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company OJ L 176 (2010); See also https://www.cssf.lu/en/legal-requirements-authorisation-procedure-manco-16/ [last accessed 31 August 2022]

[208] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 12/552 (2012), Chapter 6. Internal control

AIF management company

The AIF management company is defined by the AIFM Directive (Level 1)[209] as follows: *"Alternative Investment Fund Managers (AIFMs)": legal persons whose regular business is managing one or more AIFs"*[210]. The latter Directive is transposed in the 2013 Law on AIMF[211]. Besides, the country-specific provisions related to the management process also derive from the already mentioned Circular 18/698 and others[212].

The AIFM Directive is aimed at establishing "…[t]*he rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union"*[213]. Hence, the authorisation issued by the national competent authority is given to the management company – the investment actor, not the AIF's product.

Among the requirements necessary for obtaining the mentioned authorisation, the more general ones concern the minimum capital of the external manager (EUR 125,000)[214]. Alternatively, EUR 300,000 if the AIF is managed internally.[215] The manager's functions are mentioned in the AIFM Directive (Article and Annex I) and divided into three principal categories: (1) investment management functions (portfolio management and risk management), (2) administration (legal and fund management accounting services, customer inquiries, valuation and pricing, including tax returns, regulatory compliance monitoring, maintenance of unit-/shareholder register, distribution of income, unit/shares issues and redemptions, contract settlements and record keeping), (3) marketing and services necessary to meet fiduciary duties.[216]

The said functions are to be performed in accordance with the rules of conduct imposed by the AIFM Directive (Level 1) and the Commission Delegated Regulation 231/2013[217]. Notably, to "…[a]*ct honestly with due skill, care and diligence and fairly in conducting their activities…"*[218] and to perform in the fund's best interest[219].

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[209] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011)
[210] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 1(46)
[211] Ibid, Preamble (46)
[212] For example, Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 10/467 (2010) ; See also European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012)
[213] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 1
[214] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 8
[215] Ibid, Article 8(1)
[216] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 6, Annex I
[217] European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 21
[218] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 11(1)(a)
[219] Ibid, Article 11(1)(b)

The AIFM-specific requirements derive from AIFM Directive and the 2013 Law[220]. For example, the risk management of investment activity both at the time before the transactions and during the post-investment period, i.e. continuous review of risks with adequate frequency.[221]

"AIFMs shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed…"[222].

As well as following the AIF's investment strategy, i.e. risks and objectives,[223] maintaining the appropriate liquidity level,[224] sound administrative and accounting procedures, and electronic data processing.[225]

In this context, it is fair to underline that the manager has the direct and implied task of managing the day-to-day business of the investment fund in part of selecting the assets for investing, assessing the risk and potential non-compliance, and organising the sound and prudent administration. [226] Its core objective is ensuring the performance, execution and compliance with the pertinent legal and regulatory framework. *"AIFMs must provide the CSSF, on request, with all the information necessary to allow the CSSF to monitor compliance with the conditions referred to in this Law at all times."[227]* The technical and procedural details of such an obligation are further laid down by the national competent authority (Level 3), i.e. templates[228], the channels of information transmission[229] and the time frames, i.e. quarterly reporting[230].

The latter suggestion also proves the management company of the AIF to be treated as a CSSF's agent in terms of indirect supervision of the mentioned funds under the bottom-to-top principle.

Conclusively, the mentioned analysis forms a principal specificity of the investment fund's legal design, affirming the existence of internal supervision fulfilled by the manager on behalf of the CSSF in regulatory compliance, internal auditing and risk management. The given specificity and its outcomes on the abuse potentiality in the investment protection regime will be discussed further. However, for the moment, it is possible to deduct that the given feature underlines the strict legal regime of supervision done with a two-way modality approach: external and internal supervision of investment fund activity by the national competent authority and the management company, respectively. The said approach coincides with the previously mentioned example of duality widely utilised for categorising investment funds and their products. Hence, implying a

[220] Ibid
[221] Ibid, Article 14
[222] Ibid, Article 14(2)
[223] Ibid, Article 14(3)(a)
[224] Ibid, Article 15
[225] Ibid, Article 16; See also Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), Preiner Christina, Chapter 2: Scope of the AIFMD
[226] Danielle Sougne, Rafik Fisher and Claude Kremer, "Fund Industry in Luxembourg" (2016) Larcier Business, p. 76
[227] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 5(7)
[228] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 10/467 (2010), Annexe 1
[229] Commission de Surveillance du Secteur Financier (CSSF), Circualr CSSF 15/633 (2015), p. 1
[230] Ibid, p. 1-2

strict legal and regulatory framework designed to standardise and formalise the functioning of investment funds.

Depositary

Having analysed the management companies for both principal categories of the fund, the author further proceeds with analysing the functions of the depositary and potential specificities one could deduct for the purposes of the given research.

Unlike the management companies and managers, the depositaries, in principle, enjoy a set of functions that are no different to the UCITS or AIF funds, except for legal sources and stricter UCITS provisions envisaged to allow stronger protection to retail investors.

The main set of provisions setting the legal regime of the depositary for the UCITS fund derives from the Level 1 UCITS Directive (Chapter IV) and Level 2 Commission Delegated Regulation 2016/438, Law on UCI (2010) and the CSSF Regulations/Circulars[231].

For the AIF fund, the provisions on depositaries derive from the Level 1 AIFM Directive (Section 4), Commission Delegated Regulation 231/2013[232] (Level 2) and 2013 Law on AIFMD[233] and previously mentioned CSSF Regulations/Circulars.

The UCI Law 2010 defines the depositary as follows: "“[d]*epositary” means a credit institution entrusted with the duties as set out in Articles 17, 18, 33 and 34 for Luxembourg UCIs”*[234].

Every investment fund, AIF or UCITS, shall appoint a single depositary.[235] The latter shall originate from the national jurisdiction where the investment fund is authorised/registered.[236] For the AIF depositary, the minimum capital is EUR 730,000.[237] Instead, no specific minimum capital requirement is set for UCITS depositaries.[238]

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[231] For example, Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 16/644 (2016); Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/697 (2018)

[232] Official Journal of the European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision Text with EEA relevance (2013)

[233] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Section 4 (Level 4); See also European Securities and Markets Authority (ESMA), Questions and Answers. Application of the AIFMD. (ESMA34-32-352) (2021) (Level 3); See also European Securities and Markets Authority (ESMA), "Guidelines on key concepts of the AIFMD" (2013)(Level 3

[234] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 1(2)

[235] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 19(1); See also European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 22(1)

[236] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 19(5); Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 17(2)

[237] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 19(3)(i)

[238] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 16/644 (2016), Part II

The appointment of the depositary shall be made in the form of a written contract for both fund categories.[239] The depositaries and their functioning are subject to the rules of conduct and pre-defined organisational requirements laid down by the national competent authorities.[240]

"The obligation for the depositary to act honestly, fairly, professionally, independently and solely in the interest of the AIF and the AIF investors includes in particular the obligation for the activities of the AIF depositary to be managed and organised in a way that minimises any potential conflicts of interest."[241]

Besides, the fund's depositary is independent of the management company/managers to avoid any conflict of interest harming regulatory compliance and sound fund supervision. For instance, the CSSF Circular 18/697 mentions the relations between the AIF management company and the depositary related to the delegation of functions[242] or rules relating to preventing senior management employees of an IMF from being employed by the depositary.[243]

Alternatively, see CSSF Circular 16/644 concerning the rules between the UCITS management and the depositary. For example, the depositary will follow the escalation procedures in case of any possible discrepancies or irregularities applicable to UCITS management.[244]

The depositary comprises three distinct categories of functions[245]: (1) cash flow monitoring[246], (2) safekeeping of assets[247] and (3) oversight responsibility[248]. Each mentioned category encapsulates several task-specific missions put on the depositary by the regulator.

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[239] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 19(2); See also European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 22(2)

[240] See, for example, European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Chapter 2

[241] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/697 (2018), Part III, Chapter 1, para 52

[242] Ibid, Part III, Chapter 1, para 53

[243] Ibid, Part III, Chapter 1, para 59

[244] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 16/644 (2015), Chapter 5

[245] See official website https://www.cssf.lu/en/depositary-bank/ [last accessed 29 August 2022]

[246] European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Article 9-10; See also European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 85-86

[247] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 22; See also European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 21(3)See also Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 17(4); See also European Union, Commission Delegated Regulation (EU) 2018/1618 as regards safe-keeping duties of depositaries OJ L 271 (2018), Article 1; See also European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 89-90

[248] European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Article 3 on oversight duties for UCITS depositaries; See also European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 92

Namely, the cash-flow monitoring category comprises the depositary's duty to review the fund's cash flow daily and ensure the timely settlement of transactions. Instead, the safekeeping category of functions includes the depositary's duty to verify the ownership of assets while maintaining the record-keeping of titles and ensuring the investments are made per the fund's establishing documents. Lastly, the third category of functions is most pertinent to the current research objectives as it correlates with ensuring the fund compliance with the pertinent regulatory requirements, i.e. ongoing due diligence of the fund activity and subsequent reporting to the national competent authority.

The EU Delegated Regulations (Commission Delegated Regulation 2016/438 for the UCITS depositary and Commission Delegated Regulation 231/2013 for the AIF depositary) further specify the said function in more detail. Importantly, both of them are identical and concern four distinct aspects:

- Assessing the risks related to the nature of the fund in order to develop the oversight procedures fit for the latter;[249]
- Performing ex-post controls and ensuring the appropriate conciliation and verification procedures exist;[250]
- Establishing clear and comprehensive escalating procedures dealing with the detected irregularities while performing the oversight duties;[251]
- Obligation of the AIFM/UCITS management (investment) company to provide the depositary, before commencing its functions, all the necessary information in order to comply with AIFM (Article 21(9) and UCITS (Article 22(3)) Directives respectfully[252].

The respective CSSF Circulars further follow the Delegated Regulations. For example:

For UCITS depositary (CSSF Circular 16/644): *"The depositary is required to provide the CSSF, upon request, with all the information the depositary has obtained in the performance of its duties and which might be necessary to allow the CSSF to monitor compliance with the laws and*

[249] European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Article 3(1) (UCITS); European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 91(1) (AIF)
[250] European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Article 3(2) (UCITS); European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 92(2) (AIF)
[251] European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Article 3(3) (UCITS); European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 92(3) (AIF)
[252] European Union, Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries OJ L 78 (2015), Article 3(4); European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 92(4) (AIF)

regulations applicable to the depositary as well as the UCITS for which the credit institution acts as depositary."[253]

For AIF depositary (CSSF Circular 18/697): *"The depositary is required to provide the CSSF, upon request, with all the information the depositary has obtained in the performance of its duties and which might be necessary to allow the CSSF to monitor compliance with the laws and regulations applicable to the depositary as well as the AIF for which it acts as depositary."*[254]

An example of the oversight rule concerns the depositary function in relation to a brokerage, providing the AIF fund with access to financial instruments, i.e. derivatives, leverage[255] and others. In this vein, *Zetzsche* mentions: *"Even if the prime broker is not the sub-depositary, the depositary must oversee compliance with the law and the AIF's constituting documents as "second level control"*[256]. This implies the extension of the oversight function towards the fund's external counterparties, i.e. prime brokerage.

The fulfilment of the presented function, i.e. regulatory compliance and supervision with subsequent reporting to the national competent authority, manifests the depositary as the fund's internal organ of the CSSF. Consequently, ensuring the fund's compliance with the recurring legal provisions – a unique feature of an investment fund deriving from its legal design.

Consequently, this allows deducting the latter organs of investment funds (management and depositary) to be viewed as CSSF agents performing the function of supervision of the investment funds from the inside. This develops the specificity of the investment fund legal and regulatory framework where the fund's supervision subject to laws compliance is not only performed by the national competent authority directly but is also instructed through the particularities of the fund's legal design compulsorily comprising the above-discussed organs. The latter organs develop the procedures and assign the responsible ones with internal control and reporting to the fund's administration and the national competent authority. Consequently, the core of the just mentioned specificity rests with a two-folded supervisory mechanism performing the fund's surveyance continuously and indirectly.

The said knowledge is deducted for further estimation of abuse potentiality in relation to the investment fund. Hence, by following the objective of precising the legal phenomenon of abuse and delimiting the latter, the Thesis continues to explore the specificities of the investment fund legal and regulatory framework, including the funds' typology.

Fund types

As already reviewed, the investment fund setup process consists of several stages. This includes selecting the fund category (UCITS or AIFM), deciding on the fund's legal form (investment

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[253] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 16/644 (2015), para 88
[254] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/697 (2018), para 161
[255] European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012)
[256] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), (Prime)Brokerage, p. 555

company, contractual agreement or any other form[257]) and its unit/share's regime (open-ended (i.e. SICAV, FCP) or closed-ended (i.e. SICAF). In this vein, the current part will review another optionality related to the fund taxonomy.

The investment fund legal and regulatory framework encapsulates various fund types to choose from, depending on the already done customisation, i.e. professional or retail investors, investment objectives and others. Differently said, selecting the investment fund type implies choosing the investment vehicle for performing the collective portfolio management function (from the manager's perspective) and investing activity *via* participating in the fund (from the shareholders' or unitholders' perspective). The investment fund legal regime offers a variety of the said vehicles to choose from, depending on the various factors fitting the needs of investors and the jurisdiction at review.

The legislative impulse developing the fund type usually derives from the national legislator's initiative specific to particular national jurisdiction and is applicable within the latter's limits. However, the EU may also ignite the regulatory establishment of a distinct fund type (Level 1) that applies to the entire EU under the principle of maximum harmonisation.[258] The analysis below provides an overview of the principal fund types appearing out of national and EU legislative initiatives.

As a last point before advancing to the overview of the specific fund types, it is worth mentioning that the fund types established due to national legislative initiatives may fall under the UCITS or AIF Directives (Level 1). Alternatively, the fund's management may choose none of the said regimes but follow the specific to national law only investment vehicles, non-AIF/non-UCITS legal regime.

Specialised Investment Fund (SIF)

The Luxembourg Law on Specialised Investment Funds (SIF) (2007) defines the latter fund type as follows:

"…[s]*pecialised investment funds shall be any undertakings for collective investment situated in Luxembourg:*

> *- the exclusive object of which is the collective investment of their funds in assets in order to spread the investment risks and to ensure for the investors the benefit of the results of the management of their assets, and*
>
> *- the securities "or partnership interests" of which are reserved to one or several well-informed investors, and*

[257] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 2(2)(b)
[258] For example, European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015)

- the constitutive documents or offering documents "or partnership agreement" of which provide that they are subject to the provisions of this Law."[259]

The legal framework establishing the reviewed fund type derives from the national legislative initiative. The latter is designed for professional clients and has no implied limitations on what assets to invest, provided some limitations laid down by relevant provisions are fulfilled.[260] Put differently, the UCITS Article 5 requirement does not apply to SIF. Although the said fund belongs to the AIF category, the latter may be constituted as a non-AIF fund, i.e. does not follow the AIFM Directive. Consequently, the SIF law is divided into (1) general provisions applicable to all SIFs[261] and (2) provisions applying to AIF SIFs[262].

The AIF SIF is subject to the AIFM Directive, the 2013 Law on AIFM and subsequent Level 2 acts. For example, the management function of asset valuation shall be done in accordance with the above-mentioned legislation. This implies following the Delegated Regulation 231/2013 related to policies and procedures for the valuation of assets of the AIF[263]. Instead, the non-AIF SIF is spared from the mentioned requirements. This draws the difference between the two categories of the same fund type and shall be taken into account when considering the latter in the investment protection regime.

Before commencing its activities, the SIF fund must obtain prior authorisation from the national competent authority (CSSF)[264] and be placed in a dedicated registry[265]. Its management company shall also be authorised under the AIFM Directive for an AIF SIF. SIF may be established in either a contractual form or in the form of an investment company. In the latter case, the fund may either be an open-ended or closed-ended fund (i.e. SICAV/F), having the discretion to be incorporated as a SA, SCA, SCS or other legal forms.[266]

The CSSF Circular 07/310 installs the regulatory requirements for the SIF fund exclusively to provide the financial information necessary for supervision on a monthly and annual basis.[267]

The minimum net asset capital of the SIF is set to be no less than EUR 1,250,000 with a potential extension by the grand-ducal regulation up to EUR 2,500,000[268]This, in particular, draws the investment fund's specificity in the context of the given research – the regulatory obligation being put on investment funds to attain a certain level of capitalisation.

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[259] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Article 1(1)
[260] For example, Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 07/309 (2007)
[261] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Part I
[262] Ibid, Part II
[263] Ibid, Article 82 (Part II)
[264] Ibid, Article 42
[265] Ibid, Article 43
[266] Ibid, Article 25
[267] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 07/310 (2007)
[268] Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Article 21

The given requirement being capital intensive also differentiates the SIF fund from the rest of the fund types to be reviewed further and develops parallels with the investment protection regime dealing with capital-intensive disputes, namely, implying the latter's compatibility in terms of fulfilling the jurisdictional requirement deriving from the treaty definition of investment, i.e. substantial benefit to the host State economy.

Investment Fund in Risk Capital (SICAR)

The Investment Fund in Risk Capital (fr. *société d'investissement en capital à risque) (SICAR)* represents another fund type developed by Luxembourg legislator. The SICAR law (2004) defines the given fund type as follows:

"…[W]*hose object is to invest its assets in securities representing risk capital in order to ensure for its investors the benefit of the result of the management of its assets in consideration for the risk which they incur…".*[269]

Subsequently, the SICAR fund invests in assets considered risky. This renders the latter as an AIF fund available to professional clients unless authorised by the State to market to retail clients (Article 43 AIFM Directive).[270]

As previously mentioned, the fund's administration may opt not to follow the AIFMD legal regime, i.e. non-AIF SICAR and be bound by the national law only, i.e. SICAR law. However, this will limit the latter from marketing its shares within the EU[271].

Generally speaking, all investments carry the element of risks, hence, they are considered risky. However, the "*risk*" is approached by the subsequent law in the following way:

"Investment in risk capital means the direct or indirect contribution of assets to entities in view of their launch, development or listing on a stock exchange."[272] Therefore, the inseparable element of risk relates to the stock market, where the assets invested by the SICAR fund are circulated.

Interestingly, on one side, the investments done by the SICAR fund fulfil the criteria of risk related to the investment under the *Salini* test. On the other side, considering their interconnection to the stock market, they are simultaneously regarded as portfolio investments designed for short-selling and other speculative practices lasting less than an ordinary institutional investment.

[269] Journal officiel du Grand-Duché de Luxembourg, Law of 15 June 2004 relating to the Investment company in risk capital ("SICAR") (2004), Article 1(1)
[270] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 43
[271] Ibid, Article 31(1)
[272] Journal officiel du Grand-Duché de Luxembourg, Law of 15 June 2004 relating to the Investment company in risk capital ("SICAR") (2004), Article 1(2)

The latter mention of specific risk is not the only distinctive feature of the investment company of SICAR. The given fund is forbidden to be established based on the contract, i.e. FCP.[273] Instead, the fund may be established as a closed-ended (SICAF) or open-ended (SICAV). The legal forms available to the latter: SA, SCS, SCP and others mentioned by the respective law.[274] The SICAR's minimum capital is EUR 1 million.[275] SICAR shall publish a prospectus and annual reports.[276]

Besides, the authorisation is to be received from the CSSF before its activity starts.[277] The same obligation applies to SIF. The latter reservations are explained by a higher-than-usual risk level the given fund faces when performing. Hence, although permitting the said variation of the type of fund, the regulator, nevertheless, imposes precautionary measures to avoid market disruptions in case of capital loss, i.e. the previously discussed objective of sound functioning of financial markets put into practice.

The correlation between supervision and abuse prevention may be mentioned in this context. Namely, the more supervision the fund receives (any fund), the lower the risk of abuse. The latter is assumed based on the following: the national competent authority is responsible for ensuring the fund's compliance with the investment fund's legal and regulatory framework, i.e. market integrity. The mentioned compliance implies strict following of norms instructed, *inter alia*, to avoid abuse.

What concerns the management and depositary requirements, the rules applicable to other funds are also valid for SICAR. Namely, the ones stemming from the AIFM Directive (EU AIF) and Law on SICAR.

Consequently, despite an elevated investment risk, the given fund type has the standing to be recognised as a valid investor under the investment protection regime. Namely, the legislative basis regulating the given fund provides no legal limitations that would make the latter incompatible with treaty requirements, the *Salini* test or any good faith implications.

On the other side, the factor of the investment fund being designed to face the elevated risks does not necessarily imply the latter increases the risks of abuse in the investment protection regime. Namely, the latter's activity is to be continuously supervised internally, i.e. management company, and externally, i.e. CSSF. The given regulatory surveyance pre-determines the fund's activity as expected by the former. This, consequently, tampers the abuse risks related to the investment protection regime. Nevertheless, the latter is to be further examined when considering the investment fund's specificities against the potentiality of abuse.

Reserved Alternative Investment Fund (RAIF)

[273] Ibid, Article 1(1)
[274] Ibid, Article 1(1)
[275] Ibid, Article 4
[276] Ibid, Chapter V
[277] Ibid, Article 11-17

Reserved Alternative Investment Fund (RAIF) is another fund type developed by the national legislative initiative. The Luxembourg law on RAIF (2016) defines the latter as follows:

"For the purpose of this Law, reserved alternative investment funds shall be any undertakings for collective investment situated in Luxembourg:

a) which qualify as alternative investment funds under the amended Law of 12 July 2013 on alternative investment fund managers, and

b) the sole object of which is the collective investment of their funds in assets with the aim of spreading the investment risks and giving investors the benefit of the results of the management of their assets, and

c) the securities or partnership interests of which are reserved to one or several well-informed investors, and

d) the articles of incorporation, the management regulations or the partnership agreement of which provide that they are subject to the provisions of this Law."[278]

The principal difference between the SIF and RAIF is the latter's right to be not the object of direct authorisation by the CSSF. Instead, the RAIF fund is established based on the notary deed[279] with its further inscription in the register of commerce and companies, i.e. RCS.[280]

Consequently, the RAIF's prospectus offered to professional investors shall indicate on its front page the mention of the latter fund (investment product) being not supervised by the CSSF.[281] However, this does not mean that the RAIF fund has no supervision whatsoever. The latter is done through the management company/manager and depositary (investment actor) *via* the avenue of the AIFM Directive and Level 3-4 guidelines and recommendations from the national competent authority. This implies that the CSSF is aware of and monitors the RAIF's investment activities *via* the medium of the fund's structural organs (fund actors). This underlines the previously discussed role of managers as CSSF's agents, i.e. internal supervision.

Importantly, the RAIF fund falls exclusively under the AIF regime and the subsequent legal requirements stemming from the AIFM Directive. The given suggestion derives from the very definition of RAIF stating that the latter fund must "…[q]*ualify as alternative investment funds under the amended Law of 12 July 2013 on alternative investment fund managers…".*[282]

The RAIF fund may have a contractual form[283] and be established as an investment company (SICAV/SICAF[284]). All forms of legal entities to select are as available to RAIF as to SIF, i.e. SA, SCA, SCS. The minimum capital of RAIF shall be no less than EUR 1,250,000[285].

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[278] Journal officiel du Grand-Duché de Luxembourg, Law of 23 July 2016 on reserved alternative investment funds (RAIF) (2016)
[279] Ibid, Article 34
[280] Ibid, Article 34(3)
[281] Ibid, Article 40
[282] Ibid
[283] Ibid, Chapter 2

The subscriber to the RAIF's shares shall be a well-informed investor (institutional investor, professional investor) or any other investor fulfilling either of the two conditions: investing no less than EUR 125,000 in the fund's shares/units or being a subject of assessment made by a credit institution.[286]

Consequently, the RAIF fund spared from CSSF's direct supervision is, nevertheless, subject to indirect control rendered by the fund's structural organs, i.e. management company and the depositary. In this vein, the said organs fall under the obligation of oversight and regulatory compliance reviewed in the previous parts.

Evidently, the supervision of the fund's actors only develops a lighter form of control compared to the previously reviewed SIF. However, this does not mean the RAIF fund enjoys a lesser jurisdictional standing for the investment protection regime. Namely, the variability of investment fund supervision represents the regulatory requirements set by national law. The latter's fulfilment would imply the fund is duly authorised/registered and is valid for exercising the treaty rights, provided the principal criteria stemming from the treaty requirements, i.e. *Salini* test, good faith treaty definition and others, are fulfilled. Therefore, the presumption of jurisdictional validity for the purposes of the investment protection regime is applied.

European Long-Term Investment Fund (ELTIF)

The ELTIF stands for European Long-Term Investment Fund, elaborated as a result of the EU Regulation (ELTIFR) (2015) [287]. As mentioned by *Zetzsche*, the latter is an enabling piece of legislation responding to the gaps in the European economy. Namely, by emphasizing investing in *"real assets"* [288] by professional and retail investors for a long-term perspective.[289] The said modality of the fund's functioning creates a long-lasting positive effect by developing the EU's principal infrastructural projects.[290]

The ELTIF Regulation had been adopted "…[t]*o raise and channel capital towards European long-term investments in the real economy, in line with the Union objective of smart, sustainable and inclusive growth"*[291]. Having developed the given fund type *via* adopting an EU broad Regulation, the latter provisions are directly applicable in the jurisdictions of all Member States. Consequently, the ELTIF may only take the form of an AIF without having the modality to select the non-AIF regime.[292] *"By definition, ELTIFs are EU AIFs that are managed by*

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[284] Ibid, Chapter 3
[285] Ibid, Article 25
[286] Ibid, Article 2(1); See also European Union, Regulation 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation OJ L 176 (2013)
[287] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015)
[288] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), p. 95
[289] Ibid, p. 95
[290] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Preamble (2-3)
[291] Ibid, Article 1(2)
[292] Ibid, Article 3(2)

alternative investment fund managers (AIFMs) authorised in accordance with Directive 2011/61/EU."[293]

The ELTIF fund is open for investing to both professional and retail investors, it is a: ""…[h]*ybrid" concept lying somewhere between the AIFM and the UCITS worlds as it can invest in liquid assets but also offers an EU passport to AIFMs for marketing to retail investors and is subject to stringent rules inspired by UCITS rules as mentioned above."*[294]

The ELTIF Regulation lays down the limitations to eligible assets divided by the legislator into two principal categories.

First category: the investments authorised by the UCITS Directive, i.e. transferable securities and other eligible investments.[295] Provided, no use of short-selling and other techniques alien to long-term investment practices is available[296], i.e. speculative techniques.[297]

In this vein, the ELTIF Regulation further defines the eligible investment assets: "…[r]*eal assets with a value of more than EUR 10 000 000 that generate an economic and social benefit. Such assets include infrastructure, intellectual property, vessels, equipment, machinery, aircraft or rolling stock, and immovable property. Investments in commercial property or housing should be permitted to the extent that they serve the purpose of contributing to smart, sustainable and inclusive growth or to the Union's energy, regional and cohesion policies. Investments in such immovable property should be clearly documented so as to demonstrate the long-term commitment in the property. This Regulation is not seeking to promote speculative investments."*[298]

Second category: investing in equity or quasi-equity instruments, debts, direct or indirect holdings of individual real assets,[299] loans and shares of other ELTIFs funds, the European Venture Capital Fund (EuVECA)[300] and the European Social Entrepreneurship Funds (EuSEF)[301].

[293] Ibid, Preamble (8)
[294] Olivia Moessner, "The European Long-Term Investment Fund ("ELTIF") Regulation: A new European Label Success Story for Luxembourg?" (2015), p. 3
[295] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Article 9
[296] Ibid, Article 9(2)
[297] Olivia Moessner, "The European Long-Term Investment Fund ("ELTIF") Regulation: A new European Label Success Story for Luxembourg?" (2015), p.6
[298] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Preamble (18)
[299] Ibid, Article 10(e)
[300] Ibid, Article 10(d) ; See also Journal officiel du Grand-Duché de Luxembourg, Law of 16 July 2019 on the operationalisation of European regulations in the area of financial services (2019); See also European Union, Regulation 345/2013 on European venture capital funds OJ L 115 (2013)
[301] European Union, Regulation 346/2013 on European social entrepreneurship funds OJ L 115 (2013)

Besides, Article 11 draws the limited scope of portfolio undertakings eligible for investment, i.e. not a financial undertaking.[302] The given limitation ensures a low investment risk with a long-term perspective.[303]

The rules on fund composition provide that 70% of the entire capital shall be invested in the second category of investments, i.e. real economy rather than financial instruments. The latter is coherent with the fund's objective – long-term and specialising in *"real assets"*.[304] For these reasons also, ELTIF is precluded from borrowing more than 30% of its capital.[305] As a result, while being an AIF fund type, ELTIF Regulation encapsulates the requirements similar to the ones applicable for the UCITS funds, i.e. risk-spreading, specific assets only.[306]

What concerns the longevity of investment, this approach had been constructed with a view of a limited right of shares redemption by the fund subscribers.

"Investors in an ELTIF shall not be able to request the redemption of their units or shares before the end of the life of the ELTIF. Redemptions to investors shall be possible from the day following the date of the end of the life of the ELTIF."[307]

The latter also goes hand in hand with the fund's objective of investing in the *"real economy"*.[308] Only upon finishing the goals set by the fund, i.e. developing a specific infrastructure project, the fund has the legal standing to dissolve itself with the subsequent redemption of shares. The information on the dissolution day of the ELTIF is specified in the founding documents and the prospectus offered to potential subscribers.[309]

Before starting the investment activity, the ELTIF fund shall obtain authorisation from the national competent authority[310] and the management company (EU AIFM) of the latter fund[311]. No rule on minimum capital requirement is present in the specified Regulation.

The legal design of the ELTIF fund proves to be a "perfect match" for what is sought in investors by the investment protection regime. First, the longevity of investments correlates with the *Salini*

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[302] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Article 11

[303] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), p. 96-98

[304] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Preamble (27)

[305] Ibid, Article 14

[306] See also European Union, Commission Delegated Regulation 2015/760 with regard to regulatory technical standards on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the European long-term investment funds, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors OJ L 81 (2018)

[307] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Article 18(1); In this context, see also Article 18(2) with some derogations from the mentioned rules.

[308] Ibid, Preamble (2-3)

[309] Ibid, Article 18(1) ; See also Olivia Moessner, "The European Long-Term Investment Fund ("ELTIF") Regulation: A new European Label Success Story for Luxembourg?" (2015), p. 8

[310] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015), Article 5(1)

[311] Ibid, Article 5(2)

requirements and affirms the latter being compatible with the direct investment definition. Second, the Regulation directly mentions the eligible investment assets to be no less than EUR 10,000,000 and "…*that generate an economic and social benefit*" [312] implying the fulfilment of economic benefit to the host State aspect. And, third, the ELTIF fund is exposed to strict regulatory supervision for its product and actors. This means, *inter alia*, lowering the potentiality of abuse under the assumption that the stricter the supervision, the more compliant the fund for the abuse prevention reason.

Besides, the regulatory obligation put on the fund's administration to dissolve only upon fulfilling the set goal implies the latter fund type produces the investments that have more features with the FDI investments, i.e. longevity, investments in the real economy and others. The latter requirement is unique compared to the rest of the investors participating in the investment protection regime. Namely, unless provided in a bilateral agreement with the host State, the investor can cease its activity whenever it deems appropriate. Put differently, one has the right to invest and receive protection, not an obligation. Instead, the ELTIF fund is obliged by the investment fund law to continue its activity until fulfilling the set goals in the host State's jurisdiction. This proves a solid regulatory example of how the norm's importing impacts the host State and the potentiality of abuse within the investment protection legal regime.

Notably, the ELTIFR is undergoing the process of reforming with no adopted changes yet (as of October 2022). The EU Commission had proposed the fund legal regime amendments in light of the EU's efforts for "…[d]*eveloping the more smart, sustainable and inclusive growth…*"[313].

The proposal suggests authorising the ELTIF fund to invest in the UCITS and AIF funds managed by the EU AIFM.[314] Besides, the legal mechanism of minority co-investments[315] and the decrease of a minimum value of assets to invest, i.e. EUR 1 million,[316] is also suggested. However, the conceptual fundament on which the ELTIF fund type stands does not experience a drastic change. Namely, the latter continues to pursue the goal of long-term investing designed to develop structural projects in the real economy.

The mentioned underlines the investment fund legal and regulatory framework to adapt to the currently existing economic challenges and develop a sustainable supervisory solution to respond with. As a result, lowering the abuse potentiality for the side of investment funds participating in the investment protection regime under the previously mentioned assumption that the more the investment fund is supervised, the more it is compliant with the legal regime that, *inter alia*, targets abuse prevention. Therefore, under the legal phenomenon of norms importing, the updates in the investment fund legal framework are also assumed to impact the investment protection regime lacking the consistency of interpretation and absence of a continuous doctrinal pattern when conceptualising the legal phenomenon of abuse.

[312] Ibid, Preamble (18)
[313] European Union, Proposal 2021/0377 (COD) for amending Regulation (EU) 2015/760 as regards the scope of eligible assets and investments, the portfolio composition and diversification requirements, the borrowing of cash and other fund rules and as regards requirements pertaining to the authorisation, investment policies and operating conditions of European long-term investment funds (2021), p.1
[314] Ibid, p. 9
[315] Ibid, p. 9
[316] Ibid, p. 9

The combination of reviewed fund types underlines the variety of investment vehicles available to investors. The various conditionalities render some of them to be more relevant to the investment protection regime, affirming their jurisdictional standing, i.e. minimum capital requirement and obligation to continue the investments. Whereas, this is not the rule for all of the reviewed fund types, i.e. investment in risk capitals. Nonetheless, the underlined variability affirms the investment fund legal and regulatory framework to carry distinct and sufficient legal specificities, rendering the latter actor radically different from the rest of the investors participating in the investment protection regime.

The Regulation on Market Abuse (MAR)

Along with developing the investment fund legislative framework, the EU adopted Regulation 596/2014 on Market Abuse (2014) [317], establishing its specific conceptual visionary of abuse.

The MAR Regulation defines the abuse through a legal device of "unlawful behaviour" comprising two principal activities: insider dealing (unlawful disclosure of insider information) and market manipulation. Despite the maximum harmonisation principle in the investment fund legislative framework, the Regulation does not define abuse extensively. Instead, the following interpretation from the Preamble is offered:

"Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of this Regulation, it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation. Such behaviour prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets."[318]

The legislator develops the notion of market manipulation[319] and insider dealing[320] by specifying the negative list of actions indicating the abuse. In this vein, an abuse detection legal device functions as a conditionality trigger: if the specified action matches the Regulation's list, the abuse is deemed to be identified.

The Level 2 Delegated Regulation (Annex II) 2016/522 provides the list of market abuse indicators[321] and practices deemed to violate market integrity. The said legal device monitors the entirety of transactions against the mentioned indicators. For example:

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[317] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014)
[318] Ibid, Preamble (7)
[319] Ibid, Article 12
[320] Ibid, Article 7-8; See also a recent Decion published by the Autorité des marchés financiers (AMF) related to violation of MAR in relation to disclosure of insider information concerning the process of market sounding Autorité des marchés financiers (AMF), Procédure n° 21-11: Décision n°11 du 21 décembre 2022 (2022), para 68-78; See also European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Article 11
[321] The market abuse indicators are further used for an automated monitoring of transactions in the financial services markets and further reporting to the CSSF via Suspicious transaction and order reports (STOR): European Union, Commission Delegated Regulation 2016/957 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements,

"Entering small orders to trade in order to ascertain the level of hidden orders and particularly to assess what is resting on a dark platform — usually known as 'ping orders'"[322]

"Entering large number of orders to trade and/or cancellations and/or updates to orders to trade so as to create uncertainty for other participants, slowing down their process and/or to camouflage their own strategy — usually known as 'quote stuffing'"[323]

The absence of intent in the legal device for abuse detection by MAR had been the point of concern for academic circles calling such an approach to bring divergence in methodologies and create uncertainties.[324]

However, the decision of the regulator to apply a conceptually distinct legal device for abuse detection is also reasoned by a practical aspect. The financial services markets being the object of the MAR, comprise millions of transactions and orders often submitted and executed by automated algorithms.[325] This renders it practically troublesome to review the motivation behind every market order and transaction. As a result, the latter is born technical and formal.

Therefore, Directive 2014/65 obliges the market operators, the investment firms and persons professionally executing the market transactions to monitor[326] the entirety of transactions against the pre-defined indicators set by the Annex II of the Delegated Regulation 2016/522 as well as additional criteria deriving from the MAR's definitions and other regulatory acts. In this way, the subject of monitoring is the order activity rather than the intents or motives of those who submitted the latter, at least at the first stage of review.

The Commission Delegated Regulation (2016/957) had also adopted the reporting system for Suspicious Transactions and Orders Report (STOR). The market operators, investment firms and persons professionally executing the market transactions are obliged to report the said transactions to the national competent authority for further examination and sanctions if necessary.

It is worth mentioning that Regulation on market abuse sets the goal of sound functioning of financial markets with a strong supervisory impetus, i.e. market integrity.[327] Achieving the latter

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systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions (STOR) OJ L 160 (2016)

[322] European Union, Directive 2014/57/EU on criminal sanctions for market abuse (market abuse directive) OJ L 173 (2015), Annex II (1)(c)

[323] Ibid, Annex II (4)(e)

[324] Marco Ventoruzzo and Sebastian Mock (eds), *Market Abuse Regulation: Commentary and Annotated Guide* (Oxford University Press 2017), p. 41

[325] Janet Austin, "Protecting Market Integrity in an Era of Fragmentation and Cross Border Trading" (2014), p. 18; See also Peter Nylen, "Challenges in market abuse monitoring: Post MiFID" (2020), p. 376

[326] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 31,54; See also Marco Ventoruzzo and Sebastian Mock (eds), Market Abuse Regulation: Commentary and Annotated Guide (Oxford University Press 2017), p. 337-341; See also Peter Nylen, "Challenges in market abuse monitoring: Post MiFID" (2020), p. 371-378

[327] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Preamble (70)

objective implies, *inter alia*, prosecuting and sanctioning the abuse that is non-consistent with MAR objectives, i.e. investor protection and market integrity.

Subsequently, the investment fund fulfilling the MAR regulatory requirements with the extended help of the management company and depositary will also impact the abuse potentiality when entering the investment protection regime under the principle of "norms importing". For example, the strict following of the methodology on assets valuation laid down for AIF managers implies the given standard will also be applied by the specific investor entering the dimension of the investment protection regime, i.e. rules importing. Hence, developing a more regularised practice for valuing the disputed assets in the valuation of damages case scenario.

Consequently, the above considerations render it sufficient to consider the MAR forming a separate specificity worth including in further estimation of abuse potentiality.

Investment fund specificities

Having analysed the investment fund legislative and legal and regulatory framework, the aspects of its regulation, the internal structure of investment funds and the specific examples of investment funds, it is reasonable to draw a list of specificities pertinent to the investment fund's legal and regulatory framework.

Importantly, the investment fund legal and regulatory framework encapsulates many distinct specificities. However, only some are pertinent to the current research objectives. In particular, those relevant to the abuse phenomenon in the investment protection regime and the goal of estimating its potentiality.

- The multi-layered structure of regulatory initiative (Lamfalussy process)

The multi-layered regulatory initiative under the Lamfalussy report represents the principal specificity of the investment fund legal and regulatory framework comprising the four distinct levels with several key stakeholders (EU Parliament and Council at Level 1, EU Commission at Level 2, ESMA and national competent authorities at Level 3-4). Consequently, the investment fund legal and regulatory framework is a complex[328] corpus of norms aimed at providing regulatory treatment at the place of occurrence and in correlation to the national law of the Member States.

For example, the AIFM Directive (Level 1) mentions the function of asset valuation given to management companies. The Preamble of the Directive and Article 19 draw a general overview of the given function (brief modalities on selecting the external valuators[329]) and its

[328] See also the doctrinal opinion related to establishing the Single Rulebook on investment fund law as a response to appearing complications and complexities of the latter legal (Level 1-2) and regulatory (Level 3-4) regime: Alain Strowel and Grégory Minne (eds), L'influence du droit europeen en droit economique (L'arcier 2022), Riassetto Isabelle, Pour un *Single Rulebook* unique en droit européen des fonds d'investissement, p. 303-305

[329] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 19(4)

importance.[330] The said acts introduce an EU concept of asset valuation. The AIFM Directive further instructs the European Commission on issuing the Level 2 delegated acts aimed at unifying the specific aspects of the given function on the EU-wide level:[331] the criteria concerning the procedures for proper valuation[332], the professional guarantees of the external valuator[333] and the frequency of valuation[334]. In turn, the function of setting the nation-specific asset valuation rules is further given to the Member States by the AIFM Directive. In this context, the national competent authority develops the valuation methodology in coherence with the Level 1-2 acts placed hierarchically above the latter.[335] As a result, the single function of asset valuation is installed by several distinct regulatory powers with developing the subsequent standards and modalities of its use by the fund managers required to comply.

The four defined levels of regulatory imitative (Lamfalussy report) offer a substantial legal capacity for instructing the specific investment activity at the place of occurrence. This, in turn, allows enhancing regulatory compliance – the prerequisite for lowering the abuse potentiality in any legal system.

It is fair to acknowledge that any national legal regime consists of a system based on primary and secondary laws issued by subsequent institutions. However, this is not the case for the investment protection regime, being based only on a handful of international treaties, bilateral agreements between specific States at review and heterogeneous arbitration case practice leaving no consistent doctrinal pattern with regard to abuse conceptualisation. Hence, juxtaposing the investment protection regime against the robust legal and regulatory framework of the investment fund represents a reasonable choice for achieving the current Thesis's goals.

For these reasons, the author deems the investment fund legal regime comprising four distinct levels of regulatory initiative transposed from the EU to the national jurisdiction to be an apparent and necessary legal specificity to be included in the further estimation of abuse potentiality.

- Homogenous regulatory environment

Despite comprising several layers of regulatory initiative, the investment fund legal regime is forming one homogenous legislative body facing the trend to be codified in a Single rulebook under a horizontal approach.[336]

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[330] Ibid, Preamble (29)
[331] Ibid, Article 19(11)
[332] Ibid, Article 19(11)(a)
[333] Ibid, Article 19(11)(b)
[334] Ibid, Article 19(11)(c)
[335] For example, Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/705 (2018); See also Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 02/77 (2002)
[336] Alain Strowel and Grégory Minne (eds), L'influence du droit europeen en droit economique (L'arcier 2022), Riassetto Isabelle, Pour un *Single Rulebook* unique en droit européen des fonds d'investissement, p. 305-308; At the same time, see also The High-Level Group (Chaired by Jacques de Larosière), "On Financial Supervision in the EU" (2009), Preamble 100-109 and recommendation 10, discussing the imperfections of the EU fund supervision and the legislative harmonisation due to de minimis rules leaving heterogeneous legislative discretion to MS; See also

Consequently, the legislative body regulating the investment fund activity in a unified manner forms the specificity of an enhanced regulatory treatment utilising the homogenous and universally recognised definitions at four regulatory levels complementing each other with an objective of even regulatory treatment of investment funds while following the shared goals of market integrity and investor protection. "[T]*he EU has established a legal and regulatory framework for investment funds to ensure that similar rules apply across the single market."*[337]

As a result, the homogeneity of the legal framework prevents competition between the interpretation at varying regulatory levels and allows the application of the EU unified methodologies and approaches, i.e. asset valuation. The said uniformity ensures effectiveness in reaching the commonly shared objectives of market integrity and investor protection. These goals, *inter alia*, are also aimed at limiting the abuse and have been confirmed to impact the investment protection regime under the principle of "norms importing" reviewed in the given Thesis. Therefore, an evident link between the said specificity and the legal phenomenon of abuse in investment arbitration is established and worth including in further analysis.

- Permanent Supervisory Authorities

The key regulatory authorities acting permanently (ESMA and national competent authorities) develop not only consistent and coherent methodologies of law application but also aid in supervising the investment funds continuously in part of granting and withdrawing the fund's authorisations, on-site inspections, reporting and others forms of activities aimed at rendering permanent supervisory processes. Importantly, the investment funds, management company/manager or depositary disagreeing with the actions taken towards them by the national competent authority (CSSF) are given the discretion to refer the matter (right of appeal) to the administrative court (fr. tribunal administratif) for examining the legality of such decisions, mostly relating to imposed fines, authorisation withdrawals and others.[338] The given right stems from Level 1 Directives (UCITSD[339] and AIFMD[340]). In this way, the autonomy and independence of the said supervisory authorities are ensured, enhancing the regulatory supervision of investment funds, hence, impacting the legal phenomenon of abuse.

The widespread system of supervisory authorities allows for tackling the subject matter of investment fund activity at the place of occurrence. For example, Luxembourg's national competent authority verifies how the CSSF Regulation 15-03[341], issued to specify the

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European Court of Auditors, "Special report: Investment funds. EU actions have not yet created a true single market benefiting investors" (2022), p. 17

[337] European Court of Auditors, "Special report: Investment funds. EU actions have not yet created a true single market benefiting investors" (2022), p. 4

[338] For example, Commission de Surveillance du Secteur Financier (CSSF), Administrative fine of 30 September 2021 (2021); See also official website https://www.cssf.lu/en/Document/administrative-fine-of-30-september-2021/ [last accessed 12 April 2022]

[339] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 107(2)

[340] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 49(2)

[341] Commission de Surveillance du Secteur Financier (CSSF), Regulation N° 15-03 laying down detailed rules for the application of Article 46 of the law of 12 July 2013 on alternative investment fund managers on the marketing of foreign alternative investment funds to retail investors in Luxembourg (2015)

Luxembourg standards for implementing the derogations stemming from Article 43 AIFMD, is implemented by fund actors.

- Investors' Numerosity[342]

The investing done by the management company/managers on behalf of the fund, *per se*, encapsulates the specificity of collective investing, where numerous individuals subscribe to the fund's shares or units. The given specificity is also reflected in the part of categorising the investors into retail and professional ones, with the subsequent adaptation of investment vehicles for the needs of the mentioned categories, i.e. UCITS and AIFs.

As such, the collective investing by numerous shareholders or unitholders is the feature of the investment fund legal and regulatory framework having no distinct analogies in other legal regimes, including investment arbitration. For these reasons, the latter shall be included in the scope of the current research as it is eloquent for better precising the legal phenomenon of abuse and its qualitative feature of potentiality. In particular, it may be most eloquent to case scenarios related to treaty shopping[343] and claims multiplication[344].

- Minimum Capital Requirement

The given specificity goes as a red line through the entire investment fund's legal and regulatory framework. Namely, it is not only the investment funds obliged to have a minimum capital[345] for being authorised to perform the collective investment activity but also the structural organs of the fund rendering the supervision of the latter, i.e. management company[346]. By setting the minimum capital requirement, the regulator improves the reliability and resistance of the investment fund field when faced with financial challenges. This, consequently, aids the sound functioning of the financial markets[347] set as a general objective by principal legislative acts.[348] Namely, the minimum capital requirement ensures the financial liquidity of investment actors

[342] European Securities and Markets Authority (ESMA), "Guidelines on key concepts of the AIFMD" (2013), para 17-19

[343] Martin Valasek and Patrick Dumberry, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes" (2011), p. 71

[344] For example, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) 2007, para 137-138; See also, *Gami Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL (Under NAFTA Agreement)) 2004, Award, para 37, 43

[345] For example, Journal officiel du Grand-Duché de Luxembourg, Law of 13 February 2007 relating to specialised investment funds (2007), Article 21 (EUR 1,250,000); See also Journal officiel du Grand-Duché de Luxembourg, Law of 23 July 2016 on reserved alternative investment funds (RAIF) (2016), Article 20 (EUR 1,250,000); Journal officiel du Grand-Duché de Luxembourg, Law of 15 June 2004 relating to the Investment company in risk capital ("SICAR") (2004), Article 4 (EUR 1,000,000)

[346] For example, European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 7(1)(a)

[347] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 10

[348] The minimum capital requirement is not applicable to AIFMs mentioned under Article 3(2) of the AIFM Directive. The latter represents an exception rather than a rule.

and lowers the potentiality for registering numerous funds with a view of abuse (to be reviewed further in *Phoenix Action*[349] case analysis)

Importantly, it is not uncommon for national law to set the minimum capital requirements. However, the latter is limited to the nominal capital the commercial enterprise shall have in order to be deemed as validly registered for the purposes of the investment protection regime. For example, in France, the commercial company with publicly traded shares (SA) shall have a capital of no less than EUR 37,000.[350] In Luxembourg – EUR 30,000.[351] Instead, the latter entity's management body (if any) is spared from the said monetary requirement.

In contrast, the fund and its management company or external manager (AIFM) fall under the minimum capital requirement. [352] As already discussed, the sums sought from the latter are more elevated than what is commonly envisaged from ordinary enterprises under national provisions.

Therefore, the elevated sums of capital required from investment funds and their actors represent the legal specificity that is beneficial for the current research aimed at quantifying the abuse potentiality in relation to the investment fund only.

- Management Company and Depositary

The two analysed organs of the investment fund gained specific attention within the research context. Namely, in part of their implicit subordination to the national competent authority with regard to reporting any irregularities related to law compliance, auditing and sound management of the specific fund at review.

The mentioned organs embedded in the fund’s legal design imply the investment fund’s strict compliance with a recurring legal and regulatory framework supported by an obligation to report to the national competent authority. The given specificity, by far, has the central role in a further estimate of abuse potentiality as it has no analogues compared to the rest of the investors participating in the investment protection regime.

Namely, the regulatory requirements sought from the management company and depositary develop the effect of the fund’s internal impetus tilting the latter to better comply with the respective legislative provisions, *inter alia*, following the object of abuse prevention. Therefore, the two organs are to be viewed as the investment fund’s specificity worth including in further analysis.

- MAR

[349] *Phoenix Action Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5) 2009
[350] France, Commercial Code (2008), Article 224(2)
[351] Journal officiel du Grand-Duché de Luxembourg, Law of 10th of August 1915 concerning the commercial enterprises (Fr. Loi du 10 août 1915 concernant les sociétés commerciales) (1915), Article 2
[352] Importantly, the UCITS depositary is only spared from the minimum capital requirment. See also, Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 16/644 (2016), Part II

The investment fund's legal and regulatory framework is developing its unique conceptual visionary of abuse through the legal device of “unlawful behaviour”, monitoring all the market transactions against the pre-defined list of indicators. This forms a separate specificity pertinent to the research objectives.

As already underlined, the fulfilment of the said Regulation by the investment actors develops an indirect effect on the investment protection regime *via* the legal phenomenon of “norms importing”. In particular, when participating in an investment protection regime, the investment fund and its structural organs are obliged to follow the legal requirements of its jurisdiction of origin, including the regularised provisions of abuse prevention laid down by the mentioned Regulation.

This results in a double regulatory impetus for abuse detection deriving from two distinct legal regimes conceptualising the abuse and the legal device for its detection. Therefore, the latter is to be analysed for estimating the impact of a decrease or increase of abuse potentiality as a risk pertinent to the investment funds entering the investment protection regime.

PART II. INVESTMENT FUND ELIGIBILITY: INVESTMENT AND INVESTOR

Having passed the stage of exploring the investment fund legal regime and deducting the latter's legal specificity, the current Thesis will advance further in the research process. In particular, the current part will examine the investment protection regime and its pertinent case practice with a view to identifying the investment fund's jurisdictional standing.

Put differently, affirming the right of an investment fund to be recognised as a valid investor according to the ICSID Convention and particular BIT treaties at review. The said affirmation will allow examining the investment fund's standing in the investment protection regime compared to the rest of the investors. This will be done by exploring the varying jurisdictional requirements related to investments produced by the latter (*ratione materiae*) and the legal personality of the investor (*ratione personae*).

Section 1 – A comprehensive notion of investment

Introduction

The investment protection regime elaborated as a result of the International Convention on Settlement of Investment Disputes[353] (hereinafter ICSID) stands on two principal notions: "investment" and "investor". Any right offered and obligation sought is to be understood in connection to the activity of investing and the outcomes of the said process (recovery of expropriated investments). In this context, every dispute reviewed under the ICSID regime shall arise from the investment (*ratione materiae*) and be initiated by the investor (*ratione personae*).

In turn, the given Thesis will explore the phenomenon of abuse and its qualitative feature of potentiality from the investor's perspective. The author will stand on the investor's side in many arbitration disputes to be reviewed by the current Thesis. This will be done to deduct the investor's rationale, argumentation and teleological reasonings necessary for the current research.

It is worth mentioning that for any investment dispute, one needs to identify the necessary jurisdictional elements providing the validity for the treaty protection before being reviewed. These elements include the already mentioned *ratione personae* (investor) and *ratione materiae* (investment). Performing the in-depth exploration of these two elements allows to lay down the theoretical fundament necessary for propelling the objectives of the current research.

Conclusively, the given part of the research explores the legal quality of investment funds and their investments for estimating their validity within the limits of the investment protection regime. [354] Put differently, establishing the jurisdictional standing of the actor of the current research.

[353] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)

[354] See, for example, Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 2; See also European Union, Directive 2009/65/EC on

The work will debut from a scientific exploration of the term "investment". This is explained by the fact that investment, when directed to a foreign jurisdiction, is the initial reason for the investment arbitration dispute to arise and the abuse to take place. Besides, depending on the scope of the term provided in the pertinent Bilateral Investment Treaty (hereinafter BIT), it is the legal basis for an investor to claim one's rights. [355] Namely, the legal fact of having invested initiates accountability before the investment tribunal. This, consequently, implies the great power the scope of the term "investment" carries for both: investor and the host State. The latter's scope is also a deciding factor for the investment fund's standing that is to be reviewed further on.

The essential elements of the term "investment"

Although the ISCID Convention does not define the term "investment", there is no particular shortage of proposed definitions. Investment activity has long been present in humankind. The first mention of the latter derives from the Mesopotamian period (3000 – 500 BC). This had been followed by certain developments in the Greek civilisation (800 – 300 years BC)[356] , giving an imminent push to an ever greater widespread of such activity across continental Europe with eventual embedment into the social fabrics.

The general definition of investing is "…[a]*ct of putting money, effort, time, etc. into something to make a profit or get an advantage*…".[357]

In the investment protection regime, this would translate into the process of an investor investing its private capital into the economy of the host State with the objective of receiving profits.

Before the investment protection regime got elaborated, the State had to rely on external public offers to raise capital from outside, namely, loans from international organisations or other States. However, this changed in the aftermath of World War II. Namely, the power of private capital had been uncovered to the benefit of the post-war States, including Germany.[358]

The German government concluded the first investment protection agreement with Pakistan in 1959.[359] The idea embedded in the latter was straightforward yet innovative: the private investors investing in the economy of the Agreeing State are protected with fair and equitable treaty rights

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the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009)

355 Particular authors like Zachary Douglas, "The International Law of Investment Claims" (2009) Cambridge University Press, p. 136-137 suggest the investment protection regime to be designed with the aim of protecting the property rights forming the substance of investment property rights.

356 Norton Reamer and Jesse Downing, "Investment. A History" (2016) Columbia Business School Publishing; See also official website https://investmentahistory.com [last accessed 2 October 2019]

357 See official website: https://dictionary.cambridge.org/dictionary/english/investment [last accessed 21 June 2021]

358 Chin Lim, "Alternative Visions of the International Law on Foreign Investment" (2016) Cambridge University Press, p. 55-56 where the author presents the opinion that due to innovative approach in considering the phenomenon of investment, Germany-Pakistan BIT had set a trend in treaty making that was followed later on in time by prevailing majority of the States.

359 Germany-Pakistan BIT, Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes) (1959)

guaranteeing their safety and investment. If the host State violates such guarantees, the latter has the right to bring the dispute to the privately constituted investment Tribunal with the ultimate adjudicatory power to oblige both sides.

The conceptually new idea of investor's private capital inflow in exchange for the State giving up its adjudicatory sovereignty had revolutionalised international relations by providing more spotlight and recognition to private individuals investing abroad.[360] In turn, the countries had unleashed the economic power of the private capital, sourcing the war-torn economies. And although the approach had been revolutionary, drafting the first BIT was legally imperfect, including the definition of investment. See the following below:

"*The term "investment" shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived from and ploughed back into such "investment""*.[361]

Evidently, the above-mentioned questions the extremely broad scope of what could be considered an "investment". For example, it is unclear whether the services are included in the mentioned definition. Hence, no developed definition had challenged the fundaments on which the latter stood, bringing rather less than more certainty.

Nonetheless, pioneering the establishment of a bilateral investment agreement between Germany and Pakistan had manifested the debut of a new era for exchanging private capital. The mentioned example, consequently, naturally prompted the world community to act and discuss the potentialities of developing similar regimes on a bigger scale.

The venue for this was set at the World Bank premises, where the ICSID Convention encapsulating the general principles of such cooperation received the momentum to be "put on paper" and give the start to what is now known to be the investment protection regime. The successful example of the German-Pakistan BIT was sought to be copied and enlarged on the world scale. This also included the definition of investment.

However, the mentioned process has seen opposition of opinions, especially from the developing and the developed States. During the preparatory work, many developing States, in particular Guinea, underlined the following: "…[e]*conomic development could not be achieved without capital and* . . . [that] *developing countries would not obtain capital unless they provided adequate guarantees"*. [362]

In this context, when agreeing to the said bargain: capital in exchange for adjudicatory sovereignty give up, the developing countries had feared the ICSID Convention to open the doors for investors and non-prudent businesses willing to exploit the investment treaty rights for

[360] Relja Radovic, "Beyond Consent. Revisiting Jurisdiction in Investment Arbitration" (2020) BRILL, p. 19-30
[361] Germany-Pakistan BIT, Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes) (1959), Article 8
[362] Julian Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" (2010)See also Consultative Meeting of Legal Experts, Addis Ababa on April 30, 1946

ill-founded purposes.[363] As a result, the investment definition was suggested to include an exhaustive list of activities offering treaty protection.[364]

Instead, the developed economies had indicated the willingness to leave the draft definition of the term "investment" as broad as possible. This was done with the intent to ensure the wholesome legal protection of their nationals when entering the host economies.[365]

In the *travaux preparatoires*, the initial proposal was delivered in two principal variations (short and extended versions):

Short version:

"'*investment' means any contribution of money or another asset of economic value for an indefinite period or, if the period be denied, for not less than five years*".[366]

Extended version:

"*The term 'investment' means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares* ***in any such*** *enterprise; or (iii) financial obligations of a private or public entity other than obligations arising out of short term banking or credit facilities*".[367]

During the plenary meeting on April 29, 1964, the representative of China (Mr Tsai) offered a vision that was mainly coinciding with the majority's opinion: "… [i]t *would be quite difficult to provide a clear-cut definition of the word 'investment'…"*[368]*;* he continued: *"'Investment' was a term whose content varied according to the different economic or political backgrounds or points of view of the various countries…".*[369]

"Secondly, the foreign investor usually based his(her) investment on foreign investment law, if there was one, or a special contract entered into with the local government. If the word

363 Fifty years later, the approach remains the same. However, see also novel considerations with regards to the said matter Relja Radovic, "Beyond Consent. Revisiting Jurisdiction in Investment Arbitration" (2020) BRILL, p. 170-174

364 Susan Franck, "Arbitration Costs. Myths and Realities in Investment Arbitration" (2019) Oxford University Press, p. 20

365 See, for example, a very broad definition of the term "investment" provided in the BIT, Accord entre l'Union économique belgo-luxembourgeoise et la République algérienne démocratique populaire concernant l'encouragement et la protection réciproques des investissements (1991), Article 1; See also *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 379 on discussing the travaux preparatoires with regards to the scope of the term "investment"

366 ICSID, "History of the ICSID Convention by International Centre for Settlement of Investment Disputes " (1968) , p. 623

367 Ibid, p. 634. See also Yaraslau Kryvoi, "International Centre For Settlement of Investment Disputes (ICSID)" (2016) Wolters Kluwer p. 57

368 ICSID, "History of the ICSID Convention by International Centre for Settlement of Investment Disputes " (1968) , p. 496

369 Ibid, p. 496

'investment' was defined in that law or in that agreement, no difficulty would arise, even without a specific definition in the Convention". [370]

This, among others, implied the absence of solid reasons to introduce the universal definition of "investment" as it is too variable and self-standing. Consequently, the plurality of legal traditions and a wide range of treaties made it burdensome to establish the universal standard of the term "investment". The latter complication is not uncommon in other unions that are more homogenous. For example, the *Free Trade Area of the Americas* had nine possible variations of the definition "investment", where authors aimed to approach the given task based on a methodology of circumvention proving a negative definition, specifying what is *not* an investment.[371]

Despite particular authors considering the ICSID Commission to fail for not having installed the universally defined term "investment", the analysis of the above-mentioned discussion provides a clear picture of where parties agreed.

This agreement was based on the decision not to limit but to provide the chance to the agreeing parties to construct their own, cut to the point and need a definition that will facilitate but not curtail the investment relations between the two specific countries. The most convenient way for reaching the said goals was sought to offer the States the possibility to construct their definition eloquent to the national legal regime and specifics of the national economy *via* the avenue of the Bilateral Investment Treaty drafting (hereinafter BIT).

"…[i]t *was an explicit choice that represented categorical adoption of the broad jurisdictional position in exchange for some crucial opt-out provisions aimed at taking the developing countries' concerns into account"*.[372]

In turn, the ICSID Drafting Committee, having no proper consensus regarding the unified term, proposed applying the concept of consent. In particular, "…[t]*he requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction*".[373]

As suggested by the delegates from the United Kingdom[374], the countries should be free to decide the personal scope of the term by constructing their own definition of the term "investment" and excluding the activity the regime will not protect. The latter should have been

[370] Ibid, p. 496
[371] See Multilateral Agreement, The Free Trade Area of the Americas (not concluded) , See also Michael Hwang and Jennifer Fong, "Definition of "Investment" - A Voice from the Eye of the Storm" (2010), p. 123
[372] Julian Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" (2010)
[373] Aron Broches, "The Convention on Settlement of Investment Disputes: Some Observations on Jurisdiction" (1996) Columbia Journal of Transnational Law, p. 263-268. See also Yaraslau Kryvoi, "International Centre For Settlement of Investment Disputes (ICSID)" (2016) Wolters Kluwer, p. 57; See also Relja Radovic, "Beyond Consent. Revisiting Jurisdiction in Investment Arbitration" (2020) BRILL, p. 120
[374] Julian Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" (2010), p. 290

done by informing the ICSID Secretariat on what is not considered an investment within the specific jurisdiction, i.e. what the consent is given for.

As a result, the objective of constructing the universal term "investment" was put aside. Instead, the main emphasis was on confirming the essential elements necessary for the dispute to be resolved under the auspices of the ICSID Convention. This included the need for the dispute to be (1) "*legal*", and (2) "*arising directly out of investment*". See the final version of the ICSID's Article 25 that performs the guidance function to the parties:

"The jurisdiction of the Centre shall extend to any ***legal*** *dispute* ***arising directly out of an investment****, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.".*[375]

The rationale behind the given approach was explained by *Broches*[376] being involved in the drafting process. After him, when filing a claim, the dispute must arise out of legal (investment) interests rather than a conflict of interests (political/commercial).[377] These requirements had served as a preventive mechanism against using the ICSID as a forum for political disputes and/or other trade wars. This, as a result, became "…[r]*evolutionary in that sphere*".[378]

Investors interested in entering the particular national markets would need to consult the local regulations. Therefore, installing the country-specific definition of investment in the pertinent BIT that would better reflect the local market specificity by supplying more rather than less legal predictability to the investor planning on entering the latter, i.e. correlation of the definition with the local jurisdiction.

As a result, deciding on the *de minimis* scope of the term "investment" was left to the full discretion of the parties entering the Investment Protection Treaty.[379] In that way, the governments were not discouraged from participating in the mechanism of the investment protection regime and were not obliged to follow the common approach. Instead, they were offered a legal toolkit allowing to construct whatever they wished.

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[375] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), Article 25 (1)

[376] Head of WTO's General Counsel in charge of the ICSID Draft preparatory work

[377] Aron Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of other States" (1972) Recueil des Cours, p. 331-410. See also Monique Sasson, "Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law" (2017) Wolters Kluwer, p. 103-104

[378] Julian Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" (2010), p. 266-267. See also ICSID, "History of the ICSID Convention by International Centre for Settlement of Investment Disputes " (1968) , Consultative meeting of legal experts (February 17-22, 1964), supra note 9 at p. 429 and p. 522.

[379] Yaraslau Kryvoi, "International Centre For Settlement of Investment Disputes (ICSID)" (2016) Wolters Kluwer, p. 58

"The Convention that resulted was a wide-open procedural vehicle that allowed States to decide what kinds of activities they wanted to protect and what kinds of protections they wanted to extend".[380]

In this context, instead of developing the universal but yet not "one-size fits all" definition, the legislators emphasised the importance of two pertinent elements on which the ICSID regime shall stand: (1) the dispute shall be legal and (2) arise out of the investment. Hence, the delegates took a stance of flexibility and adaptability offered to the investment community within the given context.

The given flexibility ensured the ICSID's legitimacy and recognition, especially among those groups of States that were critical of defining the term "investment" in a non-exhaustive way.

Instead, many countries felt prompt to engage, including their national-specific exclusions mentioned in the pertinent BITs. For example, Canada-Thailand BIT excludes investments in real estate from falling under the agreed definition of "investment".[381] Moreover, Saudi Arabia precludes particular disputes related to oil extraction from being resolved by arbitration; Turkey opts for recognising those investments duly registered and approved under the local law before being considered valid for the purposes of the investment protection regime.[382]

Interestingly, the selected approach limits the opportunities of governments to oppose the enforcement of arbitral awards for the reason of investment not falling under the scope of the definition inscribed into a particular BIT. For example, when using instruments that allow crafting a personalised investment regime, it would be extra troublesome for the State to explain the reasons for contesting a particular investment *post factum*.

In turn, the investors, when entering the market, could follow the *lex specialis* and enjoy the regime of legal predictability.[383] For example, the ASEAN investment treaty directly mentioned the reasons for excluding several types of assets from the "covered" assets list.

"For greater certainty, investment does not mean claims to money that arise solely from:

a. commercial contract for sale of goods or services; or
b. the extension of credit in connection with such commercial contracts."[384]

As a result, the drafters of the ICSID Convention offered a customised approach *à la carte* where governments are free to select their level of openness to foreign capitals: the bigger the need, the

[380] Julian Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" (2010), p. 281

[381] BIT, Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments (1998), Article 1(f)

[382] Julian Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" (2010), p. 294

[383] Amado Jose and Kern Jackson, "Arbitrating the Conduct of International Investors" (2018) Cambridge University Press, p. 83, See also Ethiopian Investment Commission at http://www.investethiopia.gov.et/index.php/investment-process/starting-a-business.html [last accessed 30 July 2019]

[384] ASEAN Secretariat, ASEAN Comprehensive Investment Agreement (ACIA) (2012), Article 4, reservation 2 and 3

more open they are.[385] In turn, the ICSID Convention would draw general rules and principles on which the investment protection regime is based, and the BIT would offer a list of specificities on how such investment relations should be treated within limits set by two agreeing countries.

In this context, the creation and further adoption of the ICSID Convention gave a powerful impetus for extensive developments in capital exchange. It opened a new era of diplomacy where along with the free trade treaties, the governments felt encouraged to include the clause on investment protection or devote a separate treaty for the mentioned purposes, i.e. BIT. The participative spirit of the Convention laid a fertile ground for developing a functional system that did not limit the sovereignty of the States in terms of defining the scope of investment valid for treaty protection and aided the protection of the interests of private investors. As a result, there are currently 165 signatory States to the ICSID Convention.[386]

Treaty definition

Each investment agreement, either in the form of a clause in the trade treaty or a separate investment treaty, contains the agreed interpretation of the term investment. The latter's scope represents the permissibility of the investment activity in the specified host State's jurisdiction. Put differently, should the host State exclude from the scope of the term "investment" the oil extraction, the latter activity would, nevertheless, be available to investors (provided no national restrictions) but with subsequent denial of treaty protection. In the latter scenario, the investor will be limited to seeking justice at the local judiciary.

The treaty definitions the agreeing states use may vary from one BIT to another. The terminology and approach towards conceptualising investment activity have seen several waves of legal evolutions.[387] For example, the previously mentioned Germany-Pakistan BIT[388] and its terminology contrast with the definition inserted in the recently constituted agreement between the EU and Vietnam[389].

The Germany-Pakistan definition provides the following:

"*The term "investment" shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of* ***assets*** *such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived from and ploughed back into such "investment""*.[390]

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[385] See further on the analysis of the Albanian law on foreign direct investments, Article 1-15

[386] See official website https://icsid.worldbank.org/about/member-states/database-of-member-states [last accessed 30 October 2021]

[387] Wolfgang Alschner, "Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes" (2022) Oxford University Press, Part II New Treaties, Old Outcomes

[388] Germany-Pakistan BIT, Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes) (1959)

[389] BIT, EU-Viet Nam Investment Protection Agreement (2019)

[390] Germany-Pakistan BIT, Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes) (1959), Article 8

The immediate qualifying feature is the requirement for the capital to be brought to the host State from outside. This implies the latter to be deriving from the home State.

Further, the definition provides a brief list of assets considered investments. This includes a part of general types (goods, technical knowledge (know-how), patents), the returns received from initial investment with its further re-investment.

Oppositely, the current approach has stretched the scope of the term "asset" to a qualitatively new level. For comparison, see below the concluded investment agreement between the EU and Vietnam:

*""investment" means every kind of **asset** which is owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and a certain duration; forms that an investment may take include:*

1. *(i) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens and pledges;*
2. *(ii) an enterprise as well as shares, stocks and other forms of equity participation in an enterprise, including rights derived therefrom;*
3. *(iii) bonds, debentures, and loans and other debt instruments, including rights derived therefrom;*
4. *(iv) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;*
5. *(v) claims to money or to other assets or any contractual performance having an economic value; and*
6. *(vi) intellectual property rights and goodwill;*

returns that are invested shall be treated as investments provided that they have the characteristics of an investment and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments as long as they maintain the characteristics of an investment;"

The qualifying features used in the Germany-Pakistan BIT are also present in the current one. Namely, the requirement for the capital to originate from the home State and the mention of the re-invested return to be considered investments.

However, these underlying features are expanded and explained in more detail. For instance, the investor shall control and own such investment *ab initio*. The mention of the re-invested returns is also updated with a requirement for non-alteration of the initial project and constant maintenance of the principal characteristics of the latter.

Besides, the EU-Vietnam Agreement provides compulsory economic characteristics of the investment. This includes: "…[t]*he commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and a certain duration".*[391]

The list of assets considered as investments had also increased substantially from what had been seen in the Germany-Pakistan BIT. Namely, the former includes many financial instruments and property rights for such assets not mentioned previously, i.e. bonds, debentures, and shares. To add to this, the categorisation provides the division between the tangible and intangible assets, i.e. licenses.

Importantly, despite the tremendous developments and several investment agreements concluded since the 1960s, both terms carry particular resemblance with regard to how they are drafted.

The key importance is devoted to the institute of asset and the property regime of the latter. Although many novelties and special reservations expanded and improved the definition, the legal architecture remains untouched. In this context, the drafters first depart from identifying an investment *via* uncovering the term "asset" and its pertinent features, i.e. longevity and risk.

Further, the descriptive part specifies examples of what could be considered an investment (usually done as a list). It is, therefore, safe to suggest the structure of the definition to be answering two main questions: (A) what is considered an asset (qualifying features) and (B) what are the pertinent examples (i.e. tangible/not-tangible)?

For example, see the Estonia-Kazakhstan BIT[392] agreement:

[part A]

"The term "investment" means every kind of ***asset*** *invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter State and shall include in particular…"*[393]

[part B]

"a) movable and immovable property as well as any other rights, such as mortgages, pledges, usufructs and similar rights;

b) stocks, shares and other forms of participation in companies;

c) returns reinvested, debentures, claims to money or any other rights to legitimate performance having financial value related to an investment;

[391] BIT, EU-Viet Nam Investment Protection Agreement (2019), Article 1

[392] BIT, Agreement between the Government of the Republic of Estonia and the Government of the Republic of Kazakhstan on the promotion and reciprocal protection of investments (2011)

[393] Ibid, Article 1 (3)

d) intellectual property rights, as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organization, in as far as both Contracting Parties are parties to them, including copyrights and related rights, industrial property rights, trademarks, patents, industrial designs and technical processes, rights in plants varieties, know-how, trade secrets, trade names and goodwill;

e) rights to engage in economic and commercial activities conferred by the legislation of the States of the Contracting Parties.

Any change of the form in which assets are invested or reinvested shall not affect their character as an investment."[394]

The prevailing majority of the BITs provide a broad and rather general interpretation of the definition of the term investment comprising two parts. There are, nevertheless, some differences present. For example, the Estonia-Kazakhstan BIT directly mentions the rights to engage in commercial activities, i.e. licensing.

The author underlines the somewhat sporadic classification of legal property rights to be included in the investment agreement. In this context, the hierarchal division may imply the countries' objectives and goals when adopting the above-mentioned agreements, i.e. preference given to the real economy over financial markets. For example, see the ASEAN Comprehensive Investment Agreement (hereinafter ACIA)[395]:

" (Part A)
Investment" means every kind of asset, owned or controlled by an investor, including but not limited to the following:

(Part B)

(a) *movable and immovable property, mortgages, liens or pledges;*
(b) *shares/ stocks, bonds and debentures and any other form of participation in a judicial person and rights or interest derived therefrom;*
(c) *intellectual property rights;*
(d) *claims to money or to any contractual performance related to a business and having financial value;*
(e) *rights under contract, including turnkey, construction, management, production or revenue-sharing contracts; and*
(f) *business concessions required to conduct economic activities and having financial value conferred by law or under a contract including any concessions to search, cultivate, extract or exploit natural resources.*
(g) *The term "investment" also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment.*"[396]

[394] Ibid, Article 1 (3)
[395] ASEAN Secretariat, ASEAN Comprehensive Investment Agreement (ACIA) (2012)
[396] Ibid, Article 4

Interestingly, the BITs apply extreme variability when mentioning the specified rights, with some of them being relatively novel. For example, the market access rights, export/import quotas, and particular licenses for the extraction of mineral resources. See Estonia-Kazakhstan BIT (2011):

"*e) rights to engage in economic and commercial activities conferred by the legislation of the States of the Contracting Parties.*"[397]

Another example is the right to export quota that had been first recognised by the English judiciary[398] and legislators (*Act on Theft* (1968))[399] as an intangible asset falling under the property regime. The given practice had subsequently migrated into the relevant BITs, reflecting the specificity of the national legal systems.

The recurring investment arbitration disputes underline the existence and treaty protection of the said right. Namely, the Tribunal in *Pope & Tallbot v. Canada*[400] had decided to recognise market access as an investment property right.[401] This was done by evaluating the investor's business model, predominantly based on wood exports to the US market.[402] The investor had alleged that each time the Canadian government limited the exports of wood to the US, the investor's property rights had been expropriated.[403]

The above-mentioned analysis provides certain permissibility and liberalism with regard to including a wide scope of property rights to be covered by the investment protection regime. This manifests the agreeing countries to willingly and allegedly express their openness towards many types of assets for investing. As such, when questioning the validity of investment and the jurisdictional standing of the claim, the treaty test is applied toward the property right at review. Namely, identifying whether the descriptive part of the definition "investment" comprises in its scope the disputed asset. This forms a primary requirement for identifying the jurisdictional standing of investment, i.e. *ratione materiae*.

In this vein, the further outlook over the investment fund legal regime already allows suggesting the investment policy of many fund types to be compliant with generally broad definitions mentioned by the reviewed treaties. As such, the primary assumption of the fund's good jurisdictional standing is also identified.

Salini test

As provided above, when estimating the jurisdictional basis of an investment claim, the arbitrators compare the disputed investment with the treaty definition provided. However, there

[397] BIT, Agreement between the Government of the Republic of Estonia and the Government of the Republic of Kazakhstan on the promotion and reciprocal protection of investments (2011), Article 1 (30

[398] *Attorney-General of Hong Kong v. Nai-Keung (Cr LR 125)* (The Court of Appeal of Hong Kong) 1988

[399] House of Commons, Theft Act (no longer in force) (1968)

[400] *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL Rules 1976 (NAFTA Treaty)) 2002

[401] Ibid, Award in Respect of Damages, para 66

[402] Ibid, Interim Award, para 5

[403] Ibid, Interim Award, para 81-83

is a certain ambiguity present when applying the latter. The permissible language of many treaties often provides the investment to be "*every kind of asset*" [404].

The latter suggestion logically questions whether any asset invested in the host State be protected by an investment protection regime. To answer this, the author proposes to consider the given case scenario. A tourist from Ukraine visits Lithuania for a weekend. The latter's budget is EUR 500. The monies are brought in cash and are successfully spent for restaurants, public transport and hotel. In turn, the BIT between Ukraine and Lithuania provides on following:

"The term "investment" shall comprise every kind of asset invested by an investor of the Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter…"[405]

Could this mean that the above-mentioned tourist, while visiting Lithuania for a weekend, had invested in the context of the investment protection regime and has the standing to receive the treaty protection? The given activity is indeed beneficial to the Lithuanian economy, i.e. income of capital and additional jobs to the tourist sphere. Besides, the spending of the said amount had been done in full adherence to the laws and regulations of the State. However, the likelihood of distributing the treaty protection to the latter remains reasonably low.

"Any contract would have made some economic contribution to the place where it is performed. However, that does not automatically make a contract an 'investment' within the meaning of Article 25(1)." [406]

Apart from broad legal criteria stemming from the investment protection regime and the specific BIT at review, the pertinent case practice allows deducting the customary qualifying criteria usually deriving from the economic side of an investment. In this context, the *Salini* test should be mentioned as another instrument delimiting the jurisdictional basis in investment arbitration of investments protected under the ICSID Convention and pertinent BITs.

The *Salini* test is designed to provide the qualifying economic criteria for evaluating the investment at review. The latter is not institutionalised and derives from a case practice (*Salini v. Morocco)*[407] that was "picked up" by other tribunals and was widely applied afterwards.

And although the original test had six criteria, [408] it is now usually three of them that the subsequent tribunals mention for differentiating the investments from the economic transactions.

[404] ASEAN Secretariat, ASEAN Comprehensive Investment Agreement (ACIA) (2012), Article 4

[405] BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995), Article 1

[406] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* (ICSID Case No. ARB/05/10) 2007, para 125, 143. See also Emmanuel Gaillard, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice", *in "International Investment Law for the 21st Century"*(2009)

[407] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) 2001, para 52

[408] Ibid, para 52-53; See also *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009*, Award, para 114 where the Tribunal had tested the Claimants alleged to be an investment against six pertinent criteria:
A contribution in money or other assets
A certain duration

"*Article 25 of the ICSID Convention requires that the dispute arises directly from an investment, but provides no definition of investment. While there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.*"[409]

Despite its wide recognition, the latter is not an affixed dogma nor an obligatory rule for future tribunals.[410] For example, the Dutch Model BIT (2018)[411] encompasses four economic criteria (duration, capital contribution, expectation of profits and risk taken). In turn, *Douglas* considers it reasonable to apply only three criteria (contribution, risk and returns) to identify the compatibility of the alleged investment to be protected by the regime.[412]

Gaillard[413] suggests the majority of the cases to be divided into the orthodox following of *Salini* requirements. For example, *Jan de Nul v. Egypt*[414], *Kardassopoulos v. Georgia*[415] or *Saipem v. Bangladesh*[416]. And the non-orthodox category may even disregard the latter application of the *Salini* test (*LESI-Dipenta v. Algeria*[417], *Pey Casado v. Chile*[418] and others[419]).

The latter's expansion is explained by its auxiliary function of filling the economic gap often overlooked by investment arbitrators being the law experts. The investment protection regime revolves around assets and the subsequent rights offered to its holders. The latter comprises the aspect of legality and economics.

"Whatever economics may supply it must subsequently be filtered through, and stay within the limits of, the legal elements set out in the treaty text. In this sense, law controls economics."[420]

The author stands on the idea that supplying legal research with economics is academically necessary. In particular, no legal analysis of a specific investment at review may occur without a

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An element of risk
An operation made in order to develop an economic activity in the host State
Assets invested in accordance with the laws of the host State
Assets invested in *bona fide*

409 *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) 2015, Award, para 5.43

410 See for example *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia (ICSID Case No. ARB/05/10) 2007*, para 108-109 where the tribunal acknowledged that particular features of Salini test (continuation, regularity and contribution) are not necessarily essential to determining the scope of the term "investment".

411 The government of Netherlands, "Dutch BIT Model Treaty" (2018)

412 Zachary Douglas, "The International Law of Investment Claims" (2009) Cambridge University Press, p. 191

413 Emmanuel Gaillard, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice", in "International Investment Law for the 21st Century"(2009), p. 413

414 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) 2008

415 *Ioannis Kardassopoulos v. The Republic of Georgia* (ICSID Case No. ARB/05/18) 2010

416 *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07) 2009

417 *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire* (ICSID Case No. ARB/03/08) 2005

418 *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) 2008

419 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (ICSID Case No. ARB/97/4) 2004

420 Joost Pauwelyn, "The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement" (2013), p. 22

wholesome understanding of its economic implications. Therefore, the three principal elements of the *Salini* test (contribution, duration and risk) will further be used for examining the investment validity in the context of the current research.

The role of national law in interpreting the term "investment"

Apart from the treaty requirements, economic criteria (*Salini* test[421]), and a general principle of good faith (to be reviewed further), other pertinent instruments aiding in establishing the validity of investment in the context of the investment protection regime are to be mentioned. This includes referencing the investor's host and home State legislation.

The principle of investment protection does not establish contractual equality between the parties. This implies that the State inevitably enjoys the power of a regulator within the limits of its sovereign territory.

Although the State may transfer its competencies or agree to be responsible before the external adjudicatory bodies, the latter, nevertheless, cannot part with the function of a regulator. Consequently, before entering the national market, during the process of investing activity, and after, investors must observe the local requirement deriving from the host and home State.[422] This often includes the relevant tax provisions, an obligation to obtain the license permit under administrative law requirements or a duty to provide a safe working environment to those employed by the investor.

In this vein, the influence of the host and home State's legal regime is palpable. For these reasons, many tribunals are inclined to consult the national legal provision to better establish the legal regime where the investment is found [423] or from where the latter derives.

"'Investments' are, therefore, given an 'objective' treaty definition. But this definition does not in some way detach the rights in rem that underlie those investments from the municipal law that creates and gives recognition to those rights. Investment treaties do not contain substantive rules of property law. There must be a renvoi to a municipal property law."[424]

The BIT term "investment" gains its jurisdictional power and becomes valid only when consulted with national law and subsequent doctrinal opinions. [425] The latter is in charge of maintaining the legal environment in which the investor is placed and from where it derives. Therefore, not consulting the national legal framework of both legal regimes (home and host States) will render any attempts to define the term "investment" futile. Consequently, when identifying the specific asset or property right against the term "investment", the *renvoi* to the host State's national law is necessary.

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[421] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4) 2001*, para 52
[422] Jarrod Hepburn, "Domestic Law in International Investment Arbitration" (2017) Oxford University Press, Part I Identifying Domestic Law Issues In Investment Arbitration, p. 17-21
[423] See for example the *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (ICSID Case No. ARB/12/2) 2014 where arbitration tribunal went to investigate the property right regime in national legislation.
[424] Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2004)
[425] Emerson Tiller and Franks Cross, "What is Legal Doctrine" (2005)

The latter is enriched with a local regulatory rationale clarifying its legal meaning. For example, in *Plama Consortium Limited v. The Republic of Bulgaria (ARB/03/24)*, the dispute resolution process faced the necessity of consulting Bulgarian law to define the legitimacy of the investment made under the local privatisation procedures.

"Claimant contends that Article 5(1) of the Privatization Act invoked by Respondent is not applicable to this case since the purchase of Nova Plama shares by PCL from EEH did not correspond to a privatization. According to Claimant, the Refinery had already been privatized after its sale to EEH in 1996."[426]

In *Emmis International v. Hungary*[427], the dispute concerned the distribution of broadcasting licenses for FM frequencies in Hungary. When bidding to renew its license, the investor failed to win. The enterprise had claimed the unjust rules of the public tender limiting the investment treaty rights of the latter.

"In order to determine whether an investor/claimant holds property or assets capable of constituting an investment, it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law".

In *Encana Corporation v. Ecuador,*[428] the dispute questioned the issue of taxation and the State's denial to refund certain taxes paid by the investor. Accordingly, the Tribunal resorted to local legislation to determine whether such right is accorded to residents.

"[F]*or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case the law of Ecuador"*[429]

In *Fedax v. Venezuela,*[430] the dispute concerned the matter of promissory notes issued by the State to private enterprise. Accordingly, the claimant viewed the possession of such an obligation as an investment under the scope of the BIT.

The Tribunal investigated the scope of property rights provided by local legislation. The arbitrators referred to the State's national law, where they found the answer to the matter. In particular, the promissory notes issued by Venezuela were equalised in the legal regime to loans under the national legal order.

"In fact, the promissory notes subject matter of the dispute are in turn governed by the provisions of the Venezuelan Commercial Code and more specifically by those of the Law on Public Credit.".[431]

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[426] *Plama Consortium Limited v. The Republic of Bulgaria* (ICSID Case No. ARB/03/24) 2008, Award, para 110
[427] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary (ICSID Case No. ARB/12/2) 2014*
[428] *EnCana Corporation v. Republic of Ecuador* (LCIA, UNCITRAL (No. UN3481)) 2006
[429] Ibid, para 184
[430] *Fedax N.V. v. The Republic of Venezuela* (ICSID Case No. ARB/96/3) 1997

The arbitrators returned to examine the BIT regulating the relationships[432], where it was clearly mentioned that loans are governed by the investment protection regime and should be protected in case the right is violated. Hence, by applying the local law when interpreting the international treaty definition, the Tribunal clarified the scope of the term "investment".

Interestingly, in some cases, the Respondents refer not to their local regime but to the home State's national law. For example, in *Mera Investment Fund v. Serbia*[433], the Respondent contested the jurisdictional aspect of the claim. Namely, the improper incorporation of the Cypriot investor under the local regulations was scrutinised.[434]

Therefore, the impetus deriving from the national law plays a significant role in defining the scope of the term investment. The case practice depicts the particular interest of arbitration tribunals consulting the national legislation to better understand the internal legal framework and deliver just awards correlated with the specificities of the national jurisdictions.

As a result, the author deems the national law to be another element necessary for affirming the jurisdictional standing of investment for the current research purposes.

Based on the above-mentioned parts, it can now be assumed that the process of establishing the scope of investment validity to be consisting of several components: (i) the treaty definition analysis, (ii) the application of economic criteria, (iii) the principle of good faith and (iv) the correlation of the latter definition with the local legislation. The combination of the said criteria shapes the jurisdictional standing of investment.

The Foreign Direct Investments (FDI) and Foreign Portfolio Investments (FPI)

Another important criterion frequently mentioned in relation to investment validity is the two-fold taxonomy of portfolio and direct investments. The latter is necessary to discuss as it is most pertinent to the current Thesis's research objectives exploring the abuse potentiality on the example of an investment fund.

By definition, an investment fund invests the capital raised from its investors in different types of assets in accordance with a defined investment policy. The fund manager manages the fund's portfolio for the investors' benefit. The investment policy includes risk-spreading rules inside the portfolio and control limits regarding the targeted issuers.[435] Under the formal approach of investment funds using the notion of "portfolio" for its definition, the latter is often associated with portfolio investments. However, the latter approach remains largely unfounded when consulting the initial definitions of both terms.

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[431] Ibid, para 30

[432] Jarrod Hepburn, "Domestic Law in International Investment Arbitration" (2017) Oxford University Press, p. 47-48

[433] *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2) 2018, Decision on Jurisdiction

[434] Ibid, Decision on Jurisdiction, para 64-66

[435] For example, European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 50

To offer the principal definition, the United Nations Conference on Trade and Development (UNCTAD)[436] provides the following:

"(FDI) Direct investment is the category of international investment in which a resident entity in one country obtains a lasting interest in an enterprise resident in another country. A lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise."[437]

"(FPI) Portfolio investment includes investments by a resident entity in one country in the equity and debt securities of an enterprise resident in another country which seek primarily capital gains and do not necessarily reflect a significant and lasting interest in the enterprise. The category includes investments in bonds, notes, money market instruments and financial derivatives other than those included under direct investment, or in other words, investments which are both below the ten per cent rule and do not involve affiliated enterprises." [438]

Another definition deriving from a doctrinal point of view:

"In contrast to foreign direct investment, portfolio investment, by definition, offers a way to increase return without exercising control over the company in which the investment is made. Foreign portfolio investment also offers mechanisms for risk reduction, particularly through geographic diversification."[439]

In turn, the European Court of Justice (hereinafter CJEU):

"It is settled case-law that direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control."[440]

The provided definitions underline the most pertinent difference between the two types of investment – the control over the investment made. However, in the investment fund context, several complications of incompatibility may appear due to formal reasons.

For example, should an investor purchase the fund's shares, the former will be considered as having no control over the fund's active decision-making. The latter function is compulsorily put on the management company that later re-invests the pooled capital according to the fund's policy and under the strict regulatory supervision of the national competent authority. As a result,

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[436] United Nations Conference on Trade and Development (UNCTAD), "Comprehensive Study of the Interrelationship between Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI)" (1999)
[437] Ibid, p. 4
[438] Ibid, p. 4
[439] Kenneth Vandevelde, "The Economics of Bilateral Investment Treaties" (2000), p. 476
[440] *Opinion 2/15 of the Court (Full Court)* (The Court of Justice of the European Union) 2017, para 80

the investment made would be automatically considered should the latter definition apply, without considering the aspect of treaty definition, economic value and the type of investments made. Namely, the fund's shares are explicitly recognised by many BITs as eligible assets.[441]

Alternatively, should the investment fund purchase the shares of a specific enterprise without participating in the latter's management, such investment would be considered an FPI.[442] In this vein, the feature of control is to be further discussed.

The level of control considered substantial varies based on the interpretation. For example, the International Monetary Fund (IMF) suggests the 10% rule regarding enterprise control to differentiate the FDI from FPI. However, the latter is considered to be a necessary minimum.[443] Instead, the Organisation for Economic Development and Cooperation (OECD) provides 50% ownership for the investment to be considered an FDI.[444]

Nonetheless, the given categorisation goes contrary to the arbitration case practice recognising the jurisdictional standing of minority investors investing their capital *via* subscribing to the company shares/units. For example, in the *Lanco* dispute with investor purchasing 18,3%[445] or *Gami Investment v. the United States* dispute revolving around the ownership of 14%[446].

Apart from the aspect of control, the United Nations Conference on Trade and Development also mentions the investor's goals rendering the investment to be either an FPI or FDI: [447]

For FDI investments, the following is taken into account by the investor when investing:[448]

- National legal regime
- Intentions of the Host State to promote the national venue
- The economic situation in the Host State
- Availability of natural resources (i.e. coal, gas, and other minerals)

Whereas, for FPI investments, the majority of determinants for investors are the following:[449]

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441 BIT, Belgium-Luxembourg Economic Union - Serbia Investment Protection Treaty (2004), Article 1

442 For example, European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 5; See also European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(a)

443 IMF, Eighteenth Meeting of the IMF Committee on Balance of Payments Statistics. Definition of Direct Investment Terms (BOPCOM-05/58) (2005), Annex I; See also https://databank.worldbank.org/metadataglossary/world-development-indicators/series/BX.KLT.DINV.CD.WD [last accessed 24 June 2021]

444 OECD, "Benchmark Definition of Foreign Direct Investment" (2008)

445 *Lanco International Inc. v. The Argentine Republic* (ICSID Case No. ARB/97/6) 1998, Decision on Jurisdiction, Part III Reasons, para 10

446 *Gami Investments, Inc. v. The Government of the United Mexican States (UNCITRAL (Under NAFTA Agreement)) 2004,* Award, para 37, 43

447 United Nations Conference on Trade and Development (UNCTAD), "Comprehensive Study of the Interrelationship between Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI)" (1999)

448 Ibid, p. 15

- The high economic growth rate
- Exchange rate stability
- Macroeconomic stability
- The well-being of the national banking system
- Stock and bond market liquidity
- Taxation system
- Speed and reliability of the settlement system
- Real interest rate

The latter categorisation, however, goes contrary to the previously discussed principle of State autonomy in setting the scope of the term "investment". Hence, everything that is not implicitly excluded from the scope is deemed admissible, provided the reviewed investment complies with the previously mentioned aspects: (i) the treaty definition analysis, (ii) application of economic criteria, (iii) the principle of good faith and (iv) the correlation of the latter definition with the local legislation.

Besides, the mentioned categorisation may also be viewed as subjective. Namely, the investment funds may target the assets at financial peril with a view of short-selling[450], i.e. betting on the financial instrument to go down in price, i.e. reverse funds.

Consequently, the author finds the previously discussed categorisation of investments into the FPI and FDI categories as conceptually confusing and non-compatible with the investment protection regime following the State's autonomous discretion on setting the BIT-specific rules concerning the jurisdictional standing of investments and varying investing strategy of investment funds.

In this context, the author argues that the investment categorisation into the FPI and FDI investments is not native to the investment protection regime. It is a borrowed methodology mechanically applied to investment arbitration disputes without considering the legal specificities of the latter regime. To support the given suggestion, several arguments are to be offered.

To start with, a rather formalistic approach of differentiating the FDI from FPI by applying the 10% ownership rule may be viewed as limiting in the investment protection regime with some legal implications, i.e. the access to justice limitation.

For example, the investor acquires five per cent of shares at a price outweighing the usual FDI investment done to a specific host State, i.e. USD 1 million. Indeed, the latter's stake may be too small to influence the invested enterprise. However, from an investment protection standpoint, it

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[449] Ibid, p. 16-17

[450] European Union, Regulation 236/2012 on short selling and certain aspects of credit default swaps OJ L 86 (2012); See also European Union, Directive 2004/39/EC on markets in financial instruments (MIFID I - no longer in force) OJ L 145 (2004), Preamble (1-5), Article 2: *"…'[s]hort sale' in relation to a share or debt instrument means any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement…"*

can be considered substantial (*Salini* test). Consequently, despite fulfilling the treaty definition requirement and the *Salini* test, the latter may not be admitted for protection under the plainly viewed test of 10%.

Imagine a similar situation, however, now, the investor purchases only 1% of shares. This, evidently, constitutes a much lower than an average one-time investment done to the host State. Theoretically, the given transaction would not qualify as the invested amount under the *Salini* criteria. Besides, it is also not sufficient to offer the investor the requested level of control, i.e. less than one per cent share.[451]

However, purchasing the above-mentioned stake in the company by a reputed investor triggers the consequent recognition of the asset value among other investors following what is established by the trendsetter, i.e. market-maker[452]. Consequently, by investing a fraction of capital viewed as not passing the *Salini* test and general treaty requirements, the said investment had provided the host State economy with indirect benefits deriving from other investors following the trendsetter.

The given phenomenon is often viewed in the investment fund industry, where institutional investors set the trend for individual investors following the latter's strategy, i.e. replicating the fund's strategy that is actively managed. In this context, the division of the FDI and FPI investments would be blind to recognising such a non-material benefit, i.e. bringing publicity to the host State with a subsequent increase of economic benefit through the indirect attraction of third-party investors.

To continue, the control aspect should also be mentioned. Namely, in part, how the latter is perceived. In particular, in the *International Thunderbird Gaming Corporation v. Mexico*, the arbitrators mentioned that effective control might exist in different forms and shapes:

"Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know-how and authoritative reputation".[453]

Instead, the *Plama* dispute provides legal insights about the control in fact:

"…[i]*n the Tribunal's view, ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal*

[451] Jorun Baumgartner, "Treaty Shopping in International Investment Law" (2016) Oxford University Press, p. 120-125

[452] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 4(7)

[453] *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL (Under NAFTA Agreement)) 2006, para 180

entity's management, operation and the selection of members of its board of directors or any other managing body". [454]

Consequently, the arbitration tribunals take a much more flexible stance on estimating the validity of investments where control over the latter is a permissible concept open to consideration. It then derives the control as a definition that cannot be viewed as a threshold barrier the investor is expected to cross.

"The analysis of the ICSID case law shows that: (i) there is no consensus as to the extension of ICSID jurisdiction to portfolio investment; and (ii) arbitral tribunals, when faced with jurisdictional issues concerning portfolio investment, do not adopt a uniform approach."[455]

In this context, estimating the investment validity rests on evaluating many criteria beyond the previously mentioned categorisation of the FDI and FPI investments. For example, the owner of the golden share may have much more control than the principal stakeholder in the enterprise's business decision.

As already mentioned, the investment fund legislation limits the shareholders' rights to manage the pooled asset. The latter function is rendered by the management company exclusively (fund actor).[456] As such, purchasing the fund's shares, even the entirety, may never offer management control to the fund's shareholders. Therefore, under the mentioned definition, the latter will fall under the FPI categorisation despite being the fund's sole shareholder.

Consequently, the somewhat alien categorisation of FDI and FPI investments develops into theoretical misalliances when attempting to be interconnected to the investment protection regime. On this basis, the author considers the latter categorisation non-applicable to the current research. Instead, the jurisdictional standing of investment, i.e. validity, for the purposes of the ICSID Convention shall be juxtaposed against the previously deducted elements only. Namely, (i) the treaty definition analysis, (ii) the application of economic criteria, (iii) the principle of good faith and (iv) the correlation of the latter definition with the local legislation. The combination of the said criteria shapes the definition of investment necessary for identifying the jurisdictional validity of investment (*ratione materiae*).

Conclusion

Having analysed the legal implications for defining the term "investment", it can be safely assumed that the investment protection regime is infused with the heterogeneity of approaches on what the latter means. In this context, Article 25 of the ICSID Convention is legally and conceptually important, however, it is of no use for defining the term "investment" on a universal scale.

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[454] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Decision on Jurisdiction, para 170

[455] Giorgio Risso, "Portfolio Investment in ICSID Arbitration: Just a Matter of Consent?" (2018)

[456] For example, European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4; See also Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/698 (2018)

For the current Thesis, the deducted elements are to be used for establishing the jurisdictional validity of investment at review: the consultation of the treaty definition, the economic criteria of the *Salini* test, the good faith requirement, and the correlation with the host State's national law. The combination of the mentioned requirements develops an orderly and logical process of evaluating the disputed investment.

Besides, the combination of the said elements allows considering the investment as an evolutive term adapting to the newly appearing investment practices. This is suggested based on a comparative analysis of varying treaty definitions further interpreted by the recurring case practice.

The given part also reviewed the jurisdictional standing of the investment deriving from the investment funds. Namely, the author argued that the investment categorisation into FPI and FDI investments is conceptually inconsistent with the principle of consent elaborated by the ICSID Convention and varying case practices reviewed in investment tribunals.

On this basis, it had been decided to reject applying the said categorisation. Instead, all investments are to be tested against the previously deducted elements necessary for establishing the jurisdictional standing for receiving the investment protection. Namely, (i) the treaty definition analysis, (ii) the application of economic criteria, (iii) the principle of good faith and (iv) the correlation of the latter definition with the national legal regime (both host and home State).

As such, the given part of the research confirms the hypothesis that investments generated by the investment funds have the standing to fall under the scope of treaty protection. Provided the necessary criteria are complied with.

Section 2 – Investment Fund as an “Investor” in Investment Protection Regime

Introduction

The given part continues exploring the principal definitions of the investment protection regime. Namely, academically discovering how the term “investor” is conceptualised by the latter regime and what are its pertinent elements for the purpose of the jurisdictional standing, i.e. *ratione personae*.

The investment protection regime experiences no shortage of definitions for the term “investor” as well. However, the inability to set up one universal terminology applicable to all the existing and subsequent disputes is an evident specificity of the latter legal regime. In this context, the BITs are to be viewed as the principal suppliers for conceptualising the term “investor”. However, the previously mentioned rule of consent is still pending. Namely, the States shall agree to whatever is considered an investor, whereas the investment tribunals are to implement the expressed conceptualisation. For instance, see Lithuania-Ukraine BIT:

“ “Investor” means:

a. In respect of the Republic of Lithuania:
- natural person who are nationals of the Republic of Lithuania according to Lithuanian laws;
- any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations;

b. In respect of Ukraine:
- natural person who are national of the Ukraine according to Ukrainian laws
- any entity established in the territory of Ukraine in conformity with its laws and regulations;"[457]

Hence, for the investor to fall under the protection of the given BIT, either natural or legal entity needs to possess a pertinent link to the jurisdiction of the home State. Namely, to be duly registered in accordance with the laws (for legal persons) or to be a national of the home State (for physical persons)[458].

As such, the connection to the country of origin plays a significant role in establishing the jurisdiction, permitting the investor to profit from the investment protection regime.

"Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments…[C]*onferred by a State, it only entitles that State to exercise protection* vis-à-vis *another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national"*[459]

Even more, the above-mentioned link is to be present when: (1) the home State subscribes to the ICSID Convention; and (2) the day when the arbitration claim is submitted. [460]

Should the individual possess dual nationality: one of the home country and a second of the host State, the tribunal denies arbitration access. In *Champion Trading Inc. v. the Republic of Egypt,*[461] the Claimant having two nationalities (including the Egyptian one), was denied the claim to be reviewed. The adjudicators ruled to dismiss the claim as an apparent link was established when the Claimant used Egyptian nationality to register the enterprise.

See also the Singapore-US FTA:

"…[i]*nvestor of a Party means a Party or a national or an enterprise of a Party that is seeking to make, is making or has made an investment in the territory of the other Party; provided,*

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[457] BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995), Article 1(2)
[458] See, for example, Trilateral Trade Agreement (Canada-Mexico-United States), North American Free Trade Agreement (NAFTA) (1994), Article 201 providing on permanent residents: *"National means a natural person who is a citizen or permanent resident of a Party".*
[459] *Liechtenstein v. Guatemala* (International Court of Justice (ICJ) Reports 1955, p. 4; General List, No. 18) 1955, para 23
[460] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), Article 25
[461] *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9) 2006, Decision on Jurisdiction, Para 3.4.3

however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality."[462]

Alternatively, another example from Romania-Israel BIT:

"*With respect to physical persons – an individual who possesses both Israeli and Romanian citizenship, who invests in Israel shall not be considered a Romanian investor, for the purposes of this agreement*".[463]

Another pertinent aspect applied on the universal scale is the requirement to be duly registered in the home State's jurisdiction. For physical persons, this implies being a resident of the latter. However, for legal persons, the approach differs. Namely, the investment treaties explicitly mention several criteria designed to specify better the term "investor" in the given context. This includes the identification and distinction between the place of incorporation, the seat of the company and the place of control. For example, the BIT between France and Singapore underlines that the enterprises should be constituted in France and have a head office in France.[464]

The Belgo-Luxembourg-Serbia BIT provides the interpretation in the following way:

"…[t]*he "company", i.e. a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its registered office in the territory of that Contracting Party and making investments in the territory of the other Contracting Party."*[465]

The approach with regard to what is considered valid registration for the investor may change and evolve for specific countries entering new agreements. This, in particular, proves the evolutive nature of the term "*investor*" as well. For example, see the Sweden-Lithuania BIT[466] dating back to 1992:

"…[a]*ny legal person having its seat in the territory of either Contracting Party or in a third country with a predominant interest of an investor of either Contracting Party."*[467]

Instead, the Albania-Lithuania BIT (2007) had lost its requirement of "predominant interest" and became more generalised:

"…[a]*ny entity constituted under the laws and regulations of that Contracting Party"*[468]

[462] BIT, Singapore–United States Free Trade Agreement (2003), Article 10.19 (9)
[463] BIT, Agreement on Protection of Investments Between Israel and Romania (1991), Article 1
[464] BIT, France - Singapore Investment Protection Treaty (1975), Article 1 (3) (a)
[465] BIT, Belgium-Luxembourg Economic Union - Serbia Investment Protection Treaty (2004), Article 1 (b)
[466] BIT, Sweden - Lithuania Investment Protection Treaty (1992)
[467] Ibid, Article 1, (3) (b)
[468] BIT, Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Lithuania on the promotion and protection of investments (2007), Article 2(b)

Another example is the India-Sweden BIT. Although signed in 2000 and consequently terminated in 2001, it provides a more elaborate specification for what is considered an investor under the mentioned treaty. Namely, apart from offering a generally used definition of investor, "…[a]*ny national or a company of Contracting Party*"[469], it also supplied distinct legal criteria by mentioning a separate category of investor, i.e. "companies":

""[C]*ompanies" mean any corporations, firms and associations incorporated or constituted under the law in force in the territory of either Contracting Party, or in a third country if at least 51 percent of the equity interest is owned by investors of that Contracting Party, or in which investors of that Contracting Party control at least 51 percent of the voting rights in respect of shares owned by them."*[470]

The given consideration allows deducting the term "investor" to be approached differently by the States. The latter witnesses the trend of reformation in both directions: becoming more general or more complex, depending on the State's objective at the given moment. In this vein, the latter definition represents the State's rationale and motivation sourced from the objective the latter wishes to attain. Therefore, it shall be understood and interpreted in connection to the national law at review.

Investment fund as an "investor"

In the given part, the author will review how the home State's legal requirements pertinent to registering/authorising the investment fund may affect the latter's compatibility with the treaty requirements and, subsequently, the jurisdictional standing to receive the investment protection. For these purposes, the legal jurisdiction of Luxembourg will be used as an example.

Luxembourg had numerous investment treaties signed with third countries. For instance, the Investment Agreement between Bosnia and Herzegovina and Luxembourg provides how the latter jurisdiction conceptualises the term "investor":

The term "investor" shall mean :

> *"a) the "nationals", i.e. any natural person who, according to the legislation of the Kingdom of Belgium and of the Grand-Duchy of Luxembourg, is considered as a citizen of the Kingdom of Belgium and of the Grand-Duchy of Luxembourg respectively ;*
>
> *b) the "companies", i.e. any legal person constituted in accordance with the legislation of the Kingdom of Belgium and of the Grand-Duchy of Luxembourg and having its registered office in the territory of the Kingdom of Belgium and of the Grand-Duchy of Luxembourg respectively."*[471]

[469] BIT, Sweden-India Investment Protection Treaty (2000 (terminated in 2001)), Article 1(v)(b)
[470] Ibid, Article 1 (d)
[471] BIT, Belgium-Luxembourg Economic Union - Bosnia and Herzegovina Investment Protection Treaty (2004), Article 1

Evidently, the approach to defining the term "investor" stands based on two distinct criteria: (1) to be a national of the home State or (2) to be duly registered as a legal entity.

Interestingly, the Luxembourg – Bosnia and Herzegovina BIT provides extended coverage to investors who are not registered in Luxembourg but fall under the direct or indirect control of a legal or natural person, as mentioned in points "a" and "b":

> *"c) the "legal person" not constituted for the purpose of this Agreement, under the law of that Contracting Party, but controlled, directly or indirectly, by natural person as defined in a) or by legal person as defined in b)."* [472]

This implies the treaty recognises the modality of control of investment, i.e. direct and indirect, by either of the parties specified as an investor for the given BIT. Hence, the approach taken by the said jurisdiction provides advanced coverage to individuals and legal entities investing their capital in the host State. Namely, offering protection to legal entities controlled by the home State investor.

Despite the extended coverage, the requirement pending from the BITs agreed by Luxembourg seeks the validity of investors to be dependent on the principle of due registration in the home State's jurisdiction. In particular, to be duly registered for legal companies and residing in the host State for physical persons. Following the said requirement provides the investor eligibility. The latter is also applicable to investment funds.

In particular, fulfilling all the legal requirements posed by the national law for deeming the investment fund as duly registered for the purposes of the BIT at review. This concerns the investment funds in the form of a legal company. In particular, SICAV – an open-ended investment fund structure (fr. *Société d'investissement à Capital Variable*) (UCITS) or SICAF – a closed-ended investment fund structure (fr. *Société d'Investissement à Capital Fixe*).

At the same time, Luxembourg's investment fund law provides the modality for a fund to be registered based on the contract, i.e. common fund (fr. *Fond common de placement – FCP*). The latter is regulated by the Law on Commercial Enterprises *(lex generalis*)[473] as well as Law on Undertakings in Collective Investments (2010) (lex specialis)[474] as well as by *lex generalis*, namely the Law on Commercial Enterprises. By order of the national law, the FCP fund form shall be authorised by the CSSF[475] and also be registered in the national registry of commercial enterprises (RCS).

On the one side, although a legal entity, the common fund form does not fall under the definition proposed in the above-mentioned BIT. In particular, the term "company" encapsulates the

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[472] BIT, Belgium-Luxembourg Economic Union - Serbia Investment Protection Treaty (2004), Article 1 (b)

[473] Journal officiel du Grand-Duché de Luxembourg, Loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises et modifiant certaines autres dispositions légales (2002), Article 10, 30

[474] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 5

[475] Ibid, Article 89(1)

compulsory element of a "registered office" (*siège social*). The latter legal attribute is unavailable to FCP.

On the other side, the FCP fund preserves the status of a legal entity, i.e. subjected to national law, although being not a legal company. This includes the standing to be obliged by law, i.e. units redemption to its investors, and to enjoy the legal rights, i.e. investing activity. Subsequently, the potentiality to abuse the mentioned rights remains present with the disposition of a common fund. The latter aspect represents the central point of the current research. Hence, it would be academically unreasonable to omit the said discussion.

In this context, the previously mentioned principle of consent shall also be mentioned. As already reviewed in the example of the *Tokios Tokeles* dispute, the agreeing States enjoy the discretion to set the scope of criteria delimiting valid investors from those excluded from treaty protection. However, the said power is viewed to be exercised by explicit mention inserted in the treaty text. The latter's absence regarding the FCP fund form suggests the potential permissibility for the reviewed legal entity to fall under the scope of the discussed BIT.

Besides, the BIT concluded between Luxembourg and Bosnia, and Herzegovina underlines the willingness of the parties to preserve a broad interpretation of the term "investor" when including in its scope any other legal person that is not constituted under the law of the Contracting Party but is controlled by the Luxembourg or Serbia company/national[476].

On the basis of these considerations, the author takes the stance of a broader interpretation of the mentioned treaty by including the FCP fund form in its scope within the limits of the current Thesis.

The latter decision is motivated by two principal reasons. First, the FCP fund enjoys the legal rights offered by the Luxembourg fund law, i.e. right to invest. Therefore, the latter is presumed to be an actor of abuse. Excluding the FCP fund from the scope of research will negatively impact the quality of research interconnecting the investment fund law with investment arbitration. Second, the mentioned broad language and interpretation of treaty texts represent the legal identity of the investment protection regime. As such, denying the said permissibility as the cornerstone of the investor treaty regime in the current situation would lead to conceptual inconsistency and unnecessary formalism. Consequently, the author deems the funds authorised/registered as a legal company (SICAV/F) and a common fund (FCP) to fall under the scope of the Luxembourg BITs within the limits of the current research.

Investment fund shareholders/unitholders

The investment fund shareholders/unitholders (irrespective of their legal nature, natural person, companies and other legal entities such as investment funds and other entities) are to be viewed as indirect investors bringing the capital into the host State economy *via* the avenue of the investment fund vehicle. In this context, the author would like to return to the principle of consent where the State - a signatory to the ICSID Convention and subsequent BIT at review enjoys complete discretion for limiting the circle of those investors that are considered non-

[476] BIT, Belgium-Luxembourg Economic Union - Serbia Investment Protection Treaty (2004), Article 1 (b)

permissible for the investment protection regime. Importantly, the latter consent is implied unless explicitly denied by the State.

In *Tokios Tokeles v. Ukraine*, the Respondent had alleged the investor's *ratione personae* element to be missing. Namely, the investor had no substantial business activity on the territory of the home country in order to receive protection under the concerned BIT.[477] However, the term "investor" under the Lithuania-Ukraine BIT had been developed very broadly.

"Natural person who are nationals of Ukraine according to Ukrainian laws; and any entity established in the territory of Ukraine in conformity with its laws and regulations".[478]

The Claimant had alleged that the Ukrainian side was unwilling to include such a restriction when drafting the mentioned Lithuania-Ukraine BIT. This, in particular, was explained by referencing another BIT concluded between Ukraine and the United States. The latter directly mentioned such a prohibition by specifying the *de minimis* capital requirements.[479] Therefore, the Tribunal perceived the non-mention of restriction in the Lithuania-Ukraine BIT as an implied and willing decision to expand the scope of the term "investor" for the Lithuania-Ukraine investment cooperation.[480]

The given dispute had established the doctrinal pattern underlining the implications deriving from the broad language used in the investment treaties. Namely, the absence of limitations on the term "investor" is to be viewed as the State's consent to include any legal entity duly registered under the local legal regime unless limited by the implicit language of the concluded treaty to which the agreeing States had consented.

The given case practice develops the theoretical reasoning for viewing the investment fund shareholders as having access to the investment protection regime unless the pertinent BIT directly mentions the opposite.

In this context, *Zarra* mentions the change in the investment protection regime related to how the definitions inscribed in the investment treaties are viewed. Namely, about the evident shift: from *"effective control definitions"* towards "…[a]*sset based definitions – involving portfolio investments and the mere ownership of shares…"*[481]. Consequently, this increases the margin of opportunities for (1) minority shareholders and (2) indirect investors investing their capitals *via* collective investment vehicles, i.e. investment fund's shareholders.

When discussing the admissibility criteria for investors and their investments, the tribunals look at how the latter had fulfilled the ICSID Convention's principal goals – developing the host State economy. Instead, calculating the number of shares held or evaluating the means of how the capital is invested becomes non-essential for deciding the jurisdictional standing of the investor.

[477] *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18) 2004, Decision on Jurisdiction, para 33-34
[478] BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995), Article 1(2)
[479] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Decision on Jurisdiction, para 34-35, 36-39
[480] Ibid, Decision on Jurisdiction, para 69, 108
[481] Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 7-8

Namely, in the investment fund case law related to the shareholders' rights*:* "…[t]*he pure exercise of shareholder right is not deemed to be an exercise control"*.[482]

The importance rests with the BIT's broad language and the absence of implied limitations set by the consenting States. Differently said, if the BIT does not limit the investment protection to the minority or indirect investors, the mentioned categories of investors are deemed valid.

"The Tribunal finds that the definition of this term in the ARGENTINA-U.S. Treaty is very broad and allows for many meanings. For example, as regards shareholder equity, the ARGENTINA-U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company or a majority share; thus, the fact that LANCO holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the ARGENTINA-U.S. Treaty."[483]

The given approach received further recognition in investment disputes.[484]For instance, see the *GAMI Investments v. United Mexican States* case, where the Tribunal had explicitly noted that holding 14% shares does not preclude the Claimant from protecting one's rights.[485]

Besides, see also the *Siemens v. Argentine*[486] case:

"The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."[487]

See also doctrinal opinion:

"…([I]*magine, for instance, 100 different shareholders each owning a mere 1% of the corporation's shares). Nothing (apart, of course, from the high costs of pursuing international arbitration) would prevent all these different shareholders from filing their own separate claims against the host State for the same treaty breach"*.[488]

In this context, see the argumentation deriving from the investment case practice:

"This Tribunal must accordingly conclude that under the provisions of the Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control

[482] Dirk Zetzsche (ed), The Alternative Investment Fund Managers Directive (Wolters Kluwer 2020), p. 51
[483] *Lanco International Inc. v. The Argentine Republic (ICSID Case No. ARB/97/6) 1998*, Decision on Jurisdiction, Part III Reasons, para 10
[484] See for example *Camuzzi International S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/2) 2005 (43% of shares)
[485] *Gami Investments, Inc. v. The Government of the United Mexican States (UNCITRAL (Under NAFTA Agreement)) 2004*, Award, para 37, 43
[486] *Siemens A.G. v. The Argentine Republic (ICSID Case No. ARB/02/8) 2007*
[487] Ibid, para 137-138
[488] Martin Valasek and Patrick Dumberry, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes" (2011), p. 71

of the affected corporation when claiming for violations of their rights under such treaty are admissible."[489]

However, the mentioned permissibility shall, nevertheless, be limited to a cut-off point as provided by the subsequent Tribunal:

"The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company."[490]

The above-mentioned "cut-off" point will be further discussed in the given Thesism, namely in relation to the phenomenon of corporate claims proliferation and the qualitative features of investment.

Based on the mentioned arguments, pertinent case practice and doctrinal analysis, the author views the investment fund shareholder's standing as valid for the investment protection regime. Namely, the absence of implicit prohibition of the said categories of investors shall be viewed as an implied acceptance of offering the treaty protection.

Conclusion

The analysis of the term "investor" for the purposes of the investment protection regime unveiled several significant findings. Namely, the latter term is inherently interconnected to the investment – an initial cause for offering the jurisdictional standing.

Further on, it had been deducted that the term "investor" is loosely defined. For instance, the agreeing States define the term "investor" as any legal entity duly registered under the laws of either State or national of the said States or a physical person resident of the latter State. In this vein, a limited amount of BITs mention further specifications. For example, the BLEU-Serbia BIT implies the extension of the investment protection regime to investors who are not registered in the State but are controlled directly or indirectly by the company and physical person from Luxembourg. [491]

The absence of many specifications on the term "investor" had been interpreted to imply the States' consent to including a broad spectre of those recognised as valid investors in the investment protection regime context. The author presented several arguments in support of the latter statement.

One of the mentioned arguments has been sourced from the previous part of the current research. Namely, the principle of consent is provided at the State's discretion to limit the scope of valid investors for the investment protection regime. Following the approach deducted from the reviewed case practice, i.e. *Tokios Tokeles v. Ukraine*, the author argued that the absence of the

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[489] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) 2007, para 48
[490] Ibid, para 52
[491] BIT, Belgium-Luxembourg Economic Union - Serbia Investment Protection Treaty (2004), Article 1 (b)

mention of investment funds and their shareholders in the BIT definition manifests an implicit by the States approach to including the said categories into the scope of valid investors.

In this vein, the investment funds and shareholders/unitholders of the funds had been recognised to be valid investors to the investment protection regime, unless mentioned opposite in the pertinent BIT, i.e. consent to not include. The given deductions opened further discussion on conceptualising the role of the investment fund as an actor of abuse by estimating the abuse potentiality of the latter.

PART III. TREATY RIGHT EXERCISE: BETWEEN ABUSE AND LEGITIME USE

Section 1 – Abuse of treaty rights

Introduction

The given part will embark on conceptualising the legal phenomenon of abuse by exploring its most defining aspects. For these reasons, the latter legal phenomenon will be examined in different settings and case scenarios. This includes deducing the key elements of abuse: definition, prerequisites of occurrence and legal device for detecting the latter. The combination of the said goals is expected to aid in answering the ultimate question posed by the given part and deduct knowledge for further application.

In addition, the author will also discuss how the legal phenomenon of abuse is conceptualised by the European Court of Human Rights (ECHR) and certain aspects pertinent to both legal regimes. The said exploration is necessary for the investment protection regime, often devoid of a continuous doctrinal pattern regarding abuse conceptualisation. As a result, the ECHR conceptualisation of abuse is done to draw parallels by analogy.

To begin with, every legal regime consists of rights distributed to its participants. The investment protection regime is not an exception. The latter offers investment treaty rights to investors for the evident purpose of safeguarding their capital. For example, the right to initiate the investment arbitration dispute against the State is offered to investors with the objective of (1) safeguarding their capitals and (2) developing the host State's economy. The exercise of rights with the given motives represents normality – a regimented and orderly process of rights' distribution and their subsequent use legitimately, i.e. as prescribed by the legislator.

Definition of abuse

The general definition of abuse provides that it is the use of something for the wrong purposes in a harmful or wrong way[492]. In this context, two pertinent elements prove the use of treaty rights becoming abusive: (1) the use for wrong purposes and (2) in a way that is harmful or wrong. Further exploration of both is necessary.

- The use for the wrong purposes

The given aspect represents the abnormality where the investor has an intent different from what had been envisaged by the legislator offering the given right *ab initio*.[493] For example, the right to initiate the investment dispute in arbitration is exercised to bring negative publicity and further deter investors from investing in the given State.

As a result, the investor's motive contradicts the legislator's initial intent. In this context, the regulator's intent is considered righteous and valid. Whatever is contrary to the regulator's intent

[492] See official website https://dictionary.cambridge.org/dictionary/english/abuse [last accessed 14 June 2022]
[493] For example, see Georges Ravarani, "La responsabilite civile des personnes privees et publiques" (2014) , p. 87

will be deemed inappropriate behaviour: the investor is only a user of a legal regime, whereas the regulator is the latter's creator.

Consequently, the exercise of rights contradicting the prescribed order results in negative appreciation by the legislator and subsequent sanctioning in various forms: the denial to access the judiciary, the monetary fine imposed or any sort of administrative or criminal prosecution[494].

- Harmful or wrong way

Another universal element defining abuse is the harmful or wrong way of use. In the investment protection regime, the harmfulness of abuse is more pertinent to the current research. Namely, the abuse is identified *via* the avenue of estimating the negative impact it had caused on the investment protection regime.

What could be a sizeable negative impact? Referring to the said example of the investor submitting the arbitration dispute with the intent of bringing negative publicity against the State, the negative effect would be in the form of the investor's use of investment treaty rights as "legal weapons" [495] against the host State. Several negative potentialities may follow from the latter.

Namely, submitting unnecessary claims born out of ill-founded motives could clutter the judiciary and lower the capacity of arbitrators to render the award. Consequently, this will devoid the judiciary of its principal function – distributing justice.

Besides, the investor initiating the dispute against the host State may bring negative publicity to the host State's economy – contrary to the goal of the ICSID Convention. In this way, the financial products offered by the State, i.e. bonds and guarantees, will witness the market price decrease and lower the State's reputation as a reliable counteragent repaying its financial obligations.

Legal prerequisites of abuse

In general terms, the abuse may appear out of any law distributing the rights to individuals who seek to abuse, disregarding how precise the law is. However, certain prerequisites render the abuse to be more potential.

Considering the fact that the legal phenomenon of abuse is viewed in the given Thesis through the lens of potentiality, it is worth mentioning the said prerequisites. Namely, discussing the uncertainty or ambiguity of the law that often forms the fertile soil for the abuse to appear.[496]

For instance, *Schauer* mentions the following:

[494] For example, see European Union, Directive 2014/57/EU on criminal sanctions for market abuse (market abuse directive) OJ L 173 (2015)
[495] *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6) 2019, Decision on Jurisdiction, para 117
[496] Eric De Brabandere, "'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims" (2012), p. 618-621

"A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?"[497]

Evidently, the abuse reigns over uncertainty where opportunistic challenging of law will eventually transform into harm done *via* the improper use of rights. In this way, the legal system designed to regulate is used for harmful purposes.

The abuse targets the weakest parts of the legal regimes by parasitising on uncertainties or understatements that the legislator *ab initio* should have clarified but did not for various reasons, i.e. lack of political will, limitations of the international legal order or trivial mistakes occurring during the legal drafting.

Naturally, no reasonable person would consider bringing the aeroplane to the park. However, other vehicles that are not beyond unreasonable could have been mentioned as forbidden, i.e. scooters. Therefore, the abuse and its occurrence may be viewed as an indicator of legislative misfortunes to be fixed by the legislator. Nonetheless, the above-mentioned consideration is probably the only example where abuse benefits the legal regime.

Hence, it is necessary to underline that abuse in the given Thesis shall be conventionally viewed as potentiality appearing due to a combination of various factors forming a permissible legal environment for the latter to occur. For instance, the investor's ill-founded motives, the ambiguity of legal texts, the absence of clarifications or pertinent case practice and others. Put differently, abuse as a legal phenomenon appears out of a permissible environment encapsulating the said factors. Its potentiality is directly relevant to how fertile the soil on which it grows. This manifests the continuous and never-ending battle of regulators and legislators limiting the margins available to abuse.

Investment protection regime specificities

The above-presented part conceptualises the abuse on a general scale. Instead, the current one will look at how the specified legal regime constructed based on the ICSID Convention, i.e. investment protection regime, conceptualises the abuse. This requires, before all, understanding the specificities of the mentioned regime.

To begin with, neither the ICSID Convention nor the specific BIT at review mentions the term "abuse". Consequently, the task of crafting the latter rests wholesomely on the arbitrators rendering the pertinent dispute review process.

The given consideration then interconnects with the fact of investment protection regime being different from the rest of the legal regimes in terms of how the judiciary is organised. Namely, the investment protection regime consists of a number of one-time tribunals with arbitrators appointed by the disputing parties. As a result, the varying panels of arbitrators requiring no

[497] Herbert Hart, "Positivism and the Separation of Law and Morals" (1958), p. 593-629, 607; See also Frederick Schauer, "Thinking Like a Lawyer" (2009) Harvard University Press, p. 153

formal qualifications conceptualise the abuse in a way they feel appropriate to the needs of the sole dispute they had been appointed to resolve, i.e. *à la carte* abuse conceptualisation. The tribunal dismisses oneself as soon as the mentioned goal is reached, leaving no substantial doctrinal pattern followed by the proceedings arbitrations.

Indeed, many subsequent arbitration panels will mention the previously rendered disputes when questioning the matter of abuse. However, the rationale of selecting the disputes on which to base its decision would then lead to a conceptual cherry-picking for fulfilling the objectives of the specific dispute at review without attempting to develop a universal conceptualisation of abuse. This renders the latter legal phenomenon lost in translations: it is a fragmented and less defined legal concept with no apparent legal borderlines. For these reasons, the conceptualisation of abuse could be viewed as an orphan of its very legal regime.

At the same time, the investment arbitration case practice is very prolific in conceptualising the abuse and deducting several elements of the latter. This includes the legal device used for targeting the abuse.

Legal device for abuse detection in investment arbitration

The legal device for abuse detection represents the methodology for detecting the latter behaviour based on a pre-defined by the legislator conceptualisation of abuse. Despite the variability of definitions, the investment arbitration tribunals approach the abuse detection process by applying the most conventional legal device. Namely, correlating the investors' motives with the laws' objectives.

For example, in *Orascom v. Algeria*, the Tribunal established that *"The doctrine of abuse of rights prohibits the exercise of a right for purposes other than those for which the right was established*".[498]

The academic literature confirms the given method to be widely applied in the investment protection regime when rendering the arbitration disputes: "…[a]*buse of right occurs when its beneficiary uses it in contradiction with the goal pursued by the rule instituting that right".*[499]

For instance, in the Japan-Ukraine BIT[500], the investors are offered the right to enjoy treatment no less favourable than the residents of the host State[501], the right to non-expropriation[502] and the right to bring a claim against the host State in arbitration[503].

However, the mentioned rights represent the most fundamental ones. Instead, others may be deducted indirectly through the process of dispute resolution. For example, the right to apply for

[498] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 540
[499] Herve Ascensio, "Abuse of Process in International Investment Arbitration" (2014), p. 765
[500] BIT, Agreement between Japan and Ukraine for the promotion and protection of investment (2015)
[501] Ibid, Article 4
[502] Ibid, Article 13
[503] Ibid, Article 18

provisional measures is a procedural right given to investors by the pertinent arbitration rules[504] and deriving from a more fundamental right for initiating a dispute against the State. The right to apply for provisional measures aims to ensure the non-aggravation of the disputed assets or the *status quo* of the investor, i.e. prohibition of assets' sale until the claim is resolved.

However, the mentioned right may be used by the investor with alien objectives. For example, the intent to prolong the dispute review or obstruct the national authority from executing its power. In the *Plama* dispute, the investor had requested from the arbitration Tribunal the stopping of the bankruptcy procedures initiated by the State. The given right had been alleged by the State to be used for the sole objective of avoiding the tax obligations the investor is due. [505] Upon reviewing the arguments of both parties, the Tribunal denied the application for provisional measures. The given decision was rendered under the following rationale:

"Provisional measures are extraordinary measures which should not be recommended lightly. The need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage."

In the given case, the taxes paid to the State as a result of bankruptcy procedures are recoverable, shall the outcomes of the investment arbitration dispute be in the investor's favour, i.e. confirm the bankruptcy had appeared out of the State's expropriation. Hence, there is no irreparable harm done to the investor to limit the State's rendering of its sovereign power for tax collection.

This allows assuming the said right had been used with the ill-founded motive of avoiding the tax obligations owed to the State. The given motive, if confirmed, allows applying the previously discussed legal device of abuse detection:

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[504] International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (2006), Article 39

[505] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Decision on Provisionary Measures, para 2, 38

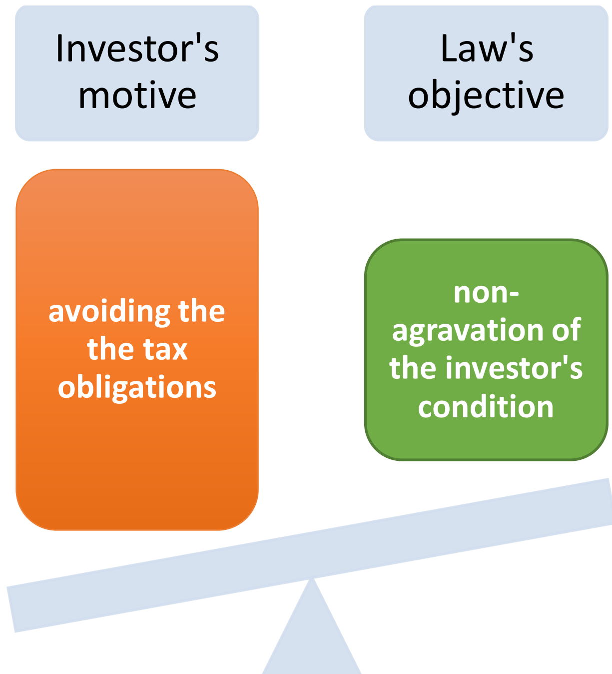

Image 2. Source: author’s illustration

Namely, the investor’s assumed motive of avoiding the tax payments owed does not match with the law's objectives of providing the right to apply for provisional measures *ab initio*. Consequently, the right is presumed to be abused.[506]

In this context, the prescribed by-law objectives are considered a golden standard against which every investor’s motive is compared. Notably, the current legal device implies that the law's objective shall never outweigh the investor’s motive: it can only be balanced or underweight.

To establish the balance in the given case scenario, the investor shall have a motive that is legally equal to the law’s objective. For example, the plant had been stopped due to the State’s expropriation measures. Several hundreds of workers have lost their jobs, with investors unable to continue production. Hence, until the investment tribunal resolves the dispute between the investor and the State, the investor may use the right to apply for provisional measures to resume production, requiring the continuous maintenance and production process. The given motive will equalise to the law's objectives: to prevent the aggravation of the investor’s condition by eliminating irreparable harm. Consequently, the legal device for abuse detection will not signal any mismatch as the law’s objectives are equalised to the investor’s motive. See the following image:

[506] Provided the Tribunal has the substantied reasons for considering the given motive to be igniting the right’s use, i.e. evidence, witness statemnets.

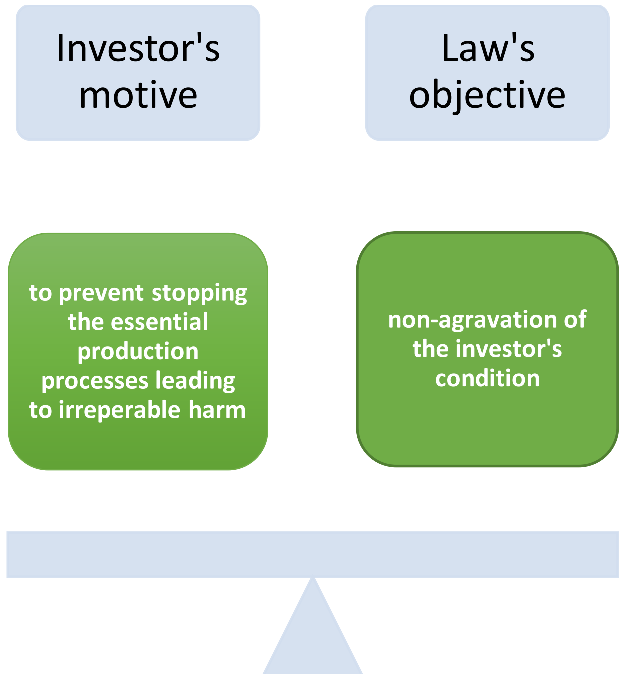

Image 3. Source: author's illustration

Consequently, the given part affirms the investment protection regime utilising the legal device for abuse detection to consist of two principal elements: (1) the inconsistency with the law's objectives and (2) causing harm.

In turn, the legal device for abuse detection commonly used by investment tribunals revolves around correlating the investor's motives with the law's objectives. In case of mismatch, the abuse is deemed identified.

The European Court of Human Rights

The just-reviewed legal device of correlating the individual's motives with the law's objectives is not uncommon elsewhere. For instance, the latter is also present in the legal regime established by the European Convention on Human Rights (ECHR Convention) and adjudicated by the European Court of Human Rights (ECHR Court).

The ECHR legal regime was elaborated as a result of joint efforts of agreeing States aiming to offer judicial protection to private individuals for harm caused by the agreeing State. Put differently, the ECHR Convention is another example of an international forum protecting private individuals against States' illicit actions.[507]

Unlike the ICSID Convention, the ECHR Convention directly mentions the legal phenomenon of abuse with its further exploration by the permanently existing Court. The latter offers the

[507] Aikaterini Tsampi, "The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of contre-pouvoirs within the State after all?" (2020), p. 134-155

consistent and continuous development of doctrinal conceptualisation of abuse.[508] This forms the immediate benefit not present in the investment protection regime. Namely, setting a permanent doctrinal pattern on abuse conceptualisation offers the gap-filling.

The first mention in the ECHR concerns the general prohibition of abuse:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[509]

Further on, the legislator emphasises the most frequent right used by the claimants is the right to apply.

"…[a]*ny conduct on the part of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and that impedes the proper functioning of the Court, or the proper conduct of the proceedings before it…"*[510]

The drafters of the Convention had envisaged the latter right to face the increased risk of abuse due to many opportunistic claims potentially flooding the Court's procedural gates.[511] For these reasons, the Convention had specifically emphasised sanctioning the abuse in connection to the said right, i.e. right to apply.

The Court, acknowledging the evident risk of the inflow of many opportunistic claims, had developed a broad conceptualization of abuse. In particular, the Practical Guide on Admissibility Criteria suggests the abuse to be: "…[a]*ny conduct of an applicant that is manifestly contrary to the purpose of the right of individual application…"*[512]. This includes submission of an application under a false identity, use of offensive language, including the publications about the ECHR judges outside the context of the pending case, use of polemic or sarcastic language, the use of the dispute review for political or propaganda purposes and others.[513]

Evidently, identifying the abuse in such a broad manner implies the Court is willing to set very tight procedural limits minimising the inflow of opportunistic claims. The teleological reasoning

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[508] For example, Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014): Laurens Lavrysen, "Contested contours: the limits of freedom of expression from an abuse of rights perspective: Articles 10 and 17 ECHR", p. 183-210

[509] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 17; See also de Paulien Morree, "Rights and wrongs under the ECHR : the prohibition of abuse of rights in Article 17 of the European Convention on Human Rights" (2016) Cambridge University Press, p. 15-21

[510] *Kongresna Narodna Stranka and Others against Bosnia and Herzegovina* (The European Court of Human Rights (Application no. 414/11)) 2016, para 15

[511] The European Court of Human Rights (ECHR), Guide on Article 17
of the European Convention on Human Rights (2022)

[512] The European Court of Human Rights (ECHR), Practical Guide on Admissibility Criteria (2021), p. 52

[513] Ibid, p. 52-54; See also *Zhdanov and Others v. Russia* (The European Court of Human Rights (Application no. 12200/08)) 2019; See also *Georgian Labour Party v. Georgia* (The European Court of Human Rights (Application no. 9103/04)) 2008

for the given approach could be further read in the said mention of abuse. In particular, the abuse of the right to apply directly endangers the principal function of the court – distributing justice. The recurring case practice further confirms the given approach.

"…"[a]*buse" refers to its ordinary meaning, namely, the harmful exercise of a right by its holder in a manner that is inconsistent with the purpose for which such right is granted."*[514]

Despite setting a low bar on what is viewed as abuse, the ECHR Court applies an identical legal device for tackling the abuse. Namely, the improper use of vested rights shall contain two pertinent elements: (1) to be inconsistent with the purposes of the Convention and (2) to be leading to harmful results, i.e. impeding the Court's functioning. Further on, the inconsistency of the individual's motives with the law's objectives is viewed to lead to harmful consequences manifesting the abusive use of rights.

In this vein, the ECHR Convention is viewed as the closest example to the ICSID Convention in terms of relying on an international adjudicatory body offering judicial protection to private individuals and organisations against the violations appearing of State actions. This allows suggesting the legal device developed by the ECHR to be most relevant to the ICSID Convention.

Therefore, the ECHR's legal regime and approach to tackling the abuse may be used for gap-filling in the current research. Namely, the latter is to be utilised against the most evident shortcoming of the investment protection regime – the absence of a common doctrinal pattern for conceptualising the abuse due to the absence of a continuous adjudicatory body.

Abuse detection process

Having passed on establishing the legal device for abuse identification in the investment protection regime, the author further suggests reviewing in-depth the latter process. At first glance, the abuse identification *via* the above-suggested legal device correlating the individual's motives with the law's objective is a straightforward task. Nevertheless, the following complications derive from a practical analysis of the dispute at review.

Combination of motives

Namely, distilling the law's objectives is a straightforward task. This could be done *via* the already mentioned analysis of the legal texts, its *travaux preparatoires* or the examination of the preambles and concluding remarks of the pertinent treaty for deducting the legislators' intents, values and principles of the pertinent legal regime.

"Every rule has a background justification – sometimes called a rationale – which is the goal that the rule is designed to serve."[515]

[514] *S.A.S. v. France* (The European Court of Human Rights (Application no. 43835/11)) 2014, para 66
[515] Frederick Schauer, "Thinking Like a Lawyer" (2009) Harvard University Press, p. 15

For example, the previously mentioned Japan-Ukraine BIT develops the set of objectives for which the latter is adopted *ab initio*. This includes the desire to promote economic relations, the "…[e]*quitable, favourable transparent conditions for greater investment by investors…"*[516] and other goals pertinent to strengthening investment activity between the contracting parties. In this context, the BIT at review or the ICSID Convention are to be considered open books revealing its objectives and goals.

Instead, establishing what motive the individual has at the time of exercising the specific right is a legally challenging task impossible to fulfil with a high level of certainty. For example, one particular action may not necessarily be called by one specific motive. *Ascensio* comments on this in the following way:

"…[i]*t is clear that an improper purpose is required to establish abusive conduct. An abstract listing of these purposes would probably be difficult, as it would defy the variety of situations that are potentially abusive.*"[517] In this way, the human rationale representing the combination of motives is far from static. The motives for exercising the specific right may change at the moment of the right exercise and not be the same as what had been initially envisaged.

Consequently, the author argues that the multitude of human rationales (legitimate and non-legitimate) embedded in a particular right exercise may trouble the previously mentioned methodology of abuse identification.

For instance, when calling for investment protection, the Claimant exercises the right to initiate the dispute with the intent to (1) retrieve the investment seized and (2) attract the public attention to the State measure causing the expropriation of investment. The sum of two motives gives the start to proceedings. Evidently, one motive is considered to be eloquent with the right's objective (retrieving the seized investment). At the same time, the second (bringing the State to public attention) is the questionable conduct that may constitute an act of abuse upon further investigation. [518] Namely, no BIT would mention the right to dispute initiation to be offered to investors for bringing negative publicity to the host State. Two specific objectives (legitimate and abusive) in the given scenario motivated the party to initiate the proceedings.

Could then the actions of the Claimant be considered as abusive wholesomely? This is to be decided by the arbitration tribunals. [519] However, as previously discussed, the specificity of the investment protection regime implies numerous one-time tribunals appointed by the disputing parties. This results in a non-consistent interpretation and varying approaches towards recognising the abuse phenomenon and the practices for distilling the investors' motives.

Interestingly, after Argentina's economic downfall, several investment disputes were initiated. [520] As a result, the investors have claimed the recovery of expropriated assets done by the State due

[516] BIT, Agreement between Japan and Ukraine for the promotion and protection of investment (2015), Preamble
[517] Herve Ascensio, "Abuse of Process in International Investment Arbitration" (2014), p. 780
[518] See, for example, *The Rompetrol Group N.V. v. Romania* (ICSID No. ARB/06/03) 2013, Award, para 47
[519] See for example the Tribunal in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2) 2012, Award, para 482, evaluating the motives of the parties.
[520] Joseph Mamounas, "ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change" (2014)

to economic necessity. Consequently, four arbitration tribunals interpreted the latter term in four opposing manners, excluding one another. [521]

See also *CME v. the Czech Republic*[522] and *Lauder v. the Czech Republic*[523] , where "…[t]*he two tribunals reached completely opposite conclusions with regards to the evaluation of the same facts*".[524]

In this vein, the discretion given to arbitrators provides the benefit of an efficient and tailored made dispute resolution process that adapts to the circumstances of the dispute at review. At the same time, this brings uncertainty to estimating what constitutes abuse when several motives had been igniting the single right exercise.

In *Philip Morris v. Australia*[525]case, the investigation of the Claimant's motives regarding the restructuring of its entity became the pivotal point in evaluating the investor's conduct. The Claimant alleged that "…[t]*he primary motivation underlying the restructuring of the Australian subsidiaries was unrelated to the BIT*".[526] In particular, *"the key motivation"* [527]for restructuring was to re-organise the corporate structure with the aim of tax optimisation instigated under the overall strategy of optimisation initiated ten years before the dispute. Whereas, to gain the additional level of protection *via* the BIT, i.e. treaty shopping, was just an extra reason that appeared as a side result rather than a primary goal.

However, the Tribunal did not get persuaded by the latter suggestion as the evidence indicated the opposite: "*From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong."*[528]

The Tribunal's phrasing "…[*t*]*he Tribunal can only conclude that the main and determinative, if not sole, reason…*" unveils particular indecisiveness regarding the causal link (an important element) between the motive and the action that follows. Namely, one could not establish with a high level of certainty that one specific motive had been driving the investor to perform the action at review.

Evidently, if looked at the same matter in the ECHR, the sole adjudicatory body could have the standing to issue the decision to be further followed in subsequent disputes. However, the legal specificities of the investment protection regime encapsulating numerous one-time tribunals offer no such opportunity. For these reasons, the abuse appearing within the limits of the latter regime gains severe heterogeneity in terms of its latter identification, despite using the commonly agreed legal device for abuse detection.

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521 Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration" (2018), 151-153
522 *CME Czech Republic SA v. Czech Republic* (UNCITRAL Arbitration Proceedings) 2003, Award
523 *Ronald S. Lauder v. The Czech Republic* (UNCITRAL (1976)) 2001, Final Award
524 Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 16
525 *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12) 2015
526 Ibid, Decision on Jurisdiction and Admissibility, para 466-475
527 Ibid, Decision on Jurisdiction and Admissibility, para 467(a)
528 Ibid, Award, para 584

Proportionality of motives

Assumingly, the Tribunal identifies the reason behind the restructuring of the enterprise and further lodging of arbitration claim in *Phillip Morris v. Australia* is motivated by two equal motives: tax optimisation (good faith) (50%) and searching for legal instruments against the upcoming reform (bad faith) (50%). In that case scenario, it would be uncertain what could be considered as just: deny the claim entirely as exactly half of the motives for the treaty rights exercise were abusive or cut the potential damages in half as the second half of the motive had been done in good faith?

The answer to the previous question may change if the abuse had constituted 10% of the overall investor's rationale for performing the mentioned exercise of the disputed treaty right. Would the claim still be considered abusive in scenarios where only 10% of the motive had been abusive? The given considerations have no definite answers and solemnly depend on the Tribunal at review. In turn, the inconsistency of the decisions, in combination with the inability to precise the human motives igniting the specific right exercise, renders the abuse detection process into a guessing game. On this basis, the author argues that abuse is an elusive, scientifically challenging legal phenomenon to detect.

Evidence base

In these considerations, the evidence base may be viewed as the guiding star allowing to detect the abuse.[529] However, the author claims the latter to be potentially misleading. Considering the fact that abuse is long-foreseen action, the abuser has the standing to produce (not forge) the necessary evidence in contemplation of the upcoming dispute. This is to be understood in the context of the investment activity often performed by the legal entities enjoying the administrative power necessary for ordering the staff to prepare the minutes, papers, emails and other written sources pointing at whatever fact proving the alleged absence of abuse.

In the previously discussed *Phillip Morris v. Australia* dispute, the Respondent had questioned the investor's allegation supported by numerous pieces of evidence, i.e. emails and minutes of the meetings: *"The Respondent also questions the veracity of that memorandum, citing to excerpts from company registers, Annual Reports of the affected affiliates*…[c]*riticises the Claimant's reliance on documentary evidence on the basis that* ***it was prepared in contemplation of this arbitration****"*[530].

As a result, the process of estimating human motives may not be considered solid or certain. In turn, the legal device for abuse detection relying on evaluating human motives will produce questionable results of abuse detection. Besides, this is also to be considered in correlation to another inherent specificity of the investment protection regime – the absence of a permanently existing adjudicatory body rendering the case decisions under a common doctrinal pattern.

[529] Frederic Sourgens, Kabir Dougal and Ian Laird, "Evidence in International Investment Arbitration" (2018) Oxford University Press, Part IV Prooving your case
[530] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Award, para 573

Triggers of abuse

As already mentioned, the abuse is a result of the treaty right exercise ignited by the ill-founded motives of the investor. Despite whatever internal goals the investor may pursue when exercising the treaty right exercise, external factors also trigger the latter to act abusively.

In this vein, investors' motives are fueled by the desired goal appearing as a result of the ill-founded treaty right exercise. For example, the right for damages is exercised by the investor to profit from justice. Hence, the abuser's goal is the willingness to gain more than what has been lost. This is done by inflating the incurred damages and calculating the value of the expropriated assets to receive more than originally owned.

Often, the motives driving the exercise of treaty rights in abuse derive from the objective of material gain[531], i.e. to profit from a justice system. In rare cases, it is personal revenge sought by the investor, i.e. bringing bad publicity for the State. As such, the motive of abuse is an expression of the desired goal fulfilled by the abusive use of rights.

In turn, the abuse trigger represents the external factors beyond the investor's rationale, establishing the permissible or non-permissible legal and ethical environment for fulfilling the above-mentioned goals *via* treaty rights exercise in bad faith. The external power pushes the individual to act abusively, regardless of the end motives. In this vein, abuse triggers are autonomous from the end goals of abuse. Whatever the goal the abuser has, the external factors impacting its rationale will remain unchanged.

In the Kantian vision, the decisions taken by human beings are less reasoned by personal emotional visionary developed in autonomy, but rather as a result of interaction with the social system where such an individual finds himself(herself).[532] At the same time, *Gibson* had long mentioned the investment protection regime and its arbitrators to live in the "…[a]*n 'ethical no man's land', a space between the formal regulation of national laws…".*[533] This was explained by the fact of the latter regime having no unified code of ethical conduct – another pertinent specificity of the investment protection regime.

Therefore, the legal counsel and the investor, deciding to resort to abuse in the investment protection regime, experience no constraints imposed by a code of conduct. At the same time, when existing in their respective national legal regimes, the same legal counsel and investor are less likely to resort to unreasonable or abusive practices representing questionable behaviour.

For example, while at the supermarket's check-out counter, demanding to split the groceries into twenty separate purchases to prolong the process (*Abaclat*[534] case) of payment. Alternatively,

[531] See for example the *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009*, Award where the investor attempted to make revenge to the State freezing all the accounts and detaining the former.

[532] Paul Formosa, "Kant's Conception of Personal Autonomy" (2013), p. 1-5

[533] Catherine Gibson, "The Role of Professional Ethics in Procedural Fairness", in "Procedural Fairness in International Courts and Tribunals"(2015), p. 205-206

[534] *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5) 2016, Decision on Jurisdiction

preparing to complain about the market's employee service before even entering the premises (*Lao Holdings v. Laos*).[535]

Before such a claim reaches the court, there will be a share of societal disagreement and bad publicity attracted to the latter. This, in particular, would deter the latter from making the said acts, although possible, due to available rights, i.e. the right to submit a claim or the right to purchase a product. Consequently, the societal discontent found in the specific legal environment impacts the decision to resort to abuse.

Instead, the investment protection regime carries no such well-established patterns due to the non-permanent nature of arbitration tribunals and the absence of any permanent institution within its system of coordinates capable of setting the ethical code of conduct compulsorily applicable to all its participants.

Interestingly, the reason for abuse appearing more frequently in the investment protection regime is also explained by some researchers because of disputing parties standing on a non-equal footing in terms of their status: private individual (legal entity) v. the host State. The latter enjoys legislative initiative, the sovereign power to render justice and more financial resources to defend itself.

"Some legal and practical asymmetries may appear to benefit States in international arbitral proceedings in limiting their disclosure obligations and the practical reach of their documentary review, while private parties do not enjoy the same legal privileges".[536]

As such, to equalise given standing, the investors may be triggered to refer to abusive practices to secure better chances of winning.[537] Consequently, the given rationale may represent another external trigger igniting the investor's abuse, disregarding the latter's end goals.

In this vein, the motive of abuse is sourced not only by the investor's internal motives shaping the end goal but is also impacted by external triggers consisting of distinct elements of a specific legal regime where the investor finds himself.

Therefore, the permissibility of the investment protection regime enjoying no continuous doctrinal pattern and the absence of a unified code of conduct represent the triggers impacting the investor's decision to abuse. Hence, the author views the abuse trigger as an essential element of the said legal phenomenon.

Being dependent on the ethical environment in which the potential abuser is placed, the motives for abuse may face an enhanced or lessened impetus for materialisation depending on society's

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[535] *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019*, Award

[536] Hugh Meighen and Brooks Daly, "Procedural Fairness in Arbitration Involving States", *in "Procedural Fairness in International Courts and Tribunals"*(2015), p. 273

[537] See an example of arm's lengths principle infringement in *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) 2015, Decision on Jurisdiction, para 54 *"[t]he parties were equal in arms as to their case, but since December 2008 Claimant's position has been weakened as the persons involved in the criminal proceedings have been forced out from the ICSID proceedings as potential witnesses or sources of information."*

permissibility towards the intended act. This is to be especially understood in the investment protection regime, having the specificity of being a loosely regulated legal environment with no permanent adjudicatory body capable of setting the widely recognised and compulsory-to-follow code of conduct.

Non-evident abuse

In the given part, the author wishes to discuss the phenomenon of non-evident abuse broadly present in the recurring arbitration case practice. In particular, to trace the teleological patterns of the latter legal phenomenon.

As already deducted, abuse is a legally fluid concept and, thus, lucrative to the benefit of investors attempting to use the latter for non-consistent with the law objectives purposes. Naturally, the investor would seek to conceal the abuse by alleging the legitimate motives driving the particular treaty right exercise. In this context, it is in the best interest of the opposing party and the investment tribunal to reveal the investor's real motives. For arbitrators, it is the duty put on them by arbitration rules to ensure a fair dispute resolution process with distributing justice. Instead, it is also in the best interest of the opposing party, i.e. the State, to unfold the abusive motives to avoid facing the negative consequences, i.e. monetary damages, reputation loss or others.

However, it is naïve to assume the recurring case practice identifies all the cases of abuse. This implies the existence of abuse that is left unnoticed, i.e. non-evident abuse, namely, the abuse that the investment tribunal or the State had not discovered amid the dispute review. What could be then the teleological reasons for its latter existence, or, put differently, why some abuse remains unnoticed?

The first and most evident rationale concerns the investor's effort to conceal the abuse. In this vein, the actor of abuse will explain the abusive exercise of treaty rights to be motivated by legitimate motives. As previously mentioned, the investor may offer several pieces of evidence proving the legitimacy of the said motives driving the exercise of the specific treaty rights. The said evidence may be prepared well before the dispute occurs.

The well-reasoned argumentation and the extensive evidence will deter the opposing party from considering the potentiality of abuse in the investor's actions. In turn, the investment tribunal will not self-initiate the scrutiny of specific treaty right exercise for the subject matter of potential abuse unless alleged by the disputing parties or so evident that it cannot be ignored.

In this reasoning, the non-evident examples of abuse appear out of active and determined actions of the investor attempting to conceal any hint suggesting the abusive motive driving the treaty right exercise.

However, another surprising reason for the non-evident abuse to appear may also be explained by the passiveness of the opposing party and the investment tribunal. At first glance, the given approach would contradict the initially mentioned system of rationales where it would be in the best interest of both to actively engage in identifying and prosecuting the abuse from the investor's side.

As suggested by Gibson, there is a certain "…[u]*nwillingness of international tribunals to confront the questionable behaviour of counsel before it, and instead to engage in reason by circumvention, to avoid the offence."*[538]

In the author's view, the answer to the given phenomenon is found in the teleological side of the investment protection regime and its legal design. As already mentioned, the said legal regime comprises numerous one-time tribunals initiated to resolve the specific dispute. The arbitrators acting in the said tribunals are appointed and financed exclusively by the disputing parties. As soon as the dispute is resolved, the investment tribunal dismisses itself, leaving no permanent body representing the judicial function of the investment protection regime.

Evidently, the sponsorship by the disputing parties supporting the review process impacts the system of the rationale of the investment tribunals. In this way, the objective of resolving the dispute quickly and efficiently will receive more priority than developing the doctrinal concept of abuse. Namely, going beyond the objectives set by the disputing parties seeking to resolve the dispute will drive the procedural costs covered by the said parties higher than envisaged unless asked by one of the sides or so evident that arbitrators cannot ignore it.

For example, in *Crystallex v. Venezuela* dispute, the investor had calculated the incurred damages opportunistically, namely, selecting the date when the market valued the disputed asset the highest. The Tribunal had denied applying the suggested methodology, however, without reviewing the potential abuse of the said right exercise.

"Crystallex opportunistically selected the spot price for gold as of 3 February 2011 (US$ 1,328) instead of the price at the time of the 2007 Technical Report (US$ 550), with a view to inflating the damages calculations."[539]

In this context, the arbitrators naming the given approach opportunistic had circumvented the exploration of potential abuse that, in the case initiated, was financed by the same parties. The opposing party had not raised the allegation regarding potential abuse either. As a result, the Tribunal had been left with very little margin of legal navigation for exploring the potentially

[538] Catherine Gibson, "The Role of Professional Ethics in Procedural Fairness", in "Procedural Fairness in International Courts and Tribunals"(2015), p. 208; See also *Corfu Channel* (International Court of Justice (ICJ)) 1949, Merits, ICJ Report 4; See also Catherine Gibson, "The Role of Professional Ethics in Procedural Fairness", in "Procedural Fairness in International Courts and Tribunals"(2015) and James Devaney, "Evidentiary Fairness and Experts in International Tribunals", *in "Procedural Fairness in International Courts and Tribunals"*(2015) British Institute of International and Comparative Law

[539] *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) 2016, Award, para 762

abusive conduct of the investor.[540] Consequently, the matter of abuse review was put off the table. The latter is sometimes referred to as a phenomenon of the absence of judicial activism.[541]

In contrast, the ECHR Court functions differently where the signatories to the ECHR Convention sponsor the latter. Therefore, the justices who are members of a permanent and autonomous judicial institution act in the latter's best interest. As previously mentioned, the abuse conceptualisation developed by the ECHR legal regime aims to prevent abusive claims from entering the "procedural gates" of the Court. For these reasons, the Convention's text mentions the notion of abuse in connection to the procedural right "to apply".

The ECHR's recurring case practice unveils that the Court's justices are eager, at any available opportunity, to extend the concept of abuse by interpreting the latter in the broadest way possible. For example, the use of vexatious language[542], the submission of the claim without the ability to provide the valid identification of the Claimant[543], and the attempts to make a claim's facts look similar to the previously resolved dispute[544] are all considered by the Court as abuse.

In contrast, it would make little sense for arbitrators comprising the investment tribunals and financed by the disputing parties to limit the inflow of disputes *via* the avenue of profound development of the doctrine on abuse, if not alleged by the disputing parties or so evident that it requires attention.

Put differently, developing the concept of abuse to limit the inflow of disputes would mean "cutting the branch on which one stands". This forms a separate and unique of its kind legal specificity influencing the legal phenomenon of abuse to be more pruned for appearance in the said legal regime

Consequently, the arbitrators' permissibility towards the investors' questionable behaviour, i.e. opportunistic calculations of damages, puts the abuse off the arbitrator's radar, hence, increasing the share of the non-evident abuse. The given environment, in turn, develops into fertile soil for further abuse occurrence with an increased risk potentiality than in other legal regimes, i.e. ECHR Convention. In the next parts, the author will present further case examples revealing the suggested specificity.

Conclusion

This part was designed to scientifically explore the theoretical basis of abuse as a phenomenon appearing in the investment arbitration field. The author selected an approach of viewing the abuse through the lens of another pertinent legal regime established by the ECHR Convention.

[540] Ibid, 2, 5

[541] Ted Thomas, "The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles" (2009) Cambridge University Press, p.88

[542] *Zhdanov and Others v. Russia (The European Court of Human Rights (Application no. 12200/08)) 2019,* para 79-81

[543] *Tjitske Drijfhout v. the Netherlands* (The European Court of Human Rights (Application no. 51721/09)) 2011, para 29

[544] *Kongresna Narodna Stranka and Others against Bosnia and Herzegovina (The European Court of Human Rights (Application no. 414/11)) 2016,* para 15

As a result, the two elements of the abuse definition had been deducted: (1) the use for wrong purposes and (2) in a way that is harmful or wrong.

In this context, the legal device of abuse detection employed by the investment protection regime is based on the methodology of correlating the law's objectives with the investor's motive. This affirms the previously discussed duality, where one single right can be exercised in two distinct manners. Even more, both of the given modalities, i.e. abusive and normative, are to be considered as standing on equal footing in terms of their interdependency.

Further on, the author underlined the conceptual complications appearing out of the abuse detection process. Namely, the inability to precise the human motives igniting the abusive exercise of treaty rights with a high level of certainty. The latter specificity of the mentioned legal device renders abuse into an elusive legal phenomenon. The given aspect has been highlighted in several examples, underlining how the combination of motives, their variability and rapid change may trouble the abuse detection process and its further sanctioning.

Besides, it had also been deducted that apart from internal motives following the investor's specific goal(s) and the harm appearing out of right's exercise, the external environment performing the function of the trigger plays a role in the abuse process. Namely, the investment protection regime being claimed as a *"no man's land"* [545] represents the ethical vacuum offering a more permissible platform for potential abuse.

Further on, the author introduced the notion of "non-evident abuse" appearing for two principal yet distinct reasons: (1) investors' active efforts to conceal the abuse and (2) the passiveness of arbitration tribunals. The second reason manifested the unusual duty of loyalty owed by the arbitrators – a unique feature deriving from the ICSID's legal regime. Namely, due to the absence of permanent adjudicatory institutions, the arbitrators financed by the disputing parties follow the objective of resolving the dispute at review fast and efficiently instead of developing the doctrinal conceptualisation of abuse. To prove the said suggestion, the author reviewed the teleological reasons standing behind the abuse conceptualisation by the investment protection regime and the previously reviewed ECHR legal regime. This had been supported by several arbitration cases revealing the arbitrator's rationale and the recurring case practice rendered by the ECHR Court.

Overall, having academically de-puzzled the definition of abuse, the specificities of the investment protection regime influencing the latter and the legal device for abuse detection, the author offered the theoretical answer to the initially posed question related to the notion of abuse. The deduced results allow advancing further to explore the concept of the legitimate use of treaty rights.

[545] Catherine Gibson, "The Role of Professional Ethics in Procedural Fairness", in "Procedural Fairness in International Courts and Tribunals"(2015), p. 205-206

Section 2 – Legitimate use of treaty rights

Introduction

As previously discussed, the use of legal rights occurs in two principal modalities: normative use and abuse. The previous part reviewed how the right is abused and the pertinent elements of the latter process. Besides, it has also been acknowledged that the specificity of the investment protection regime and the legal device used to develop a certain shortcoming with regard to detecting the abuse. Namely, the reliance on estimating the human motives igniting the specific right exercise makes the abuse fade in colour and be less contrast for spotting. For these reasons, the latter has been recognised as an elusive legal phenomenon.

To respond to the given challenge, the author proposes to approach analysing the abuse phenomenon *via* the avenue of extrapolating the latter against the normative use of rights. In this context, analysing the rationale for investors' use of treaty rights in a normative way allows to scientifically precise legal borderlines of abuse. Put differently, by establishing what abuse is not, one could estimate better what abuse is.

Hence, the following part will approach the legal exploration of the legitimate use of rights from the dualism perspective. This will include conceptualising the good faith principle with further deducting its principal elements forming the core distinction from abuse.

The good faith principle

The principle of good faith is deeply embedded in commercial and investment relations. The latter is the backbone of any transaction or project merely related to the right's exercise. In *Cicero's* view, the good faith principle was the shoulders on which justice stood. It was an indispensable part of the ideas of righteousness and fairness.[546] As early as 1659, the good faith principle was mentioned for the first time in the international treaty ending the Franco-Spanish war.[547] Interestingly, since its first mention in the international treaty text, it was heavily criticised as "…[a]*mbiguous if not amorphous or elusive…"* [548] part of the international public legal order.

Despite being legally controversial, Kotzur suggests that the *bona fide* principle has "…[r]*esemblance in more or less all legal systems and legal cultures…"*[549] which leaves no place to argue its importance to justice-making.

For example, good faith is widely recognised and applied in the UNIDROIT Commercial principles for international contracts. The latter provides a rather scarce legal definition of good faith:

"1) Each party must act in accordance with good faith and fair dealing in international trade.

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[546] Markus Kotzur, "Good Faith (Bona fide)" (2009)
[547] International Agreement, Treaty Between France and Spain: Treaty of the Pyrenees (1659), p.6-7
[548] Markus Kotzur, "Good Faith (Bona fide)" (2009), p. 73
[549] Ibid

(2) The parties may not exclude or limit this duty."[550]

However, some pertinent and descriptive examples come in handy:

"A grants B forty-eight hours as the time within which B may accept its offer. When B, shortly before the expiry of the deadline, decides to accept, it is unable to do so: it is the weekend, the fax at A's office is disconnected and there is no telephone answering machine which can take the message. When on the following Monday A refuses B's acceptance A acts contrary to good faith since when it fixed the time-limit for acceptance it was for A to ensure that messages could be received at its office throughout the forty-eight hour period."[551]

The author suggests looking at how the given principle is seen in examples deriving from investment arbitration. For instance, in the *Plama*[552] dispute, the Tribunal condemned the Claimant's approach when omitting to share the necessary information in good faith.

"Claimant contends that it acted in good faith, that Respondent never asked who the shareholders of PCL were and that Claimant had no obligation to volunteer this information. The Arbitral Tribunal does not consider that, in the circumstances of the present case, this contention can be accepted."[553]

This, among others, had caused the investment contract concluded between the investor and the host State to be void: *"The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment."*[554]

Based on this straightforward example from investment arbitration practice, one cannot but underline the good faith principle playing a pivotal role in the investment protection system. And consequently, the latter's absence would lead to bad faith giving birth to an abusive exercise of the right. Therefore, good faith interchanges bad faith in the same manner as legitimate use interchanges abuse.

In this vein, while preserving the very own interest, the contractor should be aware about apparent negative consequences deriving from performed actions over the well-being of the counter-agent. If omitting them, one would not act in *bona fide* "…[i]n *cooperation and protection of the interests of the other party to the contract."* [555]

Many view the principle in the form of contractual relations between the disputing parties. In this context, the object of such a "contract" is a common trust. Consequently, the given agreement

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550 International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT Principles of International Commercial Contracts (2016), Article 1.7
551 Ibid, Article 1.7
552 *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*
553 Ibid, Award, para 133
554 Ibid, Award, para 144
555 See Parliament of Italy, The Italian Civil Code (1942), Article 1372-1375; See also Lorena Carvajal-Arenas, "PhD Thesis: Good faith in the lex mercatoria: an analysis of arbitral practice and major western legal systems." (2011) University of Portsmouth, p. 93

manifests the existence of the disputing parties and the procedural arrangements, i.e. investment protection regime, regulating such contractual relations. "[B]*y engaging in proceedings before an international tribunal,* … [the parties] [e]*nter into a legal relationship characterised by mutual trust and confidence."*[556]

The basic contractual principle also states that "…[i]*t is perfectly open to a party to further its own interests even at the expense of the other party."*[557] This implies that while participating in the contract, one is expected to profit more than the other. Put differently, the contract shall not necessarily be advantageous to both parties evenly. Nevertheless, this is to be understood with certain limitations: parties' interests are precluded from being advanced at the expense of contractual trust based on the legally established procedures of the dispute review.

For example, the previously mentioned investor's submission of damages calculations based on the selection of the day when the disputed asset had been marketed at the highest price. Hence, leaving the inflated price of the alleged damage to the investor's benefit.

The opportunistically driven attempts performed to test the procedural waters, i.e. whether the Tribunal will accept the opportunistic calculation of damages, will be deemed as being done in bad faith. In turn, this will lead to facing all the gravity of consequences for the one acting in *mala fide*.[558]

At the same time, the principle of *bona fide* requires the parties to be farsighted and strategic in thinking. Not in an advanced way but to the point where a reasonable person would think it is sufficient to be considered. The farsightedness mentioned above should be applied to a particular limit. For example, in the *Novoenergia,*[559] The tribunal acknowledged that although the investor should be aware of the local laws and the right of the State to modify given laws before penetrating the national market, however, this should not have been done to a limit of reasonableness. The change of legislation in an abrupt manner "…[w]*ithout proper widespread public consultation and without any meaningful engagement with stakeholders …* [d]*emonstrates a clear failure to adhere to the principles of transparency and predictability."*[560]

In this context, there is nothing more precise than a loose concept of good faith having the potential to be universally applied to the most specific matters of adjudication while offering no universally accepted description, [561] nor being universally defined or directly mentioned by the ICSID Convention[562] or BITs. Hence, the institute of good faith is the most general yet important

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[556] Robert Kolb, "General principles of procedural law" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *in "The statute of the International Court of Justice: a commentary"*(2006) Oxford University Press, para 64
[557] Ibid, 64
[558] See for example *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 576
[559] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* (SCC Case No. 2015/063) 2018
[560] Ibid, Award, para 199
[561] Filippo Fontanelli and Paolo Busco, "When We Talk About Procedural Fairness" (2015) , p. 22
[562] Peter Ashford, "The IBA Rules on Evidence in International Arbitration: A Guide" (2013)at Preamble; See also Oonagh Sands, "Procedural Fairness in Investor-State Arbitration", *in "Procedural Fairness in International Courts and Tribunals"*(2015), p. 303

principle that "…[i]*s required of defendants, plaintiffs, claimants, respondents, judges, arbitrators, witnesses, experts, and third parties. It is the background of law."*.[563]

In this context, it is also fair to underline that where the good faith principle ends, the bad faith starts. For these reasons, many arbitration tribunals approach exploring the potential presence of abuse by drawing an explanation of what is good faith in the context of the dispute review and why it is absent. Certainly, the two concepts go hand in hand. In fact, they are sides of one coin., They are not alien to each other or far placed from one another either. For example, see the *Mobil*[564] case, where the Tribunal mentions two concepts in combination:

"It stresses that ICSID case law provides "a clear set of factors to be taken into account in determining whether there has been an ***abuse*** *through a 'corporation of convenience' for purposes of obtaining ICSID jurisdiction". Those conditions are not met here. The restructuring occurred long after the investment. It took effect only in order to gain access to ICSID. The disputes were not only foreseeable, but they had actually been identified and notified to Respondent before the Dutch company was even created. The restructuring did not create a protected investment under* ***the good faith*** *standards articulated in the Phoenix v. Czech Republic case. There was an* ***abuse of rights****."*[565]

Many, if not all, arbitration Tribunals mention the abuse and good faith hand in hand.[566] Namely, the abuse is usually identified with the help of acknowledging the fact of good faith absence. "[T]*he "critical point" in establishing an abuse of rights is the evidence of bad faith"* [567].

"*The theory of abuse of rights is an expression of the more general principle of good faith. The principle of good faith is a fundamental principle of international law, as well as investment law. As such, the Tribunal holds that the theory of abuse of rights is, in principle, applicable to ICSID proceedings and has, in fact, been previously applied by several ICSID and non-ICSID tribunals in investment cases*".[568]

In this context, *Ascensio* suggests that: "*All arbitral tribunals have taken good faith as a point of departure for their reasoning on abuses allegedly committed by claimants when bringing a case to arbitration. The reason for their choice is evident: good faith is a general principle of international law, and the concept of abuse of process is deduced from this principle in all systems of law.*"[569]

Hence, exploring the pertinent elements of the good faith motives and its subsequent normative treaty exercise would follow the general logic of many investment tribunals faced with the need to identify the abuse.

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[563] Emily Sipiorski, "Good Faith in International Investment Arbitration" (2019) Oxford University Press, preface
[564] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) 2014
[565] Ibid, Decision on Jurisdiction, para 47
[566] See for example the *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Award on Jurisdiction and Admissibility
[567] Ibid, Award on Jurisdiction and Admissibility, para 415
[568] *Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5) 2016*, Decision on Jurisdiction and Admissibility, para 646.
[569] Herve Ascensio, "Abuse of Process in International Investment Arbitration" (2014)

The notion of legitimacy

Before all, the theory of legitimacy, in its most common sense, is considered to be justice-based. Namely, there needs to be a justification for any use of power or right for power.[570] *"A legitimate king is a king who has the right to rule where "right" does not simply mean "legal right" but also carries a moral meaning".*[571]

In this context, legitimacy and its justification are strongly intertwined with the order of procedures *(Hinsch, 2018*).[572] The customary use of the latter provides an additional layer of legitimacy to those exercising power or their right. [573]

On this basis, the legitimacy aspect of the investment protection system is viewed as the justified use of investment treaty rights according to the prescribed procedures and the Convention's objectives. The justification in the given scenario would be a synonym of good faith, and the prescribed procedures would transpose in the strict following of arbitration rules.

This correlates with the prescriptive theory suggested by *Hinsch* (2018): the prescriptive expectation type of legitimacy implies the "…[d]*emand on others to act in the expected way as well as a belief that they have acted wrongly if they do not fulfil our expectations…"*[574]. In the prescriptive expectation, the fault will lie on the one who did not act in a prescribed way. *"If a prescriptive expectation goes unfulfilled, something went wrong on the side of the person who was expected to act in a certain way: keeping a promise rather than breaking it".*[575]

In this vein, the investment protection regime provides implied and clear guidance of what is expected from its main users – the investors. Namely, by the very same legal acts offering the discussed treaty rights.

For example, in Japan-Ukraine BIT[576]: *"Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its Area."*[577]

It is then evident that the treaty rights offered by the mentioned BIT to investors, i.e. the right to resolve a dispute in an arbitration venue against the State[578], are given with an expectation of making the investments in the mentioned regions. Hence, no investor shall exercise the right to initiate the dispute in an arbitration venue against the State without actually investing in the

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[570] Allen Buchanan, "Legitimacy, and Self-determination: Moral Foundations for International Law" (2003) Oxford University Press
[571] Wilfried Hinsch, "Expectation-Based Legitimacy", *in "Human Rights, Democracy, and Legitimacy in a World of Disorder"*(2018) Cambridge University Press, p. 98
[572] Ibid, p. 100
[573] Randy Barnett, "Constitutional Legitimacy" (2003), p. 113
[574] Wilfried Hinsch, "Expectation-Based Legitimacy", in "Human Rights, Democracy, and Legitimacy in a World of Disorder"(2018) Cambridge University Press, p. 109
[575] Ibid, p. 109
[576] BIT, Agreement between Japan and Ukraine for the promotion and protection of investment (2015)
[577] Ibid, Article 2
[578] Ibid, Article 18(1)

latter, *ab initio*. In this way, the expectation is directly put on the investor in the form of the expected investment benefit to be received by the State. Otherwise, the investor has no jurisdictional standing to exercise the said right.

Besides, other expectations may only be read between the lines and are not always implicitly mentioned by the pertinent legal act. For example, the duty of good faith. The non-fulfilment of the latter expectation by the investor when exercising the treaty rights will manifest the non-legitimate use of such right. Therefore, understanding the matter of legitimacy in the investment protection regime requires consulting the existence of case practice and doctrinal opinions produced by the relevant source, i.e. investment tribunals.

Consequently, the combination of these two expectations will indicate whether the specific right at review had been exercised by the investor legitimately. The legitimate, or, in other words, non-contravening to the law's objectives, use of legal rights is viewed as an etalon expected by the legislator from every participant to the investment protection regime.

Motives for legitimate use of investment rights

Unlike the investment protection regime, there is no legal device for estimating the legitimate use of treaty rights. Instead, the regulator and the investment tribunal assume the latter to be done in good faith unless proven the opposite, i.e. presumption of good faith. In turn, it is the legal device aiming to detect bad faith that will indicate the absence of good faith, guaranteeing the normative use of treaty rights.

Despite the absence of the mentioned legal device, the author will nevertheless discuss the pertinent elements constituting the said behaviour. However, their analysis will be more straightforward as they will directly reflect on the evident objectives set by the ICSID Convention and the pertinent BITs.

This implies that the legitimate exercise of the law derives from the motive envisaged by the regulator. For example, the right to initiate the dispute against the host State will be exercised to protect one's legitimate interest mentioned by the pertinent BIT, i.e. expropriation. Therefore, the investor exercising its rights legitimately will have a full match of its motives with the law's objectives implied by the relevant legal act.

In this context, the motive igniting the normative exercise of treaty rights is the one mentioned by the pertinent legislative act, i.e. ICSID or BIT. It is the most straightforward deduction in the given Thesis.

The triggers of legitimate use

Evidently, the majority of rights offered to investors are used in a prescribed way. The latter assumption applies to all legal regimes and fields of law. In the investment protection regime, the investors exercising the right to initiate the investment dispute are presumed to act in good faith. The legitimate usage of legal rights represents the environment of legal perfection: every legal right distributed to individuals is exercised accordingly. However, as previously mentioned, the latter objective is never attainable to the fullest as there will always be a certain margin of individuals causing abuse *via* the avenue of illegitimate use of rights.

Despite the inability to attain the entirety of rights exercises to be done legitimately, certain factors present in the investment protection regime enhance the given potentiality. Hence, the author will suggest several aspects triggering the investor to exercise their right in accordance with the law's objectives.

- The strong governance factor

The strong governance factor could be viewed from different legal angles. This could imply independent judicial, legislative and adjudicatory bodies, strict following of the rule of law principles or freedom of speech offered to a wider public. However, the most pertinent to the investment protection regime would be approaching the strong governance factor from the angle of corruption perception, particularly for a State that is a signatory to the investment protection regime.

Namely, the widespread corruption reflects the vitality of the governing structures that, in turn, interact with foreign investors. The latter's flaws directly cause the increase in investment disputes, i.e. illicit tax audits, blockade of the enterprise's work, and denial to produce or renew the license.[579]

Put differently, the increased level of corruption poisons the State institutions by creating regulatory misfortunes damaging the investors' rights and properties. This, consequently, leads to arbitration disputes under the auspices of the investment protection system.

To prove the given correlation, the author proposes considering the 2020-2021 Corruption perceptions Index Reports developed by Transparency International. [580] In particular, the study provides a list of the least corrupt countries in the world. This includes Denmark, New Zealand, Finland, Singapore, Sweden, Switzerland, Norway and the Netherlands - the top eight countries with the lowest corruption tolerance index.[581] These countries have not faced disputes from foreign investors since they participated in the ICSID Convention.[582] Interestingly, the absence of disputes is not to be explained by a low investment interreaction between these countries and the rest of the signatories to the ICSID Convention. For instance, the Netherlands investors had initiated a record number of 111 disputes claiming the recovery of the expropriated assets by foreign jurisdictions.[583]

[579] Mark Tushnet, "Rule by law or rule of law" (2014), p. 85

[580] Transparency International, "Corruption Perceptions Index" (2020); See also Transparency International, "Corruption Perceptions Index" (2021) where the mentioned pattern continiues.

[581] Transparency International, "Corruption Perceptions Index" (2020), p. 2-3

[582] See official statistics at UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/investment-dispute-settlement [last accessed 21 September 2020]

[583] See the website https://investmentpolicy.unctad.org/investment-dispute-settlement/country/148/netherlands/investor [last accessed 21 September 2020]

In contrast, the picture is polar for the bottom part of the corruption perception list.[584] For example, as a champion of investors' claims (62 claims received), Argentina is in 66th place on the Corruption Perception Index, proving the direct correlation between the level of State corruption and the number of disputes initiated against the State that is a signatory to the investment protection regime.

Based on the given comparison, the author underlines the existence of direct causality between how corrupt the governing institutions of a particular State are and how many disputes the latter is to face under the ICSID Convention. In this context, low tolerance to corruption implies the trigger for the legitimate use of treaty rights from the side of investors.

- The risk of loosing

As previously mentioned, the investment treaty right is to be exercised in either of the modes: normative or abusive. When facing the given dilemma, the investor will seriously consider the negative consequences of the abusive use of treaty rights while calculating the viability of the mentioned action. Put differently, estimating the negative outcomes of the potential sanctions following the discovery of abuse or the gains from the ill-founded use of treaty rights. In this context, the author argues that the specificity of the investment protection regime producing capital-intensive claims will tilt the investor's motive to consider the negative outcomes affecting the disputed capital and its safety with serious precaution.

In the *Philip Morris v. Australia*[585]case, the investor had lost its claim at the jurisdictional stage of review. In particular, the Tribunal had denied the investor's right to protection and, consequently, the jurisdiction for the dispute review due to discovered abuse. As a result, the Tribunal had never moved forward to analysing the merits as the jurisdiction standing was denied *ab initio*.

Another case example to mention is *Lao Holdings v. Laos*, where the Tribunal had condemned the investor for using the investment protection treaty as a legal weapon and, thus, denied the right for investment protection to an investor in a dispute worth USD 1 billion.[586]

"*When the Tribunal steps back and views the Claimants' entire course of conduct at issue in these proceedings as particularized above, including the probability of corruption in the Claimants' orchestration of the termination of the E&Y audit (itself an act of bad faith)… all support the conclusion that the Claimants were contemptuous of the commitments that came with the advantages of their Laotian investments."*[587]

[584] It is worth mentioning that not all the States in the bottom list receive the investment claims at all. This could be explained by the fairly-low economic activity of theirs or non-participation to the ICISD Convention, i.e. Somalia, Yemen, Venezuela.

[585] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Decision on Jurisdiction

[586] *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019*, Award, para 117, 280

[587] Ibid, Award, para 279

On this basis, it is worth underlining the existence of a correlation where the higher potential loss will lessen the abuse potentiality: the investor will be discouraged from resorting to the ill-founded use of law when facing the potentiality of losing access to the investment protection regime, especially in capital intensive disputes. The given rationale partly shapes the investor's motive by minimising the risk of igniting the act of abuse.

- The recurring case practice

The last argument to be reviewed is the recurring case practice triggering the investor's motivation for a normative use of treaty rights. As already mentioned, the perfect legal environment presupposes the absence of arbitration disputes and, consequently, the necessity for an adjudicatory body. However, the latter's existence is indirect proof of occurring misfortunes related to abuse.

In this context, the existence of the mentioned authority assists in further advancing the case practice related to abuse conceptualisation. It had been previously mentioned that the investment protection regime has a unique specificity of having no permanent adjudicatory. Instead, it comprises numerous one-time tribunals appointed by the disputing parties. The latter shall not be perceived negatively either. The variety of approaches for abuse conceptualisation develops a multi-fold instrumentary for effectively targeting the varying specimens of the said legal phenomenon. This, consequently, shaped the investors' motive against the ill-founded use of treaty rights.

Besides, the author finds the legal language condemning the abuse in the investment arbitration dispute to be a very distinct aspect of the investment protection regime preventing the broader public and other investors from violating the good faith principles.

In some way, the strong words of condemnation and severe consequences that follow the discovery of abuse, i.e. denial of protection, serve the preventive role from abuse appearing. Consequently, this develops into the legal environment disincentivising the investors from using their investment treaty rights in excess.

Conclusion

The given part briefly analysed the legitimate use of investment rights to better underline the legal borderlines of abuse compared to the normative use of treaty rights.

In the process of the mentioned scientific exercise, the author deducted the direct correlation between the corruption perception index and the number of investment disputes the particular country is facing. This had been claimed to shape the legal environment influencing the investor's motive for abuse of treaty rights.

In this context, the external legal environment within which the investor finds itself develops the triggers that shape the latter motives for exercising the treaty rights. For example, the previously mentioned corruption perception index, the potentiality of risks deriving from the sanctions and the recurring case practice had been tested by the author to cause the influence over the investor's motive to exercise the investment treaty right in a normative way.

The given knowledge allowed to draw a conceptual visionary of the normative use of treaty rights and its pertinent elements. It has also been mentioned that the normative use of treaty rights requires no legal device for its detection. The regulator assumes the investor to act legitimately when exercising the treaty rights unless the opposite is proven. For the latter reasons, the legal device for abuse detection targeting potential abuse is used. This, again, proves the previously alleged interrelation between the two modes of treaty rights use and affirms the scientific necessity to further review the practical examples of abuse presented against their adversaries, i.e. normative use.

PART VI. CASE SCENARIOS OF ABUSE

Introduction

The given part offers the analysis of five defined case scenarios of abuse most pertinent to the investment protection regime, namely, (1) the abuse by treaty shopping, (2) claims proliferation, (3) ill-founded use of provisional measures, (4) escaping the criminal proceedings (legal shielding) and (5) abusive valuation of damages.

Evidently, the majority of rights abused in the said case scenarios are related to the dispute review process, i.e. procedural abuse. This is reasoned by the ICSID Convention offering the investors a procedural recourse against the State.

The proposed selection represents the most frequent context for abuse to appear. At the same time, it also aims to better highlight the investment fund specificities within the context of the suggested case scenario. For example, the claims proliferation case scenario aligned with the fund specificity comprising numerous investors.

Importantly, the proposed analysis of abuse and its distinct features of occurrence, argumentation by the disputing parties and further sanctioning by the investment tribunals is done in relation to arbitration cases at review. Therefore, the research will adhere to the following: (1) examine the legal borderlines of case scenarios of abuse and (2) further test the investment fund specificities in the analysed dimensions with a view of quantifying the abuse potentiality.

Under the previously established principle of dualism, each reviewed case scenario will examine the treaty right exercise in both modes: legitimate and abusive. The given approach is expected to offer the benefit of better precising the legal curves of abuse.

Section 1 – TREATY SHOPPING

The investment protection regime represents the multi-wired system of BITs signed by numerous States across the globe. Therefore, the investor from State A seeking to invest its capital in State B foremost consults the list of BITs concluded between the two jurisdictions.

If the investor's home jurisdiction (State A) has no BIT with State B, the investor would reasonably look for alternatives offering such protection. For example, if the neighbour State C had signed the BIT agreement with State B, it would be logical for the investor to change the place of registration to be covered by the investment protection regime. In this way, the investors "shop" for the best jurisdictional location offering the necessary protection before investing in the foreign jurisdiction.

The investment arbitration case practice views residence change as, *inter alia*, permissible practice.[588] Various legitimate reasons may push the investor to relocate and fall under the protection of the desired jurisdiction: tax optimisation, improving the cash flows, or availability

[588] Jorun Baumgartner, "Treaty Shopping in International Investment Law" (2016) Oxford University Press, p. 5-17

of professionals to employ in a specific jurisdiction of the third State, i.e. investment fund industry.

Changing the place of registration for pursuing the above-mentioned goals and later initiating the investment dispute as a result of falling under the specific BIT will not be viewed as an abuse of the right to apply. Put differently, no specific limitation is pending for investors (physical persons or legal entities) for change of residence due to operational or business reasons.

Besides, the ICSID Convention and the majority of the BITs concerned imply no restrictions for initiating the dispute by extension of treaty shopping, provided the *rationae personae* and *rationae materiae* requirements are fulfilled.

However, the arbitration case practice had elaborated certain conditionalities rendering the given practice abusive. In particular, when the said relocation takes place in view of the appearing dispute. The non-permissibility of such a motive is reasoned by the fact that the ICISD Convention is not meant to initiate the investment dispute before the investment takes place. This goes contrary to the latter's objective implying the goal of fostering economic cooperation and developing the national economy of the host State.

The investor seeking to initiate the dispute in a specific jurisdiction in light of the appearing dispute before the investment takes place is viewed as exercising the treaty right as a legal weapon against the said State. Simply put, the investors resorting to treaty shopping in the said circumstances are not aiming to enhance the State economy *ab initio* but to receive the legal remedies against the upcoming dispute from the most comfortable legal forum available.

"It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty- shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."[589]

Interestingly, the previously discussed legal specificity of the investment protection regime comprising the broadly defined legal treaties develops a more permissible legal environment for investors to resort to treaty shopping. Namely, the absence of any specifications on the modality of the said practice renders the latter permissible and widespread. However, some BITs provide the implicit limitation of treaty shopping, even with legitimate purposes, by specifying the obligation for an investor to carry the substantial business activity in the place of incorporation.[590]

[589] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID No. ARB/97/7) 2001, Decision on Jurisdiction, para 62-65

[590] See, for example, BIT, Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (1994), Article 1-2

"Depending on who you ask (or perhaps more importantly, who you appoint as arbitrator), both forms of Treaty Shopping are frowned upon by the community of states. That said, neither practice is banned."[591]

In other words, the silence facilitates the interests of businesses seeking to optimise the enterprise's cash flow, organise better taxation or receive an additional layer of protection should the potential dispute appear.[592] As already said, all of the above motives constitute a legitimate reason to restructure the investment and select the jurisdiction that fits the needs and objectives of the particular enterprise.

In this context, the author aims to identify the investor's motives for exercising the treaty right to initiate the dispute *via* the avenue of treaty shopping in both abusive and normative ways. Deducting the reasons and the process of such treaty rights exercise could reveal how the abuse as a legal phenomenon appears in the case scenario of treaty shopping. For these reasons, the two distinct investment arbitrations are offered for review.

Case study: Philip Morris v. Australia

The dispute occurred between the foreign enterprise Philip Morris Asia Limited, incorporated under the laws of Hong Kong and the State of Australia. The BIT under which the claim had been submitted is the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments[593]

The subject matter of the case touches upon the investor's change of headquarters in light of Australia's Plain Packaging Reform bringing adverse effects to the tobacco industry by introducing strict limitations on design and denial of intellectual property rights. The invocation of the claim took place because the Claimant's business "…[r]*ests on its intellectual property, and in particular on the recognition of its brands*".[594] In turn, the introduction of the legislation transforms the investor "…[f]*rom a manufacturer of branded products to a manufacturer of commoditised products with the consequential effect of substantially diminishing the value of* [the Claimant's] *investments in Australia*".[595]

Preliminary, the Respondent denied the allegations and has raised three objections. The Tribunal had bifurcated the review process and reviewed two of them at the jurisdictional stage. The first allegation, "…[t]*he dispute had arisen before the Claimant had obtained the protection of the*

[591] Matthew Skinner, Cameron Miles and Sam Luttrell, "Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping" (2010), p. 261
[592] See for example, *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004* Decision on Jurisdiction; See also Matthew Skinner, Cameron Miles and Sam Luttrell, "Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping" (2010), p. 261
[593] BIT, Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (1993)
[594] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Award on Jurisdiction and Admissibility, para 6
[595] Ibid, para 7

Treaty…"[596] meaning the *ratione temporis* principle was not fulfilled. And second, "…[t]*he Claimant's restructuring constitutes an abuse of right.*".[597]

Precisely, the alleged negative change that derived from the updated legislation aimed to protect the health of consumers, as mentioned by the Respondent, was foreseen to the investor and became the Claimant's primary motivation to change the location of the regional headquarters and fall under the protection of the investment treaty, in particular, so to lodge a claim against the State of Australia under the Hong-Kong-Australia BIT.

As such, the *Philip Morris v. Australia* case deals with the evaluation of an enterprise's restructuring (change of the regional head office) in light of the enactment of the updated state measure with the potentiality for the Claimant to have this measure be foreseen and, therefore, shielded from *via* the avenue of acquired protection stemming from the Australia-Hong Kong BIT.

Before assessing the potential abuse of the Claimant's act, the Tribunal investigated the jurisdictional allegation, namely, the presence of the *ratione temporis.* In particular, the arbitrators referred to the *Gremcitel* [598] case. In situations where the *ratione temporis* is absent, meaning the investment took place after the law's enactment, the Tribunal would automatically lack the jurisdiction. Therefore, the identification of the precise date when the State measure got enacted was necessary to be established.

Ratione temporis

In Australia's view, the Claimant commenced the restructuring process following the numerous public statements of the government's intention to update the legislation. Thus, the conflict between the parties arose after the given statements got publicly communicated. "[P]*ublic statements and "exchanges" indicate that Australia's announcement of April 2010 gave rise to "a disagreement and/or conflict" between the Parties*".[599] As such, the Respondent alleged that the April 2010 announcements on legal reform had motivated the enterprise to change the regional headquarters to submit the investment claim under the Australia - Hong Kong BIT.

"*PM Asia had no interest in PM Australia prior to 23 February 2011...* [P]*M Asia only acquired its interest in PM Australia on 23 February 2011, some 10 months after the governmental announcement in relation to plain packaging and after a dispute had already arisen in relation to plain packaging*."[600]

In opposition to the given allegation, the Claimant had implied the restructuring to appear as a logical continuation of a long-established chain of actions (since 2005) having little to do with the local legislation enactment.

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[596] Ibid, Award on Jurisdiction and Admissibility, para 9
[597] Ibid, para 9
[598] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17) 2015, Award, para 182
[599] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, para 389
[600] Ibid, Australia's Response to the Notice of Arbitration, para 30

"The PMI Group has been engaged in a group-wide restructuring process "to reduce costs and improve efficiencies by streamlining its legal entity structure, rationalising business processes, centralising activities, and developing shared services"."[601]

Besides, it was also claimed that the time of the dispute should be considered as the moment when "…[t]*he measure that gave rise to the present dispute is the enactment of the TPP Act by the Parliament",*[602] not the mere intentions or public statements. In support of its standing, the Claimant mentioned uncertainty and disagreement among the top governmental officials when adopting the new legislation. Put differently, it was unclear whether the alleged reform would materialise. Therefore, the Claimant had alleged the date of disagreement to occur when the reforming law was enacted – 11 November 2011. In turn, the company's headquarters change occurred earlier, i.e. 23 February 2011. Hence, the *investor alleged the ratione temporis principle* to be fulfilled.

The author views certain opportunism in the given argumentation. Namely, the beforehand revealed plans had reasonably influenced, at least partially, the investor's decision to change the headquarters. Hence, one could not but agree with the certain impact stemming from the public statements over the change of headquarters.

In this context, it had been concluded by the Tribunal that the day of the conflict was the day of the measure's adoption, i.e. 11 November 2011. It is only after that day when no potentially or probability could not have taken a different course of action. In particular, whatever happened before did not have sufficient certainty of calling such an intention real and definite. As a result, the date of restructuring, i.e. September 2010 - 23 February 2011, was deemed to be way before the law's enactment, i.e. 11 November 2011. Hence, the *ratione temporis* principle is fulfilled, and the Tribunal has the jurisdiction to review the given dispute.[603]

Nevertheless, the fulfilment of the jurisdictional principle does not deny the second procedural allegation of the Respondent, namely, the abuse being present in the decision to change the place of registration. In this context, it is uncertain what motivated the investor to move. For these reasons, the Tribunal further reviewed the arguments of both parties alleged to be the driving force of the change of registration.

Evidence of abuse

The Philip Morris case revealed profound considerations with regard to the theory of abuse and how the parties conceptualise the latter. Both sides had different conceptualisations with regard to what abuse is. However, the common ground was found with the fact that the bar for proving the abuse is set high. In particular, the Respondent must factually prove its existence. In this context, the State of Australia provided two distinct arguments supporting the latter's standing.

First, to identify the abuse in relation to treaty shopping, one needs to analyse whether the abuser had a prior vision of a potential risk appearing in front of the enterprise. When the management

[601] Ibid, Decision on Jurisdiction and Admissibility, para 98
[602] Ibid, Decision on Jurisdiction and Admissibility, para 395
[603] Ibid, Decision on Jurisdiction and Admissibility, para 530-534

is able to clearly identify such potential bringing negative consequences for the enterprise, i.e. public statements, the invitation to the stakeholders' discussion on adoption of the law.

Second, one should trace the cumulation of actions the investor performs in response to the appearing knowledge of negative potentiality. In particular, could one genuinely prove the investor's actions after the public announcements had been aimed at preventing the given adverse effects of the tobacco reform? For example, changing the enterprise's headquarters to use investment protection instruments in contemplation of the appearing dispute.[604]

In this context, the Respondent had mentioned the *Pac Rim v. El Salvador* [605] case revealing some valuable consideration when viewing the investor's conduct to be done in contemplation of the appearing dispute.

"…[t]*he dividing line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy...*"[606]

Numerous evidentiary pieces should be in place to confirm the latter. In support of its standing, the Respondent had submitted more than one hundred communications between the enterprise officials and external lawyers discussing various legal protection options, including investment protection.[607]

In response, the Claimant referred to the unclarity of the doctrine of abuse of rights giving no fixed rules on identifying one. In this context, the author agrees with such a statement because the previously discussed analysis of the institute of abuse done through the ECHR prism had proved the investment arbitration to be based on the principles rendering the latter institution incapable of developing the stable and well-established doctrine on abuse, i.e. absence of a permanent doctrinal pattern sourced by long-lasting judicial activity. Therefore, the approach to identifying and explaining the abuse phenomenon is heterogeneous and subject to modifications.

For the investor, the abuse is not presumed unless proven by the party alleging the latter. In Claimant's view, the Respondent did not reach the said bar. [608]In particular, the Claimant pointed at the predictability of particular action having no necessity to be correlated with bad faith: *"Foreseeability" is not relevant to establishing an abuse of rights—the critical test is bad faith*".[609]

The Claimant had further asserted that the purpose of, or motivation for, a corporate restructuring did not amount to bad faith even if the Claimant could reasonably foresee a potential future dispute with the host State at the time. According to the Claimant, "…[a]*ny effort to secure BIT protection will be driven, at least to a certain degree, by the fact that an investor can foresee that*

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[604] Ibid, Decision on Jurisdiction and Admissibility, para 402
[605] *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) 2016
[606] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015,* Decision on Jurisdiction and Admissibility, para 423; See also *Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12) 2016*
[607] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*
[608] Ibid, Decision on Jurisdiction and Admissibility, para 415
[609] Ibid, para 537

a host State might engage in future conduct that would unreasonably impair or harm the foreign investment and wishes to guard against the risk that it will..." [610]

As such, in Claimant's view, "…[r]*estructuring an investment to preserve or augment BIT protection is legitimate, prudent, and fulfils a primary objective of the BIT…".*[611]

In its decision, the Tribunal agreed that the mere act of restructuring done by the enterprise does not constitute an illegitimate action.[612] Even more, the intention to protect oneself from the general risk has no harm or abuse *ab initio,* as suggested in the *Tidewater v. Venezuela* [613]case.[614] However, as long as such risk is specific and definite, one must evaluate whether there is "…[a] *very high probability and not merely a possible controversy…"*.[615] (*Pac Rim v. El Salvadore*)[616].

For these reasons, the Tribunal evaluated the events before enacting the mentioned legislation. In particular, the chronology of the communications between the enterprise representatives and external lawyers. A remarkable example is an email that circulated inside the enterprise with the title *"urgent ownership transfer"*,[617] where the urgency hints at the fact of restructuring taking place not as a part of a causal plan on optimisation but as an attempt to adjust oneself towards potential and immediate risks deriving from the legislative enactment.

Further on, the Tribunal was not persuaded, with the Claimant alleging not to foresee such enactment. Moreover, it was reasonably mentioned that any democratic State requires a lengthy and transparent procedure before adopting the legislation, including all the stakeholders in the discussion, particularly the tobacco companies, which was the case in the mentioned situation.[618]

Indeed, the legislation adoption process was lengthy, with evident perturbations related to the change of political groups and lobbyists. Nevertheless, the official government never withdrew the statement of intent to introduce the Plain Packaging legislation, which was always the goal and was announced long before any restructuring took place, i.e. April 2010.

"What became uncertain was not whether the Government intended to introduce plain packaging, but whether the Government could maintain a majority or would be replaced. But that is a difficulty which any minority government faces".[619]

As such, the Tribunal was at a view that the dispute between the parties got materialised (not already appeared(!)) but was already foreseen to the Claimant before or at the time the

[610] Ibid, para 416
[611] Ibid, para 445
[612] Ibid, para 540
[613] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) 2015, Award, para 184
[614] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, para 541
[615] *Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12) 2016*, Award, para 2.99
[616] Ibid
[617] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, para 650
[618] Ibid, para 567
[619] Ibid, para 568

restructuring took place.[620] In other words, adopting the legislation gave the conflict a formal start. However, based on the evidence considered, the Claimant knew and could foresee the potentiality of the upcoming legislation reform. This proves the existence of a very specific issue rather than a mere potentiality.

To prove or disprove the allegations of abuse of rights, the Tribunal went to establish the causational link by evaluating the motives of the Claimant when performing the restructuring. It is a routine use of the principal abuse detection device where the deducted motive is investigated to be causing the specific use of rights leading to abuse.

In arbitrators' view, preparing for "the worst case"[621] is not uncommon for investors. It is a natural course of action constituting a part of business activity when seeking legal advice. However, the decision to restructure should be supported by other independent reasons unrelated to the potentiality of the arising dispute. Put differently, it was important for arbitrators to affirm that the exercise of rights taken by the extent of treaty shopping had been motivated by several legitimate reasons matching the law's objectives.

The Claimant presented the tax reason and improved cash flow at the heart of the "broader, group-wide process"[622]of restructuring. Having reviewed the Board decisions and several internal memorandums, the Tribunal noted that the Claimant failed to invite any of the witnesses being closely engaged with the process of restructuring "…[t]*he Tribunal is inclined to place limited weight on Mr Pellegrini's testimony as it became apparent during the hearing that Mr Pellegrini was not familiar with details of legal or corporate strategy"*[623].[624]

Besides, no internal communications that could potentially be circulated within the enterprise explaining with precision the exact motives of restructuring were submitted for consideration. On the reverse, the Tribunal mentioned the Respondent's argument, suggesting that many evidence did not open the full picture and were prepared *"in contemplation of this arbitration"*.[625]

Following thorough examination, the Tribunal had experienced a shortage of persuasive evidence supporting the investor's claim that the corporate restructuring took place only partially due to the intention to shield oneself. As a result, the following decision was rendered: *"From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong".*[626]

Therefore, as the restructuring was motivated by the materialising dispute due to the enactment of the Plain Packaging legislation, the claim was found to be abusive and, as a consequence, non-admissible to be reviewed before the investment arbitration tribunal for the material part of the

[620] Ibid, para 569
[621] Ibid, para 570
[622] Ibid, para 572
[623] Ibid, para 583-584
[624] Ibid, para 582
[625] Ibid, para 573
[626] Ibid, para 584

dispute. Namely, the investor's motive when restructuring and bringing its claim against the Respondent was motivated differently from what had been expected by the investment protection system.

The entire process of restructuring and the attempts to fall under the protection of the investment treaty was done with the investor allegedly being aware of the Australian government's willingness to enact the legislation sooner or later. In such a case, the investment protection regime was abused as it was not meant to be offering the imprudent investors the legal weapons[627] aimed to enter into a legal battle with the State, *ab initio*, but to facilitate the economic exchange.

To conclude, the action of restructuring with the purpose of treaty shopping may indeed, if separately viewed, be reasonable and permissible. However, there needs to be a good reason explaining such restructuring at the moment of the dispute materialisation (but not yet appearing). As evident from the presented arguments, the Claimant has failed to persuade the Tribunal that the tax or other related reasons (i.e. optimisation of cash flow) were the major motives for restructuring the enterprise. Oppositely, the Tribunal has found that the potentiality of the upcoming dispute was one, if not sole, motive driving the Claimant to restructure urgently. Therefore, using the right to initiate the dispute by the extent of the treaty shopping with a motive to shield oneself from a potentially appearing dispute was deemed abusive and, hence, inadmissible.

As a result, the foreseeability of the dispute and further identification of its reasons represent the specificity of abuse detection in the treaty shopping case scenario context.

Case study: Tokios Tokeles v. Ukraine

Opposite to the previously mentioned example of abuse by the extent of treaty rights, the author proposes to review in the given part how the right to initiate the dispute by the extent of treaty shopping had been exercised legitimately.

The *Tokios Tokeles v. Ukraine*[628] case is a widely recognised dispute continuously cited by legal scholars and further arbitration Tribunals in relation to treaty shopping.[629] The decision issued by the Tribunal offers some insightful legal opinion regarding the permissibility of restructuring the investment originating from the host State, i.e. legitimate treaty shopping.

In the *Tokios Tokeles* dispute, the investor having its registered office in Lithuania, had heavily invested to the benefit of the Ukrainian enterprise *Taky Spravy.* The latter specialised in printing and publishing services. The invested capital had its origins from Ukraine. Namely, the

[627] *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019,* Decision on Jurisdiction, para 117
[628] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*
[629] See, for example, Katharina Baumgartner, "Treaty Shopping by Dual Nationals Through the Use of Interposed Corporate Entities" (2015)

Lithuanian enterprise had been constituted by two Ukrainian nationals owning 99% of the latter's shares.[630]

The said investment made possible the purchase of the printing machinery, the office premises and other necessary equipment for performing the printing business in Ukraine. The expected profits were envisaged to be further re-invested, which could immediately support the argument of investment being economically substantial and permanent[631] (*Salini* test). The enterprise got engaged in printing the materials for the upcoming presidential election campaign in Ukraine and, consequently, attracted some administrative pressure, i.e. regulatory checks from the governmental institutions. This had been alleged by the investors as a violation of the fair and equitable treatment standard (hereinafter FET)[632], triggering the exercise of the right to initiate the dispute against Ukraine under the Lithuania-Ukraine BIT, despite the investors being Ukrainian themselves and the capital invested through the Lithuanian entity also originating from Ukraine.

Following the Tribunal's constitution, the Respondent elevated the question of jurisdiction. In particular, the latter had opined that the Claimant is "not a genuine entity" and, hence, could not be considered an investor for investment protection purposes. The supporting argument put in front was the interpretation of the term "investor" and the subsequent explanation of modalities of the *siège social* within the context of Lithuania-Ukraine BIT[633]. In the Respondent's opinion, the main business activities, as well as the management of the enterprise, were done in Ukraine, not Lithuania. As a result, it was alleged that "…[t]*he Claimant is, in terms of economic substance, a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine*."[634]. Ultimately, the Respondent departed from the legal background by elevating toward the economic essence of the dispute. However, the Tribunal did not find such a way of reasoning as convincing.[635]

The arbitrators had first referred to the fact that the ICSID Convention was mute regarding the methodology of determining the *siège social* within the borders of the term "investor"; this was also confirmed by the scholarly opinion.[636] It was then suggested that the parties being a part of the BIT are in charge of installing the regime that fits their objectives. This implies the Lithuanian and Ukrainian contracting sides had the margin of freedom in selecting the modalities regulating the term "*investor*" and what could be considered as the *siège social* of the latter at the time of the BIT drafting and ratification, i.e. treaty principle of consent.

In this context, the notion embedded in the Lithuania-Ukraine BIT became pivotal in analysing the referred question. The Tribunal had read the treaty definition broadly: "…[a]*ny entity established in the territory of the Republic of Lithuania in conformity with its laws and*

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[630] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Decision on Jurisdiction, para 21
[631] Ibid, Award, para 109
[632] Ibid, Decision on Jurisdiction, para 3
[633] BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995), Article 1-2
[634] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Decision on Jurisdiction, para 21
[635] Ibid, Decision on Jurisdiction, para 62; See also *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) 2003, Decision on Jurisdiction, para 119
[636] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Decision on Jurisdiction, para 67

regulations."*[637]*. In the Tribunal's interpretation, the plain language used to define the term "investor" implies having no obligations except those mentioned by the BIT: (1) to be registered in the Lithuanian jurisdiction and to be (2) in due conformity with all the regulatory requirements.

In support of the Tribunal's opinion interpreting the definition of investor plainly and broadly, the arbitrators mentioned the comparison with the Ukraine-USA BIT. Unlike the Lithuania-Ukraine BIT, the Ukraine-USA BIT had specifically mentioned the denial of investor protection should the enterprise not have any substantial business in the country of registration or be owned or controlled by third nationals.[638] As such, since Lithuania-Ukraine BIT did not provide such additional requirements, the Tribunal had deemed Ukraine to willingly agree with Lithuania on setting a broad definition of the term "investor" and, subsequently, the term "*siège social*". [639]

In this vein, the Tribunal had reasonably decided to avail itself from putting any other meaning to the scrutinised term than what the parties to the BIT had intended. As explained by the arbitrators, they had no legitimate standing to bypass the contracting parties will and had sole discretion to decide the dispute by the rules laid down by the parties themselves. As a result, the Tribunal had found no legal standing to alter the initial intentions of the parties entering the Lithuania-Ukraine BIT.[640]

"In summary, the Claimant is an "investor" of Lithuania under Article 1(2)(b) of the BIT because it is an "entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."[641]

The given line of reasoning undoubtedly affirmed the agreeing States' initial intentions deducted from the wording of the BIT. This goes in conformity with the previously mentioned principle of consent, providing the States with the liberty to craft the definition in the way they deem appropriate, even if it is broadly and plainly defined.

Put differently, it is not the Tribunal's task to expand or decrease the circle of descriptive criteria potentially covered by the investment protection. The latter privilege stays with the States. Instead, Tribunal must affirm conformity with the set guidelines by enforcing the BIT's provisions.

Importantly, the mentioned discussion does not, however, concern the Tribunal's power to evaluate the investment at review. Namely, to estimate whether the alleged to be protected investment had brought added value to the economy of the host State directly or indirectly. This follows the previously deducted aspect of the bargain where the agreeing States had exchanged their adjudicatory sovereignty in return for the capital inflow. Therefore, whatever the definition and its subsequent interpretation may be, the investment and its added value shall be viewed as a

[637] BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995), Article 1(2)(b)
[638] BIT, Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (1994), Article 1(2)
[639] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004,* Decision on Jurisdiction, para 36
[640] Ibid, para 39
[641] Ibid, Decision on Jurisdiction, para 52

primary reason for the investor to have the jurisdictional standing to submit the claim against the host State in arbitration.

Despite having the investor originating from Ukraine, the latter economy had benefited from the real and palpable investment done *via* the avenue of establishing the enterprise, purchasing the equipment and re-investing the profits. This implies the very basis of the investor's jurisdictional standing had been fulfilled, i.e. investment's added value.

Consequently, the Tribunal had not overstepped the States' functions but plainly continued the direction the agreeing States took. As a result, the Ukrainian investor having its place of incorporation in Lithuania could have a legitimate standing to re-invest in Ukraine and receive investment protection should the violation of treaty rights occur. Such permissibility is offered by the broad language of the BIT intended by the signatories. The Tribunal, in this context, has a distinct function of continuing the line laid down by the signatories and issuing the award in accordance with agreed rules and the main principles of international customary law[642] in part of following the rule that the place of incorporation should be considered as a *siège social*.[643] Even more, the States set the BIT's objectives that are later correlated with the investor's motives under the previously analysed legal device of abuse detection. In this context, the author will further explore whether the motives for initiating the dispute against Ukraine were ill-founded.

Contemplation of the dispute factor

In the *Phillip Morris v. Australia*[644] case, as an example of an abusive exercise of the right to initiate the dispute by the extension of treaty shopping, the matter revolved around the investor's contemplation of arising dispute (invocation of law limiting the sale of tobacco products). In particular, the investor's inability to affirm the alleged motives explaining the decision to change the place of registration in light of the foreseen dispute.

"From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, the reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong."[645]

In this context, the *Tokios Tokeles* dispute provides a polar decision, with the Tribunal suggesting the investor registering its *siège social* with no ill-founded reasons potentially indicating the abuse.

For the Tokios Tokeles case, the dispute had appeared since the momentum when the national executive authorities had commenced the number of checks and tax audits that had stopped the enterprise from functioning for a particular period of time, i.e. approximately February 2002.[646]

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[642] Patrick Dumberry, "A Guide to General Principles of Law in International Investment Arbitration" (2020) Oxford University Press, Part I Nature, Meaning and Function of General Principles of Law in International Law, p. 15-37

[643] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Decision on Jurisdiction, para 70

[644] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*

[645] Ibid, Decision on Jurisdiction, para 584

[646] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004,* Decision on Jurisdiction, para 3

What concerns the date of incorporation, the Claimant had been *"a cooperative in 1989, and, since 1991, has been registered as a "closed joint-stock company*." [in Lithuania]*"*.[647] Evidently, the dispute had appeared long after the investment and the subsequent conflict between the investor and the State.

Further on, the conclusion of the BIT between Lithuania and Ukraine came into force only in 1995.[648] Three years after, the enterprise got registered in Lithuania by two principal investors bringing its capital from Ukraine to Lithuania and then further to Ukraine in 2002. It is then clear that the timing aspect implies the incorporation of investment through selecting the forum in Lithuania and later on re-investing the capital to Ukraine had not been motivated by any appearing dispute nor mere potentiality of the latter. Put differently, the investor had no intention to use the Lithuanian jurisdiction to invoke the investment protection regime against the Respondent when contemplating such a dispute, as, at the time of incorporation, the Lithuania-Ukraine BIT was not even in force.

Importantly, this goes hand in hand with the previously mentioned argumentation suggested by the Claimant in Tokios Tokeles: "…[a]*ny effort to secure BIT protection will be driven, at least to a certain degree, by the fact that an investor can foresee that a host State might engage in future conduct that would unreasonably impair or harm the foreign investment and wishes to guard against the risk that it will…"*.[649] Unlike Philip Morris, the investor in Tokios Tokeles had no specific dispute being foreseen to appear. Instead, it was a general assumption of potentiality that, nevertheless, may never materialise.

As such, investors in the Lithuanian case could not prevision or expect to use another country's jurisdiction to abuse the investment protection system *via*, as mentioned in *Lao Holdings v. Laos*[650], searching for *"legal weapons"*[651] to use against the host State. This is motivated by two principal reasons: (1) the absence of any specific dispute or its mere potentiality at the time of registering in Lithuania and (2) the absence of the BIT providing the treaty protection rights before the change of registration.

Based on the example of the two mentioned cases, the author deems it necessary to mention *Skinner*[652] viewing the concept of treaty shopping in the 'back end' and 'front end' modality. The 'back end' treaty shopping implies the enterprise's attempt to change the governing treaty after the conflict has arisen and the potentiality of the dispute is crystallised. In contrast, the 'front end' treaty shopping concerns the restructuring activities before any potentiality of such dispute.[653] In other words, the example with *Philip Morris v. Australia* is the 'back end' treaty

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[647] Ibid, para 1
[648] BIT, Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments (1995)
[649] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, para 416
[650] *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019*
[651] Ibid, Decision on Jurisdiction, para 117
[652] Matthew Skinner, Cameron Miles and Sam Luttrell, "Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping" (2010)
[653] Ibid, p. 260 See also John Lee, "Resolving Concerns of Treaty Shopping in International Investment Arbitration" (2015), p. 358

and, consequently, constitute abuse. Whereas *Tokios Tokeles v. Ukraine* is an example of the 'front end' treaty shopping and, hence, constitutes the legitimate use of investment treaty rights.

Evidently, the distinctive features of abuse in the case scenario of treaty shopping relate to the timing factor and the investor's capability to foresee the upcoming events instigating the change of registration. The Philip Morris case unveiled the stages of foreseeability: from a mere potentiality to the already-formed appearance.

In this context, the dividing line that puts the difference between the investor's good faith and bad faith motive when exercising the investment treaty rights, i.e. right to submit the claim, in correlation to the treaty shopping, is the contemplation of the dispute. Should the latter be crystallised but not yet materialised, the investor is to provide reasons and sufficient evidence for the *siège social* change. Therefore, it is necessary to affirm that the treaty shopping had not been born out of the motive of using the investment protection regime as a legal "weapon" against the State executing its sovereign right to regulate.

Section 2 – CLAIMS PROLIFERATION

The given part will concentrate on abuse deriving from the numerosity aspect. The numerosity in itself is a legal phenomenon evident present in many expressions. For instance, the investment fund may comprise numerous retail and professional investors participating in a collective investment vehicle.

However, the latter aspect develops into an existent potentiality of abuse when numerous investors[654] resort to claims multiplication. The latter abuse example will be reviewed in two distinct modalities. Namely, (1) the initiation of multiple claims by numerous investors[655] and (2) the tugging of the claims by numerous investors into one mass claim (class action). In both of the mentioned modalities, the claim(s) is(are) submitted by numerous investors. The latter factor is eloquent to the case study of the given research – the investment fund, hence, has been selected as a case scenario of abuse to review.

However, in the current part, the review will concentrate on analysing the distinct aspect of abuse of treaty rights borne out of claims multiplication in the pre-existing arbitration disputes with further referencing the most pertinent to investment fund structures aspect.

Evidently, submitting multiple claims born out of ill-founded motives will clutter the judicial system (international or national) and, consequently, deprive the latter of the legal certainty to be distributed among its users, who are the recipients of its decisions.

The above-mentioned represents the negative outcome of the claims multiplication phenomenon. In comparison, the most common motive for resorting to claims multiplication is often sourced

[654] The suggestion of claims multiplication is mentioned in general sense when many investors (legal and physical entities) initiate numerous claims. However, the latter is also applicable to the investment fund structure

[655] Hanno Wehland, "The Coordination of Multiple Proceedings in Investment Treaty Arbitration" (2013) Oxford University Press, para 2.32-2.33

from the desire to pressure the responding State[656], obtain a double recovery, or bring negative publicity to the latter. Logically, the said motives will not correlate well with the objectives of the investment protection regime. Therefore, the phenomenon of claims multiplication deriving from the factor of numerosity is deemed abusive by the latter.

In this vein, *Zarra* characterises the legal phenomenon of claims multiplication to be having several distinct elements:

1. the purpose of the claims is the same;
2. the facts on which the claims are based are the same;
3. the legal basis of the claims is substantially identical;
4. the parties in the two proceedings represent the same centres of interest, even if they are not formally identical[657]

Notably, the issue of claims multiplication is not uncommon in other judicial systems. For example, the European Court of Human Rights provides:

"An application where he or she repeatedly lodges vexatious and manifestly ill-founded applications with the Court that are similar to an application that he or she has lodged in the past that has already been declared inadmissible".[658]

However, the author argues that the latter is more widespread in investment arbitration due to previously deducted specificities of the investment protection regime. Namely, (1) the absence of a permanent judicial body developing the long-lasting doctrinal pattern limiting the claims multiplication practices and (2) judicial liberalism explained by the arbitrators' duty of loyalty centred towards the disputing parties.

Besides, as previously deducted, the investment protection regime had been permissible in recognising the rights of minority investors participating in collective investing.

"It should be noted that the possibility of direct claims by minority shareholders is not limited to the case of damages directly suffered by them and expressly protected by an international law rule. The reference goes also to damages suffered by the main company and only indirectly affecting shareholders' rights generally due to a loss of value of their shares".[659]

The given approach opens the forum for discussing the use of treaty rights to apply by numerous investors on a legitimate basis. In addition, another specificity of the investment protection regime revolving around the broad language of almost every BIT develops a more favourable context for recognising the right of numerous investors who had suffered the negative consequences of expropriation directly or indirectly to receive investment protection.

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[656] Zoe Williams, "The Political Economy of Investment Arbitration" (2022) Oxford University Press, p. 44-57
[657] Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 2
[658] The European Court of Human Rights (ECHR), Practical Guide on Admissibility Criteria (2021), p. 50
[659] Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 2

For these reasons, submitting numerous claims arising out of similar or identical matters is decided to be reviewed in the given Thesis as a separate case scenario of abuse.

Notably, the abuse *via* claims multiplication stands on the fundamental right to apply. The latter is given to investors as a part of the treaty rights corpus aimed at protecting the investor's private property and the judicial autonomy of the investment arbitration. In this vein, the said right, leading to claims multiplication, may be abused or used legitimately under the previously discussed principle of duality.

Put differently, it is not the phenomenon of claims multiplication that may witness the duality of exercising: abusive and legitimate, but the right to apply to lead to a subsequent phenomenon of claims multiplication. Therefore, it would be conceptually wrong to assume the claims multiplication phenomenon to be appearing on a legitimate basis; rather, it is the right to apply that, evidently, may be used legitimately.

On this basis, the author advances by reviewing the specific examples where the treaty right to apply had been used abusively and legitimately in the context of the claims multiplication phenomenon.

Case study: *Orascom v. Algeria*

The *Orascom v. Algeria*[660] dispute had arisen from the public tender for constructing the telecommunication network in Algeria. In particular, the investor had claimed to experience its assets' indirect (creeping) expropriation. In turn, the Respondent had raised the concern about the jurisdictional standing of the Claimant for bringing the investment arbitration claim. The latter had been alleged to be too far removed from the investment.

Following the jurisdictional review stage, the Tribunal explored the corporate structure of the enterprise upon the Respondent's allegation that the *ratio personae* aspect was missing. As such, the qualitative evaluation of the corporate links and interests of the ultimate beneficiary took place amidst the dispute review.

In 2005, the Claimant (OTMTI) acquired effective ownership, through a legally sophisticated chain of corporate layers, over the enterprise (OTH), having substantial telecom business in Algeria since 2001. According to the Claimant, the "political vendetta"[661] between the investor – the ultimate owner of the shares of the Claimant, and the State of Algeria, had caused some undue administrative pressure and tax reassessments procedures blocking the cash inflow and putting the OTH enterprise and its subsidiaries on the verge of bankruptcy. As a result, the Claimant was forced to sell off while suffering financial damage due to administrative pressure that diminished the enterprise's market value.

Oppositely, the Respondent denied the jurisdiction for lodging the claim as the principle of *ratione personae* was not fulfilled. Namely, the numerous corporate layers between the Claimant

[660] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award

[661] Ibid, Award, para 9

and the OTH enterprise operating in Algeria made the latter so remote from the OTH that one could hardly be considered an investor or even an indirect investor.[662]

As mentioned, the current case practice has evolved substantially regarding recognising the treaty rights of investor-shareholders: from being negative towards minority shareholders[663] towards acknowledging their standing as investors permissibly.[664] In this vein, mere ownership could offer protection, provided other qualitative criteria that form the investment link between the investor and the host State are fulfilled, i.e. substantial economic aid to the host State economy, *Salini* test, good faith, treaty definition, absence of implied limitation and others.

"…([i]*magine, for instance, 100 different shareholders each owning a mere 1% of the corporation's shares). Nothing (apart, of course, from the high costs of pursuing international arbitration) would prevent all these different shareholders from filing their own separate claims against the host State for the same treaty breach".*[665]

In this context, *Zarra* mentions several cases supporting the given approach, i.e. *Azurix*[666], *Enron*[667] and *Siemens v. Argentine*[668].[669]As such, the minority shareholders placed within a particular corporate layer of one corporate vehicle could be formally recognised as investors for investment protection.

Based on this allegation, the Respondent had underlined the concern of having these minority investors to be raising the numerous claims in bad faith, with an objective to opportunistically recover more than had been suffered or simply putting procedural pressure on the host State[670] needing to defend itself in numerous arbitrations. And, as already mentioned, the case practice, although permissible, has a varying methodology for identifying the validity of numerous claims submitted to investment arbitration.

For example, see the disputes of *CME v. the Czech Republic*[671] and *Lauder v. the Czech Republic*[672], where the US national being the primary owner of CME enterprise, had submitted two claims under different BITs individually (US – Czech Republic BIT) and through his company headquartered in the Netherlands (the Netherlands – Czech Republic BIT). As a result,

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[662] Ibid, Award, para 156-157
[663] See, for example, *Vacuum Salt Products Ltd. v. Republic of Ghana* (ICSID Case No. ARB/92/1) 1994, Award, para 31
[664] See, for example, *Lanco International Inc. v. The Argentine Republic (ICSID Case No. ARB/97/6) 1998,* Decision on Jurisdiction, para 10; See also Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 7-9
[665] Martin Valasek and Patrick Dumberry, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes" (2011), p. 71
[666] *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) 2006, Decision on Jurisdiction, para 1-5
[667] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) 2007,* Decision on Jurisdiction, para 1-5
[668] *Siemens A.G. v. The Argentine Republic (ICSID Case No. ARB/02/8) 2007,* Decision on Jurisdiction, para 20-25
[669] Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 9-11
[670] Zoe Williams, "The Political Economy of Investment Arbitration" (2022) Oxford University Press, p. 44-57
[671] *CME Czech Republic SA v. Czech Republic (UNCITRAL Arbitration Proceedings) 2003,* Award
[672] *Ronald S. Lauder v. The Czech Republic (UNCITRAL (1976)) 2001,* Final Award

“[T]*he two tribunals reached completely opposite conclusions with regards to the evaluation of the same facts”*.[673]

In this context, the case analysis of *Orascom v. Algeria* provides the value of the Tribunal’s consideration with regards to evaluating the qualitative criteria of investment link, helping to tackle the potential abuse in these types of disputes by pointing at prominent features that could potentially ease the process of spotting the latter in case categorised and analysed.

To begin with, Algeria itself had recognised the right of indirect investors to claim protection. However, the question of reasonableness was raised: until what point would it be reasonable to claim its rights for investors so remote to the investment at dispute that they had no communication with the host State? [674] This was correlated to the potentiality of appearing abuse as a result of very distant investors claiming their rights.[675] By citing the scholars’ works and arbitrators’ opinions[676], the Respondent provided several points guiding the rationale for estimating whether one could be considered a “*very distant investor*”[677] and, hence, ineligible to submit its separate claim:

1. The link between the enterprises investing and the ultimate assets holder is too far remote from each other;
2. *Raison d’être* of the investment made;
3. Claims proliferation due to numerous investors purchasing the enterprise’s shares.

Each of these elements is vital to the current research topic, hence, it shall be reviewed in detail.

Distant link

In the Respondent’s view, one needs to evaluate the link to receive jurisdictional standing in investment arbitration. Namely, its feature of lengthiness between the investor and the nominal enterprise investing in the host State.

In this vein, the Respondent pointed to 2005, when the Claimant was constituted. This was long after the agreement between the initial investor and the State for constructing the telecommunication infrastructure had been concluded in 2001. As such, the Claimant was non-existent at the time when the investment took place. Furthermore, the complex corporate chain was constituted in a way that involved “…[n]*o less than 8 companies, on 5 different levels…”*[678]. One single communication that took place between the Claimant and the host State in the period between 2005 and 2010 was the letter sent to the Algerian government over the merger done in

[673] Giovanni Zarra, “Parallel proceedings in investment arbitration” (2017) Eleven International Publishing, p. 16
[674] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) 2007*, Decision on Jurisdiction, para 1-5
[675] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 388
[676] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) 2007*, Decision on Jurisdiction
[677] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 391
[678] Ibid, Award, para 392(d)

the chains of the corporate vehicle. Hence, the Respondent considered the Claimant to be so distant from the investment made that any claim for protection should be denied under the absence of the *ratione personae* aspect.

In response, the Claimant (OTMTI) underlined its permanent and evident link to the OTH being indirectly controlled through the chain of corporate enterprises with at least 50% of shares in possession at every corporate layer. Namely, as the controlling power exists, the number of layers should be disregarded, with the Tribunal looking at the final beneficiary. This implies that as long the effective control over each enterprise involved in each of the corporate chains is in place, the investor has the legitimate right to protect its ownership at any of the inflicted layers of one corporate vehicle. For better clarity, see the illustration of the corporate chain provided.

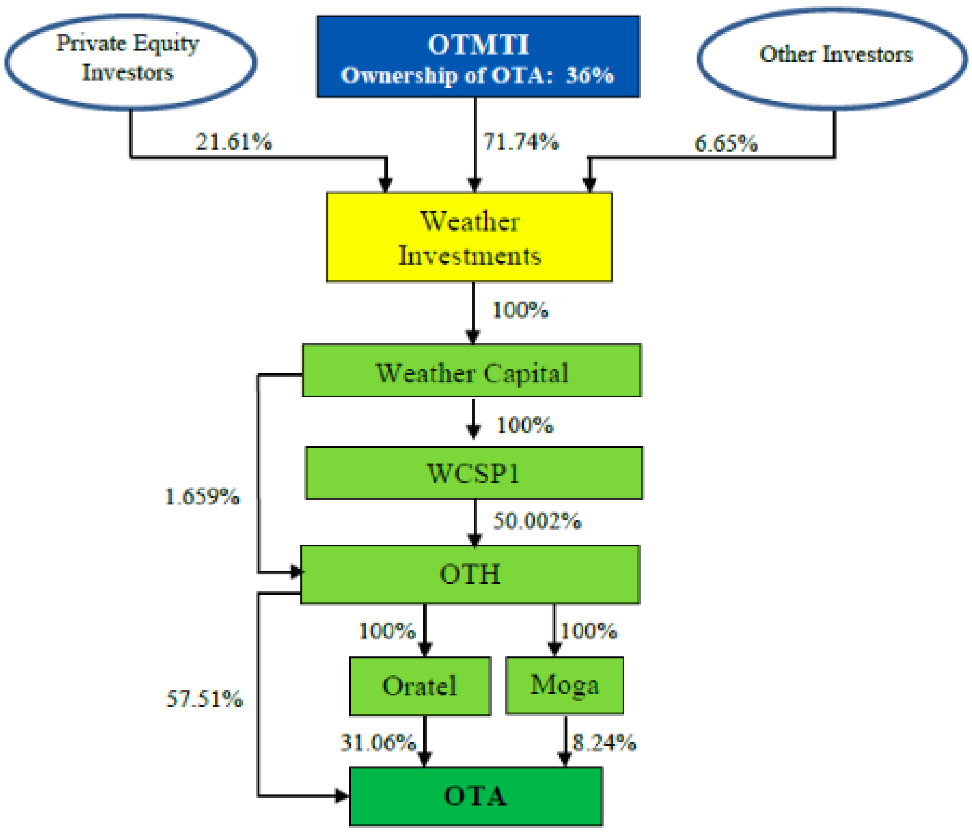


Image 4. Source: *Orascom v. Algeria* (Award, para 144)

The Claimant further continued that in the *Mobil*[679] case, where the Treaty definition did not expressly provide for recognising the inclusion of indirect investors, the Tribunal nevertheless supported the given approach. Instead, the Algeria-BLEU BIT does recognise the minority and

[679] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27) 2014,* Award

indirect investors, specifically mentioning them.[680]Therefore, "[A]*ccording to the Claimant, no tribunal had ever denied an indirect shareholder's claims based on an asserted "cut-off point", when the language of the treaty expressly covered indirect investments.".*[681]

In this context, the Tribunal was inclined to strictly follow the BIT wording favouring the investor's side by recognising the indirect ownership. Besides, not mentioning the minimum bar for receiving the protection implies that the latter is permissible rather restrictive.

This goes hand in hand with the previously reviewed dispute of *Tokios Tokeles v. Ukraine*, where the Tribunal had explicitly insisted on the principle of consent, underlining the power of agreeing States to set their own rules for the jurisdictional scope of the terms "investor" and "investment".

To continue, the temporal argument mentioned by the Respondent could hardly be considered legally fair. Namely, the legal term "investment" provides no obligation to be interrelated to the temporal aspect in the given meaning. Put differently, the owner of the latter willing to bring the claim should not be obliged to own the investment since the day of its inception. The said right may be purchased, gifted or inherited further on without limiting the jurisdictional standing for treaty protection by the ICSID Convention and subsequent BITs.

The author finds this argument convincing due to several considerations. Namely, reading the right to apply in a restrictive manner will limit the circle of protected investors and also question the reasonableness of capital exchange. In that way, the party acquiring the previously constituted investment would be discouraged from doing so as the investment protection would not apply under the reason of being constituted before the investment purchase had been made. This, in turn, would ruin the fundaments of the legal certainty where acquiring the property rights would not entail their protection under the temporal aspect.

For instance, the current case dealt with the long-term investment in developing the telecommunication network. This implies the project to be run for a substantial period and reasonably expected to change owners due to independent circumstances, i.e. lack of liquidity, death or bankruptcy of the initial investor and other reasons. As such, the longevity of the project and its potentiality to change hands should not disfavour in any way the existent investment holder who had acquired such property after the date of the constitution legitimately. Hence, the temporal aspect shall be viewed reasonably without cutting off the newly participating investors to the previously constituted projects. Provided their participation in specific investment fulfils the previously discussed criteria, i.e. treaty definition, *Salini* test, good faith and compatibility with the national law.

[680] BIT, Accord entre l'Union économique belgo-luxembourgeoise et la République algérienne démocratique populaire concernant l'encouragement et la protection réciproques des investissements (1991), Article 1

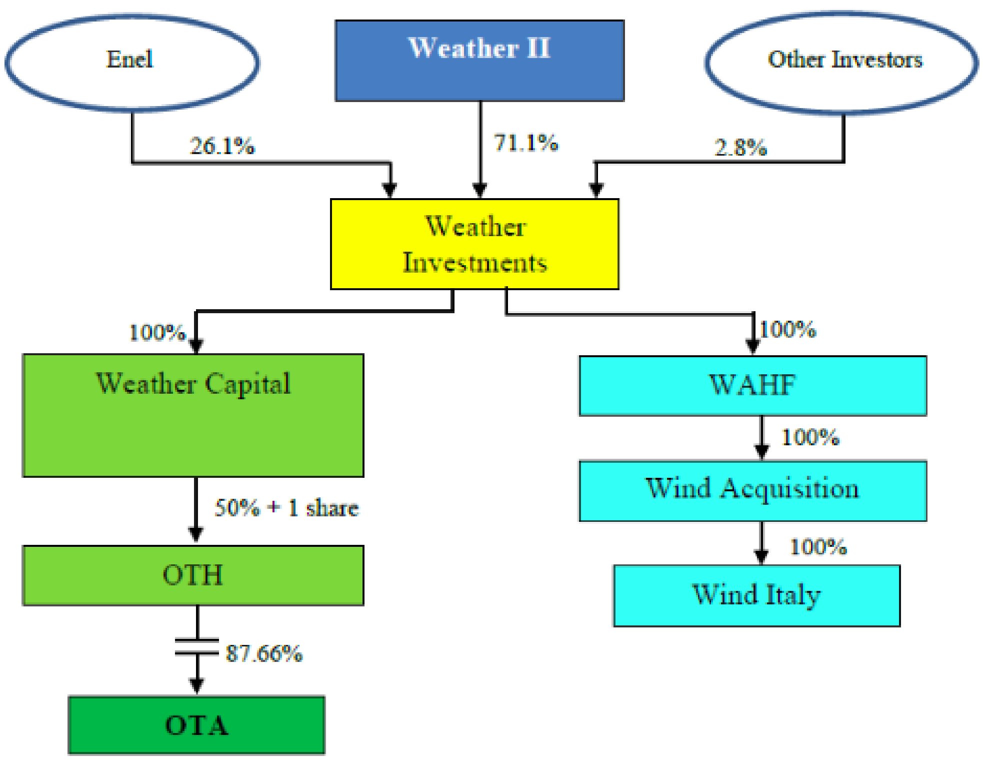
[681] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, par 397; Besides, an interesting observation could be mentioned. Namely, the unusual permissibility of the mentioned-above agreement for recognising the indirect minority investment could be explained by the fact of Luxembourg being one of the most popular jurisdictions to establish the investment fund. As such, the latter would be inclined to lay the most permissible language in order to facilitate the interests of many retail investors participating to collective investment funds authorised/registered in Luxembourg.

The given approach is also based on the ICSID Convention's objective of enhancing the private capital exchange. The latter goal would be tampered with by cutting off the new investors participating in the previously established projects. Therefore, the temporal argument presented by the Respondent found no support from the Tribunal's side.

Raison d'être

As a part of the "very distant investor" argument, the Respondent presented the rationale related to evaluating the motives triggering the acquirement of the enterprise of discord, namely the OTH.

As alleged by the Respondent, the OTH ownership was received following Weather Investments's acquisition. However, when purchasing the whole corporate vehicle, the Claimant had the primary motive of acquiring the Weather Investments, not the OTH. As such, as alleged by the Respondent, the Claimant lacked the intent "to invest". Instead, the ownership of the OTH was only acquired because it happened to be tied with the initially desired enterprise by one corporate vehicle on the opposite shoulder of the Weather Investments enterprise. [682] Should the latter not be tied with the desired enterprise, the Claimant would not consider acquiring the latter *ab initio*. See the following image:



[682] Ibid, Award, para 156-180

Image 5. Source: *Orascom v. Algeria* (Award, para 148)

In response, the Claimant agreed that the transaction's main purpose when purchasing the Weather Investments was to gain control over the Wind Italy enterprise. However, as opposed by the Claimant, the evaluation of intent is irrelevant with regards to identifying the validity of investment definition to identify the legitimacy of the jurisdictional standing. As long as the investment is made, with the substantial benefit brought to the State and fulfilling other economic and treaty criteria, the right for investment protection should not be questioned, nor the intent preceding it.

The Tribunal had supported the latter by underlining the intent for investment to be irrelevant as long as it is not abusive or detrimental to the well-being of any party involved nor to the investment protection regime in general. As such, the argument concerning the *raison d'être* was denied. Should the transaction fulfil the pertinent treaty (BIT) and economic requirements (*Salini* test), no allegation of investment invalidity could be raised under the scrutiny of the internal motives of the investor at the time of the transaction.[683]

Importantly, the just-discussed topic of intent "to invest" when selecting an investment project should not be misplaced with the previously-mentioned methodology of abuse identification based on the investor's motives. The first is placed in a strictly defined dimension of business activity, where the main objective is to receive the profits from the investment made. Instead, correlating the motives of investors with the methodology of abuse identification has the jurisdictional purpose of distributing the jurisdictional admissibility to the investment protection system. The latter is to be considered strictly within the legal dimension deriving from the pertinent treaties, i.e. ICSID, BITs and others.

The decision hints at the purely formalistic but practical approach taken by the Tribunal. The motive behind investing is not an aspect that should deny the validity of investment as such. In particular, the State receiving the economic benefit *via* investment that fulfils the *Salini* criteria, i.e. risk, duration, substantial benefit, and some pertinent treaty requirements laid down by specific BIT, would rarely care about the investor's intentions when deciding on investing. In other words, the objectives and goals pursued by the investor when acting within the business dimension are irrelevant to the investment protection system, i.e. what leg of an enterprise was envisaged to acquire? Instead, what matters foremost is the motives for applying for investment arbitration and seeking judicial protection, i.e. why exercising the specific treaty right?

The Tribunal's ruling aids the standing of jurisdictional standing of fund subscribers who often find themselves devoid of *raison d'etre* for investment. Namely, they obtain an additional argument for receiving full recognition under the investment protection regime.

For instance, the investment fund specialises in renewable energy and has its capital invested in the shares of company A involved in the solar power business. The fund subscribers who purchased the fund's shares/units, and had their capital invested via the means of a fund vehicle into the said company, did not have the initial *raison d'etre* to invest in that exact company. There are companies B and C are also involved in renewable energy. However, the fund

[683] Ibid, Award, para 376

subscribers followed the fund’s investment policy and the management's decision to select company A as an investment object. Therefore, the fund subscribers investing in the host State economy via the investment fund had no implied determination and interest in company A.

However, the reviewed decision suggests the absence of the raison d’etre to not preclude the fund subscribers from claiming their jurisdictional standing in the investment protection regime.

For identifying the validity of *rationae personae*, the quality of investment is to be identified by evaluating the previously discussed elements, *Salini* test[684], treaty definition, good faith and others. In this context, even the short-term investments practised by collective investment vehicles may have the standing to be recognised and offer the investors (fund investors and the funds themselves) the treaty protection upon further analysis of the *Salini* test that is not compulsory to follow.

The given deduction represents the reason for applying the intersectoral approach when researching the two distinct legal regimes of investment arbitration and investment funds. Namely, the analysis rendered on the verge of two allows constructing the arguments supporting the jurisdictional standing of the fund’s investors.

The Tribunal had not recognised the speculation regarding the investor's intentions at the time of investment because of their inconsistency with the general objectives of the investment protection system and remoteness to the formally established criteria. This, in turn, had benefited the standing of investment funds and their investors participating in the collective investment scheme without the real and definite intent to invest in a specific host State or project but with solid and existent effects on the host State economy. The latter is the key objective in the previously discussed bargain, i.e. capital in exchange for adjudicatory sovereignty give up.

Therefore, upon denying the allegation of the absence of raison d’etre as a disqualifying feature, the Tribunal facilitated a better jurisdictional standing of investment funds and their investors, i.e. investment fund shareholders.

Multiple claims

Another point of concern is the risk of the multiplication of claims the Respondent had raised. In particular, the host State alleged that too far-removed investors might submit their respective claims, potentially creating the issue of abuse, i.e. claims multiplication.

“…[investor] [u]*sed his group of companies to seek to maximize his chances of success by introducing several arbitrations against the Respondent at different levels of the chain of*

[684] Provided the substantial benefit is not made by such investment. In case it is, the Tribunal might consider otherwise as the Salini test is not obligatory nor restrictive as it was established in previous part. See for example the *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012*, Award, para 145, 294

companies, which is a further ground for the inadmissibility of the claims under the doctrine of abuse of rights".[685]

In response, the Claimant referred again to the BIT recognising the rights of the minority or indirect investors. [686] Following such observation, it was claimed that "…[A]*lgeria accepted the possibility of multiple arbitrations deriving from the same facts by consenting to arbitration with minority or indirect investors".*[687] However, the Tribunal did not find for the investor this time.

In this context, the Tribunal had reaffirmed that the parties are free to constitute and develop the corporate structure as they wish. As it has already been discussed, many legitimate purposes require to do so: tax optimisation,[688] improvement of the cash flow, or even planning the enterprise's BIT nationality, provided there is no dispute in place (i.e. *Tokios Tokeles v. Ukraine*[689]) or any mere potentiality of it (i.e. *Philip Morris v. Australia*[690]). However, "…[a]*n investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state..."*[691]

In principle, the investors, finding themselves at any of the corporate levels of one vehicle, are not precluded from submitting their individual claims based on identical legal facts. However, as previously mentioned by *Zarra*, their interests and attraction centres shall differ. Instead, the multiple claims submitted essentially by a sole beneficiary *via* the avenue of the corporate entities owned have the only difference – varying legal basis, i.e. BIT. However, it is not sufficient to consider the latter claims to be made in good faith. Consequently, no jurisdictional standing could be offered.

In the *Orascom* dispute, the Tribunal had found no evidence affirming the claims to be principally different or having varying centres of attraction. Instead, it became apparent that the Claimant to the current dispute, through the entities owned, had methodologically submitted multiple claims with identical merit, one after another, by using its diverse corporate vehicle against the State of Algeria.

"So when I was defending the interests of Orascom Telecom [Holding] [OTH] *only, we would use the Egyptian treaty because that's the instance now that is corresponding, and it's direct. [...] Then when things start to go worse, you say, "Listen, guys, it's not go to end up there. There*

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[685] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 402

[686] BIT, Accord entre l'Union économique belgo-luxembourgeoise et la République algérienne démocratique populaire concernant l'encouragement et la protection réciproques des investissements (1991), Article 1.2(b)

[687] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 399-400

[688] The same rationale was confirmed as legitimate in the *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Decision on Jurisdiction

[689] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Award

[690] *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Decision on Jurisdiction

[691] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 540

is an Italian treaty, so the mother company can go". Then when I sell under the gun – and again I come to the different nature of my claim [...] I used the Luxembourg treaty"[692]

As evident from the Claimant's statement, such course of action had led to a situation where the ultimate owner of the entire corporate vehicle had opportunistically exercised his rights, and the rights of the enterprises placed beneath the corporate structure in a manner that contradicted the purposes and objectives of the investment protection treaty.[693] Precisely, exercising the right for investment protection by initiating repetitive proceedings puts procedural pressure on the host State or seeks double recovery. This was contrary to the law's objectives of providing such rights.

"In the Tribunal's opinion, this conclusion **derives from the purpose of investment treaties**, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. **The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment.** Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources **that multiple proceedings involve**. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, **the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established**."[694].

See the following visualisation for information purposes.

[692] Ibid, Award, para 544
[693] Ibid, Award, para 545
[694] Ibid, Award, para 543

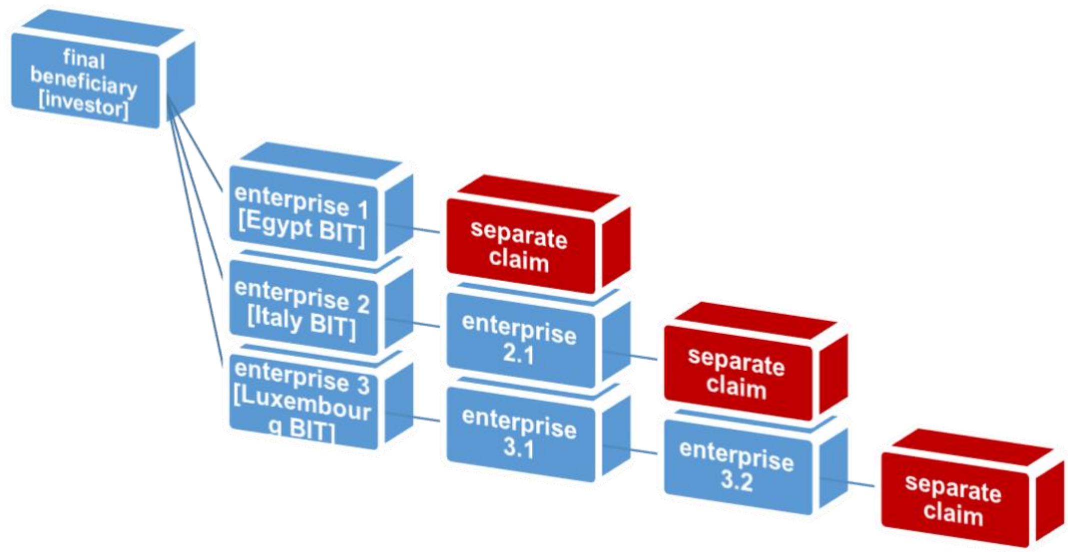

Image 6. Source: author's illustration

As such, the Tribunal ruled on the importance of scrutinising the corporate links discussed, namely, the independence of the investors and the difference in purposes of such claims. Should the Claimant not exercise effective control over the preceding enterprises submitting the identical claim, the *ratione personae* principle, potentially, upon further review, has the merit to be supported. In case the pertinent evidence suggests so, i.e. individual concern, independent standing.

Importantly, ownership does not equal to control.[695] In this context, the ownership of more than 51% of shares does not automatically confirm that the ultimate beneficiary controls the entire corporate vehicle for the mentioned-above purpose of finding the jurisdictional basis for the investor. Despite having such an example in the *Orascom* dispute, the control may be traceable through other than corporate shares ownership manner. For example, the power given by the statute of one of the corporate layers or its vehicle in its entirety, possession of the "golden share", and other potential ways laid down by the company's statute at stake and the principals of the corporate law where the exercise of power would be evident *de jure* and *de facto*. In this way, if an investor had owned a mere fraction of the shares but, nevertheless, had the management control for initiating the disputes on behalf of all of its entities placed within the vertical structure of the corporate vehicle, the latter could be an example of control without principal ownership.

[695] See for example the *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia* (ICSID Case No. ARB/16/38) 2020, Award, para 279-285 with regards to the considerations whether the State airport is an independent body form the State and being managed by the separate team that is detached from the executive branch of the State.

Therefore, analysing the standing of individual investors submitting their claims in the context of one corporate vehicle within which they are located could not have two similar methodologies. For these reasons, the investment arbitration case practice evaluates many qualitative criteria allowing the latter to affirm the jurisdictional standing of one particular investor, *de facto* and *de jure*.

There is an unbreakable bond between the ultimate investor and the capital invested into a particular project under the investment protection treaty. When analysed with precision, the latter link reveals the necessary information for determining the jurisdictional standing of the investor. Put differently, it is in the investor's DNA.

In this vein, the *Orascom v. Algeria* dispute had been deemed by Tribunal as an opportunistic attempt to get at the host State *via* orchestrating the multiplication of claims submitted under varying jurisdictions accessible by numerous corporate layers within the limits of a single corporate vehicle that had been, consequently, controlled by one sole individual. [696]

In making such a conclusion, the Tribunal returned to evaluating the sub-related claims and estimating the submitted notices for arbitration. In particular, upon precise evaluation of the application for initiating the disputes done by the Claimant and its subsequent enterprise, it became apparent how strikingly repetitive the claims were in all three applications.

"*As is evident from the content of the three notices excerpted above, the three companies complain of the same measures taken by Algeria… In the Tribunal's view, while the parties to the dispute and the legal bases for the claims (the BITs) are different, the dispute being notified in the three notices is effectively one and the same."*[697]

Besides, at the time of hearings, the latter had commented in the following way with regards to explaining his position and role in the Weather Enterprise*:*

"[W]*hen I speak as [investor], I speak for Weather II, for Weather and Orascom Telecom. I am the chairman across the board. So when I - and I am the guy who is managing…So I have - I am like the general assembly, you know, because I own the 51% through my family, and I am the chairman and I am chief executive officer. So if you want to say I'm everything, it's true."*[698]

As such, no other arguments were needed to confirm the linkage between the end beneficiary, the corporate layers created, and the claims sent against the State of Algeria under various jurisdictions. Therefore, the given case example represents the claims multiplication phenomenon in bad faith. Using numerous BITs, depending on where one of the corporate enterprises is headquartered, and initiating the investment dispute proceedings with identical

[696] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 542
[697] Ibid, Award, para 488
[698] Ibid, Award, para 493

reasons has led to exercising the investment treaty rights "…[f]*or purposes that are alien to those for which these rights were established"*[699].

As such, the Tribunal had refused the jurisdiction upon lacking the *ratione personae* element. This had been done based on estimating the quality rather than remoteness of the investment link between the principal beneficiary and all the rest of the entities submitting the investment claims against the host State.

In this context, the Tribunal disregarded the allegation of the investment link distance. Instead, the formal criteria stemming from the BIT, *Salini*, and good faith had been applied. This, in particular, benefits the standing of investment funds practising the collective investments done through its corporate vehicle.

As such, the review of the above-mentioned case manifested an example of abuse *via* claims multiplication in the vertical structure of the corporate vehicle. Namely, vertically placed claimants, i.e. corporate layers of one vehicle, submitting numerous claims under the instruction of the ultimate beneficiary.

The author further proposes reviewing another dispute manifesting the right to apply in the context of claims numerosity to be exercised in good faith.

Case study: *Abaclat v. Argentine*

Seeking to renew and restructure its national economy, Argentina raised some capital by issuing sovereign bonds.[700]Parts of these investment instruments had been distributed in the European market through the branch of private banks that were subsequently offered to retail investors.

Due to a series of events following the economic crisis, the Argentinian government declared itself in default, having no financial capacity to repay approximately USD 100 billion of external bond debt.[701] This triggered the chain of arbitration disputes, including *Abaclat v. Argentine*. The latter had concerned the European retail investors who had purchased the above-mentioned bonds through private banks or *via* subscription to investment funds, i.e. pension schemes.

As a result, in the *Abaclat v. Argentine* dispute, approximately 180,000 retail investors from Italy had filed a collective mass claim against Argentine *via* investment arbitration. More than 180,000 investors participating in the arbitration had initially withdrawn from further proceedings due to a settlement agreement with the government. As a result, approximately 60,000 individual investors had remained with their separate claims packed into one collective claim submitted before the Tribunal.

Namely, the above-mentioned subscribers to Argentina's bonds had waived their representing rights to the not-for-profit organisation aimed to represent the interest of retail investors

[699] Ibid, Award, para 543
[700] *Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5) 2016*, Decision on Jurisdiction, para 43-44
[701] Ibid, Decision on Jurisdiction, para 58

altogether – Task Force Argentina (TFA).[702] The latter was mostly organised and managed by several local banks distributing Argentina's sovereign bonds to retail investors *ab initio*. Each of the investors had signed an agreement with the TFA. The latter agreed to act on behalf of investors to submit the investment arbitration claim. As all of the above-mentioned retail investors had originated from Italy, the Argentina-Italy BIT had been selected as the legal basis for lodging the investment arbitration claim by the TFA.

Hence, the *Abaclat* case had been regarded as the first mass claim investment dispute appearing before the arbitration tribunal, with more than 60,000 individual investors seeking damages recovery.

Investment link

At the start of the review process, the Respondent had questioned the jurisdictional basis of the Claimant. Namely, Argentina denied having consented to "…[s]*uch kind of claims initiated by groups of people or class action*"[703]. Furthermore, the Respondent had alleged the attempts of the TFA to bring the investment arbitration claim to be an example of "…[u]*nprecedented abuse of the investment treaty regime*" where the mentioned-above Claimants are having unrelated to each other claims that appear out of "*investments acquired individually*"[704] at "*different times and circumstances"*[705].

In this context, the Respondent had also questioned the *ratione personae* principle and the investment link claiming the latter to be non-existent because "…[h]*olders of security entitlements have only a remote and attenuated relationship to the underlying bonds through secondary market transactions…*"[706]. This, consequently, led to considering whether such claims could be recognised as treaty claims, i.e. the ones that could invoke the investment treaty provisions or the ones deriving from the commercial contracts with banks and investment funds, i.e. *"covered-up contract claims"*[707].

The given allegations concern the previously discussed matter of quality of the investment link between the retail investor investing in Argentina by way of purchasing the sovereign bond securities distributed by the European banks. Specifically, the length between the ultimate investor (retail purchasers of the sovereign bonds) and the host State.

In the given context, the Tribunal had faced a legally multifaceted issue questioning the aspect of the numerosity of claimants and their subsequent claims to be recognised as an abuse of investment treaty rights *ab initio*. In addressing the said issue, the Tribunal concentrated on examining the investment links' legal quality for initiating the investment arbitration dispute against the host State. This was done by evaluating the relations between the host State and the

[702] Hanno Wehland, "The Coordination of Multiple Proceedings in Investment Treaty Arbitration" (2013) Oxford University Press, para 4.08-4.20
[703] *Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5) 2016,* Decision on Jurisdiction, para 102
[704] Ibid, para 234 (i)
[705] Ibid, para 234 (i)
[706] Ibid, para 234 (v); See also Jorun Baumgartner, "Treaty Shopping in International Investment Law" (2016) Oxford University Press, p. 92-95
[707] *Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5) 2016,* para 237

Claimants. Namely, whether the purchase of a financial instrument took place out of a commercial agreement with the intermediary or whether it is an investment done to the host State.

As the arbitrators found it, the Argentinian State, when passing the law on its default to bond payments (subscribed by the Claimant), had done so under the virtue of exercising its sovereign powers rather than acting within the limits of its contractual obligations for bond issue and distribution.

"…[t]*he present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general…".*[708]

Therefore, the State had exercised its sovereign power[709] to cancel the payments upon the decision of financial default announcement; this underlines the non-commercial[710] nature of relations arising from the State measure.[711] As such, the treaty claims initiated by the TFA on behalf of numerous retail investors stand on the Argentina-Italy BIT, where the loss of investment made took place out of the State's decision not to pay, i.e. indirect expropriation.

Besides, the given consideration also pushed to analyse the distribution process of the mentioned instruments.

"The bond issuer [Argentina] enters into an agreement with a group of banks, which undertake to subscribe to and purchase a bond. These banks, commonly referred to as the Subscribers or Lead Managers, then organize together with other banks, the so-called Underwriters or Co-Managers, a syndicate. The members of this syndicate, jointly referred to as the Participants, each underwrite differing parts of this bond, depending on their status in the syndicate. These Participants then distribute their specific part of the bond to further Intermediaries, such as commercial banks, pension funds and other financial institutions, which in turn may or may not distribute their part to their clients, including individual investors. Thus, the purpose of the subscribers, underwriters and intermediaries is to act as a distribution conduit."[712]

The mentioned consideration changed the role of the banks in the transactions leading to the exercise of treaty rights for initiating the dispute. Namely, the Tribunal had established the banks to have the role of intermediary distributing the requested financial instruments supplied by Argentina, i.e. "…[a]*uxiliaries of Argentina, who helped the latter create the basis for Claimants' alleged investment"*[713].

[708] Ibid, para 324
[709] See for example *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) 2000, Award
[710] See also an interesting example of *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012,* Award where the Respondent alleged the hedging agreement to be a commercial transaction (contract) rather than investment
[711] *Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5) 2016,* para 326
[712] Ibid, para 16
[713] Ibid, para 329

In this context, the final beneficiary of the investment and, consequently, the right's owner to initiate the dispute against Argentina was the one who held the financial security rather than assisted in acquiring the latter, provided the purchase of such bonds fulfilled the treaty and economic requirements of the definition "investment"[714].

Mass claim

The current dispute is a unique example of more than 60,000 individual investors claiming investment protection under the Argentina-Italy BIT. Following the Tribunal's confirmation of their jurisdictional standing, the Respondent raised the allegation that the use of treaty rights by numerous investors constitutes the "…[u]*nprecedented abuse of the investment treaty regime" were "investments* [had been] *acquired individually"*[715] at "…[d]*ifferent times and circumstances*"[716].

In response to the allegation, the arbitrators acknowledged the existence of a certain gap regarding regulating the given question. Namely, the investment protection system is not envisaged for numerous investors wrapping their separate claims into one mass claim. *"Tribunal finds that the silence of the ICSID Convention concerning collective proceedings is to be seen as a gap. As such, the Tribunal has, in principle, the power to fill this gap."*.[717]

In this context, the arbitrators had implied that one could not simply be denied access to arbitration for fear of a mass claim being submitted against the host State. Even more, investors' numerosity and subsequent claims submission do not necessarily correlate with their potential to be abusive.

The investment protection system would lose any sense should it not be capable of providing the required legal shielding, disregarding the number of those seeking the protection. Put differently, there is no legal basis for the host State to be excused from judicial review under the allegation of the claim consisting of too many investors. The same concerns the fund's investors collaborating by collective pooling of capital.

Interestingly, both the Tribunal and the Respondent had acknowledged a particular legal shortcoming that comes along with the matter of the mass claim review. Namely, having a wide circle of investors unavoidably leads to situations where the investors' individual concern is ignored: having more than 60,000 investors submitting their individual claims presupposes the Tribunal to distract from considering the investor's individual situation. Instead, the claims are unavoidably tied together and reviewed under the generalised approach of reviewing the most common allegations, i.e. damages recovery.

"In this regard, the Tribunal finds that not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately

[714] Ibid, para 362-364
[715] Ibid, para 234 (i)
[716] Ibid, para 234 (i)
[717] Ibid, para 525

with 60,000 individual arbitrations. Thus, the rejection of the admissibility of the present claims may equal a denial of justice."[718]

By this assumption, the Tribunal had prioritised avoiding the denial of justice scenario over the individual and specific claims of retail investors disregarded during the dispute review, in case the jurisdictional admissibility is granted. Ignoring some investors' specific and individual concerns is necessary for accepting the common claim. As such, the individual concern fell victim to the objective of avoiding the denial of justice.

However, this had been done to a certain degree as the Tribunal had validated the claims that are "…[i]*dentical or sufficiently homogeneous…"*[719]. For these reasons, the arbitrators recognised the elements pertinent to all claims. Namely, they are based on a sole BIT clause deriving from the Argentina-Italy investment agreement. Furthermore, the entirety of the claims challenges the Argentinian decision of non-payment. These arguments underline the investors' mass claim to be homogeneous and admissible for collective review in arbitration.

In this context, the author would like to mention the previously discussed criteria laid down by *Zarra*. Namely, the ones designed to identify the activity of claims multiplication done in bad faith:[720]

1. the purpose of the claims is the same;
2. the facts on which the claims are based are the same;
3. the legal basis of the claims is substantially identical; and
4. the parties in the two proceedings represent the same centres of interest, even if they are not formally identical[721]

Unlike in *Orascom*[722], the current dispute underlines that investors do not represent the same centre of interest, implying the absence of bad faith. The retail investors participating in the mass claim before the Tribunal had been doing so on the basis of their individual imperative, without owing any interest to third parties.

In this context, numerous investors alleging the investment protection against the host State are to be recognised to exercise the right to initiate the dispute in a normative way provided the combination of two is fulfilled: (1) investors' independence and (2) previously discussed investment definition requirements, i.e. *Salini* test, treaty definition, good faith and others. See the following image illustrating the submission of claims in the *Abaclat* dispute schematically:

[718] Ibid, para 537
[719] Ibid, para 540
[720] Giovanni Zarra, "Parallel proceedings in investment arbitration" (2017) Eleven International Publishing, p. 2
[721] Ibid, p. 2
[722] Ibid, p. 2

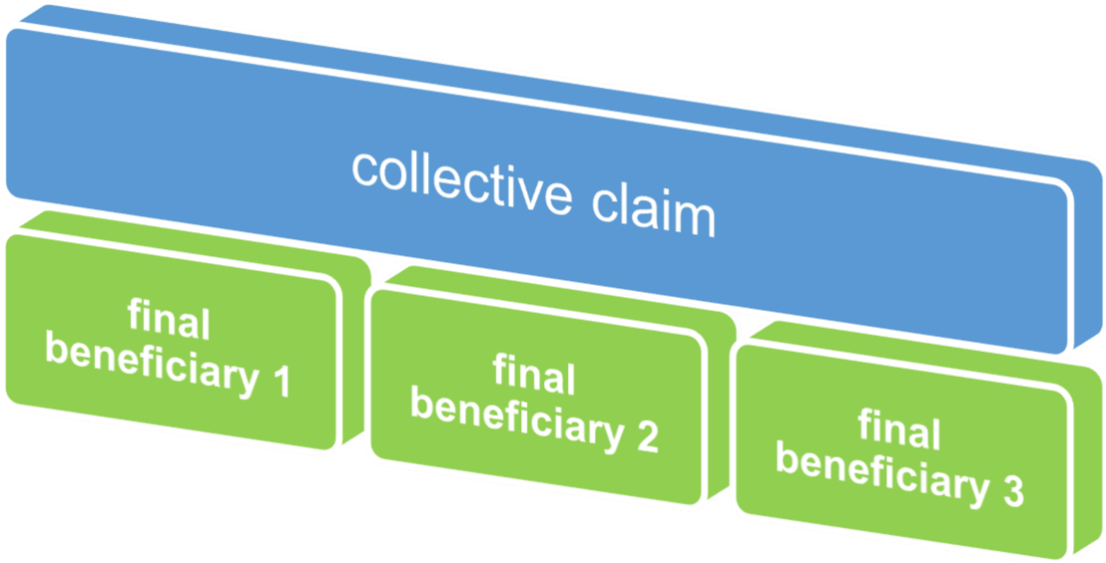

Image 7. Source: author's illustration

In this vein, although tied by one claim and factual circumstances against a single Respondent, every beneficiary carries the element of autonomy in part of the following personal rationale for subscribing to a mass claim. The latter autonomy may be proved indirectly by the rest of the investors deciding not to participate in the said mass claim but to settle *ab initio*.

Therefore, the *Abaclat* dispute reflects the specificity of numerosity in the context of investment dispute review. Namely, the permissible approach of arbitrators recognising the right of many investors to receive the treaty protection provided the combination of two pertinent elements is fulfilled: (1) investors' independence and (2) previously discussed investment definition requirements, i.e. *Salini* test, treaty definition, good faith and others.

The given considerations allow suggesting the factor of numerosity in investment dispute review shall not necessarily indicate the abuse of the investment treaty rights. This concerns foremost the investors carrying the latter specificity in their legal design, i.e. investment funds and complex corporate vehicles.

Investor v. asset holder

Having analysed the above-mentioned disputes, one could validly pose the following question: until what point an investor that is distant or indirectly involved can submit its claim without infringing the principle of legitimacy? Put differently, the principle of legal certainty requires the red line to be drawn in arbitration practice necessary to establish a "cut-off" point distinguishing the investors with real interests from the rest of the asset holders.[723] Hence, where is the said limit?

Evidently, in the investment protection regime comprising the specificity of having no established doctrinal pattern and conceptualisation of abuse, it appears troublesome to suggest a static mechanism for setting the mentioned "cut-off" point.

The Tribunal often faces the necessity to precisely analyse the relevant legal criteria to set such a "cut-off point" for a pertinent dispute at review. The "cut-off" point fluctuates depending on the circumstance and the context. As already mentioned, the relevant legal criteria based on which the Tribunal is to render its decision could be divided into two separate categories: the definition category and the investment link category.

The definition category relates to analysing the treaty and economic definition of investment. For example, how beneficial the investor's investment had been to the host State economy? Does the latter relate to the treaty definition? This had been at a close examination in the current Thesis when discussing the aspects of *ratione personae* and *ratione materiae* (Part I).

Instead, the investment link category aims at scrutinising several pertinent features necessary to confirm the solid and evident link between the claimant and the host State through the investment made: individual concern of investor, independence of investor, homogeneity of the claim in correlation to other co-submitted claims. The given criteria are laid down by the reasoning in the two mentioned disputes. Affirming the presence of these aspects when deciding on establishing the above-mentioned "cut-off point" would facilitate the Tribunal's legal argumentation and allow to distinct the legitimately submitted claims from the ones that are inadmissible (potentially abusive).

For example, in *RSM Production Corporation v. Grenada*[724], the investor lost its claims over the dispute related to petroleum licensing. In turn, several shareholders of the above-mentioned legal entity had initiated a separate dispute based on identical facts, i.e. *RSM Production and Others v. Grenada*[725]which got dismissed as well. This decision was rendered based on the legal evaluation of the investment link between the ultimate beneficiaries and the investing company that was at issue for the initial dispute.[726] Namely, the current Claimants were directly related to the RSM Production as they were the only shareholders of the latter.

"…[t]*hey are, and were at the time of the Prior Arbitration, RSM's three sole shareholders. They were thus privies of RSM at the time. As such, they, like RSM, are bound by those factual and*

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[723] See an interesting point in *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 384, where depending on the treaty definition the "cut off point" can vary greatly and should not depend only on such static features as "passive holding of shares". This implies to previously mentioned aspect with regards to direct and portfolio investments. For instance, the shareholders in investment funds would not be denied the protection should they only be passive holders of the assets. Instead, one should read the specific regulation managing the investment relations. In case of the BIT governing the Orascom v. Algeria dispute, there were not a single mention about such intention as to set the "cut off point" where the asset holding is passive.

[724] *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14) 2009, Award

[725] *RSM Production Corporation and others v. Grenada* (ICSID Case No. ARB/10/6) 2010, Award

[726] *RSM Production Corporation v. Grenada (ICSID Case No. ARB/05/14) 2009*, Award, para 1-5

other determinations regarding questions and rights arising out of or relating to the Agreement…".[727]

Therefore, apart from having established the *ratione materiae* principle to be missing, the Tribunal had also analysed the investor's relations to the investing enterprise, i.e. investment link between the end beneficiaries and the investor. Consequently, the cut-off point had been established on the basis of the Claimants being the "sole shareholders" of the RSM: anyone claiming their individual rights while being the sole investor to the RSM is cut off from doing so after having resolved the dispute between the RSM and the host State.

This dispute at review manifests the mentioned above cut-off point as a legally fluctuating variable. Even more, defining this variable in correlation to a specific dispute at stake should be viewed in a positive sense: to facilitate the principle of legal certainty *via* ensuring the availability of legal remedies should the latter be established favourably to the claimant at stake. Provided no double recovery is sought (RSM Production) or other motives deriving from bad faith, i.e. procedural pressure on the host State[728], are present.

Therefore, having correlated the *Orascom* and the *Abaclat* disputes, it has been established that the right to apply is ignited in the context of numerous claims submissions in two legal modalities: legitimate and abusive. Depending on the qualitative features, treaty requirements, and the establishment of the "cut-off point", the Tribunal is in place to decide whether such activity is done in good or bad faith.

On one side, it had been established that no specific test could determine where to establish the "cut-off" point due to many legal variables. On the other side, however, upon having analysed the above-mentioned disputes, it is possible to succinct the specific criteria aiding the task of précising several distinct elements hinting about the abuse in the claims multiplication activity in investment arbitration disputes.

Independence: the Claimant submitting its claim should, within the context of claims proliferation activity, be independent from other claimants submitting their respective claims within one corporate vehicle (vertically) or among other shareholders to one company (horizontally). The motive to submit such a claim shall derive from the very own rationale and not be ordered by the third parties, i.e. majority shareholders.

Individual concern: the entity's shareholders that had already lodged the investment arbitration claim and lost against the host State should not raise an identical claim based on the same facts. There needs to be an individual concern of investors suffering specific losses (either directly or indirectly) due to the host State's actions, i.e. intellectual property rights belonging to one of the shareholders or one of the layers of one corporate entity. The failure to confirm the existence of such individual concern would lead to considering the claim to be lodged in abuse.

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[727] *RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6) 2010*, Award, para 7.1.5

[728] See, for example, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Decision on Jurisdiction

Homogeneity of the claims: in case numerous retail investors submit multiple disputes within the limits of one mass claim, the Tribunal should evaluate the homogeneity of such claims to consider their admissibility for investment arbitration review, i.e. mass claim.

To conclude, the analysis and legal correlation of two distinct disputes (*Orascom* and *Abaclat*) suggested the claims multiplication activity *via* the avenue of the right to apply exercise, to be either done in bad or good faith depending on precise and specific analysis of many legal variables.

These conclusions greatly aid investment fund activity, where many fund investors can solicit their legal standing by sourcing the argument from the reviewed case scenarios.

Besides, the analysis of two distinct disputes also allowed deducting the key variables necessary to consider in order to establish the potential abuse of the right to apply in the context of claims proliferation. This includes the individual concern, the independence of the claimant, the treaty definition of investment, the *Salini* criteria and the claims' homogeneity. Importantly, considering the legal specificity of the investment protection regime having no established doctrinal pattern nor homogenous case practice, the said criteria are open for update and modification.

The outcomes of the current examination also facilitate the jurisdictional standing of investors participating in an investment fund for pooling capital collaboratively. Namely, the status of retail investors remains largely undefined and requires *ad hoc* analysis in correlation to a specific dispute at review. However, the results of reviewing the mentioned disputes underline that the quality of investment, i.e. individual concern and independence when initiating the dispute, allows for a better argument of the investment fund's position for obtaining the rights distributed by the investment protection regime (ICSID).

Section 3 – PROVISIONAL MEASURES

The instrument of provisional measure better facilitates a balanced review process by fulfilling two distinct functions. First, safeguarding the integrity of the procedural order.[729] Second, ensuring the protection of the rights and interests of the disputing party should a potential, and justified detriment appear, i.e. the host State selling off the expropriated investor's assets.

The instrument of provisional measures is entrusted to the hands of the tribunal. Invoking one is at the full discretion of the latter. *"The ultimate source of the arbitrator's authority to order provisional measures is the parties' agreement to arbitrate."*[730]

However, as the interested party, the investor enjoys the standing that allows for exercising its procedural right to apply. This includes, among others, the provisional measure instrument. The application for provisional measure invocation must be substantiated with evident reasons

[729] Benoit Le Bars and Tejas Shiroor, "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement" (2017), p. 1

[730] Gary Born, "Chapter 17: Provisional Relief in International Arbitration" in Wolters Kluwer (ed), *in "International Commercial Arbitration (Third Edition)"*(2020), p. 13

affirming the Tribunal's necessity to react provisionally. The investor being the claimant in the review process, may apply for invocation of provisional measures to arbitrators who will later decide on the said request.

Several reasons necessitate the analysis of abuse in the case scenario of provisional measures. Before all, the investment protection regime supplying investors with the right to call the host State to arbitration distributes the rights relevant to the dispute review, i.e. procedural rights. In this context, the right for provisional measures invoked amidst the dispute review process [731] develops a direct pertinence to the latter legal regime.

At the same time, the previously mentioned procedural and material inequality between the host State and private investor coincides with a modality for invoking the provisional measures. Namely, the host State enjoying a sovereign power may resort to deteriorating the investor's position more frequently than if the dispute occurred between two private individuals.

Besides, abusing the right for provisional measures negatively affects both the dispute review process and the State's sovereign right to act, i.e. stopping the execution order, limiting the power of national authority to seize the property. These arguments elevate the importance of the said case scenario to the level worth reviewing in the given Thesis.

Unlike the term "investment" or "abuse", the ICSID Convention directly mentions the investors' rights for provisional measures:

"*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party*."[732] In the same vein, see also the ICSID Arbitration Rules.[733]

The broad language of the Convention implies the arbitrators' right to virtually *any* action deemed necessary for preserving the respective rights of the disputing parties. Provided the latter is done in good faith.

The given legal device is a powerful instrument given to the hands of arbitrators. On one side, the right to regulate and punish (Lockean theory)[734] is viewed as an essential function of any sovereign State, and that should always remain within reach of the State itself and the nation electing a subsequent government. The limitation or absence of the said power represents the threat to the nation's existence *ab initio*. By this logic, the provisional measure should not be compulsory to follow by the State but have a pure form of recommendation. The participants of the ICSID Conference initially intended this.[735]

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[731] Benoit Le Bars and Tejas Shiroor, "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement" (2017)

[732] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), Article 47

[733] International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (2006), Rule 39

[734] John Simmons, "Locke and the Right to Punish" (1991)

[735] Christoph Schreuer and others, "The ICSID Convention: A Commentary" (2009)

On the other side, the State (having its full sovereignty *ab initio*) had agreed to join the ICSID Convention and adhere to the rules and principles laid by the latter, i.e. the ultimate power to give up the power. In this context, if the final award binds the State, why should the interim measure paving the road to rendering such an award would be deprived of the legality to bind?[736]

To add to this, the legal writing of the above-mentioned rules of the provisional measure provides the opportunity for the disputing parties, upon their common agreement, to tamper the right to invoke the provisional measure by the Tribunal in case necessary. As such, the given right vested in the hands of arbitrators, although legally powerful, is not absolute, as the parties' agreement can limit it. This indicates the disputing sides to be the core stakeholders of the investment protection regime and the dispute resolution mechanism.[737]

The reason to organise the mechanism of provisional measures in such a way was also done out of procedural necessity. If the provisional measure instrument is non-compulsory, the latter could ruin the fundaments of the dispute review process. Sir Lauterpacht mentions the following:

«It is not necessarily inconsistent with the effectiveness of the administration of international justice that the Court should have no power to decree, with binding effect, provisional measures to be taken by the parties. But I believe that it is not part of the function of the Court to recommend measures which the parties are free to accept or to reject»[738]

The investment arbitration case practice supported the given approach.[739] For example, in the *Maffezini v. Spain* dispute, the Tribunal had decided the following:

"…[t]*he Tribunal's authority to rule on provisional measures is no less binding than that of a final award*."[740] As a result, the further case practice presenting the examples of provisional measure's evolutive powers opened the forum for discussion and polarisation of opinions. [741]

Besides, one could rarely blame the Tribunal to be abusing such power. For example, in *Sergei Paushok v. Mongolia*[742], the Tribunal had ordered provisional measures that took into account the interests of the State, expressing serious concerns with regard to the value of the disputed asset:

"…[w]*hile granting Claimants the requested protection from immediate payment of the WPT and from seizure of or liens upon GEM's assets, the Tribunal also understands Respondent's*

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[736] Johnny (V.V. Veeder) Veeder, 'Provisional and Conservatory Measures' (New York Convention Day: Celebrating the 40th Anniversary of the Convention); See also Benoit Le Bars and Tejas Shiroor, "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement" (2017), p. 41; See also Francisco Vicuña, "The Evolving Nature of Provisional Measures" (2010), p. 941
[737] Benoit Le Bars and Tejas Shiroor, "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement" (2017), p. 38
[738] Hersch Lauterpacht, "Annuaire de l'Institut de Droit International" (1954), p. 535-536
[739] Christoph Schreuer and others, "The ICSID Convention: A Commentary" (2009)
[740] *Emilio Agustín Maffezini v. The Kingdom of Spain (ICSID No. ARB/97/7) 2001*, Procedural order 2, para 9
[741] Francisco Vicuña, "The Evolving Nature of Provisional Measures" (2010), p. 953-954
[742] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL Rules) 2011

concern that, at the end of the process, it should not be "thrown the keys" of GEM with assets worth significantly less than the amount of the WPT owing. Hence, its request that, if Claimants' request for interim measures were to be accepted, an escrow account should be established where the full amount of the WPT owing would be deposited W1til a final award."[743]

One could assume that such a step had been taken not only to preserve the interests of the State while ensuring the investor's status quo but also to underline the investment protection system's capability of being functional and reasonable for the sake of the overall legitimacy of the latter in the eyes of its stakeholders. As such, the Tribunal would be the least interested party in abusing the right to invoke the provisional measure. However, the same could not be said about investors who, willingly and knowingly, could seek other goals than the one prescribed by the law offering the instrument on provisional measures

For these reasons, the author now explores the abuse of rights phenomenon when submitting the request for the provisional measure on the example of a particular investment arbitration case. Namely, to provide two vivid examples of the use of the given treaty right in abusive and normative modes.

Case study: *Plama Consortium v. Bulgaria*

The given dispute had arisen between the privately-owned Cypriot legal entity *Plama Consortium Limited* and the State of Bulgaria. The case concerned the process of the Bulgarian oil refinery privatisation. As alleged by the Claimant, the government of Bulgaria had failed to provide fair and equitable treatment to the former under the Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments;[744] and Energy Charter Treaty (ECT).[745] As a result, the State was accused of invoking measures equivalent to expropriation.[746]

While reviewing the dispute, the question of provisional measures appeared. Namely, in the period between the jurisdictional and material review stage, the Claimant sent the request to the Tribunal seeking a freeze of all the ongoing national proceedings, i.e. re-opening of the insolvency proceedings, at the territory of the host State in relation to the disputed property rights.

Should the State commence the proceedings on insolvency, the Claimant will face a violation of the right to non-aggravation of its condition at the time of the dispute review. The legal basis for this was the above-mentioned Article 47 of the ICSID Convention[747] and the relevant arbitration rules.

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[743] Ibid, Decision on Interim Measures, para 86

[744] BIT, Agreement between The Government of the people's Republic of Bulgaria and The Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (1988)

[745] Multilateral Agreement, Energy Charter Treaty (ETC) (1991)

[746] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Award, para 73

[747] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), Article 47

In particular, the Claimant alleged that the government's redistribution of the bankrupt enterprise's assets would worsen the investor's position and burden the process of assets recovery should the Tribunal find for the latter. Besides, it was alleged that the local adjudication concerning the investment property contravened the Tribunal's exclusive right[748] for the dispute review under Article 25 of the ICSID Convention.[749]

The Respondent contested the given request providing, among others, the following: "…[n]*one of the proceedings at issue threaten to rule on any of the Claimant's rights"*[750]. Namely, the ongoing proceedings in no way harm the Claimant's interest and potential for receiving the award in case winning for the Claimant. The core of the pending proceedings concerns the tax payments, outside of the investment dispute review scope, the investor is due to the State.[751]

If the Tribunal grants the request for the freeze of the proceedings, the interests of third parties that are not related to the current dispute may also be harmed, i.e. investor's creditors. Therefore, fulfilling such a request will "…[c]*onflict with other international obligations of Bulgaria…"*[752] as well as with the interests of other private individuals seeking recovery out of commercial relations. The given allegation has been supported by citing the *SGS Société Générale de Surveillance SA v. Pakistan:*[753]

"We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes."[754]

Besides, the Respondent had also underlined that none of the pending proceedings related to the insolvency procedure and re-distribution of the assets between the creditors would harm the right of the Claimant to receive the remedy sought in the current arbitration. The investor had claimed recovery for alleged violation of treaty rights in the form of a monetary award, which could be paid directly by the State, should the Tribunal find for the investor.

Besides, it goes without saying about the existence of the exclusive and sovereign right of the State to dispense justice and suffice the needs of all the third parties that have their commercial interest but are not related to the current dispute, i.e. creditors. Based on the arguments above, there is no evident necessity for invoking the provisional measures upon the Claimant's application.

In turn, the Tribunal commenced by analysing the instrument of provisional measures and the objectives of its invocation.

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[748] Hanno Wehland, "The Coordination of Multiple Proceedings in Investment Treaty Arbitration" (2013) Oxford University Press, para 5.03-5.08

[749] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Decision on Provisional Measures, para 7

[750] Ibid, Decision on Provisional Measures, para 10

[751] Ibid, para 14

[752] Ibid, para 11

[753] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) 2003

[754] Ibid, Procedural order No. 2

"…[e]*xtraordinary measures which should not be recommended lightly. The need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage."*[755]

In this context, one could already notice the Tribunal's stance on viewing the provisional measures from the formal point of view where certain criteria are to be fulfilled. This, among others, includes the element of *urgency* and *harm irreparability*.

Scope of protection

The Tribunal had also agreed with the provisional measure to be an instrument designed to retain the exclusivity of the ICISD dispute resolution over any national proceedings concerning investment treaty matters. This is done, *inter alia*, to eliminate the potential aggravation of the party's conditions or the dispute process. In this relation, the Tribunal had questioned whether the instrument of provisional measure should be invoked to protect virtually any investment treaty right given to the investor or only those rights claimed at the time of the dispute review?[756]

To answer this, the Tribunal had approached the task of defining the legal limit to invoking the provisional measure instrument. This was done by analysing the *Amco Asia v. Indonesia*[757]dispute. Namely, the latter had established the "party's rights" to be limited to those rights that are strictly claimed in the dispute itself.[758] This implies the investor is not in possession of exercising the right to apply for provisional measures to protect virtually any investment treaty rights, but only those rights claimed to be violated at the time of the dispute review.

For example, a very common and guaranteed by almost every BIT investor right for exporting received incomes[759] could not be the object of provisional measure instrument invocation unless such right had been claimed to be violated by the investor at the time of the dispute review. In this context, what is the objective for setting such a restrictive limit for invoking the provisional measure? Put differently, why the right alleged to be violated has a perspective to be protected *via* the instrument of provisional measures, whilst the other pertinent investment treaty rights are not guaranteed to be ensured with the help of the latter instrument within the limits of one proceeding?

The answer lies in the context of potential abuse and burdening the process of judicial review. Namely, should the investor be in possession of claiming the protection of virtually any right that could be distantly relevant to the specific dispute, the instrument of provisional measures would

[755] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Decision on Provisional Measures, para 38

[756] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), Article 47

[757] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) 1984, Decision on Request for Provisional Measures

[758] Ibid, para 410-411; See also *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Decision on Provisional Measures, para 39

[759] For example, BIT, Agreement between Japan and Ukraine for the promotion and protection of investment (2015), Article 14(2)

be invoked so often that it will no longer be an "…[e]*xtraordinary measures which should not be recommended lightly…"*[760], but a regular instrument available as another potentiality for abuse. For this reason, the pertinent arbitration practice provides a more conservative approach towards utilising the above-mentioned instrument.

Further on, the Tribunal went to establish whether the reviewed request for provisional measure comprises two compulsory elements of urgency and harm irreparability. When discussing this question, the arbitrators did not get an affirmative answer. Namely, the urgency aspect remains largely abstract, leaving it uncertain whether the latter is present in the said request. Instead, the second element of harm irreparability got central attention from the Tribunal.

"Even assuming the worst case from Claimant's point of view, i.e., that Nova Plama is liquidated and its assets distributed to creditors and that ASR and CPC are successful in their actions, Claimant in this arbitration - which is not Nova Plama - will still be able to pursue its ECT claims for damages against Bulgaria."[761]

On this assumption, the Tribunal had ruled that when requesting the money award, one could not invoke the use of a provisional measure instrument due to the absence of the element of irreparability. The same reasoning was later applied in the *Occidental Petroleum v. Ecuador* dispute.[762]As well as in *Burlington v. Ecuador*.[763] This allows suggesting the arbitration case practice to be taking a strong stance on considering the instrument of provisional measures as something that is not used lightly.

Unfortunately, neither the Tribunal nor the Respondent had raised the allegation of potential abuse issue at the time of the dispute review, i.e. absence of judicial activism[764]. However, following the currently applied legal device on abuse detection, the author alleges the mentioned case to be an example of non-evident abuse.

In this context, the previously discussed facts underline the investor's ill-founded motives. Namely, the initial goal of seeking the damages recovery in monetary compensation does not match with the law's objective of safeguarding the investor from irreparable harm. Moreover, nothing could aggravate or cause irreparable harm to the investor should the disputed property be redistributed among the creditors under the local insolvency proceedings.

[760] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008,* Decision on Provisional Measures, para 38
[761] Ibid, Decision on Provisional Measures, para 42
[762] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11) 2012, Decision on Provisional Measures, para 42-44
[763] *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) 2017, Decision on Provisional Measures, para 79
[764] Ted Thomas, "The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles" (2009) Cambridge University Press, p. 88

Besides, the investor mentioned that the local authority's tax execution aggravates the latter's interests. [765] Nevertheless, answering these allegations, the Tribunal responded with the following:

"…[t]*he tax claims of the ASR and the state aid claims of CPC relating to Nova Plama, which are the subject of the proceedings in Bulgaria, are not presently claims before this Tribunal and will not affect Claimant's pursuit of its claims here or of the Tribunal's ability to dispose of them."*[766]

In this vein, the investor's request for provisional measures represents the manifestation of opposition based on two distinct reasons.

First, when aiming to procedurally stop the host State from selling the properties previously owned and not sought to be recovered, the Claimant had presented some procedurally illogical intentions that could not be explained otherwise but by the desire for revenge and procedural burdening of the dispute review process.

Second, when attempting to elevate the issue of taxation to the level of international dispute resolution, the Claimant had alleged the potentiality of irreparable harm due to the host State exercising its sovereign right on taxation. However, it had been confirmed that such harm could easily be restored as a result of monetary compensation should the latter win the arbitration.

Interestingly, although the Tribunal did not condemn the Claimant's action to be explicitly abusive, the obligation to cover the expenses related to the given part of proceedings had been put on the Claimant due to non-meritorious allegations.[767]

In this context, prior knowledge of permissible and legitimate motives pertinent to the right to apply for provisional measures suggests the investor to exercise the investment treaty right in bad faith, which materialised in the form of non-evident abuse, i.e. not identified by the Respondent or the Tribunal as it is, but sanctioned in the form of arbitrators putting the obligation to cover the review cost on the Claimant.

Any action motivated by the aim of procedural testing of the investment protection regime in the form of applying for provisional measures while foreseeing its outcome would render such action as putting procedural barriers for the tribunal to resolve the dispute.

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[765] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, para 3 (d, e)
[766] Ibid, para 44
[767] Ibid, Award, para 325; See also an example of the dispute where provisional measure request had been actually validated by the Tribunal despite the Respondent putting upfront the same argument with regards to money compensation request as not being eloquent to the host State's actions investigating criminal conduct, i.e. forgery *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015*, Decision on Provisional Measure, para 77-78, 80, 117; See also the same dispute when the Tribunal considered that access to evidence and witness statement could not be repaired by the damages and, hence, this constitutes an evident necessity to invoke the provisional measure ibid, para 157

"…[p]*arties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, ... or render its resolution more difficult."* [768]

In contrast to the discussed case, the author further reviews the dispute about invoking provisional measures in good faith. The given comparison will allow to better precise case scenario of using the provisional measures in investment disputes to deduct the most pertinent elements revealing the abuse.

Case study: *Burlington v. Ecuador*

The dispute in the *Burlington v. Ecuador* claim arose from two consequent contracts signed in 1999 and 2000 between the Claimant and the State of Ecuador for oil exploration until 2010 and 2020, respectively. Both of the Contracts had been concluded under Ecuadorian law. The contracts included the tax stabilisation clause aimed at ensuring no change in legislation that could infringe on the investor's right to perform under the agreed terms. In case of a potential dispute, the parties had agreed to resolve the latter *via* investment arbitration (ICSID).

Consequently, the investment dispute arose at the moment the Ecuadorian legislative body enacted Law № 2006-42 ("Law 42"), amending the oil extraction legislation in part of taxation:

"[C]*ontracting companies having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment,* ***shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference*** *[…]."*[769]

This was followed by another Decree №662 ("Decree 662"), amending the above-mentioned law to raise the imposed tax from 50% to 99%.[770] As a result, the Claimant became due to the host State nearly USD 400 million in eighteen months following the enactment of the last legislative piece, rendering the oil extraction at a loss. The tax change resulted in Claimant's decision to initiate the investment arbitration proceedings.

Amidst the dispute review, the Respondent had pressured the Claimant with the threat of property seizure due to having not paid the 99% tax. Further on, Ecuador had initiated the coactivia proceedings – a special administrative tribunal charged with the enforcement function. The coactivia tribunal had issued an order for property seizure. Meanwhile, Ecuador had commented on this with the following: "…[s]*teps have been, or will imminently be, taken by the 'coactivia judge' to seize certain assets in satisfaction of the claimed debts"*[771].

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[768] *Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) 2004*, Procedural Order 1, para 38

[769] Law of Ecuador, №2006-42, Article 2, exhibit C-7; See also *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, Procedural Order 1, para 6

[770] Ibid, Procedural Order 1, para 8

[771] Ibid, Procedural Order 1, para 12

Although the decision had no procedural limitations to be enforced, nonetheless, it is worth mentioning that no essential property necessary for keeping the production was eventually seized. This allowed the investor to continue the extraction of mineral resources. The rendered order was only executed in relation to some oil stock that did not stop production.

The Claimant had requested to invoke the provisional measures in light of the given events. In particular, it was requested to issue a temporary restraining order to shield the investor from the risk of losing the entire property under the coactivia administrative tribunal's decision to enforce the payment dues. This had been done despite the Respondent's reassurances that none of the actions would be taken towards recovering the debt until the investment tribunal renders the final award.[772]

Necessity for provisional measure invocation

As it was previously stated in the Plama dispute, the party requesting the invocation of provisional measure is charged with the burden of proving that the matter "…[c]*annot wait until the final award is rendered…*" [773]i.e. urgency and the damage is so grave that the money award, i.e. irreparability, could not recover it.[774]

Although the matter of urgency had been discussed between the parties, *inter alia*, the Tribunal had implied both of the necessary elements to be intertwined.[775] "*The urgency lies elsewhere and is closely linked to the non-aggravation of the dispute discussed*…".[776] Hence, the existence of necessity is interlinked with harm irreparability.

The general principle of evaluating the necessity is done *via* estimating the potential damage due to not invoking the provisional measure. This is estimated by looking at the consequences appearing. Namely, answering whether the potential monetary award can cure the negative effects.

Interestingly, the academic value of the *Burlington* dispute lies within the investor's attempt to challenge the said approach, where the necessity is to be compulsorily interconnected with the recovery of harm. In its line of reasoning, the Claimant had referred to the *Paushok v. Mongolia* dispute, where Tribunal had suggested the following:

"ICSID arbitral tribunals have interpreted "necessity" for provisional measures not so much as a need to prevent "irreparable" harm but as a need to ***spare*** *"significant harm"".*[777]

The investor had further developed the necessity to be not only present when the harm is irreparable, i.e. could not be compensated with the monetary award, but also when the harm is so

[772] Ibid, para 18-23
[773] Ibid, para 28-29
[774] Ibid, Procedural Order 1, para 60
[775] Ibid, para 74
[776] Ibid, para 74
[777] Ibid, para 30

substantial that it would be more reasonable to invoke the provisional measure rather than to witness the avalanche of negative consequences appearing as a result of its significance.

For the investor, the significance was represented in the combination of the three rights being alleged to be violated: (1) the right to procedural exclusivity[778], (2) the right to specific performance, and (3) the right to non-aggravation. According to the investor, the cumulation of the three creates harm that is so substantial that it would be reasonable to invoke the provisional measure in order to prevent the latter.

In the context of the above-mentioned allegation, the Respondent had taken a more formal standing by relying on the national legislation and the country's sovereignty to enforce the laws rather than considering the Claimant's novelty approach in relation to estimating the significance of the harm to invoke the provisional measure: "…[N]*o ICSID tribunal has ever rejected the criterion of "irreparable" harm to the benefit of "significant" harm*."[779]. As a result, the Respondent rejected an invitation to consider interpreting the term "necessity" from any other but previously established by the case practice point of view.

Instead, the Tribunal approached the matter by evaluating the Claimant's allegation to certain rights which got infringed and required protection under the aspect of necessity encapsulating the three breaches of rights that are so substantial that they should be considered as qualifying for invoking the provisional measures.

In the part of the coactivia administrative order infringing the right to judicial exclusivity, the arbitrators had pointed out that none of the parties had submitted a descriptive analysis explaining the legal nature of the latter. Consequently, the lack of necessary information makes it impossible to suggest that the right to exclusivity is infringed. Hence, no decision was issued in this part.

Despite not having established the investor's right to exclusivity of proceedings to be infringed, the Tribunal, nonetheless, had used the *coactivia* aspect in approaching another matter. In this context, the *Amco v. Indonesia* and the *Plama*[780] disputes were mentioned:

"…[t]*he good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult..."*[781]

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[778] Ibid, para 31(i); See also ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), Article 26; See also International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (2006), Rule 39(6)
[779] *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, para 36
[780] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Procedural Order from 6 September 2005, para 40; See also *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, Procedural Order 1, para 64
[781] *Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1) 1984*, Decision on provisional Measure, p. 412; See also *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, Procedural Order 1, para 63

Although having not found whether the coactivia tribunal had issued the order that contravenes the exclusivity of the proceedings, the Tribunal had, nevertheless, asserted that the latter order is meant to cause a negative effect equal to aggravation of the party's condition. Namely, the execution of the coactivia order renders the investor financially non-liquid and incapable of running the enterprise or performing subsequent contractual obligations.

This, most importantly, will lead to the escalation of conflict between the investor and Ecuador and, consequently, "…[t]*here is a risk that the relationship between the foreign investor and Ecuador may come to an end…*."[782]. The given outcome will go contrary to the ICSID's objective of intensifying the private capital exchange.

Consequently, the Tribunal had indirectly confirmed the coactivia order and its potentiality for execution, violating the investor's right to non-aggravation. As a result, two of three elements mentioned by the Claimant on creating the substantial harm had already been fulfilled, i.e. right to non-aggravation and the right to exclusivity of proceedings.

Right to specific performance

The discussion further followed with the Tribunal's analysis of the investor's right to specific performance. As the Respondent had alleged the investor has no such property right in relation to the investment protection regime, the Tribunal had decided to perform a two-fold analysis in order to review the given allegation: (1) from the perspective of the national legislation and (2) from the factual background.

For national law, the Tribunal had mentioned Article 1505 of the Ecuadorian Civil Code, where the right to specific performance is available as a remedy.[783] In turn, under international law, the property right to specific performance was also found in the International Law Commission Articles on State responsibility[784] used in other arbitration disputes, i.e. *CMS v. Argentine*[785].

Apart from having established the recognition of the right to specific performance in both national and international legislation, the second limb of the test presented three pertinent facts supporting the Claimant's standing:

(i) The claim does not originate from the treaty but from the Contracts concluded with the State; hence no need to relate the right for specific performance to the investment protection regime;
(ii) The Contracts continued to be performed at the time of the dispute: underlines their importance and adherence to established rights and obligations;

[782] *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, para 65
[783] Ecuador, Código civil de la República del Ecuador (2005 version) (1860), Article 1505; See also official website https://www.wipo.int/edocs/lexdocs/laws/es/ec/ec055es.pdf [last accessed 22 January 2021]
[784] International Law Commission (ILC), Responsibility of States for Internationally Wrongful Acts (2001), Article 35
[785] *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) 2005, Award, para 400

(iii) The Contracts included the choice of Ecuadorian law together with the tax stabilisation clauses guaranteeing the specific conditions of performance: one of them is the right to specific performance.

Therefore, the investor's right to claim protection for specific performance under contractual obligations was identified and established *prima facia* by Tribunal. The given considerations had allowed the Tribunal to approach the matter of necessity from the Claimant's standpoint. However, this had been done by including the host State's rationale in mind.

In particular, despite the Respondent's affirmation to not seize the investor's property until the final award is rendered, the Tribunal had raised the concern of potential loss from a perspective of investment relationships between the investor and the State. Namely, the arbitrators had a view that the enactment of Law 42 had influenced the investor's standing gravely. Moreover, the inability to sell the investment and the fact of having to pass all the profits to Ecuador[786] had forced the investor to consider "…[w]*alk(ing) away" from its investment".*[787]

As a result, the relations between the two had substantially deteriorated. And the fact that Ecuador has the option of executing the *coactivia* order (even if declaring not to do so) would put them at the point where they could not be revitalized to normal condition.

"*The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.*"[788].

Referring back to the *Occidental v. Ecuador* dispute, the Tribunal had suggested that the necessity, as well as urgency, to invoking the provisional measures lies within the need to protect the interests of not only the investor but also the State potentially facing the destruction of investment and loss of any payments, if any, under the Law 42. And above all, the investment relationships between the investor and the State consequently gave birth to the oil extraction enterprise at stake.

"…[p]*rovisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State"*[789].

The given reasoning manifested an entirely new approach to estimating the aspect of necessity. Namely, the legal exercise of revisiting the concept of necessity and provisional measure altogether had been done by balancing the State's and investor's interests at once. In the given context, preserving the ongoing performance of Contracts was specified as a higher good benefiting both parties: the investor and the State. Should the investor pay the requested debt, the enterprise will most likely stop, i.e. all the liquidity will be drained. Consequently, the initially

786 *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, para 77
787 Ibid, para 77
788 Ibid, para 84
789 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11) 2012*, Decision on Provisional Measures, para 93

created investment relations at the heart of the investment protection regime would be lost if no provisional measure was invoked. Although the latter is perfectly recoverable with the money award.

In this context, the Tribunal had managed to strike a balance between preserving investors' rights and ensuring the investment protection system's legitimacy by considering both parties' interests in the dispute. In other words, the legacy to substantiate the invocation of the provisional measure was sourced from the interests of both parties, where destroying the investment relations would contravene the objectives set by the ICSID Convention. This had given birth to a brand new conceptualisation of necessity and irreparability where the substantiality of the harm may provide the avenue for invoking the provisional measure.

Based on the said considerations, the Tribunal had issued a provisional measure ordering the Respondent to discontinue any actions towards enforcing the coactivia tribunal order as well as refraining from any conduct aggravating the investor's standing.[790]

In this context, the author questions the reasons affirming the investor's good faith for invoking the right to provisional measures. In particular, both disputes concerned the sovereign power of the State to collect taxes. However, the outcomes of the two are polarly different.

In this context, the reason proving *Burlington's* good faith lies in the aspect of ownership. In the *Plama* dispute, the investor had sought to invoke the provisional measures protecting the property to which the ownership had been long ago lost and was not sought to be recovered. This manifests an opportunistic use of provisional measures. Instead, in the *Burlington* case, the investor had direct ownership when submitting the request for provisional measure and had sought Ecuador to refrain from any actions aggravating the investor's standing directly related to the investment owned. [791] Even more, the initial request for the provisional measure had been submitted to preserve the production rather than secure the potentiality for recovery.

Consequently, the investor's motive for using the right for provisional measure with attempts to stop the execution of the coactivia order, likely draining the investor's accounts and putting the production on the verge of bankruptcy, correlates with the law's objectives of supporting and preserving the investment activity.

Therefore, based on the Tribunal's decision to invoke the provisional measure under the risk of deteriorating the relationships between the investor and the host State to the point of non-return, which would constitute substantial harm done to investment.

The *Burlington* dispute represents an example of the legitimate exercise of the right to apply for provisional measure invocation. Namely, the motive of the investor, i.e. protecting the investment *via* avoiding its aggravation under the argument of substantial loss, matches the law's objective in part of preserving the investment activity.

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[790] *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, Procedural Order 1, p. 29

[791] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Provisional Measures, para 47

In this context, the distinctive feature of abuse appearing in the case scenario of provisional measures concerns the two principal elements: necessity and harm irreparability. As evident in the *Plama* dispute, the investor's capability to recover the incurred damages in the monetary expression renders the application for the provisional measure opportunistic at heart, i.e. abusive. Therefore, the potential abuse of the right for the provisional measure in the given case scenario is to be tested against the two mentioned aspects.

Instead, using the right for provisional measures may also find a normative expression. The analysis of the *Burlington* dispute revealed a new approach to considering the necessity. Namely, the substantial harm, nevertheless, recoverable with a monetary award, may still be stopped by the avenue of provisional measures should the principal objectives of the ICSID Convention be infringed, i.e. the investment relations between the investor and the host State. The distinctive feature of normative use of the right for the provisional measure would lie in the investor's intent to prevent the complete destruction of the investment to the point of non-return, where stopping the State's action is more reasonable than observing the entire loss of the investment with its further recovery.

Put differently, the investor's attempt to extinguish the destruction *via* the avenue of invoking the provisional measures is more reasonable than waiting until the latter destroys entirely and receiving the damages recovery in monetary expression, *post factum*. The said eventuality may recover the investor's incurred loss but will not bring back the initial asset giving birth to investment relations that are long gone and cannot be restored.

The reason for selecting the said case scenario in relation to investment funds derives from the fact that the latter's introduction of provisional measures in bad faith may impact the market price of assets issued by the State (government bonds market in financial markets), i.e. market price manipulation[792]. The bigger the fund as an investor, the more market price impact the disputed asset may receive.

Section 4 – ESCAPE FROM CRIMINAL PROCEEDINGS

The criminal law aspect is seldom mentioned in relation to investment activity. First, the investment projects being the central object of the regime, derive from commercial origins, i.e. expectation of profits. Second, the investment protection system is legally isolated from the national criminal jurisdiction of the host State in question. The participating members of the ICSID Convention had no implication of criminal law to be involved in the legal structure of the investment protection regime. Put differently, the investor establishing oneself in the pertinent jurisdiction will be accountable before the host State enforcement agencies like any other resident. Therefore, the investment protection regime has a legally distant relation to the given matter.

How could the field of investment law, more specifically, the abuse of investment rights, be related to criminal law and what type of treaty rights could be abused by the latter?

[792] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Article 12

The investment activity implies that the investor complies with the national law of the host State. Any latter conduct falls under the given jurisdiction, including any possible violation of law in the criminal field. For example, tax avoidance appears out of investment activity, i.e. tax non-payment on received profits. Alternatively, the grave violation of safety norms of production in the plant constructed due to an investment made would transform into the contamination of the local environment, resulting in a criminal law violation. In this context, the investor's activity and its setbacks may trigger the criminal provisions of the host State.[793]

Evidently, triggering the invocation of criminal provisions would initiate the criminal law agencies' intervention and further investigations with potential limitations of various freedoms and monetary damages. The given reaction is well-expected and presumed because of the host State's sovereignty to distribute justice, including in the criminal law field. Even more, the latter is to be done with no distinction between the foreign investor and the local resident. This implies that in the eyes of criminal law agencies, the investor developing the infrastructure project in the host State is no different from any other resident of the said jurisdiction.

In this vein, the investor facing the potential of negative consequences arising from criminal conduct within the local jurisdiction may look for all available legal remedies. The intent to protect oneself may extend to using the treaty provisions guaranteeing the investor the legal remedy against the host State's actions.

For example, the investors develop the production of bananas in the host State by constructing the plant and hiring the local population. However, the safety standards and labour standards are not fulfilled. This results in severe health damages suffered by the employees. As a result, the local administration orders the closure of the enterprise and starts the criminal investigation with requesting a provisional measure of imprisonment from the national adjudicatory body.

In turn, the investor claims such measures to be violating the right to fair and equitable treatment where the State is attempting to pressure the investor with imprisonment. Further, the local judiciary orders the sale of the investment to recover the damages suffered by the employees.

Having not agreed with the given decision, the investor then uses the available legal remedies to oppose the outcomes of the local proceedings. This, in particular, is done by elevating the dispute from the level of local proceedings to the international investment arbitration level. Namely, by claiming the investment expropriation to occur during a criminal prosecution.

However, as previously mentioned, the investment protection regime and investment tribunals specifically enjoy no jurisdiction to review the criminal proceedings nor investigate the facts of the criminal proceedings. Accordingly, the given right rests solemnly with the host State, i.e. State sovereignty.

In this context, the bad-faith investor has the margin to exploit the limitations between national and international law by implying criminal prosecution and the negative consequences of the latter to be appearing as a result of violating the investor's treaty rights. There are numerous

[793] Importantly, one should differentiatiate the criminal offence taking place out of investment activity and investor's private life.

variations where investment law gets mixed with criminal. For example, the assets freeze, the introduction of temporary State administration for the bank's management[794], detention[795] or wiretapping[796].

This puts a precarious position for the arbitrators faced with the investment treaty claim that touches upon the State's sovereign power to adjudicate criminal matters.

"…[t]*here are very few cases indeed amongst the reported Awards which centre on criminal proceedings against individuals so that there is a paucity of accumulated wisdom as to where to strike a balance in that regard between the legitimate interests of the State and those of the foreign Investor."*[797]

The arbitrators are often jammed between the imperfections of both legal systems fused in unexpected turns. Unfortunately, in the race to strike a balance and resolve the dispute, the arbitrators may experience conceptual concussions.

For example, see the *Rompetrol v. Romania* [798]case: "…[t]*he Parties are clearly in agreement that the Tribunal is not called upon to act as Romanian judge of final instance, either to pronounce on the rightness or wrongness of the pending criminal charges"*.[799]

Or alternatively, in the *Belokon v. Latvia*[800] case, *"The Tribunal's powers under the BIT are however limited. The Tribunal cannot order the Respondent to cease investigating the Claimant"*[801].

Evidently, the sovereign State enjoys the exclusive power of justice-making, or in this case, performing criminal investigations to uncover the facts of an investor's criminal conduct. This boils down to a general principle of the host State enjoying the power of investigation and prosecution, notwithstanding the individual's nationality. In other words, the exclusive jurisdiction of the State to prosecute and investigate is spread to all the individuals concerned, disregarding the citizenship of the individuals residing in the State, the purpose of habitation or other related features, i.e. arriving at the national jurisdiction to invest.

"Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect."[802]

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[794] *Valeri Belokon v. The Kyrgyz Republic* (UNCITRAL Arbitration Rules 1976) 2014, Award
[795] *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009,* Award
[796] *The Rompetrol Group N.V. v. Romania (ICSID No. ARB/06/03) 2013,* Award
[797] Ibid, Award, para 152
[798] Ibid
[799] Ibid, Award, para 174
[800] *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*
[801] Ibid, Award, para 267
[802] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015,* Deceision on Provisional Measures, para 122

Instead, one should view the tribunals as the creations of the international public order. They enjoy the power directly pertinent to the international legal environment. The investment arbitration tribunal is the guardian of the rights deriving from international treaties. This implies the latter is involved in what concerns the violation of such rights.

Therefore, despite the host State being the ultimate sovereign of its territory, the Tribunals are reasoned to intervene in light of protecting the international treaty rights that the State's sovereign power exercise might have infringed.

For instance, evaluating whether the exercise of power by any administrative authority was not excessive or used as an instrument of pressure but rather constituted a part of normally established regulatory practice, applied to all participants in the field evenly, with no striking exceptions (i.e. fair and equitable treatment principle dispensed to all the participants of the market).

"Where such criminal proceedings have consequences of depriving the investor of the management, use, and enjoyment of property, then the BIT requires that the underlying charges not be "unreasonable, discriminatory or arbitrary."[803]

It took many decades to defy the reluctance of States to have international law standards scrutinise national conduct. However, as *Paulsson* [804]suggests, evolution is called by the natural "maturity" of the State governance and the change of perspectives. Legal inclusiveness disregards the division between "their" and "our" law. More important is the spotlight on one individual suffering the injustice, especially with the criminal prosecution involved. At that moment, the law becomes a commonly shared concept, disregarding the origins of the legal layers.

The transformation process had gained momentum from strictly denying the individual's right to bring the State to justice according to the Calvo Doctrine toward a more liberal and flexible world, providing a broader scope of rights to individuals at the expense of the sovereignty of the States.[805] This legal reality nowadays does not allow the host States to shield themselves from international public order by claiming to have national sovereignty.

"Respondent contends that the criminal proceedings are not parallel to the ICSID proceedings. While the criminal proceedings seek to sanction crimes that may have been committed, the ICSID arbitration is directed to determining whether the Claimants have the right to the relief they invoke and the compensation they are claiming.".[806]

The arbitrators play a capitally important task in the given context. The tribunals review the submitted evidence and establish the causational links, if present, between the actions related to criminal prosecution and the consequence deriving from such action over the investment rights.

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[803] *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*, Award, para 272
[804] Jan Paulsson, "Denial of Justice in International Law" (2009) Cambridge University Press
[805] Ibid, p. 27
[806] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015,* Decision on Provisional Measures, para 94

They analyse, with the help of an expert witness, expert reports and parties' reply, whether the law enforcement agencies had not overstepped their power and applied the law evenly, with no discrimination to international investors protected by the international investment treaties.

The tribunals may be viewed as watchdogs of international treaties that verify whether the host State's sovereign power to prosecute had not limited the investor's international treaty rights illegitimately.

Naturally, the investors aware of such powers of tribunals may seek to use them with bad intentions. Namely, elevating the matter of criminal investigation to the level of investment arbitration review with no good reason. Put differently, such an investor would seek a superior legal standing compared to its local counterparties.

Doing so with the intent to gain another "legal weapon" against the host State would lead to a case of abuse where the investment treaty right will be used with a motive alien to the investment protection regime. There is a great variety of motives instigating the investors to do so: from an attempt to avoid the tax payments *via* staying the proceedings[807] up to a political statement aimed to bring the public attention to the severity of State actions harming one particular investor.[808]

For these reasons, the author will now turn toward analysing the *Phoenix Action* case being the classic example of an investor elevating the criminal prosecution to the level of an investment protection regime.

Case study: *Phoenix Action v. Czech Republic*

The case of Israeli businessmen investing in the Czech Republic is one of the most vivid examples of abuse in investment arbitration history related to criminal prosecution. The Thesis will evaluate the correlation between the investment claim invocation and the criminal proceedings initiated against the investor concerned. This correlation is expected to reveal the distinctive abuse features in the case scenario of escape from criminal proceedings.

Before analysing the legal implications, the author draws attention to the name the investor gave to his enterprise, i.e. "*Phoenix Action*". Popular knowledge makes the *Phoenix* bird famous for its special power of rebirth after death. Although not established directly, this may hint at the investor's ill-founded motives attempting to reincarnate through the investment protection regime.

A dispute had arisen between the privately constituted Israeli enterprise (*Phoenix Action*) and the Czech State. The investor, through its entity, had acquired the interest in two Czech enterprises (Benet Praha and Benet Group).

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[807] *City Oriente Limited v. Republic of Ecuador* (ICSID Case No. ARB/06/21) 2008, Decision on Request for Provisional Measures
[808] *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*, Award

The dispute concerned the host State conducting the criminal investigation concerning Benet Praha and Benet Group. The Claimant alleged the investigation led to the enterprises' failure to perform with a subsequent freeze of financial assets.

Importantly, the Claimant in the *Phoenix* had been the Executive Officer of Benet Praha and Benet Group when the State initiated the criminal investigations. During this time, the Claimant had been put in custody. However, the latter had managed to escape and flee the country.

"On the basis of an arrest warrant issued against [owner of Phoenix Action and executive officer of Benet Praha and Benet Group at the time of investigation], the Czech police took him into custody and attempted to escort him to the Office of corruption and financial crimes, but [investor] escaped police and fled to Israel, where he thereafter, on October 14, 2001, registered a new company, Phoenix Action Ltd., which is the Claimant in this case."[809]

Following the investor's physical escape from Czech authorities, the law enforcement agencies froze Benet Praha's funds and seized the financial documentation confirming the alleged accusations until the court's decision was pending.

After fleeing to Israel, the saga continued with the investor establishing the *Phoenix Action* (Claimant to the given dispute) under Israeli law. The latter had purchased the Benet Praha and Benet Group. The previous owners of the said enterprises were Claimant's wife and daughter. Consequently, the transaction for acquiring the Benet Praha and Benet Group by *Phoenix Action* represented the nominal change of hands within the limits of one family.[810]

Upon receiving the title to both companies, the Claimant (*Phoenix Action*) initiated an investment dispute and alleged[811] the Czech government violated the fair and equitable treaty right guaranteed under the Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments.[812]

Rationae temporis

In this context, the *Respondent immediately raised the ratione temporis principle* as the pertinent issue implying the absence of the investor's jurisdictional standing. In particular, it was alleged that the State's measures of freezing the accounts and documentation seizure were done before the investor acquired control over the mentioned enterprises. Therefore, the Claimant had no jurisdictional standing to bring the claim as the *ratione temporis* principle was missing.

Oppositely, the Claimant had responded with the allegation of the State failing to accord fair and equitable treatment to the investor in light of the ongoing criminal proceedings that had influenced the financial well-being of two enterprises purchased, i.e. failure to terminate the funds' freeze and to terminate the document seizure. Regarding the jurisdiction, the Claimants

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[809] *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009,* Award, para 32
[810] Ibid, Award, para 41
[811] BIT, Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments (1999), Article 2(2)
[812] Ibid

had responded to the alleged lack of *ratione temporis* principle by arguing that *"(t)he Tribunal can and must exercise jurisdiction over this investment dispute let it commit a manifest excess of powers"*.[813]

In the course of proceedings, the Tribunal had found the jurisdiction to be present only for the events taking place after the investor purchased Benet Group and Benet Praha. Namely, when *Phoenix Action* acquired the two mentioned enterprises. Consequently, the investor had been denied the right for protection to investment done before the dispute had appeared.

Despite agreeing on partial recognition of jurisdiction, the matter of abuse of rights was brought to the highest attention. Namely, the Respondent had alleged the investor's claim to manifest an example of abuse where the latter had intended to raise the local criminal investigations on tax avoidance to the level of international adjudication.[814]

"The raison d'etre of Phoenix is to create a diversity of nationality in this case – i.e., to serve as a vehicle by which to bring pre-existing domestic disputes in which the Benet Companies were involved before an international investment tribunal".[815]

And although the previously discussed mention of the raison d'etre argument raised by the Respondent in the *Orascom v. Algeria*[816] case was considered irrelevant, the Tribunal in the *Phoenix Action* dispute had spared some attention for considering the Respondent's argument. This was done by analysing the pertinent elements of the *bona fide* principle.

In particular, concerning the timing of the investment, the arbitrators had acknowledged the investor to be long before aware of the tax and customs investigations taking place against the purchased enterprises. As such, "…[a]*ll the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies when the alleged investment was made..."*[817]

This leads to questioning the investor's motive for making such an investment. Namely, when analysing the entire situation with the investor fleeing to Israel, establishing a new enterprise and purchasing the previously managed companies from his daughter and wife, the Tribunal questioned the latter's good faith. Namely, could the given actions imply the investor's motive to invest in the national economy, or would this mean the latter has the objective to get back at the host State government for being prosecuted under the suspicion of tax avoidance, *ab initio*?[818]

This should be questioned in the context of the investor acquiring the Benet Praha and the Benet Group by *Phoenix Action*. The latter was done within the limits of one family where the wife and the daughter had formally passed the ownership of the mentioned-above enterprises to *Phoenix Action*.

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[813] *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009,* Award, para 50
[814] Ibid, Award, para 34
[815] Ibid, Award, para 41
[816] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 156-180
[817] *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009,* Award, para 136
[818] Ibid, Award, para 137

In this vein, the Respondent had named the following as an intent to "… [r]*ender their purely domestic disputes subject to the protections of the BIT"*.[819]

The Tribunal had supported the Respondent's side by considering the above-mentioned transactions as an attempt for an investor to shield oneself from criminal investigations and potentially mitigate the outcomes of the latter prosection. Put differently, the investor had aimed to be "re-born like a *Phoenix*" and receive its second life in the Czech jurisdictions *via* investment protection means.

"Although, at first sight, the operation realised by Phoenix looks like an investment, numerous factors converge to demonstrate that the apparent investment is not a protected investment. All the elements analysed lead to the same conclusion of an abuse of rights."[820]

Hence, the Tribunal had found the investor's motive in pursuing the escape from criminal proceedings to be not well-correlated with the law's objectives providing the investor with the above-mentioned treaty rights, i.e. right to compensation and right to submit the claim. Namely, the investor's decision to invest in the two mentioned enterprises had been motivated by the desire to acquire legal weapons against the State *via* the avenue of the investment protection regime. This manifested an example of an evident abuse where the investor's treaty exercise had opposed the objectives of the treaties on establishing the investment relations between the host State and investor. Therefore, the investor's actions constituted an example of evident abuse of investment treaty rights in light of pertinent criminal investigations.

The author views the given case example as straightforward and necessary for the review in the given Thesis. In particular, the latter's value stems from underlying investors' opportunistic motives harming and cloaking the investment adjudicatory. Besides, the latter had conceptually "clashed" the institute of investment arbitration with the sovereign right of the State for the dispense of justice.

In this context, the author views the abuse in the case scenario of escape from criminal prosecution as carrying the distinct feature of unveiling the ill-founded use of treaty rights. Namely, the investor's attempt to elevate the criminal proceedings to the investment protection level where the host State would lose its sovereign authority to render justice.

In the *Phoenix Action* dispute, it became evident that the formal change of ownership with the sole intent of initiating the dispute against the host State develops specific indicators pointing at abuse in case of investment disputes arising out of criminal prosecution by the host State.

In contrast, the author will analyse the subsequent dispute to deduct markers pointing at the legitimate use of treaty rights in the context of investment arbitration appearing out of State exercising its sovereign power to render justice in criminal matters.

[819] Ibid, Award, para 87, 141
[820] Ibid, Award, para 143

Case study: *Quiborax v. Bolivia*

As previously mentioned, there are a few examples when investment arbitration deals with disputes involving criminal matters. However, there are even fewer examples when investors have the legitimate standing to exercise the investment treaty rights limited by criminal prosecution initiated by the host State. One of them is the *Quiborax v. Bolivia*[821] dispute between the State of Bolivia and investors from Chile. The latter had raised the claim over the revoked permit for the mining concession. [822]

Upon the investment claim submission to arbitration, the host State initiated several tax audits against the investor. This later materialised into criminal prosecutions under the allegations of forgery.[823] In particular, the Claimant and several of its representatives were alleged to forge the minutes of the company's meeting in order to hide the real owner of the company's shares.[824] The Claimant opposed this and explained it as a "clerical error"[825].

Identifying the existence of an investor's guilt naturally relates to the domain of criminal justice having the exclusive right to review and prosecute. In the meantime, the arbitrators are not obliged to consider the outcomes of the criminal prosecution, nor are they forced to ignore the latter. Instead, the Tribunal is free to render the arbitration award with or without taking into account the decision from the criminal prosecution. This is explained by certain unreliability of the outcomes of such criminal investigations. *Betz* rightly mentions that:

"It needs to be emphasised that even if arbitral tribunals deal with alleged criminal behaviour, the proceedings remain of a civil nature: there is no state prosecutor involved, no penal sanctions are imposed, and the aim is not the proof of guilt of an accused person. Rather, the tribunals decide about the parties' contractual claims and defences."[826]

In the already mentioned dispute of *Phoenix Action*[827], the results of criminal justice had helped the Tribunal to analyse the motives of the investor, therefore, they were taken into account. Nevertheless, tribunals may find a lack of confidence in judicial institutions. For example, in the *Lao Holdings v. Laos*[828] dispute, the Respondent had accused the Claimant of bribery. In turn, the Tribunal had raised concern with regard to the fact that the Respondent had not engaged in prosecuting the state officials who were on the receiving side of the alleged bribery.[829]

As such, the diversity of approaches in arbitration disputes offers no established principle that puts an obligation on the Tribunal to follow the outcomes of the criminal prosecution. This could

[821] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015*
[822] Ibid, Decision on Provisional Measures, para 4
[823] Ibid, Decision on Provisional Measures, para 11
[824] Ibid, para 29-30
[825] Ibid, para 33
[826] Kathrin Betz, "Proving Bribery, Fraud and Money Laundering in International Arbitration" (2017) Cambridge University Press, p. 269
[827] *Phoenix Action Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5) 2009*
[828] *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019*
[829] Ibid, Award, para 111-112

be explained by the initial intent of the investment protection regime designed to bypass often corrupt or poorly managed administrative bodies leading to investment disputes *ab initio*.

It is worth reiterating once more that whilst Tribunals have the sole authority to review the investment disputes, i.e. ICSID exclusivity[830], either by taking into consideration the outcomes of the local investigator or not, this, nevertheless, does not limit the arbitrators' capability to extend its intervention to the limits of protecting the investor's treaty right potentiality harmed by the misfortunes of the local administration, i.e. legal permissibility through "any action" phrasing. However, this opportunity does not impose over the local criminal justice system but rather goes along the way at the moments when specific treaty rights are alleged to be of certain concern. This, in particular, occurred in the reviewed dispute.

In *Quiborax v. Bolivia*[831], the dispute concerned the matter of provisional measures requested by the investor who faced criminal prosecution from the host State. The Claimant had requested the Tribunal to order the Respondent to stop all the criminal proceedings initiated against the former. Three principal elements mentioned by the investor were alleged to be in jeopardy should the Tribunal not issue the stopping: status quo[832] of the investment dispute review, procedural integrity and exclusivity of ICSID arbitration.[833]

In turn, the Respondent had accused the investor of conducting the forgery of the corporate documentation that has naturally led to the host State executing its sovereign power in the field of criminal prosecution.

Besides, it was underlined by the host State that the criminal investigations would not burden in any way the right of the Claimant to financial compensation should his standing be considered rightful.[834] The same principle derives from the already discussed *Plama*[835] case. Therefore, no provisional measure should be adopted with regard to stopping criminal prosecution.

In this context, it has been acknowledged by both parties that the provisional measure is something that "*should not be granted lightly*"[836]. Namely, the State actions leading to losing the status quo and exclusivity of the investment proceedings must incorporate the elements of urgency and harm irreparability. [837] These matters were already discussed in the case scenario of abuse *via* provisional measures. Instead, the author wishes to concentrate on another aspect suggested by the Claimant. In particular, the right to procedural integrity of the dispute review. [838]

[830] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015*, para 125-131
[831] Ibid
[832] Ibid, para 132-138
[833] Ibid, Decision on Provisional Measures, para 1
[834] Ibid, para 77
[835] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Decision on Provisional Measures
[836] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015*, para 73, 113
[837] Ibid, para 149-165
[838] Ibid, para 139-148

Procedural integrity of the dispute.

According to the Claimant, the criminal prosecution was politically motivated to suppress the investor from pursuing its investment arbitration claim.[839] This had been done by putting pressure on one of the key witnesses participating in the given dispute.[840]

In this context, the investor's attempt to initiate the provisional measures to stop the criminal investigations, i.e. escape from criminal prosecution, is motivated by the investor's objective of preserving the procedural integrity of the given dispute to safeguard the key witness essential to the dispute review. Allowing the State to continue rendering the process of criminal investigations and further prosecuting would erase the opportunity to engage the witness to testify in investment arbitration.

"Claimants assert that Bolivia is doing everything in its power to obstruct the ICSID proceedings, and is using the criminal proceedings and other forms of harassment to ultimately force the Claimants to give up their claims."[841]

The impartiality of criminal prosecution is alleged to be confirmed by certain facts. In particular, the local judge put the key witness to the dispute in detention with a bail of USD 300,000. Having not received help from the business partner, the witness had changed his testimony completely. It was stated that he "*freely and spontaneously*" acknowledged that the minutes submitted to the State authorities were replaced, i.e., forged. Consequently, upon its testimony, the key witness was sentenced to two years of imprisonment. Nevertheless, he was immediately released following the judge's pardon due to a *"previous clean record*"[842].

As a result, the Claimants had alleged losing the key witness whose testimony in the course of investment arbitration proceedings would not be considered impartial anymore. In particular, due to the latter confession provided during a criminal investigation.

"Claimants specifically point to the fact that [witness] is now legally impeded to act as a witness for Claimants, as he has made a confession within the criminal proceedings and any testimony to the contrary in the ICSID proceedings would allow Bolivia to prosecute him for false testimony or false self-incrimination".[843]

In Claimant's opinion, this had constituted a manipulation and use of administrative power to impede the arbitral dispute review where the latter result could potentially harm the Bolivian interests. [844] Put differently, it was alleged that the procedural integrity of the dispute review in investment arbitration is now in danger. Hence, there is an evident need for invoking the provisional measure to shield the latter from an unfair course of action performed by the host State within the limits of criminal prosecution.

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839 Ibid, para 46
840 Ibid, para 56
841 Ibid, para 52
842 Ibid, para 41
843 Ibid, para 58
844 Ibid, para 59

Interestingly, as a supplementary argument to the procedural integrity allegation, the Claimant mentioned the urgency aspect. The *Biwater Gauff v. Tanzania*[845] case was used as a supportive basis for this argumentation. In particular, explaining that urgency needs to be correlated with the objectives and particular stage of the dispute review. Should this concern the momentum of witness testimonies, the urgent need to avert the risks that potentially harm the procedural integrity of the dispute appears when the witnesses are invited to testify. Hence, the current measure of stopping the criminal proceedings is aimed at safeguarding other witnesses that have not yet testified and would be demotivated to do so, having observed a recurring example.[846]

This underlines the extension of the previously discussed approach on conceptualising the urgency where the latter rests not only with the damages aspect (*Plama*) or loss of investment relations between the disputing parties (*Burlington*) but also concerns the dispute review process put in danger by the criminal prosecution initiated by the host State.

As a counter-response, Bolivia contested the procedural integrity argument, among others. It was stated that all the important evidence was already present and was sufficient for the Tribunal to resolve the dispute.[847]

"Claimants" accusation that the criminal proceedings were artificially instituted by Bolivia to destroy or distort the evidentiary value of certain documents relevant to proving their condition as investors. This would imply falsely accusing Bolivia of a crime. Respondent asserts that the Bolivian State is governed by the principle of separation of powers and that the Executive branch does not interfere in the administration of justice."[848]

Evidently, the declaration of being impartial and following the principle of separation of powers does not answer the direct and straightforward allegations from the Claimant. On the opposite, the given response underlines the continuous necessity of using the helping hand of the investment protection system when the State selects the position of legal ignorance. This helping hand was materialised in the decision rendered by the Tribunal safeguarding investors' material and procedural(!) rights.

"In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute."[849]

Furthermore, the decision of the Tribunal to support the protection of the procedural rights of investors was not a legal novelty introduced by the latter but a continuous affirmation of the

[845] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) 2008, Procedural Order #1, para 76
[846] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015*, para 68-69
[847] Ibid, para 87-88
[848] Ibid, para 91
[849] Ibid, para 117

Tribunal's rights recognised in the previous case practice.[850] The objective of preserving the material rights of investors should also include the point of concern for the procedural aspect of the dispute review. Especially in the part of witnesses and evidence production. Put differently, ensuring the material rights whilst disregarding the procedural ones would produce legally futile results where the goals of investment protection could not be achieved due to endangered means (review process).

Further on, in the line of reasoning for invoking the provisional measure, the Tribunal had identified the causal link between Bolivia's decision to invoke the criminal investigations and the investor's decision to pursue the claim in investment arbitration. This was done through an analysis of the evidence provided by the parties. In particular, the Bolivian side had expressly mentioned several times that the reference of the Claimant to investment arbitration would constitute irreparable financial and reputational harm to Bolivia. When accusing the judge, the Bolivian ministers had also mentioned the latter as not evaluating the potential risks that "…[c]*oncerns the protection of the goods and interests of the State that are subject of an international arbitration".*[851] This implies the potential partiality from the side of State officials. Therefore, the link between the criminal investigations initiated by the State and investment arbitration potentially infringing on the interests of Bolivia could not be disregarded.[852]

It is worth mentioning that Tribunal had reiterated that the given observations do not contravene Bolivia's sovereign right to perform criminal justice on its territory. Nevertheless, using such sovereign power should also not contravene the rights of investors to pursue their claims in arbitration.[853] This includes the ability to attract the testimony of witness statements not influenced by the host State's pressure from its official institutions.

In this context, one should strike a fine balance between delimiting the rights of investors and the exclusive sovereign power of the State. The mentioned line is at the limit when the State has a clear intervention impacting the investor's right in either material way, i.e. the subject of the dispute, or, as it got established, procedural way, i.e. procedural integrity of the dispute review.

"Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. Given that the existence of this ICSID arbitration has been characterized within the criminal proceedings as a harm to Bolivia, it is unlikely that the persons charged will feel free to participate as witnesses in this arbitration."[854]

The above-mentioned arguments and facts constitute the sum of reasons persuading the Tribunal[855] to intervene and to order the stopping of criminal proceedings. With such an

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[850] See for example, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22) 2008*at Procedural Order #1, para 71; See also *Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) 2017*, Award, para 60

[851] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2) 2015*, Decision on Provisional Measures, para 43

[852] Ibid, para 121-125

[853] Ibid, para 123

[854] Ibid, para 146

[855] Ibid, para 148

exceptional situation in place, the Tribunal believed that staying the criminal procedures would improve the Claimant's access to the witness testimonies and support the overall procedural integrity of the dispute review.[856] Importantly, the invocation of provisional measures on stopping the criminal procedures was underlined by the Tribunal as a measure that does not question the sovereignty of the State as any investment protection regime "…[d]*oes not exempt suspected criminals from prosecution…"*[857].

However, upon having established a very close connection between the criminal prosecution and investment proceedings, the Tribunal was of the view that stopping the criminal procedures for the time of the investment dispute review would preserve the procedural integrity and would not harm the criminal investigation conducted by Bolivian authorities after the investment arbitration is rendered.[858]

As affirmed by the Tribunal, the investor's motive put at front for applying to invoke the provisional measure instrument had been sourced to preserve the dispute review's procedural integrity *via* accessing all the necessary evidence and key witnesses' statements. This objective fits well with what is prescribed by the investment protection system. Based on the already established methodology of abuse detection, we can then assume the investor's use of treaty rights, amidst the course of criminal investigation, for applying to invoke the provisional measure had been done legitimately.

It is worth mentioning that although the investor had exercised the treaty rights legitimately, the investment protection system will not grant any immunity to the latter regarding being criminally prosecuted should the host State find the latter guilty. This remains to be the sole prerogative of the host State. Nevertheless, in the given case, the investor had used the investment treaty rights to escape from criminal prosecution at the time of the dispute review, legitimately. This had been done under the reasonable and valid motive of preserving the procedural integrity of investment arbitration dispute review.

To conclude, using investment treaty rights to escape criminal procedures may be considered a legally controversial practice. In the principal majority of the disputes, the investor may be willing to opportunistically mitigate the negative impacts of criminal prosecution initiated by the host State on a legitimate and reasonable basis, i.e. tax avoidance, harm to the employees, money laundering and other.

Consequently, the exercise of investment treaty rights to escape prosecution for the above-mentioned acts would constitute a mismatch with the laws' objectives. For example, the motive of escaping criminal prosecution for the harm done to employees will in no way correlate with the principles and objectives of the investment protection system. Hence, the investor's exercise of these rights with the ill-founded motives of shielding oneself from criminal prosecution will constitute an example of abuse, i.e. *Phoenix Action*.

[856] Ibid, para 163
[857] Ibid, para 164
[858] Ibid, para 165

In turn, the investors may face genuine pressure from the host State. For example, in the form of corrupt officials demanding illicit payments or performance.[859] The investor's denial of doing so may result in enabling all the administrative pressure from the side of the State officials. This, among others, may also include the initiation of criminal proceedings.[860] And although the investment protection system does not imply protecting the investors from the distribution of justice in the field of criminal law, the protection of investors whose treaty rights are violated as a result of such activity, nevertheless, shall trigger the involvement of the investment tribunal. Importantly, not to dispense the criminal justice instead of the host State, but to ensure the latter, when doing so, does not harm the investment treaty rights of investors.

This was shown in the *Quiborax v. Bolivia* example, where the investor had exercised the right to apply for invocation of provisional measure with the motive of preserving the procedural integrity of the investment dispute review. The latter had been confirmed to be matching the ICSID Convention, and the BIT's objectives, hence the use of such treaty rights had been considered legitimate.

Under the previously applied methodology of dualism, the author can point to the specific particularities rendering two of the reviewed disputes representing the abusive and normative use of treaty rights in the case scenario of escape from criminal proceedings.

In both disputes, the investors had attempted to raise the matter of criminal investigation to the investment arbitration level. However, this was done with two polar motives at heart. On one side, the investor in *Phoenix Action* sought to get back at the host State for initiating the criminal prosecution for non-payment of taxes. On the other side, the investor in the *Quiborax* dispute sought to preserve the procedural integrity of the dispute review upon the fear of the key witness being unavailable to testify as a result of criminal investigations initiated by the host State. Theoretically, reflecting on the example of these disputes provides better clarity in targeting abusive conduct that may not always be evident or distinct. Practically, the clarification of the given difference in investors' motives, upon further analysis of the evidence provided, provides a helping hand to future tribunals dealing with the investment arbitration dispute involving criminal investigations.

The help is materialised in the form of prior awareness of what does constitute a legitimate motive for seeking protection from an investment tribunal in the context of criminal proceedings. The latter could be used by arbitrators deprioritising the specific arguments of the Claimant, forming the "shell" motives aimed to mask the abuse. Therefore, the comparative analysis of the current case practice in the topical field provides additional help for better tackling and identifying the investor's abusive motives.

The said case scenario is most relevant to investment funds in part of fulfilling the investment fund regulatory obligations in the field of money-laundering prevention, market abuse violations and counter-terrorist financing that will be reviewed in brief in Part V when testing the

[859] See, for example, *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019*, Award, para 109-112

[860] See, for example, *The Rompetrol Group N.V. v. Romania (ICSID No. ARB/06/03) 2013*, Award, para 279

investment fund specificities in the current case scenario with a view of quantifying the abuse potentiality.

Section 5 – DAMAGES VALUATION

The prevailing majority of BITs[861] include the clause on "*prompt, adequate and effective*"[862] compensation to investors. The recurring case practice also confirms the latter standing.[863] The backbone principle and the formation of the modern institute of damages recovery in international litigation derives from the *Chorzow*[864] case. Many arbitration disputes subsequently mentioned the latter.[865]

The *Chorzow* principle provides the damages recovery function designed to "…[w]*ipe out all the consequences of the illegal act…*".[866] This implies the investor's standing to be restored to the point where the latter should not feel the consequences of the hazardous act. Put differently, to make "…[i]*njured party…made whole…*"[867].

Evidently, the said principle stretches beyond the investment protection network and is publicly recognised in other domains of international adjudication. For instance, see Article 17 of the Charter of Fundamental Rights:

"Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to ***fair compensation*** *being paid in good time for their loss."*[868]

The damages recovery principle aims to provide fair compensation to the suffering party under the spirit of restorative justice.[869] In this vein, the aspect of fairness requires further attention. Namely, fairness is born out of the adversarial spirit where both parties enjoy the right to calculate and valuate the disputed asset and the subsequent damages, consequently submitting the rendered estimations for arbitrators' review.

This manifests the investor's right to compensation comprising the procedural right to suggest the custom methodology for damages calculation and asset valuation. The mentioned rights are offered in the already discussed consideration of fairness, where both disputing parties are given

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861 See, for example, BIT, Agreement Between The Government of The Republic of Latvia and The Government of the Kyrgyz Republic For The Promotion and Reciprocal Protection of Investments (2009)

862 Diana Rosert, "The Stakes Are High: A Review of The Financial Costs of Investment Treaty Arbitration" , p. 5

863 See, for example, *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*, Award, para 321

864 *Chorzow Factory Case (Germany v. Poland)* (Permanent Court of Arbitration) 1928

865 *Flemingo DutyFree Shop Private Limited v. the Republic of Poland* (UNCITRAL) 2016, Award, para 606

866 *Chorzow Factory Case (Germany v. Poland) (Permanent Court of Arbitration) 1928*, Merits stage, para 125

867 United Nations Reports of International Arbitral Awards (UNRIAA), Opinion in the Lusitania Cases (1923), p. 39

868 European Union, Charter of Fundamental Rights of The European Union (2000), Article 17

869 See for example, *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1) 1997, Award, para 6.21 with Tribunal raising the question on how to reimburse the Claimant the damage "as if events had never occurred or taken place"

the liberty to calculate the alleged damages in the way it appears the most just to them. This is done under the assumption that no one else knows the true value of the damaged or lost asset better than its owner. *"Value, however, is not an objective quality of things. It always depends on a specific relationship between the particular object and a subject."*[870]Hence, it is more than reasonable to offer the disputing parties the said procedural right that is a part of a right to apply to calculate its worth.

Evidently, the arbitrators are not obliged to select either side but can render the award based on their own methodology. However, this does not limit the investor's right to calculate, valuate and request *ab initio*. See the example:

"Claimant requests that the Tribunal issue an Award:

(d) Awarding the Claimant compensation in the total amount of EUR 81,633,810;

(e) Awarding the Claimant interest on the above amount running from 17 February 2012 until the date of full payment of the Award at a rate of no less than EURIBOR plus a premium of 2% compounded semi-annually..."[871]

In this context, it would be naïve to expect the disputing parties to only submit the mentioned estimations in good faith. The given assumption then suggests that the process of damages recovery calculated by the opposing sides develops into a separate case scenario of abuse where the investor's right to (1) calculate the damages and (2) valuate the disputed asset may be exercised contrary to the law's objectives.

As already mentioned, the arbitrators have full discretion in deciding the number of damages and setting the bar of "fairness" in a dispute at review.[872] However, the given task may not always be straightforward and clear. The disputing parties may be interested in misguiding the arbitrator's calculation by offering the calculating methodologies in bad faith.

For example, the author proposes the following case scenario for consideration: the investor constructed a USD 1 billion bridge offering the paid service of crossing the river. Upon paying the fee, the drivers may reach the city centre faster than previously, i.e. the added value of convenience and time-saving. However, after ten years of use, the state expropriated the bridge in violation of investment treaty rights protection. The Tribunal had established the State's fault in full. What would be then a fair compensation in the given situation?

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[870] Irmgard Marboe, "Calculation of Compensation and Damages in International Investment Law" (2017) Oxford University Press, 2.58; See also *Amoco International Finance Corporation v. Iran* (Iran-US Claims Tribunal (IUSCT)) 1987, para 219

[871] *Flemingo DutyFree Shop Private Limited v. the Republic of Poland (UNCITRAL) 2016,* Award, para 42

[872] Christian Tietje and Emily Sipiorski, "Offset of Benefits in Damages Calculation in International Investment Arbitration" (2012), p. 552-553

The most straightforward solution is to offer compensation for what the investor initially paid, i.e. USD 1 billion. This, in particular, could *"wipe out all the consequences of the illegal act"*, [873] as specified in the *Chorzow* case.

However, a reasonable person from the Respondent's side would immediately question the timing: if the bridge had been used for ten years, the investor had probably partially recovered the construction price. Hence, the revenues received from the use of the bridge should also be deducted from the compensation paid.[874] As such, this would not be USD 1 billion but substantially less.

"It can be argued that expropriation is an infringement of private property rights and therefore needs to be remedied in full. Yet, it is equally possible to submit that private property is a right that entails also obligations, and that every person does not only have rights but also responsibilities towards society as a whole and must accept certain sacrifices."[875]

In turn, the Claimant's counsel would object: it would then be fair to include the maintenance costs and the taxes the investor had to cover while maintaining this bridge intact. Besides, one would need to estimate in the monetary expression the added value that had been brought by the investor, i.e. convenience and time-saving. How much time had been saved, and what is the latter's value provided that various citizens had used the said bridge? To add to this, how to measure the convenience received as a result of the bridge construction?

Evidently, the heterogeneity of approaches towards recovering what investors suffered due to State expropriation, either directly or indirectly, prevails.[876] The arbitrators are tasked with identifying the golden middle, or, put differently, the fairness in estimating the amount of compensation to the assets that vary in kind and value.

When faced with the variability of assets and their intrinsic value, the Tribunal and the disputing parties have various methodologies designed to valuate the specific assets. For example, the methodology for estimating the value of the gold mine takes into account the geological data.

However, the numerosity of variables manifests the complexity of calculating the damages fairly. In this vein, the complexity of the disputed asset provides fertile soil for abuse *via* developing misleading methodologies benefiting investors more than what is reasonably considered fair.

In turn, the arbitrators, being the persons of law, may not necessarily respond adequately to the mathematical calculations of the parties. Their legal capacities are incompatible with the task of calculating the incurred damages.

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[873] *Chorzow Factory Case (Germany v. Poland) (Permanent Court of Arbitration) 1928*, Merits stage, para 125

[874] See considerations of Christian Tietje and Emily Sipiorski, "Offset of Benefits in Damages Calculation in International Investment Arbitration" (2012), p. 546-549

[875] Irmgard Marboe, "Calculation of Compensation and Damages in International Investment Law" (2017) Oxford University Press, 2.39

[876] Ibid, 2.39

"…[I]*CSID does not employ a single economist, nor do most of the other arbitration centres where investor-state disputes are hosted. Arbitration tribunals regularly appoint administrative and/or legal secretaries, but normally neither their task nor competence extends to technical issues of economics".*[877]

Instead, Alschner had opposed the given considerations as being faulty at heart:

"More use of economics in dispute settlement often requires more rather than less law. Lawyers are needed to tackle normative questions and move them out of the way to create an enabling environment where economic tools can be properly employed to answer factual questions and shed light on conceptual challenges."[878]

The author shares the given visionary as economic calculations serve no purpose unless a legal framework provides for their application and enforcement. The arbitrators, being in charge of managing this framework, do not need to calculate the damages then but select the methodologies proposed by economists and apply the latter with the objective of a fair recovery. Sensing the latter, although economically challenging, is, nevertheless, a legal task. Hence, the function of asset valuation and damages estimation to come up with a fair recovery, although economical in essence, remains in the domain of law and shall be managed by the people of law.

Nonetheless, this does not cancel the complexity of assigning fair compensation. Nor the dangers of abuse and speculation with an objective to profit from the right for damages recovery. To analyse these potentialities better, the author then implies the apparent need to review the widely-recognised asset valuation methods as a prerequisite for abuse detection in the given case scenario.

Methodologies of assets valuation

Various asset valuation methods are essential to estimating the amount of damage done to the investor. The latter is needed for issuing the compensation guaranteed by the investment protection regime to the investor.

"Valuation is not an exact science. There often is no single value of a business. Rather, there are typically a range of values. Similarly, there is not one methodology best suited for determining the fair market value of the investment lost in every situation. Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case."[879]

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[877] Joost Pauwelyn, "The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement" (2013), p. 1

[878] Wolfgang Alschner, "Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration" in Theresa Carpenter (ed), in "The Use of Economics in International Investment Disputes: Liability and Damages"(2017) Cambridge University Press, p. 284

[879] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 886

This opinion underlines the multifaceted process of valuing the investor's assets that may, sometimes, be so complex and uncertain that it could open a dangerous pathway for those seeking to act in bad faith and profit from the given process. For example, proposing improper strategies and techniques for asset valuation meant reaching a goal other than estimating the true and fair value of the disputed asset.

This, in turn, could render the process of valuation and consequent compensation into a guessing game. These uncertainties may be useful to an investor seeking to abuse the right to compensation when submitting its calculations.

In the *Azurix v. Argentine* [880]case dealing with the infrastructure of sewing system development, the investor won the tender for water system construction. This included integrating into the latter the equipment specifically developed for the given purposes, i.e. the water Canon. The latter is unique and not widely tradable in a general market as it requires handcrafting for a specific system to be installed. Following the expropriation, the investor alleged the impossibility of recovering the invested assets. *"When the water system is built, the company can no longer walk away and take the pipelines with it…"*.[881] Besides, retrieving the above-mentioned system outside the ground and returning it to an investor would be economically unreasonable.

Besides, the investor would find no good use for returned assets as they were assembled to fit the current sewage system. As such, the disputing parties and the arbitrators would enter into the process aimed at evaluating the fair recovery *via* estimating the monetary value of the invested assets.

There is no exhaustive list of such methods, as the disputing parties are free to combine, modify or suggest some new approaches to offer the calculations that best fit a specific situation at review. Provided the calculations are mathematically correct, and the evidence supporting the line of reasoning for employing the specific method is in place.

In this context, the International Valuation Standards Commission (IVSC)[882] and some practitioners[883] suggest several methods to value assets. This, in particular, includes (i) the income methods, (2) the market methods and (3) the assets methods.[884]

Depending on the method selected, one should estimate the investor's income received from an investment, the market value at which the assets could be sold or the enterprise's financial books mentioning the price of the assets in correlation to the enterprise's obligation. Selecting one of these three principal categories could benefit either side, considering the project's specificities. For instance, if applying the market method to the above-mentioned example with the sewage system, one could predict the price to be lesser than reasonable as the asset at question is not liquid, i.e. it is specific to a mentioned project. Hence, selling the sewage pipes at a price of their

[880] *Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12) 2006*, Award
[881] Ibid, Award, para 276
[882] International Valuation Standards Council (IVSC), International Valuation Standards (IVS) (2020)
[883] José Alberro and George Ruttinger, ""Going Concern" As a Limiting Factor on Damages in Investor-State Arbitrations" (2015)
[884] Ibid, p. 4

material without including the latter's uniqueness would diminish the asset's price, lowering the subsequent damaged recovery. This would go contrary to the ground principle mentioned previously. Namely, the fairness of restorative justice. In this vein, the author then suggests reviewing these categories and the most prominent methods representing them.

- Income Approach

The group of income approach methods combines methods based on estimating the future profits the investment could bring was it not troubled by the host State. This category of methods is sometimes regarded as "but for" scenarios[885] where the valuation of assets is done by predicting their future performance. Basing the calculations on future potentialities may resemble a speculative task, i.e. suggesting something without having enough information to be sure. For this reason, this group of methods heavily depends on the evidence base.[886] One of the most distinct income methods[887] is the *Discounted Cash Flow* (DCF) method[888] which has been regarded as an "*economically appropriate and reliable measure*".[889]

The DCF method estimates how much the enterprise could earn in the perspective of time should it not be stopped from operating.[890] For example, the investor had lost the investment due to expropriation. The latter amounted to EUR 1 in 2021. In that year, the interest rate available in the market was 10% per annum. Hence, if the investor possessed the expropriated amount, EUR 0,1 could be earned. Therefore, under the discounted cash flow method, the investor would be entitled to recover EUR 1 of the expropriated amount plus EUR 0,1 of potential profits that could be reaped should the initial amount not be expropriated.

The major shortcoming of using the given method is the inability to adequately calculate the potential profits for bankrupting or relatively premature businesses (less than three years in operation).[891] In other words, estimating a business's potential profits on the verge of bankruptcy

885 See for example, the mention of the "but for" scenario in restoring the damages via income approach method in *Flemingo DutyFree Shop Private Limited v. the Republic of Poland (UNCITRAL) 2016*, Award, para 608; See also *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) 2011, para 151-2; See also Irmgard Marboe, "Calculation of Compensation and Damages in International Investment Law" (2017) Oxford University Press, 2.110-2.114

886 See for example, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* (ICSID Case No. ARB (AF)/04/5) 2007, Award, para 281-282; See also *Flemingo DutyFree Shop Private Limited v. the Republic of Poland (UNCITRAL) 2016*, Award, para 610-612, 865; See also Sergey Ripinsky and Kevin Williams, "Damages in International Investment Law" (2015) British Institute of International and Comparative Law (BIICL), p. 279

887 *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*

888 Chartered Finance Analyst (CFA) Institute, "Discounted Cash Flow Application", *in "Ethical and Professional Standards and Quantitative Methods"*(2017), p359-379; See also Global Arbitration Review (GAR), "The Applicable Valuation Approach"

889 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11) 2012*, Award, para 708; See also José Alberro and George Ruttinger, ""Going Concern" As a Limiting Factor on Damages in Investor-State Arbitrations" (2015), p. 4-5

890 Bastian Gottschling and Willis Geffert, "An Economic Assessment of Contracts, Requests for Contract Reform, and Damages in International Arbitration" in Theresa Carpenter (ed), *in "The Use of Economics in International Investment Disputes: Liability and Damages"*(2017) Cambridge University Press, p. 331-332

891 *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*, Award, para 290

or one that had just started operations develops on a speculative process. See this concern being raised in *Plama*:

"Claimant's use of the DCF method of valuation is inappropriate because Plama has no relevant history of profitability as its cash flows for years were all negative; Plama was not a money-making enterprise".[892]

As such, the methods based on estimating the potential incomes that could be reaped from the investment done are available for use, provided, nevertheless, strict requirements on solid evidence basis are in place. This is necessary to confirm that the allegation of lost profits is not a mere potentiality but a genuine expectation of the investor.[893]

- Market Approach

The market approach method analyses the disputed asset's fair market value. Although there is no universal definition of a fair market value, these are popularly used in investment arbitration practice:

"…[t]*he price that the seller is willing to accept, and a buyer is willing to pay on the open market…"*[894]*;* or

"…[t]*he price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."*[895]

In the previously-mentioned *Azurix* dispute dealing with the water Canon, the investor had suggested applying the market approach method. This should have included calculating the market price of the assets the investor had owned.[896]Nevertheless, in the situation where the asset acquired is questionable regarding its value, the potentiality of speculation may appear.

Besides, considering that investment arises due to a tender contract, some additional concerns may also appear. Namely, depending on the tendering conditions, i.e. the number of bidders and how many bids had been submitted, the bidding price might not necessarily reflect the fair market price of the asset. Put differently, the conditions of the tender, i.e. the competition between the bidders, may inflate the price of the future investment and will not reflect the fair market value. Hence, applying the market value method alleging the tender price to be the fair market price is a questionable practice of asset valuation and further compensation assignation.

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[892] *Plama Consortium Limited v. The Republic of Bulgaria (ICSID Case No. ARB/03/24) 2008*, Award, para 158

[893] See, for example, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC Case No. V 116/2010) 2013, Award, para 1688-1690 suggesting on high threshold for evidence.

[894] Thomson Reuter, "Black Law Dictionary" (2), p. 844; See also Sergey Ripinsky and Kevin Williams, "Damages in International Investment Law" (2015) British Institute of International and Comparative Law (BIICL), p. 182-183

[895] American Society of Appraisers (ASA), International Glossary of Business Valuation Terms (2001), p. 4; See also *Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12) 2006,* Award, para 425

[896] *Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12) 2006*, Award, para 411

In the Azurix dispute, the Respondent had alleged the investor to be paying an excessive price due to a “heated” bidding process. In turn, the investor had alleged the latter to be a fair market price.[897]

The Tribunal had opined that aggressive bidding from which the investor had profited by winning the Concession was the commercial strategy selected by the latter. At the same time, this had also profited the State by paying more for offering the concession to the investor.

The arbitrators had decided to support neither side with their methods selections and to base their decision on a different method based on correlating other variables, i.e. inflation rate and expansion strategy. All this together made it possible to find a golden middle in fixing the asset's price.[898]

“Tribunals often consider themselves at liberty to opt for different valuation methods and mediate between differing positions put forth by the opposing parties with a view to finding an amount of compensable loss that they consider just in the particular case.”[899]

However, the International Valuation Standards (IVS) provide their approach to treating the given matter: *The Market Value* may not always be equal to *Fair Value*. The price that appears at the tender between the participants (*Special Value*) is not the price available to the wider market (specific tender requirements, i.e. size of the business, experience, nationality). In order to define *Fair Market Value,* the *Special Value* should be distracted from the *Market Value*. Then, the result will represent the value expected under normal market conditions.

Another method existing within the limits of the market price category of methods is the event study method. The latter is applied to disputes involving publicly tradable companies on the stock market. The value of the company’s shares is then correlated with events influencing the market reaction in a particular timeframe.[900] Hence, the asset value is estimated in the above-mentioned correlation between the drop/rise of the prices and events causing the latter from the side of the host State.[901]

Another valuating method variation deriving from the market approach category revolves around considering the comparable assets tradable in the same market.[902] For example, identifying how much a specific car model the host State had expropriated would cost in the relevant market.

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[897] Ibid, Award, para 425-430

[898] Ibid, Award, para 426-427

[899] Wolfgang Alschner, “Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration” in Theresa Carpenter (ed), in “The Use of Economics in International Investment Disputes: Liability and Damages”(2017) Cambridge University Press, p. 291

[900] Rosa Abrantes-Metz and Santiago Dellepiane, “Using an Event Study Methodology to Compute Damages in International Arbitration Cases” (2011)

[901] See, for example, *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 804-812

[902] José Alberro and George Ruttinger, ““Going Concern” As a Limiting Factor on Damages in Investor-State Arbitrations” (2015), p. 5; See also International Valuation Standards Council (IVSC), International Valuation Standards (IVS) (2020), p. 22-25

This, among others, underlines particular heterogeneity of approaches. Namely, there is no certainty but only the personal beliefs of arbitrators that a particular decision on valuating the assets in the given way is the right approach. Hence, the author then points out that the given uncertainty is a prerequisite for abuse to appear. Put differently, having no common approach towards valuating the assets due to the varying nature of investment projects provides the fertile soil for investors to use its treaty rights in excess. Consequently, the specificity of damages valuation standards increases the bar of abuse occurrence higher than average.

To conclude, the methods aimed at evaluating the fair market value concentrate on estimating the value of the assets by looking at the price at which one could reasonably sell on a good market day. The arbitrators are then at liberty to choose the best method that fits the objectives. This often implies combining methods or developing a new asset valuation method.[903]

- Assets Approach

In this approach, the main emphasis is put on estimating the value of the company's assets rather than estimating potential revenues or the market price of the latter.[904] Although the price of these assets is also correlated with the market value, the assets approach method forms a separate category. This is due to the fact of considering the suggested price mentioned in the company's books rather than looking at how much one could receive for selling at a market price. This type of method may be seen as less popular as it provides a rather formalistic approach towards estimating the value of the assets. For example, if applied to the previously mentioned example of the sewage system, one should estimate the value of assets based on their purchase price indicated in the company's books.

Nevertheless, the given method is indispensable in scenarios where the enterprise has already gone bankrupt, and one needs to assess the asset's value in correlation to the latter's obligations. Therefore, assessing the company's books is the most reasonable in the given situation.[905]

For example, see *Biloune v. Ghana*[906] dispute:

"The Tribunal requested evidence of the amounts invested by Mr Biloune in MDCL as well as evidence of the expenditures of MDCL on the Marine Drive project such as receipts, bills, contracts, purchase orders, bank statements, and payroll documentation. It relied on MDCL's books of accounts to identify the investments made by Mr. Biloune in MDCL by holding that

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903 For example, see *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) 2007*, Award, para 387; See also Rosa Abrantes-Metz and Santiago Dellepiane, "Using an Event Study Methodology to Compute Damages in International Arbitration Cases" (2011), p. 329

904 Chartered Finance Analyst (CFA) Institute, "Equity Valuation: Concepts and Basic Tools", *in "Equity and Fixed Income"*(2017), p. 263-270

905 José Alberro and George Ruttinger, ""Going Concern" As a Limiting Factor on Damages in Investor-State Arbitrations" (2015), p. 6

906 *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL Arbitration Rules 1976) 1988

contemporaneous books and records of a company regularly kept in the course of business should be presumed to be accurate."[907]

The taxonomy of the said methods and selecting the one that fits the purposes of a specified dispute is only the first step in awarding fair damages compensation. Instead, the second limb of the said process is the causality to be reviewed further.

The factor of causation: correlating the investor's loss and the host State's liability

Having reviewed the main groups and some pertinent asset valuation methods, it is worth considering the aspect of causation as a second step necessary to assign compensation in investment arbitration. Put differently, to deem the compensation reasonable, one needs to estimate the fair value and the causational link between the damage done and the loss incurred. Alleging the State to recover the damages incurred due to third-party fault would lead to an abuse of treaty rights.

The widely recognised international law principle in relation to State responsibility provides: "…[t]*he wrongful act must be the condition for the occurrence of the loss…"*.[908] This implies that for the State to be ordered to issue the compensation, one should establish the link between the loss caused and the actions of the former.[909] Besides, such a link is supposed to be in "…[p]*roximate causality in relation to the wrongful act…"*.[910]which implies the necessity to establish particular permanence and continuation of the latter in order to award the compensation to be paid by the host State.

Alschner mentions several cases[911] where arbitrators, when calculating the compensation, had completely "detached" from considering the above-mentioned principle of causality[912] and went to establishing the subjective equilibrium on how to compensate. [913] In these cases, he comments, *"Damage calculation is then turned into a pure asset valuation…*"[914] devoid of a second limb of the process: establishing the causation.

Pauwelyn, in turn, mentions the *Santa Elena v. Costa Rica*[915] dispute was "…[a] *prominent ICSID tribunal in a 35-page long award devoted only a couple of paragraphs to the matter of*

[907] Ibid, Award, para 223-224
[908] Stephan Wittich, "Max Planck Encyclopedias of International Law" (2008), On Compensation
[909] Christian Tietje and Emily Sipiorski, "Offset of Benefits in Damages Calculation in International Investment Arbitration" (2012), p. 553
[910] Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals" (1994) , p. 242
[911] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) 2003, Award, para 100
[912] Hanno Wehland, "The Coordination of Multiple Proceedings in Investment Treaty Arbitration" (2013) Oxford University Press, para 1.15
[913] Wolfgang Alschner, "Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration" in Theresa Carpenter (ed), in "The Use of Economics in International Investment Disputes: Liability and Damages"(2017) Cambridge University Press, p. 291
[914] Ibid, p. 291
[915] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1) 2000

valuation."[916] In particular, to define the fair market value, he criticises the approach taken by the Tribunal on making very simplistic calculations: adding two sums and dividing them in half. See the dispute excerpt:

"... Costa Rica's valuation of Santa Elena in 1978 was approximately U.S. $1,900,000. Claimant's 1978 valuation was approximately U.S. $6,400,000.

... It can safely be assumed that the actual and true fair market value of the Property was not higher than the price asked by the owners and not lower than the sum offered by the Government, i.e., that it was somewhere between these two figures ...

In the circumstances of this case ... the Tribunal has determined that the sum of U.S. $4,150,000 [exactly half] constitutes a reasonable and fair approximation of the value of the Property at the date of its taking."[917]

The author sees the Tribunal favouring the investor's side in the given calculation. Namely, when suggesting the market price three times higher than the ones offered by the host State, the investor received the compensation of 63,8 % of what had been asked initially.

It is worth mentioning that the above-mentioned disputes represent a mere fraction of cases where the arbitrators had deferred from using a more conventional approach in estimating the damages. Instead, most tribunals use the classic approach with two limbs: value and cause.[918] In other words, estimating the true and fair value with its further correlation to the host State's liability, i.e. participatory fault. This allows for defining how much fault lies on the side of the State for causing the particular damage to the investor.

The meticulous process[919] of establishing the causation may reveal the loss of a particular investment to be reasoned by other than the host State's actions, i.e. economic downfall, commercial risks and other pertinent events influencing the investment's well-being. Acknowledging the latter's importance develops the necessity of researching in further detail the aspect of causation and its potentiality for misuse when valuing the disputed asset.

In some examples, identifying the causational link is a straightforward task. For instance, the revocation of the broadcasting license is a response to an investor's denial to solicit bribes from the broadcasting institution. This led the radio company to bankrupt as it could no longer perform its main function, i.e. broadcasting. No other measure but the State's had caused the investment to be lost, i.e. indirect expropriation. Therefore, the causation is evident, and the

[916] Joost Pauwelyn, "The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement" (2013), p. 3

[917] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (ICSID Case No. ARB/96/1) 2000*, Award, para 93-95

[918] For example, see *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL (1976) (NAFTA)) 2002, Award, para 139-141

[919] See, for example, *Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18) 2011*, Award, para 157-180 where the Tribunal established the causation via interconnecting (A) cause, (B) effect and (C) logical link.

entire fault lies on the side of the State in the case confirmed by the tribunal. Hence, if decided in favour of the investor, the State is responsible for the entire damage incurred.

Whereas in other cases, establishing the causational link may not be a straightforward task.[920] For example, the bank to which the temporary administration had been introduced due to indirect expropriation had suffered great economic loss. This led to diminishing the value of the company's shares tradable in the stock market. However, the introduction of the temporary administration may not be the sole reason for the above-mentioned loss to appear: the economic crisis that took place at the time of the mentioned events could have influenced the bank's well-being as well.[921]

Alternatively, before the indirect expropriation, the investor had made a business decision heavily detrimental to the bank's stability. In this case, although the State had introduced the temporary administration violating the treaty rights, the bank's damage had occurred due to economic downfall or questionable managerial decisions. The latter would appear regardless of the temporary administration introduction.

In this vein, the investor may resort to profiting from the mentioned events by suggesting the damages valuation methodology omitting the calculation of incurred loss due to external economic misfortunes. If decided in the investor's favour, the latter would profit from the investment protection regime by receiving compensation for the loss incurred due to external factors, i.e. the economic downfall. Evidently, the given exercise of the treaty right to calculate the damages and valuate the disputed assets will contravene the law's objective of providing an investor's fair compensation. Namely, fairness that applies to both sides of the dispute.

Another example is the party's unwillingness to produce the necessary documents leading to greater loss than what had initially been envisaged. *"Claimant argues that the documents Respondent refused to submit could have provided more precise data to its calculation of damages".*[922] As such, either side's opposition should also be considered when establishing the causational link between the damage suffered and actions leading to this, both in material and procedural matters.

It is not rare for the dispute to involve third parties potentially influencing the well-being of the investment and its further valuation. It is then necessary to delimit the claims for compensation appearing as a result of third-party actions from the ones caused by the State. The investment arbitration dispute resolution stands on the jurisdictional ground of the investment protection system resolving the disputes between the investors and the State. Accordingly, the arbitrators should estimate the State's fault exclusively and render the award recovering what had been suffered due to these actions. Any other fault caused by third parties is not recoverable in investment arbitration and should be sought elsewhere, i.e. *ratione personae* is missing.

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920 See, for example, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22) 2008*, Award, para 778-779, 787, 797-798, 807-808, 814(e)

921 See, for example, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) 2007*, Award, para 297, 308, 312, where Tribunal estimates the economic crisis factor appearing due to State's inability to fulfil systemic reforms in order to prevent the great downfall of the national economy.

922 *Flemingo DutyFree Shop Private Limited v. the Republic of Poland (UNCITRAL) 2016*, Award, para 625

It is fair to acknowledge that the evidence analysis is central in estimating the above-mentioned causation.[923] Therefore, it is essential to review what had been submitted by the disputing parties to support their standing and to eliminate the fault that had caused the damage in the first place. In particular, it is very often for the dispute resolution to observe the participatory fault to the investment's destruction that could appear as a result of the host State's action as well the third parties and investors themselves.

Speculative calculation

In this context, selecting a specific asset valuation methodology and calculating the subsequent loss is undoubtedly a vital aspect of the dispute resolution process. As well as establishing the volume of participatory fault from the host State's side.

However, the author also acknowledges that it is reasonably fair for the disputing parties to present their vision on what is the value of the investor's assets and how much had been suffered as a result of treaty rights violation. It is also reasonable to expect the investor to be doing so in surplus and the host State, logically, to do the opposite and to calculate less than what has been suffered.

Although not encouraged, the given practice is still permissible as long as the calculations are based on real (not falsified) numbers, applying a clear and straightforward methodology on how the alleged sum had been computed. "…[I]t *is perfectly open to a party to further its own interests even at the expense of the other party."*[924] In turn, the specificity of adversarial proceedings is expected to cure any excess in estimations as the parties will raise their opposition based on pertinent evidence and counter calculations.

Nonetheless, the dividing point drawing the difference between the practice of increasing the price of the asset on sale and the abuse of a right to calculate rests with the investor's intentions. In particular, the motives that stand behind one's calculations. The latter should not be to seek profits or other ill-founded goals. *"Implicated in the idea of full compensation is the premise that the compensation shall not exceed the amount that was lost by the wrongful act or breach."*[925]

For example, the vendor had sold the product that became the object of the dispute. When calculating the price of the latter to be recovered, the vendor mentions the cost of electricity paid to make the product, the labour to assemble the product and the cost of gasoline to deliver the product. The payslips to how much electricity, labour and gasoline were used to produce the mentioned asset.

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[923] For example, see Tribunals decision to reject the Claimant's allegation to having been suffered "consequential damages" on the basis of not having enough evidence nor causation link proving such damages to appear at *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 894

[924] Robert Kolb, "General principles of procedural law" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), in "The statute of the International Court of Justice: a commentary"(2006) Oxford University Press, 64

[925] Christian Tietje and Emily Sipiorski, "Offset of Benefits in Damages Calculation in International Investment Arbitration" (2012), p. 548

Nonetheless, the vendor omitted to mention that the latter resides in the same premises where the product was developed. As a result, the elevated cost of electricity may not reveal the actual value of the product sold. Alternatively, the seller may receive State benefits, significantly reducing the labour cost. Lastly, the cost of gasoline implied to be making the product more expensive may appear as a result of the vendor using the company's car for personal reasons. Hence, the price of the asset alleged to be recovered may be true in fact but misleading in nature.

Investment arbitration may include the selection of calculation methods attempting to compute the numbers opportunistically to recover more than expected. *Alschner,* in his work, mentions one pertinent example concerning two valuation methods: foreseeability and hindsight (retrospective). In particular, the foreseeability method evaluates the investment's value at the time of the breach. The hindsight method, in turn, does so at the time when the award is about to be rendered. He further explains that depending on the situation, selecting either of the methods could provide some greater benefit in recoveries to an investor, depending on the case scenario. For these purposes, he presents two case examples. Let us consider both of them below:

"Imagine a foreign investor in natural gas is driven out of the country subsequent to a FET violation. The next day, a new gas field is unexpectedly discovered on his former property, which concomitantly increases the amount of lost profits. The state, under a hindsight assessment, has to compensate also for the additional profits lost in a subsequent award even though they were not foreseeable at the time of breach, while it would not have to pay for them under a foreseeability standard.

Same investor, different setting: imagine, the next day, a new technology is invented that produces natural gas from water at much cheaper rates than it can be extracted from earth. All natural gas installations suddenly become worthless. Under a hindsight assessment, the amount of damages would drop significantly. Under a foreseeability assessment, the amount of compensation remains unaffected."

The investor being aware of events appearing with a great stake of certainty, i.e. the upcoming economic crisis, or events that had already taken place and influenced the investment, i.e. development of new technologies rendering the value of investment law, may be willing to profit by suggesting the calculations based on either method.

Previously, it had been mentioned that such an activity would be done with an expectation to profit from the right to compensation. This expectation could appear sourced by different motives presented below (non-exhaustive):

(I) erasing the investment risks;

When using the future profits estimation method, i.e. DCF, the investor may omit including the risks that are pertinent to the particular business model, i.e. change in customer behaviour, economic downfall, and unfavourable weather conditions. Thus, when estimating what could have been earned, the investor will apply the most optimistic scenario where the enterprise was expected to receive only profits and nothing less than the profits. Such an approach would erase the risks that could have normally appeared for the investor's business model should the State not have intervened.

"If the claimant is better off after the award-for example, by swapping a risk-exposed to a risk-free investment of an equivalent character, that can be qualified as unjust enrichment. But it is simply a matter of an inappropriate determination of the compensation."[926]

(II) recovering the non-recoverable loss (non-foreseeable); or

When calculating, the investor may attempt to include the loss that was not even foreseen *ab initio*. Alternatively, recovering the loss that is so distant from the host State's actions that it is impossible to establish with a certain level of assurance that such loss had occurred as a result of the host State's actions.

This concerns claiming the recovery of lost profits that were not envisaged nor expected to appear at the time of the breach (non-foreseeable loss). *"Claimed profits must not be merely speculative. They must have been anticipated reasonably; in that sense, reasonably foreseeable at the time of the breach."*[927] Submitting the request for recovering such loss would be viewed as speculative, i.e. too distant.

(III) recovering more than what had been incurred.

Inflating the costs of servicing, production or management to recover more than what had been suffered. It could be intertwined with various methods of calculations as it is based on submitting data that is insufficient, deformed or omitted to be mentioned to the point where the alleged numbers do not reflect reality.

This activity sourced by the above-mentioned intentions is regarded by many as "speculative".[928] In this context, could an act of speculation be synonymised with abuse of treaty rights on submitting and calculating the compensation claim?

As already established, to call something abusive, one must correlate the user's motives with the law's objectives providing such rights to the user.

The general definition of speculation (Cambridge Dictionary) provides the following: *"Speculation is an act of guessing possible answers to a question without having enough*

[926] Thomas Wälde and Borzu Sabahi, "Compensation, Damages, and Valuation" (2008) The Oxford Handbook of International Investment Law, p. 1099; See also Christian Tietje and Emily Sipiorski, "Offset of Benefits in Damages Calculation in International Investment Arbitration" (2012), p. 557

[927] *S.D. Myers, Inc. v. Government of Canada (UNCITRAL (1976) (NAFTA)) 2002*, Second Partial Award, para 155; See also Wolfgang Alschner, "Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration" in Theresa Carpenter (ed), in "The Use of Economics in International Investment Disputes: Liability and Damages"(2017) Cambridge University Press, p. 311-312

[928] José Alberro and George Ruttinger, ""Going Concern" As a Limiting Factor on Damages in Investor-State Arbitrations" (2015), p. 7

information to be certain".[929] When the calculation submitted is regarded as speculative, that would mean the numbers are based on insufficient data, which renders the allegation of a particular loss speculative. This involves the element of opportunism being present in the latter.

In the meantime, speculation is recognised as a permissible practice widespread in finance. The latter is directly relevant to the investment fund activity – the case study of the given research. In particular, the collective investments with an expectation for the latter's price to rise or go down in future, speculative trading.

Cambridge Dictionary defines speculative trading in finance as follows: "*Speculation is an act of buying something hoping that its value will increase and then selling at this higher price in order to make a profit".* The distinctive element of such activity is the absence of necessary information that could assure the purchaser of the fact of the future price to raise. The phenomenon of speculative trading is essential to investment fund activity and is viewed as a legitimate (permissible) practice in finance. Could then speculative calculations when submitting the request for compensation in an investment arbitration dispute constitute a legitimate use of investment treaty rights?

To answer this, the *RosInvest* arbitration dispute could be mentioned. In particular, the Tribunal had underlined the following regarding defining the term "speculative" and how it is applied to the field of investment activity.

"The word "speculative" has no defined meaning that allows one to identify "non-speculative" investments. ***All investments are in some sense ultimately speculative.*** *Investors' appetites depend on how much they are putting at risk, how much may be gained, and the chances of success."*[930]

This implies that speculation is an inherent part of investment activity where investors are putting some money at risk with an expectation to profit. For instance, hedging against the potential risks appearing on the market in relation to the hedged asset, i.e. price fluctuation.[931] Nonetheless, the fact that the investment activity consists of an inherent feature of speculation does not render the act of speculative calculation to recover the compensation *via* investment arbitration legitimate.

Although investment arbitration deals with disputes deriving from the investment field, the latter, nevertheless, is a judiciary institute designed to pursue an objective different from receiving profits. In particular, the judiciary aims to resolve disputes impartially by equal and fair application of laws. This contradicts the objective of speculative trading, i.e. to earn money on the basis of uncertainty. The investment protection system aims to assign fair recovery to the

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[929] See official website https://dictionary.cambridge.org/dictionary/english/speculation [last accessed 22 March 2021]

[930] *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation* (Stockholm Chamber of Commerce (SCC No. 24/2007)) 2012, Award, para 195

[931] See, for example, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012*

suffering party due to State actions violating the treaty provisions. For example, as was already mentioned, to provide "…[p]*rompt, adequate and effective...*"[932] compensation.

In the *RosInvest* dispute, the investor's business model was based on acquiring the greatly undervalued assets with a further objective of later sale when the price increases, i.e. speculative investment.[933] However, when the dispute appeared, and the investor approached the damages calculation process *via* estimating the value of the investment, the Tribunal denied the Claimant's calculations setting the market price on the day of the dispute review. Tribunal's discontent explained this in valuing the investment higher than what had been initially paid.

"…[t]he *Tribunal finds that any award of damages that rewards the speculation by Claimant with an amount based on an ex-post analysis would be unjust. The Tribunal cannot apply the most optimistic assessment of an investment and its returns…".*[934]

In this context, the Tribunal disagreed with the investor's intent to spread the same speculative practices used in the financial market and elsewhere to the field of dispute resolution, where different principles and goals prevail. The arbitrators had drawn a distinctive line between the business and the judiciary. The latter is not the forum to seek profits but to receive the protection and fair recovery of what had been suffered. In other words, the arbitrators had set the boundaries which spot inadmissible practices within the dimension of investment arbitration. The latter is meant to provide fair and just compensation to the point where it is meant to "…[w]*ipe out all the consequences of the illegal act…*"[935] no more and no less.

The above-mentioned should also be considered tied with the previously used argument of *Alschner* insisting on needing to use more law rather than less law when the matter of economics arises.[936] This is explained by the investment protection regime being a strictly normative framework pursuing legal rather than economic goals, i.e. to distribute justice.[937]

"Whatever economics may supply it must subsequently be filtered through, and stay within the limits of, the legal elements set out in the treaty text. In this sense, law controls economics."[938]

Thus, the investor, when submitting the speculative calculations, implies the calculations based on insufficient or deformed information, with the objective of erasing the investment risks, recovering the non-recoverable or too distant loss, recovering more than what had been suffered or other illicit types of intentions forming the motive that is alien to the objectives of the institute of investment arbitration and the treaty rights providing to the investor the right for compensation.

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[932] Diana Rosert, "The Stakes Are High: A Review of The Financial Costs of Investment Treaty Arbitration" at p. 5
[933] *RosInvestCo UK Ltd. v. The Russian Federation* (SCC Case No. V079/2005) 2010, Final Award, para 666
[934] Ibid, Final Award, para 670
[935] *Chorzow Factory Case (Germany v. Poland) (Permanent Court of Arbitration) 1928*, Merits stage, para 125
[936] Wolfgang Alschner, "Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration" in Theresa Carpenter (ed), in "The Use of Economics in International Investment Disputes: Liability and Damages"(2017) Cambridge University Press, p. 284
[937] See, for example, *Flemingo DutyFree Shop Private Limited v. the Republic of Poland (UNCITRAL) 2016*, Award
[938] Joost Pauwelyn, "The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement" (2013), p. 22

"…[O]*ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded…"*[939]

Any other than compensatory motive will contradict the investment protection system and will render the individual attempting to pursue such goals as the abuser of investment treaty rights. Instead of claiming what had been suffered, the abuser would seek to profit from the losing party, i.e. the one who "…[s]*teps on the shoulders of a drowning man…"*.[940] Therefore, the speculative calculation with the intent to profit shall be considered an act of abuse for the purpose of the given research.

Case study: *Crystallex v. Venezuela*

The dispute of *Crystallex v. Venezuela*[941] had appeared between the Canadian investor, i.e. Crystallex, and the State of Venezuela over the contractual agreement for mining concession of gold extraction granted to the investor for 20 years with the right of renewal.[942]

Following the contract conclusion, the host State failed to issue the gold mining permit to the investor. This was alleged as the measure equalling an indirect expropriation of an investor's property rights protected by the pertinent BIT.[943]

Following the round of procedural hearings, the Tribunal had found for the investor. In particular, it was established that Venezuela violated the investor's treaty right for fair and equitable treatment. As well as expropriating the Claimant's investment.[944] This opened the forum for asset valuation and damages calculation. The specificity of investment activity done by the investor, i.e. the mineral resources extraction, required applying particular methods of assets valuation in correlation to considering some pertinent facts. For instance, the amount of gold deposits, the stage of development for extraction, the complexity of extraction and the proximity of facilities necessary for a mining operation.[945]

For these reasons, the Claimant had offered four pertinent methods aimed at valuating the assets from different angles; by applying the approaches tailored to tackle the specificities of the mining industry. This included the Net Asset Value (NAV) method (income-based approach), the relative market multiple methods (market approach), the stock-market study method (market approach) and the indirect sales comparison method (market approach). While examining the proposed methods, the Tribunal had several occasions to underline the investor's estimations in

[939] *Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1) 1984*, Partial Award, para 238; See also *Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18) 2011*, Award, para 245
[940] *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara* (Ad hoc Arbitration) 1999, Award, para 343
[941] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*
[942] Ibid, Award, para 1-7
[943] BIT, Agreement Between the Government of Canada and The Government of The Republic of Venezuela for the Promotion and Protection of Investments (1996), Article 2(2)
[944] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 961
[945] Ibid, Award, para 751

part of calculating the asset's value to be speculative and opportunistic. Let us consider some of these aspects in detail.

- The valuation date

Before all, the issue of setting the valuation date appeared between the parties. Namely, setting the date from which the dispute had materialised.

In this context, the Claimant had suggested the date of 3 February 2011 relating to the mining contract recession as well as the investor's property rights final expropriation.[946] Nonetheless, the Respondent had opposed such selection. Instead, 13 April 2008 was proposed. This was the date of the investor's alleged start of expropriation, i.e. the date of permit denial for gold extraction.

The Respondent had underlined that "…[t]*he Claimant's choice of 3 February 2011 allows it to choose a higher spot price and to increase the amount of economically extractable gold contained in the ore"*[947]. In other words, the Claimant's desire to choose the valuation date two years from the time of permit denial stems from its potential interest in inflating the asset value and, consequently, the amount of damages to receive.

Normally, it is in investors' best interest to assign the expropriation date as early as possible: from the very first moment when limitation to their treaty rights occurred. This is usually done to recover all the incurred loss starting from the first moment the host State limited the investor's rights.[948] Instead, in the given case, the investor had willingly pressed to shift the date of the dispute occurrence two years later from the moment of its first appearance, i.e. denial of a permit to mine. If gold prices remained stable, there would be little interest for the former to insist on setting the valuation date later. As the Respondent underlined:

"Crystallex opportunistically selected the spot price for gold as of 3 February 2011 (US$ 1,328) instead of the price at the time of the 2007 Technical Report (US$ 550), with a view to inflating the damages calculations."[949]

This greatly resonates with a previously mentioned dispute of *RosInvest* over setting the valuation date at the time of dispute award when the stock market price of the disputed shares was the highest. Consequently, the Tribunal denied such an attempt to strictly limit the speculative attempts to inflate the price of the disputed assets. This was done under the simple but straightforward explanation: the investment arbitration forum is meant for dispute resolution and fair recovery attribution, not for speculative profiting.

Unfortunately, in the *Crystallex* dispute, the allegation of opportunism raised by the Respondent was left unnoticed by Tribunal. Although the arbitrators had confirmed April 2008 to be the

[946] Ibid, Award, para 734, 854
[947] Ibid, Award, para 746
[948] For example, see also *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (ICSID Case No. ARB/96/1) 2000*, para 37; See also Irmgard Marboe, "Calculation of Compensation and Damages in International Investment Law" (2017) Oxford University Press, 3.276
[949] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 762

valuation date. Nevertheless, the reason for setting the latter had not been substantiated in connection to the Respondent's allegation of opportunism. Instead, the Tribunal had mentioned a more general, or, to put differently, formalistic approach. In particular, the investor has not operated since the permit denial.[950] This, consequently, had rendered the investor's right to be "practically useless"[951] and, thus, should be considered the date of the dispute.

However, the author deems it necessary to apply the methodology of abuse detection to the current dispute. Based on the evidence provided, the author could not arrive at any other conclusion but to suggest the main motive for insisting on setting the valuation date two years later than the time of the permit denial is to calculate the losses based on the spot price for gold being the highest on the desired date. Consequently, this implies the motive of the investor, when exercising the right to submit the calculations based on the date of the highest spot price of gold, to be motivated by the intent of profiting from the right for compensation. As such, under the previously established methodology of abuse detection, the author deems the given example of right's exercise to be abusive (non-evident abuse), i.e. not matching the law's objectives.

- "Aggressive" mining (indirect sales comparison method)

The next example of speculative activity had materialised in the Claimant's form, suggesting a very optimistic prognosis of gold extraction. To explain briefly, the above-mentioned method analyses the previous (historic) gold mine transactions alleged to be indirectly comparable to the disputed mine. Based on the deducted numbers, the Claimant further suggested some computational adjustments rendering the prognosed sales in correlation to the one that had already occurred in similar mines.

In turn, the Claimant's allegation of extracting a particular amount of gold with its further sale was considered by the Tribunal as unrealistic and too *"aggressive"*.[952] In particular, the arbitrators pointed at the lack of studies supporting the investor's opinion to extract the specified amount of gold.[953] Besides, the correlation between the previous (historic) transactions with the projected by the Claimant potential transactions was questioned as well.

"The Tribunal considers that such adjustments are too plentiful to render this method of reliable value and that the assessment of damages reached through such calculations is too speculative to be taken into account."[954]

As a result, the supposition of the investor to extract a particular amount of gold without supporting its statement with pertinent data and studies was deemed speculative. Evidently, such attempts were made to inflate the potential value of the investment in question.

- Calculating the 20+20 years counting period (market multiplies method)

950 Ibid, Award, para 855-857
951 Ibid, Award, para 856
952 Ibid, Award, para 908
953 Ibid, Award, para 908
954 Ibid, Award, para 909

Another example of speculative calculation occurred when computing the asset's value under the market multiplies method. When calculating the damages done, the Claimant has based its estimations on the assumption of using the gold mine for a period of 40 years. Some odd argumentation supported this. Although only having 20 years of contracted use with a possibility of potential renewal for 20 more years, the Claimant had applied the maximisation logic. In particular, by suggesting that any knowledgeable investor, having in mind the limitation of 20 years period of use, would attempt to "squeeze" everything possible from this time available at the enhanced pace of work. This, in turn, would mean the potential amount of extracted gold equalling the one that could potentially be extracted in 40 years at an average pace of work.

Although not mentioning such calculation to be done in bad faith, the Tribunal, nevertheless, had denied such logic.

"The Tribunal has not been convinced by the Claimant's argument that a reasonable investor limited by a 20-year contract would proceed to mine all the gold that is economically feasible to extract at the prevailing gold price over the period of time available".[955]

This decision was also rendered because the extension period is only a potential that should be contracted further on. Besides, the market price for gold may fall in the period of the next 20 years. This, consequently, could also influence the amount of gold extraction. In turn, in case of the gold price increase, there are no clear indications that the investor will be able to negotiate the extension with the initial contract's price.

Even more, the initial contract provided the extension to be done in the format of two additional extensions of ten years each.[956] Instead, the Claimant had based its calculation on the most optimistic case scenario where both extensions would be granted at a price initially agreed upon from the start. These calculations were done when aware of having already incurred some principal misunderstandings with the host State at the project's first stage. Hence, one could reasonably assume the investor to not genuinely believe in having fulfilled the described goal of cooperating with the host State for the period of the next forty years but to project the maximum value possible of the disputed investment to reap the inflated maximum.

The speculative approach toward calculating the future revenues and the damage done was based on insufficient or deformed information. Namely, projecting the most optimistic scenarios for the next 40 years, despite having already encountered some fundamental misunderstandings with the host State. This should also be considered in correlation to the investor not having started any, even the most minimal extraction of gold. As a result, this rendered one of the proposed methodologies based on such calculations inadmissible in the Tribunal's eyes.

- Tax indemnification

Following the review of the damages stage, the investor had also asked the Tribunal to indemnify the award from paying the Venezuelan income tax and provide similar indemnity for the investor's *siège social* in Canada.

[955] Ibid, Award, para 903
[956] Ibid, para 903-904

Nonetheless, the Tribunal had supported the Respondent's position where the request to tax indemnification was considered by the latter as having "…[n]*o legal support for its unusual request…"*. [957] In this context, the Tribunal had mentioned the *Occidental v. Ecuador*[958] dispute dealing with the identical request:

"Faced with a similar request, the tribunal in Occidental v. Ecuador deemed such request "speculative and premature". This Tribunal likewise considers such request to be premature and thus denies the Claimant's request.".[959]

This underlines particular opportunism in claiming what had previously been denied under similar circumstances. Being well aware of the outcome of the *Occidental v. Ecuador* dispute, the investor had nevertheless attempted to pursue its chances in the current dispute.

The Tribunal had named such conduct as speculative and opportunistic, however, reserving oneself from considering whether such conduct could be considered abusive, i.e. absence of judicial activism[960].

Even more, when allocating the costs under the "*cost follow the event principle*", the arbitrators had split the costs evenly between the parties, with no implication of either side being abusive or providing unreasonable arguments, despite having witnessed and condemned numerous examples of speculative calculations.[961]

The reason for Tribunal to omit reviewing the potential abuse may be the intention to not deviate from the principal issue raised by the disputing parties. Going beyond what had been asked to be resolved would contravene the effectiveness of dispute resolution, i.e. prolonging the dispute review. Alternatively, the Tribunal deemed it unnecessary and non-essential to target the potential matter of abuse as the arbitrators already had all the necessary instruments to render the award.

In the author's opinion, such an approach certainly harms the endeavours of practitioners and academicians aiming to better precise the concept of abuse *via* analysing the available case practice. Nevertheless, the above-mentioned analysis of the *Crystallex v. Venezuela* dispute in part of damages recovery offered some great examples where the investor's conduct had been condemned as speculative. This manifested the Claimant's motive to be opportunistic and allegedly profiting from calculations based on insufficient or deformed data that would, with a great level of certainty, inflate the value of the assets, i.e. suggesting the valuation date with the highest spot price for gold, projecting the calculations based on 40 years period of use,

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[957] Ibid, Award, para 944

[958] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11) 2012*, Award, para 853

[959] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 946

[960] Ted Thomas, "The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles" (2009) Cambridge University Press, p.88

[961] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award, para 960

suggesting to extract the particular amount of gold without sufficient data supporting such allegation. And as a result, permit the investor to profit from the right to recovery.

Notwithstanding the reasons for arbitrators not concentrating on the matter of abuse, for the purpose of the given Thesis, the author, by applying the previously deducted principle, i.e. speculation to be synonymised with abuse, will suggest the continuous and methodological approach of investor submitting speculative and opportunistic data for calculating the asset's value, to be considered as abusive. This is done under the previously established hypothesis of abuse to be similar to speculative calculation within the field of damages calculation.

As a result, the author underlines the motive's mismatch with the law's objectives. This renders the investor's speculative conduct in the *Crystallex v. Venezuela* dispute (recovery stage) as abusive but not identified at the time of the dispute review, i.e. non-evident abuse.

In contrast to the mentioned case, the author invites the readers to examine the *Deutsche Bank v. Sri Lanka*[962] case being an example of the legitimate use of treaty rights connected to damages calculation.

Case study: *Deutsche Bank v. Sri Lanka*

The *Deutsche Bank v. Sri Lanka*[963] dispute had appeared between the private entity Deutsche Bank AG registered in Frankfurt and having several regional headquarters in London (Deutsche Bank London), Colombo (Deutsche Bank Colombo) and Singapore (Deutsche Bank Singapore) on one side[964] and the State of Sri Lanka represented by the Ceylon Petroleum Corporation (CPC) – national petroleum corporation (100% of shares owned by the State) on the other side.[965]

The dispute had arisen out of the oil Hedging Agreement concluded by the parties. The latter was concluded due to the State's objective of protecting oneself from market price fluctuation. In particular, the parties entered the Agreement on 8 July 2008, when the market price for oil was USD 137.52. Under the terms of the concluded Agreement, the parties had agreed to set the purchase price of oil at USD 112.50 (agreed Strike Price), with the Agreement lasting for one year.

In case of the market price rise, Deutsche Bank undertook an obligation to repay the difference between the agreed price and the one currently in place at the market (maximum USD 10 difference multiplied by the volume purchased). *In lieu*, should the market price fall, the host State had been obliged to repay the difference between the agreed price and the price at which the oil is tradable in the market (multiplied by the volume purchased). The calculations were to be made on a monthly basis.[966] As a result, an apparent benefit stemming from the given agreements was Sri Lanka's ability to hedge the oil price at USD 112.50.

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962 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012,* Award
963 Ibid, Award
964 Ibid, Award, para 1-3
965 Ibid, Award, para 6
966 Ibid, Award, para 30 (vi)

In other words, the State had received the benefit of protecting itself from the negative effects of price fluctuation. This was done *via* Deutsche Bank's investment to hedge the mentioned price and to recover in case raising. As the Cambridge Dictionary provides, "*to hedge – [is] an investment made in order to reduce the risk of losing money…"*.[967] In this vein, the investor had received the chance to profit in case the price of oil drops, where the host State would still be obliged to pay at an agreed price of USD 112.50 (Strike Price).

The principle of hedging is considered the antonym of speculation. Namely, the speculation is based on attempts to purchase a particular derivate with an expectation of its latter rise or decrease in price. *In lieu*, the hedging is meant to offset any risks related to speculative trading of price fluctuation, aiming to fix the asset's price at an agreed level. As a result, the purchaser would benefit from stability and permanence *via* being secured with the fixed price of derivate.

Instead, this comes with the cost of agreeing at a Strike Price that would most likely be different to a market price in the future. In other words, it is when the purchaser wants a stable price in the future, regardless of any risks that could either lower or increase the former under normal market conditions.

This was also the objective of the Sri Lankan State, which heavily relied on oil and witnessed "…[a*[n upward trend rising from a monthly average of USD 28 per barrel in January 2003 to over USD 130 per barrel in July 2008…"*[968]*.* As a result, the host State was willing to secure the price *via* the above-mentioned oil Hedging Agreement concluded between the Deutsche Bank and Sri Lanka.

At first, the oil price continued the trend of rising. On July 15 2008, after the Agreement had been concluded, Deutsche Bank made a payment of USD 35,523.81 to Sri Lanka upon the oil price peaking at USD 140.24.[969]

Nevertheless, in the upcoming months, the oil price has witnessed a trend of decrease. This resulted in Sri Lanka's payments to Deutsche Bank of USD 1,659,636.36 in October and USD 4,507,857.15 in November. Following a further price drop, the State of Sri Lanka never fulfilled the next payments. As a result, the investor had alleged to exercise its contractual right to exit the Agreement.[970] The remainder of what had been owed to Deutsche Bank had been estimated at USD 60,368,993.[971]

Upon reviewing the case, the Tribunal found for the investor. In particular, it was acknowledged that the Respondent was acting in violation of the BIT.[972] Namely, breaking the principle of fair and equitable treatment[973] and expropriating the investor's property, i.e. monies owed.[974]

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[967] See official website https://dictionary.cambridge.org/dictionary/english/hedge [last accessed 12 April 2021]

[968] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012,* Award, para 14

[969] Ibid, Award, para 37

[970] Ibid, Award, para 43

[971] Ibid, Award, para 44

[972] Ibid, Award, para 591

At the time of the damages review, the Respondent mentioned the already discussed causation between the loss suffered and the State's actions.

The investor's prudence is visible in calculating the damages based on the date when the dispute arose. In particular, the Claimant had calculated its damages amounting to USD 60,368,993 plus interest rate to be occurring since the time of the Agreement termination by the investor's initiative upon the host State's failure to perform. This amount had been claimed *ab initio*. Nevertheless, through the dispute review process, the Tribunal had established the day of the dispute occurring on 28 November 2008, i.e. more beneficial to the investor.

"It is clear that from 28 November 2008 onwards, the coordinated actions of the Supreme Court and the Central Bank prevented Deutsche Bank from receiving payment under the Hedging Agreement."[975]

However, the investor responded with the following:

"Claimant submits that if the Tribunal concludes that any of the above breaches was in fact completed by the Supreme Court's Order on 28 November 2008, the amount of its loss should be evaluated at USD 60,846,250. Deutsche Bank's primary submission however remains that it is entitled to the amount of USD 60,368,993, as calculated following termination."

The decision to stick with the original sum for compensation underlines the investor's intention to not profit by selecting the most beneficial valuation date opportunistically, but to receive to what it is entitled. This contemplates greatly with the previously mentioned dispute of *Crystallex v. Venezuela*,[976] where the investor had based its calculations on the most beneficial date when the gold was traded at its highest, two years from when the license was denied to be issued, i.e. materialisation of the dispute.

Apart from selecting the valuation date, several other aspects render the *Deutsche Bank v. Sri Lanka* dispute an example of an investor exercising the right to calculate the damages legitimately by applying appropriate and just valuation methods.

For instance, instead of continuing the oil Hedging Agreement and recovering the difference between the Strike Price and the market price of oil for the remaining six months of the valid Agreement, the investor decided to terminate the latter immediately upon witnessing the failure of the State to fulfil the obligations taken. This was done in the context of a drastic price drop that could provide substantial benefits to the investor should the latter wish to continue to perform based on the valid agreement.

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[973] BIT, Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments (2000), Article 2(2)

[974] Ibid, Article 4(2)

[975] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012,* Award, para 521

[976] *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) 2016*, Award

In addition, the moral or reputational damages that are usually claimed in excess, without any factual confirmation, had not been pursued by an investor in the given dispute. Only the incurred damages contractually confirmed by the Agreement had been claimed by the latter.

And the concluding argument in support of the legitimate exercise of the investor's right to submit the calculations derives from the Respondent's side: *"The Tribunal further notes that Sri Lanka does not dispute the process followed by Deutsche Bank in calculating its claim..."*[977]

As a result, the Tribunal had rendered the Award fulfilling the monetary claim for investor's compensation in full – a rare example in the investment arbitration field. As such, Deutsche Bank recovered the initially claimed USD 60,368,993 in its entirety. This underlines the Tribunal's approach of having cast no uncertainty on the investor's entitlement to the amounts claimed.

The above example proves the investor is exercising its right to submit the calculations of assets valuations and subsequent damages with the motive of receiving fair and full compensation for what had been suffered, with no excess. The latter was done on sufficient and reliable data casting no doubts over the investor's motives.

Based on the previously established methodology of identifying the abuse, the author suggests the motives of the investor correspond to the objectives of the treaty law providing the right for compensation. Namely, recovering the fair and full compensation[978] for the genuine loss incurred aimed to "…[w]*ipe out all the consequences of the illegal act… "*.[979]

In this context, the *Deutsche Bank v. Sri Lanka* dispute serves as an exemplary case where calculating the potential damages led to the investor's demand for compensation to be fully supported. The investor's arguments and motives could serve as the guiding point for identifying the exemplary use of treaty rights relevant to calculating the damages and valuating the investor's assets.

At the same time, the two reviewed cases reflect how an investor in two distinctive modes may exercise the right to calculate the damages and valuate the disputed assets differently.

Unlike other case scenarios, the current one encapsulates the great complexity of various factors to be considered to distinguish abuse from normative use. In particular, the use of appropriate methods supported by necessary evidence confirming the expenses incurred or loss suffered, the confirmation of causation between the damages and the State's actions and others.

The relevance of the current case scenario concerning investment fund law is found in the function of asset valuation compulsorily present in the latter legal regime. In the following part, the author will discuss the roles and functions of the fund's management company for rendering

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[977] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) 2012*, Award, para 573

[978] BIT, Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments (2000), Article 4(2)

[979] *Chorzow Factory Case (Germany v. Poland) (Permanent Court of Arbitration) 1928*, Merits stage, para 125

the fund's asset valuation and how this specificity impacts the abuse potentiality when tested in the current case scenario.

Conclusion

The conclusion of the given part offered some specific results. Namely, it has been confirmed that abuse develops differently depending on the case scenario where the latter is reviewed and the specific treaty right used. This essential conclusion underlines the variability of the legal phenomenon examined in different contexts.

In this vein, each reviewed case scenario offered particular aspects necessary for targeting the abuse in varying contexts. For instance, the treaty shopping scenario analysed the timing aspect and investors' foreseeability of the upcoming dispute. The latter had put the dividing line between what is considered a reasonable expectation of the dispute and the change of the registration place for preparing to challenge the host State legally.

Further on, the provisional measures case scenario affirmed the importance of considering the investor's initial objectives when claiming the application for provisional measures and the scope of rights to be protected by the investment protection regime.

The escape from the criminal proceedings case scenario revealed the abuse to transgress into the investor's attempts to elevate the purely national proceedings to the international level. In this way, the treaty rights offered to investors, i.e. right to initiate the dispute against the State, pave the way for abusing the legal regime with investors attempting to shield themselves from the negative consequence of the local regulator initiating the criminal prosecution.

Lastly, the abuse in the damages valuation case scenario takes the form of opportunistic calculations and varying methodologies for offsetting the investor's commercial risks and profiting from the justice system. This is done *via* the avenue of unfounded valuation of investors' assets and the use of the most-beneficial methodologies of damages calculation.

As a result, it has been acknowledged that abuse acquires various forms, depending on the case scenario at review. Deducting the most pertinent aspects revealing the abuse in different contextual settings allows to precise the latter in a more comprehensive approach and to use the latter knowledge for estimating its potentiality when juxtaposed against the investment fund's legal specificities.

In the process of reviewing the arbitration cases representing each of the mentioned case scenarios, the author also spared some attention to considering the examples of non-evident abuse and the teleological reasonings of the latter. In this context, it has been acknowledged that abuse is a conceptually complex legal phenomenon requiring the application of varying techniques for its detection and prosecution.

The deduced knowledge develops into a scientific platform allowing the author to perform the concluding part of the research. Namely, estimating the factor of abuse potentiality and hypothesising for its reasons. This, in particular, will be done through the prism of the above-mentioned case scenarios combined with one defined actor – the investment fund.

PART V ABUSE POTENTIALITY QUANTIFICATION

Introduction

Part V of the given Thesis represents the research's final and most important step – estimating the risk of abuse occurring. The said analysis will be done by examining the investment fund specificities within the legal dimension of five reviewed case scenarios of abuse.

According to the methodology applied, the deducted specificities, in essence, will represent the investment fund's legal identity that will be further inserted in the case scenarios of abuse to estimate how abuse is potential to appear in varying conditionalities of five case scenarios.

The examination by testing every legal specificity in the case scenarios of abuse will allow to assign an abuse risk level to every specificity at review in order to answer the ultimate question posed by the given Thesis. Namely, the investment fund's legal regime impact over abuse potentiality compared to the rest of investors.

The methodology of abuse potentiality quantification

Having deducted the list of specificities relevant to investment fund investors participating in the investment protection regime, the given part will estimate their influence over abuse potentiality in five case scenarios. For these reasons, the Thesis will explain the method applicable for quantifying the abuse in the given Thesis.

The hypothesis provides that each of the above-deducted specificities, when brought into the investment protection regime by the investment funds, affect the abuse potentiality. For example, the specificity of investment funds consisting of numerous investors develops a higher potentiality of abuse through claims multiplication, i.e. *Orascom*[980]. In particular, the more investors there are, the bigger the risk of abuse appearing through bad faith claims initiation.

Conversely, the investment fund legal regime encapsulating the permanent supervisory bodies and several legislative levels ensures a consistent law application and compliance, presumably, leading to an abuse decrease.

Hence, when participating in the investment protection regime, the investment funds bring their "regulatory baggage", influencing the abuse potentiality in the investment protection regime, i.e. "norms importing". The given effect is most visible when extrapolated against other investors carrying no such "baggage" specific to the investment fund field, i.e. need for authorisation, minimum capital requirement, management company and depositary.

Consequently, while inherent to the investment fund legal and regulatory framework, each of the above-deducted specificities is assumed to cause a certain degree of influence, impacting the increase or decrease of abuse potentiality in the previously studied case scenarios abuse.

[980] For example, see *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Decision on Jurisdiction

To put the latter estimation on a measurable scale, the author suggests applying the following valuation of abuse risk to be assigned to specificities deriving from the investment fund field: increasing/moderate/decreasing. The Thesis will further apply the mentioned scale of estimation by suggesting the said specificities to increase the abuse potentiality (+1 point), cause no or moderate effect (0 points) or decrease the potentiality of abuse (-1 point).

The averaged sum of the given points divided by a number of legal specificities is expected to reveal how the investment fund as a participant in the investment protection regime influences the abuse potentiality in the studied legal and regulatory framework represented by five case scenarios. Put differently, academically investigating the impact-risk analysis of the said specificities.

Notably, the latter approach is not to be viewed as a mathematic exercise but as an attempt to transpose the legal analysis of the mentioned specificities into the numerical expression for better visualisation and tangibility of the abuse phenomenon and its potentiality of occurrence, i.e. abuse risk. Hence, the suggested methodology relies solemnly on legal analysis.

Complications. The said analysis will face certain complications necessary to be mentioned.

Subjectivity of interpretation

The first complication relates to subjectivity. Namely, the future outcome is to be heavily influenced by the author's personal opinion when performing the legal analysis of the deducted specificities against five case scenarios of abuse. To respond to this, it is necessary to mention that virtually any legal interpretation and analysis result in a subjective evaluation. Hence, implying the accepted margin of faultiness.

The latter is most vivid in the investment protection regime, being an example of a severely heterogeneous legal framework based on the interpretation of rotating investment tribunals following no common doctrinal patterns. This results in awards contradicting one another and developing the conceptualisation of abuse that differs in terms of methodology and other qualitative features.

However, despite its evident drawbacks, the studied legal regime experiences no shortage of case practice nor the legitimacy crisis in part of being recognised by national legal regimes enforcing the awards. The assumption of legitimacy, despite the subjectivity of legal interpretation, is sourced from the consensual agreement of the disputing parties resorting their investment disputes to privately organised tribunals[981]. The latter explains the high tolerance towards subjective legal interpretation in the investment protection regime.

Therefore, the reviewed drawback provides an explicit and reasonable authorisation to the author of the given Thesis to allow the fraction of subjectivity to be infused into the proposed methodology. The latter may be viewed as akin to the investment protection regime.

[981] Relja Radovic, “Beyond Consent. Revisiting Jurisdiction in Investment Arbitration” (2020) BRILL, p. 29-30

At the same time, the scientific exploration of investment fund specificities deriving from the strictly regulated framework exposed to a principle of maximum harmonisation[982] develops a balancing effect. Namely, not only the investment fund specificities import the regulatory baggage to the investment protection regime but also a share of formalism and strictness of interpretation. Consequently, this suggests that the legal heterogeneity presented in the investment protection regime is counter-balanced by the legal homogeneity of the investment fund's legal and regulatory framework. The said correlation allows setting off the complication of divergence of the given methodology and the Thesis research in general, i.e. polarisation.

Variability of motives

Another complication in reaching the set outcome is the elusiveness of such a legal phenomenon as abuse. Namely, when identifying the latter, the investment protection regime uses the previously discussed legal device of correlating human motives with the law objectives. The reliance on the exploration of human rationale is viewed as a legal postulate incapable of change, at least within the limits of the current research. The author assumes the latter to be the inherent element of the investment protection regime utilising the mentioned legal device for identifying and conceptualising the abuse.

The methodology relying in its analysis on human motives cannot offer consistent nor scientifically precise outcomes because of its major downside: the inability to identify such motives with a high level of certainty. This had been previously deducted as a principal reason for abuse to emerge into an elusive legal concept with a higher level of convergence within the limits of the investment protection regime.

To cure the negative effects of the said complication and to "stabilise" the research outcomes compromised with the uncertainty, two legal remedies may be applied. First, limit the scope of research. The current Thesis already utilises the said remedy by narrowing the analysis to five case scenarios and one specific actor of abuse.

Second, to resort to the method of duality by extrapolating the outcomes of the given research to a static expression. Namely, assuming the rest of the investors to represent an average level of abuse potentiality at a fixed rate.

For this reason, the proposed methodology will divide all investors participating in the investment protection regime into two distinct groups: the investment fund investors (fund and fund subscribers) (group 1) and all other investors (group 2).

Group 1 will include all investors following the investment fund legal regime. This comprises the investment funds and the subscribers to the fund's shares, i.e. retail and professional clients, under the MIFID II Directive.

Group 2 will encapsulate all the rest of the investors participating in the investment protection regime and who are *not* investment fund investors.

[982] Not for UCITS.

Being unaware of the exact level of abuse potentiality for the rest of the investors, the author suggests assuming the latter to be at an X rate – an assumed standard level of abuse potentiality relevant to the entirety of investors, with the exclusion of investment fund investors.

Therefore, the analysis of investment fund specificities brought into the investment protection regime is to be compared to an assumed standard – an X rate of abuse pertinent to the rest of the investors. As a result, the estimation of abuse potentiality gains the benefit of relevance and contextuality. Consequently, the analysis of each of the mentioned specificities is to manifest an effect of an increase (X+1), no change (X0) or decrease (X-1) of abuse potentiality appearing as a result of investment fund specifies brought by investment fund investors in relation to abuse rate potentiality for the rest of investors at an assumed level of X.

Having established the methodological basis for performing the existing research by estimating how the investment fund specificities affect the abuse potentiality and how to measure the deducted expression, the author further proposes to begin with analysing the discussed specificities.

Importantly, it is necessary to underline that the author, when mentioning the investment fund, implies the fund's structural organs (management company and the depositary) to be the actors of abuse, despite the fund having a legal personality on its own. The fund was previously mentioned to produce the investment product (shares or units). Instead, the management company and the depositary are the fund's actors rendering the necessary activity concerning the assets' management and safe-keeping.

The multi-layered structure of legal (Levels 1-2) and regulatory initiative (Level 3-4)

As already mentioned, the legislative initiative for investment fund-legal and regulatory framework enjoys a multi-fold approach where several actors issue varying levels of acts. Namely, the EU Parliament and the Council of Europe (co-legislators) issuing the Level 1 acts, i.e. AIFM Directive and UCITS Directive (and other Level 1 Regulations, i.e. EuVECA[983], EuSEF[984], ELTIF[985]). This follows by the Commission issuing the delegated and implementing acts (Level 2). Then goes the ESMA and national competent authorities delivering the Level 3-4 guidelines and recommendations aimed at monitoring/enforcing the preceding acts.[986]

The complexity of the given legal and legal and regulatory framework encapsulating several key stakeholders develops the legislative environment tackling the specific issues at the corresponding levels, i.e. fund authorisation (Level 1)[987], the list of key investor information to

[983] European Union, Regulation 345/2013 on European venture capital funds OJ L 115 (2013)
[984] European Union, Regulation 346/2013 on European social entrepreneurship funds OJ L 115 (2013)
[985] European Union, Regulation (EU) 2015/760 on European long-term investment funds (ELTIF) OJ L 123 (2015)
[986] For example, the previously mentioned Commission de Surveillance du Secteur Financier (CSSF), Regulation N° 15-03 laying down detailed rules for the application of Article 46 of the law of 12 July 2013 on alternative investment fund managers on the marketing of foreign alternative investment funds to retail investors in Luxembourg (2015)
[987] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 5

be included in the investment fund prospectus (Level 2) [988], the structure of the management report to be delivered to the national competent authority at (Level) 3[989] and other minor monitoring functions deriving from the Level 4, i.e. specific forms and reports to be prepared by the management company/manager.

The given taxonomy and variability of legal sources allow reaching the efficiency of the legal regime by tackling the matter at a place of occurrence. The example of the asset valuation had been previously mentioned to describe the given specificity. In particular, all of the mentioned regulatory levels provided their impetus to establish, develop, and specify the legal regime for the asset valuation function.

The effect of the given specificity may be viewed as universal to all the case scenarios of abuse. The latter relates to the very backbone of the investment fund's legal and regulatory framework – its legislative basis and how it is procured. Consequently, lowering the abuse potentiality when ensuring better adherence to the legal regime *via* the avenue of utilising the four regulatory levels. However, the said assumption is deducted under a general logic. Instead, when analysing the specific case scenarios of abuse, the latter statement may not always reflect the legal reality.

[Treaty shopping]

For instance, in the treaty shopping case scenario of an investor changing its residence to another EU MS, the author sees no reason for an abuse potentiality to change. The investment fund authorised/registered in either of the EU Member States will face even regulatory requirements in part of falling under the Level 1-2 acts issued by the EU institutions and further implemented by ESMA (Level 3) and national competent authorities (Level 4).

For example, the investment fund[990] authorised/registered in Luxembourg and, following the decision to change the place of registration/authorisation to Cyprus, will face the investment fund regulatory requirements stemming from the same initiators of the regulatory initiative. In particular, the latter will fall under an equal number of regulators.

Therefore, the legal specificity of a multi-layered legal regime comprising several regulators is presumed to not affect abuse potentiality increase in the case scenario of treaty shopping. Put differently, no added value prompting the fund to change the place of registration/authorisation would be offered due to the said legal specificity. The latter will remain exposed to a regulatory initiative from four distinct levels at any jurisdiction of the EU.

What concerns the EU fund re-registering outside the EU, the latter will fall under the legal regime of the destined jurisdiction and will be impacted accordingly. However, this falls outside

[988] European Union, Commission Regulation implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website OJ L 176 (2010)

[989] European Securities and Markets Authority (ESMA), Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD (2014)

[990] In the given sense the investment fund is mean to comprise its structural organs managing the latter and sefe-keeping its assets, i.e. management company/manager and depositary.

of the given research estimating the legal specificities formed by the EU and Luxembourg investment fund law.

In this vein, it is worth mentioning the ECJ's opinion 2/15[991] underlining the MS to be sharing with the EU the competence for concluding the investment agreements with the third States.[992] This results in a case scenario where the identical legal regime for investment funds is applicable in any MS at the 1-4 Levels. However, some EU MS may have concluded more investment agreements with third countries than others. The author acknowledges that the said variability may, indeed, motivate the investment fund authorised/registered in one EU MS to change its place of registration to another EU MS. However, the mentioned motivation does not derive from the specificity of having several regulatory levels but is rather influenced by the shared competence of the EU and MS in terms of foreign investment policies leading to the variability of concluded BITs.

Hence, the author views the specificity of a multi-layered legal regime to apply evenly to all the investment funds authorised/registered in any of the EU MS and cause no practical influence over the abuse potentiality in the treaty shopping context.

[Claims multiplication]

The same applies to the case scenario of claims multiplication out of investors' numerosity. Namely, a developed and comprehensive regulatory treatment of the investment fund industry elaborated as a result of combined efforts of four distinct levels of initiative does not correlate with the procedural aspect of invoking the right to apply by numerous investors. Put differently, the investment fund legal regime does not instruct nor regulate the process of exercising the investment treaty right for initiating the arbitration claim. The latter is sourced from a BIT at review. Therefore, the investment fund legal (Level 1-2) and regulatory (Level 3-4) regimes comprising four distinct levels have little relevance to initiating multiple disputes by numerous investors in the reviewed case scenario.

[Provisional measures]

To continue, the case scenario of abuse appearing in the context of submitting the request for provisional measures is viewed not to influence the reviewed specificity either. The right to submit an investment claim and, subsequently, to apply for provisional measures offered to the investment fund as an investor under the investment protection regime is a procedural right related to the arbitration review process and is not correlated to the investment fund legal regime and its stakeholders.

Certainly, some consideration may touch upon a previously mentioned positive effect appearing as a result of the reviewed specificity. Namely, the complex legal regime encapsulating several levels of regulatory initiative aids the objective of market integrity and, hence, prudency of investment funds that later enter the investment protection regime. However, the author views

[991] *Opinion 2/15 of the Court (Full Court) (The Court of Justice of the European Union) 2017*, para 305
[992] Hallack Issam, "EU international investment policy: Looking ahead" (2022)

the provided effect as general, hence, not included in further quantification of abuse potentiality but offering a contextual background necessary to comprehend the reviewed specificity.

[Escape from criminal prosecution]

In turn, what concerns the case scenario of abuse in the context of escape from criminal prosecution, the reviewed specificity has the standing to influence the potentiality of abuse. Namely, the fund's activity is subject to reinforced supervision on several distinct levels. This also includes the AML/CMT practices[993].

"Every IFM must implement due diligence measures, in particular, on clients, initiators of UCIs, portfolio managers to whom it delegates the management and on investment advisers. The IFM must implement due diligence measures which are adapted to ML/TF risks which may arise from the UCIs it manages."[994]

In this vein, the fund and its structural organs exposed to the legal and regulatory regime initiated by four levels are presumed to face complications in resorting to criminal conduct and further abuse of treaty rights *ab initio*. The AML regulatory requirements imposed over the fund's management and depositary develop more comprehensive compliance if compared to a single source of the regulatory initiative. [995]

For example, CSSF had published the FAQ[996] for supervised investment funds related to AML/CFT aspects and required the compulsory appointment of both Responsible for Respect of Obligations (fr. responsable du respect des obligation (RR)) and Responsible for Control of Respect of Obligations (fr. responsable du contrôle du respect des obligations (RC)). Due to its specificity of being not regulated, Luxembourg's fund vehicle RAIF did not fall under the following requirement.

However, the CSSF had issued a separate FAQ obliging the latter to follow identical requirements.[997] This represents a tailored-made approach to tackling the AML practices deriving from the specificity of the multi-layered structure of legislative initiative where a specific level of the said initiative develops the legal solutions fit for the purposes. Namely, the CSSF, aware of the wide range of investment vehicles offered by the national legislation (RAIF in particular), had issued a separate specification for a destined fund type. The presented approach produces a comprehensive regulatory treatment reached *via* the medium of four legal

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[993] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/698 (2018), para 305; See also Journal officiel du Grand-Duché de Luxembourg, Law of 12 November 2004 (2004), Article 2-1; See also Commission de Surveillance du Secteur Financier (CSSF), Regulation No 12-02 (2012)
[994] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/698 (2018), para 306
[995] For example, see *Valeri Belokon v. The Kyrgyz Republic (UNCITRAL Arbitration Rules 1976) 2014*, Award, para 7, 50-54, 129
[996] Commission de Surveillance du Secteur Financier (CSSF), FAQ regarding persons involved in AML/CFT for a Luxembourg Investment Fund or Investment Fund Manager supervised by the CSSF for AML/CFT purposes (2019)
[997] Commission de Surveillance du Secteur Financier (CSSF), Frequently Asked Questions: Persons involved in AML/CFT for a Luxembourg Reserved Alternative Investment Fund supervised by the AED for the AML/CFT purposes (2019)

and regulatory levels and is expected to increase the prudency of investors in the context of the reviewed case scenario.

[Damages valuation]

Lastly, the case scenario of abuse appearing due to an ill-founded valuation of assets or damages calculation is also relevant to the currently reviewed specificity. The methodologies of calculating the assets and estimating the assets’ value deriving from and enforced by four regulatory levels standardise the process of assets valuation with a subsequent impact on damages recovery in the investment dispute review process.

The closer the regulator is to the assets, the more prudent the fund is in calculating the latter. The given prudency, in turn, will impact the abuse potentiality in the case scenario of damages calculation relying on the assets' true and objective value.

In particular, the AIFMD (Level 1) sets the framework for evaluating the fund’s assets[998] which are later reinforced by the Commission’s non-legislative acts (Level 2)[999] and national rules for evaluating the assets.[1000]

For example, the management company of Luxembourg’s Specialised Investment Fund (EU AIF) evaluated the fund’s assets at EUR 1 billion. Instead, the fund’s liabilities are estimated to be EUR 500 million. At the moment of calculation, the fund had 100,000 outstanding shares. Consequently, the fund's Net Asset Value (NAV) is calculated to be EUR 5000 per share. The latter calculation results from a reinforced four-layer legal and regulatory system developing a comprehensive function of the fund’s asset valuation.

In turn, in the case scenario of abuse *via* speculative damages valuation, the investor claiming the loss of 100 shares received in exchange for invested capital in the specified fund would face a narrow margin of opportunities for inflating the damages incurred with a view of profiting from justice. Namely, when required to establish the asset value of the disputed asset, the investment tribunal will consult the NAV calculation elaborated as the result of the reviewed specificity.

However, the assumed impact is not to be viewed as substantial but rather general because the investment protection regime is liberal in applying varying methodologies for setting the incurred damages. As such, the investment fund is not requested to resort to valuation damages set by the investment fund's legal and regulatory framework for estimating the value of the expropriated asset during the investment arbitration dispute review process. This leaves the said specificity to cause only a partial effect over the risk of resorting to abuse by the investment fund.

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[998] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 19(4)
[999] Ibid, Article 19(11)
[1000] For example, Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/705 (2018); See also Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 02/77 (2002)

Consequently, the specificity of the investment fund legal and regulatory regime comprising several actors (Level 1-4) is deemed to develop a positive effect. Namely, in part of adjusting the investment funds' legislative framework to the needs at a regulatory level of occurrence. For example, the previously mentioned CSSF Regulation 15-03[1001] issued to specify the Luxembourg standards for specific regulatory requirements before marketing the AIF shares to retail clients (AIFMD Article 43), i.e. language requirement, the information to be mentioned in the fund's prospectus and others.

However, despite being positive, the given effect is not substantial nor deciding for the potential acts of abuse. Namely, the diversified regulatory structure comprising several levels of the legislative framework will render a general effect on the investment fund's ill-founded motives for participating in the investment protection regime. Practically speaking, the specificity of the investment fund legal/regulatory regime comprising several levels will have little impact on the intent to abuse.

Instead, it is the legal and regulatory regime in itself, rather than the levels of its initiative and implementation, that are viewed to be the deciding factor in impacting the abuse potentiality of the reviewed case scenarios. Consequently, the author deems the given specificity as causing moderate or close to no effect on abuse potentiality compared to an assumed X rate of abuse potentiality applicable to the rest of the investors.

Projected effect – moderate (X0)

Homogenous legal and legal and regulatory framework

The homogeneity of the investment fund legislation as specificity in the given research is viewed to influence the entirety of case scenarios of abuse examined by the Thesis. This is explained by the fact that investment funds are exposed to the mentioned framework. Hence, the homogeneity of the latter develops an evident influence traceable in every case scenario where the fund's activity is implied.

The EU investment fund legislative and legal and regulatory framework follows the harmonisation rules leaving the Member States a narrow margin for implementing the country-specific legal variabilities unless instructed by the Level 1-2 acts. This implies that the investment fund legal regime uses legally equalised definitions, methodologies and regulatory approaches towards the investment funds in all Member States.

For example, Article 23 of the MAR provides the national competent authorities with a defined list of the universally recognised legal instruments for rendering the supervision and subsequent prosecution. [1002]

[1001] Commission de Surveillance du Secteur Financier (CSSF), Regulation N° 15-03 laying down detailed rules for the application of Article 46 of the law of 12 July 2013 on alternative investment fund managers on the marketing of foreign alternative investment funds to retail investors in Luxembourg (2015)

[1002] Helene Andersson, "Fighting insider dealing at all costs?—due process aspects on the EU market abuse regime" (2022), p. 196-211

The mentioned equalisation is also apparent beyond the EU level. Namely, the International Organisation of Securities Commission (IOSCO) is a private body of international law bringing together the national regulators in securities with the goal of developing the commonly agreed standards (customs) in financial markets.[1003] Unifying the said standards aims to enhance investor protection, assist the technical cooperation between the regulators, and establish common principles for monitoring international transactions.[1004]

The given specificity implies that the investment fund authorised/registered in the EU is exposed to a homogenous legal framework set by two principal legislative bodies (EU Parliament and Council), implemented and updated by the EU Commission and further interpreted and monitored by the ESMA, the national competent authorities. Besides, the corpus of the said rules is further coordinated at the international level amongst the IOSCO members[1005].

This contrasts with the investment protection regime relying on heterogonous interpretations of "one-time" tribunals consisting of rotating arbitrators appointed by the disputing parties. Hence, the specificity in the mentioned part primarily concerns not a specific rule or principle at review but its consistent interpretation and application towards all the investment funds involved. As a result, the latter is subjected to an even regulatory approach impacting the fund's activity in the investment protection regime.

For example, both of the principal EU fund categories are subjected to minimum capital requirement[1006], their activity is to be compulsorily managed by the respective national authority and is subject to unified rules and common definitions that are often cross-referenced in the subsequent Level 1-2 acts[1007].

[Treaty shopping]

In this vein, the *Tokios Tokeles* case representing the case scenario of abuse *via* treaty shopping could be mentioned. The latter had reflected on the margin of opportunities given to investors profiting from the absence of specifications for the term "investor" mentioned by the respective BIT. The treaty agreement concluded between Lithuania and Ukraine had only interpreted the latter in general terms, without providing any conditionalities, i.e. the amount of necessary capital and the capital's origins.

Instead, the arbitrators had interpreted the very same term mentioned by the Ukraine-USA BIT in a more restrictive manner by including the "centre of interest" aspect in the definition of an

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[1003] See official website https://www.iosco.org/about/?subsection=about_iosco [last accessed 23 August 2022]
[1004] See also the doctrinal opinion related to establishing the Single Rulebook on investment fund law as a response to appearing complications and complexities of the latter regime: Alain Strowel and Grégory Minne (eds), L'influence du droit europeen en droit economique (L'arcier 2022), Riassetto Isabelle, Pour un *Single Rulebook* unique en droit européen des fonds d'investissement, p. 303-305
[1005] IOSCO is a private organisation.
[1006] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 8
[1007] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 4(49); See also European Union, Regulation 600/2014 on markets in financial instruments (2014), Article 2(1)(29)

investor. [1008] Consequently, being outside of a single legislative environment where no commonly agreed body has the power to interpret the pertinent legal provisions results in the absence of legislative homogeneity for sharing the legal interpretations recognised by all the participants of one regulatory cluster.

The lack of the said qualities undoubtedly aids the potential increase of abuse, with investors acting in bad faith to profit from uneven or, sometimes, opposing interpretations of treaty provisions and, consequently, arbitration awards. The latter examples had already been mentioned in the previous parts of the given Thesis.

In contrast, the investment fund participating in the investment protection regime derives from a legal environment that is uniform and consistent. The decisions rendered by the European Court of Justice related to the investment fund activity represent a commonly shared legal currency to be compulsorily recognised by all the participants of the single legal regime.[1009] The said benefit of consistency is transposed into the investment protection regime in two principal ways.

Regulatory importing *via* the general application. The given method concerns the general impact over the investment protection regime and its practices to be influenced by the newly appearing actor carrying its regulatory baggage brought into the new legal environment.

The participation of the investment fund in the investment protection regime while still observing the rules of the home jurisdiction implies the effect of regulatory transposition where the investment fund law practices sought by the home State jurisdiction will continue to be followed when exposed to the investment protection regime (double regulatory exposure). This mostly concerns the specific rules also pertinent to the investment protection regime.

For example, the AIFM Directive sets an obligation on the fund managers to run the stress tests in order to "…[t]*o identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed."*[1010] The ESMA further clarifies the latter procedures concerning liquidity and stress testing.[1011]

In this vein, the investment fund exposed to the given rules on investing within the investment protection regime will import the said regulatory requirements to the latter. As such, assumed to cause the change of abuse potentialities by facing the requirement of prudency and due diligence when fulfilling the functions prescribed by the investment fund law, i.e. running the stress tests.

[1008] BIT, Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (1994), Article 1(2)

[1009] For example, see *Ipourgos Ikonomikon, Proistamenos DOI Amfissas v Charilaos Georgakis* (European Court of Justice (CJEU) (C-319/04)) 2007, para 33-35 related to a definition of an insider dealing deriving from the MAR and including in its scope the investment funds; See also *IMC Securities BV v Stichting Autoriteit Financiele Markten* (European Court of Justice (CJEU) (C-445/09)) 2011, para 26 discussing the definition of market manipulation and whether the latter could last for seconds under the MAR; See also Jesper Hansen, "Market Abuse Case Law - Where Do We Stand With MAR?" (2017), p. 388

[1010] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 15(2)

[1011] European Securities and Markets Authority (ESMA), Guidelines on liquidity stress testing in UCITS and AIFs (Final Report) (2020)

Regulatory importing *via* dispute review. The given way of transposing the regulatory requirements into the investment protection regime occurs *via* the dispute review medium. As previously mentioned, the Tribunal in *Tokios Tokeles* lacked a consistent interpretation of the term "investor" mentioned in the relevant BIT. In this context, the investment tribunals often consult the investor's home jurisdiction to analyse the legal provisions applied in the given jurisdiction. Upon identifying the specific regulatory rules or interpretations, they may be applied in the dispute at review, causing the transposition of the home State legal regime into the investment protection regime.

Consequently, it would not be uncommon for the arbitrators to interconnect the investment fund legal and regulatory framework of the Claimant to establish its legal standing in the home jurisdiction. Put differently, combining the national legal provisions of the home State with the BIT definition. Since both legal regimes deal with investing, it is expected that certain definitions and their further interpretations produced by the investment fund legislative framework will be further reinforced in the investment protection regime and the specific case at review. The given process had already been mentioned in the current Thesis when discussing the Fedax v. Venezuela case questioning the matter of the property regime of the disputed asset and whether the promissory notes were equalised in the legal regime to loans under the national legal order. [1012]

Instead, in the investment fund law, the arbitrators may use the commonly recognised definition of a derivative to estimate further its property regime and the jurisdictional validity of the investment at review. [1013] For these reasons, the norms importing from the homogenous legislative framework developed for investment funds will limit the margin of opportunities for abusers willing to resort to the ill-founded exercise of treaty rights relying on uneven legal regimes and the absence of commonly agreed interpretations. Namely, in the case scenario of treaty shopping.

As a result, the arbitrators will not only import the specific definitions into the existing dispute at review but also the benefit of its consistent and homogenous interpretation deriving from the investment fund legal regime. For example, by basing its argumentation on the MIFID II Directive related to categorising the investors into two principal groups under the maximum harmonisation rule, i.e. retail and professional clients. [1014]. In this way, the treaty definition of the investor will be enriched with the legal impetus deriving from the investment fund legal and regulatory regime.

Therefore, the "importing" of certainty and consistency deriving from the mentioned consulting of legal provisions of the home State will benefit the loosely defined BIT definitions requiring precision and having to go through inconsistent interpretations of "one-time" tribunals. In this way, the specificity of staying at the heart of the investment fund legal and legal and regulatory

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[1012] *Fedax N.V. v. The Republic of Venezuela (ICSID Case No. ARB/96/3) 1997*, para 30
[1013] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 4(49); See also European Union, Regulation 600/2014 on markets in financial instruments (2014), Article 2(1)(29)
[1014] European Union, Directive 2014/65/EU on markets in financial instruments and amending (MIFID II) OJ L 173 (2014), Article 4, Annex II

framework will transpose the bits into the investment protection regime. As a result, limiting the uncertainty on which the abuse grows by strengthening the investment protection regime.

[Damages valuation]

The given effect is also traced in various case scenarios of abuse linked to a judicial review. For instance, the case scenarios of damages valuation. The investment fund law obliges the management companies to render the fund's asset valuation. The Level 1 acts set the latter.[1015] *"Reliable and objective asset valuation is crucial for the protection of investor interests."*[1016]

Importantly, the national law sets the rules on asset valuation, however, they are implied to be not divergent.[1017] *"It is appropriate to recognise those differences but, nevertheless, to require in all cases AIFMs to implement valuation procedures resulting in the proper valuation of assets of AIFs."*[1018]

The EU regulator develops a common framework for the said national rules *via* delegated acts to ensure the mentioned goal. For instance, the Commission Delegated Regulation 231/2013. The latter lays down the elements to be compulsorily included in the national valuation policies. This comprises verifying the competence and independence of personnel, the controls over the selection valuation inputs, the appropriate times for closing the books for valuation purposes and others.[1019]

In this way, the said obligation applicable to all the investment funds, although with the variability of valuating approaches, develops the common standard of valuation comprising the key elements of the latter process.

To put the given specificity to practice, if a potential dispute appears in the investment tribunal, the investment fund being a disputing party, may be called for an estimate of the alleged damages and asset valuation. The latter will reasonably be expected to apply the same methodology used by the investment fund legal and regulatory framework without "inventing" any other beneficial or "comfortable" methods to profit from justice and abuse the investment protection regime.

As already mentioned, the investment protection regime does not impose a legal obligation on investment funds to apply the asset valuation methodology deriving from the investment fund legal and regulatory framework on the disputed asset for calculating the alleged damages in investment arbitration. However, not using the most relevant methodology for the disputed asset

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[1015] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 85; European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 19(1)
[1016] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Preamble (29)
[1017] Ibid, Preamble (82)
[1018] Ibid, Preamble (29)
[1019] European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 67(2)

may validly raise concerns from the opposing party and the investment tribunal and serve as the procedural trigger for further investigating the potential abuse in the investor's standing.

As a result, the homogenous regulatory environment impacting the abuse potentiality will also extend its positive effect on the investment protection regime where the investment fund involved in the arbitration dispute will be expected to apply the valuation standards deriving from the home State.

[Escape from criminal prosecution]

To continue, the consistency of the investment fund legal and legal and regulatory framework also aids in better tackling abuse by limiting its potentiality in case scenario of escape from criminal prosecution. Namely, the well-defined legal (Level 1-2) and regulatory (Level 3-4) regime applicable to the Member States evenly implies limiting criminal conduct, i.e. money laundering practices. Consequently, narrowing the margin of opportunities to those investors seeking to abuse the investment protection regime by elevating the criminal review dispute at the international level.

Unlike the investment protection regime, the investment fund's legal and regulatory framework tackles money laundering practices for the investment fund's activity before the latter appears and in various settings. [1020] For instance, the asset valuation methodologies[1021], the activity of the depositary and the management company carry the provisions on AML/CFT.[1022] The said provisions are continuously maintained and updated. For instance, in the recent Guideline issued by the CSSF (29 November 2021) on virtual assets, it has been underlined the fund's investing in virtual assets increases the risk of money laundering, therefore, the fund's management shall include the said risks in AML reporting.[1023] In this way, the homogenous legal and regulatory framework develops the effect impacting the potential occurrence of abuse *via* a proactive approach to tackling the potential criminal conduct in the investment fund activity. Consequently, lowering the potentiality of abuse in the case scenario of escape from criminal prosecution.

In contrast, the investment protection regime tackles the latter activity when reviewed by the investment tribunal, *post factum* of its occurrence. In this vein, the apparent advantages deriving from the investment fund's uniform and comprehensive legislative environment develop a

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[1020] For example, in terms of the fund management company fulfilling its functions, Commission de Surveillance du Secteur Financier (CSSF), Regulation No 10-4 as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (2010), Article 35; See also Journal officiel du Grand-Duché de Luxembourg, Law of 12 November 2004 (2004); Commission de Surveillance du Secteur Financier (CSSF), Regulation No 20-05 on the fight against money laundering and terrorist financing (2012); See also CSSF's official website https://www.cssf.lu/en/anti-money-laundering-and-countering-the-financing-of-terrorism/ [last accessed 25 August 2022]

[1021] European Union, Commission Delegated Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision OJ L 83 (2012), Article 83(1)(m)

[1022] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/698 (2018), Sub-chapter 5.4 ; See also Journal officiel du Grand-Duché de Luxembourg, Law of 25 March 2020 establishing a central electronic data retrieval system related to IBAN accounts and safe-deposit boxes (2020)

[1023] European Securities and Markets Authority (ESMA), FAQ – Virtual assets (UCIs) (2021), Question 4 specificity of creating an abuse-lowering effect in the case scenario of escape from criminal proceedings.

[Claims multiplication] [Provisional measures]

What concerns the proliferation of claims in the context of numerosity and application for provisional measures, the investment fund specificity of a homogenous regulatory environment causes no specific effect but rather a general positive influence exposing the investment funds to the objectives and goals of the latter. Namely, the market integrity and investor protection that, *inter alia,* aimed at abuse prevention.

The latter deduction is made based on the previously discussed differences in the exercise of rights. In particular, the case scenarios for claims proliferation or applying for provisional measures derive from the procedural right to apply when seeking investment dispute resolution. Instead, the investment fund's specificity in providing a homogenous legal (Level 1-2) and regulatory (Level 3-4) regime does not correlate with the ill-founded use of procedural rights. Therefore, the latter's effect is deemed as general in these two case scenarios.

Overall, both general and specific positive effect is confirmed to derive from the said legal specificity for lowering the risk of abuse in the investment protection regime. For example, the previously discussed asset valuation process or specification of the property regimes for distinct assets, i.e. derivative. The use of common definitions and methodologies representing a legal currency freely exchanged among its members and further imported into the investment protection regime had been confirmed to render it more troublesome for the abuse potentiality to appear.

On this basis, the author deems the effect of the abuse potentiality *via* the medium of norms importing deriving from the said legal specificity as substantial and worth recognising. For these reasons, the latter's effect is assumed to cause a decreasing effect on abuse potentiality in the investment protection regime.

Projected effect – decreasing (X-1)

Investors' numerosity

[Claims multiplication]

The investors' numerosity as the investment funds' most distinct specificity is most relevant to the case scenario of claims multiplication. Namely, the investment protection regime had long recognised the right of minority investors (less than 50 per cent of shares) and indirect investors (fund shareholders) to submit their individual claims to investment arbitration tribunals.[1024]

As already mentioned (Part III, Section 2), the given right is tempered by the requirement of having independence from the rest of the investors' claims as suggested by the case practice, i.e.

[1024] For example, *Gami Investments, Inc. v. The Government of the United Mexican States (UNCITRAL (Under NAFTA Agreement)) 2004,* Award, para 37, 43

Orascom dispute, as well as other qualifying requirements, i.e. good faith, treaty definition and *Salini* test.

The activity of claims multiplication shall be understood in the context of exercising the right to apply by numerous investors with the motives contravening the law's objectives, i.e. profiting from justice (double recovery), obstructing the judiciary or bringing negative publicity to the host State. Put differently, the right to apply exercised in the context of numerosity of investors shall not be viewed as a legal weapon multiplied by the amount of those exercising such right.[1025]

Needless to say, the investment fund's structure, i.e. legal design, rests on the specificity of numerosity – investing *via* the avenue of collective pooling of capital from many investors subscribing to the fund's shares/units. The rule of logic suggests that the more investors there are, the bigger the chance of abuse. Therefore, the case scenario of claims multiplication is most evident to be heavily impacted by the said specificity in part of promoting the increase of claims against the host State in bad faith.

[Escape from criminal prosecution]

In the author's view, the case scenario of escape from criminal proceedings *via* the exercise of the right to apply may also coincide with the reviewed specificity. Namely, the more those willing to escape criminal prosecution using the treaty rights offered by the investment protection regime, the bigger the potentiality of abuse in the way of initiating the dispute against the host State to elevate the criminal prosecution initiated against a specified investor participating to the investment fund that is treaty-protected.

Consequently, numerosity is viewed to test the capability of the legal regime to sustain itself. The negative effects deriving from the previously reviewed dispute of *Phoenix Action* may multiply in case the claimant is the investment fund consisting of numerous shareholders or unitholders initiating separate disputes to elevate the criminal prosecution review process to the investment arbitration level. This will challenge the legal regime to process an increased number of disputes by a privately constituted arbitration tribunal. In particular, the capacity to apply a wholesome and qualitative analysis to the multiplied facts and procedural questions necessary to be reviewed. Consequently, impacting the quality of the review process and developing fertile procedural conditions for abuse to appear.

Therefore, the author views the legal specificity of numerosity to increase the abuse risk in the case scenario concerning the criminal escape from national prosecution. The investment fund consisting of numerous investors will multiply the potential disputes leading to subsequent testing of the procedural resilience of a particular tribunal at review.

[1025] *Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) 2019,* Decision on Jurisdiction, para 117

[Provisional measures]

Using the legal mechanism of provisional measures, the abuse case scenario may also fall victim to the given specificity. Namely, the increased number of claimants leads to an increased potentiality for applying for provisional measures sourced by the ill-founded intent, hence, obstructing the review process. Put differently, the procedural right for initiating the provisional measures directly correlates with the number of applicants participating in the mentioned procedural review.

Moreover, considering the capabilities of one-time tribunals usually consisting of three arbitrators, the given practice will severely limit the judiciary capacities and challenge the conceptual standing of the investment protection regime. Namely, numerous investors submit individual claims without intent to seek justice but obstruct the dispute review process.[1026]

[Damages valuation]

Under the given reasoning, the case scenario of abuse *via* damages valuation[1027] is also impacted by an increased number of those submitting their claims against the host State. As mentioned, the investment protection regime enjoys no homogenous legislative framework providing the methodology for damages valuation and compensation estimation. The variety of potential methods suggested by numerous investors participating in arbitration disputes may hinder the capacities of the tribunal to analyse the proposed methods and offer a fair amount of review time, i.e. procedurally burdening. Hence, creating uncertainties comfortable for abuse to appear.

[Treaty shopping]

What concerns the treaty shopping case scenario, the author sees lesser influence over the abuse potentiality considering the investment fund to not change its place of registration despite several investors submitting their claims from varying jurisdictions. The investment fund legislation obliges the fund to select a place of registration in one of the Member State's jurisdictions.[1028]

The investors exchanging their capital for the fund's shares/units preserve the right to initiate an individual arbitration dispute. The latter assumption is sourced from the investment arbitration case practice recognising the jurisdictional standing of investors holding a minimum amount of shares. For example, in the *Lanco* dispute with investor purchasing 18,3%[1029] or *Gami*

[1026] See *Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5) 2016*, Decision on Jurisdiction, para 470-471 discussing the aspect of numerosity of investors.

[1027] *Chorzow Factory Case (Germany v. Poland) (Permanent Court of Arbitration) 1928*, Merits stage, para 125; See also United Nations Reports of International Arbitral Awards (UNRIAA), Opinion in the Lusitania Cases (1923), p. 39

[1028] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 2(e); European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Article 4(1)(p)(q)

[1029] *Lanco International Inc. v. The Argentine Republic (ICSID Case No. ARB/97/6) 1998*, Decision on Jurisdiction, Part III Reasons, para 10

Investment v. the United States dispute revolving around the ownership of 14%[1030]. The latter approach is doctrinally supported:

"…([I]*magine, for instance, 100 different shareholders each owning a mere 1% of the corporation's shares). Nothing (apart, of course, from the high costs of pursuing international arbitration) would prevent all these different shareholders from filing their own separate claims against the host State for the same treaty breach".*[1031]

In cases where the investment fund is structured in a contractual form (FCP), the unit holders[1032] also remain co-owners in invested assets under the *sui generis* legal regime.[1033] Therefore, both of the fund's legal forms provide to its shareholders/unitholders the modality to pursue the protection of their property rights individually, provided the principle of good faith is followed. This includes the independence from the rest of the co-shareholders and co-unitholders as discussed in the *Orascom* dispute (potential claim multiplication[1034]) as well as adherence to other qualifying requirements, i.e. treaty definition.

However, the potentiality of the separate unit holder of the contractual fund or shareholders of investment funds established as a legal entity to seek justice by circumventing the management company is to be left as a mere potentiality due to practical constraints related to financial feasibility. Namely, the economic reasonableness for submitting numerous claims by many retail investors retaining only a fraction of the invested asset appears to be less probable.

Importantly, the specificity of the legal treatment of the contractual fund underlines the previously discussed effect of regulatory importing, where the investment tribunal resolving the dispute involving the contractual fund must compulsorily consult the national law to identify the potential impact due to varying fund legal forms.

The cumulation of the mentioned arguments suggests the pertinent to investment fund specificity of investors' numerosity to have an implicit and heavy influence over the investment protection regime in the form of an increased abuse potentiality risk. Collectivity is heavily implied in the investment fund legal (Level 1-2) and regulatory (Level 3-4) regime and the very essence of the investment fund activity provides a more fertile soil for abuse to appear.

Projected effect – increasing (X+1)

[1030] *Gami Investments, Inc. v. The Government of the United Mexican States (UNCITRAL (Under NAFTA Agreement)) 2004*, Award, para 37, 43

[1031] Martin Valasek and Patrick Dumberry, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes" (2011), p. 71

[1032] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Article 1(30)

[1033] Isabelle Riassetto and Michel Storck, "Les compartiments d'OPC entre indépendance et dépendance", in "Droit bancaire et financier Mélanges AEDBF-France VII"(2018) Revue Banque Edition, p. 353

[1034] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) 2017*, Award, para 543

Minimum capital requirement

The investment fund law relies on the principle of setting a minimum capital requirement for investment fund types, the fund's structural organs and even fund shareholders. The latter approach is a distinct legal specificity deriving from the investment fund law.

For example, the Luxembourg SIF law sets the minimum capital amount at EUR 1,250,000[1035] for the given fund type. Instead, the EUVECA fund established under the EU law sets no minimum capital to attain for the fund. Instead, the participants in the latter shall invest a minimum of EUR 100,000.[1036]

At the same time, the UCITS external management company shall reach a capital of EUR 125,000[1037] , and the AIF management company shall have no less than EUR 300,000[1038]. For the AIF depositary, the minimum capital is EUR 730,000.[1039] The only exception to the general rule is the UCITS depositary which falls under no such requirement.[1040]

The minimum capital requirement, present in varying forms, is set to ensure the integrity and resilience of financial markets where setting the minimum capital to obtain serves the function of a financial strength necessary in changing market conditions. Despite fulfilling the said goal, the given requirement also affects the investment protection regime, where the investment fund and its structural organs fall under a specific monetary requirement.

In general, the latter is to cause a positive effect of abuse decrease for all the scenarios. The feature of a minimum capital requirement could be compared to the previously discussed aspect of the capital intensity of investment disputes where investors are discouraged from resorting to abuse (external factor) in light of facing the potentiality of being denied access to investment arbitration with subsequent treaty protection for the mentioned capitals. Namely, the bigger the amount of the investment at dispute, the lower the chance the investor will abuse the treaty rights due to the potentiality of having the arbitration tribunal deny the jurisdictional standing.[1041]

By this logic, the minimum capital requirements set by the investment fund law develop the external factor decreasing the investor's rationale for resorting to the ill-founded use of law when faced with the potentiality of having the costly authorisation revoked or registration annulled.

For example, in the *Phoenix Action*, the investor registered an enterprise in Israel to profit from treaty protection with the subsequent intention to abuse. The latter had cost its owner a fee levied

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[1035] Journal officiel du Grand-Duché de Luxembourg, Law of 23 July 2016 on reserved alternative investment funds (RAIF) (2016), Article 25
[1036] European Union, Regulation 345/2013 on European venture capital funds OJ L 115 (2013), Article 6(1)(a)
[1037] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Article 7(1)(a)
[1038] Journal officiel du Grand-Duché de Luxembourg, Law of 12 July 2013 on alternative investment fund managers (2013), Article 8
[1039] Ibid, Article 19(3)(i) (for the MC aiming to receive the status of an investment firm)
[1040] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 16/644 (2016), Part II
[1041] For example, see the previously reviewed *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, Decision on Jurisdiction

by the national regulator not exceeding the regular amount for establishing an ordinary legal entity.

However, establishing an investment fund with the subsequent and sole purpose of abusing the treaty right would mean sparing a substantial amount of capital in order to reach the monetary requirement. The latter is not sought from the rest of the investors participating in the investment protection regime, hence, forming a separate legal specificity to analyse against the case scenarios of abuse.

[Treaty shopping]

In the treaty shopping case scenario, the previously mentioned reasoning contemplates greatly. The minimum capital requirement established by the national law would discourage the investment fund to re-register to seek abuse of treaty rights *via* the avenue of treaty shopping.

The given requirement tampers the fund registering for obtaining the most convenient jurisdictions, especially intending to defend oneself in minor investment disputes. As such, if treaty shopping is done to abuse the investment protection regime, the minimum capital requirement works as an automatic prevention mechanism.

Interestingly, the EU MS apply varying national approaches toward the minimum capital requirement. For example, in France, the minimum capital requirement for a UCITS shall be no less than EUR 300,000 from its constitution day.[1042] The Cypriot law sets a minimum of EUR 500,000 worth of assets to reach in the first twelve months since authorisation by the national competent authority for AIF funds[1043]. However, the general rule provides the monetary requirement is pending for the investment fund and its structural organs across the EU jurisdictions. Furthermore, the latter is substantially higher than what is often levied by the national registrar for setting up an ordinary commercial enterprise, i.e. not an investment fund investor.

On this basis, the reviewed specificity is deemed to lower the abuse potentiality in the case scenario of treaty shopping. When facing an increased monetary requirement, the investment fund will be discouraged from resorting to treaty shopping practices with a view of abuse.

[Claims multiplication]

The same reasoning applies in the case scenario of abuse *via* claims multiplication. Namely, when discussing the modality of capital pooling *via* master-feeder structure. As already mentioned, the latter legal mechanism allows the participation of several investment funds to pool the assets together *via* two distinct methods: (1) entity pooling and (2) virtual pooling. When the use of several distinct investment funds (entity pooling) is implied, the potentiality for submitting multiple claims in bad faith appears. The more funds are pooled together, the bigger the risk of abuse is at stake. However, the latter potentiality is tampered by the reviewed

[1042] France, Code monétaire et financier (2013), Article D214-6
[1043] Cyprus, Law which provides for the alternative investment funds and other related matters (No. 4669/124(I)/2018) (2018), Article 14(1)

specificity of minimum capital requirement. The minimum capital requirement imposes a financial restraint on the investment fund for initiating multiple claims in bad faith. Consequently, the objective of abusing the investment protection regime by submitting numerous claims by many investment funds pooled together will be futile. In particular, due to the monetary requirement imposed on each pooled funds.

[Provisional measures]

In the case scenario of provisional measures, initiating the latter in bad faith requires the disputing party to the process. Consequently, the minimum capital requirement is to be fulfilled before receiving the authorisation/registration necessary for entering the investment arbitration dispute and subsequent request applying for initiating the provisional measures in bad faith. On this basis, the author views the regulatory requirement setting the minimum capital for the investment fund and its structural organs to produce the abuse-decreasing effect in the mentioned case scenario.

[Damages valuation] [Escape from criminal prosecution]

By the same logic, the minimum capital requirement will cause the abuse potentiality to decrease in the remaining case scenarios. Namely, the investment funds exposed to the minimum capital requirement will be less pruned to abusing the treaty rights in scenarios of damages valuation and escape from criminal proceedings. In particular, the monetary capital requirement sought from the investment fund may often be more in monetary expression than the envisaged result of abuse.

In this context, the author does not imply the abuse potentiality will decrease *ab initio* where the potential abuser will not resort to exercising the treaty rights with ill-founded motives at all. Instead, the author suggests the investor seeking to resort to potential abuse, i.e. damages valuation or escape from criminal justice case scenarios, will use other options requiring less rigorous rules on minimum capital to profit from treaty protection. For example, by registering a commercial enterprise or obtaining the status of a resident from a home State. In this way, the potentiality of abuse will not disappear but migrate from the investment fund field (group 1) to the category of all other investors (group 2) because of a minimum capital requirement rendering it financially burdening to register the investment fund for a consequent act of abuse.

Therefore, the minimum capital requirement, as a legal specificity examined in the current research against case scenarios of abuse, has been affirmed to deter investors from using investment fund vehicles with a view of resorting to abuse.

The monetary requirement that the regulator originally envisaged as a mechanism for preventing the negative effects of systemic financial risks and a way of strengthening the resilience of investment funds had developed the effect of abuse repellent due to the minimum capital requirement imposed. Put differently, it is less reasonable or feasible for an investor intending the act of abuse to use the investment fund as an instrument.

Consequently, the investment fund's specificity develops the abuse decrease effects in the investment protection regime under the legal phenomenon of norms importing. This renders a somewhat formal minimum capital requirement to produce the effects equal to an abuse repellant where the use of the investment fund as an instrument of abuse becomes futile for investors due to monetary constraints.

Projected effect – decreasing (X-1)

The management company and depositary

The given part will review how the investment management company(manager) and depositary enshrined in the investment fund legal design influence the abuse potentiality in the investment protection regime. This will be done by looking at the most relevant functions of the mentioned organs in the context of investment fund activity.

The functions of the management companies are mentioned in Article 6 of the respective Directives, further referring to Annex II of the UCITS Directive and Annex I of the AIFM Directive, respectively, specifying the exhaustive list of what is envisaged by the regulators.

UCITS management company: investment management, administration (accounting, customer inquiries, valuation and pricing, regulatory compliance monitoring, maintenance of unit-holder register, distribution of income, unit issues and redemptions, contract settlements and record keeping), marketing[1044] Therefore, the three principal categories of activity are put on the management company in the form of a regulatory obligation: (1) investing, (2) administration and (3) marketing.

AIF management company: investment management functions (portfolio management and risk management), administration (legal and fund management accounting services, customer inquiries, valuation and pricing, including tax returns, regulatory compliance monitoring, maintenance of unit-/shareholder register, distribution of income, unit/shares issues and redemptions, contract settlements and record keeping), marketing and services necessary to meet fiduciary duties.[1045]

Besides, the legislator further implies the specific organizational requirements to be sought from the management to reach the said goals. The latter is outlined by the CSSF Regulation 10-4[1046] and further specified by CSSF Circular 11/512[1047].

For example, the organisational structure of the management company of the fund shall be done in such a way that the risk management division is hierarchically[1048] distinct from the rest of the

[1044] European Union, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302 (2009), Annex II

[1045] European Union, Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) OJ L 174 (2011), Annex I

[1046] Commission de Surveillance du Secteur Financier (CSSF), Regulation No 10-4 as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (2010)

[1047] Commission de Surveillance du Secteur Financier (CSSF), Circular 11/512 (2011) company. In turn, the risk management policy implemented by the company will "…[e]*nsure compliance with the UCITS' risk limit system, including statutory limits concerning global exposure and counterparty risk in accordance with Articles 46, 47 and 48 of this Regulation"*[1049].

The function of risk management, as an element of the management company functions, aims at reaching market integrity – the antonym of abuse. This, in particular, is implemented in the Regulation on market abuse setting the goal of reaching market integrity[1050]. In this way, while performing its obligation, *inter alia*, the management company impacts the abuse potentiality. The more efficient and prudent the said performance, the lower the abuse risk is to appear in the investment protection regime *via* the medium of norms' importing reviewed before.

Another aspect of the management's functions impacting the abuse potentiality is the due diligence requirements put on the latter. The CSSF Regulation 10-4 provides: "[M]*anagement companies shall ensure a high level of diligence in the selection and ongoing monitoring of investments, in the best interests of UCITS and the integrity of the market."*[1051].

To reach the said goal, "[M]*anagement companies shall establish written policies and procedures on due diligence and implement effective arrangements for ensuring that investment decisions on behalf of the UCITS are carried out in compliance with the objectives, investment strategy and risk limits of the UCITS."*[1052]

Consequently, the legal regime establishing the organisational structure of the management company/manager implemented in the fund's legal design ensures the goal of market integrity through several distinct methods. This includes (1) putting the procedural (separation of specific parts of the company) and (2) material (setting written policies) legal constraints aimed to ensure the impartiality of the management company when performing its functions. Put differently, the fund's legal design compulsorily includes the management company and further obligations put on the latter, i.e. due diligence and organisational requirements, develop into impetus affecting the abuse potentiality in the investment protection regime.

For example, the investment fund management attempting to resort to abuse in investment arbitration will face fewer opportunities when requested to follow the regulatory requirements of due diligence, continuous reporting and compulsory organisational structure provisions.

Instead, the institute of depositary provides an identical set of functions for the UCITS and the AIF funds (Level 1): (1) safekeeping of assets, (2) oversight responsibility and (3) cash flow

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1048 Commission de Surveillance du Secteur Financier (CSSF), Regulation No 10-4 as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (2010), Article 13(2)
1049 Ibid, Article 13(3)(b)
1050 European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Preamble
1051 Commission de Surveillance du Secteur Financier (CSSF), Regulation No 10-4 as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (2010), Article 26(1)
1052 Ibid, Article 26(3)

monitoring. The oversight responsibility is most relevant to the current research as it represents the process of the depositary's supervision of the fund and its management company/manager to comply with the investment fund legal (Level 1-2) and regulatory (Level 3-4) regime. For example, at Level 2, the Commission Implementing Directive 2010/43 regularises the relations between the UCITS management company and the depositary. This includes the particularities to be compulsorily included in the agreement between the two: where the depositary shall have access to all the necessary information and the description of procedures to inquire about the conduct of the management company.[1053] The latter requirement is reiterated in the Level 4 CSSF Circular obliging the depositary to have access to all relevant information to fulfil its duties[1054], *inter alia*, impacting the abuse potentiality *via* means of legislative obligation to investigate the conduct of the management company/manager by the depositary and vice versa.

Another example is the obligation put on the management company/manager and the depositary to develop the self-assessment questionnaire annually, aimed at "...[s]*trengthening of the legal, regulatory and prudential provisions applicable (to investment fund managers)"*[1055]. For this reason, the management company and the depositary are required to assign individuals amongst its employees specifically responsible for preparing and submitting the reports related to the occurrence of the mentioned irregularities.

As previously mentioned, the specific procedures of escalation are set for depositaries by the CSSF. For instance, in Circular 16/644 (Level 3):

"The depositary is required to provide the CSSF, upon request, with all the information the depositary has obtained in the performance of its duties and which might be necessary to allow the CSSF to monitor compliance with the laws and regulations applicable to the depositary as well as the UCITS for which the credit institution acts as depositary."[1056]

The fulfilment of the said functions put on the depositary and management company/manager represents the organisational rules manifesting the previously discussed supervision process vis-à-vis the fund[1057], its investors[1058] and the competent authorities[1059].

The given supervision develops in a separate legal specificity alleged to impact the abuse potentiality in the examined case scenarios. In particular, the author views the latter as a positive effect of abuse decrease in part of ensuring better and more effective compliance with the requirements set by the investment fund legal framework. The fulfilment of the said

[1053] European Union, Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company OJ L 176 (2010), Article 30 (d)(e)(f)
[1054] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/697 (2018), Chapter 2, p 41
[1055] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 21/789 (2021), p. 5
[1056] Commission de Surveillance du Secteur Financier (CSSF), Circular CSSF 18/697 (2018), para 158
[1057] For example, see ibid, Part IV (para 156-157)
[1058] For example, see ibid, para 29: "With respect to the full range of tasks incumbent upon it, the depositary has an oversight duty which implies a liability for its failure to perform its obligations or improper performance thereof. In accordance with the Luxembourg law, the depositary is thus liable vis-à-vis the investors for any damage they may suffer as a result of the failure to perform its obligations or improper performance thereof."
[1059] For example, see ibid, Part IV (para 158-160)

requirements ensures market integrity, which, subsequently, includes the objective of abuse prevention – the legal phenomenon to be eliminated when reaching the sound functioning of the financial services markets. The author argues the given effect is traceable in all the case scenarios examined in the current research.

The said organs ensure the fund complies with the regulatory requirements internally[1060], along the way with the external control rendered by the national competent authority. Consequently, double supervisory control is reached. The said control remains present when the investment fund consisting of the management company and depositary, enters the investment protection regime.[1061]

[Treaty shopping]

For instance, in the case scenario of abuse *via* treaty shopping, the regulatory requirement for the management company and the depositary to obtain authorisation before the national competent authority develops into an effect of abuse decrease.

Both of the mentioned organs must undergo a rigorous evaluation by the national competent authority before receiving authorisation.[1062] *"Access to the business of management companies having their registered office in Luxembourg within the meaning of this Chapter is subject to prior authorisation by the CSSF."*[1063]

This includes fulfilling several distinct criteria. For example, see the list of requirements for an AIF management company:

"The CSSF will grant authorisation to the company only on the following conditions:

1. *(a)it shall have sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities; in particular it shall have a minimum paid-up capital of one hundred and twenty-five thousand euro (EUR 125,000); a CSSF regulation may raise that minimum amount to a maximum of six hundred and twenty-five thousand euro (EUR 625,000);*
2. *(b)the funds referred to in paragraph 2(a) are to be maintained at the management company's permanent disposal and invested in its own interests;*
3. *(c)the dirigeants of the management company, within the meaning of Article 129(5), shall be of sufficiently good repute and have the professional experience required for the performance of their duties;*

[1060] The internal control implied in this context is aimed to describe the two principle channels of control: by the NCA and the fund's structural organs. This to be understood despite the evident fact of many funds managed by external companies not constituting the part of the said fund. However, in the given context, the division between the external and internal control is to be kept.
[1061] The latter aspect is only applicable to regulated funds, i.e. falling under the EU legal regime (UCITS and AIF Directives).
[1062] Journal officiel du Grand-Duché de Luxembourg, Law of 17 December 2010 relating to undertakings for collective investment (UCI) (2010), Part IV
[1063] Ibid

4. *(d)the identity of reference shareholders or members of the management company shall be provided to the CSSF;*
5. *(e)the application for authorisation shall describe the organisational structure of the management company."*[1064]

As a result, the investment fund compulsorily requiring the management company and depositary to render its activity will face a higher procedural burden than the rest of the investors participating in the investment protection regime when planning to change the jurisdiction with a view of abuse. Consequently, the said procedural constraint is expected to limit the investor's intent of utilising the investment fund vehicle as an instrument of abuse in the case scenario of treaty shopping.

This is primarily understood for the UCITS fund category, where the authorisation of the management company (investment actor) is as necessary as the authorisation of the fund product (Article 5 UCITS Directive). Hence, before registering the fund in another EU jurisdiction, the fund must undergo an additional authorisation for the management company appointed to the latter.[1065]

[Claims multiplication]

In the claims multiplication case scenario, a similar logic may be applied. The investment funds using the master-feeder structure and submitting individual claims against the host State will face the compulsory requirement related to the authorisation and supervision of the management company and the depositary. The more funds submit their claims, the higher number of authorisations to be received for its structural organs.

The latter limitation narrows the margin for potential abuse due to the necessity of contracting the management company[1066] and depositary for every fund participating in the master-feeder structure. Consequently, the investor is discouraged to resort to abuse *via* the medium of investment fund vehicles for acting in bad faith in case scenario of claims multiplication.

[Escape from criminal prosecution]

The case scenario of abuse *via* the escape from criminal prosecution also coincides with the mentioned deduction. In addition, the national competent authority puts an implicit obligation on the said structural organs related to prohibited practices of AML/CFT stemming from Level 1-2 acts as well as Luxembourg's Law of 12 November 2004[1067]. The prohibited activities are often the reason for the investor to abuse the treaty protection with a view of escaping the home State investigations.

For example, the fund's management company invests its capital in purchasing the third State bank suspected of money laundering. The investment is made without rendering prior due

[1064] Ibid, Article 125-1(2)
[1065] Applies to an EU law regulated funds.
[1066] For funds with external management.
[1067] Journal officiel du Grand-Duché de Luxembourg, Law of 12 November 2004 (2004)

diligence verifications imposed by Luxembourg's law provisions.[1068] The host State suspects potential AML violations and initiates the investigation. With a view of receiving legal protection, the investment fund management/manager invokes the treaty protection alleging the said investigations amount to indirect expropriation.

In this vein, the depositary is charged with record-keeping of the fund's assets and is obliged to report the assets red-flagged under the AML/CFT provisions to the national competent authority. The said function would deter the fund's management from getting involved in transactions violating the AML provisions, *ab initio* and vice-versa when the management company suspects the violation of the AML/CFT provisions from the side of the depositary.

The fund's legal design instructing the mutual control of the fund's key structural organs impacts better regulatory compliance where the supervision rendered by the national competent authority externally is also complimented by the internal control performed by the management company and depositary. The given approach decreases the violations of the AML/CFT provisions with a consequent diminishing of abuse appearing out of the said practices in the case scenario of escape from criminal provisions.

[Damages valuation] [Provisional measures]

What concerns the rest of the case scenarios deriving from an exercise of procedural rights, i.e. abuse *via* damages valuation and the use of provisional measures, the author views the mentioned examples as having less relevance to the said legal specificity. Namely, the supervisory function of the management company and the depositary do not coincide with the exercise of a treaty right to apply in the course of procedural review of an investment arbitration claim.

Nonetheless, in the author's opinion, the general decreasing effect is still to be found. In particular, the regulatory requirement set by the UCI Law 2010 (Chapter 15) on the good repute (dirigeants of the management company and depositary) and due diligence, are expected the fund to have a lesser recourse to a treaty exercise in bad faith in comparison to the rest of investors having no implicit obligations of good repute and due diligence.

Consequently, the investment fund's legal design stemming from the recurring legislation develops two distinct internal actors charged with the function of the fund's supervision and compliance, *inter alia*, aiming at lowering the abuse. Hence, there is an evident causality affirming the mentioned specificity to cause the abuse decrease effect in the investment protection regime *via* the medium of the "norms importing" phenomenon.

Projected effect – decreasing (X-1)

Market Abuse Regulation (MAR)

As already mentioned, the Regulation developed for tampering with the abuse in the financial markets targets two specific types of activity relevant to the financial markets: market

[1068] Ibid, Article 2(2), Article 3-1 and other related to control and due dilligence manipulation and insider dealing. The methodology for detecting the abuse is rendered *via* the legal device of "unlawful behaviour". The regulator sets the list of indicators[1069] implying the presence of unlawful behaviour. Further, the market operators monitor the entirety of transactions against the mentioned indicators and report to the national competent authorities.

This renders the MAR's legal device for abuse detection conceptually different from the investment protection regime and its subsequent case practice. Namely, in part of applying an automated system of algorithmic surveyance *in lieu* of "manually" analysing the intents and motives of individuals submitting the said orders and executing the transactions. [1070]

As previously mentioned, the combined regulatory efforts of MAR and the investment arbitration case practice have been confirmed to enhance the abuse decrease in the investment protection regime as a general effect. This had been suggested due to two specific considerations: (1) the MAR's goal for market integrity correlates, *inter alia*, with the abuse prevention objective, and (2) the combination of efforts for prosecuting the abuse by two distinct legal methods is viewed to enhance the abuse prevention by recognising a broader scope of abuse practices, hence, lowering its potentiality.

Besides, the Regulation on market abuse and its effects must be understood in the context of the two previously mentioned investment fund structural organs: management company and depositary. Namely, the two are viewed as those implementing the Regulation objectives from the inside – a unique feature of investment funds' legal design not available to other investors.

As already mentioned, in the case scenario where the management company resorts to abuse, the depositary will face the legal obligation to report any particularities to the national competent authority and vice versa. The approach in the investment fund's legal design based on two structural organs extrapolated against one another allows the development of an enhanced abuse prevention mechanism not available to the rest of the investors participating in the investment protection regime.

However, the above-mentioned consideration is viewed to cause a general effect of abuse decrease. Instead, the given part will examine the Regulation on market abuse as a specificity of investment fund legal and regulatory framework in correlation to five specific case scenarios of abuse. This will allow for estimating the presence of any tangible effects specific to the said scenarios.

[Claims multiplication]

In the case scenario of claims multiplication, one may find little relevance in considering any specific effect deriving from the MAR over the abusive exercise of the procedural right to apply. Namely, the Regulation is limited to the previously mentioned market manipulation and insider dealing activities pertinent to the financial services markets participation (material). Instead, the

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[1069] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Chapter 2, Article 15

[1070] Marco Ventoruzzo and Sebastian Mock (eds), Market Abuse Regulation: Commentary and Annotated Guide (Oxford University Press 2017), p. 41

ICSID Convention distributes to investors procedural rights aimed at initiating the dispute review (procedural). This means the legal origins of the rights safeguarded by both regimes differ.

However, if reviewed further and considering the investment fund participation in the financial markets, certain correlations may, nevertheless, be found. In particular, the investor's right to initiate multiple disputes may be reasoned by the objective of manipulating the market price of financial instruments issued by the host State that faces negative publicity, subsequently impacting the price of State bonds or other instruments tradable at the markets. The ill-founded uses of the right to apply with a view of initiating multiple investment disputes against the host State would essentially decrease the capitalisation of the marketed assets offered by the latter in the financial markets. Hence, manipulating the market price *via* exercising the judicial rights to initiate the dispute.

"Although being a market regulation the Market Abuse Regulation does not simply apply to market-related behaviour only but to all transactions, orders or behaviour that have an impact on the price or value of financial instruments"[1071]

[Provisional measures]

The same logic applies to the case scenario of provisional measures where an investor may introduce the latter to impact the disputed asset's market price without the initial intent to obtain the latter measure. Namely, the mere fact of a provisional measure request may heavily impact the market capitalisation of a specified asset with a view of manipulating the latter's price. Consequently, the initiator of abuse will produce double regulatory violations: (1) abusing the right for provisional measures and (2) manipulating financial markets by falling under the MAR's provision sanctioning "any other behaviour" impacting the price of the marketed assets. [1072]

Hence, the MAR's broad scope of application combined with the abuse of the procedural right to apply either for initiating the investment dispute or requesting the provisional measure may develop an increased abuse risk for these two case scenarios.

For example, a Luxembourg-based private company (SA) (hereinafter Company) had entered a private investment arbitration dispute with a Ukrainian citizen over the acquisition of assets. Following the award, the Claimant initiated the proceedings in Luxembourg's district court (16 December 2021), petitioning the respondent's bankruptcy due to the failure of payment for the rendered award. The petitioning for bankruptcy contradicted Luxembourg's law due to the evident capital available in the respondent's bank accounts.

The Respondent mentioned the following:

[1071] Ibid; See also European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Article 2(3)

[1072] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Article 12(2)(a)

"Pursuant to Luxembourg law, a company is considered bankrupt when both of the following conditions are proven to the court: (i) it can no longer pay its debts ("le commerçant qui cesse ses paiements"); and (ii) it has no possibility to raise additional loans ("le commerçant dont le crédit se trouve ébranlé"). [Company] satisfies neither of these tests. Kernel Holding and its subsidiaries (collectively, "the Group") have a strong liquidity position, with cash on hand and operating cash flows providing ample sources of liquidity for ongoing debt service. As of 18 December 2020, Group had US$ 266 million of cash on accounts. In addition, the Group has access to a number of new sources of funding both from international banks and from capital markets, as demonstrated most recently by its successful placement of US$300 million 6.75% Eurobonds. As such, the [Company] considers the petition submitted by [Claimant] **frivolous and flagrantly** vexatious and intends to seek a dismissal of the case by the Luxembourg District court as promptly as possible, as well as damages for the prejudice caused by [Claimant's] actions."[1073]

The petition calling Luxembourg's court to recognise Company's bankruptcy had presumably impacted the market price of the shares distributed in the Warsaw Stock Exchange from 60 PLN on December 3 2021, to PLN 56.40 on December 17 2021.[1074] The said petition had been alleged by the Respondent as abusive, directly impacting the market price for the company's shares (ISIN: LU0327357389).

The latter example illustrates the evident impact over the market price of the disputed asset due to ongoing judicial procedures and application for various procedural measures in the course of the review, i.e. submitting a claim, petitioning to recognise the opposing party as bankrupt or requesting the provisional measure.

[Damages valuation]

In the damages case scenario for evaluating the disputed assets and calculating the amount of damages, the author considers that certain correlations are also to be found. Namely, the opportunistic valuation of damages and its further public discussion during the dispute review may be motivated by the goal of impacting the price of the marketed instruments.

The given activity will give false or misleading information about the specified instruments' market price.[1075] Hence, falling under the MAR's definition of market manipulation as well. [1076] However, the author views the MAR's impact in the given context as moderate due to the potentially imposed privacy clause on the dispute review process.

[1073] See official website https://www.kernel.ua/investor-relations/news/#kernel-holding-s-a-litigation-update [last accessed 5 December 2022]

[1074] See website https://www.google.com/finance/quote/KER:WSE?sa=X&ved=2ahUKEwjI7YCW3-L7AhXS7rsIHeqTCm8Q3ecFegQILhAi&window=5Y [last accessed 5 December 2021]

[1075] European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Article 12(1)

[1076] Ibid, Article 12(2)(a)

[Escape from criminal prosecution]

To continue, the case scenario of abuse *via* escape from criminal proceedings is deemed to have little relevance to the mentioned specificity. Namely, the MAR's goal of preserving market integrity is not coherent with the case scenario related to investors elevating the dispute review process born out of criminal prosecution to the international arbitration level.

However, the general effect of MAR seeking prudency and clarity in market transactions from the management company and the depositary in relation to the insider dealing activity adds towards the said organs acting in good faith.[1077] This implies lowering the risk of criminal conduct borne out of insider dealing and further prosecution initiated by the home State.

At the same time, the provisions deriving from the MAR are considered to have no relevance to the case scenario of treaty shopping. The investor attempting to change the jurisdictional standing to gain investment protection in bad faith has no concern about market manipulation or insider dealing prosecuted by the reviewed Regulation. Namely, the said activity occurs beyond the financial markets where the MAR is applicable.

[Treaty shopping]

However, in a situation where the fund decides to change its place of registration. Due to physical relocation, the latter will have to change the depositary and potentially the fund's management compulsorily. The said change may raise the red flag for (1) the national competent authorities cooperating with each other and (2) fund professionals exchanging with each other.

First, the MAR provisions develop the basis for the national competent authorities to exchange and cooperate in prosecuting abusive behaviours. *"In today's globalized financial markets, market abuse is rarely confined to national borders. Crossing the territorial jurisdiction of several competent authorities is often even part of a conscious strategy to disguise market abuse."*[1078] Therefore, when following the goal of market abuse detection, the national competent authorities cooperate on a cross-border basis leaving the fund's administration willing to change the place of registration/authorisation to a more favourable jurisdiction less potential.

Second, the professionals fulfilling the investment fund's management and safe-keeping represent the narrow circle of experts exchanging between themselves and questioning the reasons for the particular fund to change the place of registration/authorisation. In this vein, the MAR's Article 32 establishes the mechanisms for professionals related to the specific fund by employment relations as well as externals suspecting the potential violations of the MAR to report the latter. This is to be especially understood in the context of the recently adopted

[1077] For example, see ibid, Article 19(1) in part of obliging the management company to notify the NCA with regards to market transactions relevant to insider dealing provisions under MAR.

[1078] Marco Ventoruzzo and Sebastian Mock (eds), Market Abuse Regulation: Commentary and Annotated Guide (Oxford University Press 2017), p. 497; See also European Union, Regulation 596/2014 on market abuse (market abuse regulation (MAR)) OJ L 173 (2014), Article 31(2) whistleblowing Directive 2019/1937 for the protection of persons reporting breaches of the Union law that is specifically applicable to the financial services markets[1079].

"Whistle-blowing (sic) is in any case a highly effective enforcement tool, as the associated costs for the government are very limited, while it is a major or even the most important way to detect fraudulent behaviour."[1080]

Therefore, the MAR's legal instrument providing the wide pallete of surveyance over the investment fund's change of registration/authorisation strengthens the regulatory compliance and market integrity that, *inter alia*, impact the abuse potentiality by the said fund when entering the investment protection regime.

However, the author considers the latter effect to remain fractional as it impacts the reviewed case scenarios in a general manner, i.e. increasing the fund's prudency when entering the investment protection regime. At the same time, the MAR's principal objective rests on preserving the market integrity that only coincides with the dispute resolution process in a partial manner.

On this basis, the author admits that both legal regimes follow the same objective of abuse prosecution but in different dimensions. For MAR, it is the abuse of material right providing the market participants with the use of financial markets. Instead, for the ICSID and relevant case practice, it is the procedural (adjudicatory) right to provide the investors with access to a judicial review process. Consequently, the conceptualisation of abuse by the two regimes differs substantially. This leaves the MAR with an evident but fragmented effect over the potentiality of abuse deriving from the investment funds when entering the investment protection regime.

Therefore, the MAR's goal of safeguarding the financial markets and the objective of market integrity does not cause a principal effect over abuse potentiality in the reviewed case scenarios. Namely, the examined case scenarios are mostly related to the dispute review process, i.e. right to apply. The said mismatch suggests that the MAR is causing little or no effect over abuse potentiality in the reviewed modality.

Projected effect – moderate (X0)

[1079] European Union, Directive 2019/1937 on the protection of persons who report breaches of Union law OJ L 305 (Whistleblowing Directive) (2019), Article 3(1); See also Marco Ventoruzzo and Sebastian Mock (eds), Market Abuse Regulation: Commentary and Annotated Guide (Oxford University Press 2017), p. 503-504

[1080] Marco Ventoruzzo and Sebastian Mock (eds), Market Abuse Regulation: Commentary and Annotated Guide (Oxford University Press 2017), p. 504

Abuse potentiality quantification

Having analysed the mentioned effects against the projected case scenarios, the author deducted the following results:

1. The multi-layered structure of legislative initiative: Projected effect – moderate (X0)
2. Homogenous regulatory environment: Projected effect – decreasing (X-1)
3. Investors' numerosity: Projected effect – increasing (X+1)
4. Minimum capital requirement: Projected effect – decreasing (X-1)
5. The management company and depositary: Projected effect – moderate (X-1)
6. Regulation on market abuse: Projected effect – moderate (X0)

Further on, the author sums the deducted results and divides by the number of specificities reviewed to identify how the mentioned specificities had affected the abuse potentiality risk brought from the investment fund legal (Level 1-2) and regulatory (Level 3-4) regime by the investment funds in comparison to the rest of the investors participating in the investment protection regime:

1. [X0]+[X-1]+[X+1]+[X-1]+[X-1]+[X0] = X-2
2. [X-2]/6 = **X-0,3**

Evidently, when reviewed against the mentioned specificities brought by the investment funds in the defined case scenarios, the abuse potentiality lowers the abuse at an 0,3 rate compared to an average assumed to be at an X rate. Practically speaking, the investment funds' participation in the investment protection regime tends to decrease the abuse potentiality due to analysed specificities deriving from the legal regime of their jurisdiction of origin by approximate one-third (X-0,3) in comparison to the rest of the investors (X)

The author reiterates that the mentioned manipulation does not aim to calculate the abuse potentiality mathematically but to project the subjective legal analysis in the numerical expression. This is reasoned by an objective of better estimating the shape, curves and features of such an elusive legal phenomenon as abuse and, consequently, its potentiality.

Doing so aims to palpate the very phenomenon of abuse and its potentiality on a tangible and current example. In this context, putting more than less a spotlight on the phenomenon of abuse is expected to facilitate better academic exchange with regard to the given topic.

Conclusion

The abuse as a legal phenomenon has a lesser occurrence potentiality if initiated by the investment fund investors participating in the investment protection regime in the analysed case scenarios, i.e. X-0,3.

In the current research, the investment fund legal regime has been acknowledged to comprise many legal specificities differentiating the latter from the rest of investors. However, the author had selected a limited scope of those most pertinent to the current Thesis objectives. Namely, the specificities that are most relevant to the case scenarios reviewed.

To begin, the homogeneity of the investment fund's legal (Level 1-2) and regulatory (Level 3-4) regimes had been recognised to decrease the abuse potentiality. The investment fund exposed to universally recognised methodologies, definitions and structural requirements, i.e. silo approach, continues to follow them when entering the investment protection regime. This positively impacts the latter regime, often devoid of regulatory homogeneity. The consistency in regulatory application and use of commonly accepted definitions, methodologies and other practices lowers the margin of opportunities for the abuse to appear and spread. This had been confirmed by practical examples, i.e. use of asset valuation methods for damages valuation case scenarios.

The specificity related to investors' numerosity had been analysed to cause the abuse increasing effect in the investment protection regime. Namely, collective investing as an inherent aspect of investment fund activity presumes many indirect and minor investors. The increased number of those involved in investing activity leads to an increased risk of abuse potentiality. The latter assumption had been tested to be most pertinent for the case scenarios related to procedural use of rights, i.e. provisional measures, treaty shopping and others. In this way, the aspect of numerosity is most vivid to cause an increased risk of abuse potentiality when considered in the context of the dispute review process and the exercise of the right to apply.

Instead, the minimum capital requirement had been recognised as leading to an abuse potentiality decrease due to cost-efficiency, where the minimum necessary capital requirement puts a practical limitation on investors to resort to abusive practices. The investment fund law sets a minimum capital requirement necessary for the fund and its structural organs to overpass before using their treaty rights in bad faith. This renders claims multiplication or treaty shopping done by investment funds more costly compared to the rest of the investors. As such, a very formal and somewhat straightforward requirement deriving from the investment fund legal and regulatory framework has proven to effectively tamper with the abuse potentiality in the investment protection regime.

The investment fund's unique legal design compulsorily comprising the management company and the depositary had been affirmed to provide an abuse-decreasing effect. Namely, in part of enhanced supervision rendered from inside by the fund's organs. The author had identified the investment fund law to put an implicit obligation on the said organs to report any suspicious activity. In turn, the said control develops a more hostile environment for abuse to appear. The author tested the latter assumption on the entirety of case scenarios and found its pertinence to all of them. Hence, it was acknowledged the reviewed specificity to cause an abuse potentiality decrease.

Lastly, the EU Regulation on Market Abuse (MAR) and its effect on the abuse potentiality was reviewed in the given course of analysis. It was identified that the latter targets a much narrower scope of abuse compared to the investment protection regime. Namely, the latter comprises insider dealing and market manipulation activities related to the material use of financial services markets. Instead, the investment protection regime and the investment tribunals prosecute the abusive exercise of procedural rights related to the dispute review process.

The two regimes also apply different legal devices (methodologies) for abuse identification. Namely, the MAR monitors the market transactions and market orders against the specified list of criteria. Market operators fish out those considered suspicious for a second review stage and later forward them to the national competent authority according to the STOR reporting mechanism. Instead, investment arbitration approaches the abuse detection process by analysing the single dispute at review upon the request of either party or at its own initiative. The latter process stands on correlating human motives with the laws' objectives and further sanctioning the abusive practices by the same tribunal.

Although making a general effect on abuse-tempering, the MAR was recognised to not provide a tangible and specific impact in the case scenarios reviewed. The latter conclusion is reasoned by the fact of two regimes targeting differentiated abuse practices. As already mentioned, MAR revolves around the material use of the rights related to financial market participation. Instead, the abuse within the limits of the investment protection regime is pertinent to a judicial review process (procedural rights). The given mismatch underlines the difference between the conceptualisations, which renders the regulatory effects deriving from MAR to be causing moderate or no effect over the reviewed case scenarios.

Consequently, the discussed analysis allowed to appoint the risk points for every investment fund specificity when inserted in the five case scenarios. Put differently, the author had estimated how the novel investment fund specificities, when imported into the examined case scenarios of abuse, impact the abuse potentiality in the numerical expression.

CONCLUSION

The Thesis's conclusions primarily lay down the path to conceptualising the legal phenomenon of abuse from a non-conventional approach by looking at the qualitative feature of abuse – its potentiality.

The discovery of the given academic angle is probably less valued if considered in the abstract. Instead, the enhanced benefit of the latter appears when examined on the example of a novel actor to the investment protection regime – the investment fund. Evaluating the legal specificities of the latter in five case scenarios allowed quantifying the feature of abuse potentiality in precision to a specified actor.

Reaching the said goal resulted from undergoing a gradual research advancement comprising several distinct stages. Each of the mentioned stages offered an entry ticket for further progression. For instance, after affirming the investment fund and its investments fall under the scope of the ICSID Convention, the author further answered what is an abuse of investment right by an investment fund.

Responding to the above-posed question allowed to deduce the pertinent elements of the latter legal phenomenon. Namely, the motives and triggers of abuse, the legal device employed by the investment protection regime to detect the abuse and other aspects reflected in the investment arbitration case practice, i.e. evident and non-evident abuse.

Within the course of the research, it was established that the scientific precision of the legal phenomenon of abuse in isolation renders the latter faded in colour and problematic to distinguish its legal borderlines. This is explained by several specificities of the investment protection regime influencing the abuse to be more elusive than elsewhere, i.e. absence of a permanent adjudicatory institution, the rotating pool of arbitrators appointed by the disputing parties and most importantly, the absence of a continuous doctrinal pattern conceptualising the abuse in a homogenous manner.

To cure the mentioned shortcoming and increase the legal contrast of the abuse phenomenon, the author applied the dualist methodology aimed at comparing the normative use of treaty rights with abuse. This was done by selecting five case scenarios and juxtaposing the distinct specimens of abuse and normative use of identical treaty rights. The case scenarios of abuse had also been selected in relevance to the investment fund as a studied actor of abuse.

Each analysed case scenario revealed the particularities of abuse conceptualisation and its further detection in the varying conditionalities. It has been underlined that most rights abused by investors are procedural. The latter is reasoned by the investment protection regime revolving around the matter of the judicial protection offered to investors facing the host State's violation of the treaty regime. Therefore, the principal right allowing the investors to receive protection is the right to initiate the investment dispute in arbitration, i.e. right to apply and the subsequent procedural rights deriving from the latter.

In the treaty shopping scenario, it had been clarified that the mere potentiality or expectation of the dispute might transform the normative use of a treaty right to apply into abuse. This should be especially understood in the context of investors enjoying the administrative resource, allowing them to prepare the evidence in contemplation of the upcoming dispute to conceal the bad faith, i.e. minutes of the meetings, distributed emails and others. The case analysis of legitimate and abusive use of treaty rights in the treaty shopping scenario context also helped to deduct the indicators pointing at the investor's good faith, i.e. absence of a materialised dispute or its evident potentiality, temporal aspect and others.

In the claims multiplication scenario, the author reviewed the aspect of numerosity impacting the abuse potentiality when the right to apply is exercised in the context of many investors submitting their individual claims. The latter case scenario is most pertinent to the investment funds comprising numerous investors subscribing to collective investment vehicles. In this vein, the investment link and other pertinent features have been discussed as guiding points for differentiating the legitimate and abusive exercise of a treaty right to apply in the context of the numerosity of applicants. Besides, the author also deducted the arguments affirming that investment funds and their shareholders have the standing to receive investment protection.

The provisional measures case scenario revealed the particularities related to identifying the necessity and irreparable harm being the key indicators for setting a fine line between the normative use of the said right and abuse. The analysis of two polar case examples also helped to establish the evolving nature of the arbitration case practice, where the objective of preserving the investment relationships between the investor and the State had been recognised as a novel reason for legitimately invoking the provisional measure.

Further on, the author reviewed the example of abuse juxtaposed against the normative use of treaty rights in the context of escape from criminal proceedings initiated by the host State against the investor. It has been underlined that treaty rights are used by investors to elevate the purely national law matter to the international level, guaranteeing investment protection. However, the latter practice may find legitimate reasoning when protecting the procedural integrity of the investment dispute review, i.e. ensuring the witnesses to the process are not intimidated by the local justice.

Lastly, the damages valuation matter was selected as a case scenario of abuse. The latter is relevant to the investment fund legal regime applying the established asset valuation methods imposed by the pertinent legislation. The author reviewed how the procedural treaty right to select the specified methodologies for valuating the assets and calculating the damages may serve the investor's goals not envisaged by the investment protection regime, hence, manifesting an abuse of treaty rights. This was done by juxtaposing the case example of a normative exercise of the said rights.

The review of these case scenarios allowed deducting the particular aspects rendering the use of treaty right in the abusive or normative manner in pertinence to the specific conditionalities. In this way, the study on the legal phenomenon of abuse gained contextuality supported by the practical examples deriving from the existing arbitration case practice.

The deduced results further allowed to proceed with analysing the legal specificities of the investment fund's legal (Level 1-2) and regulatory (Level 3-4) regime – the second element necessary for estimating the abuse potentiality as the principal research objective of the current Thesis.

The author had academically examined the taxonomy of investment fund legal acts (Lamfalussy process) and its diverse system of regulatory initiative comprising the four distinct levels. Several technicalities necessary for drawing a wholesome understanding of the selected subject matter have also been discovered. This includes distinguishing between the fund categories, forms and types, discussing the role and functions of the fund's structural organs and the difference between the fund product and the actor.

The said analysis allowed to distil the investment fund specificities deriving from the said legal and regulatory framework unique to the analysed actor and relevant to the reviewed case scenarios.

Along the process of research, the author had also spared substantial attention towards the legal phenomenon of norms importing, explaining both in theory and practice how the investment fund's law impacts the legal phenomenon of abuse when the fund enters the investment protection regime, i.e. *via* a general application and dispute review medium.

After deducting the necessary elements (abuse-case scenarios and investment fund specificities), the author proceeded towards methodology on abuse potentiality estimation. The latter had been developed on the legal principle of dualism where the results of examining the investment fund legal specificities in five case scenarios had been juxtaposed to the rest of the investors assumed to be representing the abuse potentiality at a set level of an X rate – the standard level of abuse potentiality.

As a result, the author had established a solid academic basis from which he could further depart by estimating the abuse potentiality in relevance to the rest of the investors (assumed standard). This followed with analysing each legal specificity recognised to be relevant to the investment fund and further considered against the five-case scenarios of abuse and their contextual elements rendering the treaty exercise abusive.

Importantly, the proposed methodology had been identified to carry several distinct shortcomings, i.e. subjectivity and inability to reach a higher level of precision. The author addressed them by providing the reasoning and means fit for the circumstances.

As the outcome of the methodology application, every specificity gained the numerical expression representing the varying level of abuse potentiality risk: -1 (positive decrease of abuse potentiality), 0 (no evident influence) and +1 (negative increase of abuse potentiality). The sum of the deducted points was divided by the number of specificities analysed. Consequently, the abuse potentiality rate of X-0,3 was computed for the investment funds participating in the investment protection regime and compared to the rest of the investors representing an assumed rate of X.

Hence, it has been proven that the investment funds, due to their legal specificities deriving from the investment fund legal and regulatory framework, decrease the abuse potentiality rate by approximately 30% compared to the rest of the investors assumed to represent the average standard of abuse potentiality in the investment protection regime. Put differently, the investment fund as an actor in the investment protection regime is less pruned to abuse the treaty rights than the rest of the investors participating in the same regime due to regulatory baggage comprising distinct legal specificities influencing the latter in an abuse-decreasing manner.

The said conclusion carries the benefit of novelty in part of allowing to precise study on abuse and further extend the knowledge related to the said legal phenomenon. For example, academic estimation of impact deriving from the legal phenomenon of "rules importing", conceptualising other, non-conventional features of abuse and most importantly, developing the improved legal device to enhance the abuse detection process.

Besides, the study on abuse potentiality in relation to a specified investor could further extend the academic discussion with regard to the participation of investment funds in the investment protection regime and the means of identifying the potential abuse stemming from its legal specificities.

In this vein, the investment tribunals are offered an expanded conceptual inventory for better tackling the shortcoming and specificities of the legal phenomenon of abuse that often remains elusive and troublesome to identify with a high level of certainty[1081].

The author views the results deduced from the given Thesis to serve the multi-fold purpose developed in the two principal benefits: (1) affirming the investment funds' standing to receive the investment protection regime and (2) conceptualising the abuse from a qualitatively different angle, i.e. potentiality.

[1081] For example, see *Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12) 2015*, para 584, underlining the abuse to be impossible to ascertain with a high level of prediction.

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