

INTERPRETATION OF “INVESTMENTS” AND “INVESTORS” IN THE RUSSIA-BELGIUM/LUXEMBOURG BIT: SEEKING WAYS TO RESOLVE THE CASE OF NSD

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Abstract

The paper addresses jurisdictional issues on the case of NSD initiating investment arbitration against Belgium/Luxembourg. Under the Russia-Belgium/Luxembourg BIT, the states undertake to prevent expropriation of investments and, if it does happen, to pay timely and fair compensation. Such “expropriation” may also occur due to sanctions. Being a Russian intermediate custodian for a number of foreign securities, the NSD has accounts with the centralized European securities *Euroclear/Clearstream* depositories. Since the inclusion of the NSD in the list of entities provided for in Annex I of EU Regulation no. 269/2014 in June 2022, transactions with the securities were suspended, NSD’s account with *Euroclear/Clearstream* was blocked. Because the NSD accounts with foreign securities depositories were blocked, it became impossible to transfer non-Russian securities from a securities account opened with the NSD to another Russian or foreign securities depository. One of the ways to challenge the consequences of *Euroclear/Clearstream* actions is to file a claim with the investment tribunal against Belgium/Luxembourg. The case has two potential solutions: mass claim from the end-investors or one single claim by the NSD as a “nominee holder” of the end-investors’ securities. The first option might seem time- and resource-costly, which is why a claim by the NSD might seem more attractive. Hence, using the interpretation instruments of public international law, the paper aims at assessing the perspectives of initiating investment arbitration proceedings by the NSD, thereby focusing on interpretation of the two central terms in the Russia-Belgium/Luxembourg BIT — “investor” and “investment”. The paper concludes that *prima facie* the investment tribunal would have jurisdiction over the case *rationae personae* nonetheless the “nominee holder” status of the NSD, as well as jurisdiction *ratione materiae*, where the blocked securities could constitute an “investment” in the sense of the BIT. Consequently, the paper defines the legal capacity of nominee holders to initiate arbitration. Since the issue has never been raised before, the paper draws an analogy with the case law on shell companies.

Key words

investment arbitration, NSD, blocked assets, jurisdiction, BIT interpretation

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1. Restrictive measures against the NSD: defining the frame of the problem

Since 2022, sanctions have become a major issue in the field of international law. Mostly, sanctions are discussed in three respects: the legality of sanctions,¹ the process of delisting² and their impact on arbitration as a “victim” of sanctions.³

One of the most painful blows both to the state and its citizens was the suspension of services for the National Settlement Depository,⁴ essentially depriving Russian and international investors of the ability to

¹ Hofer A. *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?* // Oxford University Press. 2017. Vol. 175 № 16. P. 186–189. Ruys T., Ryngaert C. *Secondary Sanctions: A Weapon Out Of Control? The International Legality Of, And European Responses To, Us Secondary Sanctions* // The British Yearbook of International Law. 2020. 018. doi:10.1093/bybil/bra2a007. P. 9. Ruys T., Angelet N. *Immunity, inviolability and countermeasures a closer look at non-UN targeted sanctions* // Cambridge Handbook on Immunities and International Law. 2022. See generally, Aaken, van, A. *International Investment Law and Decentralized Targeted Sanctions: An Uneasy Relationship* // Columbia FDI Perspectives. 2015. № 164. Menkes M.J. *The Legality of US Investment Sanctions against Iran before the ICJ: A Watershed Moment for the Essential Security and Necessity Exceptions* // Annuaire canadien de droit international, 2019. P. 328.

² Niederberger A., Biersteker T. *UN Individual Sanctions Listing and Delisting Patterns and Their Interaction with Autonomous Measures: Considerations for Mediators* // Sanctions and Mediation Policy Memo Series: Policy Memo 3/3, New York : United Nations University. 2022. Eriksson M. *In Search of a Due Process – Listing and Delisting Practices of the European Union* // Department of Peace and Conflict Research Uppsala University. 2009. P. 8–52.

³ Ahn T. *The Applicability of Economic Sanctions to the Merits in International Arbitration Proceedings: With a Focus on the Dynamics between Public International Law Principles, Private International Law Rules and International Arbitration Theories* // Pepperdine Dispute Resolution Journal. 2018. Vol. 18. P. 299–323.

⁴ The NSD is a central settlement depository of Russia, constituted under the Federal Law № 414-FZ dated 7 December 2011 “On the Central Securities Depository” (hereinafter — CSD). The CSDs, initially, served as an instrument to replace the “paper certificates” circulated originally. These companies facilitated the “immobilization” of financial instruments and their centralized

manage their holdings with Moscow and SPB Exchange. This happened in March 2022 when Euroclear⁵ stopped carrying out any instructions received from the NSD, followed by the Clearstream⁶ blocking the NSD account a week later. It was a direct sequence of the forthcoming NSD inclusion in the list of designated persons under the EU Regulation no. 269/2014 on the 3 June 2022. The inclusion of the NSD in Annex I to the Regulation, coupled with Article 2(2) of the Regulation, implies it is no longer possible to instruct any transaction which may “result in any charge payable” to the NSD or any other funds or economic resources to or for the “benefit” of NSD,⁷ directly or indirectly.

As a result of sanctions against the NSD, millions of investors,⁸ who held the securities through the NSD⁹ cannot dispose of those securities, cannot get return on their investments (e.g. dividends, trading margin or conversion of depositary receipts), and cannot transfer their investments to a different non-designated depository, since every single operation involves respective fees paid to the NSD, constituting the impermissible “charge payable to the benefit” of the NSD.¹⁰ Consequently, the NSD cannot process depositary service fees,¹¹ which form the NSD’s own damages (distinct from the end-investors’ damages of the lost (or stuck) dividends and coupons, and the lost profit from intra-day trading and general volatility in stock prices, forcing the end-investors to miss the buy-and-sell moments). Additionally, Russian companies listed on the EU stock exchanges were deprived of the ability to pay dividends in Euros, which forced the Russian companies to issue “replacement securities” to replace the Eurobonds (or other securities) and make the payments in rubles (under Federal Law no. 292-FZ dated 14 July 2022). This caused additional expenses for the Russian issuers — and entailed losses of the Russian end-investors due to currency rate differences.

An additional risk for the blocked assets is the newly implemented Article 5a of the Regulation 269/2014, which allows to confiscate assets “in the public interest”,¹² and which is already discussed in Germany as a mechanism to confiscate the end-investors’ assets held by the NSD for the NSD own infringements.¹³

Presently, the investors have four ways to recover the access to their assets held through the NSD. The first option is for the NSD to obtain a general license, which became possible as an *ad hoc* resolution after the NSD has agreed to lift the fees chargeable for the transfers and provided that the end-investors

accounting. For instance, now the Russian CSD, represented by the NSD provides post-clearing settlements and thus interacts with clearing houses, makes cash transfers for Moscow Exchange (MOEX) trades, on-exchange or OTC trades, as well as transfers in connection with Bank of Russia’s refinancing of credit institutions and Bank of Russia’s open market operations.

⁵ Euroclear Belgium is a Belgian CSD, which, first, settles and clears securities transactions executed on European exchanges (securities transactions, including bonds, shares, derivatives and investment funds; covers a wide range of international trading fixed and floating rate debt instruments, convertibles, warrants and equities), second, the Chamber also functions as a central securities depository, where it is the custodian of major financial institutions participating in European markets, third, processes orders for fixed-income securities and derivatives. Every payment of coupons on Eurobonds and dividends will eventually pass with participation of Euroclear. Euroclear Bank has links with CSDs in 45 major countries, the Russian ruble is already one of 54 settlement currencies in Euroclear Bank.

⁶ Clearstream is a Luxembourgian CSD with similar functions: it settles domestic and cross-border securities transactions, including bonds, shares, derivatives and investment funds; covers a wide range of international trading fixed and floating rate debt instruments, convertibles, warrants and equities.

⁷ Therefore, all activities that involve, directly or indirectly, paying a fee to the NSD or making funds or economic resources available to or for its benefit are prohibited. Under Article 2(2) of Council Regulation (EU) No 269/2014, activities may continue that are not otherwise subject to sanctions and where NSD does not receive or benefit from fees or other funds or economic resources as a direct or indirect consequence. Note that ‘funds’ and ‘economic resources’ are defined broadly in Council Regulation (EU) No 269/2014. For further explanations see the *FAQ of the EU on the CSDs*. URL: https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-central-securities-depositaries_en.pdf (accessed at: 03.05.2023).

⁸ Hereafter, the term investor and end-investor is used to denote an investor on stock markets, while “investor” (in quotation marks breaks) refers to the term in a treaty.

⁹ See the structure of the end-investor – NSD – Euroclear/Clearstream further below. Bech M. L., Hancock J., Wadsworth A. Central securities depositories and securities settlement systems // BIS Quarterly Review. 2020. URL: https://www.bis.org/publ/qtrpdf/r_qt2003y.htm (accessed: 22.11.2023). Principles for financial market infrastructures // BIS CPMI Paper 2012. № 101. P. 92.

¹⁰ The respective illegality was pronounced by the EU in FAQ, see Q 22. URL https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-central-securities-depositaries_en.pdf (accessed: 22.11.2023).

¹¹ Fee schedule see: URL: <https://www.nsd.ru/en/tariffs/>; *Fee Schedule for NSD’s Withholding Agent Services* see: URL: https://www.nsd.ru/upload/tariffs/en/tariffs_nalog_2021_10_01_en.pdf (accessed: 22.11.2023); URL: <https://www.nsd.ru/en/publications/news/operational-news/nsd-to-extend-marketing-period-for-its-depository-services-fees/> (accessed: 22.11.2023).

¹² Amendments of 18 December: “...deprive in the public interest a natural or legal person, entity or body listed in Annex I of funds or economic resources belonging to, owned by or controlled by such person, entity or body, provided that compensation paid for such deprivation of funds or economic resources is frozen.”

¹³ *Genprokuratura Germanii reshila izyat rossijskie aktivy na €720 mln*. URL: <https://www.rbc.ru/politics/20/12/2023/6582af679a79475639d7863c> (accessed: 26.12.2023).

terminate all agreements with the NSD.¹⁴ The second option is for investors to obtain a specific license with the administrative bodies in Belgium/Luxembourg.¹⁵ These options are reserved to direct applications and do not represent a mass and universal solution, do not allow for indemnification, and require termination of relations with the NSD, meaning the NSD as a central settlement depository (hereinafter — CSD) of Russia stays inoperative. Currently, the third option has been pending since August 2022, where the NSD has filed a lawsuit with the General Court of the European Court of Justice (hereinafter — ECJ). On the surface, the third option seems an effective solution. However, the practice of challenging the designations is to the utmost unfavorable. The ECJ set out the basic principles in the early cases brought by the People's Mojahedin of Iran (MEK) and Yassin Kadi: whether the Council, while giving designation, stated “adequate reasons” without them being “excessively vague” and whether the Council committed a “manifest error of assessment” in deciding whether the evidence is sufficient to justify the listing, coupled with an analysis of proportionality¹⁶ of the measure. Precisely these arguments were brought by the NSD in the General Court pending case,¹⁷ and precisely these arguments are consistently denied by the ECJ as grounds for an annulment. Finally, the licensing mechanism and challenges with the ECJ are solely aimed at obtaining an annulment on the listings, and do not allow for indemnification of the damages incurred.¹⁸ The fourth alternative option would involve a mass claim in investment arbitration brought by the end-investors. This is even more appealing since arbitration provides for means of the losses compensating¹⁹ which would be unavailable in the ECJ.²⁰ However, it sprouts huge organizational drawbacks in assembling the numerous claims and the controversial position that a special consent by the respondent is required in the event of a mass claim.²¹

Precisely these are the reasons why the present paper proposes a different option — to commence arbitration by the NSD as a nominee holder of the end-investors' assets. In that sense, the paper suggests resolving the first and primary question: would the investment tribunal have jurisdiction over the NSD claim?

For the NSD, the damages could include the lost fees, where the transactions were stopped, depending on the statistical analysis of the usual fee income for the period, as well as adjusted for the expected amount of end-investors' growth depending on the market sentiment (planned IPOs during the blocked period, expiration date of features, etc.). For the end-investors, the damages could be calculated within their investment strategy (assessed through their previous investment behavior, the predictability of the market; or assessed through their investment plan for the upcoming year in written), by calculating the lost profit (interest, dividends, asset value difference) from the missed transactions (buy-sell). The choice of the NSD as a claimant is also driven by the fact, that if the case of the NSD (an indirect holder of the investment rights) stands before arbitration, then the direct investors and investments in the sanctioning states would undeniably enjoy a similar, or even a higher degree of protection.

The prerequisite for the investor-State arbitration are the concepts of an “investment” and an “investor” which define applicability of the BIT to the case of NSD. The definition of an “investment” and “investor” thus sets ground for establishing the jurisdiction of the arbitral tribunal *rationae personae*, i.e. being an investor of a state party to the treaty is a necessary condition of eligibility to bring a claim, and jurisdiction

¹⁴ Luxembourg (Clearstream) has issued a general license that permits unblocking assets of Russian investors held in the accounts of the Russian NSD (was valid from 20 December 2022 to 7 January 2023). According to the general license, after brokers and depositories of the investors withdraw their accounts from the NSD, they have to submit to the Luxembourg Ministry of Finance: first, written evidence of the termination of any agreements concluded with NSD within 10 days from its termination and no later than 5 business days beginning 7 January 2023; second, written evidence that the agreements concluded with NSD were concluded prior to 3 June 2022. General authorization pursuant to article 6b paragraph 5 of Council Regulation (EU) № 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions that undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, as amended. URL: <https://mfin.gouvernement.lu/dam-assets/dossiers/sanctions-financieres-internationales/documentation/general-authorization-ru-sanctions-269-2014-art6-para-5.pdf> (accessed at: 28.11.2023).

¹⁵ Clarifications of the European Commission, issued on 12 August 2022.

¹⁶ On the basis of Articles 16 and 17 of the EU Charter of Fundamental Rights.

¹⁷ *NSD v Council*, Case T-494/22, action brought on 12 August 2022. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022TN0494> (accessed: 13.11.2023).

¹⁸ Article 275 Treaty on the Functioning of the European Union does not confer any jurisdiction on the EU Courts to hear and determine any action for damages. For the application of the logic see, for instance, a claim for challenging the designation in Case C-134/19 P Bank Refah Kargaran v Council of the European Union.

¹⁹ *BP Exploration Company v Libya*, Award on the Merits, 10 December 1973, (1979) 53 ILR 297, 353–354.

²⁰ See footnote 17.

²¹ For instance, a tribunal has reasoned that silence of a treaty on mass claims as a “qualified silence” prohibits collective proceedings, is “contrary to the purpose of the BIT and to the spirit of [treaty].” *Theodoros Adamakopoulos v. Republic of Cyprus*, ICSID Case № ARB/15/49, Decision on Jurisdiction. 7 February 2020.

rationae materiae on the definition of an investment.²² Hence, the present paper is reserved to the fundamental question of whether the NSD has procedural ability to commence arbitration against Luxembourg/Belgium,²³ by assessing the terms “investor” and “investment”.

Since the Vienna Convention on the Law of Treaties (hereinafter — VCLT) entered into force for Belgium and Luxembourg after the BIT in question (1992 and 2003, respectively vs. 1989), the VCLT could not be applied in an investment tribunal directly (Article 4 VCLT), but its norms still apply as a customary rule.²⁴ Consequently, the paper interprets the Russia-Luxembourg/Belgium BIT 1989 (hereinafter — BIT)²⁵ clause by clause using the interpretation methods provided by Articles 31 and 32 VCLT.

2. Interpretation of the term “investor” in the Russia-Luxembourg/Belgium BIT

2.1. The NSD as an “investor” under the ordinary meaning

According to Article 1(1.2) of the BIT, an investor is defined either as “any legal entity (a) established under Soviet, Belgian or Luxembourg law and having its registered office in the territory of [the USSR, Belgium, Luxembourg] which (b) may, in accordance with the laws of its country, make investments²⁶ in the territory of the other Contracting Party” (points added by the author), or “any natural person who, under [the domestic legislation] shall be deemed to be a national of [the USSR, Belgium, Luxembourg] respectively, and who may, under the law of his country, make investments in the territory of the other Contracting Party” (hereafter translation from Russian — the author). First, following the primary rule of interpretation²⁷ mandated by Article 31(1) VCLT,²⁸ this section analyzes the term “investor” based on its ordinary meaning of the terms included in the definition. Second, the section expands the analysis to the object and purpose interpretation of the term “investor”.

2.1.1. “[E]stablished under Soviet, Belgian or Luxembourg law and having its registered office in the territory of [the USSR, Belgium, Luxembourg] respectively”

The first part of Article 1(1.2) of the BIT sets out a nationality requirement for qualifying as an investor. The NSD is a company established under the laws of the Russian Federation by the Order

²² Amado J., Kern J., Doe Rodriguez M. *Jurisdiction Ratione Personae: The Foreign Investor / Arbitrating the Conduct of International Investors*. Cambridge : Cambridge University Press, 2018. P. 118.

²³ The choice of Luxembourg/Belgium as host states is driven by the fact that these are the states of Euroclear/Clearstream registration. Respectfully, end-investors make investments on their territory since these entities form the taxable base for Belgium/Luxembourg. Illustratively, Euroclear during the 9 month “freezing” period has gained €3 billion, paying Belgium €740mn in taxes. See information on taxes on: <https://www.ft.com/content/88ff88c4-6efe-40b7-b635-80eb6bd73c2c> (accessed: 29.12.2023).

²⁴ See, for instance, reasoning in *Saluka Investments B.V. v. The Czech Republic*, under UNCITRAL Rules, Partial Award 17 March 2006, § 5.4.1: “...this does not preclude interpretation of the treaty based on the general principles laid down in Article 31 *et seq* of the VCLT since these essentially codify customary international law and correspond to the practice of the Federal Tribunal (BGE 122 II 234 para 4c with references). In accordance with Article 31(1) VCLT, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. According to the relevant federal jurisprudence, the interpretation of an international treaty must primarily start from the text of the treaty as understood by the contracting parties with the view to the purpose of the treaty based on the principle of good faith. If the meaning of the text, as it arises from common language usage as well as the object and purpose of the treaty, does not appear to be manifestly absurd, an interpretation that goes beyond the wording – whether expanding or restricting it – is only possible if, based on the context or the circumstances of the treaty’s conclusion, it can be concluded with certainty that the contracting States had jointly intended to deviate from the wording (BGE 127 III 461 para 3; 125 V 503 para 4b; 124 III 382 para 6c p 394, all with references).”

²⁵ *Accord entre les Gouvernements du Royaume de Belgique et du Grand duché de Luxembourg et le Gouvernement de l'Union des républiques socialistes soviétiques, concernant l'encouragement et la protection réciproque des investissements*. Signed on 09.02.1989, entered into force 18.08.1991. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3645/belgium-luxembourg---russian-federation-bit-1989-> (accessed: 20.11.2023).

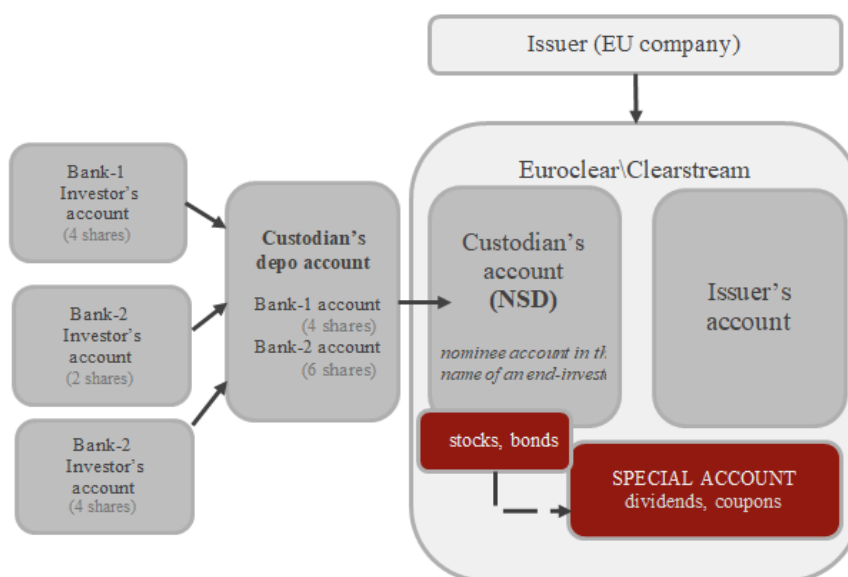
²⁶ From Russian “капиталовложения”.

²⁷ The ILC Commission unanimously included these words had to be a “starting point of interpretation”: “logic indicates” that “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” should be the first element to be mentioned. See *Draft Articles VCLT 1966*. Yearbook of the International Law Commission, 1966, Vol. II. P. 220.

²⁸ In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, “a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (hereinafter — VCLT).

no. 12-2761/PZ-I dated 6 November 2012, with a registered office in Moscow, Russia.²⁹ On its face, it seems the NSD would have the status of an “investor” in the terms of Article 1(1.2). Here, the primary concern however would be that the tribunal may be inclined to limit the scope of Article 1 so as to exclude nominee holders, and apply the second part of Article 1(1.2) to the end-investors, which names “any natural person” as an appropriate “investor” in the sense of the BIT. The reason for such limitation is that the plain language of Article 1(1.2), expressing the nationality requirement and the “ability to make investments,” does not include legal entities which do not make these investments themselves. Recently, investment tribunals have been using an effective nationality test to determine protection, resulting in trustees being denied BIT protection, which is instead limited to the beneficiaries.³⁰ Simultaneously, the International Law Commission, when drafting the VCLT, explained that if a treaty “is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects” good faith and the objects and purposes of the treaty demand that “the former interpretation should be adopted”.³¹

This logic, seemingly, may lead an investment tribunal to deny protection to a nominee holder which is, precisely, the status of the NSD in the end-investors-Euroclear/Clearstream relations. To briefly explain the NSD nominee status, being a CSD, Euroclear/Clearstream maintain “omnibus” accounts of the end-investors, where the issuers open similar accounts to issue the securities. The same does the NSD which consolidates and maintains securities of the end-investors on its account held through banks or brokers. Where the issuer and the investor belong to different legal systems, the end-investors have no “direct” access to the issuer.³² The CSDs thus establish “bridges” among themselves³³ and act as nominee holders of the securities on foreign markets in the name of the end-investors,³⁴ collect their customers’ holdings in a common securities account in Euroclear/Clearstream system, called a nominee account.³⁵ Currently, the profits from their holdings are transferred to non-trading special accounts.



Scheme 1. Frozen asset holding structure.

²⁹ EGRUL website. URL: <https://egrul.nalog.ru/index.html> (accessed 19.11.2023).

³⁰ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case № ARB/12/20, Final Award, 26 April 2017. For an opposing award see: *Leopoldo Castillo Bozo v. Panama*, Caso CPA № 2019-40, Award (8 November 2022).

³¹ Draft Articles VCLT 1966 // Yearbook of the International Law Commission, 1966, Vol. II. P. 220. P. 219.

³² Unless under the domestic law, the end-investor has access to foreign stock-exchange markets directly through foreign brokers.

³³ See the list of the established bridges by the NSD. URL: <https://www.nsd.ru/services/depozitariy/operatsii-s-tsennymi-bumagami/vnebirzhevye-raschety/mesta-raschetov-po-tsennym-bumagam/> (accessed at: 03.05.2023).

³⁴ *Principles for financial market infrastructures* // BIS CPMI Paper 2012. № 101. See the list of the established bridges by the NSD. URL: <https://www.nsd.ru/services/depozitariy/operatsii-s-tsennymi-bumagami/vnebirzhevye-raschety/mesta-raschetov-po-tsennym-bumagam/> (accessed at: 03.05.2023).

³⁵ *Euroclear Sweden, Answers to questions from private individuals*. URL: <https://www.euroclear.com/sweden/en/banker/bankkontor.html> (accessed: 26.12.2023).

Hence, the question stands, can the NSD, given his “nominee holder” status, act as an “investor”, and the blocked securities, bonds, dividends and coupons constitute an “investment” under the Russia-Belgium/Luxembourg BIT.

An illustrative example would be the Lithuania-Ukraine BIT in the *Tokios Tokelés v. Ukraine* case.³⁶ The tribunal analyzed a BIT provision with a word-to-word similar wording to the present case³⁷ and held that unless the BIT provides otherwise it is not for the tribunals to impose limits on the scope of BITs not found in the text:

According to the ordinary meaning of the terms of the Treaty, the Claimant is an ‘investor’ of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an ‘investor’ of Lithuania.³⁸

Even though the tribunal faced a question of piercing the corporate veil,³⁹ the *Tokios Tokelés v. Ukraine* case arose out of a dispute between a state and a first-level shareholder, which has some margin of independence and its own legal tools of control over the investment. For instance, when the company shareholders are balanced with the company board of directors, which precludes the company from losing its own legal “personality”).

In contrast to the *Tokios Tokelés v. Ukraine*, the object of the present paper is the NSD — a nominee holder without any rights for the proposed “investments” which conceivably may not enjoy the rights granted to the end-investors, whose capital flow increases the economy of the host state.⁴⁰ For this very reason a perfect analogy for the NSD as a nominee holder would be to compare the NSD to a shell company, since both a nominee holder of securities (the NSD) and a nominee holder of shares (a shell company) have no interest of their own, neither they benefit from an investment themselves, nor they are under a total control of their beneficiaries (or end-investors).⁴¹ As for the last element, “control” is often interpreted broadly so as to include any type of control, such as by providing “access to supplies, access to markets, access to capital, know-how and authoritative reputation”.⁴² The rights to stocks (and other blocked financial instruments) belong solely to the end-investors and the NSD merely exercises the instructions (or orders) of the end-investors. Therefore, with regard to the blocked assets the NSD is under the “control” of its end-investors in the language of the investment treaty, which allows driving a comparison with the shell companies bringing cases to investment arbitration.

An objection that the “investor” is a controlled shell company was raised in the *Saluka v. The Czech Republic*.⁴³ The case arose out of the acquisition of the Czech state-owned bank IPB by Saluka Investments BV, a Dutch Company. Czech Republic, as the host state, argued that “Saluka is a mere shell used by Nomura [an English company] for its own purposes”⁴⁴ and has “no interest in the IPB shares”, eventually making Saluka fail to meet the definition of an investor under the BIT.⁴⁵ The tribunal denied the Czech argument, stating that to exclude a company meeting formal requirements of incorporation under the BIT the parties to the BIT need to “exclude wholly-owned subsidiaries”⁴⁶ explicitly

³⁶ *Tokios Tokelés v. Ukraine*, Case № ARB/02/18, 29 April 2004.

³⁷ “Any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.”

³⁸ *Ibid.* §28.

³⁹ I.e. looking beyond the company as a legal person down the chain of its beneficiaries: “piercing” or “lifting” the corporate veil in the Anglo-American tradition, *durchgriffshaftung* in the German tradition, “abuse of law,” fraud (*fraude la loi*), simulation and fictitiousness (*fictivite*) in the French tradition. See more in Vandekerckhove K. *Piercing The Corporate Veil* // European Company Law. Vol. 4. № 5. P. 191–200; see also Ventoruzzo M. et al. *Comparative Corporate Law: Look no Further*. West Academic Press, 2015. P. 151.

⁴⁰ Notably, (i) substantial commitment; and (ii) significance for the host state’s development can be set as the criteria for establishing an investment under the ICSID Convention. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, Award, ICSID Case No ARB/02/13, IIC 208 (2006), 31 January 2006, ICSID.

⁴¹ Nougayrede D. *After the Panama Papers: A Private Law Critique of Shell Companies*, 52 INT’L L. 327 (2020). See also *Eurofood IFSC*, 2006 E.C.R. 1-3813.

⁴² *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 26 January 2006. §180. The tribunal gave interpretation to what constituted “control” under the NAFTA Agreement.

⁴³ *Saluka Investments B.V. v. The Czech Republic*, under UNCITRAL Rules, Partial Award 17 March 2006.

⁴⁴ *Ibid.* §42.

⁴⁵ *Ibid.* §227.

⁴⁶ *Ibid.* §229. “In dealing with the consequences of that way of acting, the Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands — such as, in this case, Saluka — the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none. The parties to the Treaty could have included in their agreed definition of “investor” some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the

from the BIT which was not the case in *Saluka*. For instance, such an exclusion was included in the US-Ukraine BIT⁴⁷ where the parties excluded companies which had “no substantial business activities in the [host] territory”.

For a long time, the tribunals have upheld the practice of protecting the claims of “shell” investors: in *ADC v. Hungary*,⁴⁸ *Mobil v. Venezuela*,⁴⁹ and *Aguas del Tunari v. Bolivia*.⁵⁰ This created a robust body of investment case law forwarding the shell companies and promoting treaty shopping where the beneficiary investors did not belong to a BIT party.⁵¹ The reason is that the tribunals have adopted a literal understanding of the nationality requirement, consistently explaining that it would be “tantamount to set aside the clear language agreed upon by the treaty Parties”⁵² and “to substitute [their] views of the definition of the term ‘investor’ to that of the Contracting Parties to a BIT”.⁵³ This led the practice to reject arguments that “economic reality should prevail over formal legal structure when it comes to the interpretation of [the BIT]”.⁵⁴ Even in the *CME v. Czech Republic* and *Lauder v. Czech Republic*, where two parallel proceedings of the same claims were initiated by a beneficiary and a direct shareholder, the tribunals rejected jurisdictional objections of the Czech Republic on the abuse of process by the investors.⁵⁵

This approach, while optimistic for the NSD, is actually rather positivistic and cannot suffice the continuously evolving practice of economic considerations. Even the ICJ in the *Barcelona Traction* concluded that “the veil is lifted... to prevent the misuse of the privileges of legal personality, as in certain of... malfeasance... or to prevent the evasion of legal requirements or of obligations”.⁵⁶ In the same vein, Russia has fairly argued in the *Yukos* case that a company cannot be allowed protection if it was created “for no discernable *bona fide* purpose”.⁵⁷ The latter argument was not accepted by the PCA in *Yukos*, but let one imagine the practice taking a turn to strengthen the application of the nationality requirement. The potential widened perspective on the problem is realistically close. For instance in the *Pac Rim* the tribunal distinguished between geographical business activities and nationality of the investor, concluding that the company was “akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities”.⁵⁸ This paragraph does not reflect the term “investor” as analyzed through a shell-structure⁵⁹ (but rather application of the CAFTA denial of benefits clause), however shows possibilities of the practice extension, and probable risks to nominees.

For the NSD, it means two potential tests. If the NSD was considered akin to a shell company, the tribunal would rule in favor of the NSD as an issue of the positivistic approach (one-tier test). However, the test could be hardened by the economic and good faith criteria (three-tier test), if we were to adopt the failed arguments of the host states in previous practice. On the one hand, the investor’s bad faith stems from treaty-shopping.⁶⁰ Since both the NSD and the end-investors belong to Russia, it is difficult to imagine the NSD acting in bad faith in this regard. Rather conversely, the sole reason for the NSD to

laws of third States, but they did not do so. The parties having agreed that any legal person constituted under their laws is entitled to invoke the protection of the Treaty, and having so agreed without reference to any question of their relationship to some other third State corporation, it is beyond the powers of this Tribunal to import into the definition of “investor” some requirement relating to such a relationship having the effect of excluding from the Treaty’s protection a company which the language agreed by the parties included within it.”

⁴⁷ Article 1(2).

⁴⁸ *DC Affiliate Ltd. et al. v. Republic of Hungary*, ICSID Case № ARB/03/16, Award of the Tribunal, 1 334-35, 2 October 2006.

⁴⁹ *Mobil Corp. et al. v. Bolivarian Republic of Venezuela*, ICSID Case № ARB/ 07/27, Decision on Jurisdiction, 10 June 2010.

⁵⁰ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case № ARB/02/3, Decisions on Respondent’s Objections to Jurisdiction, T 154, 21 October, 2005.

⁵¹ See Burgstaller M. *Nationality of Corporate Investors and International Claims Against the Investor’s Own State* // 7 J. World Investment & Trade 857. 2006.

⁵² *Rompetrol*, §85.

⁵³ *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case № ARB/05/ 16, Award, 190, 29 July 2008.

⁵⁴ *Rompetrol*, §85.

⁵⁵ *CME Czech Republic BV v Czech Republic*, Final award, March 2003, Ad Hoc Tribunal (UNCITRAL). *Lauder v. Czech Republic*, Award, 3 Sept 2001, Ad Hoc Tribunal (UNCITRAL).

⁵⁶ *Barcelona Traction, Light and Power Co. Ltd. (Belgium. v. Spain)*, 1970 I.C.J., Reports 3, §58.

⁵⁷ *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, (Permanent Court of Arbitration 2009), §71(44), 407.

⁵⁸ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case № ARB/09/12, §4.75.

⁵⁹ The investor-company was relocated, however maintained its business in a different jurisdiction, which triggered application of the denial of benefits clause to Chapter 10 CAFTA.

⁶⁰ For instance, see *Cementownia Nowa Huta S.A.*, ICSID Case № ARB(AF)/06/2, Award: the tribunal found that Cementownia’s claim was “manifestly ill-founded,” Cementownia “intentionally and in bad faith abused the arbitration [because] it purported to be an investor when it knew that this was not the case.”

initiate a case instead of the end-investors is to facilitate thousands of investors to have a consolidated case led by a massive entity. This would have positive economic implications for the end-investors, since investment arbitration is one of the priciest ways to resolve a dispute (where the fees may go as high as USD 1 million⁶¹). Thus, for a regular investor, investment arbitration might not be a favorable approach to seek compensation from the blocked assets, unless the investors join in a class claim.⁶² A class claim, however, would cause substantial losses in order to assemble the end-investors around Russia and harmonize a legal position around them.

Moreover, the investors themselves do not lose an autonomous right to initiate their own investment arbitration, as will be discussed below. They would be entitled to recover their own damages in a separate proceeding or claim for consolidation of proceedings. Even though there is no define procedure for consolidation except for the ICSID cases where one center administers the case,⁶³ consolidation is exercised in practice, as was done in the *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v Argentine Republic* (where the investors asserted their rights under different BITs) and *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua* (where the claims were based on a single BIT).

Therefore, in terms of good faith and economic considerations the NSD seems an appropriate claimant for the investment arbitration case, and it is able to pass both one-tier and three-tier tests for establishing its “investor” status.

2.1.2. “[W]hich may, in accordance with the laws of its country, make investments in the territory of the other Contracting Party”

In 2007 Euroclear and the NSD signed a Memorandum of Understanding⁶⁴ laying out the foundation for launching a legal link between the institutions. In 2014, Euroclear Bank in Belgium and NSD in Russia established a “bridge” to provide cross-border services for Russian domestic securities.⁶⁵ This led Belgium to recognize the NSD as Russia’s central securities depository and allowed it to open a “foreign nominee account” with the Euroclear Bank to develop a direct link between them.⁶⁶ Furthermore, NSD provides cross-border services with respect to securities under Russian domestic legislation: under the Federal Law no. 414-FZ dated 7 December 2011 “On the Central Securities Depository”.

Therefore, the NSD meets the formal requirements of the BIT, if interpreted in accordance with the BIT ordinary meaning. Indeed, the NSD is entitled by the domestic legislation of both states to act as a CSD. However, the function is purely intermediary, meaning that in accordance with the ordinary meaning of the phrase, the NSD would not qualify as a legal entity “mak[ing] investments in the territory of the other Contracting Party,” since the economic contribution originates in the end-investor’s funds.

Accordingly, to establish whether these considerations preclude the NSD from having a standing, the interpretation needs to expand to the object and purpose of the treaty.

⁶¹ The costs of arbitration include (1) arbitrator fees and institutional administrative expenses, (2) legal fees and expenses, (3) expert costs and (4) hearing and witness costs. Illustratively, the ICSID, the Schedule of Fees (the latest of which dates from 1 January 2019) provides that only the arbitrators are entitled to receive a fee of USD 3,000 per day, making an average of USD 875,907 fee per case. At the same time, arbitration costs are under 10% of the total arbitral costs, meaning that in reality the costs would reach much higher levels. See the study of Kirtley W. *How To Reduce the Overall Costs of Investment Treaty Arbitration* // Aceris Law LLC. 2022. URL: <https://www.acerislaw.com/how-to-reduce-the-overall-cost-of-investment-treaty-arbitration-to-less-than-usd-1-million/> (accessed: 23.11.2023). See also *Arbitrating Small Value Claims in Investment Arbitration*. URL: <https://www.ibanet.org/document?id=Arbitrating-Small-Value-Claims-in-Investment-Arbitration-2022> (accessed: 23.11.2023).

⁶² The present paper does not assess the perspectives of mass claims in investment arbitration, since the topic is comprehensive enough for a separate study. More on the perspectives of a class claim in investment arbitration see in Strong S.I. *Class, Mass, and Collective Arbitration in National and International Law*. New York, NY, USA : Oxford University Press, 2013; McCarl R. *ICSID Jurisdiction over International Mass Investment Arbitrations: Due Process and Default Rules* // *Stanford Journal of International Law*. 2015. P. 173–194.

⁶³ ICSID Arbitration Rule 46(2).

⁶⁴ A non-binding agreement establishing opportunities for cooperation.

⁶⁵ *Euroclear Bank and NSD launch cross-border services for Russian corporate and municipal bonds*. URL: https://www.finyear.com/Euroclear-Bank-and-NSD-launch-cross-border-services-for-Russian-corporate-and-municipal-bonds_a28291.html (accessed: 23.11.2023).

⁶⁶ *Euroclear/NSD link offers cross-border opportunities in Russia*. URL: <https://www.thetradenews.com/euroclear-nsd-link-offers-cross-border-opportunities-in-russia/> (accessed: 23.11.2023).

2.2. “Investor” as an entity which “may make investments” through the object and purpose of the BIT

The “object and purpose” of the Russia-Belgium/Luxembourg BIT is the second step of interpretation under Article 31(1) VCLT.⁶⁷

As was handsomely noted by a tribunal in *Aguas de Tunari v. Bolivia*, the purpose of an investment treaty is to serve as “portals through which investments are structured, organised, and, most importantly, encouraged through the availability of a neutral forum”.⁶⁸ As A. Broches once noted, the purpose of the control test in the investment treaties is to expand the jurisdiction and thus promote investment.⁶⁹ In the same vein, the preamble to the Russia-Belgium/Luxembourg BIT states that its aim is “to create favorable conditions for investors... taking into account the positive effect that [the BIT] may have in improving business contacts and building confidence in the field of investment”.

Establishment of a “bridge” between the NSD and Euroclear/Clearstream was the first step to build business contacts between the CSDs, which can only become attractive for the CSDs and the end-investors provided they get adequate protection of their assets located abroad. The concern outlined in paragraph 2.1(b) related to the situation where the NSD, whose functions are purely intermediary, does not make its own financial contribution and thus cannot be treated as an “investor” under the ordinary meaning of the term.

That is precisely why in 1998 the tribunals recognized a notion of a “*de facto* investor”. In *Sedelmayer v. Russia*,⁷⁰ the Tribunal allowed protection of a beneficiary from a third state (Mr. Sedelmayer, a German national) under the German-Russia BIT (with a similar wording) through an investment of an intermediary incorporated in the USA. This approach was further adopted and shows that the tribunals might not stick to logic where the claimant has to make a direct financial contribution (*Enron v. Argentina*,⁷¹ *CMS v. Argentina*,⁷² *CME v. Czech Republic*,⁷³ *Gas Natural v. Argentina*,⁷⁴ and *Maffezini v. Spain*⁷⁵).

Therefore, the second part of Article 1(1.2) of the Russia-Belgium/Luxembourg BIT, setting down the requirement of the investor to be able “to make investments under the laws of the sending state”, does not preclude establishing the jurisdiction *ratione personae* over the NSD claim.

2.3. A case initiated by the end-investors: an alternative or a risk of losing the claimant's right of the NSD?

Even though the case practice of parallel proceedings is fairly liberal, and the tribunals tend to find jurisdiction nonetheless the arguments on the abuse of rights,⁷⁶ the risk of the tribunals turning the practice around the “most appropriate” claimant cannot be completely excluded. This section briefly touches upon the right of the end-investors to initiate investment arbitration bypassing the nominee holder

⁶⁷ *Competence of the ILO to Regulate Agricultural Labour*. P.C.I.J. (1922). Series B. № 2–3. P. 2:

In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.

Interpretation of Peace Treaties Advisory Opinion. I.C.J. Reports 1950. P. 229.

The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which... would be contrary to their letter and spirit.

⁶⁸ *Aguas de Tunari v. Bolivia*, ICSID case № ARB/02/03, Decision on Jurisdiction, 21 October 2005. §332. Luxemburg/Belgium-Russian BIT BIT in its preamble similarly provides for “creating favourable conditions for investors” and “improving business contacts and building confidence in the field of investment.”

⁶⁹ Broches A. *The convention on the settlement of investment disputes between states and nationals of other states* // Selected Essays. Brill Nijhoff, 1995. P. 358–359, 361.

⁷⁰ *Franz Sedelmayer v. The Russian Federation*, SCC Award, 7 July 1998.

⁷¹ *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case № ARB/01/03, Award, 22 May 2007.

⁷² *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case № ARB/OJ/S, Decision on Objections to Jurisdiction, 17 July 2003.

⁷³ *CME Czech Republic B.V. (The Netherlands) vs. Czech Republic*, Partial Award, 3 September 2001.

⁷⁴ *Gas Natural v. Argentina*, ICSID Case № ARB/03/10, Decision on Jurisdiction, 17 June 2005.

⁷⁵ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case № ARB/97/7, Award, 13 November 2000.

⁷⁶ *IBM v. Ecuador*, Award, 22 December 2003. *Sempra v. Argentina*, Award, 11 May 2005. *Desert Line Products v. Yemen*, Award, 6 February 2008. *CME Czech Republic B.V. (The Netherlands) vs. Czech Republic*, Partial Award, 3 September 2001. For instance, In *Eureko v. Poland*, the tribunal allowed an investor's claim to proceed under the treaty in spite of an exclusive jurisdiction clause, stating that the investor “advances claims for breach of Treaty... [and] every one of those claims must be heard and judged by this Tribunal.” See *Eureko v. Poland*, Award, 19 August 2005. §113.

of their rights, the NSD. If the BIT does not allow beneficiary's actions,⁷⁷ then the NSD would have a stronger jurisdictional claim, since the NSD would be the only available and appropriate claimant and otherwise, the blocked assets would lose any available protection in investment treaty arbitration.

2.3.1. Ordinary meaning of the term “investor” in the context of the end-investors rights to initiate investment arbitration

Even though the practice tends not to limit the scope of interpretation of the term “investor” (as explained above in sub-section 2.1.1), the scope of interpretation cannot be unjustly expanded.

For instance, an illustrative example would be the *Fedax NV. v. Venezuela*⁷⁸ case. The case concerned promissory notes, initially acknowledging a debt owed to a Venezuelan company, but then assigned to Fedax by way of endorsement. The tribunal concluded that the Venezuelan company was excluded from the host state-investor relationship and has lost its claiming rights. Nonetheless it was the transaction of the Venezuelan company that constituted an investment. The case reflects the NSD situation perfectly as it considers the source of investment not as relevant as the controlling rights and rights of disposal, which the NSD, effectively, lacks.

While the alignment of the NSD case with the shell companies looks more convincing, every kind of risk shall be taken in the account throughout the analysis. The present situation may be similarly qualified as not accepting the NSD participation in the transaction, since the transactions (stock purchases) are made exclusively by the end-investors. For instance, in the case of *Gas Natural SDG S.A. v. Argentina* the tribunal analyzed a provision from the Argentina-Spain BIT, fairly similar to the present BIT (no additional requirements except for a change in wording⁷⁹). While Argentina maintained that the claimant did not qualify as an “investor” given he was an indirect shareholder of the Gas Natural (i.e. he was a beneficiary in a long chain of companies), the tribunal has found that the wording of Article 1(1) of the Argentina-Spain BIT does not allow interpretation in the vein of excluding indirect investors from its scope of application.⁸⁰

Even though the language of provisions of the Argentina-Spain BIT and Russia-Belgium/Luxembourg BIT are comparable, the *Gas Natural* reasoning would not limit the scope of interpretation of the Russia-Belgium/Luxembourg BIT. This is because the latter includes an additional paragraph stating: “[t]he term ‘investment’ also means an indirect investment made by investors of one Contracting Party in the territory of the other Contracting Party through an investor of a third State”. This express reference to indirect investments limits the scope of the indirect investments only to those relating to the intermediaries in the third states, and, in fact, expand application of the BIT (i.e. the end-investor is Russian, intermediary is located in a third state, and the host state is Belgium/Luxembourg, where intermediary is entitled to claim). This means that in the NSD case, both NSD and the end-investors preserve the right to claim. Even more, had the intermediary NSD been incorporated in a third state, the Russian end-investors also would have been able to bring a claim under the BIT.

The express language of other BITs that have allowed indirect investors by a clear reference to long corporate chains, support that conclusion. For instance, the Netherlands-Bulgaria BIT⁸¹ provides for “legal persons constituted under the law of that Contracting Party” or, if not constituted, then “controlled directly,

⁷⁷ The appropriateness of the “derivative action” notion is a matter of discussion. The present paper uses the concept by analogy to the derivative actions by the shareholders of a company, where the claim is filed on behalf of the company.

⁷⁸ *Fedax N.V. v Venezuela*, ICSID Case № ARB/96/3, Decision on Jurisdiction of 11 July 1997 at §24, reprinted at 371LM 1378 (1998).

⁷⁹ Agreement Between The Argentine Republic And The Kingdom Of Spain On The Reciprocal Promotion And Protection Of Investments, 1992. Article 1(1):

“...the term “investors” shall mean:

(a) Individuals having their domicile in either Party and the nationality of that Party, in accordance with the agreements in force on this matter between the two countries;

(b) Legal entities, including companies, groups of companies, trading companies and other organizations constituted in accordance with the legislation of that Party and having their main office in the territory of that Party.”

⁸⁰ “...Assertion that a claimant under a Bilateral Investment Treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the State party to the BIT, has been made numerous times, never, so far as the Tribunal has been made aware, with success.” *Gas Natural SDG S.A. v. Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction Case № ARB/03/10, 17 June 2005.

⁸¹ Netherlands Bulgaria BIT, entered into force on 1 March 2001.

or indirectly by natural persons as defined in or by legal persons". Similarly, Article 1 of the Sweden-India BIT⁸² uses a combination of incorporation, ownership and control tests and provides that:

'companies' 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 per cent of the equity interest is owned by investors of that Contracting Party, or in which investors of that Contracting Party control at least 51 per cent of the voting rights in respect of shares owned by them.

Conversely, a different approach is used in the Belgium/Luxembourg-Philippines BIT (2003). While the text⁸³ itself suggests similar to the Russia-Belgium/Luxembourg BIT wording, the text of the Belgium/Luxembourg-Philippines BIT does not contain the restrictive paragraph, which would allow for a wide interpretation as described in the case practice above.

2.3.2. The end-investors in the light of the "subsequent agreements and practice" interpretation

Subsequent agreements between the parties regarding the interpretation and practice in the application of the treaty are taken into account for the purposes of interpretation as a third step of interpretation (after the "ordinary meaning" and the "context and object and purpose") under Article 31(3) VCLT. For instance, in *Fraport v. Philippine* the tribunal determined that an "instrument of ratification" that the Philippines had exchanged with Germany three months after the conclusion of the BIT was relevant for determination of the "investment" under Article 31(3)(b) VCLT (i.e., subsequent practice).

The investment arbitration case practice knows one case in the application of the Russia-Belgium/Luxembourg BIT — *Berschader v. Russia*.⁸⁴ There, the tribunal adopted a similar reasoning developed above: a Russian company itself automatically constitutes an "investor" under Article 1.1. Additionally, under Article 1.2 the BIT extends coverage to the investments made through the intermediaries in a third state.

The study thus shows that the Russia-Belgium/Luxembourg BIT does not protect "any" indirect investor but only those where the end-investor is incorporated in Russia (or Belgium/Luxembourg). Since both the NSD and the end-investors belong to Russia, the tribunal could potentially find jurisdiction *ratione personae* in both instances. The end-investors qualifying under the "investor" requirements mean a potential risk of the tribunal rejecting the claim of the NSD as a nominee holder. However, the risk is purely theoretical, since no similar instances have been found, and shell companies, fairly resembling the nominee status of the NSD by lack of their own economic interest in the dispute, have been successful to argue jurisdiction *ratione personae*. Most importantly, as it was previously shown the NSD as an investor of the first tier can qualify under the existing positivistic approach of investment tribunals, and under the advanced three-tier test of economic and good faith considerations. However, if the tribunal denies jurisdiction over the NSD's claim, the mass derivative claim by the end-investors would be an adequate alternative way to resolve the case of the blocked assets in Euroclear/Clearstream.

3. Blocked assets as an "investment" under the Russia-Belgium/Luxembourg BIT

The preamble of the Russia-Belgium/Luxembourg BIT specifically mentions the Parties desire "to create favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party" and to "the positive effect that the present Treaty can have on fostering business contacts and strengthening trust in the area of investments". Similar wording of BITs was previously interpreted so as to give wide interpretation to the "investment". However, the *Berschader v. Russia* case⁸⁵ (interpreting the Russia-Belgium/Luxembourg BIT) noted that the broad interpretation does not mean including every kind of investment, be that direct or indirect. The present section analyzes whether the blocked assets (securities, bonds, dividends and coupons) constitute an "investment" under the BIT.

⁸² Sweden-India BIT, entered into force on 1 April 2001.

⁸³ Belgium/Luxembourg-Philippines BIT, entered into force on 19 December 2003: "Investor" shall mean... the 'companies', i.e. with respect to both Contracting Parties, a legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Party."

⁸⁴ *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case № 080/2004.

⁸⁵ *Ibid.* §139.

3.1. Types of “investment” definitions

An investment agreement may allow a non-exhaustive or an exhaustive list of investments. For instance, an exhaustive approach is reflected in the Canadian Model Foreign Investment Protection Agreement (2003).⁸⁶ The indicative factor for an exhaustive list is an article enumerating the types of investments without any reference to a broad wording of “every asset.” The latter is exactly the most-frequently used wording in BITs, for instance, a non-exhaustive clause is contained in the U.S. Model BIT (2004),⁸⁷ US–Rwanda BIT (2008):

Investment” means *every asset* that an investor owns or controls, directly or indirectly, that has the *characteristics* of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment *may* take include.

However, having adopted a broad definition, the abovementioned BITs have also limited the scope of investments with a number of characteristics: commitment of capital, expectations of gain, assumption of risk. Inclusion of these characteristics follows the later practice of the *Salini Costruttori S.p.A. v. Kingdom of Morocco*,⁸⁸ which defined precisely five conditions to identify an investment under the ICSID Convention: duration, regularity of profit and return, assumption of risk substantial commitment, and significance for the host state’s development. Since the Russia-Belgium/Luxembourg BIT was concluded prior to the *Salini* case, the absence of these criteria is understandable. However, would that mean that with the later case practice the tribunal would implement the named characteristics in the older treaties?

It is highly unlikely. Above it was already described how the tribunals tend to approach the definitions strictly so as not to give excessively wide interpretations. The interpretation could also not be given under the rule of the “subsequent practice” under Article 31(3)(b) VCLT since it requires “the agreement of the parties regarding its interpretation” rather than an opinion of the arbitral tribunal in interpreting a few of the BITs with no general application. Furthermore, the *Salini* test is not applied universally, for example if some adopt a modified version of the *Salini* test and others rely on the definition of “investment” in the applicable BIT.⁸⁹

Therefore, if the Russia-Belgium/Luxembourg BIT enshrines a non-exhaustive list of investments with no additional requirements, the blocked assets would most likely constitute an “investment”.

3.2. “Investments” under the Russia-Belgium/Luxembourg BIT

Article 1(2) of the Russia-Belgium/Luxembourg BIT describes the term “investments” as “every type of asset which investors of one Contracting Party invest in the territory of the other Contracting Party in accordance with its law, including in particular:

- (1.2.1) property (buildings, facilities, equipment and other tangible assets),
- (1.2.2) funds, shares and other kinds of interest in companies and rights of demand related thereto,
- (1.2.3) claims⁹⁰ relating to any services of economic value,
- (1.2.4) IP rights, and “indirect investments” made by investors of one Contracting Party in the territory of the other Contracting Party through an investor of a third State.

⁸⁶ “Investment means: (I) an enterprise; (II) an equity security of an enterprise; (III) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (IV) a loan to an enterprise <...> (VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V); (VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory <...> (IV) or (V); and (XI) any other claims to money...”

⁸⁷ The U.S. Model BIT contains provisions developed by the U.S. Administration to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002, which incorporated many of the principles from existing U.S. BITs. The U.S. Model BIT is substantively similar to the investment chapters of the free trade agreements the U.S. has concluded since the 2002 Act. URL: www.ustr.gov (accessed: 23.11.2023).

⁸⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, Award, ICSID Case № ARB/02/13, IIC 208 (2006), 31 January 2006, ICSID.

⁸⁹ Bischoff H. *International investment Law a Handbook*. P. 503, §17.

⁹⁰ From Russian “права требования”.

The first remarkable element to notice is that the BIT uses the words “every type of asset” and “including in particular”. This wording indicates that Article 1(2) provides a non-exhaustive list of investments, giving us the road to a broad interpretation of the term.

Notably, the BIT also uses a phrase “every type of assets” instead of “every asset”,⁹¹ which would be a more frequent term to include in a BIT. The wording of the BIT is undeniably broader in a sense that “every type of asset”, on its face, suggests that the article allows broadening the scope of application to the “new types” of assets invented by states in the course of time: for instance, crypto-currencies which normally are not defined either as funds or as financial but rather as *sui generis*. Therefore, the ordinary meaning of the elements forming the definition of an “investment” suggests that the BIT allows interpreting the term so as to include such types of assets as bonds, shares publicly offered on the financial markets, dividends distributed through the stock exchange markets.

Finally, the Russia-Belgium/Luxembourg BIT does not provide for the limitations, such as the US-Rwanda BIT described earlier, which eliminates the risk of denying the qualification of the blocked assets as an “investment”.

To speak more broadly, an “investment” generally refers to “real” investments in “real” economic resource needed in production of goods and services, such as machines and buildings.⁹² The “real” material meaning is encompassed in the paragraphs (1.2.1), (1.2.2) and (1.2.3) extend the investments to financial assets. Practice of the “ordinary meaning” interpretation shows that paragraph (1.2.3) will normally give rise to investments derived from commercial transactions (for instance, as established in the *Petrobart v. Kyrgyz Republic*⁹³). The most important category for the NSD case would be paragraphs (1.2.2) and (1.2.3).

Paragraph (1.2.2) — “other kinds of interest in companies and rights of demand related thereto” — is wide and can be interpreted to the extent beyond participatory interest in a company. For instance, that is why investment agreements would exclude particular kinds of investments as done in the COMESA Investment Agreement which expressly excludes “portfolio investment”. However, it is doubtful that the blocked assets would qualify under the paragraph (1.2.2). Contrary to paragraph (1.2.2), the end-investors are not deprived of the shares and the dividends itself, since the sums are still deposited to their accounts, even though the access to the accounts is prohibited⁹⁴ (for instance, Section 13(2)(a) UK Regulation 2018 provides for an exception from the financial sanctions that “enable[s] interest or other earnings on accounts to accrue, provided that any such interest, other earnings and payments will also be frozen”). Rather, the limitation to the end-investors economical right refers more to the right to *dispose* of the assets and thus gain profit, and to receive the dividends in order to *withdraw* the sums from the brokerage account. In its essence, these actions rather represent a *blocked right to demand*, which would preclude the investors to claim paragraph (1.2.2).

However, the next paragraph reads: “right to demand relating to any services of economic value”. In this regard, frequently, the BITs cover only “claim to money” or “title to money” that “has been used to create an economic value or to any performance having an economic value”,⁹⁵ meaning the claims can be exclusively monetary. The Russia-Belgium/Luxembourg BIT, however, broadens the definition so as to include *any type of demand*, including a direct indication of the demand for “performance of services”.

An illustrative case of the “ordinary meaning” interpretation to wording, similar to paragraphs (1.2.2) and (1.2.3), would be the *Eureko B.V. v. Poland*,⁹⁶ where Eureko claimed that “corporate governance” and an “international public offering” amounted to an “investment.” In that case, Article 1 of the Denmark-Poland BIT, the term “investment” was formulated as “ii) rights derived from shares, bonds and

⁹¹ Which in Russian would be “любое имущество” — as compared to “все виды имущественных ценностей” in the Russia-Belgium/Luxembourg BIT.

⁹² Heiskanen V. *Of Capital Import: The Definition of “Investment” In International Investment Law* // ASA Special Series. 2010. № 34. Hoffman A. *Protection of Foreign Investments through Modern Treaty Arbitration* // Association suisse de l'arbitrage. 2010. P. 55.

⁹³ *Petrobart v. Kyrgyz Republic*, Stockholm Chamber Case № 126/2003, Final Award, 29 March 2005.

⁹⁴ The situation would be different if the money were unilaterally written off by the States and, for instance, transferred to Ukraine.

⁹⁵ Germany/Singapore BIT (1973) (Treaty between the Federal Republic of Germany and the Republic of Singapore concerning the Encouragement and Reciprocal Protection of Investments, signed on 3 October 1973); Germany-Nigeria BIT (2000) (Treaty between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments, signed on 28 March 2000); Dutch-Polish BIT; Japan-Laos BIT (2008) (Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment, signed on 14 June 2007); Japan-Cambodia BIT (2007) (Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment signed on 14 June 2007).

⁹⁶ *Eureko B.V. v. Republic of Poland*, Partial Award on Liability, 19 August 2005.

other kind of interests in companies and joint ventures; iii) title to money and other assets and to any performance having an economic value <...> v) right to conduct economic activity... granted under contract.” The tribunal concluded that corporate governance rights had “economic value”, derived from the shares in a company, and thus Euroko was entitled to protection under the BIT.

In another case, a tribunal analyzed the UK-Czech BIT, which defined “investment” as “claims to money or to any performance under contract having a financial value”.⁹⁷ The claimant alleged that the term included the rights under the contract of cooperation. However, the tribunal stated that the purpose of the agreement was to “obtain a license” — a non-financial interest with non-financial rights. Since financial value exists only when “it appears to be well-founded or at the very least creates a legitimate expectation of performance in the future”, cooperation rights could not qualify as an investment.⁹⁸ That means, that the purpose of the investment under the BIT in question and the rights under the agreement may serve as limitations as to what can be an “investment”.

In the NSD case, the initial purpose of the investors (and the NSD itself) is to gain profit on the currency and stock markets. As was described in section 1, in the NSD case the investment comprises blocked financial instruments, held by the NSD through Euroclear/Clearstream, which serve its end-investors coupons and dividends, this includes bonds, Eurobonds which by their nature constitute a debt, as well as rights of selling these instruments in for a profitable sales price on the volatility of the stock markets. These elements have economic value, and thus the financial instruments themselves would qualify as an “investment” under paragraph (1.2.2) and the rights related thereto would suffice paragraph (1.2.3). Notably, this goes in line with the reasoning in the *Berschader v. Russia*, where the “investment” under the Russia-Belgium/Luxembourg BIT was seen as comprising shares, construction contracts, property rights in buildings and a debt.⁹⁹

Conclusion

In 2022 designation of the NSD as a sanctioned person entailed suspension of all transactions with foreign securities held at that depository, from purchase and sale transactions to receipt of coupons and dividends. The present paper thus took route to analyze the perspectives of the NSD filing a claim with an investment tribunal against Belgium/Luxembourg — the states of the two major central settlement depositories, Eurostream and Clearstream, which have suspended the depository “bridge” with the NSD. The case would have been based on the Russia-Belgium/Luxembourg BIT (1989). The paper narrowed down the question to interpreting two core terms of the BIT so as to establish the jurisdiction of the tribunal: the terms “investor” and “investment”.

First and foremost, the paper came to the conclusion that the NSD is a nominee holder of the financial instruments stuck in the blocked accounts. The structure of the “bridge” end-investors — NSD — Euroclear/Clearstream thus resembles shell companies' structure, which allows using the instruments of corporate law in order to investigate case practice on the investor — shell-companies standings in investment arbitration. Consequently, the practice of the BIT interpretation showed that the tribunals do not use the doctrine of corporate veil to diminish the right of a nominee to file a claim. And even if the tribunals did apply the heightened standards of jurisdiction under the good faith and economic utility of initiating the dispute, that the host-states for decades tried to argue (unsuccessfully), the NSD would still satisfy this three-tier test.

Nonetheless, the conclusion on the NSD also does not preclude the end-investors to file a separate claim themselves; the BIT contains a clause on the “indirect investments” established in the state-party to the BIT (regardless of the place of its registration). At the same time, investment arbitration practice allows parallel proceedings, leading to the conclusion that the tribunal would be unlikely to deny jurisdiction on the “most appropriate claimant” grounds.

As to the meaning of the “investment”, the Russia-Belgium/Luxembourg BIT has adopted one of the widest wordings (“every type of asset”) and has included a specific provision (“right to demand relating to any services of economic value” and “funds, shares and other kinds of interest in companies and rights of demand related thereto”) both of which could be potentially interpreted so as to include the blocked assets – and thus allow the NSD to establish an “investment” under the BIT.

⁹⁷ *William Nagel v. Czech Republic*, SCC Case 49/2002, Award 9 September 2003. §17.

⁹⁸ *Ibid.* §301.

⁹⁹ *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case № 080/2004. §114–123.

Therefore, the NSD could build a *prima facie* case in investment arbitration, since the tribunal would be likely to find jurisdiction *ratione personae* and *ratione materiae*. This, in turn, would resolve a low-success chance of the NSD in the CJEU in its mission to unblock the frozen assets, and provide an open door for future challenges of designations in international investment tribunals.

ТОЛКОВАНИЕ ПОНЯТИЙ «ИНВЕСТИЦИИ» И «ИНВЕСТОРЫ» В РОССИЙСКО-БЕЛЬГИЙСКО-ЛЮКСЕМБУРГСКОМ ДВУСТОРОННЕМ ИНВЕСТИЦИОННОМ ДОГОВОРЕ: ПОИСК ПУТЕЙ РАЗРЕШЕНИЯ ДЕЛА НСД

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Аннотация

Статья исследует юрисдикцию инвестиционного трибунала по двустороннему инвестиционному договору между Россией и Бельгией/Люксембургом на рассмотрение дела об оспаривании санкционных ограничений в случае его инициирования НРД. Согласно российско-бельгийско-люксембургскому ДИД, государства обязуются не допускать экспроприации инвестиций, а если она все же происходит, то выплачивать своевременную и справедливую компенсацию. Такая «экспроприация» может произойти и в результате санкций. Являясь российским депозитарием по ряду иностранных ценных бумаг, НРД имеет счета в централизованных европейских депозитариях Euroclear/Clearstream. С момента включения НРД в список подсанкционных организаций ЕС согласно Регламенту ЕС no. 269/2014 в июне 2022 года операции с ценными бумагами были приостановлены, а счет НРД в Euroclear/Clearstream был заблокирован. В связи с тем, что счета НРД в иностранных депозитариях были заблокированы, перевод иностранных ценных бумаг со счета депо, открытого в НРД, в другой российский или иностранный депозитарий стал невозможен. Одним из способов оспаривания таких последствий является подача иска в инвестиционный трибунал против Бельгии/Люксембурга. Дело имеет два возможных решения: массовый иск от конечных инвесторов или единый иск НРД как «номинального держателя» ценных бумаг конечных инвесторов. Первый вариант может оказаться чрезмерно время- и организационно-затратным, поэтому иск от НРД может показаться более привлекательным. Таким образом, применяя инструменты толкования международного публичного права, автор ставит задачу оценить перспективы инициирования НРД инвестиционного арбитражного разбирательства. Автор сосредоточился на толковании двух центральных терминов российско-бельгийско-люксембургского ДИД: «инвестор» и «инвестиции». В работе делается вывод о том, что инвестиционный арбитраж *prima facie* будет обладать юрисдикцией по делу *ratione personae*, несмотря на статус «номинального держателя» НРД, а также юрисдикцией *ratione materiae*, поскольку заблокированные ценные бумаги и доходность от них представляют собой «инвестиции» по смыслу ДИД. В связи с этим в статье определяется процессуальная правоспособность номинальных держателей инициировать арбитраж. Поскольку ранее этот вопрос не поднимался ни в доктрине, ни в практике, в статье проводится аналогия с прецедентным правом в отношении «технических» компаний.

Ключевые слова

инвестиционный арбитраж, НРД, заблокированные активы, юрисдикция, толкование ДИД

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