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Jurisdiction and Admissibility in the Czech Republic's BITs

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Prohlášení:

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V Praze 22. 6. 2016

Kateřina Heroutová

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Agreements
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
MFN clause	most-favoured-nation clause
UAE	United Arab Emirates
UK	United Kingdom of Great Britain and Northern Ireland
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

By January 2015, at least 29 international investment arbitration proceedings were commenced against the Czech Republic.[1] The number of claims in comparison to other states is exceptionally large; in fact, it is the third highest number in the world.[2] Given that investment arbitration is an extremely costly affair where the state has nothing to gain but much to lose, the situation is clearly not desirable.

It is of paramount importance to define the causes underlying such amount of investment cases instituted against the Czech Republic and to try to find a remedy. The problem is a very complex one, stretching over several fields of study including politics, economics, and of course, law. Just as with any other complex issue, it is the best to break it into little parts and analyse these separately one by one. This work attempts to examine one piece of the puzzle, the metaphorical root of the problem – the bilateral investment agreements ('BITs').

The word 'root' was chosen as BITs indeed form the root, the basis, of proceedings that the Czech Republic took part in. They both provided the legal basis of the proceedings, which is the jurisdiction of the tribunal, and they laid down the applicable law. The wordings of Czech Republic's BITs should therefore be taken into account when inquiring after the reasons why the Czech Republic is frequently targeted.

However, even the topic of BITs as a whole is too wide and needs to be further specified in order to be manageable within the space intended for this work. A scrutiny of the cases the Czech Republic faced in the past reveals that there are several problems that connect to the BITs and their wording. Each of the problems emerges in different stages of the proceedings.

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[1] UNCTAD 'Recent Developments in Investor-State Dispute Settlement (ISDS)' (2014) 1 IIA Issue Note UNCTAD/WEB/DIAE/PCB/2014/3 28; UNCTAD 'Recent Trends in IIAS and ISDS' (2015) 1 IIA Issue Note UNCTAD/WEB/DIAE/PCB/2015/1 13.

[2] UNCTAD 'Recent Trends in IIAS and ISDS' (2015) 1 IIA Issue Note UNCTAD/WEB/DIAE/PCB/2015/1 6.

When one searches for a place where to start, it is usually the best to start at the beginning. At the beginning of each proceedings there is the question of the jurisdiction of the tribunal and a little later down the road there is the question of admissibility of the claim. Let us therefore examine whether there can be a problem with the clauses that pertain to jurisdiction of the tribunal and admissibility of the case. A scrutiny of the cases reveals one surprising fact: certain investors decided to raise claims under circumstances where it was *prima facie* very uncertain whether any tribunal under similar circumstances could ever have jurisdiction over such dispute and whether such claims could be admissible. Yet the investors believed the respective law governing the issue would allow them to proceed with the case.

All of the cases relate to issues on which the public opinion is either divided, or which consist of behaviour that is straightforwardly condemned by the community of academics and practitioners alike. The first of these issues is treaty shopping, a practice where an investor restructures its investment in a way so as to obtain protection of a BIT. A particularly clear case of a criticized form of treaty shopping occurred in the case of *Phoenix v the Czech Republic* [3] ('*Phoenix*'). According to the Czech Republic, a similar instance of treaty shopping also occurred in the case of *Saluka v the Czech Republic*[4] ('*Saluka*').

The second issue is parallel proceedings, where one ultimate investor commences two different arbitral proceedings regarding the same set of measures taken by the state. This happened in the cases of *Lauder v the Czech Republic*[5] ('*Lauder*') and *CME v the Czech Republic* [6] ('*CME*'). The third issue asks of the question whether the most favoured nation clause could and should be applicable to dispute resolution. It was raised in *Frontier Petroleum Services v Czech Republic* [7] ('*Frontier Petroleum*').

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[3] *Phoenix Action, Ltd v Czech Republic* (Award of 15 April 2009) ICSID Case No ARB/06/5 (Phoenix Award).
[4] *Saluka Investments BV v Czech Republic* (Partial Award of 17 March 2006) (Saluka Award).
[5] *Ronald S Lauder v Czech Republic* (Final Award of 3 September 2001) (Lauder Award).
[6] *CME Czech Republic BV v Czech Republic* (Partial Award of 13 September 2001) (CME Partial Award).
[7] *Frontier Petroleum Services Ltd v Czech Republic* (Final Award of 12 November 2010) (Frontier Petroleum Award).

These cases have two things in common. Firstly, the argumentation the Czech Republic used therein showed that the state perceived the situations as problematic and undesirable and attempted to combat them with mechanisms contained in its BITs. Its argumentation was successful only in the case of *Phoenix*. The majority of purported breaks in BITs were thus ineffective. Secondly, they represent situations where, according to the Czech Republic, an investor should never have even contemplated to raise a claim. However, because the investors saw an opportunity in a form of a particular wording of a BIT clause, proceedings were instituted. The number of the proceedings against the Czech Republic rose. These cases leave one to wonder whether other investors could be inspired to raise claims under similar circumstances and consequently, whether the Czech Republic will have to face perhaps even more controversial arbitrations in the future.

This brings us to the key questions of this work: could the high number of investment cases against the Czech Republic have been partially prompted by ineffective provisions in Czech Republic's BITs? If so, do other of these BITs contain more effective mechanisms which could prevent the situations from reoccurring again? If not, do any such mechanisms even exist?

To answer these questions, this work firstly scrutinises the cases in order to pinpoint the factors which facilitated the situations and identify respective provisions in the BITs that were invoked. It then surveys all other Czech BITs[8] to see if the same clauses are present there as well and if so, how they are worded. Lastly, it analyses the provisions, asks whether they could be effective in the situations at hand and if the answer is to the negative, it suggests how to change them.

Regarding the sources, the work operates primarily with arbitral awards issued in the above stated cases and BITs concluded by the Czech Republic. It also draws inspiration from academic works dedicated to each of the issues. Where relevant, it looks into arbitral awards issued in cases raised against other states.

The work starts with explaining the terms 'jurisdiction' and 'admissibility', elaborates on the role of these aspects in arbitral proceedings and explains how they are connected to BITs (Chapter 2). It then proceeds to inspect the respective issued

[8] For enumeration of BITs cited in this work see footnote 277.

one by one. The issue of treaty shopping is the topic of Chapter 3. Chapter 4 is dedicated to parallel proceedings, and Chapter 5 to the question of the most favoured nation clause. Chapter 6 concludes the whole work.

The work, for the sake of consistency, focuses only on BITs that are currently valid. It does not take into consideration multilateral investment treaties or treaties that are being negotiated in the present.

2. JURISDICTION AND ADMISSIBILITY DEFINED AND UNDERSTOOD

Jurisdiction of tribunals and admissibility of claims are two very important aspects of every arbitral proceedings. The absence of either of those aspects means that the claimant will not be successful in its claim. Whether or not a tribunal will have jurisdiction over a claim and whether the claim will be admissible should therefore be the first point to contemplate when an investor decides if it should raise a claim. Clearly and narrowly constructed requirements for jurisdiction and admissibility can deter investors from instituting proceedings.

For the purpose of this work it is necessary to first define what is understood by both terms, explain what the precise role of both elements in proceedings is and assesses what the relationship between jurisdiction and admissibility on one side and BITs on the other is. Only then can one proceed to examine the respective clauses in BIT and examine their utility.

Jurisdiction can be defined as an adjudicative power of a tribunal,[9] or in another words, the power of a tribunal to hear a case.[10] The question of tribunal's jurisdiction is the first one to be solved in each proceedings; if the tribunal finds it lacks the power to hear the case, it will terminate the proceedings without ever examining its

[9] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) (Douglas) [291].
[10] *Waste Management Inc v United Mexican States* (Dissenting Opinion of Keith Highet) ICSID Case No ARB(AF)/98/258 (Waste Management) [59].

merits. For these reasons, jurisdiction of a tribunal has been labelled as the 'cornerstone' of each proceedings.[11]

In order to understand why jurisdiction of a tribunal plays such a prominent role in arbitral proceedings, one must appreciate the concept of investment arbitration as such. International investment arbitration is a very specific institute. It allows an individual to raise a claim directly against a sovereign and independent state using a platform that has not necessarily been created by national laws of this state, but instead may have been created on an international level by an agreement of this state and a home state of the individual. As a sovereign member of the international community, a state may by no means be coerced to take part in investment arbitration proceedings – the proceedings can take place only with the consent of a state. The power of a tribunal to hear the case stems from this consent.[12]

There are three ways in which a state generally gives its consent to arbitration.[13] Firstly, it may stem from a direct agreement between the investor and the host state. Secondly, it may be founded by a national legislation of the host state. Thirdly, and crucially for this work, a consent may be given through an international treaty between the host state and the home state of the investor. In practice, this type of consent is often vested in BITs.[14]

The vast majority of BITs contains a clause through which the states consent to international investment arbitration;[15] for the purposes of this work, these clauses will be referred to as 'dispute resolution clauses'. A dispute resolution clause may read as follows:

> 'Each Contracting Party hereby consents to submit a dispute [between a contracting party and an investor of the other contracting party concerning an investment of the latter] to an arbitral tribunal.'[16]

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[11] J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 329.
[12] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) (Dolzer and Schreuer) 238.
[13] ibid (n 12) 238.
[14] ibid (n 12) 242.
[15] ibid (n 12).
[16] Netherlands BIT (n 8) art 8(2).

Jurisdiction is usually understood as having three aspects: a material one (jurisdiction *ratione materiae*), a personal one (jurisdiction *ratione personae*), and a temporal one (jurisdiction *ratione temporis*).[17]

Jurisdiction *ratione materiae* asks which type of dispute can be submitted to an arbitral tribunal. Some BITs, such as the Agreement on Encouragement and Reciprocal Protection of Investments between the Czech and Slovak Federal Republic and the Kingdom of the Netherlands[18] ('Netherlands BIT') cited above, contain a broad definition of the term dispute – it is any dispute between an investor and the host state regarding an investment made pursuant to the BIT. Other BITs are more restrictive; for example, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments[19] entitles the tribunal to hear only a claim concerning disputes regarding certain provision of the BIT.[20]

Jurisdiction *ratione personae* relates to the question of who is entitled to submit a claim. BITs typically state that it is an 'investor', while this term is being defined elsewhere in the BIT. The Netherlands BIT can again serve as an example here; its Art. 8 contains a dispute resolution clause which uses the term 'investor' defined in its Art. 1(b).[21]

The third aspect of jurisdiction, jurisdiction *ratione temporis*, examines whether the obligation in question was in force at the time of the alleged breach. This aspect is an embodiment of a principle referred to as the intertemporal principle.[22] It was eloquently expressed by the Permanent Court of Justice as follows: 'A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'[23] An investor may therefore complain of allegedly illegal measures taken by the state only

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[17] Douglas (n 9) [301].
[18] Netherlands BIT (n 8).
[19] UK BIT (n 8).
[20] ibid art 8(1).
[21] Netherlands BIT (n 8) art 8(1), 8(2), 1(b).
[22] Douglas (n 9) [616].
[23] Island of Palmas (1928) 2 RIAA 829, 845.

if the measures were forbidden by a BIT at the time when they were taken. The principle does not have to be specifically embodied in a BIT in order to apply.

The aspect of jurisdiction therefore relates to the power of a tribunal to hear the case and as such is usually founded in respective provisions of BIT.[24] Admissibility is different. It is examined at the next stage of the proceedings. In order to determine whether a case is admissible, the tribunal inquires into the nature and features of the claim itself.

The question of admissibility is the question of whether it is appropriate[25] for a tribunal, which has jurisdiction over the claim,[26] to uphold such claim. It invites the tribunal to examine the circumstances surrounding the claim in order to find out whether there exists a fact for which it would be inappropriate for a tribunal to rule in favour of an investor even if the merits of the case would strictly speaking lead to that conclusion. To put it differently, an objection to admissibility of a claim amounts to asking the tribunal to rule that the claim is inadmissible on grounds different than the ultimate merits.[27]

The reasons why a claim may be found inadmissible vary. A claim has been found inadmissible e.g. due to the absence of good faith, as pronounced by the tribunal in *Plama Consortium Limited v Republic of Bulgaria.*[28] In this case the investor misrepresented its true identity[29] in order to obtain a necessary approval from the state.[30] The tribunal found that such conduct was contrary to the principle of good faith,[31] and stated that 'In consideration of the above […], this Tribunal cannot lend

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[24] cf *SGS Société Générale de Surveillance v Republic of the Philippines* (Decision of the tribunal on Objections to Jurisdiction of 29 January 2004) ICSID Case No ARB/02/6 (SGS v Philippines) [154].
[25] Waste Management (n 10) [59].
[26] cf SGS v Philippines (n 24) [155].
[27] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications Limited 1986) vol 2 438.
[28] *Plama Consortium Limited v Republic of Bulgaria* (Award of 27 August 2008) ICSID Case No ARB/03/24.
[29] ibid [129].
[30] ibid [144].
[31] ibid.

its support to Claimant's request and cannot, therefore, grant the substantive protections of the [investment agreement].'[32]

Another example of inadmissibility can be found in the case of *SGS Société Générale de Surveillance v Republic of the Philippines*.[33] In this case, the investor instituted international investment arbitration proceedings, while alleging that the host state breached a BIT by breaching a contract concluded between the investor and the host state.[34] However, the contract itself also contained a dispute resolution clause.[35] The tribunal decided that the claimant should not be allowed to bring its claim to international arbitration; instead, the claim should be heard pursuant to the dispute resolution clause present in the contract[36] and ruled the claim inadmissible.[37]

The reasons for inadmissibility are often found in general principles of international law outside BITs. However, that does not mean that requirements on admissibility cannot be included in a BIT.

As shown above, jurisdiction and admissibility are different concepts. It is important that tribunals properly distinguish between these two.[38] Although it may seem that the lack of jurisdiction of a tribunal and inadmissibility of a claim may have the same ultimate consequences (i.e. investor will not be successful in its claim), dismissal of a claim due to a lack of jurisdiction brings about different ramifications than dismissal of a claim due to inadmissibility.

Most importantly perhaps, the distinction is important for the possibility to challenge the arbitral award. An award may usually be challenged on the basis that the tribunal erred in its finding jurisdiction over the claim; however, it may not be challenged based on tribunal's mistaken views on the merits.[39] Mistaking a matter of jurisdiction

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[32] ibid [146].
[33] SGS v Philippines (n 24).
[34] ibid [15]–[16].
[35] ibid [137].
[36] ibid [154].
[37] ibid [155].
[38] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen (ed), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005) (Paulsson) 601.
[39] David AR Williams QC, 'Jurisdiction and Admissibility' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) (Williams) 920.

for a matter of admissibility may therefore have the effect of depriving an investor of the possibility of challenging the award.

Theoretically, a correct classification of the reason why the claim cannot be upheld could also speed up the proceedings, as the tribunal usually first examines jurisdiction and then admissibility. However, some tribunals examine jurisdiction and admissibility together.[40]

It should be noted that the distinction between jurisdiction and admissibility, albeit important, is often unclear[41] and tribunals sometimes struggle with the correct classification of these two elements.[42] Different tribunals may perceive similar issues differently; academic works often use the terms in conjunction.[43] Consequently, it is possible that where tribunals and consequently this work refers to jurisdiction, the respective problem should have better been defined as one of admissibility and vice versa.

Jurisdiction and admissibility are both essential aspects of every case. Jurisdiction is usually vested in arbitral tribunal by the virtue of a combination of various provisions of a BIT. The lack of admissibility on the other hand often depends on circumstances not connected to any of BIT's clauses. This does not mean that certain situations under which a claim can be found inadmissible cannot be incorporated in BITs. It is therefore the wording of BITs that one should examine if there are concerns that the requirements for jurisdiction and admissibility are too lenient and invite too many investors to commence investment arbitration proceedings.

3. TREATY SHOPPING

The first problem that emerged in cases against the Czech Republic that this work discusses is treaty shopping. The term treaty shopping designs a behaviour when

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[40] Some tribunals issue an award on 'jurisdiction and admissibility', e.g. in SGS v Philippines (n 24); *Abaclat and Others v Argentine Republic* (Decision on Jurisdiction and Admissibility of 4 August 2011) ICSID Case No ARB/07/5.
[41] Williams (n 39) 920.
[42] Paulsson (n 38) 607.
[43] cf e.g. Eric De Brabandere, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims' [2012] 3 JIDS 609.

investors 'deliberately seek to acquire the benefits of an investment treaty by making foreign investments or bringing claims from third countries that have more favourable treaty terms with the target host state.'[44] In another words, it is a situation when investors attempt to gain access to protection of their investment that they were previously not entitled to.

The Czech Republic has alleged that an investor engaged in treaty shopping in two instances: in *Phoenix* and *Saluka*. In the *Phoenix* case, a company named Phoenix Action, Ltd. ('Phoenix') acquired an investment, after there were some issues with the investment. Phoenix then commenced proceedings against the Czech Republic in respect to these issues. In the case of *Saluka,* the claimant in the dispute, Saluka Investment BV ('Saluka'), was a company that was effectively owned by another company that was incorporated in a different country and that was not under the protection of any investment treaty. The mother company was not allowed to bring the claim on its own, and it used Saluka to do it in its stead.

In both cases, the Czech Republic objected to the jurisdiction of the tribunal. In *Phoenix* it was successful; in *Saluka* it was not. The question that presents itself is whether in both cases the claimant indeed engaged in undesirable behaviour. If so, the next question is why the situation was not prevented, and how a similar situation can be averted in the future.

This Chapter in its first Section sheds some light on the factual situation of both cases and evaluates them (3.1). Second Section assesses the reasons which enabled treaty shopping in *Saluka* and stopped it in *Phoenix* (3.2). Next Section examines the definition of 'investment' and 'investor' as these seems to be the primary causes of the problem (3.3). A possible solution to this problem in the form of a denial of benefits clause is then examined on a theoretical level (3.4). The last Section analyses the concrete formulations of the denial of benefits clause in the Czech Republic BITs (3.5).

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[44] Matthew Skinner, Cameron A Miles, and Sam Luttrell, 'Access and advantage in investor-state arbitration: The law and practice of treaty shopping' (2010) 3 JWEL & B 260 (Skinner) 260.

3.1. FACTUAL BACKGROUND AND EVALUATION OF TRIBUNALS' FINDINGS

The factual circumstances in *Phoenix* and *Saluka* were very different. Correspondingly, so were the arguments of the parties and the rulings of the tribunals. *Phoenix* was a classic case of treaty shopping that is condemned. In *Saluka*, the claimant engaged in what appears to be a standard business practice.

Phoenix was an Israeli company owned by a Czech national, Mr Beno, who established the company in 2001.[45] In 2002, Phoenix purchased two companies from another company that happened to be owned by Mr Beno's wife.[46] The transaction took place at a time when the companies were already subjected to criminal investigation.[47] Phoenix then commenced international arbitration proceedings against the Czech Republic.[48]

The Czech Republic raised objections to the tribunal's jurisdiction based on provisions of the Agreement between the Government of Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments[49] ('Israel BIT') that was used in the case and on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[50] ('ICSID Convention'). It *inter alia* claimed that the tribunal had no jurisdiction *ratione temporis* over the claim, Phoenix did not own any investment in the sense of the BIT, and that Phoenix did not classify as an investor due to its failure to satisfy the diversity of nationality requirement prescribed by the relevant BIT.[51]

The tribunal found that it lacked the *ratione materiae* jurisdiction over the dispute, as the purported investment did not qualify as protected investment.[52] Claimant's

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[45] Phoenix Award (n 3) [22].
[46] ibid [22], [27].
[47] ibid [32].
[48] ibid [1].
[49] Israel BIT (n 8).
[50] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).
[51] Phoenix Award (n 3) [35].
[52] ibid [145].

transaction represented an abuse of system, and such action could not be protected.[53] It should be mentioned that the tribunal based its decision on the wording of the ICSID Convention rather than the Israel BIT.[54] However, as can be seen later in this Section, the case would have been dismissed irrespective of the applicable law.

In the *Saluka* case,[55] Saluka was a Dutch company that was a part of a Japanese conglomerate that has operated within the Czech Republic since 1990.[56] Saluka acquired shares in one of the major Czech banks[57] from another member of the conglomerate in 1998.[58] In 2001, Saluka initiated arbitration proceedings against the Czech Republic.[59]

The Czech Republic objected to the notion that the Netherlands BIT based on which the case was raised establishes jurisdiction of the tribunal in this case. It claimed that Saluka has not made an investment in the Czech Republic[60] and also that Saluka does not constitute an investor as it is not the real party in interest in the arbitration.[61]

The tribunal dismissed both objections. Firstly it examined the definition of investment in the respective BIT and found it did not support respondent's arguments.[62] Secondly, it refused to deny Saluka the status of a protected investor. It came to the conclusion that '[t]here is no doubt that Saluka meets the only requirements expressly stipulated in [the Netherlands BIT] of the Treaty for qualification as an investor'.[63]

The two cases are examples of treaty shopping as defined on page 10. Skinner identifies two categories of treaty shopping. The first one is so called 'treaty shopping at the back end of an investment'. It describes a situation when an investor

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[53] ibid [142]–[144].
[54] cf ibid [96], [116].
[55] For a detailed explanation of the circumstances of the case, cf Vladimir Balaš, 'Saluka Investments B. V. (The Netherlands) v. The Czech Republic, Comments on the Partial Arbitral Award of 17 March 2006' (2006) 7 J. World Investment & Trade 371 (Balaš) 371 – 375.
[56] Saluka Award (n 4) [43].
[57] ibid [1].
[58] ibid [71].
[59] ibid [2].
[60] ibid [199(a)].
[61] ibid [199(c)].
[62] ibid [207], [209].
[63] ibid [223].

restructures its business after it has become a subject of a dispute.[64] The other category is labelled 'treaty shopping at the front end of an investment,[65] which is a situation where an investor makes changes in the structure of its business before there is any notion of a dispute as a part of a scheme to secure the investment in the best way possible.[66] According this test, *Phoenix* represented treaty shopping at the back end of an investment; *Saluka* at the front end of an investment.

Opinions on whether treaty shopping is desirable vary. Dolzer and Schreuer argue that in general, there is nothing illegal and unethical about restructuring one's business so as to maximize its protection.[67] Douglas states that forum shopping at the back end of an investment is impermissible, whereas at the front end of the investment is acceptable.[68] States tend to condemn both practices.[69]

There are persuasive arguments for frowning upon instances of treaty shopping at the back end of an investment. When states offer their protection to investors through BITs their conduct is of course not motivated by sheer altruism. They hope to gain something in return - investors that will contribute to the economic growth of the state. With an investor that engages in the treaty shopping on the back end of an investment, state's effort to boost its economy completely misses its aim. Such investor will not help the state's economic situation in any way. Consequently, when an investor acquires an investment with the sole purpose of commencing arbitral proceedings, it uses the protection of the BIT for a whole different ultimate reason than for which it was offered in the first place. Its conduct amounts to an abuse of the system.[70]

On the other hand, treaty shopping at the front end is understandable and, contrary to what states might claim in this matter, justifiable. A typical scenario in this case involves an investor that truly intends to conduct its business in another country for a certain period of time, thus helping the economy of this country. As every investment

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[64] Skinner (n 44) 260.
[65] ibid 260.
[66] ibid.
[67] Dolzer and Schreuer (n 12) 54.
[68] Douglas (n 9) [542].
[69] Skinner (n 44) 260.
[70] cf Phoenix Award (n 3) [144].

involves multiple sources of risk, the investor searches for the best way to protect its investment against any possible future harm, including interference from the part of the state. Since the legal reality created by the system of BITs is that an investment is better protected against measures taken by a state if it is owned by an investor incorporated in a particular state rather than by an investor from another state, including the host state,[71] the investor decides to channel the investment through another entity.

The states created a system in which they compete to attract investors by offering them as favourable conditions as possible from perspective of legal protection. It is a similar concept to a situation when the investor evaluates which country has the most favourable tax policy, or which country offers the easiest method of incorporating a company, and decides to establish its business there. The investors cannot be punished for acting on those offers and behaving in a way the states intended them to behave. It should therefore come as no surprise that when tribunals are confronted with such an investor and they contemplate whether to pronounce the investor worthy of a protection of a BIT, they do so.

Nevertheless, when considering the effectiveness of the provision of BITs from the state's point of view, what matters is the opinion of the state on this practice – whether it considers treaty shopping in any form desirable or not. In *Saluka*, the Czech Republic made it clear that it expects protected investors to have a real link to its home state, and not to be a mere conduit for the investment.[72] It seems that the Czech Republic did not wish to support any form of treaty shopping, be it the one displayed in *Phoenix* or be it the one from *Saluka*.

3.2. Reasons Why the Tribunal Declined its Jurisdiction in Phoenix and Upheld it in Saluka

To assess whether Czech Republic's BITs protect the state from treaty shopping, one must examine the reasons why the tribunal refused to rule in favour of the claimant

[71] Cf Balaš (n 55) 376.
[72] Saluka Award (n 4) [207]–[210].

in the case of *Phoenix* and why it saw itself entitled to hear the claim in the case of *Saluka*.

As discussed in Section 3.1, the Czech Republic raised several objections to the jurisdiction of the tribunal in the *Phoenix* case. The tribunal focused on one – whether the investment allegedly made by Mr Beno was made *bona fide*. The tribunal did not understand this requirement as being prescribed by the ICSID Convention which it examined – the Convention itself does not expressly state any such condition[73] – but as prescribed by general principles of international law.[74] It stated that [t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect […] investments not made in good faith.'[75]

In order to determine the presence of good faith or a lack thereof, the tribunal took several factors into consideration. Among others, it looked at the timing of the investment and noted that Phoenix acquired the investment at a time when it was already burdened by problems with the authorities.[76] It also inquired into the timing of the claim, which pointed to the fact that the whole scheme was designed with the intention to assert an investment arbitration claim.[77] The nature of the claim suggested that Phoenix never intended to perform any economic activity in the Czech Republic;[78] instead, its aim was to bring international litigation against the state.[79] These and other factors lead the tribunal to believe the investor was not acting in good faith.[80] In the light of this conclusion, the tribunal was precluded from having jurisdiction over the case and did not address other of the respondent's objections.[81]

[73] Cf ICSID Convention (n 50) art 25(1).
[74] Phoenix Award (n 3) [106].
[75] ibid [100].
[76] ibid [136].
[77] ibid [138].
[78] ibid [140].
[79] ibid [142].
[80] ibid [144].
[81] ibid [146].

Evaluation of tribunal's findings leads to several observations. Firstly, the *Phoenix* case is a clear cut example of abuse of process.[82] It would be difficult to imagine the tribunal ruling otherwise. Secondly, the reasons behind the dismissal of the claim did not depend on the wording of any treaty, but on general principles of international law that apply in each and every case. It therefore seems that there is no need for including special mechanisms to combat such obvious cases of treaty shopping at the back end of an investment into BITs.

The outcome of the *Saluka* case was different. Here too did the respondent allege that there was no *bona fide* investment and that the claimant did not classify as an investor.[83] The tribunal first contemplated the presence of an investment. It examined Art. 1(a) of the Netherlands BIT, which states: 'The term 'investments' shall comprise every kind of asset invested either directly or through an investor of a third State.'[84] The tribunal noted that the definition is very wide.[85] It dismissed Czech Republic's assertion that there was no intention on the investor's part to make a true investment[86] as irrelevant, for 'Even if it were possible to know an investor's true motivation in making its investment, nothing in Article 1 makes the investor's motivation part of the definition of an "investment"'.[87] For the same reason it dismissed the argument that the investment was in fact a mere conduit for an investment of the mother company.[88] The definition of the investment in the Netherlands BIT did not compel the tribunal into the economic nature of the transaction; the tribunal would exceed its powers if it did so.[89]

The tribunal then turned its attention to the definition of an investor. It reads:

> '(b) the term "investors" shall comprise:
>
> […]

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[82] Martin J Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes' (2011) 26 ICSID Review Foreign Investment Law Journal 34 (Valasek) 66.
[83] Saluka Award (n 4) [199].
[84] Netherlands BIT (n 8) art 1(a).
[85] Saluka Award (n 4) [203].
[86] ibid [207].
[87] ibid [209].
[88] ibid [210].
[89] ibid [211].

> ii. legal persons constituted under the law of one of the Contracting Parties.'[90]

The respondent stated that despite being a legal person constituted under the laws of the Netherlands,[91] Saluka still did not represent an investor as it was merely a shell company and as such was not a *bona fide* investor.[92] It invited the tribunal to pierce the corporate veil and recognize the real investor, Saluka's mother company.[93] The tribunal refused to do so. It stressed that it 'must always bear in mind the terms of the Treaty under which it operates'.[94] The treaty did not allow the tribunal to pierce the corporate veil.

The respondent also complained about the lack of real and continuous link between Saluka and the Netherlands for which it allegedly did not qualify as an investor.[95] In a now notorious statement, the tribunal conceded that:

> '[it] has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty.'[96]

But again, the tribunal was unable to go beyond the definition of the investment in the BIT and to create an additional requirement of real and continuous link.[97]

The findings of the *Saluka* tribunal highlight a difference in understanding of the concept of nationality that can be adopted by international investment tribunals and in understanding of the problematics endorsed by the International Court of Justice ('ICJ'). In its *Nottebohm* case,[98] the ICJ formulated the principle of effective

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[90] Netherlands BIT (n 8) art 1(b).
[91] Saluka Award (n 4) [223].
[92] ibid [227].
[93] ibid [227].
[94] ibid [229].
[95] ibid [239].
[96] ibid [240].
[97] ibid [241].
[98] *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4.

nationality.[99] As can be seen in the *Saluka* case, in the absence of an express statement of this principle in the BITs or ICSID Convention,[100] tribunals may be reluctant to use the principle.[101]

Arbitral practice from cases against other states shows a similar approach to forum shopping across the world. The tribunal in *Mobil Corporation v Venezuela*[102] set a clear test regarding permissible treaty shopping:[103] corporate restructuring is perfectly legitimate, as long as it is undergone before the disputes arise.[104] Tribunals in *Banro v Congo*[105] and *Cementownia v Turkey*[106] followed the same test. Other tribunals went further and suggested that the investment lacks good faith even in instances when the dispute had not yet arisen, but was foreseeable.[107]

It can be thus assumed that in the light of the recent arbitral awards, if an investor undergoes corporate restructuring with the purpose of getting access to international arbitration at the time the dispute was already present or was foreseeable, the

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[99] ibid 22.

[100] cf prof. JUDr. Pavel Šturma, DrSc. and doc. JUDr. Vladamír Balaš, CSc., *Ochrana mezinárodních investic v kontextu obecného mezinárodního práva* (Studie z mezinárodního práva č. 3, Univerzita Karlova v Praze, Právnická fakulta 2012) 88 where professor Šturma examines art 25(2)(a) of the ICSID Convention and remarks that it was not the intention to include the effective nationality principle in the ICSID Convention.

[101] The most prominent award addressing this topic is *Tokios Tokelės v Ukraine* (Decision on Jurisdiction of 29 April 2004) ICSID Case No ARB/02/18 (Tokios Tokeles).

[102] *Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolanade Petroleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolanade Petroleos, Inc v Bolivarian Republic of Venezuela* (Decision on Jurisdiction of 10 June 2010) ICSID Case No ARB/07/27 (Mobil Corporations v Venezuela).

[103] Paul Michael Blyschak, 'Access and advantage expanded: Mobil Corporation v Venezuela and Other Recent Arbitration Awards on Treaty Shopping' (2011) 4 JWEL & B 260 32, 35.

[104] Mobil Corporations v Venezuela (n 102) [204]–[205].

[105] *Banro American Resources, Inc and Société Aurifère du Kivu et du Maniema SAR v Democratic Republic of the Congo* (Award of the Tribunal of 1 September 1 2000) ICSID Case No ARB/98/7 [9], [24], [26]; cf Dolzer and Schreuer (n 12) 54.

[106] *Cementownia 'Nowa Huta" s.a. v Republic of Turkey* (Award of 17 September 2009) ICSDI Case No ARB(AF)/06/2 [153], [156] – note that the tribunal firstly found that the claimant never actually acquired the investment, but had it done so, it would not have been in a good faith.

[107] *Aguas del Tunari SA v Republic of Bolivia* (Decision on Respondent's Objection to Jurisdiction of 21 October 2005) ICSID Case No ARB/02/3 [329], [331]; *Pac Rim Cayman LLC v the Republic of El Salvador* (Decision on the Respondent's Jurisdictional Objections) ICSID Case No ARB/09/12 [2.99].

tribunals will refuse to hear the claim,[108] even if not expressly authorized by the applicable BIT. States therefore do not necessarily have to redraft their BITs in order to prevent treaty shopping at the back end of an investment.

In the case of treaty shopping at the front end of an investment the situation is different. Numerous tribunals were faced with such situation, and like the *Saluka* tribunal, refused to pierce the corporate veil in the absence of a corresponding provision in the BIT.[109]

It therefore remains to be assessed whether the way Czech BITs are drafted enables the investors to engage in treaty shopping on the front end of the investment.

3.3. DEFINITION OF INVESTMENT AND INVESTOR

As can be seen in the cases of *Saluka* and *Phoenix*, treaty shopping is primarily a question of the definition of investor and investment in the BITs. Definition of an investment as 'every kind of asset invested by an investor' and definition of an investor as an 'entity incorporated in one of the contracting parties' will not give grounds for tribunals such as the *Saluka* tribunal to decline its jurisdiction.

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[108] Tania Voon, Andrew Mitchell and James Munro, 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration' [2014] 5 JIDS 41 (Voon) 65; Inna Uchkunova, 'Drawing a Line: Corporate Restructuring and Treaty Shopping in ICSID Arbitration' (Kluwer Arbitration Blog) <http://kluwerarbitrationblog.com/blog/2013/03/06/drawing-a-line-corporate-restructuring-andtreaty-shopping-in-icsid-arbitration> accessed 12 August 2013.

[109] Tokios Tokeles (n 101) [53]–[56]; cf Antoine Martin, 'International Investment Disputes, Nationality and Corporate Veil: Some Insights From Tokios Tokelés and TSA Spectrum de Argentina' (2011) 8 TDM <http://ssrn.com/abstract=1781768> accessed 1 April 2015, 8; *The Rompetrol Group NV v Romania* (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility of 18 April 2008) ICSID Case No ARB/06/03 [85]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan* (Award of 29 July 2008) ICSID Case No ARB/05/16) [326].

Certain provisions of the *Saluka* award may serve as inspiration for those seeking advice on how to structure BITs in order to combat treaty shopping.[110] The tribunal stated:

> '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 laws of third States […].'[111]

It also suggested that the parties could have agreed on a definition of an investor which would require the investor to have a real and continuous link to the state.[112]

It should be examined whether Czech Republic's BITs contain definitions that are too broad or whether they contain provisions similar to those envisaged by the *Saluka* tribunal. If they are too broad, the question that presents itself is if restricting them is indeed the best way to combat treaty shopping.

Majority of the Czech BITs define investor as an entity incorporated or constituted[113] in the territory of the Czech Republic, or as an entity having its seat, permanent seat, residence, permanent residence or registered office in the territory of the Czech Republic, [114] or a combination thereof. [115] They therefore impose only formal

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[110] cf Balaš (n 55) 379.
[111] Saluka Award (n 4) [229].
[112] ibid [339]–[241].
[113] Bahrain BIT (n 8) art 1(2)(b); Canada BIT (n 8) art 1(e)(1); Greece BIT (n 8) art 1(3)(b); Hungary BIT (n 8) art 1(2)(b); Latvia BIT (n 8) art 1(2)(b); Korea BIT (n 8) art 1(2)(b); Malaysia BIT (n 8) art 1(1)(c)(ii); Netherlands BIT (n 8) art 1(b)(ii); Panama BIT (n 8) art 1(2)(b)(ii); Saudi Arabia BIT (n 8) art 1(2)(b); Singapore BIT (n 8) art 1(4); Thailand BIT (n 8) art 1(2)(b); Ukraine BIT (n 8) art 1(2)(b); UAE BIT (n 8) art 1(2)(b); UK BIT (n 8) art 1(c)(ii)(bb); USA BIT (n 8) art 1(2)(b).
[114] Finland BIT (n 8) art 1(1)(c)(ii); Germany BIT (n 8) art 1(3); Spain BIT (n 8) art 1(2)(b).
[115] Albania BIT (n 8) art 1(2)(b); Argentine BIT (n 8) art 1(2)(b); Austria BIT (n 8) art 1(2)(b); Belarus BIT (n 8) art 1(2)(b); Bulgaria BIT (n 8) art 1(2)(b); Cambodia BIT (n 8) art 1(2)(b); China BIT (n 8) art 1(2)(b); Costa Rica BIT (n 8) art 1(2)(b); Croatia BIT (n 8) art 1(1)(b); Cyprus BIT (n 8) art 1(2)(b); DPRK BIT (n 8) art 1(2)(b); Egypt BIT (n 8) art 1(2)(b); El Salvador BIT (n 8) art 1(2)(b); France BIT (n 8) art 1(2)(b); Georgia BIT (n 8) art 1(2)(b); Guatemala BIT (n 8) art 1(2)(b); India BIT (n 8) art 1(a)(ii); Indonesia BIT (n 8) art 1(2)(b); Israel BIT (n 8) art 1(3)(ii)(b); Jordan BIT (n 8) art 1(2)(b); Kazakhstan BIT (n 8) art 1(2)(b); Lebanon BIT (n 8) art 1(1)(b); Lithuania BIT (n 8) art 1(2)(b); Macedonia BIT (n 8) art 1(2)(b); Moldova BIT (n 8) art 1(2)(b); Mongolia BIT (n 8) art 1(2)(b); Montenegro BIT (n 8) art 1(3)(2); Morocco BIT (n 8) art 1(2)(b); Nicaragua BIT (n 8) art 1(2)(b); Norway BIT (n 8) art 1(3)(b); Paraguay BIT (n 8) art 1(2)(b); Peru BIT (n 8) art 1(2)(b); Poland BIT

requirements on investors.[116] Such definitions are very broad and encourage treaty shopping as they encompass shell companies set up only for the purpose of channelling an investment.[117]

Some BITs go even further and define investor as an entity incorporated under the laws of a third country and controlled by a national of or entity incorporated in the other contracting party.[118] This further broadens the number of investors who are protected by the BIT and consequently raises the number of ways in which a company may undergo corporate restructuring in order to gain access to international arbitration.

Only a minority of Czech BITs impose additional requirements that could prevent treaty shopping[119] such as conducting business activities within territory of the state other than the host state or having a head office in that state. [120]

As to the definition of investment, most of the BITs are equally wide in this respect as in the definition of investor. The most far-reaching definition of investment is contained in the Netherlands BIT [121] and two other BITs.[122] They do not describe investment in any other way than an asset being 'invested', and expressly allow indirect investments. The majority of the BITs[123] have a very similar clause, with the difference that they do not expressly mention indirect investment.

(n 8) art 1(2)(b); Serbia BIT (n 8) art 1(3)(2); South Africa BIT (n 8) art 1(2)(b); Sri Lanka BIT (n 8) art 1(2)(b); Syria BIT (n 8) art 1(2)(b); Tajikistan BIT (n 8) art 1(2)(b); Uruguay BIT (n 8) art 1(3)(b); Uzbekistan BIT (n 8) art 1(2)(ii); Venezuela BIT (n 8) art 1(2)(b); Viet Nam BIT (n 8) art 1(2)(b).

[116] cf Dolzer and Schreuer (n 12) 51.

[117] Saluka Award (n 4) [240]; cf Valasek (n 82) 57.

[118] Australia BIT (n 8) art 1(1)(d); Sweden BIT (n 8) art 1(2)(b); Switzerland BIT (n 8) art 1(1)(b).

[119] cf Dolzer and Schreuer (n 12) 51.

[120] Azerbaijan BIT (n 8) art 1(2)(b); Belgium BIT (n 8) art 1(a)(ab); Bosnia and Herzegovina BIT (n 8) art 1(2)(b)(i); Chile BIT (n 8) art 1(1)(b); Kuwait BIT (n 8) art 1(2)(b); Mauritius BIT (n 8) art 1(1)(c); Mexico BIT (n 8) art 1(1)(b); Philippines BIT (n 8) art 1(2)(b); Portugal BIT (n 8) art 1(2)(b); Romania BIT (n 8) art 1(2)(b); Russia BIT (n 8) art 1(1)(b); Tunisia BIT (n 8) art 1(2)(b); Turkey BIT (n 8) art 1(1)(b); Yemen BIT (n 8) art 1(2)(b).

[121] cf Saluka Award (n 4) [203].

[122] Belgium BIT (n 8) art 1(2); France BIT (n 8) art 1(1).

[123] Albania BIT (n 8) art 1(1); Argentina BIT (n 8) art 1(1); Austria BIT (n 8) art 1(1); Bahrain BIT (n 8) art 1(1); Belarus BIT (n 8) art 1(1); Bosnia and Herzegovina BIT (n 8) art 1(1); Bulgaria BIT (n 8) art 1(1); Cambodia BIT (n 8) art 1(1); Chile BIT (n 8) art 1(2); China BIT (n 8) art 1(1); Costa Rica BIT (n 8) art 1(1); Croatia BIT (n 8) art 1(2); Cyprus

Only a handful of BITs limit the definition of an investment. Two[124] understand investment only as direct investment. A few BITs mention the element of ownership or control,[125] some expressly mentioning direct or indirect ownership or control.[126]

More restrictive definitions of investor and investment in the Czech BITs could probably to certain extent prevent treaty shopping. So could an introduction of the control rule,[127] under which the nationality of investors is determined by the actual person in control,[128] to the BITs. However, before assessing to which extent these would be effective, it is prudent to ask whether regulation through restricting the definitions of investor and investment is the most effective way to safeguard the Czech Republic against treaty shopping.

It seems that it is not the best option. There are two reasons for this assertion. Firstly, one must keep in mind the purpose for which the system of international investment law was created. The states agree to offer protection to investors in the hope of attracting them to make investments within their territories, and while doing so contribute to the economy of the state. While abuse of the system is a problem, when searching for a solution the purpose of the system should not be eradicated. Restricting the definitions of investor and investment to the point where any treaty

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BIT (n 8) art 1(1); DPRK (n 8) art 1(1); Egypt BIT (n 8) art 1(1); El Salvador BIT (n 8) art 1(1); Finland BIT (n 8) art 1(1); Georgia BIT (n 8) art 1(1); Germany BIT (n 8) art 1(1); Greece BIT (n 8) art 1(1); Guatemala BIT (n 8) art 1(1); Hungary BIT (n 8) art 1(1); India BIT (n 8) art 1(2); Indonesia BIT (n 8) art 1(1); Israel BIT (n 8) art 1(1); Jordan BIT (n 8) art 1(1); Kazakhstan BIT (n 8) art 1(1); Korea BIT (n 8) art 1(1); Latvia BIT (n 8) art 1(1); Lebanon BIT (n 8) art 1(2); Lithuania BIT (n 8) art 1(1); Macedonia BIT (n 8) art 1(1); Malaysia BIT (n 8) art 1(1)(a); Mauritius BIT (n 8) art 1(1)(a); Mexico BIT (n 8) art 1(2); Moldova BIT (n 8) art 1(1); Mongolia BIT (n 8) art 1(1); Montenegro BIT (n 8) art 1(1); Nicaragua BIT (n 8) art 1(1); Norway BIT (n 8) art 1(1); Panama BIT (n 8) art 1(1); Paraguay BIT (n 8) art 1(1); Peru BIT (n 8) art 1(1); Philippines BIT (n 8) art 1(1); Poland BIT (n 8) art 1(1); Portugal BIT (n 8) art 1(1); Romania BIT (n 8) art 1(1); Russia BIT (n 8) art 1(2); Saudi Arabia BIT (n 8) art 1(1); Serbia BIT (n 8) art 1(1); Singapore BIT (n 8) art 1(1); South Africa BIT (n 8) art 1; Spain BIT (n 8) art 1(1); Sri Lanka BIT (n 8) art 1(1); Sweden BIT (n 8) art 1(1); Switzerland BIT (n 8) art 1(2); Syria BIT (n 8) art 1(1); Tajikistan BIT (n 8) art 1(1); Thailand BIT (n 8) art 1(1); Tunisia BIT (n 8) art 1(1); Ukraine BIT (n 8) art 1(1); UAE BIT (n 8) art 1(1); Uruguay BIT (n 8) art 1(1); Uzbekistan BIT (n 8) art 1(1);Venezuela BIT (n 8) art 1(1); Viet Nam BIT (n 8) art 1(1); Yemen BIT (n 8) art 1(1).

[124] Azerbaijan BIT (n 8) art 1(1); Turkey BIT (n 8) art 1(2)(a).

[125] Australia BIT (n 8) art 1(1)(a); UK BIT (n 8) art 1(a).

[126] Canada BIT (n 8) art 1(d); Kuwait BIT (n 8) art 1(1); USA BIT (n 8) art 1(1)(a).

[127] Xiao-Jing Zhang, 'Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping' (2013) Contemp Asia Arb J 49 (Zhang) 51.

[128] ibid 51; M Sornajah, *The International Law on Foreign Investment* (CUP 2010) (Sornajah) 329.

shopping is prohibited might mean painting with a broad brush and deterring more investors than desirable.

Definitions of investor and investments must be extensive enough to encompass all possible persons that the state wishes to attract. That is a large and heterogeneous group; as such it can be described only in broad terms. It seems more prudent not to restrict these broad definitions, but rather insert a new clause that would contain a description of investors and investment that the state does not wish to admit. This is a much smaller group, and it is therefore easier to identify common features of its members and define them.

Secondly, it should be noted that although the states object to treaty shopping when it comes to arbitral proceedings, not all forms of treaty shopping are necessarily harmful. Treaty shopping at the front end of an investment may in the end prove beneficial to the state.

The states understandably object to this practice when there is an actual dispute with the investor, just as the Czech Republic did in *Saluka*, as they want to avoid paying damages. But if there is no dispute, they do not question who is behind the investor – the fact that the investor has no real link to its home state is less important than the contribution the investor brings to the local economy.

Restricting the definitions would deprive the state of all the investors that genuinely intend to conduct business in the Czech Republic over an extensive period of time and contribute to the state's economy. Majority od them will never commence proceedings against the state, but they deem the ability to do so if need be important enough to play a role in their decision where to invest.

Thirdly, there may be investors who do not primarily seek to engage in treaty shopping, but who cannot rule out that after making the investment in a certain state they will not want to undergo a corporate restructuring for whichever reasons, or move their business away from this state, and only keep a seat there. If the definitions are restricted, such investors will know that if they ever engage in a similar behaviour, it will mean they will lose the protection of the BIT. Consequently they may decide to invest in another country, where they will still be able to benefit from the BIT even if they wish to make changes in their business in the future.

The fourth reason is closely connected with the second and third one. If the investor does not meet the restrictive requirements set by the BIT, the tribunal will have to decline its jurisdiction regardless on whether the investor's inability to meet the criteria is understandable or pardonable. If the investor brings a claim based on a BIT, the tribunal must assess its jurisdiction based on the terms of the BIT only,[129] irrespective of the fact that even the host state might agree that the putative investor should be protected by the BIT.

The host state and the investor cannot validly change the BIT to the effect that the investor will constitute an exception and that the BIT requirements should be changed in its case. A BIT is an international treaty and as such can be amended any by the contracting parties.[130] Of course this is not a problem that could not be overcome: the other contracting state of the BIT will likely be more than willing to assist its investor, or the jurisdiction of the tribunal could be founded by a direct agreement between the host state and the investor. However, the whole process will be more complicated than just raising a claim based on a BIT.

In conclusion, changing the definitions of investor and investment in the BITs may bring more harm than good. Their restriction would be a very rigid solution to the problem of treaty shopping. It seems better to find an entirely different clause that will be capable of precisely defining what type of behaviour is undesirable, and at the same time will be flexible enough to allow the states to offer protection to those who engage in treaty shopping, but nevertheless whose presence is still beneficial for the state.

3.4. Denial of Benefits Clauses as a Potential Solution

Denial of benefits clauses may be the answer to the above described problem. The term designates clauses which allow a state to 'deny the benefits of the treaty to a

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[129] cf the strict adherence to the wording of the BIT demonstrated by the *Saluka* tribunal - Saluka Award (n 4) [229], [241].

[130] cf Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331(VCLT) art 39 - all the Czech BITs were concluded after the Czech Republic adopted VCLT and after VCLT came into force; VCLT is consequently applicable to them.

company which is not controlled from the state of incorporation'[131] or which does not conduct business activities there.

Denial of benefits clauses represent a more efficient method of preventing investors that engaged in treaty shopping from successfully raising a claim. Firstly, it defines the small group that is to be deterred, rather than the voluminous group that is to be admitted. As such, the definition can be much more focused and precise. The first problem described in Section 3.3 is therefore addressed.

Secondly, the clause allows for flexibility. In order to be effective, it must be invoked by the host state. This directly solves the fourth problem described in Section 3.3 Flexibility is also a solution for the second and third problem that relate to investors who wish to engage in treaty shopping as it is the only way their investment can be protected, and to investors who do not mean to engage in treaty shopping but cannot rule out they will not fulfil the definition in the future. These can contractually agree with the state that the clause will not be invoked.

The denial of benefits clauses represent a right of a state, and as such they may be waived. The investors may conclude an agreement with the host state in which the state promises it will not invoke the clause in the future. Thus, even if the investors meet the definition in the denial of benefits clause, the clause will not be applicable. If the agreement was for whichever reason invalid, and state invoked the clause, it would show bad faith on the part of the state, which would significantly strengthen the position of the investor in the arbitral proceedings.

The fact that the clause is to be invoked at the state's discretion may raise concerns that it will be used arbitrarily. That is not the case though. The tribunal is still entitled to assess whether the investor meets the criteria described in the clause and therefore whether the state is at the liberty to invoke the clause.

For these reasons, the denial of benefit clauses represent a potentially more efficient way to prevent treaty shopping. Question is whether they are present in the Czech BITs and if so, whether their concrete wording could truly serve their purpose.

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[131] Sornajah (n 128) 329.

3.5. DENIAL OF BENEFITS CLAUSES IN CZECH BITS

Denial of benefits clauses are present in the Agreement between the Czech Republic and Canada for the Promotion and Protection of Investments[132] ('Canada BIT'), and the Treaty Between the Czech and Slovak Federal Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment ('USA BIT').[133] A not so typical form is contained in Agreement between the Czech Republic and the Australia on the Reciprocal Promotion and Protection of Investments ('Australia BIT').

The clause present in the Canada BIT provides:

> 'Subject to prior notification and consultation in accordance with this [BIT], a Contracting Party may deny the benefits of this [BIT] to an investor of the other Contracting Party that is an enterprise of such Contracting Party and to investments of such investors if investors of a third state own or control the enterprise and the enterprise has no substantial business activities in the territory of the Contracting Party under whose law it is constituted.'[134]

Less strict rules for its application is contained in the USA BIT:

> 'Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.'[135]

The denial of benefits clause in the Australia BIT reads:

> 'Where a company of a Contracting Party is owned or controlled by a citizen or a company of any third country, the Contracting Parties may

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[132] Canada BIT (n 8) art 15(2).
[133] USA BIT (n 8) art 1(2).
[134] Canada BIT (n 8) art 15(2).
[135] USA BIT (n 8) art 1(2).

> decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.' [136]

To summarize, the denial of benefits clause in the USA BIT is applicable with respect to a company of the other contracting party if the company conducts no substantial business activities or is under foreign control; the Canada BIT imposes both of these conditions cumulatively, and adds a requirement of prior notification. The clause in the Australia BIT operates only upon an agreement of both contracting parties.

The clause in the Australia BIT is the least efficient of the three. If an investor is a part of a conglomerate powerful enough to pressure the government of its home state not to agree on the application of the clause, the home state may be very reluctant to give its consent even in cases of treaty shopping, which, despite not amounting to clear cut treaty shopping at the back end of an investment, are questionable.[137] Also, whether the two contracting states agree or not may depend more on diplomatic relations between the two states as opposed to the factual situation of the case.

The structure of denial of benefits clauses contained in the Canada BIT and the USA BIT seem more apt to fulfil their purpose than their Australian counterpart. Their application does not depend on the will of the other contracting party, but on predefined objective conditions.

However, certain problems may still arise with their application. Arbitral practice so far shows that denial of benefits clauses are less effective than it was expected. The tribunals found some terms in clauses like the ones in Canada BIT and USA BIT ambiguous and interpreted them in favour of the investors.[138]

The first problematic term is 'substantial business activities'. *Prima facie* it appears that the term should ensure that companies that serve as a mere conduit for an investment should be excluded from the protection of the BIT. The ordinary meaning of the word 'substantial', according to which the term should be interpreted pursuant

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[136] Australia BIT (n 8) art 2(2).
[137] cf opinions of tribunals to which extent must a future dispute be unforeseeable for an investor in order not to engage in impermissible treaty shopping in Section 3.2.
[138] Zhang (n 127) 61.

to Art. 31(1) of VCLT, is defined by the Collins dictionary as 'of a considerable size or value'.[139] Nevertheless, tribunals can understand the term differently. The tribunal in *Limited Liability Company Amto v Ukraine* [140] stated:

> '"substantial" in this context means "of substance, and not merely of form". It does not mean "large", and the materiality not the magnitude of the business activity is the decisive question. In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff.'[141]

Arbitral practice shows that in reality the threshold for what constitutes a substantial business activity is indeed not high.[142] Voon warns that 'unless the investor is a shell company that exists only on paper without any employees, commercial operations, or a physical existence (for example, with offices)'[143] the investor will be found to conduct substantial business activities in the territory of its home state.

The arguments that the Czech Republic raised in *Saluka* and the word 'substantial' in the BIT suggests that the Czech Republic did not wish to exclude only companies which exist on paper. If that is so and the Czech Republic wishes to deny benefits of the BIT to companies which engage in some business activities, e.g. keeping an office or employees that serve as an intermediary between the company and its parent company, it should clarify the wording of the clause.

The state could propose to insert examples of what are the signs of substantial business activities, such as a certain turn-over generated in the home state. Investment arbitration is a very costly thing and as such it is primarily used by investors with substantial financial resources. Should an investor who commences arbitration have a surprisingly low turn-over, it could point to the fact that it does not conduct business in its home state. Another possible solution is to look at business

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[139] *Collins English Dictionary* (9th edn, 2007) 1606.
[140] *Limited Liability Company Amto v Ukraine* (Final Award of 28 March 2008) SCC Case No 080/2005.
[141] ibid [69].
[142] Zhang (n 127) 59.
[143] Voon (n 108) 54.

activities of the mother company together with other companies controlled by it. The denial of benefits clause could state that if the investor conducts a disproportionally small part of the group, the investor could be denied the benefits of the BIT.

The second problematic term, which is contained in the Canada BIT, is 'subject to prior notification'. The word 'prior' insinuates that the notification must be given before the dispute occurs. It is not difficult to imagine the reason behind this clause; each contracting party wants to secure the best conditions for conducting business for its investors and this caveat in the clause ensures that the investors know whether they enjoy the benefits of the BIT or not.

In practice, this formulation has a rather burdensome effect. In order to be able to give the notification and to rely on the clause in the future, the Czech Republic has to have the information necessary to assess whether the notice should be given. It needs to actively monitor all the investors in its territory or at least order them to report whether they are engaging in any business activities in their home countries. Such behaviour could take a substantial amount of resources.

To make the clause more effective while retaining its effect, the responsibility should be shifted from the state on the investor. There should not be any requirement of prior notification; instead, there should be an option for the investor to negotiate an agreement with the state if the investor wishes to ensure the clause will not be applicable in its case.

Troublingly, the requirement of prior written notification has been found by tribunals even in cases when the BIT did not expressly contain it. The tribunal in *Plama Consortium Limited v Republic of Bulgaria* stated that the phrase 'have a right to deny' means that in order to operate, the right has to be actively exercised by a notification to the investor.[144] The right is effective only after the notification has taken place.[145] If the state wishes to avoid having to monitor and notify all investors, not only it should omit the requirement of prior notification, but it should expressly add that no prior notification is required.

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[144] *Plama Consortium Limited v Republic of Bulgaria* (Decision on Jurisdiction of 8 February 2005) ICSID Case No ARB/03/24 (Plama v Bulgaria Decision on Jurisdiction) [155].
[145] ibid [162].

In conclusion, one of the problems the Czech Republic has encountered in arbitral practice was the one of treaty shopping. There are two types of this practice: treaty shopping at the front end of the investment, which is in general not condemned by scholars and tribunals, and treaty shopping at the back end of an investment, which amounts to abuse of the system of investment arbitration. Based on Czech Republic's argumentation in *Saluka*, the Czech Republic wishes to avoid both types of treaty shopping.

Treaty shopping in enabled by broad definitions of investment and investor in BITs. The majority of Czech BITs are not capable of stopping the *Saluka* scenario from happening again. If the Czech Republic seeks to prevent the investors from engaging in treaty shopping, it should include denial of benefits clauses the likes of which can be found in the Canada BIT and the USA BIT with specifications of what is meant by substantial business activities and with express exclusion of the requirement of prior written notification.

4. Two Different Proceedings Commenced by One Ultimate Investor

The second problem that has emerged in the case law against the Czech Republic that will be discussed in this work is the problem of parallel proceedings. Purported safeguards in Czech Republic's BITs failed to prevent the instance of parallel proceedings in cases *Lauder* and *CME*.

Two intertwined investors, Mr Ronald S Lauder and CME Czech Republic B.V. ('CME') commenced two proceedings against the Czech Republic. In both proceedings, the claimants complained about same set of measures taken by the Czech Republic with respect to the same ultimate investment. In both cases the state objected to jurisdiction of the tribunal and admissibility of the case on the basis that the claimant should not be allowed to commence two parallel arbitrations.

In each of the cases the Czech Republic built its argumentation in a slightly different way. In *CME*, due to the absence of any suitable provision in the BIT, the respondent

had to back up its arguments with references to principles of international law.[146] In *Lauder* the Czech Republic tried to rely on the BIT in question.[147] In both cases the arguments failed.[148]

This Chapter aims to assess the reasons behind the failure of Czech Republic's arguments to convince the tribunals and to find mechanism that could prevent this situation from reoccurring in the future. The first Section describes the factual situation of the case and evaluates it (4.1). The next Section examines the legal causes that enabled Mr Lauder and CME to initiate and continue in the proceedings (4.2). The third Section then contemplates possible solutions to the problem that the two cases demonstrated (4.3).

4.1. FACTUAL BACKGROUND AND EVALUATION OF TRIBUNALS' FINDINGS

Lauder and *CME* both emerged from actions of the Czech Media Council in respect to granting a broadcasting licence to and supervision of a company called Česká nezávislá televizní společnost, spol. s.r.o. CME held a major interest in this company,[149] and Mr Lauder in turn through several different companies controlled CME.[150]

Mr Lauder commenced proceedings against the Czech Republic on 19 August 1999[151] based on the USA BIT. CME then initiated another proceedings on 22 February 2000[152] based on the Netherlands BIT. Both tribunals upheld their jurisdiction, and the cases were decided differently on the merits.

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[146] CME Partial Award (n 6) [302].
[147] Lauder Award (n 5) [156].
[148] CME Partial Award (n 6) [412]; Lauder Award (n 5) [166].
[149] CME Partial Award (n 6) [4].
[150] ibid [6].
[151] Lauder Award (n 5) [10].
[152] CME Partial Award (n 6) [2].

The situation created in *Lauder* and *CME*[153] closely resembles a so called *lis alibi pendens* situation. *Lis alibi pendens* has been defined as a 'situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time'.[154] There are different forms, in which *lis alibi pendens* can occur: parallel proceedings can be conducted by an arbitral tribunal and by a state court, or by two arbitral tribunals, or by an arbitral tribunal and a supra-national court.[155] The situation at hand was similar to the second form of *lis alibi pendens*.

However, it was not a pure *lis alibi pendens* situation. It is important to appreciate that even though interlinked, the claimants were formally different and the causes of action (the BITs) were also different. Thus, the parties were not the same and neither was the cause of action.

CME-Lauder situation and *lis alibi pendens* situations in general are not desirable for several reasons. Firstly, looking from the greater perspective of the system of international arbitration, if the two proceedings have different outcomes, it will create a situation of legal uncertainty.[156] Different outcomes of cases with identical factual situations decided based on a comparable law show how differently the regulation can be perceived by different arbitrators, which in turn shows that the result of proceedings may be a matter of chance rather than law and factual circumstances.

The ramifications of such discrepancy of outcomes are amplified by the absence of a universal appellate system or of an authoritative body which could render a final decision regarding the understanding and application of law. *CME* and *Lauder*

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[153] A slightly similar situation was raised in *CMS Gas Transmission Company v the Republic of Argentine* (Award of 12 May 2005) ICSID Case No ARB/01/8 and *LG&E Energy v the Republic of Argentine* (Award of 25 July 2007) ICSID Case No ARB/02/1; however, as this instance of parallel proceedings is different, namely the claimants were not interlinked, only happened to be affected by the same circumstances, and as the case does not involve the Czech Republic, these proceedings are not explored later on.

[154] Filip de Ly and Audley Sheppard, 'ILA Final Report on Lis Pendens and Arbitration' (2009) 25 Arbitration International 3 (ILA Final Report) 3, citing James Fawcett (ed) 'Declining Jurisdiction in Private International Law' Report to the XIVth Congress of the International Academy of Comparative Law, Athens, 1994 (OUP 1995) 27.

[155] ILA Final Report (n 154) 5.

[156] Frank Spoorenberg and Jorge E Viñuales, 'Conflicting Decisions in International Arbitration' (2009) 8 LPICT 91, (Spoorenberg) 92.

expose flaws in the international investment arbitration system, which can undermine its credibility and bring about confusion.

Secondly, from the state's perspective, commencement of proceedings stemming from the same set of measures by related investors such as in *CME* and *Lauder* is perceived as an abuse of the system.[157] One should keep in mind that investment arbitration proceedings are asymmetrical – the role of the claimant is in reality always assumed by the investor and consequently states find themselves only in the position of the respondent. When it comes to arbitration, the state has nothing to win; only to lose. This is by no means to suggest that the whole system of protection of international investment is askew in favour of the investor. The existence of BITs is beneficial for states; through BITs, they seek to encourage investors to make investments in their territory. They do so by guaranteeing certain rights on an international level and by promising that should these rights be breached, an investor can have its case heard by an impartial tribunal.

However, a system which cannot prevent *CME-Lauder* scenario allows for a situation when an investor makes several attempts on recovering damages through various subsidiaries. The investor can thus raise its chances of success by simply raising another claim under a different BIT though a related company. Multiplying the number of tribunals that hear virtually the same case means creating more chances that one tribunal will perceive the legal situation in a manner favourable for the investor.[158]

Given the fact that different tribunals may have widely different opinions on the matter, such behaviour may be effective. Even more so if the case raises one of the many issues in international investment law on which the public opinion remains divided. The MFN clause that is elaborated on in Chapter 5 is a prime example of such question; another important example is the umbrella clause.[159]

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[157] cf CME Partial Award (n 6) [302]-[310].
[158] Hypothetically, an investor may also wait for the outcome of the first proceedings and only if it is unfavourable for him, commence the second proceedings. As this scenario has not occurred though, is it not further elaborated on.
[159] Tribunals have demonstrated a different understanding on the matter e.g. in SGS v Philippines (n 24) and *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*

It is possible to imagine a situation where an investor goes even one step further than in *CME* and *Lauder* and actually waits for the outcome of the first case before it raises a second claim. *Prima facie* such behaviour may seem destined to fail; an examination of tribunals' language in the said cases however reveals that such claimant may be successful. It is apparent that the tribunals (for reasons further described in Section 4.2) did not feel obliged to consider whether a similar case has been submitted to a different tribunal when it came to their jurisdiction over the cases and admissibility thereof.

In *CME*, the tribunal stated:

> 'A party may seek its legal protection under any scheme provided by the laws of the host country. The Treaty [under which the case was decided] as well as the US Treaty [that was the basis for the other proceedings] are part of the laws of the Czech Republic and neither of the treaties supersedes the other. Any overlapping of the results of parallel processes must be dealt with on the level of loss and quantum but not on the level of breach of treaty.'[160]

The *Lauder* tribunal pronounced as follows:

> 'The existence of numerous parallel proceedings does in no way affect the Arbitral Tribunal's authority and effectiveness, and does not undermine the Parties' rights. On the contrary, the present proceedings are the only place where the Parties' rights under the Treaty can be protected.'[161]

Through these findings the tribunals sent a rather clear message to investors: they may take advantage of the protection the host state gives them on multiple occasions. Consequently, the state might find itself haunted by ramifications of certain measures it had taken over and over again, which is undoubtedly not a situation the states desired when they concluded BITs.

(Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003) ICSID Case No ARB/01/13.

[160] CME Partial Award (n 6) [419].

[161] Lauder Award (n 5) [174].

Of course, this scheme is not risk-free for the investor. It might end up losing all of the proceedings and facing the obligation to reimburse the state for the costs of arbitration, which can be substantial. Still, the cost-benefit analysis of the situation may lead to the conclusion that this attempt is worth the risk, especially if the amount of damages sought is high. In the case of Mr Lauder, commencing several proceedings indeed paid off. In both proceedings Mr Lauder had to pay a half of the arbitral fees ($ 250,685.1 in *Lauder*[162] and $ 675 601.72 in *CME*[163]) together with the costs of its own legal representation;[164] in *Lauder* he also paid half of the costs involved in direct hearing. [165] Nevertheless, in *CME* he was awarded $ 269,814,000.[166]

Investor may also have other motives for commencing additional proceedings. More proceeding can put the state under more pressure and the state may therefore be easily persuaded to agree to a settlement.[167]

States rightfully deem a conduct the likes of the above described as abusive, as it uses the system in a way for which it was not created. Through concluding BITs, the states wished to assure the investor that should it believe its rights had been violated, it could seek remedies in a forum that is as independent and just as possible. They did not mean to create a situation in which an investor may get as many shots on recovering damages as it needs to in order be satisfied.

Thirdly, parallel proceedings represent a problem as they create additional expenses on the part of the state; instead of dealing with one proceedings the state has to dedicate its limited resources to handle two. Even in the ideal situation where the state is in the end fully reimbursed for the sum it took to take part in the proceedings, it would be desirable if there were not any costs to begin with.

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[162] ibid [319].
[163] *CME Czech Republic BV v Czech Republic* (Final Award of 14 March 2003) (CME Final Award) [IX].
[164] ibid [IX]; Lauder Award (n 5) [319].
[165] Lauder Award (n 5) [Decision].
[166] CME Final Award (n 163) [IX].
[167] Michael Waibel, 'Coordinating Adjudication Processes' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (OUP 2014) 517.

The Czech Republic bore more costs than it would have had if there had been only one proceedings. As mentioned above, as a result of the CME Award, it had to pay $ 269,814,000 in damages, plus interest, plus arbitrators fees in the amount of $ 675 601.72. [168] However, it did not end there. In *Lauder*, the claims were mostly dismissed, but the respondent was still found to have breached the BIT.[169] Although the breach did not give rise to any damages,[170] it prompted the tribunal to decide that each party has to bear its own costs of legal representation, half of the direct costs involved in the hearing, and $ 250,685 in the fees and expenses of the tribunal.[171]

It should be stated that when it comes to the damages, if the state was ordered to pay damages in both of the proceedings, it would not be required to reimburse the claimant twice in full. As the tribunal in *Lauder* suggests,[172] the second tribunal would be expected to take into consideration the amount the respondent was already ordered to pay when it assess damages.

For the three above described reasons, the situation when an investor is able to raise multiple claims based on one set of events represents a problem not only for the state, but also for the system of international investment law in general, and therefore it should be prevented.

4.2. The Legal Circumstances Behind Mr Lauder's Commencement of Two Proceedings

In order to examine possible solutions of the situation, their effectiveness and feasibility, one must first assess which legal factors enabled Mr Lauder to seek damages in two different proceedings. Let us therefore inquire into the mechanisms which the Czech Republic attempted to invoke in *CME* and in *Lauder* in order to prevent two proceedings from taking place, and into the reasons why these mechanisms failed.

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[168] CME Final Award (n 163) [IX].
[169] Lauder Award (n 5) [Decision].
[170] ibid [235].
[171] ibid [Decision].
[172] ibid [172].

The CME Award does not reveal much from respondent's argumentation in the case. According to the CME Award, the Czech Republic argued that 'It is an abuse of the Bilateral Investment Treaty regime for Mr. Lauder, who purportedly controls CME, and, subsequently, CME to bring virtually identical claims under two separate treaties.'[173] Later in the Award it can be found that the respondent labelled claimant's actions as impermissible treaty shopping.[174] One can imagine that due to the lack of appropriate instruments in the BIT in question, the respondent had to resolve to support its case with general principles.

The tribunal was not convinced by these arguments; it stated that there was no abuse of process in this case. Although the claimant raised two claims in different foras, it repeatedly requested to consolidate both proceedings. The Czech Republic did not agree[175] as it wanted to assert the right to have each action determined independently and promptly.[176] The tribunal also declined to classify claimant's actions as treaty shopping. In the part of the Award already quoted in Section 4.1 it stated that the claimant was merely using all means as defending its investment that the state gave him, which is permissible. [177]

In *Lauder*, the Czech Republic had more to build on in the terms of BIT provisions than in the previous case. It attempted to invoke Art VI(3)(a) of the USA BIT,[178] which states:

> '[…] Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:
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> (i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; […].' [179]

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[173] CME Partial Award (n 6) [302].
[174] ibid [396].
[175] ibid [412].
[176] ibid [302].
[177] ibid [419].
[178] ibid [156].
[179] USA BIT (n 8) art VI(3)(a).

The tribunal however did not find that this article prevented Mr Lauder from raising the claim. The provision was meant to avoid situation where the same investment dispute would be submitted to a different tribunal by the same claimant against the same respondent.[180] The *Lauder* case and the *CME* case involved not only different parties,[181] but also a different dispute, as they were both based on different arbitration treaties.[182]

An examination of the findings of the tribunal described above leads to the conclusion that there were several circumstances here, which each in its own part and also in their combination enabled Mr Lauder to commence one proceedings in his own name and other via a company he controlled. They can be summarized in three points.

The first and most apparent is the lack of effective mechanisms in the BITs which would have enabled the tribunals to decline their jurisdiction or declare the claims inadmissible by the virtue of factually identical proceedings that were pending in front of another tribunal. Secondly, it is the fact that the Czech Republic refused to consolidate the two proceedings.[183] Thirdly, as Sacerdoti suggests, the *CME-Lauder* scenario was possible as one of the BITs in questions allowed claims to be raised by an indirect investor.[184] Mr Lauder was therefore entitled to raise a claim regarding an investment that he owned through several other companies.

Out of the three circumstances, only the first one will be elaborated on in this Chapter, as it pertains directly to the question of jurisdiction and admissibility. The second reason was a result of Czech Republic's own decision and it does not relate to the wording of any of the respective BITs; it is also a question of the procedural rules that were used in both cases. It will therefore not be further examined as it outstretches the scope of this work. The third reason is connected to definitions of an

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[180] Lauder Award (n 5) [161].
[181] ibid [163].
[182] ibid [165].
[183] CME Partial Award (n 6) [412].
[184] Giorgio Sacerdoti, 'The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards' Bocconi Legal Studies Research Paper No 07-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981020> accessed 12 March 2015, 9.

investor in Czech Republic's BITs; their drawbacks are described in Chapter 3; this Chapter shall not revisit them again.

As it follows, there is one problem that the cases of *CME* and *Lauder* present which shall be scrutinize further in this Chapter. It is the fact that the Czech Republic was unable to rely on its own BITs to prevent what it described as abuse of the system. Neither of the BITs in question contained a provision which would have given either of the tribunals a legal ground for declining to hear the case due to the lack of jurisdiction or for dismissing it for its inadmissibility. The question which now presents itself is whether there are such mechanisms in other of Czech Republic's BITs on which the state could rely should a different investor attempt to take Mr Lauder's example. If the answer is negative, it should be assessed whether similar tools are present in BITs concluded between other states and whether the Czech Republic could adopt them as well.

4.3. POSSIBLE SOLUTIONS TO CME-LAUDER SCENARIO

Searching for clauses that could prevent the *CME-Lauder* scenario from reoccurring means searching for clauses that address a situation very similar, but not identical, to *lis alibi pendens* situation. Its particularity lies in the fact that the claimants in both cases are related, yet not identical, and the cause of the disputes is the same actions adopted by the state, yet the disputes relate to different BITs.

There are special types of clauses that may solve certain types of *lis alibi pendens* situations.[185] They allow tribunals to refuse to hear or dismiss a claim under certain circumstances due to another pending proceedings. The first of these clauses are so called fork-in-the-road provisions explored in Subsection 4.3.1; the second are waiver clauses, which are inspected in Subsection 4.3.2; and the third is a clause presented in Art. 10(5)(b) of the Canada BIT described in Subsection 4.3.3.

[185] Bernardo M Cremades and Ignacio Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 Arbitration International 507 (Cremades) 531; Spoorenberg (n 156) 99.

4.2.1. Fork-in-the-Road Provisions

The first type of clauses that is designed to prevent *lis alibi pendens* situation is the fork-in-the-road clause. This provision typically requires that investor decides whether it shall submit its claim to domestic courts of the host state, or whether it will bring its claim to international arbitration. [186] Once made, the choice is final; if the investor chooses to submit its dispute to one of the foras, any other tribunal is precluded from having jurisdiction over the matter.[187]

Fork-in-the-road provisions are structured in two ways in Czech Republic's BITs. In the first case, they are part of the dispute resolution clause, where they add another condition under which a disagreement between an investor and a state can be resolved by an arbitral tribunal. The second type of fork-in-the-road provision sees the clause as a separate one in the sense that it is not incorporated in the dispute resolution provision; however it is still closely connected to the dispute resolution clause[188] as it could not operate without it.

The first form of a fork-in-the-road clause is present in the Art. VI(3)(a) of the USA BIT, which was examined in *Lauder*. This combination of a dispute resolution clause and a fork-in-the-road clause states that a dispute cannot be submitted to an arbitral tribunal if it had been previously 'submitted by [the investor] for resolution in accordance with any applicable previously agreed dispute settlement procedures; and [the investor] has not brought the dispute [before domestic tribunals of the host state]. [189] Such clause is not unique among Czech Republic's BITs; two other agreements contain a very similar provision: the Agreement between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments ('Mexico BIT'), [190] and the Agreement between the Czech Republic

[186] C Schreuer, 'Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 Journal of World Investment and Trade 231, 238 – 239.
[187] cf Douglas (n 9) [319].
[188] ibid.
[189] USA BIT (n 8) art VI(3)(a).
[190] Mexico BIT (n 8) art 10(2).

and the Republic of Tunisia for the Promotion and Reciprocal Protection of Investments.[191]

The second type of the fork-in-the-road provision is present in several other Czech BITs. It works in conjunction with a dispute resolution clause which is structured in a way so as to provide an investor – future claimant with a choice of alternative judicial foras to take its dispute to.[192] An example of such dispute resolution clause can be found in Art. 8(2) of the Agreement between the Government of the Czech Republic and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments ('Chile BIT'):

> '[…] the investor may submit the dispute either:
>
> (a) to the competent tribunal of the Contracting party in whose territory the investment was made; or
>
> (b) to the international arbitration of the International Centre for Settlement of Investment Disputes (ICSID) […]; or
>
> (c) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) […].'[193]

The actual fork-in-the-road provisions are then found later in the BIT; their purpose is to make the choice of the forum offered in the dispute resolution clause final. Their specific wording differs. Some state that once an investor has made its choice and submitted its dispute to either domestic courts or international arbitral tribunal, the choice is final.[194] Others allow withdrawing the claim from domestic courts in accordance with laws of the host state, if the choice was made to that effect, but declare the choice of international arbitration final,[195] or definitive.[196]

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[191] Tunisia BIT (n 8) art 8(3).
[192] cf Douglas (n 9) [320].
[193] Chile BIT (n 8) art 8(2).
[194] Argentine BIT (n 8) art 8(2); Azerbaijan BIT (n 8) art 10(4); Chile BIT (n 8) art 8(3); Uruguay BIT (n 8) art 8(2).
[195] Costa Rica BIT (n 8) art 8(4); Panama BIT (n 8) art 8(3).
[196] China BIT (n 8) art 9(4); El Salvador BIT (n 8) art 8(3).

Regardless of the differences in their wordings, the provisions are all to the same effect: they do not allow the same claimants to submit a dispute regarding the same BIT to a different investment arbitration forum again.[197]

As it was shown in Section 4.2, the fork-in-the-road provision did not work in *CME-Lauder* scenario. Spoorenberg submits that the *lis alibi pendens* principle, which is the main idea behind fork-in-the-road clauses, has been interpreted rather strictly here,[198] and suggests that at least the *CME* tribunal could have adopted a broader interpretation. [199] However, it seems that in the *Lauder* case, it was not the interpretation of the principle that was strict; it was the wording of the clause. The rules of interpretation gave the tribunal no other choice as how to understand the provision.

The USA BIT as an international treaty is to be interpreted pursuant to the Vienna Convention on the Law of Treaties ('VCLT'). [200] Art. 31 of the VCLT states that expressions in treaties shall be interpreted pursuant to their ordinary meaning.

The examination of expressions in the respective provisions and their context reveals the following: the fork-in-the-road clauses and dispute resolution clauses to which they are connected contain expressions such as 'either party to the dispute may institute […] proceedings'[201], 'investor may submit the dispute'[202], '[dispute] may be submitted, upon a request of an investor'[203], 'the investor shall be entitled to submit the case'[204], and 'the investor shall be entitled to submit the dispute'[205].

These expressions are used to specifically prescribe conditions under which arbitral proceedings can be commenced, in the sense that they state who can or cannot be the claimant in future arbitral proceedings and also which matter the proceedings shall or shall not resolve. The clauses only operate if the claimant is the 'investor' and when

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[197] cf Lauder Award (n 5) [161].
[198] Spoorenberg (n 156) 98.
[199] ibid 99.
[200] VCLT (n 130)
[201] USA BIT (n 8) art VI(3)(a).
[202] Chile BIT (n 8) art 8(2); Mexico BIT (n 8) art 10(2).
[203] Argentine BIT (n 8) art 8(2); Uruguay BIT (n 8) art 8(2).
[204] Azerbaijan BIT (n 8) art 10(2); China BIT (n 8) art 9(2); Costa Rica BIT (n 8) art 8(2); El Salvador BIT (n 8) art 8(2); Panama BIT (n 8) art 8(2).
[205] Tunisia BIT (n 8) art 8(3).

the proceedings concern the 'dispute' ('case'). In another words, in order for the clause to preclude tribunal's jurisdiction, the dispute (meaning legal dispute) and the claimant in both cases must be identical.[206] Consequently, there are three reasons why none of these clauses is applicable in *CME-Lauder* scenario – a situation where a claimant raises a second claim through an affiliate incorporated in a different country and protected by a different BIT.

Firstly, the criterion of identity of the dispute is not met as the cases of *CME* and *Lauder* revolved around two different disputes. The term dispute in the legal sense of the word is understood as a dispute over the observation and interpretations of a certain legal rule.[207] Therefore, it is necessarily connected to a particular BIT. The term 'dispute' is even specifically described as such in certain BITs. For example, Art. 8(1) of the Chile BIT describes the term disputes as 'disputes, which arise within the terms of this [a] between a Contracting Party and an investor of the other Contracting Party'.[208]

Other BITs connect the term 'dispute' to the particular agreement indirectly. They describe a 'dispute' as a dispute raised in connection with an 'investment'.[209] The word 'investment' is then defined in each of the BITs in question, making it a legal term which can only operate within the framework of this one BIT. If an investor raises another claim under a different BIT, then by default this other claim involves another subject (investment), defined by a different BIT.

Secondly, the criterion of identical claimants in both cases is not met. The claimants in the *Lauder-CME* scenario were two separate legal entities. In order for the clause to operate in this case, its wording would have to encompass not only the investor as defined by the BIT, but also entities connected with the claimant. Alternatively, the definition of investor itself would have to be changed to grant the tribunal the power to inquire into the structure of the claimants to find if they are owned or controlled by another entity to which the definition would stretch as well. The fork-in-the-road

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[206] cf Lauder Award (n 5) [161].
[207] cf ibid [162], [165].
[208] Chile BIT (n 8) art 8(1).
[209] E.g. Argentine BIT (n 8) art 8(1); Azerbaijan BIT (n 8) art 10(1); China BIT (n 8) art 9(4); Costa Rica BIT (n 8) art 8(1); El Salvador BIT (n 8) art 8(1); Panama BIT (n 8) art 8(1); Tunisia BIT (n 8) art 8(1); Uruguay BIT (n 8) art 8(1).

clauses contained in Czech Republic's BITs do not allow the former alternative. The definitions of investor are also insufficient to stop claimants from submitting multiple claims; as apparent from their examination conducted in Chapter 3.3.

There is also a third reason why a tribunal in a position of the *Lauder* tribunal could refuse to apply a fork-in-the-road clause, albeit this argument was not discussed in the case. The clause strictly speaking forbids the investor to institute only the second proceedings. This reason is more prominent with the first form of fork-in-the-road-provisions as discussed on page 41. These clauses are worded to the effect that they allow a claimant to submit the claim *unless* it was already submitted elsewhere. However, when the claim is submitted, the provision does not compel the tribunal to take into consideration whether other proceedings have been instituted and it does not lay grounds for refusing to hear or dismissing the first claim.

The second form of fork-in-the-roads provisions appears to be less conclusive in this matter. This type of clause follows up on a dispute resolution clause that presents an investor with alternative choices of foras by pronouncing the choice 'definitive'. If a first tribunal was notified that second proceedings were instituted, it could decide to interpret the clause in a manner to render the first claim inadmissible.

The above analysis shows that the fork-in-the-road provisions are not a suitable solution to a problem the likes of *CME* and *Lauder* cases. Despite what states might claim these provisions were intended for,[210] they do not cover situations when a claimant institutes multiple proceedings through other companies it controls under different BITs.

The provisions would thus require significant adjustments in order to be applicable in a scenario similar to the one in *Lauder* and *CME*. The main problem with the fork-in-the-road provisions is that the application of the clause requires the dispute to be identical, therefore necessarily confines its scope of application to disputes arising out of the same BIT. In order to solve the problem, not only fork-in-the-roads provisions would have to be changed, but in some cases also the dispute resolution clauses. The definition of an investor would have to be changed too.

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[210] cf Lauder Award (n 5) [156].

Although this is theoretically possible, changing the fork-in-the-road provisions does not appear to be the best solution. Fork-in-the-road provisions are simply meant to address a specific problem – classic *lis alibi pendens* situation. Although the *Lauder-CME* situations are similar to it, they ultimately have different features. Rather than expanding one clause that is meant to address specific situation in order to address a different situation as well, and thus creating a broad and complicated clause, it seems better to add a different clause that would address this specific situation. A look into the international pool of BITs reveals that there are alternatives to fork-in-the-road clauses which may be much more suitable.

4.2.2. Waiver Clause

One alternative to the fork-in-the-road provisions is a so called waiver clause. This is a clause that conditions the investor's ability to raise a claim by its waiving the right to commence other proceedings or continue therein. A waiver limits the investor's options to raise a claim to one single forum; it thus prevents the classic *lis alibi pendens* situation,[211] and depending on the wording of the clause, may even be effective against situations such as the one in *CME-Lauder*.

A waiver clause is similar to a fork-in-the-road clause in the sense that it seeks to limit the investor to his earlier choices.[212] As they both have (to certain extend) the same effect, BITs tend to contain either one or the other – Czech Republic's BITs that contain a waiver clause do not contain a fork-in-the-road provision.[213] Both however operate in a different way; contrary to a fork-in-the-road clause, the waiver clause requires the investor to actively give up its rights to constitute different proceedings under certain circumstances.

A waiver clause is present in two of Czech Republic's BITs: the Canada BIT and the Mexico BIT.[214]

Art. 10(5)(a) of the Canada BIT reads:

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[211] Cremades (n 185) 531.
[212] Sornajah (n 128) p 320.
[213] cf Canada BIT (n 8); Mexico BIT (n 8).
[214] Mexico BIT (n 8) art 10(4).

> ‘An investor may submit a claim under this Article to arbitration only if the investor and, where the claim is for loss or damage to an interest in an enterprise that is a juridical person which the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach referred to in paragraph 1 of this Article, except for procedures for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Contracting Party.’[215]

Similar clause can be found in Art. 10(4) of the Mexico BIT.

These waiver clauses are designed to prevent the classic *lis alibi pendens* situation. They lay down the choice between ‘other dispute settlement procedures’, which, in the absence any other specification, should encompass international investment tribunals as well. Their wording however reaches also beyond *lis alibi pendens* scenario.

The clauses seem to address the problems described in Section 4.2.1. Firstly, the requirement of an identical dispute is no longer present. The legal cause of a dispute which fixates the clause to cases of a breach of one specific BIT is no longer of interest to the tribunal. Instead, the focus is now on the conduct of the host state of which the investor complains. The object of these waiver clauses does not revolve around a ‘dispute’, but rather around a ‘measure’ that ‘is alleged to be in breach’.

Had this clause been present in the USA BIT based on which the *Lauder* case was decided or in the Netherlands BIT used in the *CME* case, the condition of the identity of measures would have been complied with; Mr Lauder and CME complained of the

[215] Canada BIT (n 8) art 10(5)(a).

same actions taken by the Czech Republic.[216] The same sets of measured could no longer form basis of a different claim.

The second problem, the requirement that the second proceedings must be instituted by the same claimant, is also addressed in the waiver clauses. The clauses expand the definition of entities which are not allowed to raise the claim again. It is no longer just the investor; under certain circumstances, it is also any enterprise owned or controlled directly and indirectly by the investor. The condition here is that the claim is for loss or damage to interest in the said enterprise.

In *CME* and *Lauder* cases, Mr Lauder controlled the company CME, who suffered the damage. In the *CME* case, CME complained about the loss it suffered; in the *Lauder* case, Mr Lauder complained of the loss it suffered on its investment in CME. Under a waiver clause, both Mr Lauder and *also* CME would have to waive the right to initiate other proceedings.

The third problem which the fork-in-the-road provisions could potentially be facing, that the clause only forbade the second proceedings from being instituted, but did not strictly speaking require the first proceedings to be discontinued, is also solved by the waiver clause. Here the investor and the related enterprise waive their right to both initiate and continue another proceedings. To prevent the *CME-Lauder* scenario from reoccurring, it will suffice if a waiver clause is present in either of the BITs based on which the investor raises its claim.

As shown above, the waiver clause, just as the fork-in-the-road clause, is capable of solving a classic *lis alibi pendens* situation. In addition, the waiver clause is also structured to stop situations that are similar, but not quite *lis alibi pendens*; they focus on the allegedly illegal conduct of a state and extend also to entities different from the investor. Including a waiver clause with a wording similar to the one in Canada and Mexico BIT could make it impossible for investors to initiate multiple claims under different BITs through its subsidiaries and consequently deter investor from even attempting such move.

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[216] Lauder Award (n 5) [156].

4.2.3. Art. 10(5)(b) of the Canada BIT

Although a waiver clause could be effective in preventing parallel proceedings such as *CME-Lauder* from taking place, the clause was not designated specifically for this problem. A further scrutiny of Czech Republic's BITs reveals that there is another clause which could have been designed precisely with this scenario in mind – Art. 10 (5)(b) of the Canada BIT.

Art. 10(5)(b) of the Canada BIT provides:

> 'If an investment is held indirectly through an investor of a third state by an investor of one Contracting Party in the territory of the other Contracting Party, the investor of a Contracting Party may not initiate or continue a proceeding under this Article if the investor of the third state submits or has submitted a claim with respect to the same measure or series of measures under any agreement between the other Contracting Party and the third state.'[217]

If such a clause had been contained in the USA BIT, it would have been applicable in *Lauder*. Mr Lauder was an investor of one contracting party – the United States of America, who held an investment indirectly through CME, an investor of a third state – the Netherlands. Under this clause, once he instituted the second proceedings through CME, he would not be allowed to continue in the first proceedings and the proceedings would have to be stayed.

This wording of this clause addresses all three problems which arose (or could have arisen) with the fork-in-the-road provision. Firstly, as the waiver clause does, it defines what constitutes identical claims based on the factual situation – the measures taken by the host state, rather than the legal one (identical BITs in both cases). Secondly, it is designed for a situation when the claim is raised by two different claimants that are interlinked in a way that one controls the other. Thirdly, this clause allows the tribunal not only to refuse to hear the second proceedings, but to stay the first proceedings as well, thus making it irrelevant which proceedings have been instituted first.

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[217] Canada BIT (n 8) art 10(5)(b).

However, a thorough examination of the strict wording of the provision reveals that the clause raises two new problems: firstly, it would only be effective in *Lauder*, not in *CME*. Art. 10(5)(b) Canada BIT forbids only the ultimate controller to commence another proceedings. It does not reach to the investor who serves as a conduit for the investment. This problem could be solved by extending the wording of the clause to the effect that it would preclude tribunal's jurisdiction over a claim raised also by an investor of the contracting party that is owned or controlled by an investor of a third state, under the condition that the controlling investor of the third state also raises the claim.

The second problem is that if a clause like this with the modification described in the previous paragraph is present in both of the BITs that govern the proceedings, it could lead to a situation where both of the tribunals could feel obliged to decline jurisdiction. If the clause is strictly formulated and leaves the tribunal no choice to soften its effects, then once the second proceedings were instituted, both of the proceedings would have to be stayed. The investor that is factually behind both of the claims will be entirely deprived of protection.

While it is not desirable that an investor abuses the system by commencing multiple proceedings, it seems unjustifiably harsh to punish the investor for this behaviour by stripping it of any chances of defending its investment. The protection of the investment should still stand, the states should only ensure that this protection cannot be abused. Even though it is highly likely that if faced with this problem, the tribunals would adopt a broad interpretation of the clause and only one of the proceedings would be stayed, in order to secure that investor will indeed have access to protection in any case, this problem should be addressed in the wording of the respective provision. It could be solved by adding a caveat to the clause stating that the clause applies unless the other investor waives its right to continue in the other set of proceedings.

In conclusion, *Lauder* and *CME* presented the investment arbitration system in the Czech Republic with a specific problem of parallel proceedings. Such parallel proceedings are undesirable for several reasons: they create legal uncertainty and can undermine the faith in the whole system; they represent an abuse of the protection

that has been offered to investors by the Czech Republic; and they create huge and unnecessary expenses.

The USA BIT and the Netherlands BIT used in the two cases did not contain mechanisms that could, in the tribunals' opinions, prevent the situation. An examination of the other BITs concluded by the Czech Republic shows that the vast majority of them would also be unable to prevent the *Lauder-CME* scenario from happening. Only a few BITs contain clauses that could be effective in this situation - the waiver clauses. Although the waiver clauses are formulated in a way as to encompass a range of possible situation, the problem that the Czech Republic was confronted with could be one of them. A unique mechanism that seems to be designed specifically to target investors like Mr Lauder is contained in the Canada BIT.

If the Czech Republic wishes to avoid a situation similar to the one created by cases of *CME* and *Lauder* in the future, it needs to modify its BITs. Rather than adjusting existing fork-in-the road provisions or inserting these where they are not present, the most effective way seems to insert either waiver clauses or clauses such as the one in Art. 10(5)(b) of the Canada BIT with slight adjustments. Waiver clauses may be a more prudent choice, as they encompass a wider range of situations, thus protecting the state in more ways than a clause modelled after Art. 10(5)(b) of the Canada BIT.

5. MOST-FAVOURED-NATION CLAUSES

The application of a most-favoured-nation ('MFN') clauses represents the third issue examined by this work. The MFN clause is a treaty provision 'whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.'[218] The clause ensures that an investor is treated at least as favourably as an investor of a third state that has also concluded a BIT with the host state.[219]

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[218] 'Document A/33/10: Report of the International Law Commission on the work of its thirtieth session, 8 May-28 July 1978' [1978] II[II] YBILC 1, 18.
[219] Dolzer and Schreuer (n 12) 186.

The tribunal in the case of *Frontier Petroleum* was presented with a question whether the agreed sphere of relations covered by the MFN clause included dispute resolution. In another words, the tribunal was asked to assess whether the jurisdiction of the tribunal could be established by a dispute resolution clause present in a different BIT by the virtue of the MFN clause. The respondent submitted that the clause did not extend to jurisdictional matters.[220]

The tribunal did not address the argument. This Chapter aims to determine what could have been the outcome had the tribunal decided to focus on the matter. In the first Section, it presents the factual background of the case and its evaluation (5.1). In the second Section it examines the understanding of the clause as demonstrated by other investment arbitration tribunals (5.2). The last Section focuses on the MFN clauses contained in Czech Republic's BITs (5.3).

5.1. FACTUAL BACKGROUND AND EVALUATION OF TRIBUNAL'S FINDINGS

In the case of *Frontier Petroleum*, Frontier Petroleum Services Ltd. was a Canadian company that made an investment in a Czech aircraft manufacture company. The Czech Republic allegedly interfered with this investment and a dispute arose. It was later presented to an investment arbitration tribunal. The respondent denied tribunal's jurisdiction asserting the tribunal lacks jurisdiction *ratione materiae*.[221]

The claimant addressed all of respondent's grounds for this assertion and in order to best secure its access to arbitration, it submitted an alternative argument. The claimant alleged that should the tribunal conclude that it lacked jurisdiction due to a narrow construction of the applicable provisions in the Canada BIT, the claimant is entitled to benefit from a more broadly constructed clause found in the USA BIT by the virtue of an MFN clause present in the Canada BIT.[222] The claimant thus asked the tribunal to apply a generally worded MFN clause to extend the scope of tribunal's jurisdiction beyond the wording of the original dispute resolution clause.

[220] Frontier Petroleum Award (n 7) [249].
[221] Frontier Petroleum Award (n 7) [211], [244].
[222] ibid [247].

The submission was not addressed as the tribunal found it had jurisdiction as respondent's arguments did not stand.[223]

The consequences of a possible affirmative answer from the side of the tribunal would be far reaching. If such arguments are found to be valid, any safeguards that a state has inserted in its BITs with respect to jurisdiction may become obsolete. If the MFN clause is understood to encompass jurisdictional issues, then one broadly drafted dispute resolution clause present in any of the host state's BITs will open the door to arbitration for any investor from a state that has also concluded a BIT with the host state, if this BIT contains a MFN clause. Investors that so far have been deterred from raising a claim by narrowly constructed dispute resolution clauses will be free to raise claims against states, and the number of arbitrations will increase.

Of course it can be objected that as sovereign states the contracting parties were free to insert a clause to that effect in their BITs and as such the consequences thereof are perfectly legitimate. However, the position the Czech Republic expressed in *Frontier Petroleum* suggests that at least the Czech Republic did not mean for MFN clause to cover jurisdictional issues.[224]

Unfortunately, the tribunal in *Frontier Petroleum* did not state its opinion in regard to this matter. The issue has been however presented to other tribunals. Their findings indicate how MFN clauses may be interpreted in the future.

5.2. UNDERSTANDING OF MFN CLAUSES BY TRIBUNALS

Some claimants have already attempted, under various circumstances, to gain an advantage through a MFN clause.[225] Troublingly, when faced with the question

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[223] ibid [252].
[224] cf ibid [249].
[225] cf *Austrian Airlines v the Slovak Republic* (Final Award of 9 October 2009) (Austrian Airlines v Slovakia); *Vladimir Berschader and Moïse Berschader v the Russian Federation* (Award of 21 April 2006) SCC Case No 080/2004 (Berschader v Russia); *Gas Natural SDG, SA v the Argentine Republic* (Decision on Jurisdiction of 17 June 2005) ICSID Case No ARB/03/10 (Gas Natural v Argentina); *Hochtief AG v the Argentine Republic* (Decision on Jurisdiction of 24 October 2011) ICSID Case No ARB/07/31 (Hochtief v Argentina); *ICS Inspection and Control Services Limited (United Kingdom) v the Republic of Argentina* (Award of 10 February 2012) PCA Case No 2010-9 (ICS Inspection v Argentina); *Impregilo*

whether MFN clauses extend to jurisdictional matters, tribunals have expressed very different opinions.

Some tribunals[226] held that MFN clauses apply to dispute resolution. Despite having far-reaching ramifications, there are arguments which justify this position. The tribunal in *Emilio Agustín Maffezini v the Kingdom of Spain*[227] gave the following explanation:

> 'Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.'[228]

Some tribunals[229] came to the same conclusion, but subjected the application of MFN clauses to jurisdictional matters to restrictions – according to these tribunals, the MFN clause can only extend existing rights; it cannot created rights where none previously exited. [230] The MFN clause can ease the conditions for access to

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SpA v Argentine Republic (Award of 21 June 2011) ICSID Case No ARB/07/17 (Impregilo v Argentina); *Emilio Agustín Maffezini v the Kingdom of Spain* (Decision of the Tribunal on the Objections to Jurisdiction of 25 January 2010) ICSID Case No ARB/97/7 (Maffezini v Spain); *National Grid Plc v the Argentine Republic* (Decision on Jurisdiction of 20 June 2006) (National Grid Plc v Argentina); Plama v Bulgaria Decision on Jurisdiction (n 144); *RosInvest Co UK Ltd v the Russian Federation* (Award on Jurisdiction of October 2007) SCC Arbitration V (079/2005) (RosInvest v Russia); *Salini Costruttori SpA and Italstrade SpA v the Hashemite Kingdom of Jordan* (Decision on Jurisdiction of 9 November 2004) ICSID Case No ARB/02/13 (Salini v Jordan); *Siemens AG v the Argentine Republic* (Decision on Jurisdiction of 3 August 2004) ICSID Case No ARB/02/8 (Siemens v Argentina); *Telenor Mobile Communications AS v the Republic of Hungary* (Award of 13 September 2006) ICSID Case No ARB/04/15 (Telenor v Hungary); *Wintershall Aktiengesellschaft v the Argentine Republic* (Award of 8 December 2008) ICSID Case No ARB/04/14 (Wintershall v Argentina).

[226] Gas Natural v Argentina (n 225) [31]; Impregilo v Argentina (n 225) [108]; Maffezini v Spain (n 225) [54]; National Grid Plc v Argentina (n 225) [93]; RosInvest v Russia (n 225) [131]; Siemens v Argentina (n 225) [102]–[103].

[227] Maffezini v Spain (n 225).

[228] Maffezini v Spain (n 225) [54] (footnote omitted).

[229] Hochtief v Argentina (n 225) [77].

[230] ibid [79].

international arbitration if a dispute resolution clause is strict, but in the absence of a dispute resolution clause it cannot create the basis for tribunals' jurisdiction.

Other tribunals[231] held that dispute resolution clauses are in general covered by MFN clauses, but the specific MFN clauses which they were faced with did not. Yet another group of tribunals[232] found that MFN clauses are inapplicable to dispute resolution, except for where expressly stated otherwise. The tribunal in *Telenor Mobile Communications AS v the Republic of Hungary*[233] offers the following reasoning:

> 'In the absence of language or context to suggest the contrary, the ordinary meaning of "investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State" is that the investor's substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural fights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.'[234]

The different positions taken by tribunals cannot be satisfactorily explained by differences in wordings of the clauses. Several tribunals interpreted the same BITs and reached different conclusions. The BIT between Germany and Argentina[235] was subjected to interpretation by the tribunal in *Wintershall v Argentina*, which

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[231] Austrian Airlines v Slovakia (n 225) [124], [140].
[232] Berschader v Russia (n 225) [208]; ICS Inspection v Argentina (n 225) [310]; Plama v Bulgaria Decision on Jurisdiction (n 144) [227]; Salini v Jordan (n 225) [119]; Telenor v Hungary (n 225) [100]; Wintershall v Argentina (n 225) [162].
[233] Telenor v Hungary (n 225).
[234] ibid [92].
[235] Tratado entre la Republica Federal de Alemania y la Republica Argentina sobre Promocion y Proteccion Reciproca de Inversiones (signed 9 April 1991, entered into force 8 November 1993) (Argentine Republic – Federal Republic of Germany) <http://investmentpolicyhub.unctad.org/IIA/country/8/treaty/128> accessed 19 March 2015.

restricted the MFN clause,[236] and also by tribunals in *Siemens v Argentina* and *Hochtief v Argentina*, which expanded the MFN clause to dispute resolution.[237] The tribunal in *ICS Inspection v Argentina*[238] examined the BIT between Argentina and the United Kingdom[239] and interpreted the clause restrictively, whereas the tribunal in *National Grid Plc v Argentina*[240] interpreted the same clause extensively.

Moreover, the same phrases included in different MFN clauses have been found to carry different meanings. Several tribunals[241] were presented with MFN clauses that related to 'all matters' governed by a treaty. The phrase was both pronounced to signify that the contracting parties wished to include dispute resolution to the matter,[242] and on the other hand not to cover dispute settlement.[243] Similarly, the term 'treatment' has been found to encompass dispute resolution[244] and to exclude it.[245]

Finally, tribunals vary in their opinion on what silence on the topic signifies; some ruled MFN clauses are applicable to dispute settlement unless the parties clearly state otherwise,[246] and some ruled they apply only in cases where the parties expressly state so.[247]

In the light of the above it does not seem to be the specific wording of a BIT that determines the verdict. Rather than that, as Dolzer and Schreuer[248] observe, the division of the cases into two opposing groups correspondents to their factual situation. Tribunals allowed the application of MFN clauses to dispute resolution in

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[236] Wintershall v Argentina (n win) [162].
[237] Hochtief v Argentina (n 225) [77]; Siemens v Argentina (n 225) [102]–[103].
[238] ICS Inspection v Argentina (n 225) [310].
[239] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (signed 11 December 1990, entered into force 19 February 1993) <http://investmentpolicyhub.unctad.org/IIA/country/8/treaty/161> accessed 19 March 2015.
[240] National Grid Plc v Argentina (n 225) [93].
[241] Berschader v Russia (n 225); Gas Natural v Argentina (n 225); Impregilo v Argentina (n 225) Maffezini v Spain (n 225).
[242] Impregilo v Argentina (n 225) [108].
[243] Berschader v Russia (n 225) [194].
[244] Impregilo v Argentina (n 225) [99].
[245] ICS Inspection v Argentina (n 225) [294].
[246] Gas Natural v Argentina (n 225) [49].
[247] Plama v Bulgaria Decision on Jurisdiction (n 144) [223].
[248] Dolzer and Schreuer (n 12) 273.

cases where claimants attempted to use the MFN clause to circumvent minor procedural obstacles, [249] such as a requirement to resort to the host state domestic courts for a period of time prior the institution of arbitration. On the other hand, in cases where the claimant attempted to gain a more substantial advantage, such as to extend the scope of the tribunal's jurisdiction to cases that would otherwise be completely outside the scope of tribunal's jurisdiction, the tribunals did not endorse this attempt.[250] However, there are exceptions on both sides.[251]

The differences in the outcomes are understandable. In cases where arbitration has already commenced it would seem unnecessary to decline jurisdiction over a minor procedural matter.[252] On the other hand, the situation is different when a claimant attempts 'to bypass a limitation in the settlement resolution clause of the [BIT].'[253] Effectively, such attempts 'subvert the common intention of [the contracting States] in entering into the BIT in question'[254] and should not be allowed.

The above described leads to one principle observation: there is a huge amount of perplexity when it comes to MFN clauses. The positions tribunals have taken towards MFN clauses are widely different. The lack of stable approach to MFN clauses creates confusion. It seems that the states may only be certain (if such thing as certainty exists in investment arbitration) that the tribunals will not extend MFN clauses to jurisdiction if the MFN clause itself expressly states so.

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[249] Gas Natural v Argentina (n 225); Hochtief v Argentina (n 225); Impregilo v Argentina (n 225); Maffezini v Spain (n 225); National Grid Plc v Argentina (n 225); Siemens v Argentina (n 225).
[250] Berschader v Russia (n 225); Plama v Bulgaria Decision on Jurisdiction (n 144); Salini v Jordan (n 225) [119]; Telenor v Hungary (n 225).
[251] Tribunals ICS Inspection v Argentina (n 225) and Wintershall v Argentina (n 225) rejected attempts to circumvent procedural obstacles; the tribunal in RosInvest v Russia allowed the MFN clause to enable jurisdiction over matters the original BIT had not provided for.
[252] cf Plama v Bulgaria Decision on Jurisdiction (n 144) [224].
[253] Wintershall v Argentina (n 225) [168].
[254] Telenor v Hungary (n 225) [100].

5.3. MFN CLAUSE IN CZECH REPUBLIC'S BITS

It now remains to be assessed whether in future, investors may be tempted to use MFN clauses as a gate to arbitration against the Czech Republic, or whether the Czech BITs are able to prevent this behaviour.

Most of the BITs the Czech Republic has concluded[255] contain either the following MFN clause, or one of a very similar wording ('Standard MFN clause'):

> '1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable.
>
> 2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or of any third State, whichever is more favourable.'

MFN clauses of this content have already been examined by arbitral tribunals. Tribunals in *Berschader v Russia*,[256] *ICS Inspection v Argentina*[257] and *Wintershall v*

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[255] Albania BIT (n 8); Argentina BIT (n 8); Bahrain BIT (n 8); Belarus BIT (n 8); Bosnia and Herzegovina BIT (n 8), Bulgaria BIT (n 8), Cambodia BIT (n 8); Canada BIT (n 8); Chile BIT (n 8); China BIT (n 8); Costa Rica BIT (n 8); Croatia BIT (n 8); Cyprus BIT (n 8); Egypt BIT (n 8); El Salvador BIT (n 8); Georgia BIT (n 8); Germany BIT (n 8); Greece BIT (n 8); Guatemala BIT (n 8); Hungary BIT (n 8); India BIT (n 8); Indonesia BIT (n 8); Israel BIT (n 8), Jordan BIT (n 8); Kazakhstan BIT (n 8); DPRK BIT (n 8); Korea BIT (n 8), Kuwait BIT (n 8); Latvia BIT (n 8); Lebanon BIT (n 8); Lithuania BIT (n 8); Macedonia BIT (n 8); Malaysia BIT (n 8); Mauritius BIT (n 8); Mexico BIT (n 8); Moldova BIT (n 8); Mongolia BIT (n 8); Montenegro BIT (n 8); Morocco BIT (n 8); Nicaragua BIT (n 8); Panama BIT (n 8); Paraguay BIT (n 8); Peru BIT (n 8); Philippines BIT (n 8); Poland BIT (n 8); Portugal BIT (n 8); Romania BIT (n 8); Russia BIT (n 8); Saudi Arabia BIT (n 8); Serbia BIT (n 8); South Africa BIT (n 8); Spain BIT (n 8); Sri Lanka BIT (n 8); Sweden BIT (n 8); Syria BIT (n 8); Tajikistan BIT (n 8); Thailand BIT (n 8); Tunisia BIT (n 8); Turkey BIT (n 8); Ukraine BIT (n 8); United Arab Emirates BIT (n 8); UK BIT (n 8); Uruguay BIT (n 8); Uzbekistan BIT (n 8); Venezuela BIT (n 8); Viet Nam BIT (n 8); Yemen BIT (n 8).

[256] Berschader v Russia (n 225) [208].

[257] ICS Inspection v Argentina (n 225) [310].

Argentina[258] found that this formulation excluded the application of the MFN clause to dispute resolution. Tribunals in *Hochtief v Argentina,*[259] *National Grid Plc v Argentina,*[260] *Siemens v Argentina*[261] and *RosInvest v Russia* in stated the opposite. Troublingly, whereas in the first three of the latter group of cases the tribunals used MFN clauses to bypass procedural obstacles, in *RosInvest v Russia* the tribunal used the clause to create jurisdiction which it otherwise would not have. This shows that the MFN clauses in the majority of Czech Republic's BITs could potentially be used by investors to obtain more favourable conditions regarding dispute settlement.

Other BITs contain MFN clauses that are even more likely to be extended to dispute resolution clauses. Some[262] are more general, such as the BIT between Austria and the Czech Republic, the Dohoda mezi Českou a Slovenskou Federativní republikou a Rakouskou republikou o podpoře a ochraně investic[263] ('Austria BIT'), which simply promises investors treatment no less favourable than that accorded to investors of a third state. Some contain merely an equivalent to the first paragraph of the Standard MFN Clause.[264]

The Austria BIT has been examined by a tribunal, albeit not in a case against the Czech Republic, but in a case against Slovakia.[265] In *Austrian Airlines v the Slovak Republic*[266] the claimant raised an expropriation claim[267] and argued that should the tribunal not base its jurisdiction on the Austria BIT, it is entitled to rule based on other unspecified BITs concluded by the Slovak Republic by the virtue of an MFN clause.[268] The case thus falls into the category of cases where the claimants try to

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[258] Wintershall v Argentina (n 225) [162].
[259] Hochtief v Argentina (n 225) [77].
[260] National Grid Plc v Argentina (n 225) [93].
[261] Siemens v Argentina (n 225) [102]–[103].
[262] Austria BIT (n 8); France (n 8).
[263] Austria BIT (n 8).
[264] Australia BIT (n 8); Norway BIT (n 8); Singapore BIT; Switzerland BIT (n 8).
[265] The case was based on a BIT which Austria concluded with the former Czechoslovakia; when the state dissolve, both the Czech Republic and Slovakia became successor states and consequently the BIT in question is valid between both Austria and Slovakia and Austria and the Czech Republic; cf Austrian Airlines v Slovakia (n 225) [8].
[266] Austrian Airlines v Slovakia (n 225).
[267] The factual background of the dispute has not been made public, the Award only reveals the procedural aspects of the dispute, cf Austrian Airlines v Slovakia (n 225) missing [10]–[25].
[268] Austrian Airlines v Slovakia (n 225) [77].

extend the scope of jurisdiction to a case which could otherwise not be decided by the tribunal at all.

The tribunal firstly found that the dispute settlement mechanism contained in Art. 8 and Art. 4[269] of the Austria BIT did not grant it jurisdiction over expropriation claims.[270] It then turned to the MFN clause. Importantly, the tribunal found that in general, MFN clauses apply to dispute resolution.[271] It however added that in this case, the BIT when read as a whole showed the MFN clause had to be interpreted restrictively. [272] This decision brings further uncertainty to the matter, as it demonstrates that even though the wording of the MFN clause itself points to one interpretation, the tribunals may opt for another because of the way they read the BIT as a whole.

Jurisdictional questions are expressly excluded from the scope of MFN clause only in the Agreement between the Czech Republic and the Republic of Azerbaijan for the Promotion and Reciprocal Protection of Investments ('Azerbaijan BIT').[273] Art. 3(6) of the Azerbaijan BIT contains the following provision:

> 'For the avoidance of doubt, the present Article shall apply only in respect of the kinds of treatment offered in Articles 2 to 7 of this Agreement, and shall not apply in respect of Investor's rights to submit disputes arising under this Agreement to any dispute settlement procedure.'[274]

This caveat, when read pursuant to Art. 31 VCLT, should stop investors from successfully attempting to gain a standing in front of a tribunal solely by the virtue of the MFN clause.

It appears that the Czech Republic intended that all its MFN clauses should be interpreted this way. Firstly, Art. 3(6) of the Azerbaijan BIT clarifies Art. 3(1) and 3(2) that contain the Standard MFN Clause. This indicates that all the Standard MFN

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[269] ibid [92], [93].
[270] ibid [108].
[271] ibid [124].
[272] ibid [125]–[140].
[273] Azerbaijan BIT (n 8).
[274] ibid Art 3(6).

Clauses were meant to be understood this way; otherwise, it would be more prudent to draft an entirely different MFN clause rather than using the Standard MFN Clause and giving it a new meaning.[275]

Secondly, the BIT was signed in 2011, after the most prominent arbitral awards on the topic of MFN clause have been issued. It therefore seems that in the light of the subsequent development in the understanding of the MFN clauses, the Czech Republic wished to clarify the MFN clauses in its BITs. Thirdly, in *Frontier Petroleum* the Czech Republic expressed that it never meant for MFN clauses to be interpreted extensively. [276]

The case of *Frontier Petroleum* brought the problem of understanding of MFN clauses into spotlight. The position of the Czech Republic is that MFN clauses were not meant to be the basis for tribunals' jurisdiction. However, arbitral practice shows that tribunals have demonstrated very varied understandings of the subject, with some endorsing the position of the Czech Republic and some demonstrating an understanding to the contrary.

In the view of the confusion and conflicting decisions regarding MFN clauses, it appears that the only way the Czech Republic can ensure that the MFN clauses will not be used to circumvent jurisdictional obstacles is to include an additional explanatory provisions, such as Art. 3(6) of the Azerbaijan BIT, to the existing MFN clauses.

6. CONCLUSION

This work aimed to answer the question whether the high number of investment cases commenced against the Czech Republic could have been partially prompted by ineffective BIT provisions, and if so, whether other BITs would be more effective and how to make them so. The conducted analysis showed that in the three issues

[275] Note that this argument cannot be used universally, much will depend on the subsequent practice of states; cf National Grid Plc v Argentina (n 225) [85] – The tribunal expressed a similar opinion, but then in the view of a conflicting subsequent practice rejected the argument.
[276] Frontier Petroleum Award (n 7) [249].

that were examined, investors believed it could successfully raise a claim because the respective provisions in the BITs would not stop it; and they were mostly right. The vast majority of Czech BITs would not be effective in the analysed situations either. There are however ways how to improve them.

The first issue examined in this work was treaty shopping. There are two main types of treaty shopping: treaty shopping at the back end of an investment, conducted with the sole purpose of gaining access to international investment arbitration to solve a concrete dispute, and treaty shopping at the front end of an investment, which an investor undertakes as a part of effort to protect its investment in the best possible way against any scenario. Treaty shopping at the back end of an investment is universally seen as an abuse of process and likely will not be endorsed by any tribunal regardless of the applicable BIT.

Treaty shopping at the front end of an investment is seen by prominent academics as a legitimate thing. Conversely, the Czech Republic expressed a position that it should not be allowed. Most of its BITs are however unable to stop it, as they contain wide definitions of who is an investor able to raise a claim and what constitutes investment over which there can be a dispute. One of the solutions to this problem could be to adjust these definitions in the BITs. However, for several reasons described in Section 3.3 this is not the best option. A more appropriate response to the issue of treaty shopping could be the inclusion of so called denial of benefits clauses into the BITs. Denial of benefits clauses allow the state to deny the benefits of the respective treaty to specific investors under positively determined circumstances, where an alleged investor is owned or controlled by persons incorporated in or with a nationality of a third state. These clauses are already present in three of Czech Republic's BITs. With slight adjustments regarding the specification of terms contained therein they can be effective against both forms of treaty shopping, while allowing the state to decide whether or not to exercise them.

The second issue which was analysed was the one of parallel proceedings, where one investor decided to multiply its chances for recovering damages by commencing two proceedings where he complained of the same set of measures. One of the proceedings was conducted in his own name, the other in a name of a company he owned. Similar attempts should not be endorsed for several reasons: firstly, they

create legal uncertainty, as each of the proceedings can (and in the cases at hand did) end with different verdicts. They thus undermine the faith in the whole system of international arbitration system, as they show how differently certain problems can be understood by different tribunals. Secondly, they represent an abuse of the protection that has been offered to investors by the Czech Republic. Thirdly, they bring about substantial and unnecessary expenses.

The Czech Republic objected to tribunals' jurisdictions using the *lis alibi pendens* principle and a fork-in-the-road clause contained in one the BITs. Tribunal's scrutiny revealed that the fork-in-the-road clause could not have prevented the investor from raising a second claim. This clause, together with all other fork-in-the-road clauses that are present in certain Czech BITs, serves only to stop an identical claimant from raising a dispute regarding an identical BIT. These conditions were not present in *CME* and *Lauder*.

A handful of Czech BITs offers alternatives to the fork-in-the-road clause that would have been able to preclude Mr Lauder from raising the second claim. One of such alternatives is a waiver clause, which requires the investor, and all entities the investor controls, to waive the right to commence proceedings in respect to the same set of measures taken by the state. The waiver clauses target a larger variety of situation than just *CME* and *Lauder*, but they would most probably be effective in these cases too, as they would compel the tribunal to either decline its jurisdiction or stay the proceedings. Additionally, an unusual mechanism that seems to be designed specifically to target investors the likes of Mr Lauder can be found in the Canada BIT.

In order to secure that the investors will not be inspired by Mr Lauder's actions and commence multiple proceedings, the Czech Republic should include either the waiver clause or a clause similar to the specific clause in the Canada BIT into its BITs. As the waiver clause is a solution to more types of problems, it seems efficient to opt for this instrument.

The third problem that has emerged in the case law against the Czech Republic was the understanding of the MFN clause. More specifically, the tribunal was asked to extend the clause to jurisdictional issues. The Czech Republic protested against such move. It is hardly surprising; if MFN clause is universally understood so as to enable

tribunals to base their jurisdiction on any other BIT concluded by the state, any specific clauses that would restrict jurisdiction is certain cases, such as the clauses described in the preceding paragraphs, will become easy to circumvent.

The tribunal did not address the argument. An inquiry into the practice of other tribunals reveals that the public opinion on the matter is troublingly divided. Different tribunals give different answers to this question and awards show that the differences cannot be attributed to different wordings of BITs. It therefore seems that in absence of a specific provision to the contrary, the tribunal in *Frontier Petroleum* could have found enough support in investment arbitration case law to agree with the claimant.

A provision that safeguards that tribunals will not read MFN clauses as applicable to jurisdiction is contained in the Azerbaijan BIT. It states that the MFN clause does not apply in respect to investors' rights to submit disputes to dispute settlement procedure. It would be prudent to include a similar clause to other BITs as well.

In conclusion, the Czech Republic BITs contain certain provisions that in the light of subsequent case law revealed loopholes. These may prompt the investor to think that its claim, otherwise uncertain, could be successful. The Czech Republic consequently has to face a greater number of proceedings than it would if the provisions in the Czech Republic BITs[277] were worded more specifically, or if the BITs contained special clauses to combat certain behaviour.

[277] The complete list of BITs mentioned and examined in this work is listed in the Index of Authorities.

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ABSTRACT IN ENGLISH

Jurisdiction and Admissibility in the Czech Republic's BITs

The purpose of this work is to assess whether the high number of investment cases the Czech Republic had to face was partially prompted by wordings of Czech Republic's BITs. The work focuses on clauses that pertain to jurisdiction of tribunal and admissibility of claim, as these are the first questions that are raised in every proceedings.

The work consists of six Chapters. The first Chapter is introductory and outlines the issues that will be examined. The second Chapter defines the terms 'jurisdiction' and 'admissibility' and explains how the concepts relate to provisions of BITs.

The third Chapter is dedicated to topic of treaty shopping. It explores cases against the Czech Republic where the issue of treaty shopping was raised, analyses the argumentation and provisions that were used in each case together with similar provisions contained in other Czech BITs, and suggests changes that should be made in order to make the clauses more effective against treaty shopping.

The fourth Chapter examines the instance of parallel proceedings commenced against the Czech Republic. In a structure similar to the previous Chapter, it firstly analyses the awards and the BITs that were used together with the rest of the Czech BITs. Finally it inquires whether the provisions should be altered in order to be able to combat the practice.

The fifth Chapter focuses on MFN clauses and asks whether their effect can be extended to dispute resolution clauses. Given that the tribunal who was presented with the question did not address it, the work turns to the findings of other investment tribunals. It then assesses how to prevent the use of MFN clauses on dispute resolution clauses.

The sixth Chapter concludes the work. It states that the high number of cases could indeed have been partially caused by BIT provisions, as investors saw the opportunity to take advantage of either too broadly or too strictly worded clauses and took it. Similar provisions are present in a large number of Czech BITs; unless they are rephrased, investors can raise controversial cases again.

ABSTRAKT V ČESKÉM JAZYCE

Pravomoc tribunálu a přípustnost nároků ve dvoustranných dohodách na ochranu a podporu investic uzavřených Českou republikou

Cílem práce je zjistit, zda vysoký počet mezinárodních investičních arbitráží, kterým musela v minulosti Česká republika čelit, je částečně zapříčiněn formulací českých BIT. Práce se zaměřuje na otázku pravomoci tribunálu případ rozhodnout a na otázku přípustnosti nároku, neboť tyto dvě otázky jsou v rozhodčím řízení kladeny jako první.

Práce se skládá ze šesti částí. První část je úvodní. Druhá část vysvětluje pojem jurisdikce tribunálu a přípustnost nároku a jejich ýásouvislost s BIT.

Třetí část práce se zabývá fenoménem označovaným anglickým názvem „treaty shopping“. Nejprve zkoumá případy, ve kterých byl investor z této činnosti obviněn a dále zkoumá argumentaci a ustanovení, která byla v případech použita. Následně zjišťuje, zda jsou podobné doložky obsaženy i v dalších BIT uzavřených Českou republikou, a zda by se jejich znění měla upravit, aby byla ustanovení proti „treaty shopping“ účinnější.

Čtvrtá část práce zkoumá případy paralelních rozhodčích řízení. Ve struktuře obdobné jako v předchozí kapitole zjišťuje, jaké argumenty a ustanovení byly tribunálu předloženy, jak se s nimi tribunál vypořádal, a zda jsou podobné doložky k nalezení i v ostatních BIT. Dále navrhuje, jak BIT upravit, aby se v budoucnu problému lépe zamezilo.

Pátá kapitola se soustředí na zacházení podle doložky nejvyšších výhod a hledá odpověď na otázku, zda se vztahují také na pravomoc tribunálu. Tribunál, u kterého byla tato otázka vznesena, se tématem nezabýval. Práce se proto obrací na rozhodnutí jiných tribunálů. V poslední části kapitoly se zjišťuje, jak nejlépe zamezit tomu, aby tribunály založily svou jurisdikci na zacházení podle doložky nejvyšších výhod.

Šestá kapitola práci uzavírá shrnutím, že k vysokému počtu rozhodčích řízení proti České republice mohlo přispět znění českých BIT. V určitých případech investoři využili někdy příliš širokých a někdy naopak příliš úzce formulovaných ustanovení a založili na nich svůj nárok. Podobná ustanovení jsou obsažena i řadě dalších českých BIT; pokud nebudou upravena, investoři jich mohou v budoucnu využít znovu.

TEZE V ČESKÉM JAZYCE

PRAVOMOC TRIBUNÁLU A PŘÍPUSTNOST NÁROKŮ VE DVOUSTRANNÝCH DOHODÁCH NA OCHRANU A PODPORU INVESTIC UZAVŘENÝCH ČESKOU REPUBLIKOU

1. ÚVOD

Do začátku roku 2015 musela Česká republika čelit minimálně 29 investičním sporům. Toto číslo je v porovnání s ostatními zeměmi mimořádně vysoké, Česká republika je třetím nejžalovanějším státem před mezinárodními investičními tribunály.

Tento stav jistě není žádoucí a je třeba analyzovat jeho příčiny. Samotná problematika investičních sporů je však velmi složitá a z velké části zasahuje i do mimoprávních oborů. Cílem této práce je objasnit, do jaké míry přispívá k vysokému počtu investičních sporů způsob, jakým jsou formulována určitá ustanovení dvoustranných dohod na podporu a ochranu investic („BIT“) uzavřených Českou republikou.

Prozkoumání rozhodčích nálezů vydaných v investičních sporech vedených proti České republice, ať už vyznívajících v její prospěch či v její neprospěch, odhaluje jeden zajímavý poznatek: podání žalob bylo v několika případech pro investory velmi riskantní. Rozhodčí řízení je velmi drahé a časově náročné. Dalo by se tedy očekávat, že jej investoři budou iniciovat pouze za situace, kdy jsou si do značné míry jisti svým úspěchem. Tedy, kdy jsou přesvědčeni, že skutková situace skutečně vede k závěru, že stát porušil své povinnosti vyplývající z BIT, a dále pak, že rozhodčí tribunál, ke kterému žalobu podávají, bude mít pravomoc ve sporu rozhodnout. Přesto se vyskytly případy, kdy investoři podali žalobu za situace, kdy by tribunál podle názorů převažujících v praxi i mezi akademiky neměl mít nad sporem jurisdikci, či nárok neměl být přípustný, nebo byla pravomoc tribunálu a

přípustnost nároku přinejmenším sporná. Tyto kauzy budou dále podrobněji zkoumány.

Případy je možné rozřadit do tří kategorií. V první kategorii se nacházejí kauzy, kdy se investoři dopustili jednání, které se označuje anglickým termínem „treaty shopping“. Výraz označuje situaci, kdy investor s příslušností státu, který nemá (v našem případě) s Českou republikou uzavřenou BIT, nebo je pro ně BIT méně výhodná, učiní investici prostřednictvím dceřiné společnosti s příslušností státu, který s Českou republikou uzavřel BIT pro investora výhodnější. Podle obecně uznávaného názoru je toto jednání zavrženíhodné, pokud se jej investor dopustil s cílem získat přístup k mezinárodnímu rozhodčímu řízení ohledně již vzniklého sporu. V ostatních situacích, kdy se investor jen obecně snaží zabezpečit svou investici proti veškerým případným rizikům, se „treaty shopping“ obecně nepovažuje za nepřípustné jednání. Státy ale mohou být toho názoru, že ani takováto forma „treaty shopping“ není žádoucí.

„Treaty shopping“ se vyskytl ve dvou případech vedených proti České republice. Prvním z nich byla kauza *Saluka proti České republice* (“*Saluka*”), druhým *Phoenix proti České republice* („*Phoenix*“). V případu *Saluka* se investor dle názoru tribunálu nedopustil „treaty shopping“, který by byl zakázaný aplikovatelnou BIT. Na druhou stranu *Phoenix* je příkladem „treaty shopping“, kterého se investor dopustil se záměrem iniciovat řízení o konkrétním sporu před rozhodčím tribunálem. Tribunál se proto v tomto případě odmítl sporem zabývat. Česká republika však chování odsoudila v obou případech.

Druhá kategorie obsahuje případy paralelních řízení, které představují kauzy *Lauder proti České republice* („*Lauder*“) a *CME proti České republice* („*CME*“). Pan Lauder zde inicioval dvě arbitrážní řízení, jedno svým jménem a druhé jménem společnosti CME Czech Republic B.V., kterou vlastnil. Obě řízení se týkala stejných opatření přijatých Českou republikou, a principiálně i stejné škody, která z nich údajně vzešla. Česká republika namítala, že rozhodčí tribunály neměly pravomoc spor rozhodnout a že nárok byl nepřípustný, neboť se jednalo o zneužití práva iniciovat mezinárodní investiční arbitráž. V obou případech dle České republiky existovala překážka probíhajícího řízení, kvůli které nebylo možné v řízeních pokračovat. Oba tribunály však rozhodly, že jsou oprávněny vést řízení.

Do třetí kategorie případů spadá zacházení podle doložky nejvyšších výhod („doložka MFN“). V případě *Frontier Petroleum Services proti České republice* („*Frontier Petroleum*“) byl vznesen alternativní argument, že pokud by tribunál shledal, že mu stávající BIT neposkytuje nad sporem jurisdikci, má svou jurisdikci založit na doložce o řešení sporů obsažené v jiné BIT, neboť mu to umožňuje doložka nejvyšších výhod ve stávající BIT. Tribunál se tímto argumentem nezabýval. Pohled na nálezy ostatních tribunálů zabývajících se tímto tématem ukazuje, že judikatura je ohledně účinku MFN doložky rozpolcená a tribunál by našel dostatečnou podporu pro kladné i záporné rozhodnutí.

Všechny případy mají společné dvě spolu související skutečnosti. Za prvé je z vyjádření České republiky patrné, že stát chtěl těmto situacím zabránit, a to za použití obranných mechanismů zakotvených v BIT. Argumenty však až na jeden z případů (*Phoenix*) tribunál nepřesvědčily a mechanismy se v daných situacích ukázaly být neefektivní. Za druhé se v těchto případech investoři vůbec neměli rozhodnout spor vznést, neboť měli být od vyvolání mezinárodní investiční arbitráže odrazeni zněním BIT. Tak se však nestalo a celkový počet rozhodčích řízení započatých proti České republice byl navýšen.

Nabízí se zde proto tyto výzkumné otázky: „Mohl být vysoký počet investičních arbitráží proti České republice způsoben neefektivními ustanoveními BIT?“ Pokud ano, pak je relevantní otázka: „Obsahují ostatní BIT ustanovení, která by byla v daných situacích účinnější, tak aby se tyto situace už neopakovaly?“ Pokud ne, je třeba se ptát: „Existují vůbec takové mechanismy?“

Při hledání odpovědi na tyto otázky předložená práce nejprve analyzuje všechny výše uvedené případy a zaměřuje se na ustanovení BIT, která v nich byla použita. Dále zkoumá všechny ostatní BIT uzavřené Českou republikou, aby zjistila, zda jsou tato ustanovení obsažená i v dalších dohodách a pokud ano, jak jsou formulována. Následně jsou všechna tato ustanovení analyzována ve světle případů, kterým by měla být schopna zabránit, a v doložkách se navrhují změny sloužící ke zvýšení jejich účinnosti.

Práce tudíž vychází především ze znění rozhodčích nálezů a českých BIT. Závěry v ní obsažené jsou inspirovány také akademickými pracemi pojednávajícími o

jednotlivých problémech, a tam, kde jsou relevantní, také nálezy ostatních tribunálů na stejná témata.

Práce je členěna do šesti kapitol. První kapitola je úvodní. Druhá se zabývá pojmy „jurisdikce“ a „přípustnost nároku“ a vysvětluje, proč jsou tyto aspekty rozhodčího řízení spojené se zněním BIT. Třetí kapitola pojednává o prvním z výše uvedených problémů, a sice fenoménu “treaty shopping“. Otázka paralelních řízení je obsahem čtvrté kapitoly. Pátá kapitola se zaměřuje na vztah zacházení podle doložky nejvyšších výhod a jurisdikce rozhodčího tribunálu. Šestá kapitola obsahuje shrnutí a závěr práce.

2. JURISDIKCE TRIBUNÁLU A PŘÍPUSTNOST NÁROKU

Jurisdikce tribunálu a přípustnost nároku jsou velmi důležité komponenty rozhodčího řízení. Bez nich nemůže tribunál vydat rozhodčí nález. Otázka jejich existence by tedy měla být prvním, čím se bude investor zabývat, když se rozhoduje, zda podat žalobu. Je tudíž důležité ujasnit si, co tyto dva pojmy znamenají a jaký je jejich vztah k BIT.

Pojem jurisdikce označuje pravomoc tribunálu vydat v daném případě rozhodnutí. Jako v každém rozhodčím řízení, vychází tato pravomoc v mezinárodní investiční arbitráži ze souhlasu obou stran. Zatímco souhlas investora je typicky vyjádřen podáním žaloby, souhlas státu může být dán několika způsoby. Tím nejčastějším z nich je souhlas obsažený v doložce o řešení sporů, která je součástí BIT. Stát v ní vyjadřuje souhlas s tím, aby byl případný spor s investory s příslušností státu, který je druhou smluvní stranou BIT, řešen mezinárodním investičním tribunálem. Otázku, zda má tribunál jurisdikci, lze tedy přeformulovat na otázku: „Udělil stát v doložce o řešení sporů souhlas s tím, aby se spor o dané otázce s daným žalobcem řešil před mezinárodním investičním tribunálem?“

Přípustnost nároku je odlišný koncept. Při zkoumání přípustnosti nároku se tribunál, který předtím určil, že má pravomoc spor rozhodnout, ptá, zda je přípustné či vhodné, aby se sporem zabýval. Není to již otázka svolení k arbitráži, ale otázka okolností doprovázejících spor. Důvody, pro které může být návrh nepřípustný, jsou velmi

různorodé. Tribunály shledaly nepřípustnost například z důvodu, že žalobce nebyl v dobré víře, nebo proto, že měl být k projednání sporu v prvé řadě příslušný jiný tribunál. Právní základ pro závěr, že je návrh nepřípustný, se typicky nenachází v samotné BIT. To však neznamená, že by tomu tak nemohlo být, a že by si státy nemohly sjednat doložky určující, za jakých situací by spor neměl být projednán.

Chce-li stát zajistit, že tribunál nebude mít pravomoc určitý spor rozhodnout, nebo že bude muset prohlásit nárok za nepřípustný, musí zařadit do svých BIT ustanovení s tímto účinkem. Při hledání odpovědi na otázku, zda vysoký počet rozhodčích řízení proti České republice může být způsoben problematickou úpravou jurisdikce tribunálu či přípustnosti nároku, je proto vhodné zkoumat BIT.

3. TREATY SHOPPING

Pojem „treaty shopping“ je definován jako chování, při kterém se investor záměrně snaží získat výhody vyplývající z BIT tím, že realizuje svou investici nebo vznáší žalobní nárok prostřednictvím společnosti s příslušností třetí země, která má s hostitelským státem uzavřenou výhodnou BIT.

Nauka rozlišuje takzvané „treaty shopping na začátku investice“ a „treaty shopping na konci investice“. První se odehrává v době, kdy investor provádí svou investici. O druhém se hovoří za situace, kdy se investor snaží změnit vlastnickou strukturu investice v momentě, kdy se v souvislosti s investicí vyskytl problém, a z toho důvodu, aby získal přístup k mezinárodní investiční arbitráži. Část akademiků se shoduje na tom, že první z popsaných druhů „treaty shopping“ není nepřípustný a neměl by být ani zakázaný. Česká republika však ve sporu *Saluka* vyjádřila názor, že toto chování není žádoucí. Druhá z forem „treaty shopping“ je obecně odsuzována. Česká republika se s ním setkala v kauze *Phoenix*.

3.1. SKUTKOVÉ PODSTATY PŘÍPADŮ SALUKA A PHOENIX A ZHODNOCENÍ POSTOJE TRIBUNÁLU

V případu *Phoenix* se jednalo o investora české národnosti, který v Izraeli založil společnost Phoenix. Na tuto společnost byla následně převedena investice vlastněná rodinným příslušníkem českého investora, a to v době, kdy se o tuto investici v České republice začala zajímat policie. Společnost Phoenix následně podala žalobu k mezinárodnímu investičnímu tribunálu. Česká republika namítala, že případ je zneužitím mezinárodní ochrany investic. Tribunál žalovanému přisvědčil, rozhodl, že nárok je nepřípustný a žalobu zamítl.

Případ *Saluka* pojednával o nizozemské společnosti Saluka, která byla vlastněna japonským koncernem. Saluka podala proti České republice žalobu. Stát se bránil, že Saluka neučinila v České republice žádnou investici ve smyslu BIT, a že skutečným investorem není Saluka, ale japonský koncern. Tribunál však po prostudování znění BIT dospěl k závěru, že Saluka splňuje její definici investora, a že učinila investici v právním slova smyslu.

3.2. PRÁVNÍ DŮVODY ZÁVĚRŮ OBSAŽENÝCH V ROZHODČÍCH NÁLEZECH

K zodpovězení otázky, zda je něco v nepořádku s českými BIT, je nutné zjistit, jaká ustanovení BIT byla v jednotlivých případech použita, jaký cíl tím byl sledován, a jak tribunály argumenty přijaly.

V případě *Phoenix* se argumentovalo především obecnou právní zásadou, že ochrana se poskytuje pouze těm právům, která jsou vykonávána v dobré víře. Tribunál v tomto případě situaci pečlivě zkoumal a z několika různých důvodů došel k závěru, že se v tomto případě jednalo o zneužití práva a investor tedy v dobré víře nejednal. Na tomto místě je nutno podotknout, že případ *Phoenix* byl ukázkovým příkladem "treaty shopping" na konci investice, tedy praxe, která je obecně zavrhovaná. Tribunál prohlásil nárok za nepřípustný jen na základě obecných zásad právních, pozitivní znění právní úpravy v tomto případě nehrálo roli. Dá se tedy očekávat, že

na to, aby se stát ubránil případům jako je *Phoenix*, není třeba žádné speciální ustanovení.

Jinak je tomu v případě *Saluka*. Česká republika zde argumentovala, nad rámec definice investice a investora obsažené v předmětné BIT musí tribunál zkoumat, zda investor skutečně zamýšlel provádět ekonomické operace na území hostitelského státu, a zda byl investor pouhým prostředníkem, skrze kterého by operovala jiná entita. Tribunál k tomu uvedl, že ačkoliv má pro tyto požadavky pochopení, ve znění BIT oporu nemají. Definice investice a investora byla velmi široká s minimálními požadavky a tribunálu nepříslušelo tuto definici rozšiřovat. *Saluka* proto mohla vznést svůj nárok.

3.3. DEFINICE INVESTICE A INVESTORA V ČESKÝCH BIT

Případ *Saluka* ukazuje, že co se týče znění BIT, spočívají faktory umožňující „treaty shopping" především v definicích investice a investora. Průzkum ostatních BIT uzavřených Českou republikou odhaluje, že většina z nich obsahuje definici stejně obsáhlou, ne-li širší, než definice zkoumaná v případu *Saluka*. Většina českých BIT by tedy „treaty shopping" nezabránila.

Nabízí se proto otázka, zda je nejlepší obranou proti tomuto chování změna těchto definic. Práce dochází k tomu, že není. Důvody pro tento závěr by se daly shrnout jako poznání, že ačkoliv se Česká republika v případu *Saluka* bránila jurisdikci tribunálu, což je vzhledem k tomu, že se snažila vyhnout investičnímu sporu, pochopitelné, „treaty shopping" na začátku investice není bez dalšího chováním zavrženíhodným. Státy jej samy podněcují, když soutěží v tom, který nabídne investorovi lepší podmínky. Většina investorů, kteří využívají možností co nejlépe zabezpečit svou investici proti případným zásahům, by proto měla mít přístup k mezinárodní ochraně. Definice investice a investora by toto měla reflektovat a měla by být dostatečně obsáhlá, aby zahrnula všechny myslitelné investory.

Jako vhodnější řešení se proto jeví identifikovat ta jednání, která by skutečně měla být zakázána. Tvoří totiž mnohem menší skupinu než různorodí investoři, kteří zamýšlí investovat v České republice. Jako taková může být definice konkrétních jednání, která jsou zakázaná, mnohem přesnější a cílenější, než formulace dopadající

na veškerá jednání, která jsou dovolená. Navrhuje se tedy ponechat stávající definice investice a investora a zařadit do BIT nové doložky, které by specifikovaly, kdo a za jakých podmínek je z mezinárodní ochrany vyňat.

3.4. Doložky, které umožňují státu odepřít investorovi ochranu nabízenou mu BIT

Příkladem takové doložky je takzvaná „denial of benefits“ doložka, tedy doložka, která umožňuje státu prohlásit, že při splnění určitých podmínek se na investora ochrana nabízená BIT nevztahuje. Tyto podmínky typicky zahrnují skutečnost, že investor je vlastněn nebo ovládán jiným investorem s příslušností třetího státu, nebo že investor nevykonává na území hostitelského státu podstatné obchodní aktivity.

Tyto doložky skutečně mohou být odpovědí na problémy “treaty shopping“. Přesně vystihují námitky, které Česká republika k případu *Saluka* měla. Navíc představují právo státu, jehož výkon záleží na úvaze státu, nikoliv povinnost tribunálu určitým způsobem rozhodnout. Chce-li investor, který by byl pro stát významný a stát by o jeho získání usiloval, v zemi investovat a být si jistý, že bude mít přístup k mezinárodní ochraně, může se státem uzavřít dohodu, že stát práva poskytnutého mu doložkou nevyužije.

3.5. Doložka denial of benefits v českých BIT

Zbývá otázka, zda české BIT podobnou doložku obsahují a pokud ano, v jakém znění? Odpověď není pro stát velmi příznivá. Podobná doložka je totiž obsažena jen v několika málo BIT.

Ustanovení navíc obsahují několik problematických částí. První z nich je pojem „podstatné obchodní aktivity“. Praxe jiných tribunálů ukázala, že toto spojení může být vykládáno velmi restriktivně, což je způsobeno mnohoznačností pojmu v jeho anglické jazykové verzi. Bylo by tedy vhodné pojem upřesnit. Dalším problémem je skutečnost, že se po státu může požadovat, aby uplatnění této doložky investorovi hlásil předem, než vznikne spor. To by samozřejmě pro stát znamenalo značnou

zátěž, neboť by musel aktivně monitorovat všechny investory, kteří by v budoucnu hypoteticky mohli podat na Českou republiku žalobu. Aby doložky fungovaly tak, jak mají, a v momentě, kdy je toho potřeba, je nutno výslovně určit, že předchozí notifikace není nutná.

Třetí kapitola této práce vede k závěru, že většina českých BIT je proti „treaty shopping" na začátku investice bezbranná. Chce-li Česká republika tomuto chování zabránit, musí do BIT zahrnout doložky „denial of benefits" s upraveným zněním.

4. PARALELNÍ ŘÍZENÍ

Další ze situací, kterou se práce zabývá, je problém vyvolaný v případech *CME* a *Lauder*. Jeden investor zde vyvolal dvě rozhodčí řízení proti České republice, jedno vlastním jménem a druhé skrze společnost, kterou ovládal. Předmětem obou řízení byly stejné události. Ačkoliv se Česká republika bránila, že by tribunály neměly mít nad paralelními řízeními jurisdikci, a alternativně že by nároky neměly být přípustné, oba tribunály vydaly meritorní rozhodnutí, a to dokonce s rozdílnými výsledky.

4.1. SKUTKOVÉ PODSTATY PŘÍPADŮ CME A LAUDER A ZHODNOCENÍ POSTOJE TRIBUNÁLU

V případech se jednalo o to, že jeden investor, americký občan pan Lauder, ovládající společnost CME inkorporovanou v Nizozemí, inicioval dvě různé mezinárodní arbitráže proti České republice. Žalovaný namítal nedostatek pravomoci tribunálu a nepřípustnost návrhu.

Oba tribunály shledaly, že takové závěry nemají oporu v aplikovatelném právu. Ačkoliv se případy *CME* a *Lauder* podobají situaci, jejíž projednání by bránila překážka litispendence, nejsou s touto situací totožné. V obou případech se totiž jednalo o jiného žalobce a jiný spor.

I přes závěry tribunálu se nelze nad postojem České republiky podivovat. Případy jako *CME* a *Lauder* jsou nežádoucí z několika důvodů. Z pohledu mezinárodních investičních arbitráží jako systému jsou problematické, neboť v nich hrozí nebezpečí

vydání konfliktních nálezů. Dále je možné paralelní řízení chápat jako zneužití systému. Uzavřením BIT státy svolily poskytnout investorovi možnost předložit spor o opatřeních negativně ovlivňujících investici k nestrannému a mezinárodnímu fóru. Jejich cílem nebylo vytvořit systém, ve kterém bude mít investor tolik příležitostí vyvolat mezinárodní arbitráž, kolik jich uzná za vhodné. Za třetí paralelní řízení představují pro stát značné nadbytečné výdaje.

Je tedy třeba najít způsoby, jak odradit investory od toho, aby se nechali inspirovat panem Lauderem.

4.2. PRÁVNÍ DŮVODY ZÁVĚRŮ OBSAŽENÝCH V ROZHODČÍCH NÁLEZECH

Protože byly oba případy rozhodovány na základě rozdílných BIT, byly rozdílné i prostředky, které mohla Česká republika na svou obranu využít.

V případu *CME* musela Česká republika z důvodu absence vhodných ustanovení v BIT argumentovat obecnou právní zásadou ochrany jen takových práv, která jsou vykonávána v dobré víře. Tribunál ale tomuto argumentu nepřisvědčil. Jednak konstatoval, že České republice byla opětovně nabízena možnost řízení konsolidovat a tak problém paralelních řízení odstranit, což Česká republika odmítla. Dále uvedl, že nemůže mít investorovi za zlé, že se snaží využít všechny právem poskytnuté prostředky k ochraně své investice. Obě BIT, které byly v řízeních použity, jsou rovnocennými součástmi právního řádu České republiky, a dávají jednak panu Lauderovi a jednak CME možnost obrany.

V případu *Lauder* Česká republika spoléhala na jedno z ustanovení BIT, podle kterého může investor podat žalobu pouze v případě, že už ten samý spor nepředložil k řešení jinému fóru. Tribunál rozhodl, že toto ustanovení jeho jurisdikci ani přípustnosti nároku nebrání, neboť v obou případech figuroval jiný žalobce a jednalo se o jiný spor.

4.3. MOŽNÁ ŘEŠENÍ PROBLÉMU

Existuje několik mechanismů, které mají za úkol obecně zabraňovat paralelním řízením. V českých BIT se objevují tři. Práce je v této části postupně rozebírá.

4.3.1 Investor na rozcestí

Prvním z těchto mechanismů jsou ustanovení s anglickým názvem „fork-in-the-road“, který by se do češtiny dal přeložit jako „rozcestí“. Tato ustanovení nutí investora, aby si k řešení svého sporu se státem vybral jedno fórum a u vybraného fóra zůstal.

Předmětné stanovení je obsaženo v BIT, kterou se zabýval tribunál ve věci *Lauder*, a také v několika ostatních českých BIT. Jak je vidět ze závěrů tribunálu, nepředstavují pro zkoumanou situaci vhodné řešení. Předpokládají totiž, že jak žalobce, tak spor jsou v obou situacích identické.

Tyto předpoklady nebyly splněny. Byť pan Lauder a CME představovali provázané osoby, právně tvořili dvě rozdílné entity. Jednota sporu také nebyla dodržena. Pojem spor je třeba chápat v právním slova smyslu, tedy jako spor o výklad a dodržování konkrétní BIT. Předmětné BIT zde byly rozdílné, byly tedy rozdílné i spory.

4.3.2. Ustanovení, které investora donutí vzdát se práva zahájit další rozhodčí řízení

Dalším ustanovením, jež je třeba při hledání odpovědi na otázky položené kauzami *CME* a *Lauder* zvážit, je ustanovení označené v angličtině jako „waiver clause“. Takové ustanovení je obsaženo ve dvou českých BIT. Předepisuje, že investor může podat žalobu k mezinárodnímu tribunálu pouze tehdy, pokud se on a zároveň jiné právnické osoby, které vlastní či ovládá, vzdají práva na iniciování jiné arbitráže ohledně stejných opatření přijatých státem.

Toto ustanovení je v předmětných situacích vhodnější než „fork-in-the-road“ ustanovení. Řeší oba problémy, které se u „fork-in-the-road“ vyskytly. Rozšiřuje totiž okruh osob, které nemůžou vyvolat rozhodčí řízení. Dále se soustředí na předmět sporu a nikoliv na jeho právní základ. Klíčem k řešení problému paralelních řízení by tedy mohla být tato ustanovení.

4.3.3 Ustanovení článku 10 odst. 5 písm. b) česko-kanadské BIT

Unikátní prostředek sloužící k zabránění situace jako je *CME* a *Lauder* nabízí česko-kanadská BIT. Její ustanovení obsažené v článku 10 odst. 5 písm. b) předepisuje, že pokud je investice investora vlastněná nepřímo skrze jiného investora s příslušností třetího státu, nemůže investor zahájit či pokračovat v řízení, pokud na základě stejných skutkových okolností žalobu předložil i druhý investor.

Toto ustanovení rovněž představuje vhodné řešení, neboť opět rozšiřuje počet osob, které nemohou předložit žalobu či pokračovat v řízení, a zároveň definuje nepřípustná paralelní řízení podle jejich předmětu a nikoliv podle aplikovatelného práva. S drobnými úpravami dále v práci rozvedenými by bylo proti situacím, jako byla ta vyvolaná případy *CME* a *Lauder*, účinné.

Čtvrtá kapitola práce ukazuje, že většina českých BIT není schopná zabránit investorům, aby se vydali ve stopách pana Laudera. Existují však dva druhy ustanovení, která by byla proti takovému chování účinná a jejich zahrnutí s drobnými změnami do českých BIT by mohlo odradit investory od zahajování paralelních řízení.

5. ZACHÁZENÍ PODLE DOLOŽKY NEJVYŠŠÍCH VÝHOD

Posledním problémem, kterým se práce zabývá, je zacházení podle doložky nejvyšších výhod. V případu *Frontier Petroleum* byla položena otázka, zda se zacházení podle doložky nejvyšších výhod vztahuje i na doložku o řešení sporů. Tribunál se otázkou nezabýval. Na základě průzkumu nálezů vydaných v obdobných případech si však lze představit, že by tribunál mohl odpovědět jak kladně, tak i záporně.

5.1. SKUTKOVÉ PODSTATY PŘÍPADU A ZHODNOCENÍ POSTOJE TRIBUNÁLU

Kanadská společnost Frontier Petroleum Services Ltd. zahájila proti České republice mezinárodní investiční arbitráž. Aby si pojistila, že tribunál bude mít nad sporem jurisdikci, vznesla mimo jiné i alternativní argument nutnosti zacházení podle doložky nejvyšších výhod. Pokud by tribunál shledal, že mu kanadsko-česká BIT nedává pravomoc případ rozhodnout, měl by podle žalobce tuto pravomoc založit na jedné z šířeji formulovaných doložek o řešení sporů obsažených v jiných českých BIT, která by se na případ aplikovala díky institutu zacházení podle doložky nejvyšších výhod.

Tribunál se k argumentu nevyjádřil. Případná kladná odpověď by ale měla dalekosáhlé důsledky. Znamenala by, že jakékoliv brzdy zabudované v doložkách o řešení sporů v jednotlivých BIT by bylo možné velmi snadno obejít. Není proto divu, že stát se takovému výkladu zacházení podle doložky nejvyšších výhod bránil. Zbývá tedy zjistit, zda existuje možnost, že by tribunál tímto stylem doložku interpretoval.

5.2. DALŠÍ NÁLEZY VYDANÉ NA TOTO TÉMA

Pohled na judikaturu mezinárodních investičních tribunálů ukazuje, že otázka vlivu zacházení podle doložky nejvyšších výhod na pravomoc tribunálu není v praxi mezinárodní investiční arbitráže vyřešena.

Některé tribunály dospěly k závěrům, že zacházení podle doložky nejvyšších výhod se na doložku o řešení sporů bez dalšího vztahuje, nebo že se na ně takové zacházení vztahuje s určitými omezeními. Jiné rozhodly, že se na ně obecně vztahuje, ale v daném konkrétním případě, tomu tak není. Další tribunály se vyjádřily v tom smyslu, že zacházení podle doložky nejvyšších výhod není na otázku pravomoci tribunálu aplikovatelné.

Rozdílné závěry tribunálu nemohou být připsány rozdílným zněním jednotlivých doložek. Několik různých tribunálů zkoumalo stejná ustanovení a dospělo k opačným závěrům. Nálezy ukazují, že příčiny těchto rozporů je třeba hledat spíše

v odlišných skutkových situacích jednotlivých případů. Jak poznamenávají Dolzer a Schreuer, zacházení podle doložky nejvyšších výhod bylo typicky vztahováno na doložky o řešení sporů v případech, kdy tribunál v zásadě jurisdikci měl už podle původní BIT a žalobce potřeboval obejít určitou procedurální podmínku menšího významu. Tribunály tak například rozhodly, že žalobce nemusel dodržet předepsanou lhůtu několika měsíců, než mohl vznést žalobu. Na druhou stranu tam, kde by tribunál vůbec neměl nad daným sporem jurisdikci a žalobce se pokoušel pravomoc tribunálu založit uměle, mu takový pokus nevyšel.

Vzniká tak situace značné právní nejistoty, která jistě není žádoucí. Je proto vhodné zkoumat, zda v českých BIT existují ustanovení, která by nejasnost odstranila.

5.3. ZACHÁZENÍ PODLE DOLOŽKY NEJVYŠŠÍCH VÝHOD V ČESKÝCH BIT

Většina příslušných doložek v českých BIT je formulována stejným či velmi obdobným způsobem. Podobné doložky byly již zkoumány ostatními tribunály, přičemž rozhodnutí těchto tribunálů zněla jak ve prospěch, tak v neprospěch aplikace zacházení podle doložky nejvyšších výhod na pravomoc tribunálu případ rozhodnout.

Jediná BIT, která obsahuje doložku, která výslovně vylučuje svou aplikaci na doložky o řešení sporů, je BIT uzavřená mezi Českou republikou s Ázerbájdžánem. Přeje-li si Česká republika do budoucna zabránit, aby tribunály zakládaly svou pravomoc na jiných BIT, než na BIT primárně aplikovatelné, měla by podobnou doložku zařadit i do svých ostatních BIT.

6. ZÁVĚR

Rozbor některých rozhodčích nálezů vydaných ve sporech s Českou republikou ukazuje, že v několika případech investoři využili široce či naopak úzce formulovaných ustanovení BIT a byli tak schopni zahájit a vést řízení proti České republice.

Průzkum ostatních českých BIT naznačuje, že většina z nich by nebyla schopna účinně a s jistotou podobným pokusům v budoucnu zabránit. Investorům tak nic nebrání v tom, aby se inspirovali chováním žalobců ve zkoumaných případech.

Několik BIT však obsahuje ustanovení, která jsou schopná daným situacím zamezit. Jejich zahrnutí s drobnými úpravami do ostatních BIT by mohlo snížit počet investičních arbitráží vedených v budoucnu proti České republice.

Key words: jurisdiction, admissibility, BIT

Klíčová slova: jurisdikce, přípustnost, BIT