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PRE-CONTRACTUAL RIGHTS AS AN INVESTMENT UNDER THE BILATERAL INVESTMENT TREATIES OF LITHUANIA

Master Thesis

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I. INTRODUCTION

At the time this Master Thesis was drafted Lithuania had 33 bilateral investment treaties concluded with the other states. Bilateral investment treaties treaties share similar object and purpose – to facilitate investments between the states and to grant the reciprocal protection of investment made by national of one contracting state in the territory of the other contracting state.[1] The jurisdictional provisions of such treaties entitle foreign nationals of one contracting state to bring a claim against the other contracting state and provide alternative forums for dispute settlement among investors and the state.[2] Since bilateral investment treaties focus on the protection of investments, the jurisdictional provisions require that the dispute would arise out of an investment.[3] The term "*investment*" embedded in the jurisdictional provisions of the treaties makes reference to the other provisions of the treaty which provide the definition of the term "*investment*". The term is constantly defined as a kind of property or an asset which belongs to the national of the other contracting state. Then, the definition is followed by a sample list of property in kind that constitutes an "*investment*" under the bilateral investment treaty.[4]

The investment tribunals have to determine whether the alleged violation arises out of an object that is investment under the treaty. Regardless of how broad assets-based definition of investment may be, such question is frequently contented between the parties to the dispute.

The question whether claimant's pre-contractual rights may constitute an investment under the bilateral investment treaty is one of the disputed topics in investment arbitration. Pre-contractual rights vary under the domestic law of the host state and may include other party's duty to conduct the negotiations in good faith, various rights arising out of the preliminary contract, the right to

[1] See e.g.: Preamble of the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, 14 January 1998 ("USA – Lithuania BIT"), Preamble of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Lithuania for the Promotion and Protection of Investments, 17 May 1993 ("UK – Lithuania BIT"), Preamble of Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Estonia, 7 September 1995 ("Lithuania- Estonia BIT"), etc.

[2] See e.g. Art. 9 of the Denmark and Lithuania Agreement Concerning the Promotion and Reciprocal Protection of Investments, No. 31059, 30 March 1992 ("Denmark – Lithuania BIT"), Art. 7 of Agreement between the Republic of Lithuania and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, 28 September 1992 ("Poland – Lithuania BIT"); Art. 11 of Agreement between the Federal Republic of Germany and the Republic of Lithuania for Promotion and Reciprocal Protection of Investments, 28 February 1992 ("Germany – Lithuania BIT"), etc.

[3] Ibid.

[4] See e.g. Article 1(a) of UK – Lithuania BIT, Article I.1.(a) of US – Lithuania BIT, Article 1.(1) of Sweden and Lithuania Agreement on the Promotion and Reciprocal Protection of Investments, No. 31210, 17 March 1992 ("Sweden – Lithuania BIT"), etc. Christoph. H. Schreuer, "*The ICSID Convention: a Commentary*", Cambridge, 2011, p. 129, para. 99.

damages as a result of violation of preliminary contract, etc. Four investment tribunals rejected claimant's arguments that pre-contractual rights constituted an investment.[5] However, none of these decisions shut the doors firmly for the claims arising out of pre-contractual relations. Two decisions of the tribunals were followed by concurring and separate opinions of one of the arbitrators[6] and some legal scholars in one or another way opposed either decisions in full or the reasoning adopted in those decisions.[7] Hence, the topic of pre-contractual rights is pertinent and well not settled in investment arbitration.

The object of this Master Thesis is the provisions setting forth the definition of investment in the bilateral investment treaties concluded by Lithuania with the United Kingdom, the Netherlands, the United States of America, Sweden, Denmark, Germany, Russia, Poland and Estonia ("BITs" or singular - "BIT")[8]. The first 3 BIT's were chosen due to their wide-spread application on globe, which would make this Master Thesis more representative of the major situation in the world. What concerns the BIT concluded with the Netherlands, it is not an unseen practice when Lithuanian origin investor opts for the Netherlands as a place of incorporation of the company from which it controls its subsidiaries in the foreign countries or Lithuania. Such capital restructuring may be made seeking to exercise the protection granted by the bilateral investment treaties concluded by the Netherlands with the other states, which are not only wide-spread, but also recognized as favourable to investors.[9] The last 6 BITs are the BITs concluded with the top 5 states by foreign direct investment flow to Lithuania over the last 5 years,[10] which

[5] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2) Award and Concurring Opinion, 15 March 2002 // 17 ICSID Rev.—FILJ 142 (2002) ("Mihaly v Sri Lanka"), Zhinvali Development Ltd. v. Republic of Georgia (ICSID Case No. ARB/00/1) Award and the Separate Opinion of Andrew J. Jacovides, 24 January 2003 ("Zhinvali v Georgia"), William Nagel v the Czech Republic (Arbitration Institute of the Stockholm Commercial Chamber of Commerce Case No. 049/2002) Final Award, 9 September 2003 ("Nagel v Czech Republic"), F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago (ICSID Case No. ARB/01/14) Award, 3 March 2006 ("F-W Oil v Trinidad & Tobago").

[6] Concurring opinion of David Suratgar in Mihaly v Sri Lanka, Separate opinion of Andrew J. Jacovides in Zhinvali v Georgia.

[7] Farouk Yala, Walid Ben Hamida, Zachary Douglas.

[8] UK – Lithuania BIT, Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Lithuania and the Government of the Kingdom of the Netherlands, 26 January 1994 ("Netherlands – Lithuania BIT"), USA – Lithuania BIT, Sweden- Lithuania BIT, Denmark – Lithuania BIT, Germany – Lithuania BIT, Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments. 29 June 1999 ("Russia – Lithuania BIT"), Poland – Lithuania BIT.

[9] George Kahale "*The new Dutch sandwich: The issue of treaty abuse", in "Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment*" // Columbia FDI perspectives, No. 48, 10 October 2011, available at: http://www.vcc.columbia.edu/content/new-dutch-sandwich-issue-treaty-abuse [Date of connection: 19 December 2011].

[10] See the statistics of the foreign direct investment in Lithuania for years 2005-2010 by each state in the official website of Statistics Department of the Republic of Lithuania:

would imply that these treaties are most likely to be referred to by the foreign investors in Lithuania, which in turn makes this Master Thesis more practically applicable in the future.

The problem of this Master Thesis is the following: "*Could the BITs protect the pre-contractual rights of the foreign investors?*" An illustrative approach to the problem can be the following: the foreign national negotiates with the host state for a contract, spends reasonable amount of assets for various pre-contractual purposes, negotiations are advanced, the preliminary agreement is signed and only the formal conclusion separates the parties from the main agreement. Could the investor's pre-contractual rights obtained through the process of negotiations under the domestic law constitute an investment under the BITs? This issue is not only contentious in the theory, but also has important reflections in the practice. States, including Lithuania, enter into numerous contracts with foreign investors and even more states enter into pre-contractual relations that eventually fail to reach the main agreement. In June 2010 the Ministry of Economy of Lithuania itself claimed having directly negotiated with 66 major foreign investors.[11] In 2011 Lithuania aims for developing new public infrastructure projects in cooperation with foreign investors, e.g. new nuclear power plant in Visaginas or liquid gas terminal in the port of Klaipeda. Thus, the risk of disputes with the foreign investors is credible and trigger the protection of the BITs.

The aim of this Master Thesis is to examine the BITs with respect to the problem of this Master Thesis and to provide the conclusions leading to the positive or negative answer to the question posed in the problem.

The tasks and the structure of this Master Thesis are structurally interconnected, meaning that 7 tasks raised in this Master Thesis follows by 7 separate sections. The sections are as follows:

1. Introduction to the textual reading of the provisions defining investment under the BITs (1st Section);

2. The comparative assessment of the tribunals' practice and the writings of legal scholars on the issue of protection of pre-contractual rights under international investment law (2nd Section);

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http://db1.stat.gov.lt/statbank/selectvarval/saveselections.asp?MainTable=M2030202&PLanguage=1&TableStyle=&Buttons=&PXSId=17234&IQY=&TC=&ST=ST&rvar0=&rvar1=&rvar2=&rvar3=&rvar4=&rvar5=&rvar6=&rvar7=&rvar8=&rvar9=&rvar10=&rvar11=&rvar12=&rvar13=&rvar14= [Date of connection: 26 November 2011].

[11] Media article, available at: http://finansai.eversus.lt/naujienos/1466 [Date of connection: 20 December 2011]

3. Presentation of the possibility of applying the definition of investment as described by the tribunals interpreting the term "*investment*" set in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14 October 1966 ("ICSID") Art. 25.1 (3rd Section);

4. Assessment of legitimate expectations of performance in the future as investment under the international investment law (4th Section);

5. Assessment of rights to damages arising out of the breach of duty of good faith in the pre-contractual relations as an investment under the international investment law (5th Section);

6. Determining the domestic pre-contractual rights that could constitute and investment under the BITs (6th Section);

7. Determining the ample of protection of pre-contractual rights under the BITs (7th Section).

Finally, the conclusions of the Master Thesis (3rd Chapter) give possible answers whether pre-contractual are protected under the BITs.

The hypothesis of the Master Thesis is the following: "*Even though the investment tribunals were hesitant to recognize that the pre-contractual rights are investments under the bilateral investment treaties under some circumstances the pre-contractual rights may constitute an investment under the BITs*". The hypothesis is based on the scholarly writing and the tribunals' findings in the *obiter dictum* of the decisions.

II. PRE-CONTRACTUAL RIGHTS AS ASSESSED UNDER THE RULES OF TREATY INTERPRETATION

1. Textual reading of the provisions defining investment under the BITs

Following Art. 31.1 of the Vienna Convention on the Law of Treaties, 1969 ("Vienna Convention")[12] the primary step for assessing whether pre-contractual rights may or may not be protected under the BITs is to find the provisions in the BITs *prima facie* capable at encompassing the rights arising out of pre-contractual relations and to interpret those terms in accordance with their ordinary meaning.

[12] "*A treaty shall be interpreted in good faith* ***in accordance with the ordinary meaning*** *to be given to the terms of the treaty in their context and in the light of its object and purpose*." [Emphasis added]

All the BITs contain an investment-defining provision which, as a general rule in all of the bilateral investment treaties, is the primary article of the treaty. The very first articles of the BITs are aimed at defining not only investment, but also investor, nationality, territory, etc.[13]

For the purpose of multi-assessment of the number of the BITs a Summary Table of the BITs' Provisions *Prima Facie* Encompassing the Pre-contractual Rights ("Summary Table") is provided as an annex to the Master Thesis. Summary Table provides the extracts of the articles of the BITs, which are grouped in 5 groups (columns 1 to 5) based on a similar wording of the provision:

(i) General asset / property-based definition of investment – provision found in all the BITs and, as a general rule, formulated as "*"investment" means every kind of asset…*"[14] or *""investment" means every kind of property".*[15] The textual nature of such provisions is to encompass any kind of property or asset which would constitute an investment under the BIT.[16] This provision certainly holds potential as entailing rights arising out of pre-contractual relations, such as rights arising out of the preliminary agreement (obligation of the other party to conclude the main agreement or to pay a fine to the other party if it fails to do so) or even legitimate expectation that the main agreement will be concluded "for certain"[17]. This provision in all the BITs is further specified by providing a non-exhaustive, sample list of assets or property that is perceived as an "investment" under the BIT, e.g. Art. I(1)(a) of USA – Lithuania BIT reads that investment includes:

> *"(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
>
> *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*

[13] See Art. I.1 of US – Lithuania BIT, Art. 1 of UK – Lithuania – BIT, Art. 1 of Sweden – Lithuania BIT, Art. 1 of Russia – Lithuania BIT.
[14] Art. 1(a) of UK – Lithuania BIT.
[15] Art. I.1(a) of USA – Lithuania BIT.
[16] Norman Stephan Kinsella and Noah Rubins "*International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*", Oxford, 2005.
[17] See Section 6 of this Master Thesis.

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic work, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law."

The pre-contractual rights could certainly never be associated with the rights in the form "*shares of stock or other interest in the company*" or various "*intellectual property rights*". These categories of rights being manifestly out of the range of the problem are not any further discussed in this Master Thesis, but other categories do have a *prima facie* capacity to entail the pre-contractual rights, in particular:

(ii) Intangible property / property rights – these categories of rights are usually formulated as "*immovable property as well as any other property rights…*"[18] or "*tangible and intangible property…*"[19] For the same basis as a general definition of investment these categories of rights may also include the pre-contractual rights, which could be considered as property rights or intangible property;

(iii) Claims to money – specific claims that constitute an investment formulated as "*claims to money*"[20], but may also be defined as "*title to money*"[21]. Presumptively, "*claims to money*" or "*title to money*" does entail the right to damages arising out of pre-contractual relations as a result of violation of the preliminary agreement which obliges the parties to conclude the main agreement, but may also arise out of a violation of a general statutory duty of good faith. "*Claims to money*" in some BITs are connected with additional requirements, e.g. formulated as to be pertinent on the purpose these claims are made for: "*claims to money which has been used to create an economic value or*

[18] Art. 1.(1)(a) of Sweden – Lithuania BIT.
[19] Art. I.1(a)(i) of USA – Lithuania BIT.
[20] Art. 1(a)(iii) of UK – Lithuania BIT.
[21] Art. 1(a)(iii) of Netherlands – Lithuania BIT.

claims to any performance having an economic value"[22] or "*claims to money or to any performance having an economic value and connected with investment*".[23] As will be further seen such various wording may have significant outcomes is assessing whether pre-contractual rights may be protected under the BITs;[24]

(iv) Any right conferred by law or by contract – *prima facie* broad and all-encompassing category of rights able to cover right to damages or even the claimant's legitimate expectations that the contract will be concluded "for certain". This category of rights is least homogenous and only two BITs: USA – Lithuania BIT and Estonia – Lithuania BIT provide for such broad formulation: "*any right conferred by law or contract"*[25] and "*any rights conferred by law or by contract*"[26] However, the provisions of the other BITs that are located in the same place are more specific and provide for rights that can not be equated with any of the rights arising out pre-contractual relations, e.g. "*administrative concessions, including concessions for search and extraction…"*[27] or *"rights granted by a public authority to carry out an economic activity…"*[28]

Having determined the BITs' provisions *prima facie* capable at protecting investor's pre-contractual rights, the next step is to assess the findings of the investment tribunals and the writings of the legal scholars on the issue of pre-contractual rights in foreign investment law.

2. Practice of international investment tribunals and writings of legal scholars on the issue of protection of pre-contractual rights under international investment law

The textual reading of the broad asset-based definition of investment under the BITs suggests that almost every category of sample rights could potentially entail the pre-contractual rights. The question is how this could be compatible with all 4 arbitral tribunals' decisions that refrained from jurisdiction having found no investment in the pre-contractual dealings between the foreign national and the state. Thus, a closer look is needed to those decisions, which will also shed some

[22] Art. 1.1(c) of Germany – Lithuania BIT.
[23] Art. I(2)(c) of Estonia – Lithuania BIT.
[24] See Section 7 of this Master Thesis.
[25] Art. I.1(a)(v) of USA – Lithuania BIT.
[26] Art. I(2)(e) of Estonia – Lithuania BIT.
[27] Art. 1.1(e) of Germany – Lithuania BIT.
[28] Art. I.(2)(e) of Poland – Lithuania BIT.

light on context and the purpose of the treaties in interpreting the term "investment" under the BITs as required under the Art. 31.1 of the Vienna Convention.[29]

2.1. Mihaly v Sri Lanka

The question as to whether the pre-contractual rights or pre-contractual expenditures may constitute an investment under international investment law was for the first time addressed by the ICSID tribunal in Mihaly v Sri Lanka.[30] In that case Mihaly, the American corporation, signed a "letter of intent" with the government of Sri Lanka, based on which Mihaly held an exclusive right to negotiate for the conclusion of "Build-Operate-Transfer" contract for construction of a power plant in Sri Lanka.[31] Mihaly spent several million dollars (2-4 % of the total projected investment value) obtaining financing, negotiating project documents, and engaging consultants. The Sri Lankan government, however, refused to sign the main agreement. Consequently, Mihaly filed a claim under the ICSID. The claimant, without going into the details of the bilateral investment treaty, argued that its pre-investment expenditures constituted an "*investment*" under Art. 25.1 of the ICSID Convention.[32]

The tribunal found that the Sri Lankan government took great care in the documentation relied upon by the Claimant and that such documentation (i) did not create any binding contractual obligation; and (ii) the negotiations never matured into a final contract.[33] Based on that, the tribunal concluded that the expenditures could not be regarded as an investment as long as the final contract was not concluded.[34] Having stated that the specific obligations of the parties have to be considered case-by-case, the tribunal briefly concluded that *"in other circumstances, similar expenditure may perhaps be described as an investment."*[35] It further stated that if the main contract had been concluded

[29] "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty* ***in their context and in the light of its object and purpose***." [Emphasis added]
[30] Dr Walid Ben Hamida "*The Mihaly v. Sri Lanka Case: some Thoughts relating to the Status of Pre-Investment Expenditures*" // Tod Weiler "*International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*", Cameron May, 2005, p. 51.
[31] Mihaly v Sri Lanka, paras. 51-56.
[32] Art. 25.1 of the ICSID Convention: "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an* ***investment****...*" [Emphasis added]
[33] Mihaly v Sri Lanka, para. 48.
[34] Ibid.
[35] Ibid, para. 49.

> *"the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby become part of the investment."*[36]

The tribunal further stated that whether the expenditures were small or large was irrelevant and the decisive factor was the "admission" of investment, namely, the moment from which the parties have entered into a contractual relationship.[37]

What concerns the government's obligation to conduct the negotiations in good faith and the investor's right arising thereof as an investment under the ICSID Convention, the tribunal in the *obiter dictum* of the decision found that

> *"[i]t may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, these remedies do not arise because an investment had been made, but rather because the requirements of proper conduct in relation to negotiation for an investment may have been breached. That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention."*[38]

Importantly, the tribunal stated that the investor may claim for damages in pre-contractual relations, but the right in itself would not create an investment, the claimant could rather base its claim on the substantive provision of the bilateral investment treaty. The tribunal, presumably, implicitly referred to Art. II.1 of the Treaty between the United States of America and the Democratic Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investments, 20 September 1991 ("USA – Sri Lanka bilateral investment treaty") which provides for the national treatment and the most-favoured-nation treatment standards for investors seeking to establish the investment in the other contracting state.[39] However, even in such cases the claim

[36] Mihaly v Sri Lanka, para. 50.
[37] Mihaly v Sri Lanka, para. 51.
[38] Mihaly v Sri Lanka, para. 51.
[39] Art. II.1 of USA – Sri Lanka BIT: "*Each Party shall **permit** and treat investment, activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable…*" [Emphasis added]

could not be arbitrable under the ICSID Convention, but, the tribunal implicitly left the gateway open to the other dispute resolution forums contained in the bilateral investment treaties.

Finally, the tribunal approached the definition of investment under the USA – Sri Lanka bilateral investment treaty, but without going to any details, briefly mentioned that the claimant "*did not advance any argument based on the provisions of Article I of the BIT…*"[40]

The tribunal's decision in Mihaly v Sri Lanka, even though provides for some guidance to the problem of the Master Thesis, leaves several questions unaddressed. What is clear from the tribunal's decision is that:

1. Under some circumstances pre-investment expenditures may constitute an investment, but in general, the pre-investment expenditures may become a part of investment only after the negotiations come in to fruition – the main agreement is signed;

2. Rights arising out of negotiations for the conclusion of the agreement is generally not an investment, but may be arbitrable in the forum other than ICSID, if there is a substantive provision in the bilateral investment treaty providing for protection of investors at the pre-contractual stage of investment.[41]

The tribunal, however, left some important questions unaddressed:

1. What are those circumstances in which pre-investment expenditures may constitute an investment under the bilateral investment treaty or the ICSID Convention?

On the one hand, the tribunal found that pre-investment expenditures could be considered as an investment after the main agreement is signed,[42] on the other hand the tribunal stated that in other circumstances (before the conclusion of the main agreement) *"similar expenditure may perhaps be described as an investment*"?[43] The tribunal did not state as to what those circumstances are when pre-investment expenditures may be considered an investment under the bilateral investment treaty or the ICSID Convention. Concluding that no investment was made in that case, the tribunal, however, mainly relied on the fact that the state did not accept the

[40] Mihaly v Sri Lanka, para. 54.
[41] See also Christoph H. Schreuer, "*The ICSID Convention: a Commentary*", Cambridge, 2001, p 130: "*Clauses in BITs that cover disputes concerning the admission or establishment of investments cannot create a basis for ICSID's jurisdiction since there is no investment*";
[42] Ibid, para. 50.
[43] Ibid, para 49.

responsibility for pre-investment expenditures and that there were no binding, at least preliminary, obligations between the parties.[44] Presumably, the tribunal's conclusion would have been different if the parties would have concluded a preliminary agreement by which the parties would have obliged themselves to enter into the main agreement under the conditions agreed or even would agree on a fine if the counterparty fails to conclude the main agreement. Such a situation would eliminate the grounds on which the tribunal rejected the claimant's contentions – the parties would be bound by the contract (preliminary) and the government would have accepted the expenditures, namely, the government would have to recover the damages suffered by the other party if the main agreement eventually would be not concluded.

2. Are the pre-contractual claims otherwise excluded from the jurisdiction of the tribunal both under Art. 25.1 of the ICSID Convention and other dispute resolution forums under the bilateral investment treaty?

Addressing this question a due regard should be paid to the concurring opinion of one of the arbitrators in the Mihaly case – David Suratgar. The arbitrator emphasized that the parties to USA - Sri Lanka bilateral investment treaty agreed on a general and broad definition of investment[45] and emphasized particular provisions of Art. I(1)(a) of USA - Sri Lanka bilateral investment treaty:

> *"(iii) a claim to money or a claim to performance having economic value, and associated with an investment,… and*
>
> *(iv) any right conferred by law or contract, and any licenses and permits pursuant to law."*[46] [Emphasis in the original]

Stronger referral to the particular provisions of the bilateral investment treaty rather than to the general sources of international law is also endorsed by prof. Zachary Douglas arguing that the

[44] Ibid, para. 51.
[45] Walid Ben Hamida "*The Mihaly v. Sri Lanka Case: some Thoughts relating to the Status of Pre-Investment Expenditures*" // Tod Weiler "*International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*", Cameron May, 2005, p. 64: "*The US-Sri Lanka BIT, much like the majority of investment protection instruments, contains a broad definition of investment*."
[46] Individual Concurring Opinion by David Suratgar in Mihaly v Sri Lanka, para. 3.

tribunal did not cogently assess the definition of investment under USA - Sri Lanka bilateral investment treaty.[47]

Further, even though arbitrator David Suratgar agreed that Mihaly's activities in Sri Lanka would not fall under the scope of the ICSID Convention Art. 25.1,[48] the arbitrator stated that

> *"... it should be added that the written and oral evidence presented to the Tribunal suggests that the Claimant may well have a sound basis for pursuing its claim before other fora."*[49]

Referring to the above-quoted Article I(1)(a)(iv) of USA - Sri Lanka bilateral investment treaty, the arbitrator finally concluded that *"[e]xpenditure incurred by successful bidders do indeed produce "economic value"..."*[50] The concurring opinion of David Suratgar suggests that had the investor chosen a dispute settlement forum not limited to the definition of investment as provided under the ICSID Convention Art. 25.1, the investor could have successfully claimed for the jurisdiction of the tribunal. These conclusions are significant to the analysis of the problem of the Master Thesis, since it would mean that under similar circumstances the pre-contractual rights may satisfy the definition of investment under the bilateral investment treaties and if the investor chooses to resort to the dispute settlement forum other than ICSID, the investor may successfully argue for the tribunal's competence over such claims.

Dr Walid Ben Hamida and Farouk Yala support the position of David Suratgar and conclude that the request for damages could have fallen under the scope of USA - Sri Lanka bilateral investment treaty:

> *"...perhaps the BIT's definition of investment appeared broad enough for the Claimant to believe that it could assert that pre-investment expenditures gave rise to a "claim to money" within the meaning of Article I(a)(iii) of the BIT."*[51]

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[47] Zachary Douglas "*The International Law of Investment Claims*", Cambridge University Press, 2009, p. 187, para. 398C(1).
[48] Ibid, para. 8.
[49] Ibid, para. 9.
[50] Ibid, para. 10.
[51] Walid Ben Hamida "*The Mihaly v. Sri Lanka Case: some Thoughts relating to the Status of Pre-Investment Expenditures*" // Tod Weiler "*International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*", Cameron May, 2005, p. 65. See also Farouk Yala "*The Notion of 'Investment' in ICSID Case Law: a Drifting Jurisdictional Requirement? Some "Un-Conventional" Thoughts on Salini, SGS & Mihaly*" // Transnational Dispute Management, Vol. 1 - issue 4, 2004, p. 18.

Similarly, the right to pre-contractual negotiations in good faith, according to Dr Walid Ben Hamida, may also have been within the scope of USA - Sri Lanka bilateral investment treaty:

> *"Also, it could have been submitted that its "good faith negotiations tort claim" was supposed to be included within the categories of a "right conferred by law" in the sense of article I(a)(v) of the BIT."*[52]

Farouk Yala further extends the list of categories that could have claimed to be an "*investment*" by adding "*legitimate expectations*" as an investment under the bilateral investment treaty:

> *"It might have been submitted that Sri Lanka acted in bad faith during the negotiations, and wrongfully deprived claimant of his legitimate expectations."*[53]

Dr Walid Ben Hamida finally concludes that Mihaly could have successfully argued for investment made under the treaty and under the ICSID Convention:

> *"It was tenable for Mihaly to argue that its rights fit within the broad notion of "investment" provided in the applicable US-Sri Lanka BIT, and that according to the subjective theory, those rights are protected under the ICSID Convention."*[54]

Significantly to the problem of the Master Thesis some remarks from the critics of Mihaly v Sri Lanka should be concluded:

1. Pre-contractual expenditures do entail economic value for the host state, thus it should fall under the scope of broad asset-based definition of investment set in the bilateral investment treaties;

2. The rights arising out of pre-contractual relations in particular, right to damages as a result of violation of good faith or legitimate expectations that the main contract will be concluded could fall under the scope of bilateral investment treaty provisions providing for the investment definition in the form of "*claim to money*" or "*right conferred by law or contract*".

2.2. Zhinvali v Georgia

[52] Ibid.
[53] Farouk Yala "*The Notion of 'Investment' in ICSID Case Law: a Drifting Jurisdictional Requirement? Some "Un-Conventional" Thoughts on Salini, SGS & Mihaly*" // Transnational Dispute Management, Vol. 1 - issue 4, 2004, p. p. 16.
[54] Ibid, p. 65 – 66.

The other investment tribunal faced with pre-contractual relations in investment arbitration was the tribunal in Zhinvali v Georgia. In that case the government of Georgia negotiated with the Irish investor – Zhinvali for rehabilitation of a hydro-electric power plant and its instalments.[55] During the negotiations the parties signed several agreements on the exclusivity period of negotiations, the state informed Zhinvali that expenses incurred during the period are to be carried by the claimant and that it is looking to a prompt conclusion of the final contract.[56] On the day of conclusion of the concession agreement, the state refused to sign it and informed the claimant that the agreement has to be awarded through a public tender.[57] The shift in negotiations was probably influenced by the criticism from the World Bank for lack of transparency the process of awarding the project to Zhinvali.[58] The Claimant filed a claim under the framework of ICSID Convention and argued that its pre-investment expenditure and the intellectual property (draft agreements used in the negotiations) constituted investment under the Georgian Investment Law[59] and under Art. 25.1 of the ICSID Convention.[60] Remarkably, in Zhinvali v Georgia the national law rather than bilateral investment treaty provided for the state's consent to the ICSID arbitration of the disputes arising out of investment.

The tribunal in Zhinvali v Georgia concluded that the claimant failed to prove that the draft agreements and other documents that circulated among the parties did have a market value and that they were all indeed provided to the state.[61] Even though the tribunal based its findings on the claimant's failure to prove the factual circumstances it relied on, the tribunal stated that

> *"[i]n sum, if the Claimant under the facts presented has any grievance with regard to misappropriated "intellectual property", it is, in the Tribunal's judgment, more*

[55] Zhinvali v Georgia, para. 1.
[56] Ibid, para. 109.
[57] Ibid, para. 116.
[58] Ibid, para. 131.
[59] As referred to in Zhinvali v Georgia, para. 377, Art. 1 of Law of Georgia on the Investment Activity Promotion and Guarantees, 26 June 1998, No. 1513-II ("Georgian Investment Law") provides:
"*1. Investment is any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity carried out on the territory of Georgia for earning of possible income.*
2. Such value or right may be:
<…>
(c) …"know-how", experience and other intellectual value;
(d) other legally recognized property and intellectual value or right."
[60] Zhinvali v Georgia, para. 2.
[61] Ibid, paras. 385-388.

akin to a tort or breach of contract claim for bad faith behavior than it is to a claim falling under the 1996 Georgia Investment Law."[62]

So to decide whether the claim arising out of a tort or breach of contract in investment the tribunal decided to determine whether pre-investment expenditures constitutes an investment under the Georgian Investment Law.[63]

The tribunal in that case found no provision in the Georgian Investment Law providing for a right to recovery of the development costs (pre-investment expenditures).[64] The tribunal further agreed with the claimant that, in contrast to Mihaly v Sri Lanka, in this case the parties were bound by contractual obligations based on preliminary agreement, promissory estoppel[65] and the settlement agreement,[66] but regardless of that, the tribunal found that it does not amount to proof that Georgia *"consented to take responsibility for the Claimant's development costs as a qualifying investment under Georgia law*."[67]

The tribunal referring to Mihaly v Sri Lanka further found that since the transaction as a whole did not close, the development costs were not ultimately "swept up" under the umbrella of the project as a whole, in other words it could form a part of investment, but only after such transaction would be closed.[68] Here again the tribunal concluded that the fact that pre-contractual binding agreements were violated "*has more to do with an alleged breach of contract or other culpable conduct by the Respondent rather than with any notion of "Investment".*[69] Presumably, the tribunal in Zhinvali v Georgia, found that the term investment as defined under Georgian Investment Law: "*[i]nvestment is any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity carried out on the territory of Georgia for earning of possible income*."[70] could hardly encompass investor's rights arising out of a sole

[62] Ibid, para. 388.
[63] Ibid.
[64] The tribunal, probably, meant the substantive of provisions that provide certain standards to investors at the time of establishment, e.g. Art. II.1 of USA – Lithuania BIT.
[65] Black's Law Dictionary, Ninth Edition, ed. Bryan A. Garner, 2009, p. 631: "*The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promise did actually rely on the promise to his or her detriment.*"
[66] Zhinvali v Georgia, para. 411.
[67] Ibid.
[68] Ibid, paras. 410 - 411.
[69] Ibid, para. 411.
[70] Art. 1.1 of the Georgian Investment Law.

breach of contract or culpable action due to the failure of such claim to meet the requirement for the contribution and use of the asset in the entrepreneurial activity for earning of possible income.

Having raised some doubts as to the constructive conduct of the claimant during the negotiations, the tribunal finally found that no implied consent of the government to be responsible for the development costs was given, but opposite – the tribunal found that at some stage of negotiations the government was explicitly insisting that all expenses were for the claimant's account.[71]

The decision of the tribunal in Zhinvali v Georgia, just as in Mihaly v Sri Lanka, was followed by the separate opinion by one of the arbitrators – Andrew J. Jacovides, who argued that but for the state's conduct the project would have consummated and the development costs would have been covered in investment costs.[72] Moreover, the arbitrator followed the claimant's line of reasoning and opined that in contrast to Mihaly v Sri Lanka, here, the state has assumed the obligations under the preliminary contract and provided for a promissory estoppel, thus, this case exactly falls under the scope of as to what the tribunal in Mihaly v Sri Lanka stated as "*other circumstances, similar expenditures may perhaps be described as an investment*".[73] The tribunal in Zhinvali v Georgia was confronted with the definition of investment provided under the national law, which would mean that the tribunal was not bound by the rules of treaty interpretation. Moreover, the tribunal found factual circumstances to the detriment of the claimant's position: either that the claimant himself failed to negotiate properly or that the claimant failed to prove any value of the rights allegedly violated. Regardless of this, some of the tribunal's conclusions are worth mentioning in the context of the problem of this Master Thesis, in particular that:

1. The tribunal found that claimant's right to damages arising out of pre-contractual relations – either it is based on tort or contractual violations – does not constitute an investment under the Georgian Investment Law. The tribunal did not specify the reasons for such conclusions, but it can be assumed that the tribunal referred to Art. 1.1 of Georgia Investment Law, which provides that *"[i]nvestment is any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity…*"[74] Thus, the

[71] Zhinvali v Georgia, para. 412.
[72] Separate Opinion of Andrew J. Jacovides in Zhinvali v Georgia, para. 16.
[73] Separate Opinion of Andrew J. Jacovides in Zhinvali v Georgia, para. 18, as referred to Mihaly v Sri Lanka, para 49.
[74] As referred to in Zhinvali v Georgia, para. 377,

tribunal drew importance to the purpose of the rights that are protected under the law, i.e. that the rights need "*to be contributed and used in the entrepreneurial activity*" and that the rights arising out of pre-contractual relations, namely, right to negotiations in good faith or right to damages has nothing to do with the rights that are used in the entrepreneurial activity as required under Art. 1.1. of the Georgian Investment Law;

2. The tribunal made clear that the investment may arise out of pre-establishment phase of investment only if the state agrees to accept the responsibility for those expenses, e.g. through the preliminary agreement, however the opposing arbitrator argued that the obligation to enter into an agreement under the preliminary contract or the promissory estoppel, does in fact constitute an acceptance of development costs as an investment.

Prof Zachary Douglas criticizes the tribunals in Mihaly v Sri Lanka and in Zhinvali v Georgia elaborative contentions as to whether pre-investment expenditures could constitute an investment in one case or another:

> *"If expenditures in the host state lead to the acquisition of a property right… and the economic characteristics of an investment have materialized.., then there is an investment in the host state and the protection of the treaty is engaged."*[75]

To the contrast of tribunal's decisions in Mihaly v Sri Lanka, the scholar positively found the tribunal's in Zhinvali v Georgia established analysis on whether the claimant had obtained a proprietary right under the applicable domestic law.[76]

2.3. William Nagel v Czech Republic

The tribunal in Nagel v Czech Republic was confronted with the cooperation agreement between UK national William Nagel and Czech state telecommunication company under which the parties agreed to jointly seek to obtain, through a consortium, the necessary licenses and permits to establish, own and operate a GSM mobile telephone network in the Czech Republic.[77] The state

[75] Zachary Douglas "*The International Law of Investment Claims*", Cambridge University Press, 2009, p. 187, para. 398C(1).
[76] Ibid, p. 189, para. 398C(2).
[77] Nagel v Czech Republic, para. 1.

eventually did not award the licenses to the claimant.[78] Consequently, the claimant filed a claim with the Arbitration Court of Stockholm Commercial Chamber.

The Claimant relied on the broad definition of investment contained in the bilateral investment treaty and asserted that his rights derived from the cooperation agreement were "*claims to money or to any performance under contract having financial value*" within the meaning of Art. I(iii) of the bilateral investment treaty.[79]

The tribunal referred to the investment definition under the bilateral investment treaty and concluded that the underlying concept of the definition of investment under the treaty is an asset in the form of right or claim having financial value which has to be real rather than just potential.[80] For that purpose the tribunal went on to assess the domestic Czech law arguing that the domestic law determines whether or not there is a financial value.[81] The tribunal importantly concluded that "*a claim can normally have a financial value only if it appears to be well-founded or at the very least creates legitimate expectation of performance in the future*."[82]

Having set the relevant rules qualifying certain right or a claim an investment under the UK-Czech Republic bilateral investment treaty, the tribunal went on to assess the parties' rights and obligations arising out of the cooperation agreement under the Czech law. The tribunal found that the cooperation agreement was both valid and binding,[83] but the parties' obligations under the agreement, such as to work together for the purpose of obtaining a GSM network license without the guarantee that license would, in fact, be obtained, was not sufficient to raise to the level of

[78] Ibid, para. 3.
[79] Art. 1 of 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, 10 July 1990 with an amending Exchange on Notes, 23 August 1991 and 24 October 1991 ("UK – Czech Republic BIT"): "*For the purposes of this Agreement:*
(a) the term 'investment' means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:
(i) movable and immovable property and any other related property rights including mortgages, liens or pledges;
(ii) shares in and stock and debentures of a company and any other form of participation in a company
(iii) claims to money or to any performance under contract having a financial value;
(iv) intellectual property rights, goodwill, know-how and technical processes;
(v) business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources."
[80] Nagel v Czech Republic, para. 299.
[81] Ibid, para. 300.
[82] Ibid, para. 301.
[83] Ibid, paras. 318-320.

"legitimate expectations" entailing a financial value.[84] The tribunal further concluded that the agreement did not oblige the parties to make the monetary contributions.[85] Finally, the tribunal found that the agreement was only of a preparatory nature, did not have a financial value and, thus, was not an investment under the treaty.[86]

The decision of the tribunal in Nagel v Czech Republic is of significant importance to the problem of the Master Thesis. It was the only tribunal so far not restricted by the definition of investment under the Art. 25.1 of the ICSID Convention. The tribunal's analysis was focused on the bilateral investment treaty, which employs very similar provisions to the provisions set in the BIT's. The tribunal's conclusions can be summarized in the following points:

1. The main criterion for finding that a certain right or a claim is an investment – the financial value attributed to the right or the claim, which has to be real rather than potential;

2. The financial value is present if the right or the claim creates a legitimate expectation of performance in the future.

The tribunal did not specify the situations in which the legitimate expectations of performance in the future may arise, it just found that it was not so in that case. Is it only as a result of some binding contractual rights of the preliminary nature, e.g. preliminary contract, or may also arise out of advanced negotiations absent any preliminary contracts, the question remained unaddressed.

2.4. F-W Oil Interests v Trinidad & Tobago

The claimant, F-W Oil Interests, through the public tender held by the Trinidad & Tobago owned company Trinmar was awarded to negotiate and conclude the agreement for exploitation and extraction of oil in the offshore of Trinidad & Tobago.[87] The claimant asked Trinmar to provide guarantee that the contract will be concluded and to provide an assurance that the claimant will be compensated for the work done in the event such an agreement was not concluded.[88] The

[84] Ibid, para. 326.
[85] Ibid, para. 328.
[86] Ibid, paras. 328-329.
[87] F-W Oil Interests v Trinidad & Tobago, para. 8.
[88] Ibid, para. 9.

claimant received no positive response to the requests.[89] Almost half a year later Trinmar informed the claimant that it withdraws from the negotiations.[90] The claimant filed a claim with ICSID and argued that the following constitutes an investment under Art. I(d) of USA – Trinidad & Tobago bilateral investment treaty:[91] (1) contractual rights obtained by FWO through the tender process; (2) rights conferred by law; (3) FWO's transmittal of specialised industry know-how, intellectual property, and original, innovative and unique economic business models to the State; and (4) FWO's investment of tangible property and funds to develop the program.[92]

At the outset of assessment whether the claims possessed any investment in Trinidad & Tobago, the tribunal concluded that "*the investor must show the existence of some form of legally enforceable right, or its equivalent*".[93] The tribunal added that only proprietary or contractual rights are protected under the treaty.[94]

The tribunal started its analysis with the fourth category (4) and relying on some English cases[95] concluded that wasting of FWO's pre-contract efforts and expenditures in a different context might have had a real prospect of success,[96] but rejected it in that case on three grounds: (i) an express or implied request to perform the work or make the expenditure must be present before the responsibility of the intended employer is engaged under the domestic law, which was absent in that case;[97] (ii) even if the claimant could prove the latter, there could be no investment under the bilateral investment treaty/ICSID regime anyway, since the withdrawal from negotiations can

[89] Ibid, para. 10.
[90] Ibid, paras. 11-12.
[91] Art. I(d) of the Treaty between the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investments, 26 September 1994 ("USA – Trinidad & Tobago BIT"):
"'*investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of*
(i) a company;
(ii) shares, stock, and other forms of equity participation; and bonds, debentures, and other forms of debt interests, in a company;
(iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;
(iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges;
(v) intellectual property, including …;
(vi) rights conferred pursuant to law, such as licenses and permits."
[92] F-W Oil Interests v Trinidad & Tobago, para. 138.
[93] Ibid, para. 124.
[94] Ibid, para. 125.
[95] See Regalian Properties v London Docklands Development Corporation, 1995, 1 WLR 212; Lord Goff of Chieveley, Gareth Jones, "*the Law of Restitution*", Fourth Edition, London, 1993, p. 554-563.
[96] F-W Oil Interests v Trinidad & Tobago, para. 141.
[97] Ibid, para. 141.

not be the violation and an investment under the treaty at the same time;[98] and (iii) the state in the correspondence between the parties made clear that it shall not be responsible for expenses incurred in negotiations.[99]

With respect to the first category (1) (contractual rights obtained through the tender process) the tribunal went to analyse the national law of Trinidad & Tobago, but having found that the national law has not yet seen an opportunity to deal with pre-contractual relations in the context of the case, the tribunal sought for precedents in the jurisdictions of the Commonwealth.[100]

The tribunal rejected that there were pre-contractual relations between the parties on the grounds that Trinmar refused to issue the guarantee for the claimant's pre-contractual expenses, the wording of the postulated contracts provided that the award in the public tender and agreed conditions were subject to further negotiations and entry into force of a definitive written agreement, thus the claimant could not insist that the parties were in the preliminary binding contract.[101] For the same reasons the tribunal rejected the claimant's claim with respect to the second category (2) (rights conferred by law).

The tribunal rejected claimant's contention that the third category (3) (IP rights, know-how, etc.) constitutes an investment finding that it did not possess a credible financial and that the claimant failed to prove having lost it anyway.[102]

Due regard should be paid to the following conclusions made by the tribunal in F-W Oil Interests v Trinidad & Tobago:

1. The right claiming for investment has to be enforceable and proprietary;

2. Claim for recovery of pre-contractual expenditures can not be held an "investment" since the same act, namely, withdrawal from negotiations, can not be a source of investment and a violation of the treaty standards at the same time, meaning that the investment has to precede the violation;

[98] Ibid, para. 142.
[99] Ibid, para. 143.
[100] Ibid, paras. 152-153.
[101] Ibid, paras. 162-164.
[102] Ibid, para. 184.

3. Important factor to determine whether the state accepted pre-contractual expenditures as "investment" is either the request by the state to make such expenditures or acceptance of the responsibility for such expenditures if the negotiations do not fructify.

2.5. Conclusions

Even though the tribunal in SGS v Philippines in the *obiter dictum* of its decisions stated that "*[t]ribunals have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved and acted on,*"[103] the tribunals left the gateway open to the claims arising out of pre-contractual relations. The following conclusive points can be drawn from the tribunals' reasoning:

1. The starting point for determining whether rights arising out of pre-contractual relations may constitute an "investment" is the bilateral investment treaty and its wide and "all-encompassing" definition of investment;

2. The right or a claim may only be investment if its enforceable and proprietary, meaning that it must entail a financial value which has to be real rather than potential;

3. The financial value is real if the right creates a legitimate expectation of performance in the future;

4. Pre-contractual expenditures that were incurred in the anticipation of the main agreement by itself may become investment only after the main agreement is concluded or if these expenditures mean obtaining other rights listed in the bilateral investment treaties;

5. Pre-contractual rights claiming for investment may be established in the bilateral investment treaty in the form of "*claim to money*" or "*any right conferred by law or by contract*." Both rights could derive from investor's right arising out of preliminary contractual relations in which the state either requests to make certain expenditures or accepts the responsibility for the expenditures incurred by the investor;

Some controversies still remain open:

[103] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6) Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004; 8 ICSID Rep. 518 (2005), para. 132.

1. Is the definition of investment as established by the ICSID tribunals in interpreting Art. 25.1 of the ICSID Convention applicable in interpreting the definition of investment under BITs?

2. May legitimate expectations of performance in the future, but not a legally enforceable right, constitute an investment under the bilateral investment treaty?

3. May the right to damages arising out of state's breach of the general statutory duty of good faith in the pre-contractual relations constitute an investment under the bilateral investment treaty?

3. ICSID Convention definition of investment in interpreting the definition of investment under the BITs

Some recent decisions of the investment tribunals seem to merge the definition of investment in bilateral investment treaties with the term "investment" found in the ICSID Convention Art. 25.1. This significant trend has some serious consequences, since the tribunal comprised under the rules other than ICSID would apply the typical features of investment as established by the ICSID tribunals, namely, the "Salini Test". This in turn means that the tribunal confronted with the claimant contending that pre-contractual rights constitutes an investment under the bilateral investment treaty would have to assess whether the asset claimed to be "investment" entails (i) contribution to the economy of the host state (ii) extending over certain period of time and (iii) involving some risk.[104] The majority of the tribunals recognized these three typical features of investment, some of them going even further and adopting additional typical features of investment such as contribution to the development of a host state.[105] The rationale for "bridging the gap" between the ICSID definition of "investment" and the definition of "investment" found in the bilateral investment treaties is complex.

3.1. Application of the objective features of the ICSID definition of investment is supported by the rules of treaty interpretation

[104] Patrick Mitchell v Democratic Republic of the Congo (ICSID Case No. ARB/99/7), Decision on the Application for Annulment of the Award, 1 November 2006 // ICSID Review, FILJ 587, 2005, para. 39

[105] Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco (ICSID Case No. ARB/00/4) Decision on Jurisdiction, 23 July 2001, // English translations of French original in ICSID Review 400, 2004, paras. 50-58; Fedax N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction, 11 July 1997 // 37 ILM 1378, 1998, para 43; Ioannis Kardassopoulos v Georgia (ICSID Case No. ARB/05/18) Decision on Jurisdiction, 6 July 2007, para. 116; Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (ICSID Case No. ARB/04/13) Decision on Jurisdiction, 16 June 2006, para. 91, etc.

The tribunal in Romak v Uzbekistan was confronted with "all-encompassing", "asset-based" provision of investment under Art. 1(2) of the Agreement between the Swiss Confederation and Republic of Uzbekistan concerning the Promotion and Reciprocal Protection on Investments, 16 April 1993 ("Switzerland – Uzbekistan bilateral investment treaty").[106] The claimant in that case argued that, since the request for money arising out of supply of goods contract fits within the literal meaning of "*claims to money*", the tribunal should feel comfortable finding the "investment" under the Switzerland – Uzbekistan bilateral investment treaty.[107] The Tribunal addressed Romak's position and stated that it puts special emphasis on the word in the list of assets under the Art. 1(2) of the Switzerland – Uzbekistan bilateral investment treaty[108] and that such approach deprived the term "investment" of any inherent meaning, which is contrary to the logic of Art. 1(2) of the treaty.[109] The Tribunal added that this would also contradict Art. 32(b) of the Vienna Convention, since it would lead to the result "*which is manifestly absurd or unreasonable."*[110] The tribunal felt that it is not correct that every commercial contract between a Swiss national and a State entity of Uzbekistan, regardless of the nature and object of the contract, would constitute an investment.[111]

Since the tribunal Romak v Uzbekistan found that literal application of the term "investment" would lead to unreasonable results, it sought for establishing the aim and the context of the treaty. The tribunal felt that the wording of the preamble of the treaty. "[E]*conomic cooperation to the mutual benefit of both States*" and the "*aim to foster the economic prosperity of both States*,"[112] suggested an intent of the contracting states to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions.[113]

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[106] „*The term 'investments' shall include every kind of assets and particularly:*
(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
(b) shares, parts or any other kinds of participation in companies;
(c) claims to money or to any performance having an economic value;
(d) copyrights, industrial property rights.., technical processes, know-how an goodwill;
(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law."

[107] Romal S.A. v the Republic of Uzbekistan (Permanent Court of Arbitration Case No. AA280) Award, 26 November 2009 ("Romak v Uzbekistan"), para 178.

[108] Ibid, para. 178.

[109] Ibid, para. 180.

[110] Ibid, para. 184.

[111] Ibid, para. 187.

[112] Ibid, para. 189, as referred to the Preamble of the Switzerland – Uzbekistan bilateral investment treaty.

[113] Ibid.

Similarly, the other tribunal in Phoenix v Czech Republic[114] interpreted the similar introductory wording of the other bilateral investment treaties and came to the similar conclusions that:

> *"The BITs are not deemed to create a protection for rights involved in purely domestic claims, not involving any significant flow of capital, resources or activity into the host State's economy."*[115]

Having established that the bilateral investment treaty aims to protect only those assets that *inter alia* contain significant contribution to the host state, for the purpose of defining the term investment under the bilateral investment treaty the tribunal in Romak v Uzbekistan referred to the decisions ICSID tribunals interpreting the "investment" under the ICSID Convention, which was also supported by the rules of treaty interpretation

> *"requiring the interpreter to infer that a State party to two or more treaties which employ the same term in the same (or a similar) context intended to give the[sic] said term the same (or at least a compatible) meaning in all the treaties."*[116]

Uzbekistan and Switzerland were parties both to the ICSID Convention and the Switzerland - Uzbekistan bilateral investment treaty, therefore the tribunal found that it was reasonable to consider that both parties intended to give the same meaning to the term "investment". This was supported by the Art. 31(3)(c) of Vienna Convention stating that *"any relevant rules of international law applicable in the relations between the parties"* shall be taken into account together with the context of the treaty.

Such position of the tribunal is further supported by prof. Zachary Douglas stating that

> „*the use of the term "investment" in both instruments [investment treaties and the ICSID Convention] imports the same basic economic attributes of an investment derived from the ordinary meaning of that term*." [117]

The similar line of reasoning was followed by the tribunal in GEA v Ukraine[118] which assessed the definition of investment under the ICSID Convention and under the bilateral investment

[114] Phoenix Action Ltd v Czech Republic (ICSID Case No. ARB/06/5) Award, 15 April 2009 ("Phoenix v Czech Republic").
[115] Phoenix v Czech Republic, para. 97.
[116] Ibid, para. 195.
[117] Zachary Douglas "*The International Law of Investment Claims*", Cambridge University Press, 2009, p. 165.

treaty and observed that regardless of whether the term "investment" is embodied in the ICSID Convention or in a relevant bilateral investment treaty, it contains an objective meaning encompassing the same typical features of investment.[119]

Therefore, the tribunal in GEA v Ukraine quoted the findings of the tribunal in Romak v Uzbekistan establishing the meaning of investment including the three typical features of the "investment" developed by the ICSID tribunals:

> *"The Arbitral Tribunal therefore considers that the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk <…> By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment." In the general formulation of the tribunal in Azinian, "labelling ... is no substitute for analysis.*"[120] [Emphasis in the original]

Since the Tribunal in Romak v Uzbekistan was acting under the framework of the UNCITRAL Arbitration rules, it observed what consequences may have the situation when the applicable definition of investment in the proceedings under the UNCITRAL Arbitration rules is broader than that applied in the proceedings under the ICSID Convention. Obviously, in such case the investor may find more convenient to settle the dispute in the forum where the definition of investment is broader. The tribunal in Romak v Uzbekistan found that such forum-shopping would be inacceptable:

> "*This view would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both absurd and unreasonable.*"[121]

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[118] GEA Group Aktiengesellschaft v Ukraine (ICSID Case No. ARB/08/16) Award, 31 March 2011 ("GEA v Ukraine").
[119] GEA v. Ukraine, para. 141.
[120] Ibid.
[121] Romak v Uzbekistan, para 194.

3.2. Conclusions

The relevant findings of the tribunals in Phoenix v Czech Republic, GEA v Ukraine and Romak v Uzbekistan deserve a reasonable consideration. Hardly one could argue that rights arising out of pre-contractual relations, namely, right to damages either due to violation of the general duty of good faith in the negotiations or because of breach of preliminary agreement is not a "*claim to money*" or a "*right conferred by law or by contract*", etc. in its straight-forward, literal sense. However, the reasoning of the tribunals analysed in this chapter suggests that

1. BITs are aimed at protecting investment in its objective meaning rather than every ordinary commercial transaction, thus the literal meaning of the treaty which would result to the contrary is not convincing;

2. If both contracting states are the parties both to the bilateral investment treaty and the ICSID Convention, the interpreter may assume that the same term found in both instruments entails the same meaning;

3. The claimant's choice between the dispute resolution forums in the bilateral investment treaties can not be motivated by the definition of investment as applied in each of these forums;

4. Hence, the arbitral tribunals in interpreting the term "investment" under the bilateral investment treaty may refer to the decisions of the ICSID tribunals interpreting the same term.

This means that the requirements for investment, in particular, contribution to the economy of the host state, certain duration of investment and the risk and, as the case may be, contribution to the development of the state are all applicable in assessing whether pre-contractual right constitutes an investment under the BIT. This may have significant outcomes in interpreting whether the pre-contractual rights may be protected under the BITs.

4. Legitimate expectations of performance in the future as investment under the international investment law

The tribunal in Nagel v Czech Republic chose the concept of legitimate expectations as a decisive factor for distinguishing investment from other activities that would not constitute it. Arguably,

even though the tribunal found that cooperation agreement between the claimant and the state owned entity did not create legitimate expectations of performance in the future, it drew a very thin line between the assets protected under the bilateral investment treaty and other categories that do not constitute an investment under the bilateral investment treaty. This is especially so in case of pre-contractual relations when the conditions are in fact agreed between the parties and only the formal conclusion of the contract separates parties from the contract.

The tribunal's concept of legitimate expectations has some opposable views in the field of international law. Dr Monique Sasson argues that even though the definition of property rights in investment treaties is often very broad, this does not mean that such rights should encompass interests or expectations, otherwise the result is that any interest amounts to a property right under an international investment treaty, regardless of the presumption that international law protects legal interests and not expectations.[122]

Author further argues that legitimate expectations are not legal obligations and do not represent a new category of property protected under the bilateral investment treaties.[123] Significantly, the scholar states that

> *"They [legitimate expectations] may constitute a proprietary right if the investor can express the expectation in contractual terms, but without that aspect they are not legal obligations."*[124]

This conclusion of the scholar leads to the result that irrespective of the claimant's certitude that the agreement will be concluded, this would not amount to protected legitimate expectations under the bilateral investment treaty as long as the main agreement is not signed.

The ICSID Annulment Committee in MDT v Chile noted that the obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.[125] Similarly, the ICSID *Ad Hoc* Committee in CMS v Argentina commented that

[122] Monique Sasson "*Substantive Law in Investment Treaty Arbitration*", Wolters Kluwer, 2010, p. 87.
[123] Ibid, p. 94.
[124] Ibid, p. 94.
[125] MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, (ICSID Case No. ARB/01/7), Award, 25 May 2004, para. 67.

> *"Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT."*[126]

The abovementioned position on legitimate expectations leads to the conclusion that investors' expectations – legitimate or not – cannot be used to create the tribunal's jurisdiction, but may be in determining if there was a breach of the substantive provisions of the bilateral investment treaty.

According to the opposable logic, an investor who has concluded a contract can be essentially in the same legal position as an investor who is at an earlier stage of the negotiation process, both of them would equally qualify for investment protection. This would strain the boundaries of international law and the language of the BIT beyond their reasonable limits.

5. Right to damages arising out of breach of the duty of good faith in the pre-contractual relations as an investment under international investment law

Dr Walid Ben Hamida and Farouk Yala observed that the claimant in Mihaly v Sri Lanka could have claimed for investment in the form of "*claim to money*" as a consequence of claimant's right to damages under the domestic Sri Lankan law.[127] However, the tribunal in F-W Oil v Trinidad & Tobago rejected such argument as one "placing horse before a cart". The tribunal in F-W Oil v Trinidad & Tobago concluded that the right to damages arising out of arbitrary withdrawal from negotiations which was not in conformity with the duty of good faith under the domestic law could not constitute an investment and the violation of the substantive standards at the same time. In other words the investment has to precede the alleged violation of that investment. Thus, the claimant's claim that the right to damages constitutes an investment regardless of the fact that it indeed was an enforceable right having financial value was strictly rejected.

The tribunal's position in F-W Oil v Trinidad & Tobago finds support in the writings of prof Zachary Douglas, who, relying on the decisions of investment tribunals, establishes a general rule that

[126] CMS Gas Transmission Company v Argentina (ICSID Case No. ARB/01/8), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 89.
[127] See Subsection 2.1 of this Master Thesis.

"[t]he claimant must have had control over the investment in the host contracting state party at the time of the alleged breach of the obligation forming the basis of its claim."[128]

This results that if a claim to money arises only as a result of violation of pre-contractual relations which are not investment under the bilateral investment treaty, no investment can be established.

The rationale behind such a position finds also support in the tribunal's findings in GEA v Ukraine. In that case the tribunal had to decide whether the arbitral award in favour of the claimant could constitute an investment under the bilateral investment treaty. The tribunal found that

"…the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention."[129]

The said position rests its main argument on the application of the objective definition of investment in the bilateral investment treaties. The right to damages arising out of pre-contractual violations which is approved by tribunal or court could not constitute an investment under the bilateral investment treaty, since it would no satisfy the main criterion for qualifying an asset or a right as a property – a contribution to the host state.

6. Domestic pre-contractual rights under Lithuanian law that could constitute an investment under the BITs

Yet in Barcelona Traction case, the International Court of Justice stated that in assessing shareholders' claims in the field of diplomatic protection, "*international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field*".[130] In that case the court found that international law has to recognize the corporate entity as institution created by the state and referred to the municipal law for determining the rights and obligations of the companies and their shareholders.[131] Accordingly, the tribunals in F-W Oil Interests v Trinidad & Tobago and William Nagel v Czech Republic

[128] Zachary Douglas "*The International Law of Investment Claims*", Cambridge University Press, 2009, p. 297.
[129] GEA v Ukraine, para. 162.
[130] Barcelona Traction, Light and Power Co. Ltd., (Belgium v. Spain) Preliminary objections, ICJ Reports 1961; New application, ICJ Reports 1964, p. 33-34, para. 38.
[131] Ibid.

explicitly referred to the municipal law so to determine what rights, if any, the claimant possessed in the course of pre-contractual relations.[132] So did the tribunal in Mihaly v Sri Lanka concluding that the state took a great care in the negotiations and, thus the claimant did not acquire any right under the domestic law which in turn could have constituted investment either under the bilateral investment treaty or the ICSID Convention Art. 25.1.[133] The rights that the claimant may acquire in the course of negotiations under the Lithuanian law, which in turn may or may not constitute an investment under the BITs, are the following:

6.1. Duty of good faith and the preliminary agreement

Lithuanian legal system as well as absolute majority of other legal systems recognizes the duty of good faith in pre-contractual relations.[134] Art. 6.163(2) of the Civil Code of the Republic of Lithuania[135] ("CC") sets the basic rule that parties are free to enter into negotiations and negotiate and shall not be held liable if the parties fail to reach an agreement. Art. 6.163(1) of the CC, however, provides that in the course of pre-contractual relationships, parties shall conduct themselves in accordance with good faith. Art. 6.163(3) further provides that if the party enters into negotiations or continues them without intending to reach an agreement with the other party, it fails to negotiate in good faith, likewise any other actions that do not conform to the criteria of good faith shall be deemed to be bad faith in negotiations.[136]

Art. 6.165 of the CC establishes a particular form of contract – the preliminary contract and reads that a preliminary contract is an agreement of the parties by which they obligate themselves to conclude the main agreement in future under the conditions agreed in the preliminary contract. Even if the preliminary contract is signed the parties are still considered to be at the stage of pre-contractual relations, however, in such cases the contractual liability rules will apply.

6.2. The extent of liability in the breach of duty of good faith or in the violation of the preliminary agreement

[132] F-W Oil Interests v Trinidad & Tobago paras. 152-153 and Nagel v Czech Republic, para. 300.
[133] Mihaly v Sri Lanka, para. 48.
[134] Art. 1337 of the Civil Code of Italy; the court practice of France provide of recovery of damages arising out of general duty of good faith based on the tort established in Art. 1382 of the Civil Code of France; UNIDROIT Principles of International Commercial Contracts, 2010, Art. 2.15; Principles of European Contract Law Art. 2.301.
[135] Civil Code of the Republic of Lithuania, 18 July 2000, No. VIII-1864, last amended on 9 June 2011, No XI-144 // Official Gazette "Valstybės žinios", No. 85-4130, 13 July 2011.
[136] Art. 6.163 (3) of the CC.

Art. 6.163(3) of the CC establishes that a party who negotiates in bad faith shall be liable for the damages caused to the other party. Similarly, Art. 6.165 (4) of the CC provides for liability under the preliminary contract and reads that if a party absent due grounds avoids or refuses to enter into a main agreement, it shall be bound to compensate the other party for the damages incurred.

The general rule for civil liability set in Art. 6.245(1) of the CC defines the civil liability noting that it is a pecuniary obligation by which one party shall have the right to claim for compensation of damages (damage), and the other party shall be bound to make compensation for those damages.

The court practice has established that the party shall not be forced to conclude the main agreement even in the instances when the duty to enter into it is established by laws or contract, thus in case of pre-contractual liability specific performance is not possible.[137]

Lithuanian law provisions regarding civil liability are based on the core principle of compensation (*restitutio in integrum*) – the aggrieved party must be placed to the position as if no damage were caused. The prevailing court practice and the doctrine agrees that the scope of compensation in pre-contractual relations is limited to direct damages, monetary value of the loss of chance *(la perte d'une chance)*[138] and the benefit the party at fault had accrued.[139] However, "*the lost profit, which would have been received by conclusion of the agreement, is not included in the losses.*"[140] This position can be explained by Lithuanian legal scholars arguing that *"... if the main contract is not concluded parties may be compensated not for the breach of the duty to conclude the contract, but for the breach of trust."*[141]

6.3. Legitimate expectations

[137] Judgment of Lithuanian Supreme Court on 2 July 2010, Civil Case No 3K-3-302/2010, Valentinas Mikelėnas *"The Commentary of the Civil Code of the Republic of Lithuania. Book Six. Law of Obligation*", Vol. 1. Vilnius: Justitia, p. 194-195.
[138] On the loss of chance see the Judgment of Lithuanian Supreme Court on 19 January 2005, Civil Case No 3K-3-38/2005; Judgment of the Plenary Session of the Lithuanian Supreme Court on 6 November 2006, Civil Case No 3K-P-382/2006.
[139] Ibid.
[140] Valentinas Mikelėnas *"The Commentary of the Civil Code of the Republic of Lithuania. Book Six. Law of Obligation*", Vilnius, 2003, p. 208.
[141] Dangutė Ambrasienė, Solveiga Cirtautienė, "*The Problem of the Nature of Pre-Contractual Liability for Breach of Contract: Contractual, Delictual or Sui Generis*" // Jurisprudencija, 2008 10(112), p. 52-63.

The concept of legitimate expectations as an investment under the bilateral investment treaty was recognized by some legal scholars[142] and even though not established in that case, but principally recognized by the tribunal in Nagel v Czech Republic.[143] Lithuanian courts seem to establish the concept of legitimate expectations in pre-contractual relations if the negotiations are advanced: "*the good faith requires that the advanced negotiations should not be terminated without the adequate reason."*[144]

Advanced negotiations means that both parties have an understanding and are convinced that they have already reached an agreement on all the necessary conditions of the contract and, therefore, the party has acquired the reasonable ground to expect that the contract will be concluded "for certain".[145] On the one hand, one could argue that the concept of legitimate expectations is a derivative of a general duty of good faith, which only imposes on the parties a higher degree of the duty of good faith. On the other hand, the party does not have a right to request the other party to conclude the agreement but has a reasonable understanding that due to advanced negotiations the contract will be eventually concluded.

The extent of legitimate expectations may also depend on whether the parties were bound by the preliminary contractual relations or not. The leading legal expert in Lithuania in the field of pre-contractual relations, prof Dangutė Ambrasienė, together with dr Solveiga Cirtautienė, suggest that liability for violations of pre-contractual relations in Lithuania is neither delictual nor contractual, but *sui generis*.[146] This position is explained by the fact that standard of proof of the delictual liability is unacceptable in cases of pre-contractual liability – it is too strict, meaning that the party claiming for damages has to prove all the elements of the delictual liability, i.e. not only the unlawful act, but also damages, causation and the fault.[147] Scholars argue that the last three elements are easier to establish in case of contractual liability, since there is a presumption that the causation and the fault exists in case of contractual violation,[148] whereas the exact amount of damages maybe agreed by the parties in the form of penalty or a fine. The contractual

[142] Farouk Yala "*The Notion of 'Investment' in ICSID Case Law: a Drifting Jurisdictional Requirement? Some "Un-Conventional" Thoughts on Salini, SGS & Mihaly*" // Transnational Dispute Management, Vol. 1 - issue 4, 2004, p. 16.
[143] Nagel v Czech Republic, para. 301.
[144] Judgment of Lithuanian Supreme Court on 19 January 2005, Civil Case No 3K-3-38/2005.
[145] Judgment of the Plenary Session of the Lithuanian Supreme Court on 6 November 2006, Civil Case No 3K-P-382/2006.
[146] Dangutė Ambrasienė, Solveiga Cirtautienė, "*The Problem of the Nature of Pre-Contractual Liability for Breach of Contract: Contractual, Delictual or Sui Generis*" // Jurisprudencija, 2008 10(112), p. 52-63.
[147] Ibid, p. 59.
[148] Ibid.

liability is especially favoured in case of the preliminary contract, which may entail many elements found in the main contract. Authors, however, disagree that the liability in the pre-contractual relations in all cases should be treated under the rules of contractual liability, since that would undermine the principle of freedom to enter into a contract, thus absent preliminary contract the delictual liability rules should apply. In any case the party may not claim for lost profits, since the parties in pre-contractual relations may only obtain what is called "reliance", but not "expectations" interest, which arises in contractual relations.[149]

One could argue that the sort of liability rules applicable at the stage of negotiations may predetermine the level of the party's legitimate expectations. This would mean that in case of preliminary agreement the party's legitimate expectations may be those similar to the legitimate expectations in case of an ordinary contract and, alternatively, if no such agreement is signed, the expectations may only be equated to the expectations that the other party would meet its general duties imposed by the state, namely, the duty of good faith, which doubtfully entails a financial value. Moreover, if the preliminary agreement is signed there is no need to raise the legitimate expectation as a self-standing investment, since it would be covered under the umbrella of rights arising out of preliminary contracts, which could be considered as "*claim to money*" under the BIT.

6.4. The value of the preliminary contract

Regardless of the similar extent of liability under the preliminary and the main agreements, the financial value under the preliminary contract is still doubtful. Lithuanian courts explicitly consider the preliminary contracts as organizational contracts rather than those which entitle the parties to some pecuniary benefits:

> *"Preliminary contract is an organizational agreement assigned to the pre-contractual stage. By such contract neither of the parties gains the substantive (material) benefit, which is the feature of the main agreements. The object of a preliminary contract is a future main agreement, however, in terms of pecuniary rights it cannot be recognized as the object of the civil rights from the legal perspective. This feature allows distinguishing the preliminary contract from the main agreement, because the object of the preliminary agreement is not a pecuniary*

[149] Ibid, p. 62 (Summary in English).

value with respect to which the parties enter into the main agreement <...>. Thus, the preliminary contract is an agreement for the other (main) agreement by the parties, i.e. agreement, which is foundation of the obligations to conclude the main agreement according to the agreed terms and conditions."[150]

6.5. Conclusions

The domestic Lithuanian national law the following specific pre-contractual rights:

1. Right to expect that the other party would meet its statutory duties, namely, would conduct the negotiations in good faith;

2. Right to direct damages and the monetary value of the loss of chance if no preliminary contract is signed, but if the other party:

    a. enters into negotiations without intention to conclude the contract;

    b. disrupts the advanced negotiations without sufficient reasoning; or

    c. in any other way fails to negotiate in good faith.

3. Right to direct damages and the monetary value of the loss of chance if the other party fails to conclude the main agreement as was agreed under the preliminary contact;

4. In cases the negotiations are advanced and the other party expects that main agreement shall be concluded "for certain", legitimate expectations can not be considered as something more than expectations of a general duty of good faith, since the courts still recognize that the liability arising out of pre-contractual violations if the agreement is not signed is determined by the rules of tort;

5. In cases the preliminary agreement is signed the legitimate expectations may be of a higher degree than those arising out of the sole duty of good faith. However, the Lithuanian courts recognize that preliminary contracts entail no pecuniary value.

7. The ample of protection of pre-contractual rights under the BITs

[150] Dangutė Ambrasienė, Solveiga Cirtautienė, "*The Problem of the Nature of Pre-Contractual Liability for Breach of Contract: Contractual, Delictual or Sui Generis*" // Jurisprudencija, 2008 10(112), p. 62.

The assessment of the BITs' provisions providing for the definition of investment shall be based on the ordinary meaning of these provisions in the context and in the light of object and purpose of those treaties as required by the customary rules on treaty interpretation.[151] The rationale established in the practice of the investment tribunals dealing with pre-contractual together with the writings of legal scholars as established in the previous sections shall also be taken into consideration in interpreting the terms of the BITs.

Certainly, provisions defining investment do vary from BIT to BIT, and the particularities of each of the BIT effect the firmness of the conclusions as to whether the pre-contractual rights do qualify for investment under one or another BIT. Prominent scholars, in assessing the capability of the bilateral investment treaties to protect the pre-contractual rights, state that:

> *"Indeed, much will depend also on the scope of the definition of investments which the national law or IIA, which grants rights of admission and establishment, applies. Thus a broad asset based definition will cover most types of investment, regardless of the need for permanent establishment or even actual commercial presence in the host country, while narrower definitions, focused on the nature of the enterprise undertaken in the host country, may restrict these rights only to investments undertaken through a permanent establishment involving actual commercial presence in the host country."*[152]

All the provisions setting forth the definition of investment in the BITs contain similar, in some cases identical asset / property-based non-exclusive definition of investment,[153] e.g. Art. 1(a) of UK – Lithuania BIT reads "*"investment" means every kind of asset…*", so does in fact identically begin Art. 1.2 of Russia – Lithuania BIT,[154] Art. I(2) of Poland – Lithuania BIT,[155] Art. 1(1) of the Sweden – Lithuania BIT[156] Art. 1(a) of the Netherlands – Lithuania BIT[157]. Similarly, Art. I.1(a) of USA – Lithuania BIT substitutes "asset" with "property" and provides that *""investment" means every kind of property…"* Art. 1.1. of Germany – Lithuania makes

[151] Art. 31.1 of Vienna Convention: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."
[152] P. Muchlinksi, F.Ortino, S. Schreuer "*The Oxford Handbook of International Investment Law*", Oxford, 2008, p. 232.
[153] See Column 2 of the Summary Table.
[154] "*The term investment shall mean any kinds of assets…*"
[155] "*The term "investment" means any kind of asset…*"
[156] "*The term "investment" shall mean every kind of asset…*"
[157] *"Term "investments" shall comprise every kind of asset…"*

somewhat a mixture of "asset" and "property" and reads that "*the term "investment" means property assets in any form, particularly…*"[158] With some derogations that are addressed in the subsection 7.4 Art. 1(I) Denmark – Lithuania BIT[159] and Art. 1.1. of Estonia – Lithuania BIT[160] provide for similar open and asset-based definitions of investment.

General asset-based definition of investment then follows by a sample list of rights that are protected under the BIT. Some categories of assets, as listed in the BITs, such as shares, stock or other interest in the company[161] or intellectual property rights[162] are omitted from assessing due to the manifest incapability of those rights to encompass the pre-contractual rights. Otherwise, each of these rights shall be further examined with respect to each of their capacity to encompass the following pre-contractual rights as established under the Lithuanian law:[163] (i) right to expect that the other party would meet its statutory duties, namely, would conduct the negotiations in good faith and the right to damages if the party fails to do so; (ii) rights arising out of preliminary agreement, namely, obligation to conclude the main agreement and a right to fine/penalty if the other party fails to conclude the main agreement; (iii) right to direct damages and the monetary value of the loss of chance if the other party fails to conclude the main agreement as was agreed under the preliminary contact; (iv) legitimate expectations that the main agreement will be concluded "for certain".

7.1. Intangible property / rights *in* rem

As a general rule, the open list of rights constituting an investment starts with the assets in the form of movable and immovable property or property and in absolute majority of cases provide for the same examples of those property rights, namely, mortgages, liens and pledges.[164] The term "*movable or immovable property*" is usually understood as referring to things, namely,

[158] Original German version of the provision: "*1. umfaßt der Begriff »Kapitalanlagen« Vermögenswerte jeder Art, insbesondere*."
[159] "*The term »investment« shall mean every kind of asset connected with…"*
[160] "*The term "investment" means any kind of asset invested for the purpose…"*
[161] Art. 1(a)(ii) of UK – Lithuania BIT, Art. I.1.(a)(ii) of US – Lithuania BIT, Art. 1.(1)(b)of Sweden – Lithuania BIT, Art. 1(I)(i) of Denmark – Lithuania BIT, Art. 1(I)(b) of Germany – Lithuania BIT, Art. 1.2(b) of Russia – Lithuania BIT, Art. I.(2)(b) of Poland – Lithuania BIT, Art. 1.1(b) of Estonia – Lithuania BIT.
[162] Art. 1(a)(iv) of UK – Lithuania BIT, Art. I.1.(a)(iv) of US – Lithuania BIT, Art. 1.(1)(d)of Sweden – Lithuania BIT, Art. 1(I)(iv) of Denmark – Lithuania BIT, Art. 1(I)(d) of Germany – Lithuania BIT, Art. 1.2(d) of Russia – Lithuania BIT, Art. I.(2)(d) of Poland – Lithuania BIT, Art. 1.1(d) of Estonia – Lithuania BIT.
[163] See Section 7 of this Master Thesis.
[164] See Column 3 of the Summary Table, in particular: Art. 1(a)(i) of UK – Lithuania BIT, Art. 1.(1)(a) of Sweden – Lithuania BIT, Art. 1(I)(iii) of Denmark – Lithuania BIT, Art. 1(I)(iii) of Germany – Lithuania BIT, Art. 1.2(a) of Russia – Lithuania BIT, Art. I.(2)(a) of Poland – Lithuania BIT, Art. 1.1(a) of Estonia – Lithuania BIT.

rights *in rem*.[165] Hence, it entails no potential of encompassing pre-contractual rights which are certainly not the rights *in rem*.

In that context only US – Lithuania BIT distinguishes, in particular, Art. 1.(1)(a) of US – Lithuania BIT provides for term "*tangible and intangible property*" as opposed to the term "*movable and immovable property*" as set in the rest of the BITs. One could argue that the category of assets in the form of intangible property, as set in US – Lithuania BIT, entails the pre-contractual rights, since the pre-contractual rights may give rise to the claim for recovery of damages and such rights having a financial value would qualify for intangible property. So in order to properly address this assumption a closer look at the provisions setting the terms is needed: Art. 1.(1)(a) of US – Lithuania BIT provides a sample list of intangible rights protected under the US – Lithuania BIT: "*mortgages, liens or pledges*", meanwhile, the majority of the rest of BITs list the same three rights or similar rights, which are examples of the property rights that are protected under the BIT.[166] Arguably, these sample rights set a context of intangible rights and property rights that are protected under the BIT and in both cases these rights are the rights *in rem*. Hence, the nature of pre-contractual rights is distinct from the nature of rights *in rem* and falls neither under the category of intangible property nor under the scope of property rights as protected under the BITs.

7.2. Claims to money / claims to performance having financial value

The third category of assets is "*claims to money or performance having financial value*"[167] or "*title to money or performance having financial value*"[168]. This category of assets is, arguably, very close to the rights arising out of pre-contractual relations. Claims/title to money could entail the right to damages arising out of a violation of a general duty of good faith or the right to damages as a consequence of failure to conclude the main agreement as agreed under the preliminary contract. Rights arising out of preliminary contract, i.e. the right to penalty if the other party fails to conclude the main agreement may be covered under the "*claim to money*",

[165] See Art. 1.1(a) of German model BIT (2005) "*movable and immovable property as well as any other **rights in rem**, such as mortgages, liens and pledges*"; Art. 1.1(a) of France model BIT "*movable and immovable property as well as any other **right in rem** such as mortgages, liens, usufructs, pledges and similar rights*". [Emphasis added]

[166] Art. 1(a)(i) of UK – Lithuania BIT, Art. 1.(1)(a)of Sweden – Lithuania BIT, Art. 1(I)(iii) of Denmark – Lithuania BIT, Art. 1(I)(iii) of Germany – Lithuania BIT, Art. I.(2)(a) of Poland – Lithuania BIT, Art. 1.1(a) of Estonia – Lithuania BIT.

[167] See Column 4 of the Summary Table, in particular: Art. 1(a)(i) of UK – Lithuania BIT, Art. 1(I)(iii) of Denmark – Lithuania BIT, Art. 1(I)(iii) of Germany – Lithuania BIT, Art. 1.2(a) of Russia – Lithuania BIT, Art. I.(2)(a) of Poland – Lithuania BIT, Art. 1.1(a) of Estonia – Lithuania BIT.

[168] Ibid, Art. 1.(1)(a)of Sweden – Lithuania BIT, Art. 1(a)(i) of Netherlands – Lithuania BIT.

whereas obligation to conclude the main agreement could fall under "*claims/title to performance having financial value*".

Claim for recovery of damages in its literal meaning is in fact a "*claim to money*", whereas "obligation to conclude the main agreement" may be a "*claim to performance having financial value*". There certainly may be situations in which the conclusion of the agreement may result in the economic benefits to the parties, thus the financial value may be presumed. However, under Lithuanian domestic law the party may not force the other party to conclude the main agreement even if the party is under an obligation of the preliminary contract to do so, the aggrieved party may only be entitled to the recovery of damages or a fine. Thus, the party can not enforce its right to conclude the main agreement in the form of specific performance, which means that in such case the party is entitled only to "*claim to money*" rather than to "*claim to performance having financial value*".

The wording of the provision regarding "*claims to money*" slightly varies from BIT to BIT. This diversity may have an effect on findings as to whether rights postulated in this section do qualify for "*claim to money*" under the respective BIT. The variety of these provisions can be categorized in three groups sharing the same or almost the same wording. For the illustrative purposes the groups are named as follows: (i) Liberal; (ii) Purpose based; and (iii) Prescriptive connection with "investment".

i. Liberal

The liberal group of wording generally means that the provision is not restricted by any other additional preconditions that must be present so that "*claims to money*" could qualify for investment. Five out of nine BITs, namely UK – Lithuania BIT, Netherlands – Lithuania BIT, Sweden – Lithuania BIT, Poland – Lithuania BIT and Denmark – Lithuania BIT fall under this category.

Art. 1(a)(iii) of UK – Lithuania BIT describes the category as "*claims to money or to any performance under contract having financial value*", Art. I(2)(c) of the Poland – Lithuania BIT provides an identical wording to the UK – Lithuania BIT. The "Swedish" and the "Dutch" BITs, accordingly Art. 1(1)(c) and Art. 1(a)(iii) employ synonymous term "title" and read as follows "*title to money or any performance having economic value*", whereas Art. 1(I)(ii) of the Denmark

– Lithuania BIT provides for *"... claims to money or other rights relating to services having a financial value."*

At this stage of analysis category of rights named as "*claims to money*" in the BITs concluded by Lithuania with UK, Netherlands, Poland and Sweden is the broadest and does cover the right to penalty or fine if the main agreement is not concluded, as agreed under the preliminary agreement or a right to damages arising out of violation of a duty good faith in pre-contractual relations.

ii. Purpose-based definition

There is only one BIT located in this group: Germany – Lithuania BIT, but it is interpretation-capacious, since, as opposed to the other two groups, does not lead to a firm conclusion as to whether the provision is able to encompass pre-contractual rights.

Art. 1.1(c) of Germany – Lithuania BIT makes "*claim to money*" contingent on the purpose those claims are used for: "*claims to money which has been used to create an economic value or claims to any performance having an economic value*."

The fact that Germany – Lithuania BIT has specific limits to the "*claims to money*" that are considered to be investment may have a significant outcome in assessing as to whether this category of property does encompass the pre-contractual rights. Assumingly, the term "*invested to create economic value*" separates the claims to money that are protected under the BIT from claims to money arising out of mere commercial transactions, e.g. claims to money arising out of one-off sales of goods contracts, which are, as some prominent legal scholars and the tribunals agree, not protected under the BIT.[169] As a result, not every pre-contractual right could be protected under the Germany – Lithuania BIT, but only that which arises out of an anticipated main agreement which is intended to create economic value, i.e. to be an investment in its objective sense.

iii. Prescriptive connection with "investment"

This group of BITs provides for the definition of the rights protected under the BITs that is limited to some specific requirements that are absent in the BITs of the other two groups. This

[169] James Crawford "*Treaty and Contract in Investment Arbitration*" // Arbitration International, Vol. 24, No. 3, 2008, p. 362: *"Not every contract entered into by an investor is an investment contract: the classic example is an ordinary contract for the supply of goods and services.";* Romak v Uzbekistan, para. 187-188.

group covers three BITs: US – Lithuania BIT, Russia – Lithuania BIT and Estonia – Lithuania BIT.

Art. I.1(a)(iii) of US – Lithuania BIT provides that investment under the BIT covers e.g. "*a claim to money or a claim to performance having economic value, and associated with an investment*." The significant part of this provision is the one setting the requirement for the "*claim to money*" and "*claim to performance having economic value*" to be associated with an investment.

Art. I(2)(c) of Estonia – Lithuania BIT similarly reads that an example of asset that is protected under the BIT is "*claims to money or to any performance having an economic value and connected with investmen*t". The wording of this provision of Estonia – Lithuania BIT is almost identical to the one of US – Lithuania BIT, and only term "*associated*", as set in US – Lithuania BIT, is substituted by the term: "*connected*". Slight differences of the wording in those two BITs are insignificant.

Art. 1.2(c) of Russia – Lithuania BIT sets similar limits to this category of property protected under the BIT "*claims to money, invested to create economic value, and claims to any performance having an economic value and connected with investments*".

Protection of the "*claim to money*" under the BITs concluded by Lithuania with US, Estonia and Russia only if these are connected with investment suggests that such claims have to be connected (associated) with investment that is already made at the time the rights to such claim arises. If the BIT prescribes that the claim has to be "*connected*" or "*associated*" with certain object, that object must be present before the investor obtains the right to "*claim to money*", otherwise no connections can be established between those two objects. This specific requirement may indicate that some pre-contractual rights, namely claim to damages arising out of other party's failure to negotiate in good faith may be eliminated from the scope of rights protected by the BITs, since at the time the claim for damages is made, there is no investment made by the investor, but opposite – the investor seeks to establish the investment by entering into stage pre-contractual relations. This, however, may not be equated with the right to the fine or damages which arise out of a preliminary agreement if the other party fails to conclude the main agreement, since in such case the claimant may argue that the preliminary agreement in itself is an investment and the claim arising out of it is "*associated*" or "*connected*" to that preliminary agreement.

Art. 1.2(c) of Russia – Lithuania BIT to the contrast of the other BITs contained in this group has some other specifics which, arguably, further restrict the protection the asset in the form "*claims to money*", since these are limited to the claims "*...invested to create economic value*". This limitation is almost identical to the one employed in the Germany – Lithuania BIT, except that the term "*used*" as employed in Germany – Lithuania BIT is substituted by the term "*invested*" in Russia – Lithuania BIT, presumably, the meaning is synonymous and either the "*the claim to money*" has been "*used*" or "invested" does not have effect on the different meaning of those two provisions. Due to almost identical wording of this category of rights as set in Russia – Lithuania BIT and in Germany – Lithuania BIT, the similar conclusion should be drawn as to the effect of this wording on the possibility of this category to encompass the investor's pre-contractual rights. As was stated in case of Germany – Lithuania BIT, for the same reasons should be concluded that the wording of the Russia – Lithuania BIT suggests that Russia – Lithuania BIT may protect only those rights for request for recovery of the damages that arise out of pre-contractual relations leading to the conclusion of the main agreement which is intended to create economic value, i.e. to be an investment in its objective sense rather than being ordinary commercial contract.

7.3. Any right conferred by law or by contract

This category of example rights that are protected under the BITs is either very generalized or is quite specific by listing several rights that are protected under the BIT.[170] As for example, Art. I.1(a)(v) of US – Lithuania BIT covers "*any right conferred by law or contract…*" or Art. I.(2)(c) of Estonia – Lithuania BIT provides for identical wording "*any rights conferred by law or by contract…*", Art. 1(a)(v) of the Netherlands – Lithuania BIT provides for slightly more limited protection and covers "*rights granted by public law*" rather than any rights granted by law: "*rights granted under public law, including…*" Other BITs are way much more specific and do not provide for an open and generally based definition, but simply list several rights of a similar nature that are intended to be protected by the BIT, e.g. Art. 1(a)(v) of the UK – Lithuania BIT covers "*business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit resources*", "Scandinavian" BITs entails almost identical wording of the provision,[171] Germany – Lithuania BIT is more limited and Art. 1.1(e) provides

[170] See Column 5 of the Summary Table, in particular: Art. 1(a)(i) of UK – Lithuania BIT, Art. 1.(1)(a)of Sweden – Lithuania BIT, Art. 1(I)(iii) of Denmark – Lithuania BIT, Art. 1(I)(iii) of Germany – Lithuania BIT, Art. 1.2(a) of Russia – Lithuania BIT, Art. I.(2)(a) of Poland – Lithuania BIT, Art. 1.1(a) of Estonia – Lithuania BIT.
[171] See Column 5 of the Summary Table.

only for "*administrative concessions, including concessions for search and extraction*", Russia – Lithuania BIT distinguishes a bit from the other of the BITs and Art. 1.2(e) provides for protection of rights to conduct economic activities conferred by law, but further lists the same illustrative concession as found in the most of other BITs, i.e. "*concessions to search for, cultivate, extract and exploit natural resources*".

The investor may argue that the ordinary meaning of "*any right conferred by law or by contract*" may entail investor's rights arising out of pre-contractual relations, namely, the right to request for the recovery of damages. This right may be conferred by the law – the party which negotiates in bad faith may be entitled to recover the damages of the other party incurred due to failure to sign the agreement based either on the general duty of every person to act in good faith in the course of negotiations[172] or on the provisions of the preliminary contract setting for penalty in case the party fails to sign the main agreement under the conditions agreed in the preliminary contract. As a result, the BITs containing such a general provision may encompass the investor's pre-contractual rights as investment, namely, US – Lithuania BIT, Estonia – Lithuania BIT, whereas the respective articles of "Scandinavian" BITs, Germany – Lithuania BIT and Russia – Lithuania BIT may exclude the application of the material standards of the treaties to the investor's pre-contractual rights, since the scope of these provisions is limited to numerous administrative concessions rather than to any rights conferred by law or by contract.

In case of the Netherlands – Lithuania BIT the investor may argue that numerous pre-contractual rights may fall under the scope of "*rights granted under public law*", since e.g. the general duty of good faith in pre-contractual relations or the right to damages if such duty is violated and causes the other party damages etc., is indeed the right granted under the statutory law. In such case, the parties' agreed rights and obligations agreed under the preliminary agreement (the fine) may be under this provision excluded from the protection under the BIT. The position that the category of rights in the form of "*any right conferred by law or by contract*" may refer to the rights arising out of pre-contractual relations can be rebutted by the argument that the term refers to the specific rights that neither of them are pre-contractual rights. The term "*any right conferred by law or by contract*" is listed side-by-side with other more specific rights in this category of assets which could provide a relevant context in interpreting the term, e.g. Art. I.1(a)(v) of USA-Lithuania BIT reads that not only "*any right conferred by law or by contract*" is protected but

[172] Art. 6.163 of the CC.

also *"…and any licenses and permits pursuant to law*". Similarly, Art. I.(2)(e) of Estonia – Lithuania BIT extends protection to *"…and any license or permit, including concessions to search for, cultivate, extract or exploit resources*." One may argue that the general term "*any right conferred by law or by contract"* may be limited to the rights that arise out of various administrative permits, which may also include some other similar rights, e.g. "*franchise*"[173] and other "*rights granted by a public authority."*[174] The pre-contractual rights are certainly not the rights granted by public authorities for pursuing some specific economic activity, thus it would not fall under the category of "*any right conferred by law or by contract"* as understood in the context of that term.

7.4. Specifics of Denmark – Lithuania and Estonia – Lithuania BITs

A couple of BITs, namely, Denmark – Lithuania BIT and Estonia – Lithuania BIT make an investment in the form of property or asset contingent on some additional requirements, e.g. Art. 1(I) of Denmark – Lithuania BIT sets that *"The term »investment« shall mean every kind of asset connected with economic activities acquired for the purpose of establishing lasting economic relations between an investor and an enterprise irrespective of the legal form…"* Similarly, Art. 1.1. of Estonia – Lithuania BIT reads *"[t]he term "investment" means any kind of asset invested for the purpose of performing economic activity…"*

Arguably, these provisions of the BIT's may eliminate the applicability of pre-contractual rights to the protection of the BIT in their entire extent. The pre-contractual rights could not qualify for an asset connected with economic activity, as it is required e.g. under Art. 1(I) of the Denmark – Lithuania BIT, before the pre-contractual rights transform into the main agreement, since only then investor starts performing economic activity. Accordingly, pre-contractual rights may fall out of the scope of protection of Art. 1.1. of Estonia – Lithuania BIT, since even if the pre-contractual rights is considered an asset, that asset *stricto sensu* is not acquired for the purpose of performing an economic activity, but rather is of an organizational nature aimed at concluding the main agreement, which only then could qualify for investment under the BIT.[175]

III. CONCLUSIONS

[173] Art. 1(1)(e) of Italy – Lithuania BIT.
[174] Art. I.(2)(e) of Poland – Lithuania BIT.
[175] See Subsection 6.4 of this Master Thesis.

The conclusions will follow with respect to each of the right claimed to be investment under the BIT. The last conclusion is applicable to all the rights claimed to be an investment under the BIT:

1. Right to expect that the other party would meet its statutory duties, namely, would conduct the negotiations in good faith

Investment under the BITs is an asset-based right, which has to be proprietary and entail financial value. The financial value has to be real rather than just potential. Based on this rule, the right to expect that the other party would conduct the negotiations in good faith is not a proprietary right. A general duty imposed by the state on each person has no financial value as long as the right is not transformed into the right to damages arising out of violation of the duty of good faith. Moreover, such right entails no contribution to the host state, thus is not protected under the BITs.

2. Right to direct damages or the monetary value of the loss of chance if the other party fails to negotiate in good faith

The right to damages can not constitute what is called "*claims to money*" or "*rights conferred by law*" under the BITs, since the investment cannot arise out of a sole violation. The claimant must have had control over the investment in the host state at the time of the alleged breach of the obligation and the violation has to arise out of such investment. Moreover, the right to damages may not stand the requirement for being of a real financial value, since as long as it is not approved by the judicial organ its value may only be potential. US – Lithuania BIT, Russia – Lithuania BIT and Estonia – Lithuania BIT may exclude the right to damages arising out pre-contractual relations based on its wording. These treaties require that the claim to money would be connected or associated with an investment, which is not the case when the right to damages arises out of pre-contractual relations, meaning that at that time the investment is only at the state of establishment. Germany - Lithuania BIT, arguably, limits "*claims to money*" protected under the treaty only to the claims that arise out of negotiations that would lead to the conclusion of the contract that is an investment in its objective sense ("the Salini Test").

3. Rights arising out of a preliminary agreement

Rights arising out of a preliminary agreement, namely, the contracting parties' obligation to conclude the main agreement and the other party's right to fine/penalty if it fails to do so are

likely to protected by the BITs. The tribunals concluded that investment may arise out of pre-establishment phase of investment only if the state agrees to accept the responsibility for those expenses through the preliminary agreement. Thus, if the parties are bound by such preliminary agreement the claimant may have a sound basis for claiming that the investor possesses a right in the form of "*claim to money*" or "*investment*" in general. However, regardless of the fact that the other party was obliged to enter into the main agreement, the claimant may not argue that this right constitutes claimant's "*claim to performance having economic value*", since under Lithuanian law party can not force the other party to conclude the main agreement.

Lithuanian law, however, states that regardless of its contractual nature, the preliminary agreement belongs to the stage of pre-contractual relations and may not be equated with other contracts, since its object is not a proprietary value. Moreover, Lithuanian law does not recognize the right to recovery of indirect losses (lost profits) in case of pre-contractual violations. Such implications of domestic law may render decision that the rights arising out of preliminary agreement do not entail a real financial value, thus could not constitute an investment under the BITs.

4. Legitimate expectations that the main agreement will be concluded "for certain"

Lithuanian law recognizes some specific categories which are not pre-contractual rights, but legitimate expectations, meaning that in case the negotiations are well advanced, the Lithuanian law recognizes a higher standard of good faith in the negotiations. This in turn means that the party can not withdraw from negotiations without a good reason.

However, the doctrine in international law shows that since the legitimate expectations is not a legal right, it is not protected under the BIT.

5. Pre-contractual rights have to be assessed in compliance with the objective meaning of investment as established by the ICSID tribunals

The recent practice shows that the definition of investment as interpreted by the ICSID tribunals with respect to Art. 25.1 of the ICSID Convention is applicable in interpreting the definition of investment under the bilateral investment treaties. This means that any pre-contractual right that is claimed to be an investment under the BIT has to satisfy the objective features of investment

(the "Salini Test"). The pre-contractual relations are, thus, questionable. One could doubt whether the pre-contractual relations entails any contribution to the host state. This may be consistent with the wording of Denmark – Lithuania and Estonia – Lithuania BITs which, arguably, protect only those pre-contractual rights that are aimed at concluding a main agreement which would satisfy the objective definition of investment. Similar outcomes may have Germany – Lithuania BIT in assessing whether "*claims to money*" satisfies the definition of investment, since the treaty protects only those "*claims to money*" that have been used to create an economic value. The requirement for creating economic value may connotations with the requirement for the objective meaning of investment (contribution, duration, risk, etc.)

28 December 2011

Vilnius

Rapolas Kasparavičius **doc. Dr. Loreta Šaltinytė**

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Pre-contractual rights as an investment under the bilateral investment treaties of Lithuania

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SUMMARY

After the global financial crisis hit the Lithuania's economy in 2007 and the domestic consumption fell to the levels of the beginning of the XXI century, the Lithuanian government turned to foreign investors. In 2010 an unprecedented number of negotiations initiated by the Lithuanian government for conclusion of the contracts with foreign investor took place. In 2011 Lithuania aims for developing new public infrastructure projects in the cooperation with foreign investors, e.g. new nuclear power plant in Visaginas or liquid gas terminal in the port of Klaipeda. So far Lithuania has 33 bilateral investment treaties ("BITs") concluded that protect the foreign nationals from the main states investing capital in Lithuania. Meanwhile, the issues of pre-contractual rights in the practice and the doctrine of foreign investment law is not well-settled – 4 investment tribunals recognized that claimant's pre-contractual rights did not constitute investment under the bilateral investment treaties. Hence, the tribunals refused to exercise the jurisdiction over such disputes. The tribunals, however, did not shut the doors firmly for protection of pre-contractual rights in foreign investment law. Moreover, a number of scholars criticised some decisions of the tribunals.

The problem of the Master Thesis is whether foreign national's pre-contractual rights in Lithuania would be protected under the bilateral investment treaties. Master Thesis analyses 9 BITs concluded by Lithuania: 6 BITs were chosen with respect to the states that are top investor in Lithuania over the last five years, i.e. Denmark, Sweden, Germany, Russia, Poland and Estonia, 3 BITs concluded with the USA, the UK and the Netherlands were chosen due to their wide spread application in the globe. Master Thesis aims to answer whether the pre-contractual rights of the foreign nationals of those states would be protected under the BITs. For that purpose the Master Thesis raises 7 seven tasks which are structurally reflected in 7 seven sections of the paper:

1. Introduction to the textual reading of the provisions defining investment under the BITs (1st Section);

2. The comparative assessment of the tribunals' practice dealing with rights arising out of pre-contractual relations in foreign investment law (2nd Section);

3. Presentation of the possibility to apply the definition of investment as explained by the tribunals interpreting the term "investment" under the ICSID Convention Art. 25.1 (3rd Section);

4. Assessment of legitimate expectations as investment under the foreign investment law (4th Section);

5. Assessment of rights to damages arising out of violation of good faith as investment under the foreign investment law (5th Section);

6. Determining the domestic pre-contractual that could constitute and investment under the BITs (6th Section);

7. Interpretation of the wording of investment provision in the BITs with respect to the domestic pre-contractual rights (7th Section).

Teisės, kylančios iš ikisutartinių santykių, kaip investicija Lietuvos dvišalėse investicijų apsaugos sutartyse

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SANTRAUKA

Pasaulinei finansų krizei 2007 m. smarkiai sukrėtus Lietuvos ekonomiką bei vidaus vartojimui smukus iki XXI a. pradžios žemumų, Lietuvos vyriausybė atsisuko į užsienio investuotojus. 2010 m. vyko beprecedentis skaičius derybų, Lietuvos vyriausybės inicijuotų su užsienio investuotojais. 2011 m. Lietuvos vyriausybė siekia vystyti naujus viešus infrastruktūros projektus kartu su užsienio investuotojais, t.y. nauja Visagino atominė elektrinė ar suskystintų dujų terminalas Klaipėdos uoste. Tuo pat metu Lietuva yra sudariusi 33 dvišales investicijų apsaugos sutartis, kurios, be kita ko, apsaugo užsienio investuotojus iš valstybių, kurios yra didžiausios investuotojos Lietuvoje. Tuo tarpu ikisutartinių teisių apsaugos problema užsienio investicijų teisėje nėra aiškiai išspręsta – 4 investicinio arbitražo tribunolai pripažino, kad ikisutartiniai santykiai nėra investicija pagal užsienio investicijų apsaugos sutartis, todėl tribunolai atsisakė kompetencijos spręsti ginčus, kylančius iš tokių santykių. Vis dėlto, investicinio arbitražo tribunolai neatmetė galimybės, kad ikisutartinės teisės gali būti saugomos užsienio investicijų sutarčių. Be to, kai kurie teisės mokslininkai sukritikavo kai kuriuos šių tribunolų sprendimus.

Problema šio magistrinio baigiamojo darbo yra klausimas, ar užsienio investuotojo ikisutartinės teisės būtų saugomos dvišalių investicijų apsaugos sutarčių. Magistro baigiamasis darbas analizuoja 9 dvišales investicijų sutartis: 6 iš jų buvo pasirinktos atsižvelgiant į šalis, kurios yra didžiausios investuotojos Lietuvoje per paskutiniuosius 5 metus, t.y. Danija, Švedija, Vokietija, Rusija, Lenkija bei Estija, 3 dvišalės investicijų apsaugos sutartys, sudarytos su JAV, JK bei Nyderlandais, buvo pasirinktos dėl jų plataus taikomumo visame pasaulyje. Magistro baigiamasis darbas siekia atsakyti į klausimą, ar užsienio investuotojų ikisutartinės teisės būtų saugomas pagal šias dvišales užsienio investuotojų sutartis. Šiam tikslui pasiekti Magistro baigiamasis darbas iškelia 7 užduotis, kurios struktūriškai yra perteiktos 7 darbo skyriuose:

1. Nuostatų, apibrėžiančių investicijas dvišalėse investicijų sutartyse, pažodinės reikšmės pristatymas (1 Skyrius);

2. Investicinio arbitražo tribunolų praktikos dėl ikisutartinių santykių apsaugos dvišalėse investicijų sutartyse palyginamasis įvertinimas (2 Skyrius);

3. Pristatymas galimybės taikyti investicinio arbitražo tribunolų išplėtotą investicijos sąvoką, esančią ICSID Konvencijos 25.1 str., aiškinant investicijos sąvoką, esančią dvišalėse investicijų sutartyse (3 Skyrius);

4. Teisėtų lūkesčių, kaip investicijos, įvertinimas užsienio investicijų teisės srityje (4 Skyrius);

5. Teisių į nuostolius, kylančių iš sąžiningumo pareigos pažeidimo, kaip investicijos, įvertinimas užsienio investicijų teisės srityje (5 Skyrius);

6. Iki-sutartinių teisių, kurias investuotojai gali įgyti pagal nacionalinę Lietuvos teisę, kurios galėtų būti ginamos pagal dvišales investicijų sutartis, nustatymas (6 Skyrius);

7. Investicijas apibrėžiančių nuostatų dvišalėse investicijų sutartyse išaiškinimas (7 Skyrius).

ANNEXES:

Summary Table of the BITs' Provisions Prima Facie Encompassing the Pre-contractual Rights

Provision / BIT	1. Asset / property-based definition of investment	2. Intangible property / property rights	3. Claims to money / claims to performance having economic value	4. Any right conferred by law or by contract
1. UK - Lithuania	Art. 1(a) "investment" means every kind of asset…	Art. 1(a)(i) movable and immovable property and any other property rights such as mortgages, liens or pledges	Art. 1(a)(iii) claims to money or to any performance under contract having financial value	Art. 1(a)(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit resources
2. Netherlands - Lithuania	Art. 1(a)(i) the term "investments" shall comprise every kind of asset…	Art. 1(a)(i) movable and immovable property as well as any other rights *in rem* in respect of every kind of asset	Art. 1(a)(iii) title to money, to other assets or to any performance having an economic value	Art. 1(a)(v) rights granted under public law, including rights to prospect, explore, extract and win natural resources
3. USA - Lithuania	Art. I.1.(a) "investment" means every kind of property…	Art. I.1(a)(i) tangible and intangible property, including rights, such as mortgages, liens and pledges	Art. I.1(a)(iii) a claim to money or a claim to performance having economic value, and associated with an investment	Art. I.1(a)(v) any right conferred by law or contract and any licenses and permits pursuant to law.
4. Sweden - Lithuania	Art. 1.(1) The term "investment" shall mean every kind of asset…	Art. 1.(1)(a) immovable property as well as any other property rights, such as mortgage, lien, and similar rights	Art. 1.(1)(c) title to money or any performance having economic value	Art. 1.(1)(e) business concessions conferred by law, administrative decisions or under contract, including concessions to search for,

				cultivate, extract or exploit natural resources
5. Denmark – Lithuania	Art. 1(I) The term »investment« shall mean every kind of asset connected with economic activities acquired for the purpose of establishing lasting economic relations between an investor and an enterprise irrespective of the legal form	Art. 1(I)(iii) movable and immovable property, as well as any other rights as mortgages, privileges, guarantees and any other similar rights	Art. 1(I)(ii)… claims to money or other rights relating to services having a financial value,	Art. 1(I)(v) business concessions conferred by law or by contract, including the concessions related to natural resources
6. Germany – Lithuania [176]	Art. 1.1. the term "investment" means property assets in any form, particularly… [177]	Art. 1.1(a) property in the form of movable and immovable property, including various rights to things such as mortgages and liens [178]	Art. 1.1(c) claims to money which has been used to create an economic value or claims to any performance having an economic value;	Art. 1.1(e) administrative concessions, including concessions for search and extraction
7. Russia – Lithuania	Art. 1.2 The term investment shall mean any kinds of assets…	Art. 1.2(a) movable and immovable property as well as respective property rights	Art. 1.2(c) claims to money, invested to create economic value, and claims to any performance having an economic value and connected with investments	Art. 1.2(e) rights to conduct economic activities conferred by law or under contract, including, in particular, concessions to search for, cultivate, extract and exploit natural resources

[176] Not original translation from German into English.
[177] Original: *„1. umfaßt der Begriff »Kapitalanlagen« Vermögenswerte jeder Art, insbesondere…"*
[178] Original: *„a) Eigentum an beweglichen und unbeweglichen Sachen sowie sonstige dingliche Rechte wie Hypotheken und Pfandrechte."*

8. Poland - Lithuania	Art. I.(2) The term "investment" means any kind of asset…	Art. I.(2)(a) movable ad immovable property as well as any other rights in rem, such servitudes, mortgages, liens, pledges.	Art. I.(2)(c) claim to money or to any performance having an economic value	Art. I.(2)(e) rights granted by a public authority to carry out an economic activity, including concessions for example, to search for, extract or exploit natural resources
9. Estonia – Lithuania	Art. 1.1.The term "investment" means any kind of asset invested for the purpose of performing economic activity	Art. 1.1(a) movable ad immovable property as well as any other rights in rem, such as mortgages, liens, pledges.	Art. I.(2)(c) claims to money or to any performance having an economic value and connected with investment	Art. I.(2)(e) any rights conferred by law or by contract and any license or permit, including concessions to search for, cultivate, extract or exploit resources