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ДОКТРИНА «ПОЛИЦЕЙСКИХ ПОЛНОМОЧИЙ» В ИНВЕСТИЦИОННЫХ СПОРАХ, СВЯЗАННЫХ С САНКЦИЯМИ: БИЛЕТ, КОТОРЫЙ СТОИТ ДОБРОСОВЕСТНОГО ПОВЕДЕНИЯ?

ВВЕДЕНИЕ. *Возросла популярность инвестиционного арбитража как площадки для разрешения споров, связанных с санкциями. Однако до сих пор ни один из таких споров, переданных на рассмотрение инвестиционных трибуналов, не закончился вынесением арбитражного решения. Таким образом, инвестиционный арбитраж, несмотря на упомянутую привлекательность и растущую популярность, в значительной степени остается terra incognita для лиц, желающих разрешить с его помощью санкционные споры. Авторы вносят свой вклад в эту развивающуюся дискуссию, анализируя практику инвестиционных арбитражей. Цель настоящей статьи – рассмотреть, каким образом инвестиционные трибуналы толкуют добросовестность как критерий правомерной реализации прав в рамках доктрины «полицейских полномочий», и изучить, как инвестор может использовать эти выводы в спорах, связанных с санкциями. Выбор данной темы основан на том, что должностные лица государства-санкционера обычно сопровождают принятие таких санкций публичными заявлениями, которые могут быть использованы подсанкционными инвесторами, чтобы разоблачить отсутствие добросовестности со стороны государства-санкционера и продемонстрировать необоснованность его ссылки на доктрину «полицейских полномочий». По мнению авторов, именно эти заявления могут показать, что государство, применяющее санкции, по словам трибунала по делу «Эскосол», действует в скрытых целях, которые простираются далеко за пределы санкционного регулирования.*

МАТЕРИАЛЫ И МЕТОДЫ. *В представленном исследовании использовались общенаучные методы познания (анализ, синтез, индукция, дедукция), специально-юридические методы (формально-юридический, технико-юридический, метод юридической аналогии), сравнительно-правовой и, прежде всего, метод кейс-стади*

(анализ судебной практики). Авторы уделяют особое внимание доказательственной силе, которую арбитражные суды придают публичным заявлениям. Они также рассматривают конкретные доказательства, на которые ссылаются инвесторы, чтобы обосновать отсутствие добросовестности государства и на этой основе отличить проигранные дела от успешных. Предстоящий анализ будет состоять из обзора следующих дел, в которых требование добросовестности тщательно изучалось инвестиционными арбитражами: Марфин Инвестмент Груп против Кипра, Международный центр по урегулированию инвестиционных споров (далее – МЦУИС), Решение от 26 июля 2018 г.; Дойче Банк против Шри-Ланки, МЦУИС, Решение от 31 октября 2012 г.; Касинос против Аргентины, МЦУИС, Решение трибунала от 5 ноября 2021 г. и Содексо против Венгрии, МЦУИС, Выдержки из решения от 28 января 2019 г. Выбор этих дел обусловлен тем, что в них анализируется добросовестность как требование к поведению государства, принимающего инвестиции, и уделяется достаточное внимание обсуждению доказательств, представленных инвесторами.

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Представленный анализ показал, что разбирательства в инвестиционном арбитраже не приводят к снятию санкций. Инвестиционные договоры, которые являются основой для юрисдикции инвестиционных арбитражных споров, предусматривают компенсацию в качестве основного средства правовой защиты. В то же время инвестиционный арбитраж может предоставить инвесторам возможность получить компенсацию от государства, применяющего санкции, или, по крайней мере, побудить это государство начать переговоры и убедить отменить санкции в рамках мирного разрешения спора. Для тех инвесторов, которые не смогли добиться желаемого результата путем переговоров, важно учесть, какие «козыри» или средства защиты государство, применяющее санкции, может предъявить в арбитраже. Несомненно, главным «козырем» является доктрина «полицейских полномочий», которую заслуженно называют признанным элементом государственного суверенитета. На этот «элемент» государство-ответчик ссылается практически в каждом споре, затрагивающем публичные интересы, такие как общественный порядок или безопасность. Ссылка на доктрину «полицейских полномочий» – естественный, почти интуитивный шаг для государства, поскольку доктрина позволяет осуществлять регулирование для защиты общественных интересов без привлечения государства к ответственности за нарушение международных инвестиционных обязательств перед иностранными инвесторами.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *Авторы пришли к выводу, что государства не обладают чрезвычайно широкими полномочиями вмешиваться в деятельность инвестора в рамках осуществления доктрины «полицейских полномочий». Стандартом доказывания недобросовестности являются ясные и убедительные или неопровержимые доказательства. Важны не только требования, предъявляемые к качеству доказательств, но и их количество. Какой бы достойной ни была цель, декларируемая принимающим государством, трибунал может установить, что подлинная, скрытая цель, была политической. Кроме того, арбитражные трибуналы придают различное значение публичным заявлениям государственных чиновников в СМИ. Наконец, принцип соразмерности (пропорциональности) может сыграть на руку инвестору даже в отсутствие четких и недвусмысленных публичных заявлений высших должностных лиц. Привлечение внимания арбитражного суда ко времени событий, связанных с оспариваемыми мерами, также может способствовать успеху инвестора.*

КЛЮЧЕВЫЕ СЛОВА: *инвестиционные споры, добросовестность, доктрина «полицейских полномочий», стандарт доказывания, принцип соразмерности (пропорциональности)*

ДЛЯ ЦИТИРОВАНИЯ: Завершинская Д.А., Боклан Д.С., Доктрина «полицейских полномочий» в инвестиционных спорах, связанных с санкциями: билет, который стоит добросовестного поведения? – *Московский журнал международного права.* № 1. С. 69–82. DOI: https://doi.org/10.24833/0869-0049-2025-1-69-82

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POLICE POWERS IN THE SANCTIONS-RELATED INVESTMENT DISPUTES: A TICKET WHICH COSTS GOOD FAITH BEHAVIOR?

INTRODUCTION. *This article discusses growing popularity of investment arbitration as a forum for resolving sanctions-related disputes. The crunch point, however, is that so far none of such disputes brought before investment tribunals has resulted in the arbitral award. Thus, investment arbitration, despite its mentioned attractiveness and growing popularity, largely remains terra incognita for persons wishing to pursue sanctions-related disputes. The authors contribute to this emerging discussion providing analysis of relevant recent case law. The purpose of this Article is to examine how investment tribunals have interpreted good faith as a requirement for a lawful exercise of police powers and to explore how these findings can be used in the sanctions-related disputes from an investor's perspective. The choice of this topic is based on the hypothesis that governmental officials of the sanctioning state typically accompany the adoption of sanctions with public statements that can be used by the sanctioned investors to expose the lack of good faith on the part of the sanctioning state and crush the state's invocation of the police powers. It is these statements that may reveal that a sanctioning state, in the words of the Eskosol tribunal, acts for ulterior purposes.*

MATERIALS AND METHODS. *General scientific methods of cognition (analysis, synthesis, induction, and deduction), special legal methods (formal-legal, technical-legal, method of legal analogy), comparative legal and primarily case study method were used in the presented research. The authors focus on the probative value that arbitral tribunals ascribe to public statements. They also examine other evidence relied upon by investors to prove the absence of good faith of the state and, on this basis, to distinguish lost cases from successful ones. The forthcoming analysis will consist of a review of the following cases in which the good faith requirement has been scrutinized by arbitral tribunals: Marfin Investment Group v. Cyprus, ICSID: Award, 26 July 2018, Deutsche Bank v. Shri Lanka, ICSID: Award. 31 October 2012, Casinos v. Argentina, ICSID: Award of the Tribunal. 5 November 2021 and Sodexo v. Hungary, ICSID: Excerpts of Award. 28 January 2019. These cases are chosen because they analyze good faith as a requirement for the conduct of the state receiving investments and they pay sufficient attention to the discussion of the evidence presented by investors.*

RESEARCH RESULTS. *Presented analysis has shown that investment arbitration proceedings do not result in elimination of sanctions. Investment treaties which serve as a jurisdictional basis for investment arbitration disputes provide for compensation as a primary remedy. At the same time, investment arbitration may provide investors with an opportunity to obtain compensation from the sanctioning state, or, at least, to encourage that state to initiate consultations and persuade it to lift sanctions in a friendly manner. For those investors who have been unsuccessful in achieving the desired outcome through negotiations, it is important to consider what "trump cards" or defences the sanctioning state may rise in arbitration. Undoubtedly, the main "trump card" is the police powers doctrine, which has been deservedly referred to as a recognized component of State sovereignty. This "component" is invoked by the respondent state in virtually every dispute involving a public interest, such as public order or security. To invoke the police powers as a defence is a natural, almost intuitive step for a state as the doctrine allows for regulation to protect the public interest without being held liable for breach of international investment obligations to foreign investors.*

DISCUSSION AND CONCLUSIONS. *Authors came to the conclusion that states do not possess extremely broad discretion to interfere with investments in the exercise of legitimate regulatory authority. The standard of proof for bad faith allegations is clear and convincing or cogent evidence. Not only is the standard important, but also the quantity – the evidence must be sufficient. No matter how laudable the goal that a host state declares, this fact would not prevent a tribunal from finding that a genuine, behind-the-doors aim was political. Tribunals ascribe different weight to public media statements of state officials. The principle of proportionality can serve the investor's position even in the absence of clear and unambiguous public statements from top officials. To draw the tribunal's attention to the timing of the events surrounding the challenged measures may contribute to the investor's success.*

KEYWORDS: *Investment disputes, good faith, police powers doctrine, standard of proof, principle of proportionality*

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I. Introduction. Investment arbitration and sanctions: can they cross paths?

The emergence of numerous sanctions[1] regimes has led to the growing popularity of investment arbitration as a forum for resolving sanctions-related disputes.

To illustrate this statement, the authors will give two striking examples. The first is the investment dispute initiated by Mikhail Fridman in 2024 against Luxembourg over the freezing of Mr Fridman's US$15.8 billion in assets[2]. The sanctions lie at its very core as the Grand Duchy of Luxembourg froze Mr Fridman's assets precisely to comply with the European Union's sanctions. Now the co-founder of Russia's Alfa Group is arguing before the *ad hoc* tribunal that the freezing constitutes "a grave injustice" and an indirect expropriation that violates Luxembourg's obligations under the investment treaty concluded with Union of Soviet Socialist Republics in 1989[3]. The amount of compensation requested by Mr Frid-

[1] The use of the term "sanctions" to denote unilateral restrictive (coercive) measures in this paper is used in an attempt to present a consensus definition. From a legal point of view, this term should not be used in international relations, since this contradicts the foundations of international law. "Sanctions" can be used in national legal orders, since they have the function of punishment, which does not apply to unilateral measures of states [Boklan, Koval 2024:8].

[2] See Russian Oligarch Launches €15bn Lawsuit Against Luxembourg. – *Bilaterals.org.* 14 August 2024. URL: https://www.bilaterals.org/?russian-oligarch-launches-eur15bn (accessed date: 9.01.2025).

[3] Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg, and the Government of the Union of Soviet Socialist Republics, Concerning the Mutual Encouragement and Protection of Investments. 1989. URL: https://edit.wti.org/document/show/bc883946-ac64-4e50-9b78-8f13137f128e (accessed date: 9.01.2025).

man exceeds half of Luxembourg's annual budget for 2024[4]. The second example is the claim submitted before the International Center for the Settlement of Investment Disputes (ICSID) by Luxembourg-based ABH Holdings against Ukraine[5]. The dispute arose from Ukraine's nationalization of Sense Bank owned by ABH Holdings on the ground that the bank's indirect owners, Mikhail Fridman and Petr Aven, were placed under the sanctions regime[6].

The mentioned disputes concern so-called "unilateral restrictive measures" [Olmedo 2023:95], that is coercive measures adopted without the United Nations' approval. These unilateral sanctions, imposed by one state on entities/individuals or another state outside its jurisdiction, have increasingly been used as a foreign policy tool to influence the behavior and policies of other states. It is more of a political tool [Kritskiy 2016:204]. In the "sanctions" context, extraterritoriality refers to claims by a state to enforce purely domestic restrictive acts outside its territory, as well as situations where that state makes foreign participants in proceedings with a "sanctions" element liable in its territory [Kritskiy 2021:101]. Unilateral sanctions represent a departure from traditional conceptions of state sovereignty and non-intervention [Keshner 2015:147], as they extend the reach of a country's laws and regulations beyond its borders. These measures typically involve trade restrictions, financial sanctions, asset freezes, or limitations on specific transactions, aiming to coerce or penalize targeted entities or individuals in third countries [Boklan, Koval 2024:9]. Unilateral sanctions serve as an effective foreign policy tool used as a political signal or to put pressure on another state to change its behavior [Boklan, Murashko 2022:144]. The present-day discussion on the use of the term "unilateral sanctions" to designate unilateral coercive measures could be the sign of a new evolution in the law of enforcement, even though no consensual rules have so far developed in this respect [Miron 2022:14]. Some scholars indicating the difference between sanctions imposed by the United Nations Security Council and unilateral "sanctions" define the latter as "restrictive measures" [Beaucillon 2021:6-8]. Still, investment arbitration has faced the sanctions authorised by the United Nations Security Council as well. For instance, Libyan Investment Authorities has launched investment arbitral proceedings against Belgium, whose court seised Libyan assets in the course of domestic criminal proceedings in Belgium. The attachment of these assets became possible due to fact that they were deposited in a Belgian financial company Euroclear in compliance with the United Nationals Security Council sanctions against the Gaddafi regime of 2011[7]. The United Nations Security Council has the primary responsibility for maintaining international peace and security, and it can impose sanctions on states or entities that engage in activities deemed to be a threat to peace [Ivanova 2016:185]. This is further evidence of the popularity of investment arbitration as a mechanism for resolving of various sanctions-related disputes. The crunch point, however, is that so far none of such disputes brought before investment tribunals has resulted in the arbitral award. Thus, investment arbitration, despite its mentioned attractiveness and growing popularity, largely remains *terra incognita* for persons wishing to pursue sanctions-related disputes.

The key thing to know to unravel this uncertainty is that investment arbitration proceedings do not result in elimination of sanctions. To clarify, investment treaties which serve as a jurisdictional basis for investment arbitration disputes provide for compensation as a primary remedy. At the same time,

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[4] Russian Oligarch Launches €15bn Lawsuit Against Luxembourg. – *Luxembourg Times.* 14 August 2024. URL: https://www.luxtimes.lu/luxembourg/russian-oligarch-launches-15bn-lawsuit-against-luxembourg/17751745.html (accessed date: 9.01.2025).

[5] ICSID: ABH Holdings v. Ukraine. 29 December 2023. – *ICSID Case* No. ARB/24/1. URL: https://www.italaw.com/cases/11130 [hereinafter – *ABH Holdings v. Ukraine*].

[6] ABH Holdings Considered the SBU's Search for Fridman a Guise for the Takeover of Ukraine's Sense Bank. – *Forbes*. 21 December 2021. URL: https://www.forbes.ru/milliardery/503001-abh-holdings-scel-rozysk-fridmana-cbu-prikrytiem-dla-zahvata-ukrainskogo-sense-bank (accessed date: 9.01.2025). See The Law on Amendments to Certain Legislative Acts of Ukraine on Improving the Procedure for Withdrawing a Bank from the Market under Martial Law No 3111-IX. 11 April 2023. URL: https://itd.rada.gov.ua/billInfo/Bills/Card/41670 (accessed date: 9.01.2025).

[7] ICSID: Libyan Investment Authority v. Kingdom of Belgium. – *ICSID Case* No. ARB(AF)/23/3. URL: https://www.italaw.com/cases/11042. See The Libya Observer. *Libya Take Legal Action Against Belgium Over Frozen Assets.* 9 December 2023. URL: https://libyaobserver.ly/economy/libya-take-legal-action-against-belgium-over-frozen-assets (accessed date: 13.01.2025). See also Libya's Wealth Fund Says Belgian Court Lifts Euroclear Asset "Seizures". – *Reuters*. 22 January 2025 (accessed date: 26.01.2025). URL: https://www.reuters.com/business/finance/libyas-wealth-fund-says-belgian-court-lifts-euroclear-asset-seizures-2025-01-22/ (accessed date: 26.01.2025).

investment arbitration may provide investors with an opportunity to obtain compensation from the sanctioning state, or, at least, to encourage that state to initiate consultations and persuade it to lift sanctions in a friendly manner. For instance, Qatar Airways which challenged in investment arbitration the air, sea and land blockade undertook by the UAE, Bahrain, Saudi Arabia, and Egypt[8], eventually resolved the conflict diplomatically while using investment proceedings as a leverage.

For those investors who have been unsuccessful in achieving the desired outcome through negotiations, it is important to consider what "trump cards" or defences the sanctioning state may raise in arbitration. Undoubtedly, the main "trump card" is the police powers doctrine which was widely discussed in the literature [Melville 2023; Lehmann 2021; Titi 2015; Titi 2018; Zamir 2017; Ranjan 2018], and has been deservedly referred to as "a recogni[s]ed component of State sovereignty"[9]. In earlier indirect expropriation cases, investment tribunals had tended to focus solely on the economic effect of the challenged measures, without taking into acccount the respondent state's intent or the purpose of such measures [Zamir 2017; Wigati, Amalia 2022]. Tribunals' reliance on a single element of analysis – economic impact – was reflected in the name of this approach – the sole effects doctrine. The police powers doctine emerged as an antagonist to this one-sided view. According to this doctrine, a lawful exercise of a state's regulatory power does not constitute expropriation giving rise for a state's duty to compensate [Zhu 2024]. In order to determine whether the doctrine is legitimately invoked, investment tribunals must inquire into the purpose underlying the respondent state's regulation, thus, looking well beyond its economic impact. Despite investment tribunals favouring the sole effects doctrine over the police powers in some recent cases [Godinez 2024], since 2000, there has been "a 'consistent trend' in awards and treaty practice in differentiating between an exercise of police powers from an indirect expropriation" that 'reflects the position under general international law"[10]. Thereby, this "component of State sovereignty" is currently invoked by the respondent state in virtually every dispute involving a public interest, such as public order or security.

II. Police powers doctrine: what "trump cards" it hides for the sanctioned investors?

The police powers doctrine is often perceived by scholars as "a free ticket for states to evade their responsibility towards investors" [Bulut 2022:585]. This perception is not completely unfounded. Since the *SD Myers v. Canada* case [UNCITRAL: Partial Award. 13 November 2000], arbitral tribunals have recognised "the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders"[11]. Plainly speaking, this "deference" implies that an arbitral tribunal cannot step into the shoes of a national legislator and review its measures de novo as if an arbitral tribunal were a national appellate court[12]. This is why the arbitral tribunal's mandate is limited to determining whether the respondent state has violated its international obligations. This concept of deference to the decisions of the respondent state's domestic authorities can best be illustrated by quoting from the Invesmart *v. Czech Republic* case [UNCITRAL: Award. 26 June 2009]:

"A decision to revoke a bank's licence, which takes place within a detailed national legal framework that includes administrative and judicial remedies, is not reviewed at the international law level for its 'correctness', but rather for whether it offends the more basic requirements of international law. *Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals.* Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions"[13].

[8] Arbitrations Against UAE, Bahrain, Saudi Arabia, and Egypt. – *Qatar Airways.* 22 July 2020. URL: https://www.qatarairways.com/en/press-releases/2020/July/qatarairwaysarbitrations.html (accessed date: 9.01.2025).

[9] ICSID: Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic. Award. 5 November 2021. – *ICSID Case* No. ARB/14/32. Para. 331 [hereinafter – Casinos v. Argentina].

[10] See e.g. ICSID: Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay. Award. 8 Juny 2016. – *ICSID Case* No. ARB/10/7. Para. 295.

[11] UNCITRAL: SD Myers v. Canada. Partial Award. 13 November 2000. Para. 263.

[12] UNCITRAL: Invesmart v. Czech Republic. Award. 26 June 2009. Para. 501 [hereinafter – *Invesmart v. Czech Republic*].

[13] Ibid. Para. 501.

This "high deference" approach gives rise to a presumption that the regulatory measures of the respondent's governmental authorities are lawful[14]. It is the investor that bears the burden of rebutting that presumption. Importantly, the standard of proof required to refute the presumption and, thus, to demonstrate that a state's regulatory measure falls short of its police powers is extremely high, namely clear and convincing or conclusive evidence[15]. As in this regard was pointed out in *Mondev v. USA* [ICSID: Award. 11 October 2002], "a State may treat foreign investment unfairly and inequitably *without necessarily acting in bad faith*"[16]. It is therefore not surprising that of many investors who claim that the respondent state is guided by political motives rather than by the protection of public interest, only few succeeded in arbitration on this ground. Furthermore, arbitral tribunals are always on guard against unduly restricting the state's right to regulate. For example, in *Charanne v. Spain* [SCC: Award. 21 January 2016], the tribunal concluded that recognising the provision of certain guarantees to a limited group of investors as amounting to the creation of legitimate expectations, "would impose excessive limitations to the state's right to regulate the economy in the public interest"[17]. This tension between the protection of investor and "the legitimate scope of democratic decision-making" is indeed a "recurring theme" in investment arbitration [Bonnitcha, Williams 2020:77-100].

Nonetheless, despite this seemingly pessimistic caveat, the authors dare to suggest that the "police powers" ticket is not "out of charge" for the state. First, "the fact that a tribunal acknowledges the state's right to regulate does not mean that it will necessarily also find in favour of the respondent" as "no case can be decided in abstract" [Titi 2022:26]. Second, as discussed below, the high standard of proof for bad faith allegations has been met in several cases. Finally, to avail itself of the "police powers" benefits, a state invoking this doctrine must fulfil several requirements of varying degrees of complexity. One of them is to convince the arbitral tribunal that the state has acted in good faith towards the investor[18]. This "good faith" requirement has unfairly earned little attention in both academic writings and arbitral practice. In particular, investment tribunals have considered good faith in the context of the investor's illegitimate conduct in making an investment[19], as a part of the due process obligation of the state receiving investments, when analysing instances of fraud, corruption, unclean hands and abuse of process [Smutny, Polasek 2012:277-296][20]. However, good faith as a requirement for a lawful exercise of police powers remains largely uncovered. Thus, the purpose of this Article is to examine how investment tribunals have interpreted good faith as a requirement for a lawful exercise of police powers and to explore how these findings can be used in the sanctions-related disputes from an investor's perspective. Ahead of the curve, we note that in *Eskosol v. Italy* [ICSID: Award. 4 September 2020], the tribunal clarified what stands for accusations of a state's bad faith behavior: "an allegation that *a State acted on a pretext* is close to alleging that it acted in bad faith"[21].

The choice of this topic is based on the hypothesis that governmental officials of the sanctioning state typically accompany the adoption of sanctions with public statements that can be used by the sanctioned investors to expose the lack of good faith on the part of the sanctioning" state and crush the state's invocation of the police powers. It is these statements that may reveal that a sanctioning state, in the words of

[14] See e.g. ICSID: Phillip Morris v. Uruguay. Concurring and Dissenting Opinion of Co-Arbitrator Gary Born. 8 July 2016. – ICSID Case No. ARB/10/7. Para. 141: "This observation reflects *the presumptive lawfulness of governmental authority under customary international law, as well as respect for a state's sovereignty, particularly with regard to legislative and regulatory judgments regarding its domestic matters.* Or, as another tribunal noted, a state would not violate its obligations towards an investor if the government authorities made "a decision which is different from the one the arbitrators would have made if they were the regulators"; *"arbitrators are not superior regulators" and "they do not substitute their judgment for that of national bodies applying national laws".*

[15] See Casinos v. Argentina.

[16] ICSID: Mondev v. United States of America. Award, 11 October 2002. – *ICSID Case* No. ARB(AF)/99/2. Para. 116.

[17] SCC: Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain. Award. 21 January 2016. – *SCC Case* No. 062/2012. Para. 497.

[18] See e.g. ICSID: Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus, Award. 26 July 2018. – ICSID Case No. ARB/13/2. Para. 826 [hereinafter – *Marfin Investment Group v. Cyprus*].

[19] *Marfin Investment Group v. Cyprus.* Para. 830.

[20] The "Bona fide" (Good faith) Principle. – *Jus mundi.* 23 September 2024. URL: https://jusmundi.com/en/document/publication/en-bona-fide-principle# (accessed date: 13.01.2025); [Smutny, Polasek 2012:277-296].

[21] ICSID: Eskosol S.P.A. in Liquidazione v. Italy. Award. 4 September 2020. – *ICSID Case* No. ARB/15/50. Para. 386.

the *Eskosol* tribunal, acts for ulterior purposes. For example, in the aforementioned *ABH Holdings v. Ukraine,* the sanctioning state allegedly launched a "concerted smear campaign" against the expropriated bank, where Ukrainian governmental officials, including the head of the National Bank of Ukraine, stated that "the Russian market is toxic, and their money is poisonous", and that "the presence on the market of [Russia]... poisons even those businesses that are not directly related to Russia"[22]. In the claimant's view, these statements demonstrate that the genuine intention of the sanctioning state was to drive the investor out of the market, and not the safeguarding of the banking system[23].

Thus, the authors will focus on the probative value that arbitral tribunals ascribe to public statements. The authors will also examine other evidence relied upon by investors to prove the absence of good faith of the state and, on this basis, to distinguish lost cases from successful ones. The forthcoming analysis will consist of a review of the following cases in which the good faith requirement has been scrutinised by arbitral tribunals: *Marfin Investment Group v. Cyprus* [ICSID: Award, 26 July 2018], *Deutsche Bank v. Shri Lanka* [ICSID: Award. 31 October 2012][24], *Casinos v. Argentina* [ICSID: Award of the Tribunal. 5 November 2021][25] and *Sodexo v. Hungary* [ICSID: Excerpts of Award. 28 January 2019][26]. These cases are chosen because they analyse good faith as a requirement for the conduct of the state receiving investments and they pay sufficient attention to the discussion of the evidence presented by investors. Nonetheless, it should be noted that some of the mentioned cases have been criticised by scholars. Where appropriate, the authors will touch upon the reasons for such criticism and discuss its objectivity. General conclusions on the mentioned cases will be presented in the final part of this article.

III. Good faith requirement for a lawful exercise of the police powers doctrine: analysis of arbitral tribunals

1. *Marfin Investment Group v. Cyprus* [ICSID: Award, 26 July 2018]

Marfin Investment Group v. Cyprus revolved around the measures taken by the Cypriot authorities during the Eurozone crisis against a bank owned by one of the claimants ("the Bank"). The disputed measures consisted of the removal of the Bank's senior management and the introduction of the recapitalization programme which resulted in the nationalisation of the Bank.

The claimants argued that all these measures cumulatively and individually constituted an unlawful creeping expropriation of their investment in Cyprus and a violation of the fair and equitable treatment. Notably, the claimants' argument was that Cyprus had acted in bad faith generally by intentionally nationalising the Bank, as well as on specific instances, such as when Cyprus removed the senior management of the Bank for allegedly political reasons. Cyprus' principal position in this respect boiled down to the "protect[ion of] the health of Cyprus' financial system during a time of profound economic crisis"[27]. In Cyprus' view, the alleged measures constituted a legitimate exercise of its police powers. The claimants, in turn, argued that Cyprus had deliberately taken advantage of the economic crisis to nationalise the Bank[28]. It follows that the allegations that Cyprus failed to act in good faith were at the heart of the claimants' submission[29].

The tribunal began the analysis of the case by affirming that "a distinction exists between the reasonable *bona fide* exercise of police powers, which does

[22] ABH Holdings v. Ukraine. Claimant's Request for Arbitration. Para. 67(iv).

[23] Ibid. Para. 66: "Throughout 2022 and 2023, the State undertook what can only be described as a concerted smear campaign against the Bank, *with various State officials making public statements that the Bank was associated with Russian hostilities and drumming up public support for the nationalisation of the Bank, and making clear that it was the State's intention to do so".*

[24] ICSID: Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka. Award. 31 October 2012. – *ICSID Case* No. ARB/09/2 [hereinafter – Deutsche Bank v. Shri Lanka].

[25] ICSID: Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic. Award. 5 November 2021. – *ICSID Case* No. ARB/14/32 [hereinafter – Casinos v. Argentina].

[26] ICSID: Sodexo Pass International SAS v. Hungary. Excerpts of the Award. 28 January 2019. – *ICSID Case* No. ARB/14/20 [hereinafter – Sodexo v. Hungary].

[27] Marfin Investment Group v. Cyprus. Para. 830.

[28] Ibid. Para. 825.

[29] Ibid. Para. 832.

not amount to a compensable taking, and indirect expropriation"[30]. The tribunal went on to explain that in order to find whether a state exercises its police powers in good faith, it is necessary to examine "the nature and the purpose of the State's action"[31].

Unfortunately for the claimants, "the nature and the purpose" of Cyprus' measures did not raise the tribunal's concerns. The main reason for this was that the allegations of Cyprus' bad faith were supported solely by evidence that the tribunal assessed as "circumstantial" and, thus, not meeting the "convincing evidence" standard of proof[32]. Specifically, the claimants relied on the following evidence to show "overarching plan [of Cyprus] to nationalise [the Bank]":

– *Minutes of the Cypriot Cabinet meeting held on the Eve of the Eurozone summit.* The minutes reflect the discussion of a draft of the Financial Crisis Management Law which allowed for state intervention in banks, including by appointing new management and acquiring ownership of the bank in exchange for investment support. This draft, which subsequently became the current legislation, was used against the Bank in this case. The claimants relied on those parts of the minutes which specifically mentioned the Bank's opposition to the passage of the draft law and the name of Mr Vgenopoulus, the then Chairman of the Bank, as an individual "that to be relieved" if the law would not be passed. The claimants also relied on those excerpts of the minutes that discussed nationalisation of Cypriot banks as a primary purpose of this draft law. All the referred excerpts, in claimants' view, evinced "the intent to nationalise Cypriot banks…by removing top management"[33]. This did not persuade the tribunal which stated that "the minutes only reflect a discussion of the options available to the Government under the then draft of the Management of Financial Crises Law for intervention in troubled banks upon the latter's request"[34];

– *The testimony of the then Minister of Finance indicating that he had prior knowledge of the removal of the bank's top management.* However, the tribunal decisively rejected the testimony as "the lack of opposition to the decision [to remove the top management of the Bank] … cannot be equated with the existence of a conspiracy to expropriate the Bank between the two officials in the country"[35];

– *The "Secret report" prepared at the instructions of the President of Cyprus* which, as the tribunal observed, contained "a bold claim" that the then Minister of Finance "had prepared on behalf of the government the plan for nationali[s]ing the [B] ank"[36];

– *An email from the bank's then chairman to the bank's majority shareholder,* which the tribunal did not analyse in detail, only briefly noting that the Bank's chairman's position could not be indicative of Cypriot intent.

All of the evidence referred to was rejected because none of it proved that there was a conspiracy among governmental officials to acquire the Bank for ulterior motives. Rejecting this evidence due to its low probative value, the tribunal proceeded to examine each of the measures challenged by the investors. For example, the removal of senior management has been analysed through the lens of each of the criteria for the legitimate exercise of police power. In general, the tribunal recognised that "had been removal… not based on objective considerations, the Tribunal may well have found a breach of the Treaty obligations"[37]. However, the existence of objective considerations does not exhaust the analysis. There should have been "clear and convincing evidence" that the Central Bank of Cyprus acted improperly or arbitrarily[38]. Unfortunately, the arbitral tribunal did not specify what "convincing" evidence it expected from the claimants. We can only refer to the contrary, namely, to the evidence that the claimants submitted to demonstrate Cyprus' intent to nationalise the Bank. It was:

– Public statements of the Governor of the Central Bank of Cyprus that "if there was stronger political support, this [removal of Mr. Vgenopoulos] would have been a risk which the regulator could have taken"[39];

[30] Marfin Investment Group v. Cyprus. 828.
[31] Ibid. Para. 828.
[32] Ibid. Para. 838.
[33] Ibid. Para. 848.
[34] Ibid. Para. 840.
[35] Ibid. Para. 854.
[36] Ibid. Paras. 1344-1345.
[37] Ibid. Para. 931.
[38] Ibid. Para. 937.
[39] Ibid. Para. 927.

– The correspondence between Central Bank of Cyprus and the Bank which, in claimants' view, did not reveal any objective reasons for removal of the Bank's top management. Remarkably, the tribunal managed to discern eight reasons for such a removal from that single letter[40].

Nevertheless, at least the following can be inferred from the above-mentioned observations of the arbitral tribunal. If the Claimants had succeeded in proving that the Central Bank of Cyprus did not have sufficient grounds to remove the senior management because, for example, it had acted effectively and had not contributed to the economic collapse of the Bank, this might have convinced the arbitral tribunal. However, this did not happen.

2. *Deutsche Bank v. Sri Lanka* [ICSID: Award. 31 October 2012]

In *Deutsche Bank v. Sri Lanka,* good faith appeared in the context of Sri Lanka's obligation to accord fair and equitable treatment to the investor and not to unlawfully expropriate the investment. Notably, the award was accompanied by a dissenting opinion of Makhdoom Ali Khan which discussed the probative value of public statements in arbitration and criticised the tribunal's approach to this issue in that case. The key observations of this dissenting opinion will be explored in details below.

The background of the dispute is as follows. Ceylon Petroleum Corporation ("CPC"), a wholly state-owned oil company, entered into hedging agreements with several local and foreign banks, including Deutsche Bank, in 2008 to protect Shri Lanka from the effects of the oil price spike. After the oil prices began to fall, Deutsche Bank exercised its right to terminate the hedging agreement, leaving CPC with an outstanding debt. Against this backdrop, the CPC and the banks involved in this hedging program have been heavily criticised by the Sri Lankan media and politicians and even accused of corruption. Several individual petitioners went further and successfully challenged before the Supreme Court the authority of the CPC to enter into hedging agreements and of the competence of the CPC Chairman to execute them himself. As a result of that, the court ordered the suspension of all the payments under the hedging agreements and the commencement of an investigation into the hedging agreements. Before the results of the investigation became publicly known, the Central Bank of Sri Lanka informed the management of Deutsche Bank that the bank failed to comply with the proper procedures in executing hedging agreements. It was this fact, in particular, that gave the claimant the ground to argue that investigation into the hedging agreements was conducted in bad faith since its outcome "was a foregone conclusion", and the genuine motivation of the Governor of the Central Bank of Sri Lanka was to exonerate the governmental authorities pressured by the media for entering into a "disastrous agreement". Deutsche Bank thus challenged both the Central Bank's and the Supreme Court's measures in arbitration and argued, *inter alia,* that they were not bona fide. In setting out its allegations, the claimant laid particular emphasis on the timing of the events surrounding the said investigation. In particular, the claimant relied on the fact that only a week before the investigation began, the Governor of the Central Bank instructed the CPC to suspend outstanding payments to Deutsche Bank.

The tribunal dismissed Shri Lanka's argument about host state's "extremely broad discretion to interfere with investments in the exercise of 'legitimate regulatory authority'"[41]. With respect to the interim order of the Supreme Court by which all the outstanding payments from CPC to Deutsche Bank were suspended, the tribunal noted that the order was only five-page long, issued just in 48 hours, satisfied all the claims based on the "extremely limited" evidence without even hearing from the banks affected by the order. The tribunal also relied on the public statements made by Chief Justice Silva who presided over the hearing. In particular, the Chief Justice stated: *"the Government was forced to comply with the hedging agreements.* We will stop that on a judicial order, just pass on to benefit to the people. The Government said you stop the hedging agreements we won't pass on the benefit". The Chief Justice further stated that "internationally, Sri Lanka had no defence to present in the arbitration proceedings, that it was a difficult fight"[42]. The tribunal inferred from these statements that "the decision was issued for political reasons"[43].

In sum, the tribunal devoted two pages to the analysis of the claimant's bad faith allegation with respect to Sri Lanka's investigation. On these two

[40] Marfin Investment Group v. Cyprus. 945.
[41] Deutsche Bank v. Shri Lanka. Para. 522.
[42] Ibid. Para. 479.
[43] Ibid. Para. 479.

pages the tribunal reiterated the facts thrown by the claimant and abruptly came to the conclusion that "the Governor had obviously decided that the payments to the banks should be stopped and that from the moment he reali[s]ed he could not achieve this result by way of an order he had to do it by means of an investigation"[44].

Arbitrator Makhdoon Ali Khan in his Dissenting Opinion seriously questioned the probative value of the statements of the former Chief Justice of the Supreme Court to which the tribunal referred to impute a bad faith to the respondent[45]. In this respect, the arbitrator highlighted that the standard of proof for bad faith allegations is "cogent and credible evidence", while the analysis to discharge this standard must be "rigorous"[46]:

"In any event, relying solely on such contested evidence to impute bad faith to the highest court of a country does not meet the standard for rigorous analysis and reasoning that should be the sine qua non for any international tribunal recording such a damaging finding about the Supreme Court of a Sovereign State"[47].

Arbitrator affirmed that a "high measure of deference" to the decisions of domestic authorities exists giving rise to the presumption that their conduct is proper and in good faith. This presumption cannot be rebutted with "subjective view"[48] inferred from an Internet newspaper run by a person for whom warrant was issued by Interpol.

In addition to questioning the tribunal's reliance on this interview, arbitrator called into question its content and the overall context. This way arbitrator concluded that "political nature" of the Supreme Court's decision was in fact the Court's involvement in the matter of public concern triggered by the high taxes that the Treasury officials heightened to meet the claims arising out of the hedging agreement. It is not surprising that the Chief Justice as the judge of the highest court in the country considered domestic courts a more suitable forum to resolve this issue. Thus, in arbitrator's view, there was no ground to believe that "[the Court's] intervention was motivated by any behind the scenes dialogue or by political considerations"[49].

3. *Casinos v. Argentina* [ICSID: Award of the Tribunal. 5 November 2021]

Casinos v. Argentina arose from the revocation of the investor's 30-year licence for operation of gaming facilities and lottery activities. In the investor's view, the revocation of the licence constituted an unlawful indirect expropriation, one of the milestones of the respondent's comprehensive campaign to oust the claimant from the market and replace with domestic enterprises.

The Tribunal agreed should this discriminatory plan be proved, this would indeed constitute an act of bad faith rendering the respondent's exercise of police powers unlawful[50]. At the same time, having proclaimed the "conclusive evidence" standard of proof (the one which tribunals routinely choose when dealing with bad faith allegations), the tribunal decisively rejected the evidence submitted by the investor as "insufficient". To prove that since 2007 when the new governor took new office the claimant was being constantly harassed, the claimant, in particular, submitted the following arguments:

1) in 2008, the government replaced fixed licence fee by the dynamic fee depending on the claimant's income. As a result, the financial burden on the claimant increased;

2) VideoDrome, an Argentine gaming operator, sent a letter to the Argentinian regulator offering to take over some of the claimant's operations on the terms more favorable to respondent. This happened two weeks before the investigations that led to the revocation of the licence. After the licence was revoked, VideoDrome received the claimant's licence exactly on those conditions it proposed in the letter earlier;

3) The Governor publicly announced the revocation of the claimant's licence 40 minutes afterwards disregarding the claimant's right to challenge the revocation of the licence before administrative or judicial bodies. The Governor then simply repeated the regulator's allegations which pointed to a political nature of the revocation;

[44] Deutsche Bank v. Shri Lanka. 483.
[45] Ibid. Dissenting Opinion of Makhdoom Ali Khan. Para. 107.
[46] Ibid. Para. 108.
[47] Ibid. Para. 113.
[48] Ibid. Para. 106.
[49] Ibid. Para. 111.
[50] Casinos v. Argentina. Para. 360.

4) The Minister was quite explicit in stating that the fees should be increased (he even pinpointed a social project which would be funded at the expense of the increase) and until the company is found liable for a breach of the licence, the only way to reconsider the fee is to renegotiate.

Ultimately, the tribunal qualified these arguments as "circumstantial" evidence, and therefore insufficient to infer any bad faith motives on the part of the respondent. Nonetheless, this did not prevent the Tribunal from finding that the respondent had acted in bad faith, yet, on a different legal basis – the principle of proportionality. In concluding that the principle of proportionality was not respected, the tribunal took into account the following factors:

1) three investigations by the respondent did not establish any serious violations by the investor that could serve as a ground for a revocation of the licence;

2) the respondent failed to adopt less intrusive measures against the investor before revoking the licence. The respondent also failed to warn the investor in advance about the revocation and did not offer to eliminate violations;

3) There was no urgency that could prompt the revocation of the claimant's licence because the claimant complied with Argentinian law.

Thus, the Tribunal concluded: "After having known and accepted for such a long time these three operators, *ENREJA could not in good faith,* without any warning and without possibility to amend matters, take the most drastic sanction of revoking ENJASA's license"[51].

4. *Sodexo v. Hungary* [ICSID: Excerpts of Award. 28 January 2019]

Sodexo v. Hungary arose from Hungarian tax legislation that gave preferential treatment to a Hungarian state-owned company to the detriment of private operators like Sodexo. The approach of the Sodexo tribunal was different from the one in the *Casinos v. Argentina [ICSID: Award of the Tribunal. 5 November 202*1]. Remarkably, the tribunal devoted less than five pages to discussion of the bona fide requirement in contrast to extensive analysis in *Casinos v. Argentina* [ICSID: Award of the Tribunal. 5 November 2021]. Although the tribunal quite tentatively declared that "object, context and intent" of the measures shall be explored[52], in practice, the tribunal discerned the intent of the Respondent's governmental officials though their multiple statements in the media. Those statements of the ministers and other senior officials unambiguously revealed that they wanted the voucher system to be state-owned rather than involve French issuers. In this regard, the tribunal stated that "Many politicians and ministers stated their goal for profits from the voucher system to remain in Hungary, for the voucher system to be state-owned rather than involve French issuers, and for foreign companies to no longer profit from the voucher system"[53].

The fact that the *prima facie* declared goal of Hungarian legislation was laudable, i.e. to provide healthy meals to the Hungarian population, did not stop the tribunal from finding that the genuine, leading, aim was discriminatory. The tribunal also considered that Hungarian officials rejected the investor's attempts to negotiate and find a compromise before the reform was enacted. Hence, the spirit of proportionality from the *Casinos* tribunal is also reflected in this case.

IV. Conclusions: the key observations from the arbitral tribunal's practice for subsequent use in the sanctions-related disputes

The purpose of this Article from the outset was to examine how arbitral tribunals treat evidence supporting allegations of bad faith in the context of the police powers, for subsequent use in the sanctions-related disputes. Provided analysis leads authors to the following conclusions. Despite the tribunals unanimously recognise high deference to the decisions of domestic authorities of the host state, as was observed by the *Deutsche Bank* tribunal, states do not possess "extremely broad discretion to interfere with investments in the exercise of 'legitimate regulatory authority'". In addition, the standard of proof for bad faith allegations is clear and convincing or cogent evidence. Not only is the standard important, but also the quantity – the evidence must be sufficient. Tribunals regularly treat the evidence presented by investors as "circumstantial". Nonetheless, an investor's chances of meeting the standard increase if he or she bases the evidence on "objective considerations". Recall that in *Marfin v. Cyprus*, the arbitral tribunal emphasised: if the investors had demonstrated objective

[51] Casinos v. Argentina. 391.
[52] Sodexo v. Hungary. Para. 272.
[53] Ibid. Para. 280.

facts of non-involvement of the bank's senior management in its collapse, the removal of that management by Cyprus would have been recognised as unlawful. However, in that case it was the Central Bank of Cyprus that "relied on objective factors" and concluded that the bank's management was at least partially responsible for the bank's liquidity crisis and, thus, lawfully removed the management. No matter how laudable the goal that a host state declares, this fact would not prevent a tribunal from finding that a genuine, behind-the-doors aim was political. For instance, in *Sodexo v. Hungary,* the tribunal unveiled Hungarian genuine goal for discrimination of Sodexo disguised under the protection of the public health. In addition, tribunals ascribe different weight to public media statements of state officials. For instance, in *Sodexo v. Hungary,* the existence of multiple public statements was sufficient for the tribunal to discern the absence of good faith on behalf of respondent state. In *Deutsche Bank v. Shri Lanka,* the official statements of the Chief Justice of the Supreme Court became one of the key, though not the only, pieces of evidence that proved Shri Lanka's political motivation. Remarkably, those statements were very clear as they did not provide for a double meaning and made by senior officials at the minister's level. To recall, the Chief Justice explicitly stated that the government prejudged the court's decision. To the contrary, in *Marfin v. Argentine,* the statements cited by the claimants were rather ambiguous and allowed only for very cautious inferences. On top of that the principle of proportionality can serve the investor's position even in the absence of clear and unambiguous public statements from top officials. In *Casinos v. Argentina,* the tribunal rejected the investor's evidence as circumstantial, though, nonetheless, concluded that the Argentinian authority acted in bad faith based on the proportionality principle: it adopted the most drastic measures without a prior notification and without a possibility to remedy the investor's violation of legislation. Alomgside with that drawing the tribunal's attention to the timing of the events surrounding the challenged measures may contribute to the investor's success.

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