The Compliance with the Law Requirement in International Investment Law

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Abstract

Part I of this Article considers the effects of a treaty expressly covering only those investments that are made in accordance with host state law. In such cases, the legality of the investment, with respect to the host state law, is shown to be a jurisdictional prerequisite. Part II discusses the presence of an implicit obligation that an investment must accord with host state and international legal principles in order for the claims related to that investment to be admissible. Part II also attempts to clarify some confusion among recent cases as to the nature of this obligation. Part III examines certain exceptions to the preclusion of a claimant’s claims based on its illegal investment. The exceptions discussed in Part IV include where the claimant’s illegality is the result of a good faith mistake and where the host state, knowing of the illegality, condoned the claimant’s investment.
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THE COMPLIANCE WITH THE LAW REQUIREMENT IN INTERNATIONAL INVESTMENT LAW

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INTRODUCTION

Increasingly, foreign investors are aware of the legal protections afforded to their investments under international law, including under investment treaties. Such legal protections provide investors with important means of ensuring the safety of their investments from the wrongful acts of the state in which the

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investments are made. Typically, investment treaties require host states to: provide a foreign investor with fair and equitable treatment and full protection and security in relation to its investment; restrict the host state from directly or indirectly expropriating the investment unless done for a public purpose, in a nondiscriminatory manner, in accordance with due process, and accompanied by fair compensation; and disallow discrimination based on nationality.\(^1\) Of particular importance, investment treaties allow investors of the home state to arbitrate disputes directly with host states for violations of the treaty.\(^2\) This form of recourse deviates from the traditional avenue where a foreign investor must seek diplomatic protection from their home state to address wrongs committed by the host.

There are, however, certain circumstances under which foreign investors are not permitted to pursue their claims against the state. As such, investors must meet certain basic jurisdictional (and admissibility) prerequisites. For instance, the investor must have made a qualifying “investment” under the investment

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2. See Vandevelde, *supra* note 1, at 632; see, e.g., 2004 MODEL BIT: TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [COUNTRY] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, art. 24, available at http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf [hereinafter 2004 US MODEL BIT] (indicating that an investor of the home state may submit the dispute to arbitration “[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation.”); INDIAN MODEL TEXT OF BIPA: AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF [COUNTRY] FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, art. 9(3) (2003), available at http://ita.law.uvic.ca/Indiamodelbit.htm (“Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration.”); GERMAN MODEL TREATY 2008: TREATY BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, art. 10(2), available at http://ita.law.uvic.ca/documents/2008-GermanModelBIT.doc (“If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration. The two Contracting States hereby declare that they unreservedly and bindingly consent to the dispute being submitted to one of the following dispute settlement mechanisms of the investor’s choosing . . . .”).
treaty and must also demonstrate that it is a national of the home state party to the investment treaty under which it is pursuing its claim(s).

This Article focuses on one such prerequisite, which is increasingly at issue in recent investment arbitrations—that is, the legality of the investment in question. It has become commonplace for respondents to allege that investors have not complied with the law in making their investment, and accordingly, should be prevented from pursuing their claims. Under international investment law, there is an emerging principle requiring compliance with the law of the host state, and at times international legal principles, in order to be granted the substantive legal protections provided by an investment treaty.

The requirement that only investments made in accordance with the law be protected under an investment treaty can either be explicit in an investment treaty, such as in the definition of “investment,” or based on general principles of law, it can be read as an implicit obligation—each carrying with it a different consequence. It is the latter development that is particularly important. The lack of clarity with respect to the emerging implicit obligation for investments to accord with the law may leave investors, states, and tribunals with an uncertain understanding as to when the substantive protections of an investment treaty should be denied to an investor.

Part I of this Article considers the effects of a treaty expressly covering only those investments that are made in accordance with host state law. In such cases, the legality of the investment, with respect to the host state law, is shown to be a jurisdictional prerequisite. Part II discusses the presence of an implicit obligation that an investment must accord with host state and international legal principles in order for the claims related to that investment to be admissible. Part II also attempts to clarify some confusion among recent cases as to the nature of this obligation. Part III examines certain exceptions to the preclusion of a claimant’s claims based on its illegal investment. The exceptions discussed in Part IV include where the claimant’s illegality is the result of a good faith mistake and where the host

3. Investment treaties will often define a covered “investment.”
state, knowing of the illegality, condoned the claimant’s investment.

I. INVESTMENT TREATIES WITH “IN ACCORDANCE WITH THE LAW” PROVISIONS

Provisions requiring that investments be made “in accordance with the law” are frequently included in investment treaties to ensure the legality of investments. Contracting parties may limit consent to arbitration to disputes meeting their specified characteristics. Though the governing law in investment treaty arbitration will be international law, i.e., the relevant treaty and other applicable principles of international law, when assessing whether a particular investment is made in accordance with the law, investment treaties containing “in accordance with the law” provisions will often contain a renvoi to the law of the host state. The tribunal in Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines explained in

4. See Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 125 (June 18, 2010), http://ita.law.uvic.ca/documents/Hamesterv.GhanaAward.pdf (“[I]t is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection. One such common condition is an express requirement that the investment comply with the internal legislation of the host State. This condition will typically appear in the BIT where this is the instrument that contains the State’s consent to ICSID arbitration.”); see also Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶ 184 (Aug. 2, 2006), http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf.

relation to the “in accordance with the law” provision being considered in that case: “[t]he [bilateral investment treaty (“BIT”)] is, to be sure, an international instrument, but its Articles . . . effect a renvoi to national law, a mechanism which is hardly unusual in treaties . . . . A failure to comply with the national law to which a treaty refers will have an international legal effect.”6

Similarly, the tribunal in Tokios Tokelès v. Ukraine stated that, “[t]he requirement in Article 1(1) of the Ukraine-Lithuania BIT that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs.”7

The tribunal in Desert Line v. Yemen acknowledged the “well traversed” and “quite familiar” nature of “in accordance with the law” provisions, maintaining that they exclude investments “made in breach of fundamental principles of the host State’s law, e.g., by fraudulent misrepresentations or the dissimulation of true ownership.”8 One way in which an investment treaty can accomplish this objective is to define the term “investment” as referring only to assets “accepted in accordance with the respective laws and regulations of either Contracting State,”9 or “in conformity with the hosting Party’s laws and regulations.”10

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7. Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 84 (Apr. 29, 2004), 20 ICSID Rev. 205.
8. Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶¶ 104–05 (Feb. 6, 2008), http://icsid.worldbank.org/ICSID/ FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC791_En&caseId= C62; see L.E.S.I. S.p.A et ASTALDI S.p.A v. Algeria, ICSID Case No. ARB/05/3, Decision, ¶ 83(iii) (July 12, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC528_Fr&caseId=C48 (“[L]a mention que fait le texte à la conformité aux lois et règlements en vigueur ne constitue pas une reconnaissance formelle de la notion d’investissement telle que la comprend le droit algérien de manière restrictive, mais, selon une formule classique et parfaitement justifiée, l’exclusion de la protection pour tous les investissements qui auraient été effectués en violation des principes fondamentaux en vigueur.”).
This requirement, however, can also be found in other sections of the investment treaty.11

An investment treaty containing such a clause expressly requires that only investments made in accordance with host-state law fall within the jurisdiction of a tribunal deciding a claim under that investment treaty.12 Ultimately, the primary aim of any "in accordance with the law" provision is "to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."13

One example of a case where a tribunal denied jurisdiction over a claimant’s claims due to the investment’s failure to accord with the laws of the host state is *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*. In that case, the tribunal found that based on the language of the BIT and its *travaux préparatoires*, “the will of the parties to the [El Salvador-Spain] BIT was to exclude from the scope of application and protection of the Agreement disputes originating from investments which were not made in

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11. See Christina Knahr, *Investments “in Accordance with Host State Law,” in INTERNATIONAL INVESTMENT LAW IN CONTEXT 27, 27* (August Reinisch & Christina Knahr eds., 2008) (noting that “in accordance with the law” clauses are often included as part of the definition of investment or in provisions regarding the protection or admission of investment); e.g., Germany-Philippines BIT, supra note 9, art. 2(1) ("Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations . . . .").

12. See Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 115 (July 14, 2010), http://italaw.com/documents/Fakes_v_Turkey_Award.pdf (noting that if the investment was not “established in conformity with the Respondent’s laws and regulations” according to the definition of the term investment in the applicable BIT, “the Contracting Party cannot be deemed to have given its consent to arbitrate the dispute under . . . the BIT . . . .”).

accordance with the laws of the host State." The tribunal further found that the claimant had fraudulently misrepresented itself in a bidding process for government contracts. As a result, the tribunal determined that it had no jurisdiction over the dispute because Inceysa’s investment did not meet the BIT’s requirement of legality.

Of note regarding the Inceysa case, rather than focusing on Salvadoran-enacted law in assessing the compliance of the investment with the law of the host state as expected, the tribunal directed itself back to international law. The tribunal determined that “the BIT, as valid law in El Salvador, is the primary and special legislation this Tribunal must analyze to determine whether Inceysa’s investment was made in accordance with the legal system of that Nation.” In assessing the legality of the investment in accordance with the BIT, the tribunal noted that the BIT “does not contain substantive rules that permit a determination whether Inceysa’s investment was made in accordance with the law of El Salvador,” but that its reference to “generally recognized rules and principles of International Law” required the tribunal to look to such principles to assess whether the investment was legally made. This is to say, the tribunal found that the host state law to which the BIT directed it, in turn required the tribunal to look to generally recognized rules and principles of international law. As such, in denying jurisdiction over the claimant’s investment, the tribunal found that the claimant had violated the principle of good faith, the

14. Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶ 195 (Aug. 2, 2006) http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf; see id. ¶ 208 (“The Tribunal having decided that the consent given by the Kingdom of Spain and the Republic of El Salvador excludes investments not made in accordance with the laws of the host State, it must determine whether the investment that generated the dispute raised before it was made in accordance with the laws of ... El Salvador, and in order to determine thereafter whether this Tribunal is competent or not to hear the dispute submitted to it.

15. Id. ¶ 335.

16. Id. ¶¶ 224–27.

17. Id. ¶ 220. The tribunal found that the BIT comprised part of Salvadoran law based on Article 144 of the Political Constitution, which affirms that “international treaties concluded by El Salvador with other States or international institutions are considered laws of the Republic upon their entry into force . . . .” Id. ¶ 219.

18. Id. ¶ 223.

19. Id. ¶ 224.

20. Id. ¶¶ 230–39.
principle of nemo auditur propriam turpitudinem allegans (i.e., nobody can benefit from his own wrong),\textsuperscript{21} international public policy,\textsuperscript{22} and the prohibition of unlawful enrichment.\textsuperscript{23} The tribunal in Inceysa could just as easily have found that the investment’s procurement through fraudulent means violated Salvadoran domestic law against fraud (assuming such a law exists) and as such was precluded from the protection of the BIT.

In another case, Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, the tribunal determined that “the BIT explicitly and reiteratedly required that an investment, in order to qualify for BIT protection, had to be in accordance with the host state’s law . . . .”\textsuperscript{24} The claimant was found to have “knowingly and intentionally circumvented the [Anti-Dummy Law]”—a domestic law limiting a foreign investor’s ability to intervene in the management, operation, administration or control of a Philippine public utility.\textsuperscript{25} As a consequence, the claimant could not “claim to have made an investment ‘in accordance with law’” and so the tribunal found that it “lack[ed] jurisdiction \textit{ratione materiae}.”\textsuperscript{26}

It should be noted that the Fraport award was recently annulled on grounds that the claimant was not given the right to be heard on certain evidence that came to light only after the close of the proceedings.\textsuperscript{27} Nonetheless, the annulment decision does not take away from the tribunal’s interpretation of the “in accordance of the law” clause in the applicable BIT, or the consequences of a finding that the claimant breached Philippine law in making its investment.\textsuperscript{28}

\textsuperscript{21} Id. ¶¶ 240–44.
\textsuperscript{22} Id. ¶¶ 245–52.
\textsuperscript{23} Id. ¶¶ 253–57.
\textsuperscript{24} Fraport, ICSID Case No. ARB/03/25, ¶ 398. The applicable BIT in that case defined “investment” as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State . . . .” Germany-Philippines BIT, supra note 9, art. 1.
\textsuperscript{25} Fraport, ICSID Case No. ARB/03/25, ¶ 401.
\textsuperscript{26} Id.
\textsuperscript{27} See Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 219, 247 (Dec. 23, 2010).
\textsuperscript{28} See id. ¶ 112 (the Annulment Committee finding that the tribunal’s interpretation of the “in accordance with the law” requirement was “not untenable.”).
More recently, the tribunal in *Alasdair Ross Anderson et al. v. Republic of Costa Rica* rejected the claimants’ claims on the basis that the investment in question did not comport with the law.\(^{29}\) In that case, 137 Canadian nationals brought claims against Costa Rica for alleged violations of the Canada-Costa Rica BIT relating to their investment made through the Villalobos brothers, who were involved in a currency exchange operation. The applicable BIT between Canada and Costa Rica defined “investment” as “any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws . . . .”\(^{30}\)

The tribunal found that Villalobos brothers had breached the Organic Law of the Central Bank of Costa Rica by engaging in financial intermediation without authorization.\(^{31}\) As such, the tribunal concluded that because “the transaction by which the Claimants obtained ownership of their assets . . . did not comply with the requirements of the [law;] . . . the Claimants did not own their investment in accordance with the laws of Costa Rica,” and that the tribunal was “without jurisdiction to hear and decide the Claimants’ claims.”\(^{32}\) In reaching this conclusion, the tribunal noted that “Costa Rica, indeed any country, has a fundamental interest in securing respect for its law.”\(^{33}\) The tribunal also commented that “prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal” and that “[a]n important element of such due diligence is for investors to assure themselves that their investments comply with the law,” which the tribunal found was “neither overly onerous nor unreasonable.”\(^{34}\)

These three cases, *Anderson, Fraport, and Inceysa*, maintain that where an investment treaty expressly requires that


\(^{30}\) Id. ¶ 46 (emphasis added).

\(^{31}\) Id. ¶ 55.

\(^{32}\) Id. ¶¶ 57, 59.

\(^{33}\) Id. ¶ 58; see id. ¶ 53 (“The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country.”).

\(^{34}\) Id. ¶ 58.
investments be made in accordance with host state law, the parties have decided that only such investments are covered by that investment treaty. Of course, there are certain issues regarding the scope of such clauses that cannot be generalized and can only be determined based on the specific wording of the investment treaty. For instance, most investment treaties only require an investment to comply with host-state law at the time of its making. Occasionally, certain investment treaties only require compliance with the host state's domestic laws governing the admission of investments. For the most part, however, faced with an "in accordance with the law" requirement in the applicable investment treaty, a tribunal must assess whether the investment in question was made in compliance with the host-state law in order to find that it has jurisdiction over the claims related to that investment.

II. THE OBLIGATION TO MAKE AN INVESTMENT IN ACCORDANCE WITH THE LAW WHERE NO SUCH PROVISION IS PRESENT

Many investment treaties do not contain an "in accordance with the law" provision. In cases based on investment treaties


36. See, e.g., Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 127 (June 18, 2010), http://ita.law.uvic.ca/documents/Hamesterv.GhanaAward.pdf ("Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction . . . . Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue . . . . "). As the tribunal in Hamester added, "[l]egality in the subsequent life or performance of the investment . . . may well be relevant in the context of the substantive merits of a claim brought under the BIT." Id.; see Fraport, ICSID Case No. ARB/03/25, ¶ 345 ("the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.") (emphasis added).

where the parties have not expressly required that the investment in question comply with host-state law, the legality of the investment is not a jurisdictional prerequisite. A tribunal should, however, consider whether there is a general principle of law that nonetheless requires a consideration of the investment’s compliance with the law at the merits phase.38

In this regard, it is helpful to consider the decision of *Plama Consortium Ltd. v. Republic of Bulgaria*, an arbitration arising under the Energy Charter Treaty ("ECT").39 In *Plama*, the tribunal noted that the ECT does not include a provision calling for the investment’s conformity with a given law.40 The lack of such a provision, however, does not suggest that ECT’s protections would apply to “all kinds of investments, including those contrary to domestic or international law.”41 According to the tribunal, the ECT, upon its adoption, was designed to be applied and interpreted in line with “generally recognized rules and principles of observance, application and interpretation of treaties . . . .”42 Thus, the claimant’s misrepresentation in obtaining approval for the purchase of a Bulgarian entity came with consequences. Not unlike the *Alasdair* tribunal's rationale that any country has an interest in securing respect for its laws, the tribunal in *Plama* determined that denying substantive ECT protections to investments made against the law furthers the ECT’s general goal of “strengthen[ing] the rule of law on energy issues.”43 The lack of an “in accordance with the law” provision did not preclude the tribunal from analyzing the legality of the

38. General principles of law are considered to constitute part of international law. See Statute of the International Court of Justice, art. 38(1) (c), available at http://www.icj-cij.org/documents/index.php?l=4&p=2&p3=0 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . the general principles of law recognized by civilized nations . . . ."). See generally BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge University Press 2006) (1953).


40. Id. ¶ 138.

41. Id.


investment in assessing the admissibility of the claimant’s claims in relation to that investment. Rather, the tribunal concluded that “the substantive protections of the ECT cannot apply to investments that are made contrary to law.”

Interestingly, unlike in cases where the applicable investment treaty has an “in accordance with the law” clause, the tribunal in 

Plama did not limit its assessment of the investment’s legality with respect to host-state law, but also assessed the legality of the investment under international law. Even in 

Inceysa, where the tribunal considered the legality of the investment under international legal principles, it only did so because it determined that Salvadoran law incorporated a reference to such principles. The approach adopted in 

Plama follows logically given that the applicable substantive law included international law. In this regard, questions may arise as to non-state actors being the subjects of international legal obligations; such a requirement, however, is not unusual. Specifically in the investment law context, requiring that foreign investors be subjected to basic international legal principles when they are themselves asserting international legal rights against the host state is hardly unreasonable.

In 

Plama, the claimant’s investment was deemed to be “in flagrant violation” of Bulgarian and international law. Specifically, the claimant in 

Plama shrouded its investment so that “it was simply a corporate cover for a private individual with limited financial resources” and its deliberate concealment amounted to fraud and calculated inducement. The tribunal determined that the investment was obtained through deceptive and fraudulent misrepresentation that ran contrary to

44. *Id.* ¶ 139 (citations omitted).
46. For an extensive list of cases where non-state actors are subject to international law, see generally Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 *Va. J. Int’l L.* 977 (2011).
47. Generally in international arbitration, claimants have been required to comply with transnational public policy in both the commercial and investment treaty context. See Carolyn B. Lamm, Hansel T. Pham & Rahim Moloo, *Fraud and Corruption in International Arbitration*, in *LIBER AMICORUM BERNARDO CREMADIES*, 699, 706-11 (M. A. Fernández-Ballesteros & David Arias eds. 2010).
48. See Plama, ICSID Case No. ARB/03/24, ¶¶ 135, 137.
49. *Id.* ¶¶ 133, 135.
international legal principles. Granting ECT protections to the investment would violate the principle of *nemo auditur propriam turpitudinem allegans*, as well as the basic notions of international public policy. By failing to provide the host state with necessary information for obtaining approval of the investment, the claimant's conduct was also deemed contrary to the principle of good faith, an element of both Bulgarian and international law. As such, the investor could not be granted the substantive protections under the treaty.

The approach of the *Plama* tribunal is consistent with the clean hands doctrine—a general principle of law that should be applicable in all cases. The "in accordance with the law" requirement effectively disqualifies claims made by investors with unclean hands vis-à-vis that investment. As the *Alasdair* tribunal noted, the expectation that investors should exercise due diligence to ensure their investment's compliance with the law is not an onerous or unreasonable requirement.

Similarly, in the recent Yukos—related arbitrations under the ECT against Russia—resulting from the same set of jurisdiction and admissibility proceedings in The Hague—the respondent argued that the claimants' claims should not be admitted as a result of its unclean hands. Though the tribunal found that the claimants had made a covered investment

50. Id. ¶ 143.
51. Id. ¶¶ 135, 144.
52. Id. ¶ 146.
53. See generally Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law*, 1 TRANSNAT'L DISP. MGMT. (2011). The clean hands doctrine as defined by Sir Gerald Fitzmaurice is: "[h]e who comes to equity for relief must come with clean hands." Thus, a state that is guilty of illegal conduct may be "deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it." GERALD FITZMAURICE, 92 RECUEIL DES COURS 119 (1957) (citations omitted).
according to the express terms of the ECT, and as such that it had jurisdiction, the tribunal acknowledged that allegations relating to the claimants' unclean hands would need to be determined at the merits phase,\textsuperscript{56} perhaps with an impact on the admissibility of the claimants' claims. The tribunal decided not to "dispose of the issues argued by Respondent concerning the 'unclean hands' of Claimant and Claimant being an instrumentality of a 'criminal enterprise,' which it will address during any merits phase of this arbitration."\textsuperscript{57}

A recent case, \textit{Gustav F W Hamester GmbH \\ & Co KG v. Republic of Ghana}, appears to take a position consistent with that articulated herein. In \textit{Hamester}, the tribunal found that, independent of the text of the treaty:

\begin{quote}
[A]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; [] if its creation itself constitutes a misuse of the system of international investment protection under the ICSID [International Centre for the Settlement of Investment Disputes] Convention[]; or if it is made in violation of the host State's law.\textsuperscript{58}
\end{quote}

The tribunal made clear that "[t]hese are general principles that exist independently of specific language to this effect in the Treaty."\textsuperscript{59} The applicable BIT in that case, however, contained an express provision requiring compliance with the laws of the host state at the time that the investment is made. For the purposes of deciding on its jurisdiction, the tribunal ultimately found that the respondent "ha[d] not fully discharged its burden of proof" in relation to the alleged fraudulent conduct of the claimant as it related to the initiation of the investment.\textsuperscript{60} As such, the tribunal found that it had jurisdiction over the dispute and that any

\begin{footnotes}
59. \textit{Id.} ¶ 124.
60. \textit{Id.} ¶¶ 131–32.
\end{footnotes}
fraudulent conduct taking place after the initiation of the investment would bear on the merits of the dispute.61

Though confirming the implicit obligation to comply with host-state law, the *Hamester* tribunal did not go so far as to expressly require compliance with international legal principles, as a general matter, but only focused on certain aspects (as noted above), such as the principle of good faith. In this regard, any knowing violation of international legal norms, in fact, contravene principles of good faith. Illegally made investments, including those made in violation of any applicable substantive international legal obligation, should be denied protection. This denial of treaty protection should be applied equally, for example, to claims based on violations of international human rights norms as to claims based on investments procured through deceitful conduct. From the perspective of denying protection under an investment treaty, there is no good reason to prioritize one violation of the law over another. As such, tribunals should not permit an investor the ability to profit from an investment that it made in contravention of the law in some cases but not others.62

In *Phoenix Action, Ltd. v. Czech Republic*, the tribunal also affirmed the principle that investments made in contravention of the laws of the host state cannot be protected by a BIT (though it did not expressly comment on the issue of illegality under international legal principles).63 In that case, the Israel-Czech Republic BIT expressly included an “in accordance with the law” provision and the question of compliance with host-state law was not at issue. Nevertheless, citing *Plama*, the tribunal added that the requirement of conformity with host-state law “is implicit even when not expressly stated in the relevant BIT,”64 noting that

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61. *Id.* ¶ 138.
64. *Id.*
“States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith.”

This requirement should be interpreted as applying equally to any dispute resolution mechanism contemplated by the applicable investment treaty, whether under the auspices of ICSID or otherwise.

The tribunal then went on to comment:

There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.

Such commentary, however, appears to blur the line of when the legality of a claimant’s investment is a question of jurisdiction and when it is a question of admissibility. In the case of explicit references to the “in accordance with the law” requirement, tribunals must look to the BIT to evaluate the investment’s legality as a jurisdictional question. For example, in *Inceysa*, the applicable BIT included an “in accordance with the law” provision and the tribunal made its decision on jurisdictional grounds: “because Inceysa’s investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre.”

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65. *Id.* ¶ 106; see also *Hamester*, ICSID Case No. ARB/07/24, ¶ 123 (quoting *Phoenix Action, Ltd.* v. *Czech Republic*).

66. *Hamester*, ICSID Case No. ARB/07/24, ¶¶ 102, 104.

67. See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş.* v. *Islamic Republic of Pak.*, ICSID Case No. ARB/08/29, Decision on Jurisdiction, ¶ 110 (Nov. 15, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC523_{En}&caseId=C27 (concluding that no compelling argument was present to find illegality of the investment and that nothing in the claimant’s actions relative to the investment could “oust the Tribunal’s jurisdiction in the present case”); see also *Fraport AG Frankfurt Airport Serv. Worldwide* v. *Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶¶ 335, 356, 398, 401 (Aug. 16, 2007) (finding the tribunal did not have jurisdiction because the claimant’s investment had not been made in accordance with Philippine law, as required by the Germany-Philippines BIT).

On the other hand, where there is no explicit "in accordance with the law" limitation in the applicable investment treaty—the instrument of consent to arbitration—to cover only those investments that comport with host-state law, such a limitation cannot be jurisdictional in nature. For instance, in Plama, a case where there was no explicit "in accordance with the law" reference in the investment treaty, the tribunal found that it had jurisdiction, but that the claimant’s claims were inadmissible under the applicable law. Thus, the lack of an "in accordance with the law" provision in the ECT signified no jurisdictional requirement of such a nature. Rather, the consequence of the claimant bringing forth its claims, premised on an illegally made investment, ultimately rendered those claims inadmissible.

In this regard, investment tribunals should be careful not to impose an "in accordance with the law" requirement at the jurisdictional phase where the applicable investment treaty does not contain an explicit "in accordance with the law" clause. Rather, where no such clause is present, the only way that the investment’s failure to comport with the law should serve as a bar to an investor’s claims is on grounds of inadmissibility. Whereas a jurisdictional challenge is a plea that the tribunal lacks

69. Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 229 (Feb. 8, 2005) http://icsid.worldbank.org/ICSID/ FrontServlet?RequestType=CasesRH&actionVal=showDoc&docId=D521_En&caseld=C24. The claimant’s illegality did not affect the Energy Charter Treaty’s scope of consent, but rather, served as an equitable defense to the claimant’s ability to bring claims before the tribunal. Id. ("As the Arbitral Tribunal has already stated . . . the Respondent’s allegation of misrepresentation by the Claimant does not deprive the Tribunal of jurisdiction in this case. Nevertheless, these assertions by the Respondent are serious charges which, the Tribunal will have to examine on the merits.").

70. See generally id.

71. See Hamester, ICSID Case No. ARB/07/24, ¶ 127 (June 18, 2010), http://ita.law.uvic.ca/documents/Hamesterv.GhanaAward.pdf (limiting its jurisdictional analysis based "on the wording of [this] BIT.").

72. For the difference between jurisdiction and admissibility, see generally, Jan Paulsson, Jurisdiction and Admissibility, in Global Reflections on International Law, Commerce and Dispute Resolution 601 (Gerald Aksan et al. eds., 2005). Stefan Talmon, Article 43, in The Statute of the International Court of Justice: A Commentary 977 (Andreas Zimmermann et al. eds., 2006); see id. at 1029 ("Preliminary objections may be based on three different grounds: lack of jurisdiction, inadmissibility of the application, or any other objection of a preliminary character. Neither the Court nor the parties have always made a clear distinction between [sic] the various grounds. It is, however, important to make such a distinction . . . ").
competence to decide on any issue in the case whether related to the merits or to the substantive admissibility of the claim, an admissibility challenge is a plea for the tribunal to dismiss the substantive claims on a basis other than on the merits of those claims. To be clear, an investment treaty tribunal does not reach the question of admissibility until it has found that it has jurisdiction. Denying jurisdiction on grounds that do not concern the scope of the parties' consent renders any resulting award vulnerable. As Jan Paulsson has described, "mistakenly classifying issues of admissibility as jurisdictional may result in an unjustified extension of the scope for challenging awards, and frustrate the parties' expectations." As such, the finding made by the Phoenix Action tribunal that any investments performed in "manifest" violation of the law should fail at the jurisdictional stage is questionable. If an investment treaty does not limit its coverage to investments that accord with either domestic or international law, then it cannot be said that the parties have consented to limit the tribunal's

73. See 2 GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 438–39 (Grotius Publications Ltd. 1986) ("[A]n objection to the jurisdiction of the tribunal... is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim."); Christian Tomuschat, Article 36, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 589, 646 (Andreas Zimmermann et al. eds., 2006) (noting "[j]urisdiction is geared to the basic requirement of consent by the litigant parties").

74. See FITZMAURICE, supra note 73, at 438 (commenting that an admissibility challenge "is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits") (footnotes omitted); Tomuschat, supra note 73, at 646 (maintaining that "admissibility touches upon other requirements which may result either from the application of general rules of international law (e.g., exhaustion of local remedies in instances of exercise of diplomatic protection) or from specific agreements between the parties concerned (e.g., referral of a particular class of disputes to arbitration)").

75. See, e.g., SGS Société Générale de Surveillance S.A.v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶154 (Jan. 29, 2004), http://icsid.worldbank.org/ICSIID/FromServlet?requestType=CasesRH&actionVal=showDoc&docId=DC0557_En&caseId=C6 ("This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction."); see also Paulsson, supra note 72, at 607.

76. Paulsson, supra note 72, at 601.

77. See Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶104 (Apr. 15, 2009), http://icsid.worldbank.org/ICSIID/FromServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1033_En&caseId=C74.
jurisdiction in this respect.\textsuperscript{78} As such, any decision by the tribunal not to proceed to the substantive merits of a claimant's claims due to the illegality of the investment would be a question of admissibility. Indeed, in such an instance, the tribunal would not be saying that it is not competent to decide the dispute, but that there is an important substantive reason for why the claimant's claims are being dismissed.

The tribunal in the recent case of \textit{Toto Costruzioni Generali S.P.A. v. Republic of Lebanon} likewise identified the requirement to make an investment in accordance with the law as a jurisdictional prerequisite where no explicit requirement in this regard can be found in the applicable investment treaty.\textsuperscript{79} Interestingly, however, this decision, relying on \textit{Phoenix Action}, suggests that the requirement to make an investment in accordance with the law is a requirement under the ICSID Convention (instead of the investment treaty). In this regard, one may question the \textit{Toto} tribunal's reading of the \textit{Phoenix Action} decision, when it states: "the Tribunal [in \textit{Phoenix Action}] added two criteria to have an 'investment' \textit{under the ICSID Convention};" one of which the \textit{Toto} tribunal said to be "that assets be invested in accordance with the laws of the host state."\textsuperscript{80} The ICSID Convention establishes facilities, \textit{i.e.}, the International Centre for Settlement of Investment Disputes, for the arbitration and conciliation of investment disputes between Contracting States and nationals of other Contracting States, and Article 25 of the ICSID Convention articulates the jurisdiction of the Centre.\textsuperscript{81} As such, where an investment treaty provides for the resolution of disputes under the treaty to be referred to ICSID, the

\textsuperscript{78} See \textsc{Nigel Blackaby, Constantine Partaside, Alan Redfern \& Martin Hunter}, \textsc{Redfern and Hunter on International Arbitration} 341 (5th ed. 2009) ("In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come. It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate.").

\textsuperscript{79} See generally \textit{Toto Costruzioni Generali S.P.A. v. Republic of Leb.}, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), http://icsid.worldbank.org/ICSID/ FrmServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1191\_En&caseId=Cl04.

\textsuperscript{80} Id. \S\ 85 (emphasis added).

\textsuperscript{81} ICSID Convention, \textit{supra} note 5, at art. 25.
jurisdictional requirements of both the investment treaty and Article 25 of the ICSID Convention must be met. 82

The tribunal in *Phoenix Action*, like the tribunal in *Plama*, found that “this condition—the conformity of the establishment of the investment with the national laws—is implicit even when not expressly stated in the relevant BIT.” 83 The tribunal did not suggest that an investment must accord with the host-state law as part of the assessment as to whether it satisfied the test under Article 25 of the ICSID Convention. As the Report of the Executive Directors on the ICSID Convention makes clear, the ICSID Convention does not define the term “investment” 84 and though some tribunals have identified certain criteria that must be met in order for an investment to come within the scope of Article 25 of the ICSID Convention, 85 there appears to be a trend away from limiting a tribunal’s jurisdiction based solely on the reference to “investment” in the ICSID Convention. 86 Consistent

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82. See Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 68 (May 24, 1999), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docld=DC556_En&caseld=C160 (“A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.”); see also RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 60-62 (2008).


84. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in ICSID CONVENTION, REGULATIONS AND RULES ¶ 27 (2006) (“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre.”).


86. See Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008), http://icsid.worldbank.org/ICSID/ FrontServlet?requestType=CasesRH&actionVal=showDoc&docld=DC1589_En&caseld=C67; see also Julian Davis Mortenson, The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law, 51 HARV. INT'L L.J. 257,
with this position, the tribunal in *Saba Fakes v. Republic of Turkey* recently noted, "the principle[] of... legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention." That tribunal explained, "the expressions 'legal investment' or 'investment made in good faith' are not pleonasm, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons." 88

Somewhat ironically, the tribunal in *Toto* itself references the lack of a definition or criteria for an investment anywhere in the Convention. Citing the case of *Biwater Gauff v. United Republic of Tanzania*, the tribunal emphasized that the ICSID Convention should not be interpreted as providing a “fixed or autonomous definition of ‘investment’ that must prevail in all cases." Rather, the tribunal found that “[investment criteria] do not appear in the ICSID Convention. On the contrary, it is clear from the travaux préparatoires of the Convention that several attempts to incorporate a definition of ‘investment’ were made, but ultimately did not succeed.”

From the above discussion it appears that certain tribunals after *Plama*, though relying on that case, have confused the nature of the requirement that an investment must be made in accordance with the law. Where the applicable investment treaty does not expressly limit its scope to investments that are made in accordance with the law, such a requirement should be imposed only as a barrier to admissibility of the claimant’s claims. In this instance, the “in accordance with the law” assessment at the

257 (2010) (advocating for a less restrictive interpretation of the term “investment” in the ICSID Convention); see generally Malaysian Historical Salvors SDN BHD v. Gov’t of Malay., ICSID Case No. ARB/05/10, Decision on the Application for Annullment (Apr. 16, 2009), http://icsid.worldbank.org/ICSI/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247 (annulling an award where the tribunal had denied jurisdiction solely on its interpretation of the term “investment” in Article 25 of the ICSID Convention without taking into account the definition of the term “investment” as defined in the BIT—the instrument of consent).


88. Id.

89. *Biwater Gauff (Tanzania) Ltd.*, ICSID Case no. ARB/05/22, ¶ 315.

admissibility phase requires an evaluation of whether the investment is made in compliance with both host-state law and international legal principles. In such circumstances, it would be inappropriate to cloak what is a substantive denial of the claimant's ability to bring its claims as a decision that the tribunal is not competent to exercise jurisdiction under the BIT or, for that matter, the ICSID Convention (in cases where it may apply).

III. EXCEPTIONS TO THE IN ACCORDANCE WITH THE LAW REQUIREMENT

A. The Exception for “Good Faith” Mistakes

One must consider whether any illegality related to the investment, no matter how insignificant, should preclude the jurisdiction of an arbitral tribunal faced with interpreting an “in accordance with the law” clause. This question was addressed in Tokios Tokelès v. Ukraine, where the respondent alleged that the claim should be rejected due to defects in documents filed by the claimant with the respondent in regards to the investment.\textsuperscript{91} The tribunal was unable to conclude whether the documents tendered by the claimant were in fact defective, but nonetheless stated:

Even if we were able to confirm the Respondent’s allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty. In our view, the Respondent’s registration of each of the Claimant’s investments indicates that the “investment” in question was made in accordance with the laws and regulations of Ukraine.\textsuperscript{92}

In coming to this conclusion, the tribunal interpreted the “in accordance with the law” clause in its context and with the object and purpose of the BIT in mind, as required by Article 31 of the Vienna Convention on the Law of Treaties.\textsuperscript{93} Notably, the tribunal determined that “the object and purpose of the BIT is to

\textsuperscript{91} Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 83 (Apr. 29, 2004), 20 ICSID Rev. 205 (2005).
\textsuperscript{92} Id. ¶ 86.
\textsuperscript{93} Id. ¶ 85.
provide broad protection for investors and their investments."\(^{94}\)

As such, according to the *Tokios* tribunal, to exclude jurisdiction over an investment as a result of "minor errors" would not be appropriate, even in the face of a requirement in the applicable investment treaty that investments accord with host-state law.\(^{95}\)

The tribunal in *Fraport* also addressed the issue of whether all types of illegally made investments would result in their exclusion from the jurisdiction of the tribunal. In that case, however, the tribunal did not use a "minor errors" test, which is vulnerable to an overly subjective assessment, but rather adopted a good faith standard. Specifically, the tribunal stated:

When the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith.\(^{96}\)

Explaining what it meant by good faith mistakes, the tribunal gave some examples:

An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue. Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability. This would indicate the good faith of the investor.\(^{97}\)

Based on this explanation, it seems that it would be willing to exclude good faith mistakes from the "in accordance with the

\(^{94}\) Id.

\(^{95}\) Id. ¶ 86; see Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶ 297 (Nov. 8, 2010), http://icsid.worldbank.org/ICSID/ FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1751_En&caseld=C108 (adopting the minor errors test from *Tokios*, that tribunal found: "This Tribunal agrees with the rationale of the tribunal in *Tokios* in reaching its own conclusion that Claimant's investment is not excluded from the Tribunal's jurisdiction by virtue of alleged defects in Claimant's registration paperwork").


\(^{97}\) Id.
law” requirement. In that case, however, the tribunal found that “the comportment of the foreign investor, as is clear from its own records, was egregious and cannot benefit from presumptions which might ordinarily operate in favour of the investor.”

Following the decision in Fraport, the tribunal in Desert Line v. Yemen affirmed the “good faith” standard in assessing the legality of an investment. In Desert Line, the respondent argued that the claimant had failed to obtain a certificate from the Yemen General Investment Authority for its investment, and as such, its investment fell outside of the BIT’s scope of protection. First, the tribunal “did not accept that a particular certificate from the Yemen General Investment Authority was necessary to bring the Claimant’s investment under the ambit of the BIT.”

In any event, in referring to the good faith standard articulated in Fraport, the tribunal found that “[such] leniency would be appropriate in this case . . . .” In the tribunal’s view, the fact that the good faith standard was met in this case was confirmed by asking the question: “is the likelihood that the investor would have received a certificate if he had believed it was necessary and requested it?” The tribunal found that the answer was “overwhelmingly affirmative.” The question asked by the Desert Line tribunal is similar to the Fraport tribunal’s assessment that an investor acts in good faith if it can be said that “the offending arrangement was not central to the profitability of the investment” and that if the investment was made in a way that accorded with the law it would not have adversely affected its profitability.

Though the above cases discuss the exception for good faith mistakes (or minor errors) where the relevant investment treaties contained “in accordance with the law” clauses, the same reasoning applies a fortiori to an assessment of admissibility where no such clause exists. In both instances, good faith mistakes in relation to the investment should not have the disproportionate

98. Id. ¶ 397.
100. Id. ¶ 117.
101. Id.
102. Id.
103. Fraport, ICSID Case No. ARB/03/25, ¶ 396.
effect of precluding a claimant from the benefits of treaty protection.

B. Estoppel by the Host State from Raising the Investment's Illegality

There are certain circumstances where a host state should be precluded from raising the illegality of the investment to avoid the jurisdiction of the tribunal. Estoppel, generally viewed as a principle of international law, is one such circumstance. Affirmations or declarations by a state party are binding on it and entitle reliance by other parties, making it all but impossible for the state to then reverse those actions or its consequences. For example, in the Eastern Greenland Case before the Permanent Court of International Justice, the court held that because Norway had previously “reaffirmed that she recognized the whole of Greenland as Danish,” “she has debarred herself from contesting Danish sovereignty over the whole of Greenland.”

In the context of international investment law, where the host state knew of the illegality but still endorsed the investment, it

104. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 153, 643-44 (7th ed. 2008) (noting that estoppel is based on principles of good faith and consistency and is regularly part of the judicial reasoning of tribunals); CHENG, supra note 38, at 141-42 (“[A] man shall not be allowed to blow hot and cold—to affirm at one time and deny at another. . . . Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel,’ or by any other name, it is one which courts of law have in modern times most usefully adopted.”) (quoting England, Court of Exchequer: Cave v. Mills (1862) 7 Hurlstone & Norman, 913, 927); see also Pan Am. Energy LLC v. Argentine Republic, ICSID Case No. ARB/08/13, Decision on Preliminary Objections, ¶ 159 (July 27, 2006), http://italaw.com/documents/PanAmericanBPJurisdiction-eng.pdf (“Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.”); Pope & Talbot, Inc. v. Canada, NAFTA/UNCITRAL, Interim Award, ¶¶ 110-12 (June 26, 2000), http://www.naftaclaims.com/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf.

105. See Part I.C. MacGibbon, Estoppel in International Law, 7 INT’L & COMP. L.Q. 468, 512 (1958) (“[A] State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim _allegans contraria non audiendus est._”); see also DOLZER & SCHREUER, supra note 82, at 6.

should be estopped from raising that illegality before the tribunal.

As the tribunal in Fraport stated: “[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.”107 In that case, however, the tribunal found that “a covert agreement, which by its nature is unknown to the government officials who may have given approbation to the project, cannot be any basis for estoppel.”108 The tribunal in Desert Line confirmed the principle endorsed by Fraport, noting that, “[i]t would offend the most elementary notions of good faith, and insulting to the Head of State, to imagine that he offered his assurances and acceptance [of the investment] with his fingers crossed, as it were, making a reservation to the effect ‘that we welcome you, but will not extend to you the benefits of our BIT with your country.’”109

Similarly, an affirmative statement by the government ratifying the actions of the investor may lead a tribunal to conclude that there was no violation of the law in the first place.110 In this regard, the tribunal in Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine denied the respondent’s argument that certain contracts comprising claimant’s investment did not accord with the law where Ukrainian representatives had stated, prior to the commencement of the

107. Fraport, ICSID Case No. ARB/03/25, ¶ 346; see R.R. Dev. Corp. v. Republic of Guat., ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, ¶¶ 146–47 (May 18, 2010) (citing Fraport in rejecting Respondent’s argument that Claimant’s investment was not made in accordance with the law because “‘principles of fairness’ should prevent the government from raising ‘violations of its own law as a jurisdictional defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law’”).

108. Id. ¶ 347.


110. See, e.g., Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶ 302 (Oct. 20, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1751_En&caseId=C108 (the tribunal finding that the extension of certain contracts was not illegal given that the extensions “had received the explicit approval of the State Tourism Administration.” This finding was irrespective of the fact that the terms of those same contracts “must be reformed”).
arbitration, that the contracts in question "are valid."\textsuperscript{111} The tribunal found that while it "need not go so far as to rely on this statement under the formal rubric of estoppel" the statement made by the respondent indicated that "Respondent did not at that time consider those contracts (or the payment scheme contained in them) to be illegal under Ukrainian law."\textsuperscript{112}

**CONCLUSION**

It appears clear that where the applicable investment treaty contains a clause requiring the investment to be made in compliance with host-state law, such a requirement is a jurisdictional prerequisite. If parties consent to exclude the application of an investment treaty to investments that do not accord with host-state law, a tribunal cannot defer the question of the investment’s legality to the merits.

On the other hand, where parties do not expressly exclude investments that are not made in accordance with the law from the investment treaty’s coverage, to preclude jurisdiction of the dispute would be to limit jurisdiction in a way not contemplated by the parties. This is not to say that a claimant whose claims are premised on an investment that does not accord with the law should be able to pursue its claims. Indeed, as cases have rightly articulated, there is a substantive obligation to make one’s investment in accordance with the law. In its administration of justice, an arbitral tribunal should not lend its support to a claimant whose claims arise from an investment which was not legally made under the law of the host state or international legal principles. Concerns in this regard become a question of admissibility for the claimant’s claims, \textit{i.e.}, a claimant whose investment was not made in accordance with the law should be precluded from its substantive claims being heard even though the tribunal has jurisdiction over the dispute. In the interest of judicial economy, it may be efficient for a tribunal to decide on

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\textsuperscript{112} Id. The tribunal noted that "this is not a case such as Fraport v. Philippines (cited by Respondent), in which the facts that rendered the investment illegal under the host state’s law were hidden from the state." \textit{Id.}
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questions of jurisdiction and admissibility in the same proceeding. Nevertheless, in certain circumstances it may be necessary to defer the question of admissibility to the merits phase where more facts must be established to assess the validity of the claims.

“In accordance with the law” clauses, found in many investment treaties, are most-often limited to requiring compliance with host-state law. However, there may be a case where a tribunal faced with an “in accordance with host-state law” clause finds that it has jurisdiction, but also finds that the claimant’s claims are inadmissible due to the investment’s non-compliance with international legal principles. Though such an argument has yet to be explored by a tribunal, it appears theoretically possible by following the logic adopted by the Plama tribunal, and, to an extent, the Hamester tribunal.

Further, most investment treaties limit the “in accordance with the law” requirement to compliance with the law at the initiation of the investment. This makes sense given that the entirety of an investment procured or initiated through an illegal act is tainted by that illegality. That is, the investor’s hands are unclean with respect to the entirety of the investment. For the same reason, in assessing the admissibility of a claimant’s claims, the “in accordance with the law assessment” should also be made with respect to the initiation of the investment in question. Illegalities arising at some later stage of the investment may have

113. See, e.g., Southern Bluefin Tuna Case, UNCLOS, Award on Jurisdiction and Admissibility, ¶ 65 (Aug. 4, 2000), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=7_10.pdf. (deciding that because the tribunal “lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan” that it “does not find it necessary to pass upon questions of the admissibility of the dispute”).


115. Such a scenario is unlikely given that any applicable international legal principles would likely be reflected somewhere in the host-state law.
an impact on certain claims based specifically on the illegal conduct, or on the amount of damages granted for a breach, but may not deem all of the claims of the investor inadmissible. There may be an instance, however, where, although the investment is procured legally, illegality pervades the investment to such an extent that all of the claims are in some way based on the claimant's illegality. In such a situation, it should be open to a tribunal to deem all of the claimants' claims inadmissible.

Whether assessing an investment's compliance with the law as a jurisdictional matter or as a matter of admissibility, a tribunal should apply two caveats: 1) a good faith mistake in making an investment should not result in a failure of the investment to benefit from the protection of an investment treaty; and 2) a host state should be estopped from raising the investment's illegality if it knew of the illegality and condoned it. Barring one of these exceptions, a claimant whose investment is not made in accordance with the host-state law or international legal principles should not be permitted to pursue its claims.