Chapter V: Investment Arbitration - Illegal Investments

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I. Introduction

Foreign investment is today regulated by a patchwork of bilateral and regional treaties. The requirement that investments be made in compliance with the laws and regulations of the host State is a common requirement in modern bilateral investment treaties.(1) Many investment protection treaties contain "in accordance with host State law" clauses. The wording of these clauses can, however, differ significantly.

The purpose of such provisions is "to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal", as was explained by the Tribunal in Salini v. Morocco.(2) Most States have sometimes argued that "in accordance with host State law" clauses would limit the definition of investment under the BIT to the domestic notion of investment instead of referring to the legality of the investment. This however was convincingly rejected by a number of tribunals.(3) Furthermore, these clauses also have to be distinguished page "307" from specific approval requirements contained in some investment protection treaties.(4)

Some BITS contain "in accordance with host State law" clauses in the definition of investment. Examples are the Germany Philippines BIT (Fraport), the Lithuania Ukraine BIT (Tokios Tokeles), the Bangladesh Italy BIT (Saipem), the Spain Mexico BIT (Tecmed) and the Oman Yemen BIT (Desert Line).(5) To include the clause in the definition of investment of BITs leads to a paradox: On the one hand host State law becomes a point of reference concerning the extent of the jurisdiction of the Tribunal. In that function host State law can limit the scope page "308" of legal review by the Tribunal. On the other hand host State law is often the very subject of the legal review by the Tribunal, which has to determine whether host State law and its application led to breaches of the BIT. Therefore, host State law becomes yardstick and object of review at once.

Other treaties contain an "in accordance with host State law" clause in the provisions on promotion, admission and protection.(6)

Tribunals have found that where they had to apply a BIT that contained an "in accordance with host State law" clause, an investment that was in violation of host State law did not enjoy the protection of the BIT. But it appears that even where tribunals had to apply a BIT without an "in accordance with host State law" clause, they would refuse to afford protection to investments that are contrary to host State law.

The Tribunal in Plama(7) operated under the Energy Charter Treaty which does not contain an "in accordance with host State law clause". The Tribunal decided, however, that the existence of such a clause is not a prerequisite for a tribunal to be able to deny protection to an illegal investment. The Tribunal in Plama took note of the fact that

> the ECT does not contain a provision requiring the conformity of the Investment with a particular law.(8)

But it stated:

> This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.(9)

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The Tribunal in Phoenix referred to this approach with approval.(10)

The possibility of a denial of investment protection to illegal investments is limited, however, to illegalities committed by the investor. Investment protection treaties allow for the host State to retain a degree of control over foreign investments by denying

protect on to those nvestments that do not comp y w th ts aws.[11] These treat es, however, do

> not a ow a State to prec ude an nvestor from seek ng protect on under the BIT on the ground that ts own act ons are ega under ts own aws. In other words, a host State cannot avo d jur sd ct on under the BIT by nvok ng ts own fa ure to comp y w th ts domest c aw.[12]

Therefore, n Kardassopou os, where Georg an State-owned enterpr ses v o ated Georg an aw by exceed ng the r author ty and thereby had rendered vo d *ab initio* the concess on under Georg an aw, Georg a was unab e to nvoke an " n accordance w th host State aw" c ause n a BIT to deny nvestment protect on.[13] The same approach had prev ous y been taken by the Tr buna n SPP v. Egypt.[14]

For th s reason th s art c e cons ders on y vo at ons of host State aw comm tted by the nvestor.

Tr buna s that dec ned to protect nvestments that were not n accordance w th host State aw have e ther den ed jur sd ct on[15] or have dec ned protect on at the mer ts stage.[16]

II. Denial of Jurisdiction

A. No Legal Investment

One opt on for a Tr buna s to deny jur sd ct on *ratione materiae* for ack of a ega nvestment. Th s s what the tr buna n Fraport[17] d d. It he d that the nvest page "310" ment was not n accordance w th aw and that the tr buna therefore acked jur sd ct on *ratione materiae* Art c e 1 of the Germany Ph pp nes BIT conta ns the fo ow ng def n t on of nvestment:

> Art c e 1 Def n t on of Investment
>
> *For the purpose of this Agreement:*
>
> 1. the term " nvestment" sha mean any k nd of asset accepted ***in accordance with the respective laws and regulations*** *of either Contracting State* …[18]

Fraport nvested n a passenger Term na Project at Man a a rport. The Tr buna found that "[ ]n the event of a pub c ut ty franch se, the proponent and fac ty operator must, n case of a corporat on, be du y reg stered and owned and contro ed up to at east s xty percent (60%) by F p nos, as further requ red by the Ph pp ne Const tut on".[19] The Tr buna found t estab shed that

> Fraport conc uded that the on y p aus b e way for ts equ ty nvestment to prove prof tab e was to arrange secret y for management and contro of the project n a way wh ch the nvestor knew were not n accordance w th the aw of the Ph pp nes.[20]

The Tr buna conc uded that management and contro of the project were accomp shed by ega secret shareho der agreements. It he d that

> Fraport know ng y and ntent ona y c rcumvented the Ant Dummy Law by means of secret shareho der agreements. As a consequence, t cannot c a m to have made an nvestment " n accordance w th aw". … Because there s no " nvestment n accordance w th aw", the Tr buna acks jur sd ct on rat one mater ae.[21]

In a number of other cases tr buna s exam ned whether nvestments comp ed w th host State aw and conc uded that they were ega and therefore protected nvestments. ere are some examp es:

In Sa uka the Respondent a eged that the C a mant had not made ts nvestment n accordance w th host State aw and therefore shou d be den ed protect on under the Treaty.[22] The def n t on of nvestment n Art c e 1 of the Nether ands Czech BIT does not conta n an " n accordance w th host State aw" c ause.[23] Such page "311" a c ause s, however, conta ned n the prov s on on adm ss on n Art c e 2 of the Nether ands Czech BIT.[24] The Tr buna exam ned the ssue neverthe ess as part of the def n t on of nvestment s nce t cons dered comp ance w th host State aw to be an mp c t requ rement of an nvestment:

> 204. The Tribunal notes in passing that, although not in terms part of the definition of an 'investment', it is necessary implicit in Article 2 of the Treaty that an investment must have been made in accordance with the provisions of the host State's laws. In relevant part, Article 2 stipulates that [e]ach Contracting Party … shall admit such investments in accordance with its provisions of law'. Accordingly, and as both parties acknowledge, the obligation upon the host State to admit an investment by a foreign investor (*i e* in the present context, to allow the purchase of shares in a local company) only arises if the purchase is made in compliance with its laws.

One of the arguments of the Czech Republic was that the business plan submitted to the authorities did not contain a disclosure of the future long-term plans and objectives. The Tribunal did not find this to be in violation of host State law and stated:

> While that provision [of an Official Communication of the Czech National Bank] requires the submission of a business plan, the Tribunal has seen nothing to suggest that it imposes a legal obligation upon an investor to disclose its future long-term plans and objectives going far beyond the immediate purposes of its investment in the bank whose shares are being purchased. A business plan's inherent liability to considerable generality, and a Tribunal such as this must hesitate before reading into that liability such a particular and far-reaching content.[25]

Furthermore the Tribunal found that neither the original purchase of the IBP shares (the investment) by Nomura Europe nor the subsequent ownership of them by Saluka showed any breach of the law. On the contrary, the Czech authorities had explicitly acknowledged Saluka's status as the proper owner of those shares. Therefore the Tribunal considered the holding of the shares by Saluka as an investment as required by Article 1 of the BIT.

In Phoenix[26] the applicable BIT contained an "in accordance with host State law" clause in the definition of investment.[27] The Tribunal discussed *in abstracto* page "312" the consequences of violations of host State law by an investor. It stated in an *obiter dictum* that in cases where it is manifest that the investment has been made contrary to law a tribunal may deny its jurisdiction.[28] It found, however, that the investment had been performed in accordance with host State law.[29]

In OKO Pankki v. Estonia[30] a Loan and a Loan Agreement were the original investments. The question arose whether the invalidation of a Payment Agreement for the repayment of the Loan had also invalidated the legality of the Loan and the Loan Agreement. Only investments in accordance with the laws and regulations of the host country were protected by the applicable BITs.[31] The Tribunal denied that an invalidation of the Payment Agreement would invalidate the original investment and deprive it of its jurisdiction. It found that

> it is not disputed that both [the Loan and the Loan Agreement] were made in accordance with the law and regulations then prevailing in Estonian territory. …
>
> [T]he fact that the Payment Agreement was eventually declared invalid by the Estonian Supreme Court cannot here decide the Tribunal's jurisdiction. That decision, …, leaves intact the Bank's investment, *i e* the Loan Agreement and the Loan as originally made …[32]

The cases analysed so far have in common that tribunals discussed whether the alleged legality deprived the investments of their status as protected investments under the BITs.

B. No Valid Consent

Another option for a Tribunal is to deny jurisdiction for lack of consent to arbitration. In Inceysa[33] the Claimant had obtained a concession contract for the page "313" operation of vehicle inspection services. The Ministry of the Environment and Natural Resources of El Salvador decided not to proceed with this contract and finally terminated the concession contract. Inceysa brought a case under ICSID. El Salvador objected to the jurisdiction of ICSID. It claimed that the concession had been obtained by defrauding the State during the public bidding process.

The "in accordance with host State law" clause in the Spain Ecuador BIT is not included in the definition of investment but in the provisions on promotion, admission and protection. The Tribunal found that an exclusion of illegal investments from the protection of a BIT need not be contained in the definition of investment itself. It may also be contained in the BIT's articles that indicate its scope of protection or even in the chapter related to "Promotion and Admission".[34] The relevant provisions in Inceysa read:

> Spain Ecuador BIT (courtesy translation from Spanish)
>
> Article 2 Promotion and Admission
>
> Each Contracting Party [...] will *admit* investments *according to its legal provisions*
>
> The present Article will also apply to investments made before its entry into force by investors of a Contracting Party *in accordance with the laws of the other Contracting Party* in the territory of the latter [...]
>
> Article 3 Protection
>
> [...]
>
> Each Contracting Party shall protect in its territory the investments made *in accordance with its legislation* [...][35]

El Salvador argued that its consent to the jurisdiction of the Centre was limited to differences related to investments made in accordance with the laws of El Salvador. The Tribunal found that the argument that Inceysa's investment was not protected by the BIT was a matter of jurisdiction and not a substantive defence to the merits of the matter.[36]

The Tribunal found it established that Inceysa had submitted in the bid for the concession false financial documentation and had not presented its real financial conditions.[37] Inceysa had intentionally misrepresented its qualifications and capacities[38] and concealed its relationship with another bidder.[39]

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The Tribunal[40] based its decision to decline jurisdiction on the violation of several rules:

It found that falsifying the facts constituted an obvious violation of the principle of good faith by Inceysa. As provided by the legal maxim, *nemo auditur propriam turpitudinem allegans* "nobody can benefit from his own wrong" Inceysa was not entitled to the protection granted by the BIT.[41]

Furthermore, the Tribunal found that to protect investments made fraudulently would be a violation of international public policy.[42] Finally, it held that the acts committed were against the legal principle that prohibits unlawful enrichment. Such enrichment must be sanctioned by preventing its consummation.[43] Since the investment was made in a clearly illegal manner, it was not covered by the necessary consent to arbitrate the dispute.[44]

III. Denial of Substantive Protection

Not only can a tribunal deny protection of an illegal investment by declining jurisdiction. It can also deny investment protection at the merits stage.

A. No Substantive Protection for Illegal Investments

This approach was adopted by the Tribunal in World Duty Free.[45] The case concerned an exclusive concession to run the duty free operations at Kenya's page "315" international airports in Nairobi and Mombasa. The contract under which the Claimant brought its ICSID claims (the 1989 Agreement) had been procured by a payment to the then sitting head of State.[46]

The Respondent argued that the 1989 Agreement was unenforceable and requested the dismissal of the claims.[47] The Tribunal classified the payment as bribe.[48] It found bribery to be in violation of international public policy and to be a crime under Kenyan as well as English law. It was not entirely clear whether Kenyan and/or English law was the applicable law. But both legal orders contained identical rules on corruption and on the legal effects of corruption.[49]

The Tribunal held that it could not enforce a contract secured by corruption:

> 157. In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[50]

Furthermore, the Tribunal held that

> there can be no affirmation or waiver in this case based on the knowledge of the Kenyan President attributable to Kenya. The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery.[51]

The Tribunal dismissed the claims since corruption is against international public policy and against Kenyan and English Law:

> The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws.[52]

The claim advanced by World Duty Free Limited was dismissed.[53]

The Tribunal in Plama,[54] a case decided under the Energy Charter Treaty, adopted a similar approach. There, the Tribunal denied at the merits stage the pro page "316" tection for an investment obtained through misrepresentation and dismissed a claims.

According to the Tribunal the Claimant had misrepresented the actual composition of the investing consortium. The Claimant had presented itself as a consortium of major companies having substantial assets. In truth, an individual, who personally did not have significant financial resources, was acting alone as the sole investor in the guise of that "consortium". The Arbitral Tribunal was persuaded that Bulgaria would not have given its consent to the investment had it been aware of these facts.[55]

The Tribunal decided that the investment was obtained by deceitful conduct, that is, in violation of Bulgarian law. Like the Inceysa tribunal, it was of the view that granting the protection to Claimant's investment would be contrary to the principle *nobody can benefit from his own wrong*. The Tribunal found that it "would also be contrary to the basic notion of international public policy" to enforce a contract obtained by fraudulent misrepresentation.[56]

Furthermore, the Tribunal found that Claimant's conduct was contrary to the principle of *good faith*[57] which is part not only of Bulgarian law but also of international law, as also noted by the tribunal in the Inceysa case:

> The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important where the information is necessary for obtaining the State's approval of the investment.[58]

B. Justification for Government Interference

The legality of an investment has negative consequences for the protection of the investment if a host State successfully invokes violations of host State law as a defence for its interferences with the investment. In such cases tribunals did not find that the substantive protections of the investment protection treaty do not apply. However, they held that these protection standards had not been violated by the host State when taking action in response to the legal threats committed by the investor.

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In Genin v. Estonia, the Claimants were the principal shareholders in

EIB (Eston an Innovat on Bank). One of the C a mants' arguments was that the Respondent, through ts agency, the Bank of Eston a, vo ated the BIT by revok ng EIB's bank ng cence. The Respondent successfu y just f ed the revocat on of the bank ng cence by nvok ng ser ous vo at ons of the Eston an bank ng code by EIB.(59)

Thunderb rd v. Mex co(60) nvo ved a Canad an company operat ng three v deo gamb ng fac t es n Mex co. Mex can Law proh b ted gamb ng and uck-re ated games w th n Mex can terr tory. The government c osed the fac t es as ega . Thunderb rd cha enged the c osures before a NAFTA tr buna .

Thunderb rd a eged that a breach of the fa r and equ tab e treatment protect on under Art c e 1105 NAFTA had occurred s nce t had re ed on an off c a op n on of the gam ng regu ator on the ega ty of the mach nes. The gam ng regu ator had ssued an op n on on the ega ty of the mach nes n wh ch t restated the proh b t on on gamb ng but conf rmed that t had no power to proh b t mach nes that operated n the form and cond t ons descr bed by the nvestor.(61)

Later the gam ng regu ator began to c ose each of the fac t es n wh ch Thunderb rd had an ownersh p stake on the bas s that the mach nes used n those fac t es were proh b ted gamb ng equ pment under Mex can aw.

The Tr buna found that when obta n ng the off c a op n on Thunderb rd had not d sc osed key nformat on about the mach nes. Th s was fata for any eg t mate expectat on' and for the nvestor's re ance on any representat on.

The Tr buna den ed a vo at on of fa r and equ tab e treatment and he d that no compensat on was owed for a regu atory tak ng s nce the nvestor never enjoyed a vested r ght n the bus ness act v ty that was subsequent y proh b ted.(62)

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Therefore, three types of react on to ega nvestments have emerged so far n the case- aw of arb tra tr buna s:

- den a of jur sd ct on (no ega nvestment or no va d consent)
- den a of app cab ty of the substant ve standards at the mer ts stage
- no vo at on of a standard because of a just f ed nterference.

IV. Standards for the Relevance of a Violation of Host State Law

In those cases where the nvestments were obta ned n an ega way nvestment protect on nc ud ng access to the standards of protect on was den ed e ther n the dec s on on jur sd ct on or when dea ng on the mer ts.

Where the ega t es occurred n the performance of the nvestment the tr buna s d d not deny access to the substant ve standards. But they dec ded that the standards had not been vo ated by the State act on w th respect to the nvestment. Th s was the case rrespect ve of whether the act v ty per se was ega or whether the way n wh ch the nvestment operated was ega .

It s c ear that not every m nor nfract on w ead to a den a of nvestment protect on. On y breaches of fundamenta norms of a ega order w have such an effect. The s gn f cance of the contravent on to host State aw w be the most mportant factor n the dec s on whether the eg t macy of the nvestment as a who e s at stake. Somet mes the grav ty of the contravent on on ts own w not prov de an exact ne between cases where nvestment protect on shou d be den ed and those where t shou d be uphe d. At the two ends of the spectrum very mportant norm and m nor forma ty dec s ons w be easy to take. In the m dd e other factors ke the ones ment oned be ow may contr bute to the assessment.

The poss b ty to take ega t es a so nto cons derat on when dec d ng on the breach of the substant a standards w make the job of nvestment tr buna s eas er. In case of doubt a tr buna may choose to ook at the ega ty when exam n ng the comp ance w th the substant ve standards by the host State rather than to deny nvestment protect on from the outset. Th s s a so an appropr ate approach for those cases, where the ega ty s not apparent from the outset.

The case- aw so far does not prov de for exact standards to dec de when a breach of host State aw eads to the exc us on from nvestment protect on. owever, here are some e ements wh ch were taken nto cons derat on by tr buna s:

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A. Major Infractions Affecting the Legitimacy of the Project as a Whole

1. The Gravity of the Contravention of Host State Law

Tribunals have examined whether the way in which the investments were obtained or the activity per se was in violation of important principles of host State law or international law.

The Tribunal in Inceysa[63] explicitly stated that an investment made in significant contravention of Salvadoran law, such as through gross misrepresentation or fraud in a government tender process does not enjoy investment protection.

In the cases in which investment protection was denied Tribunals found that misrepresentations,[64] corruption,[65] fraud[66] or intentional circumvention of a constitutional norm and a norm of an ant dummy law[67] had occurred. In all of these cases the Tribunals found that the investment was obtained as a consequence of the breach of legal requirements.

The Tribunals in LESI and Astaldi v. Algeria[68] and in Rumeli v. Kazakhstan[69] stated that a certain level of violation of host State's laws and regulations is required to defeat the Tribunal's jurisdiction based on a BIT's requirement that the disputed investments be in conformity with the host State's laws. The Rumeli Tribunal stated that

> 168. … As determined by the Arbitral Tribunal in the *LESI* case, such a provision will exclude the protection of investments only if they have been *made in breach of fundamental legal principles of the host country ('en violation des principes fondamentaux en vigueur')* [70]

In Desert Line v. Yemen the Tribunal summarized arbitral precedents and also resorted to the standard of a violation of fundamental principles of host State law as triggering the exclusion from investment protection. It stated that such clauses are page "320"

> intended to ensure the legality of the investment by excluding investment made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or dissimulation of true ownership.[71]

In Phoenix v. Czech Republic, the Tribunal in an *obiter dictum* referred to a situation in which an investment activity *per se* is in contradiction with fundamental norms of international law. The Tribunal concluded that in such a situation no investment protection should be granted:

> … nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.[72]

By contrast, arbitral tribunals have considered minor errors in the observance of bureaucratic formalities of the domestic law as irrelevant.

In Tokios Tokeles v. Ukraine[73] the respondent alleged that the full name under which the Claimant registered its subsidiary was improper because it was not a recognized legal form under Ukrainian law. The Tribunal took note of the fact that the Respondent did not allege that the Claimant's investment and business activity were illegal *per se* It also found irrelevant that despite the not entirely correct formalities the investment had been registered. The Tribunal held that

> 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.[74]

In Metalpar v. Argentina[75] the legality concerned failures to

reg ster compan es at the appropr ate t me. Reg strat on was a requ rement under Argent nean aw but not prov ded for n the BIT. Argent na argued that th s fa ure shou d bar the compan es from access to ICSID. The Tr buna rejected th s content on. It stated that Argent nean aw prescr bed ts own sanct ons for such fa ures. Furthermore, to pun sh reg strat on fa ures w th exc us on from nvestment protect on wou d be d sproport onate:

> 84. A ju c o de Tr buna , a fa ta de reg stro oportuno podría sanc onarse denegando a nscr pc ón de determ nados documentos de a soc edad, med ante e aperc b m ento, o a mpos c ón de una mu ta a a soc edad o a page "321" sus func onar os, pero sería desproporc onado cast gar esa om s ón negándo e a nvers on sta una protecc ón esenc a como es e acceso a os tr buna es arb tra es de CIADI. Además, sería óg co adm t r que determ nada conducta (a fa ta de reg stro oportuno) para a que e ordenam ento ega argent no prevé unas sanc ones específ cas pud era sanc onarse, además, de otra forma no prev sta en ese ordenam ento.(76)
>
> Courtesy trans at on from Span sh
>
> In the v ew of the Tr buna , the ack of t me y reg strat on cou d be sanct oned by a den a of the nscr pt on of certa n documents of the soc ety, by a warn ng or the mpos t on of a f ne to the company or ts off c a s, but t wou d be d sproport onate to pun sh th s om ss on w th deny ng an nvestor an essent a protect on as the access to ICSID arb trat on.

Add t ona y, t wou d be og ca to adm t that certa n behav our (the ack of t me y reg strat on) for wh ch the Argent nean ega system prov des for spec f c sanct ons cou d be pun shed, add t ona y, n other forms not prov ded for n that ega order.

The Tr buna n Myt neos v. Serb a(77) wh ch rejected the host State's c a m to deny nvestment protect on a so h nted to the fact that the act v ty per se was not ega . It referred to Tok os Toke es w th approva and stressed that t was mportant for the Tok os Toke es Tr buna that the nvestment act v ty as such was ega :

> The [Tok os Toke es] tr buna rejected th s c a m and found that C a mant's act v ty was covered by the def n t on of nvestment under the BIT s nce those nvestment act v t es n the pub sh ng bus ness were not ega under the aw of the host State. The tr buna further suggested that m nor reg strat on rregu ar t es are harm ess errors as ong as the nvestment was not *'illegal per se'*(78)

S nce t was not even argued by Respondent n Myt neos that the bus ness act v t es were ega , The Tr buna found no reason for the nvestment not to be protected under the BIT:

> 154. In the present case, even Respondents d d not contend that C a mant's act v t es were ega . In fact they express y stated that Respondents do not contend that the Agreements were not n comp ance w th the aws e ther they on y say that the Agreements were not reg stered as nvestment agreements, most certa n y because the part es d d not cons der them as fram ng nvestments at a , but on y as regu at ng ong-term commerc a transact ons.'
>
> page "322"
>
> 157. The Tr buna thus conc udes, by a major ty, that for the purposes of the BIT the nvestment has been made n accordance w th the aws of Serb a and Montenegro and s thus protected under the BIT.(79)

2. The Importance of the Offending Arrangement for the Profitability of the Investment

The mportance of the offend ng arrangement for the prof tab ty of the nvestment can serve as further e ement n estab sh ng whether the nvestment project as a who e acks eg t macy. It can be a support ng e ement for dec d ng whether nvestment protect on shou d be den ed ent re y or whether the ega ty shou d better be taken nto cons derat on when assess ng whether the host State has v o ated a substant ve standard.

The Tr buna n Fraport d scussed th s e ement when t stated that t w work n favour of an nvestor who comm tted an ega ty f that

ega ty wou d not be of major nf uence for the prof tab ty of the nvestment. The Tr buna sa d:

> 396. … Another nd cator that shou d work n favour of an nvestor that had run afou of a proh b t on n oca aw wou d be that the offend ng arrangement was not centra to the prof tab ty of the nvestment, such that the nvestor m ght have made the nvestment n ways that accorded w th oca aw w thout any oss of projected prof tab ty.(80)

In Fraport, however, the nvestor apparent y was of the op n on that w thout the ega arrangements the nvestment cou d not operate n a prof tab e way:

> 355. … In the context of the nterna Fraport documents, the secret shareho der agreements show that Fraport from the outset understood, w th prec s on, the Ph pp ne ega proh b t on but be eved that f t comp ed w th t, the prospect ve nvestment cou d not be prof tab e.
>
> 398. The record nd cates that … oca counse exp c t y warned that a part cu ar structura arrangement wou d vo ate a ser ous prov s on of Ph pp ne aw. Moreover, the vo at on *qua* vo at on was exp c t y d scussed at the eve of the Board of D rectors. In v ew of the due d gence study prepared by f nanc a experts (who had apparent y not been br efed on the oca aw restr ct ons), the nvestor, Fraport, conc uded that the on y p aus b e way for ts equ ty nvestment to prove prof tab e was to arrange secret y for management and contro of the project n a way wh ch the nvestor knew were not n accordance w th the aw of the Ph pp nes. Th s was accomp shed by Art c e 2.02 of the FAGPAIRCARGO-PAGS-PTI Shareho ders' Agreement of 6 Ju y 1999 wh ch a owed Fraport (or FAG as t was then known) to have a cast ng and contro ng vote over matters wh ch fe w th n ts area of exper page "323" t se and competence'. Thus the vo at on cou d not be deemed to be nadvertent and rre evant to the nvestment. It was centra to the success of the project. The awareness that the arrangements were not n accordance w th Ph pp ne aw was man fested by the dec s on to make the arrangements secret y and to try to make them effect ve under fore gn aw. A of these facts der ve from nterna Fraport documents whose cred b ty can hard y be mpeached by Fraport.(81)

3. The Investor's Awareness of the Illegality

A though not a ways easy to prove, a further e ement, that s taken nto cons derat on by tr buna s n estab sh ng whether they shou d grant nvestment protect on, s the nvestor's awareness of the ega ty of the nvestment.

The Tr buna n Fraport v. Ph pp nes took know edge of and nformat on by oca counse on the ex stence of an ega ty as a benchmark:

> 396. When the quest on s whether the nvestment s n accordance w th the aw of the host state, cons derab e arguments may be made n favour of constru ng jur sd ct on *ratione materiae* n a more bera way wh ch s generous to the nvestor. In some c rcumstances, the aw n quest on of the host state may not be ent re y c ear and m stakes may be made n good fa th. An nd cator of a good fa th error wou d be the fa ure of a competent oca counse 's ega due d gence report to f ag that ssue. …
>
> 397. In th s case, the comportment of the fore gn nvestor, as s c ear from ts own records, was egreg ous and cannot benef t from presumpt ons wh ch m ght ord nar y operate n favour of the nvestor.

An nd cat on of the nvestor's awareness of the ega ty s whether there were efforts to h de the ega ty.(82) In Fraport the Tr buna ment oned that secret shareho der agreements show that the nvestor knew from the beg nn ng that the construct on of ts nvestment was ega and that t tr ed to h de that ega ty:

> 355. … The Tr buna 's concern here s … w th the secret shareho der agreements. In the context of the

nterna Fraport documents, the secret shareho der agreements show that Fraport from the outset understood, w th prec s on, the Ph pp ne ega proh b t on but be eved that f t comp ed w th t, the prospect ve nvestment cou d not be prof tab e. So t e ected to proceed w th the nvestment by secret y vo at ng Ph pp ne aw through the secret shareho der agreements. These agreements ev dence that Fraport p anned and knew that ts nvestment was not n accordance' w th Ph pp ne aw.

Bes de the actua awareness of the ega ty wh ch was estab shed n Fraport, a certa n due d gence can be requ red from an nvestor. The Tr buna n Fraport page "324" stated, however, that n case of an nvestment made n good fa th, wh ch was not the case there, a certa n en ency can be granted to nvestors.

The Tr buna n Desert L ne v. Yemen approved th s approach.(83) In that case Respondent argued that s nce C a mant's nvestment was never forma y "accepted" by the Respondent as an nvestment accord ng to ts aws and regu at ons C a mant shou d not have access to nvestment protect on. The nvestment had, however, been endorsed at the h ghest eve of the State and benef ts of the Yemen te Investment Law had been extended to the nvestment by an ad hoc dec s on of the V ce Pr me M n ster. Therefore, the Desert L ne Tr buna found that the pure y forma requ rement of "acceptance" shou d not ead to a depr vat on of nvestment protect on but that the en ency ment oned by the Fraport Tr buna shou d be app ed:

> 117. Such en ency wou d be appropr ate n th s case, as s conf rmed when one puts the hypothet ca quest on: s the ke hood that the nvestor wou d have rece ved a cert f cate f he had be eved t was necessary and requested t? The answer s overwhe m ng y aff rmat ve, both because of the genera endorsement of the nvestment at the h ghest eve of the State, and n ght of the extens on of YIL benef ts by the *ad hoc* dec s on commun cated by the V ce Pr me M n ster.

B. Cure or Estoppel Because of Informal Acceptance by the Host State

Know ng acceptance by the host State can cure the breach of the host State aw or estopp the host State from ra s ng the ega ty. ere are some examp es:

In SwemBa t v. Latva(84) the Latv an author t es removed a sh p owned by SwemBa t from ts berth where t was a eged y ega y moored. It prevented the nvestor from us ng the sh p and then auct oned the sh p w thout payment of compensat on. The Tr buna repeated y re ed upon Respondents behav our to dec de upon the ega ty of the nvestor's act ons or the va d ty of ega acts. Among other th ngs t found that four months to erance of the author t es of an a eged y ega y moored sh p was too ong. Therefore, the government cou d not re y on the a eged ega ty:

> 34. … We f nd t surpr s ng that SwemBa t has not been nformed at an ear er stage, when dur ng the autumn of 1993 t negot ated w th … author t es about the project, about the ega ty hereof. It s a so surpr s ng that the harbour master … shou d have taken part w th a p ot and two tow page "325" boats n tow ng the sh p to K psa a, f the moor ng of the sh p was ega . F na y, t s surpr s ng that the author t es wa ted for more than four months before tak ng any measures n that regard, f rea y the who e enterpr se was ega .
>
> 35. In these c rcumstances we f nd that SwemBa t has shown, that n a ke hood t has comp ed w th Lavan aw, that the Respondent has not shown that the nvestment was not made n accordance w th the aws and regu at ons of Latv a, and that n any event the act ons of the Respondent were out of proport on w th any non-comp ance that may have ex sted.(85)

In Tok os Toke es v. Ukra ne the Tr buna found that the reg strat on of each of the C a mant's nvestments desp te ncorrect forma t es nd cated that the " nvestment" n quest on was made n accordance w th the aws and regu at ons of Ukra ne. As a consequence, the a eged ega t es cou d no onger be re ed on by the government.(86)

In Tecmed v. Mex co[87] Mex co just f ed a reso ut on deny ng the renewa of a perm t for a waste d sposa fac ty w th rregu ar t es comm tted dur ng the andf 's operat on. The author t es cou d not have been unaware of the ex stence of the a eged rregu ar t es or nfr ngements. owever, they d d not act and nform the nvestor that these rregu ar t es m ght jeopard ze the perm t's renewa . Therefore, the Tr buna d d not accept the rregu ar t es as just f cat on and cons dered the den a on these grounds to be excess ve y forma st c.[88] It found that a vo at on of fa r and equ tab e treatment and an expropr at on had occurred.[89]

As a ready ment oned, the Tr buna n Kardassopou os v. Georg a[90] he d that Georg a cou d not re y on an "n accordance w th host State aw" c ause s nce t was the State-owned enterpr ses that vo ated Georg an aw.[91] owever, the Tr buna found Respondent a so to be *estopped* from argu ng that the agreements were vo d *ab initio* under Georg an aw. The Tr buna s rat ona e was that C a mant had a eg t mate expectat on that h s nvestment n Georg a was n accordance w th re evant oca aws s nce the content of the agreements had been approved by Georg an Government off c a s for many years w thout object ons as to the r ega ty.[92]

Other Tr buna s ment oned the poss b ty of an estoppe , acqu escence to a vo at on of host State aw or a wa ver to nvoke t but den ed t n pract ce: n Fraport v. Ph pp nes[93] the Tr buna ment oned the poss b ty of an estoppe : page "326"

> 346. There s, however, the quest on of estoppe . Pr nc p es of fa ness shou d requ re a tr buna to ho d a government estopped from ra s ng vo at ons of ts own aw as a jur sd ct ona defense when t know ng y over ooked them and endorsed an nvestment wh ch was not n comp ance w th ts aw.

It den ed, however, that an estoppe had occurred:

> 347. But a covert arrangement, wh ch by ts nature s unknown to the government off c a s who may have g ven approbat on to the project, cannot be any bas s for estoppe : the covert character of the arrangement wou d depr ve any ega va d ty (assum ng that nforma and poss b y *contra legem* endorsements wou d have ega va d ty under the re evant aw) that an express on of approbat on or an endorsement m ght otherw se have had. There s no nd cat on n the record that the Repub c of the Ph pp nes knew, shou d have known or cou d have known of the covert arrangements wh ch were not n accordance w th Ph pp ne aw when Fraport f rst made ts nvestment n 1999.[94]

> 387. As a matter of aw, the C a mant s correct that the cumu at ve act ons of a host government may const tute an nforma acceptance' of a fore gn nvestment that otherw se vo ates ts aw. The C a mant s a so correct that a fa ure to prosecute someth ng of the order of a vo at on of the ADL, such that an nvestor reasonab y nferred that t was act ng awfu y and made further nvestments, cou d obv ate an object on to jur sd ct on *ratione materiae* The ssue here, however, s fact. The C a mant, know ng of the vo at on of the ADL, consc ous y concea ed t, such that any act ons that m ght otherw se have been v ewed by a fore gn nvestor n good fa th as endorsements by the Ph pp ne government cannot be deemed to have cured the vo at on or estopped the Government. The Respondent cou d hard y have n t ated ega act on aga nst the C a mant for vo at ons wh ch the C a mant had concea ed.[95]

Furthermore, the Tr buna a so exc uded the poss b ty that a wa ver had occurred. It he d that the nvestor cannot c a m that

> … h gh off c a s of the Respondent subsequent y wa ved the ega requ rements and va dated Fraport's nvestment, for the Respondent's off c a s cou d not have known of the vo at on.[96]

In Wor d Duty Free v. Kenya[97] C a mant a eged that Kenya wou d e ther be estopped or wou d have wa ved ts r ght to nvoke the br bery. The Tr buna found n th s regard that Kenya on y earned of the fact when t rece ved C a mant's wr t page "327" ten w tness statement. Therefore, t rejected the content on of an estoppe as we as of a wa ver. It stated:

> 184. … There can be no aff rmat on or wa ver by Kenya

> w thout know edge; and as Lord Must stated n h s op n on, [a] party cannot wa ve a r ght wh ch he does not know to ex st'.

The know edge of the Kenyan Pres dent was not attr buted to Kenya for the purpose of a wa ver:

> 185. Moreover, there can be no aff rmat on or wa ver n th s case based on the know edge of the Kenyan Pres dent attr butab e to Kenya. The Pres dent was here act ng corrupt y, to the detr ment of Kenya and n vo at on of Kenyan aw (nc ud ng the 1956 Act). There s no warrant at Eng sh or Kenyan aw for attr but ng know edge to the state (as the otherw se nnocent pr nc pa) of a state off cer engaged as ts agent n br bery.

In Thunderb rd v. Mex co the Tr buna found that the fact that t took s x months unt the gam ng regu ator began to c ose fac t es was not suff c ent to estab sh that pr or to that date, the author t es had author sed (or were ntent ona y to erat ng) Thunderb rd's operat ons.(98)

In Desert L ne v. Yemen(99) the Tr buna found that Respondent had wa ved the cert f cate requ rement because of the endorsement of the nvestment at the h ghest eve of the State and the extens on of benef ts under the Yemen te Investment Law by the V ce Pr me M n ster to the nvestment. It he d that the Respondent " s estopped from re y ng on t to defeat jur sd ct on".(100) The Tr buna referred to the approach of the Fraport Tr buna concern ng estoppe w th approva :

> Pr nc p es of fa rness shou d requ re a tr buna to ho d a government estopped from ra s ng vo at ons of ts own aw as a jur sd ct ona defense when t know ng y over ooked them and endorsed an nvestment wh ch was not n comp ance w th ts aw.'(101) Th s comment app es *a fortiori* when the a eged prob em s not vo at on of aw, but mere y as here the fa ure to accomp sh a forma ty foreseen by aw, and not even requ red by t except as a cond t on of obta n ng benef ts unconnected w th those of the BIT tse f.(102)

The essent a cr ter a, as estab shed by these Tr buna s, are that a State know ng y over ooks a fa ure to comp y w th ts aw and endorses an nvestment wh ch page "328" was not n comp ance w th ts aw. Therefore, an nforma acceptance can cure a vo at on of host State aw, f the host State know ng y to erates the conduct of the nvestor for a certa n t me.

C. Time Element – Illegality at the Time of the Establishment or Later on

A further ssue to be cons dered s the t me e ement. Severa d fferent types of s tuat ons may ar se.

An nvestment may be ega *ab initio* But t s a so poss b e that an nvestment was n accordance w th host State aw at the moment of the n t at on of the nvestment and the contravent on of host State aw occurs ater on dur ng the operat on of the nvestment. Th s may e ther be the resu t of a change of host State aw dur ng the t me of operat on of the nvestment or the resu t of a change of the nvestor's act ons.

Shou d such ega t es depr ve a tr buna of ts jur sd ct on or be hand ed at the mer ts stage?

The Tr buna n Fraport(103) stated n an *obiter dictum* that the re evant po nt n t me for purposes of jur sd ct on s the start of the nvestment:

> 344. W th respect to the tempora extens on of the cond t on n the re evant prov s ons of the BIT, t has been contended by the Respondent and some of ts experts that an nvestment, n order to ma nta n jur sd ct ona stand ng under the BIT, must not on y be n accordance' w th re evant domest c aw at the t me of commencement of the nvestment but must cont nuous y rema n n comp ance w th domest c aw, such that a departure from some aws or regu at ons n the course of the operat on of the BIT wou d depr ve a tr buna under the BIT of jur sd ct on.
>
> 345. A though th s content on s not re evant to the ana ys s of the prob em wh ch the Tr buna has before

t, name y the entry of the nvestment and not the way t was subsequent y conducted, the Tr buna wou d note that th s part of the Respondent's nterpretat on appears to be a forced construct on of the pert nent prov s ons n the context of the ent re Treaty. The anguage of both Art c es 1 and 2 of the BIT emphas zes the *initiation* of the nvestment. Moreover the effect ve operat on of the BIT reg me wou d appear to requ re that jur sd ct ona comp ance be m ted to the n t at on of the nvestment. If, at the t me of the n t at on of the nvestment, there has been comp ance w th the aw of the host state, a egat ons by the host state of vo at ons of ts aw n the course of the nvestment, as a just f cat on for state act on w th respect to the nvestment, m ght be a defense to c a med *substantive* page "329" vo at ons of the BIT, but cou d not depr ve a tr buna act ng under the author ty of the BIT of ts jur sd ct on.(104)

The Tr buna n Phoen x(105) he d that mod f cat ons of host State aw after the estab shment of an nvestment shou d not ead to a m tat on of the jur sd ct on of an nvestment tr buna :

> 102. The core esson s that the purpose of the nternat ona protect on through ICSID arb trat on cannot be granted to nvestments that are made contrary to aw. The fact that an nvestment s n vo at on of the aws of the host State can be man fest and w therefore a ow the tr buna to deny ts jur sd ct on. Or, the fact that the nvestment s n vo at on of the aws of the host State can on y appear when dea ng w th the mer ts, whether t was not known before that stage or whether the tr buna cons dered t best to be ana yzed a[t] the mer ts stage, ke n the case of *Plama*
>
> 103. Of course, the ana ys s of the conform ty of the nvestment w th the host State's aws has to be performed tak ng nto account the aws n force at the moment of the estab shment of the nvestment. The State s not at berty to mod fy the scope of ts ob gat ons under the nternat ona treat es on the protect on of fore gn nvestments, by s mp y mod fy ng ts eg s at on or the scope of what t qua f es as an nvestment that comp es w th ts own aws.
>
> 104. There s no doubt that the requ rement of the conform ty w th aw s mportant n respect of the access to the substant ve prov s ons on the protect on of the nvestor under the BIT. Th s access can be den ed through a dec s on on the mer ts. owever, f t s man fest that the nvestment has been performed n vo at on of the aw, t s n ne w th jud c a economy not to assert jur sd ct on.(106)

Th s approach, to address ega t es that ar se after the estab shment of an nvestment at the mer ts stage, f nds support n the anguage of many BITs on th s ssue. ere are some examp es:(107)

The Ch nese Mode BIT (2003) conta ns the " n accordance w th host State aw" c ause n the c ause on adm ss on. It reads:

> Art c e 2 Promot on and Protect on of Investment
>
> 1. Each Contract ng Party sha … adm t such nvestments n accordance w th ts aws and regu at ons.

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The French Mode BIT (2006) prov des:

> Art c e 1 Déf n t ons
>
> …
>
> 1. Le term nvest ssment' dés gne …
>
> l est entendu que es d ts avo rs do vent être ou avo r été nvest s conformément à a ég s at on de a Part e contractante …
>
> Art c e 3 Encouragement et adm ss on des nvest ssements
>
> Chacune des Part es contractantes encourage et

admet, dans e cadre de sa eg s at on et des d spos t ons du present accord, es nvest ssements effectués par es nvest sseurs de 'autre Part e …

The German Mode BIT (2005) prov des n Art c e 9

Th s Treaty sha a so app y to nvestments made pr or to ts entry nto force by nvestors of e ther Contract ng State n the terr tory of the other Contract ng State cons stent w th the atter's eg s at on.

Czech Repub c Israe BIT[108] prov des n Art c e 1

For the purposes of the present Agreement

1. The term nvestment' sha compr se any k nd of assets nvested n connect on w th econom c act v t es by an nvestor of one Contract ng Party n the terr tory of the other Contract ng Party n accordance w th the aws and regu at ons of the atter and sha nc ude, n part cu ar, though not exc us ve y: …

The BITs wh ch conta n the c ause n ts regu at ons on adm ss on a refer to the adm ss on as the re evant po nt n t me. At that po nt the nvestment must be n conform ty w th host State aw for jur sd ct ona purposes. The text of the French Mode BIT wh ch conta ns such a c ause n the def n t on of nvestment as we as n the regu at ons on adm ss on a so nd cates that the re evant po nt n t me s when the nvestment s made.

The same s true for treat es wh ch ke the Czech Repub c Israe BIT conta n the c ause on y n the def n t on of nvestment. It a so speaks n the past when t uses the phrase "any k nd of assets nvested … n accordance w th the aws …".

The treat es as we as the two dec s ons referred to above a focus on the t me of the estab shment of the nvestment. At f rst s ght th s approach appears em nent y reasonab e. Th s eads, however, to the quest on whether "the t me of the nvestment" can a ways be determ ned w th accuracy. In part cu ar, t may be open to doubt whether an nvestment s necessar y a one t me event that can be reduced to a part cu ar date.

An nvestment s often a process rather than an nstantaneous act. To take a re at ve y s mp e examp e: shares of a oca company are somet mes acqu red n severa steps over t me rather than at once. An nvestment operat on s often com page "331" posed of a number of d verse transact ons and act v t es, wh ch must be treated as an ntegrated who e. Therefore, an nvestment s often a comp ex process nvo v ng d verse transact ons wh ch have a separate ega ex stence but a common econom c a m.

To a certa n extent th s s a ready ref ected n the def n t on of " nvestment" conta ned n BITs and other treat es cover ng a var ety of d fferent r ghts and transact ons. Tr buna s have emphas zed repeated y that what mattered for the ex stence of an nvestment was not so much ownersh p of spec f c assets but rather the comb nat on of r ghts that were necessary for the econom c act v ty at ssue. Th s doctr ne of the "genera un ty of an nvestment operat on" was set out a ready n the very f rst case that came before an ICSID tr buna , o day Inns v. Morocco.[109]

There s cons stent case aw show ng that tr buna s, when exam n ng the ex stence of an nvestment for purposes of the r jur sd ct on, have not ooked at spec f c transact ons but at the overa operat on.[110] Tr buna s have refused to d ssect an nvestment nto nd v dua steps taken by the nvestor, even f these steps were dent f ab e as separate ega transact ons. What mattered for the dent f cat on and protect on of the nvestment was the ent re operat on d rected at the nvestment's overa econom c goa .

Therefore, the approach descr bed above w not ead to a sat sfactory resu t when t cannot be dec ded when exact y the nvestment was estab shed. The ega ty may have occurred at a t me when certa n steps n the process of estab shment were a ready undertaken wh e others st fo ow at a ater stage.

What cou d tr buna s ook at n such s tuat ons? The ssue s not "to react or not to react at a " but rather wh ch of the three opt ons 1) den a of jur sd ct on, 2) den a of app cab ty of the substant ve standards at the mer ts stage or 3) no v o at on of a standard because of a just f ed nterference shou d be chosen.

In s tuat ons where the ega ty occurred a ready to obta n the n t a nvestment ke corrupt on or fraud a den a of jur sd ct on w be the appropr ate react on. In cases of doubt opt on two, to deny the

app cab ty of the substant ve standard at the mer ts stage, seems to be the appropr ate response.

The Tr buna n Berschader[111] opted for the atter approach. It sa d:

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> 111. The Respondent has further contended that the nvestments re ed upon by the C a mants were ega and, as a resu t, do not sat sfy the requ rements of comp ance w th the aws of the Russ an Federat on conta ned n Art c e 1.2 of the Treaty. The Tr buna s of the v ew that the awfu ness of the nvestments re ed upon by the C a mants s a not an ssue affect ng the jur sd ct on of the Tr buna , but rather a substant ve ssue perta n ng to the mer ts of the case. It wou d, therefore, be nappropr ate for the Tr buna to cons der th s ssue at th s stage n the proceed ngs.

Mod f cat ons of host State aw dur ng the nvestment process have to be carefu y scrut n zed by tr buna s. The paradox ment oned ear er whereby host State aw may m t the scope of ega rev ew and at the same t me s the object of that ega rev ew may ga n re evance here.

To g ve an examp e, f the conduct of an nvestor was n accordance w th host State aw at the t me of the nvestment and the host State, ater dur ng the fet me of the nvestment, adapts ts ega order to br ng t nto ne w th nternat ona human r ghts standards, the ssue w be comp cated.[112] In such a case t shou d be dec ded as a matter of substance whether nvestment protect on shou d be den ed. Whether human r ghts abuses' of an nvestor wh ch were n accordance w th host State aw at the t me of the n t a nvestment but are n breach of a new nat ona norm shou d ead to a oss of nvestment protect on cannot be answered n the abstract. The same ho ds true for new env ronmenta regu at ons or hea th regu at ons. In such a s tuat on the expectat ons of the nvestor w have to be ba anced aga nst the regu atory nterest of the State under the respect ve treaty protect on standards. Often, t w be preferab e not to deny nvestor protect on from the outset but to str ve for an approach that eads to an econom c burden shar ng between the nvestor and the host State. The resu t shou d depend on a number of factors: amongst them the conduct and the eg t mate expectat ons of the nvestor as we as the regu atory nterests of the State and the econom c consequences for the State and the nvestor.

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The form n wh ch the object on s ra sed w a so nf uence at what stage of the proceed ngs the treatment of ega nvestments w be addressed. It w make a d fference whether the Respondent c a ms that the tr buna shou d deny jur sd ct on because of the ega ty or whether the object on s on y brought as a substant ve defence.

V. Summary and Conclusions

A d squa f cat on of ega nvestments from nternat ona protect on s common to many nvestment protect on treat es. Efforts of respondent States to use " n accordance w th host State aw" c auses n order to mpose def n t ons of nvestment conta ned n oca aw have fa ed. These c auses on y concern the ega ty of an nvestment and not ts def n t on.

Furthermore, on y ega t es mputab e on the nvestor w ead to an exc us on from nvestment protect on. Th s w not be the case f the ega ty s attr butab e to State organs.

"In accordance w th host State aw" c auses are found n d fferent contexts (def n t on of nvestment, adm ss on prov s on etc.) n b atera nvestment protect on treat es. They re ate to the way n wh ch the nvestment s estab shed as we as to the nvestment act v ty as such.

C auses n the def n t on of nvestment referr ng to host State aw m t the jur sd ct on on y w th regard to the ega ty of the nvestment. The mean ng of the term " nvestment" as such does not depend on host State aw. If the c auses are conta ned n the def n t on of nvestment host State aw has a paradox ca doub e ro e as po nt of reference for tr buna s and as object of rev ew. The d fferent contexts n wh ch the "host State aw" c auses are found n the var ous treat es have not so far had any nf uence on the nterpretat on of these c auses by tr buna s.[113]

Desp te the scarce case- aw on the ssue, arb tra pract ce prov des some gu dance on re evant cr ter a for the exc us on of ega nvestment from protect on. Major nfract ons of host State aw that

affect the eg t macy of an nvestment project as a who e have severe consequences for the protect on of an nvestment. Tr buna s use three approaches: 1) Tr buna s that den ed jur sd ct on have e ther he d that there s no protected nvestment or that there s no consent to arb trate. 2) In other cases they dec ded that there was an nvestment, but that t s not protected and hence d sm ssed the case on the mer ts. 3) In s tuat ons, where Respondent successfu y nvoked vo at ons of host State aw as a just f cat on for an nterference, tr buna s dec ded that no substant a vo at on had occurred.

The key cr ter on for ega ty was the grav ty of the nfract on. Supp ementary e ements were the nf uence of the ega ty on the prof tab ty of an nvest page "334" ment project and the nvestor's awareness of the ega ty. Efforts to h de ega t es w p ay aga nst an nvestor. M nor nfract ons d d not ead to a den a of nvestment protect on. But they may be taken nto account when dec d ng on the vo at on of the substant a guarantees.

Cure or estoppe w th regard to an ega ty n favour of the nvestor s poss b e. One of the requ rements for an estoppe or a wa ver s act ve know edge of the State of the ega ty. If State organs to erate a certa n conduct over a certa n t me th s can be regarded as wa ver.

Un atera dec s ons of the state to mod fy the def n t on of nvestment n a BIT va a mod f cat on of the aws and regu at on n the host State after the estab shment of an nvestment w not ead to a oss of jur sd ct on. In such cases the ega ty w have to be taken nto cons derat on at the mer ts stage. If appropr ate, protect on shou d be den ed at that stage. page "335"

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[1] Chr stoph Schreuer et a ., The ICSID Convent on: A Commentary 140 (2d ed. 2009); *see also* Andrea Car evar s, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9 The Journa of Wor d Investment and Trade 35 49 (2008); Chr st na Knahr, *Investments "in Accordance with Host State Law"*, 4 TDM No. 5.

[2] Sa n Costruttor S.P.A. and Ita strade S.P.A. v. K ngdom of Morocco, ICSID Case No. ARB/00/4, Dec s on on Jur sd ct on, 23 Ju y 2001, 6 ICSID Reports 400, para. 46.

[3] *See e g* , Sa n Costruttor S.P.A. and Ita strade S.P.A. v. K ngdom of Morocco, *supra* note 2, at para. 46 (… th s prov s on refers to the va d ty of the nvestment and not to ts def n t on.); LESI-DIPENTA v. A ger a, ICSID Case No. ARB/03/08, Award, 10 January 2005, *available at:* http:// ta. aw.uvc.ca/documents/d pentav.a ger a.pdf, para. II, 24( ); Gas Natura v. Argent na, Dec s on on Jur sd ct on, 17 June 2005, ICSID Case No. ARB/03/10, *available at* http:// ta. aw.uvc.ca/documents/GasNatura SDG-Dec s ononPre m naryQuest onson Jur sd ct on.pdf, paras. 33, 34; Bay nd r v. Pak stan, ICSID Case No. ARB/03/29, Dec s on on Jur sd ct on, 14 November 2005, *available at* http:// ta. aw.uvc.ca/documents/Bay ndr-jur sd ct on.pdf, paras. 105 110; Myt neos v. State Un on of Serb a and Montenegro and Repub c of Serb a, Dec s on on Jur sd ct on, 8 September 2006, *available at* http:// ta. aw.uvc.ca/documents/Myt neosPart a Award.pdf, paras. 137 157; Sa pem v. Bang adesh, ICSID Case No. ARB/05/07, Dec s on on Jur sd ct on, 21 March 2007, *available at* http:// ta. aw.uvc.ca/documents/Sa pem-Bang adesh-Jur sd ct on.pdf, paras. 79 82, 120 124; L.E.S.I. S.p.A. et ASTALDI S.p.A. v. A ger a, ICSID Case No. ARB/05/3, Dec s on on Jur sd ct on, 12 Ju y 2006, *available at* http:// ta. aw.uvc.ca/documents/LESIA ger a.pdf, para. 83 ( ); Desert L ne Projects LLC v. The Repub c of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008, *available at* http:// ta. aw.uvc.ca/documents/DesertL ne.pdf, paras. 97 123.

[4] *See* Myt neos v. State Un on of Serb a and Montenegro and Repub c of Serb a, *supra* note 3, at paras. 137 157; spec f c approva requ rements were app cab e *e g* n the fo ow ng cases: Yaung Ch Oo v. Myanmar, ICSID Case No. ARB/01/1, F na Award, 31 March 2003, 42 ILM 540 (2003), paras. 53 62; Grus n v. Ma ays a, ICSID Case No. ARB/99/3, Award, 27 November 2000, *available at* http:// ta. aw.uvc.ca/documents/Ph ppe_Grus n_v_Ma ays a.pdf, para. 9.2.

[5] *See e g* , Germany Ph pp nes BIT

Art c e 1 Def n t on of Investment

For the purpose of th s Agreement:

1. the term " nvestment" sha mean any k nd of asset accepted *in accordance with the respective laws and regulations* of e ther Contract ng State, … (emphas s added).

L thuan a Ukra ne BIT

Art c e 1 (1) of the BIT def nes " nvestment" as "every k nd of asset nvested by an nvestor of one Contract ng Party n the terr tory of the other Contract ng Party n accordance w th the aws and regu at ons of the atter …" (Tok os Toke es v. Ukra ne, ICSID Case No. ARB/02/18, Dec s on on Jur sd ct on, 29 Apr 2004, *available at* http:// ta. aw.uvc.ca/documents/Tok os-Jur sd ct on_000.pdf, para. 74).

Bang adesh Ita y BIT

Art c e 1 (1)

The term " nvestment" sha be construed to mean any k nd of property nvested before or after the entry nto force of th s Agreement by a natura or ega person be ng a nat ona of one Contract ng Party n the terr tory of the other n conform ty w th the aws and regu at ons of the atter.

Oman Yemen BIT

Art c e 1 (1)

The term "Investment" sha mean every k nd of asset owned and nvested by an nvestor … and that s accepted, by the host Party, as an nvestment accord ng to ts aws and regu at ons, and for wh ch an nvestment cert f cate s ssued.

Spa n Mex co BIT

Artícu o I, Def n c ones

4. Invers ón s gn f ca, entre otros, os s gu entes act vos prop edad de, o contro ados por, nversores de una Parte Contratante y estab ec dos en e terr tor o de a otra Parte Contratante de conform dad con a eg s ac ón de esta ú t ma: …

Ar c e I, Def n t ons

4. Investment means nter a a the fo ow ng assets, property of or contro ed by nvestors of one Contract ng Party and estab shed on the terr tory of the other Contract ng Party n accordance w th the eg s at on of the atter: … (courtesy trans at on from Span sh).

[6] *See e g* , Spa n Ecuador BIT

Art c e 2 Promot on and Adm ss on

Each Contract ng Party […] w *admit* Investment *according to its legal provisions*

The present Art c e w a so app y to nvestments made before ts entry nto force by nvestors of a Contract ng Party *in accordance with the laws of the other Contracting Party* n the terr tory of the atter […]

Art c e 3 Protect on

…

Each Contract ng Party sha protect n ts terr tory the nvestments made, *in accordance with its legislation* […]

(courtesy trans at on from Span sh, emphases added).

Nether ands Bo va BIT

Art c e 2

E ther Contract ng Party sha , w th n the framework of ts aw and regu at ons, promote econom c cooperat on through the protect on n ts terr tory of nvestments of nat ona s of the other Contract ng Party. Subject to ts r ght to exerc se powers conferred by ts aws or regu at ons, each Contract ng Party sha adm t such

nvestments.

[7] P ama Consort um L m ted v. Bu gar a, ICSID Case No. ARB/03/24, Award, 27 August 2008, *available at* http:// ta. aw.uv c.ca/documents/P amaBu gar aAward.pdf.
[8] *Id* at para. 138.
[9] *Id*
[10] Phoen x Act on, Ltd. v. Czech Repub c, ICSID Case No. ARB/06/5, Award, 15 Apr 2009, *available at* http:// ta. aw.uv c.ca/documents/Phoen xAward.pdf, para. 101.
[11] oann s Kardassopou os v. Georg a, Dec s on on Jur sd ct on, ICSID Case No. ARB/05/18, 6 Ju y 2007, *available at* http:// ta. aw.uv c.ca/documents/Kardassopou os-jur sd ct on.pdf, para. 182.
[12] *Id*
[13] *Id* at para. 184.
[14] Southern Pac f c Propert es (M dd e East) L m ted v. Egypt, Award, 20 May 1992, 32 ILM 933, paras. 81 85 (1993).
[15] *See e g* , Fraport AG Frankfurt A rport Serv ces Wor dw de v. Ph pp nes, Award, 16 August 2007, ICSID Case No. ARB/03/25, *available at* http:// ta. aw.uv c.ca/documents/FraportAward.pdf; Inceysa Va so etana S.L. v. Repub c of E Sa vador, ICSID Case No. ARB/03/26, Award, 2 August 2006, *available at* http:// ta. aw.uv c.ca/documents/Inceysa_Va so etana_en_001.pdf.
[16] *See e g* , P ama Consort um L m ted v. Bu gar a, *supra* note 7.
[17] Fraport AG Frankfurt A rport Serv ces Wor dw de v. Ph pp nes, *supra* note 15.
[18] Emphases added.
[19] *Id* at para. 86.
[20] *Id* at para. 398.
[21] *Id* at para. 401.
[22] Sa uka v. Czech Repub c, Part a Award, 17 March 2006, *available at* http:// ta. aw.uv c.ca/documents/Sa uka-Part a awardF na .pdf, para. 183.
[23] Nether ands Czech BIT: Art c e 1

For the purposes of the present Agreement:

(a) the term " nvestments" sha compr se every k nd of asset nvested e ther d rect y or through an nvestor of a th rd State and more part cu ar y, though not exc us ve y: …

[24] Nether ands Czech BIT: Art c e 2

Each Contract ng Party sha n ts terr tory promote nvestments by nvestors of the other Contract ng Party and sha adm t such nvestments n accordance w th ts prov s ons of aw.

[25] Sa uka v. Czech Repub c, *supra* note 22, at para. 214.
[26] Phoen x Act on, Ltd. v. Czech Repub c, *supra* note 10.
[27] Art c e 1 (1) Israe Czech Repub c BIT:

> 1. The term " nvestment" sha compr se any k nd of assets nvested n connect on w th econom c act v t es by an nvestor of one Contract ng Party n the terr tory of the other Contract ng Party *in accordance with the laws and regulations of the latter* and sha nc ude, n

part cu ar, though not exc us ve y: …

[28] *Id* at paras. 102 104.
[29] *Id* at para. 134.
[30] OKO Pankk Oyj, VTB Bank (Deutsch and) AG and Sampo Bank P c v. Eston a, ICSID Case No. ARB/04/6, Award, 19 November 2007, 22 ICSID Rev ew FILJ 466 501 (2007).
[31] Art c e 2 of the Eston a F n and BIT: App cab ty of th s Agreement
(1) Th s Agreement sha on y app y to nvestments made n accordance w th the aws, regu at ons and procedures of the host country.

Art c e 2 of the Eston a Germany BIT:

(1) Jede Vertragsparte w rd n hrem ohe tsgeb et Kap ta an agen von Staatsangehör gen oder Gese schaften der anderen Vertragsparte nach Mög chke t fördern und d ese Kap ta an agen n Übere nst mmung m t hren Rechtsvorschr ften zu assen. S e w rd Kap ta an agen n jedem Fa gerecht und b g behande n.

[32] *Id* at paras. 189 190.
[33] Inceysa Va so etana S.L. v. Repub c of E Sa vador, *supra* note

15.

[34] *Id* at paras. 186 188.

[35] Emphases added.

[36] *Id* at para. 160. A though the argument that Inceysa's nvestment s not protected by the Agreement because t s an nvestment that was not made n accordance w th the aws of E Sa vador can be dent f ed as a substant ve defense re ated to the mer ts of the matter, th s presumpt on s ncorrect. Indeed, f t s determ ned that the nvestment s not protected by the Agreement, t wou d mp y recogn z ng that the necessary prem se for the Arb tra Tr buna to va d y assume jur sd ct on was not met. Consequent y, n the end, the Arb tra Tr buna wou d be dec d ng on ts own competence and not on the C a mant's ndemn ty c a ms.

[37] *Id* at paras. 103, 104, 110.

[38] *Id* at paras. 118, 122.

[39] *Id* at para. 115.

[40] *Id* at para. 187 referr ng to Sa n v. Morocco, Dec s on on Jur sd ct on, *supra* note 2, at para. 46:

> In envsag ng "the categor es of nvested assets […] n accordance w th the aws and regu at ons of the sa d party," the provs on n quest on refers to the ega ty of the nvestment and not to ts def n t on. It a ms n part cu ar to ensure that the b atera Agreement does not protect nvestments wh ch t shou d not, genera y because they are ega ."

[41] *Id* at para. 240.

[42] *Id* at paras. 246, 252.

[43] *Id* at para. 254.

[44] *Id* at para. 257.

[45] Wor d Duty Free v. Kenya, Award, ICSID Case No. ARB/00/7, 4 October 2006, *available at* http:// ta. aw.uvc.ca/documents/WDFv.KenyaAward.pdf; *see also* Respondents app cat on for d sm ssa , 1 TDM ssue 2 (2004); on corrupt on and nvestment arb trat on *see e g* , F or an augenender & Chr stoph L ebscher, *Corruption and Investment Arbitration: Substantive Standards and Proof in* Austr an Arb trat on Yearbook 2009 539 564 (K ausegger et a . eds., 2009); mar Raeschke-Kess er & Dorothee Gottwa d, *Corruption in* The Oxford andbook of Internat ona Investment Law 584 616 (Much nsk et a . eds. 2008); mar Raeschke-Kess er, *Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors States and Agents*, 9 The Journa of Wor d Investment & Trade 5 33 (2008); mar Raeschke-Kess er, *Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects in* Arb trat ng Fore gn Investment D sputes, Procedura and Substant ve Lega Aspects 471 501 (orn ed., 2004).

[46] *Id* at para. 130.

[47] *Id* at paras. 105 124.

[48] *Id* at para. 136.

[49] *Id* at para. 159.

[50] *Id* at para. 157.

[51] *Id* at para. 185.

[52] *Id* at para. 188.

[53] *Id* at para. 192.

[54] P ama Consort um L m ted v. Bu gar a, *supra* note 7.

[55] C a mant represented to the Bu gar an Government that the nvestor was a consort um wh ch was true dur ng the ear y stages of negot at ons. It then fa ed, de berate y, to nform Respondent of the change n c rcumstances, wh ch the Tr buna cons ders wou d have been mater a to Respondent's dec s on to accept the nvestment. On the bas s of the ev dence n the record, Bu gar a had no reason to suspect that the or g na compos t on of the consort um, cons st ng of two major exper enced compan es, had changed to an nd v dua nvestor act ng n the gu se of that "consort um", and no duty to ask.

[56] *Id* at para. 143.

[57] *Id* at para. 144.

[58] *Id* at para. 144.

[59] Gen n and others v. Eston a, ICSID Case No. ARB/99/2, Award, 25 June 2001, *available at* http:// ta. aw.uvc.ca/documents/Gen n-Award.pdf, paras. 348 365.

[60] Internat ona Thunderb rd Gam ng Corporat on v. Mex co, Award, 26 January 2006, *available at* http:// ta. aw.uvc.ca/documents/Gen n-Award.pdf.

[61] Thunderb rd had not offered to prov de the regu ator w th a phys ca samp e or nspect on of the part cu ar game mach ne at ssue but descr bed the games. The request conc uded that the proposed operat on was not of the type proh b ted by Mex can aw and sought conf rmat on of th s conc us on by the gam ng regu ator. The gam ng regu ator ssued an off c a op n on on the ega ty of the mach nes to Thunderb rd's request. It restated the proh b t on on

gamb ng and uck-re ated games under Mex can aw. It then conf rmed that t had no power to proh b t mach nes that operate n the form and cond t ons stated by the nvestor. It emphas zed that the vdeo games sk mach nes cou d be operated as ong as they d d not become, n any manner whatsoever, gam ng or bett ng mach nes.

[62] *Id* at para. 208.

The tr buna found that

> 164. It cannot be d sputed that Thunderb rd knew when t chose to nvest n gam ng act v t es n Mex co that gamb ng was an ega act vty under Mex can aw. … Thunderb rd must be deemed to have been aware of the potent a r sk of c osure of ts own gam ng fac t es and t shou d have exerc sed part cu ar caut on n pursu ng ts bus ness venture n Mex co. At the t me EDM requested an off c a op n on from SEGOB on the ega ty of ts mach nes, EDM must a so be deemed to have been aware that ts mach nes nvo ved some degree of uck, and that do ar b acceptors coup ed w th w nn ng t ckets redeemab e for cash cou d be reasonab y v ewed as e ements of bett ng. Yet EDM chose not to d sc ose those cr t ca aspects n the So c tud.
>
> 166. Cons der ng the forego ng, the Tr buna f nds that there was no eg t mate expectat on created by the Of c o to the effect of br ng ng Thunderb rd's c a ms n the present case under Art c e 1102, 1105 and/or 1110 of the NAFTA.

[63] Inceysa Va so etana S.L. v. Repub c of E Sa vador, *supra* note 15, at para. 202.

[64] P ama Consort um L m ted v. Bu gar a, *supra* note 7.

[65] Wor d Duty Free Company L m ted v. The Repub c of Kenya, Award, *supra* note 45.

[66] Inceysa Va so etana S.L. v. Repub c of E Sa vador, *supra* note 15.

[67] In Fraport the Tr buna found that the nvestor know ng y and ntent ona y c rcumvented the ru e that n case of a pub c ut ty franch se, the proponent and fac ty operator must be owned and contro ed up to at east s xty percent (60%) by F p nos. Th s ru e was conta ned n the const tut on and the Ant Dummy aw.

[68] L.E.S.I. S.p.A. et ASTALDI S.p.A. v. A ger a, *supra* note 3, at para. 83.

[69] Rume Te ekom A.S. and Te s m Mob Te ekomun kasyon zmet er A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 Ju y 2008, *available at* http:// ta. aw.uvc.ca/documents/Te s maward.pdf.

[70] Rume Te ekom A.S. and Te s m Mob Te ekomun kasyon zmet er A.S. v. Kazakhstan, *supra* note 69, at para. 168. Emphas s added. Footnote om tted.

[71] Desert L ne Projects LLC v. The Repub c of Yemen, *supra* note 3, at para. 104.

[72] Phoen x Act on, Ltd. v. Czech Repub c, *supra* note 10, at para. 78.

[73] Tok os Toke es v. Ukra ne, *supra* note 5.

[74] *Id* at para. 86.

[75] Meta par S.A. and Buen A re S.A. v. Argent ne Repub c, ICSID Case No. ARB/03/5, Dec s on on Jur sd ct on, 27 Apr 2006, *available at* http:// ta. aw.uvc.ca/documents/Meta par-Argent na-Jur sd ct on.pdf.

[76] *Id* at para. 84.

[77] Myt neos v. State Un on of Serb a and Montenegro and Repub c of Serb a, *supra* note 3.

[78] *Id* at para. 151. Footnote om tted.

[79] *Id* at paras. 154, 157. Footnote om tted.

[80] Fraport AG Frankfurt A rport Serv ces Wor dw de v. Ph pp nes, *supra* note 15, at para. 396.

[81] *Id* at paras. 355, 398.

[82] *Id* at para. 387.

[83] Desert L ne Projects LLC v. The Repub c of Yemen, *supra* note 3, at paras. 116, 117.

[84] SwemBa t v. Latv a, Award, 23 October 2000, *available at* http:// ta. aw.uvc.ca/documents/Swemba t-Latv a-Award-23Oct2000.pdf; for a case note *see* Farouk Ya a, *Final Arbitral Award Rendered in 2000 in UNCITRAL Ad Hoc Arbitration SwemBalt AB v Republic of Latvia*, Stockho m Arb trat on Report 97 131 (2004:2).

[85] *Id* at paras. 34, 35.

[86] Tok os Toke es v. Ukra ne, Dec s on on Jur sd ct on, *supra* note

5, at para. 86.

[87] Técn cas Med oamb enta es Tecmed, S.A. v. Un ted Mex can States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, *available at* http:// ta. aw.uvc.ca/documents/Tecn cas_001.pdf.

[88] *Id* at para. 149.

[89] *Id* at paras. 151, 174.

[90] Ioann s Kardassopou os v. Georg a, *supra* note 11.

[91] *See supra* p. 7.

[92] *Id* at paras. 185 194.

[93] Fraport AG Frankfurt A rport Serv ces Wor dw de v. Ph pp nes, *supra* note 15.

[94] *Id* at para. 347.

[95] *Id* at para. 387.

[96] *Id* at para. 401.

[97] Wor d Duty Free Company L m ted v. The Repub c of Kenya, *supra* note 45.

[98] Internat ona Thunderb rd Gam ng Corporat on v. Mex co, *supra* note 60, at para. 165.

[99] Desert L ne Projects LLC v. The Repub c of Yemen, *supra* note 3.

[100] *Id* at paras. 117, 118.

[101] Fraport AG Frankfurt A rport Serv ces Wor dw de v. Ph pp nes, *supra* note 15, at para. 346.

[102] Desert L ne Projects LLC v. The Repub c of Yemen, Award, *supra* note 3, at para. 120.

[103] Fraport AG Frankfurt A rport Serv ces Wor dw de v. Ph pp nes, *supra* note 15.

[104] *Id* at paras. 344, 345.

[105] Phoen x Act on, Ltd. v. Czech Repub c, *supra* note 10.

[106] *Id* at paras. 102 104. Footnotes om tted.

[107] *See* a so the examp es of " n accordance w th host State aw c auses" n footnotes 5 and 6.

[108] BIT app cab e n Phoen x.

[109] o day Inns v. Morocco, ICSID Case No. ARB/72/1, Dec s on on Jur sd ct on, 12 May 1974. The dec s on s unreported. A deta ed account w th extens ve quotat ons was pub shed by P erre La ve, *The First "World Bank" Arbitration (Holiday Inns v Morocco) Some Legal Problems*, 51 Br t sh Year Book of Internat ona Law 123 (1980); *also in:* 1 ICSID Reports 645 (1993).

[110] *See e g* , PSEG v. Turkey, ICSID Case No. ARB/02/5, Dec s on on Jur sd ct on, 4 June 2004, 11 ICSID Reports 434, paras. 106 124; Joy M n ng v. Egypt, Award, 6 August 2004, 19 ICSID Rev ew FILJ 486 para. 54 (2004) (*but see* the apparent contrad ct on w th the Tr buna 's statement at paras. 42, 44); Patr ck M tche v. Democrat c Repub c of the Congo, Dec s on on Annu ment, 1 November 2006, *available at* http:// ta. aw.uvc.ca/documents/m tche annu ment.pdf, para. 38; Sa pem v. Bang adesh *supra* note 3, at paras. 112 114.

[111] Berschader v. Russ a, Award, 21 Apr 2006, *available at* http:// ta. aw.uvc.ca/documents/BerschaderF na Award.pdf, para. 111.

[112] For the re at onsh p between human r ghts and nvestment aw *see e g :* Luke Er c Peterson & Kev n Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (2003), *available at* http://www. sd.org/pdf/2003/ nvestment_ nt_human_r ghts_b ts.pdf; Ursu a Kr ebaum, *Privatizing Human Rights The Interface between International Investment Protection and Human Rights in* The Law of Internat ona Re at ons L ber Am corum anspeter Neuho d 165 189 (Re n sch & Kr ebaum eds., 2007); Lahra L bert , *Investissements et Droits de l'Homme in* New Aspects of Internat ona Investment Law 2007, 791 852 (Kahn & Wä de eds., 2007); Wa d Ben am da *Investment Arbitration and Human Rights*, 4 Transnat ona D spute Management 2007; Moshe rsch, *Interactions between Investment and Non-Investment Obligations in International Investment Law in* The Oxford andbook of Internat ona Investment Law 154 181 (Schreuer et a . eds., 2008); Bruno S mma & Theodore K , *Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology in* Internat ona Investment aw for the 21st Century, Essays n onour of Chr stoph Schreuer 678 707 (B nder et a . eds., 2009); Ursu a Kr ebaum, *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 Journa of Wor d Investment and Trade 653 677 (2009).

[113] *See also* Andrea Car evar s, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9 The Journa of Wor d Investment and Trade 48 (2008).