ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW

EMERGING PRACTICES OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS IN ADJUDICATING ILLEGAL INVESTMENTS: ANALYZING SELECTED CASES

A Thesis submitted to the School of Graduate Studies Addis Ababa University, School of Law in Partial Fulfillment of the Requirement for Master of Law [LL.M] in Public International Law stream

By: Efream Baraky

Advisor : Asst.Prof. Mohammed Habib (LLB, LLM)

October, 2015
Addis Ababa

Table of Contents

ACKNOWLEDGMENT iii
DECLARATION v
ACRONYMS vi
ABSTRACT 1

CHAPTER ONE
GENERAL BACKGROUND

1.1 INTRODUCTION 2
1.2 STATEMENT OF THE PROBLEM 6
1.3 RESEARCH OBJECTIVES 8
1.4 RESEARCH QUESTIONS 8
1.5 SIGNIFICANCE OF THE STUDY 9
1.6 METHODOLOGY 10
1.7 SCOPE OF THE RESEARCH 10
1.8 ORGANIZATION 11
1.9 LIMITATIONS 11

CHAPTER TWO
REVIEW OF RELATED LITERATURES

2.1 THE CONCEPT OF INVESTOR-STATE DISPUTE SETTLEMENT 12
2.1.1 Enforceability 15
2.1.2 Neutral Forum 16
2.1.3 Procedural Flexibility 16
2.1.4 Arbitrators with the Appropriate Experience 16
2.2 SOME CRITICISMS AGAINST ISDS 17
2.2.1 Legitimacy 17
2.2.2 Transparency 17
2.2.3 Nationality Planning 17
2.2.4 Inconsistency of Arbitral Decisions 18
2.2.5 Erroneous Decisions 18

2.2.6 Arbitrators' Independence and Impartiality 18
2.2.7 Financial Stakes 19

2.3 JURISDICTION OF INVESTMENT ARBITRAL TRIBUNALS AND ISSUE OF ADMISSIBILITY 20
2.3.1 Jurisdiction of Investment Tribunals: 20
2.3.2 Admissibility: The Conditions for the Exercise of Jurisdiction 25
2.4 THE "ACCORDANCE WITH THE LAW" LIMITATION 27

CHAPTER THREE

EMERGING PRACTICES OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS IN ADJUDICATING ILLEGAL INVESTMENTS: ANALYZING SELECTED CASES

3.1 INTRODUCTION 31
3.2 ILLEGAL INVESTMENT ARBITRATION-CORRUPTION 33
3.2.1 Corruption as an Investor Claim 33
3.2.2 Corruption as a Host State Defense 35
3.3.ILLEGAL INVESTMENT ARBITRATION-FRAUD 37
3.4.ILLEGAL INVESTMENT ARBITRATION-BREACH OF OTHER HOST STATE LAWS 43
3.5.TEMPORAL DIFFERENTIATION-ILLEGALITY AT THE TIME OF THE ESTABLISHMENT OR IN THE OPERATION OF THE INVESTMENT 48
3.6.EXCEPTIONS TO THE "LEGALITY REQUIREMENT" CLAUSE 50
3.6.1.The Exception for "*De Minimis*" Breaches or "Good Faith" Mistakes 50
3.6.2.Estoppel-Prohibiting the Host State from Raising the Investment's Illegality 54

CHAPTER FOUR

CONCLUDING REMARKS

BIBLIOGRAPHY 62

ACKNOWLEDGMENT

Though only my name appears on the cover of this thesis, a great many people have contributed to make this thesis viable, but only some of them can be possible to mention here.

Above all, my deepest gratitude is to my wife Tigst Tesfaye for supporting me throughout my study and great patient at all times.

Next, I am indebted to my advisor, Asst. Prof. Mohammed Habib. I have been amazingly fortunate to have an advisor who gave me the freedom to explore on my own and at the same time the guidance to recover when my steps faltered. Without his help I would not have been able to complete the thesis in the time I had available.

Many friends have helped me stay courageous through these difficult times. Their support and care helped me overcome setbacks and stay focused on my study. I greatly value their friendship, but I really regret for I cannot mention all here.

I am also thankful to the Legal Services Directorate staffs of the NBE who helped me stay focused on my study. I greatly value their care in general. But, I have to give also a special mention for the support given by W/ro Kibre Moges, Ato Zeray G/wahid, W/ro Sara Worku and W/ro Atsede Yoseph.

Lastly but most importantly, none of this would have been possible without the love and patience of my family. Thus, I am grateful to my loving families in general for their strong moral support and encouragement during the course of my studies. In particular I am appreciative to my uncle Kidane Zeru who made my journey possible and for his unremitting financial provision.

APPROVAL SHEET BY THE BOARD OF EXAMINERS

EMERGING PRACTICES OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS IN ADJUDICATING ILLEGAL INVESTMENTS: ANALYZING SELECTED CASES

By: Efream Baraky

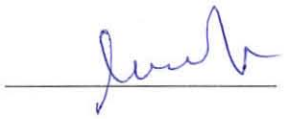
A Thesis Submitted to Addis Ababa University, School of Law in Partial Fulfillment of the Requirement for LL.M in Public International Law.

Approved by Board of examiners:

1. Yonachew Belew _____
   Signature
2. Martha Belete _____
   Signature
3. Mohammed Habib _____
   Signature

DECLARATION

I declare that *Emerging Practices of International Investment Arbitration Tribunals in Adjudicating Illegal Investments: Analyzing Selected Cases* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. Thus I understand that if at any time it is discovered that I have significantly misrepresented material presented in this thesis, any degree awarded to me on the basis of that material may be revoked.



Advisor: Asst. Prof. Mohammed Habib **Efream Baraky**

October, 2015

ACRONYMS

ADR.....Alternative Dispute Resolution

BIT(s).....Bilateral Investment Treaty(ies)

ECT..... Energy Charter Treaty

FET..... Fair and Equitable Treatment

IAA(s)..... Investment Arbitration Agreement(s)

ICC..... International Chamber of Commerce

ICJ..... International Court of Justice

ICSID Convention..... The Convention on the Settlement of Investment Disputes between States and Nationals of Other States

ICSID..... International Centre for Settlement of Investment Disputes

IIA(s)..... International Investment Agreement(s)

ISDS..... Investor-State Dispute Settlement

MIT(s)..... Multilateral Investment Treaty(ies)

NAFTA..... North American Free Trade Agreement

OECD..... Organization for Economic Co-operation and Development

P..... Page

PCIJ..... Permanent Court of International Justice

PP..... Pages

SCC..... Stockholm Chamber of Commerce

UN..... United Nations

UNCITRAL..... United Nations Commission on International Trade Law

UNCTAD..... United Nations Conference on Trade and Development

V..... Versus

WIR..... World Investment Report

WTO..... World Trade Organization

ABSTRACT

There is support in the investment treaty cases for the proposition that the lawfulness of the investment is a condition precedent for the conferral of adjudicative power upon tribunals or for the availability of substantive protections at the merit phase. This plea of legality is justified by reference to arguments either: (i) an express provision of the treaty requires that lawfulness of the investment; or (ii) the notion that investment treaties should give effect to general principles of laws such as good faith or the maxim that a claimant should not be able to profit from its own wrongs. However, in effect, the decision on when to address the plea of illegal investment has proved to have shown potentially significant consequences for the respondent, the claimant and for the general outcomes of investment arbitrations. In this vein, many legal scholars who have studied the trend of this discourse seemed to have supported the idea that when an express provision of the applicable treaty requires the lawfulness of the investment, the tribunal must consider the plea of illegal investment as jurisdictional question. Conversely, where there is no an express provision of the applicable treaty requires the lawfulness of the investment, tribunals must consider the matter as regards the merit of the dispute either to affect the substantive protection or the amount of compensation due. This thesis, however, defended that such conclusions are not amenable to be a consistent broad-spectrum and unified interpretation as can be evidenced by examination of more inclusive authoritative international investment cases, which instead proposed that adjudication to be made by giving significant emphasis to the specificity of a given qualification in the IIA, and/or of the circumstances of the actual case.

CHAPTER ONE
GENERAL BACKGROUND

1.1 INTRODUCTION

Generally, as investments flow now moves in all directions, international investment agreements (IIAs) provide investors with important means of ensuring the safety of their investments from the wrongful acts of the state in which the investments are made.[1] Substantively, IIAs require host state, *inter alia*, 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 to be paid promptly and effectively; and disallow discrimination based on nationality.[2]

Procedurally, most IIAs allow investors of the home state to arbitrate disputes directly with host states for violations of the treaty.[3] 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 state.[4]Given the relaxation of States' former monopoly on access to international jurisdiction and the financial and public policy issues at stake, investor-State arbitration is thus a significant development in public international law rivaling the creation of the right of direct access to international human rights courts.[5]Accordingly, a

---

[1]Moloo Rahim and Khachaturian Alex, "The Compliance with the Law Requirement in International Investment Law," *Fordham International Law Journal*, Vol. 34, Issue No.6,(September 27, 2010), pp.1473-1474, available at SSRN: http://ssrn.com/abstract=1683523, accessed on February 12, 2015.

[2]*Ibid,* p.1474

[3] *Ibid*

[4]*Ibid*

[5]Christopher. J Thomas Q.C. and Michael Ewing-Chow, "The Maturation of Investment Treaty Arbitration," *ICSID Review Foreign Investment Law Journal*, Vol. 25, No.1 (Spring 2010), p.5; The surge of investment arbitration has thus liberated private parties from the uncertainties whether their case will be espoused by their home States and it has equally removed the nuisance for host States having to defend often highly technical claims against foreign States willing to exercise diplomatic protection. However, Zachary argues that unlike human rights that are vested and enjoyed simply by virtue of one's being born into the human race, the vesting and enjoyment of investment treaty rights is contingent upon the putative investor taking certain positive steps in the host state. For detail information see Zachary Douglas, *The International Law of Investment Claims*, (New York: Cambridge University Press, 2009).

vast majority of investment arbitrations are initiated today on the basis of consent of a host state given through investment arbitration agreements (IAAs) comprised either within a bilateral investment treaty (BIT) or a multilateral investment treaty (MIT). Consent to international investment arbitrations can also be found in the domestic investment laws of a host state and/or in a specific contract concluded between a foreign investor and a host state.[6]

However, the fact that most modern IIAs contain dispute settlement clauses, providing for different forms of settling investment disputes between States and nationals of the other contracting parties, should not be mistakenly viewed as opening a guaranteed avenue to investment arbitration.[7] Instead, States Parties to IIAs may expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection.[8]States Parties so use multiple mechanisms to limit the scope of application of the agreements for the reciprocal protection of investments signed by them.[9]One such common condition is an express requirement that the investment comply with the internal legislation of the host State.[10] Consequently, the requirement that investments must be made *"in accordance with the laws of the host State"* or with such other phrase framed differently but having the same effect is a common requirement in modern IIAs.[11]The purpose of such provisions is to

---

[6]ICSID, "Background Information on the International Centre for Settlement of Investment Disputes (ICSID)" *Fact Sheet,* available at: https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20%20ENGLISH.pdf, accessed on April 6, 2015.

[7] August Reinisch, " How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?",*infra* (n. 144), p. 116.

[8]*Gustav F-W Hamester GmbH & Co KG v. Republic of Ghana,*(ICSID Case No. ARB/07/24), Award, June 18, 2010, ¶ 125, available at: http://www.italaw.com/sites/default/files/case-documents/ita0396.pdf, accessed on July 24, 2015; see also *Inceysa Vallisoletana, S.L. v. Republic of El Salvador,* (ICSID Case No. ARB/03/26), Award, August 2, 2006, ¶ 184, available at: http://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf, accessed on July 24, 2015; *Saba Fakes v. Republic of Turkey*, (ICSID Case No. ARB/07/20), Award, July 14, 2010, ¶.115, available at: http://www.italaw.com/sites/default/files/case-documents/ita0314.pdf, accessed on July 24, 2015; *Tokios Tokelės v. Ukraine,* (ICSID Case No. ARB/02/18),Decision on Jurisdiction, April 29, 2004, ¶. 84, available at: http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf, accessed on July 24, 2015.

[9]*Gustav F-W Hamester GmbH & Co KG v Republic of Ghana*, *supra* (n. 8), ¶. 125; see also, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador, supra* (n. 8),¶. 185.

[10]*Ibid*

[11]In the case of *Saba Fakes v. Republic of Turkey*, *supra* (n. 8), ¶.115, the tribunal in reasoning out its decision referred to Article 2(2) of the Netherlands-Turkey BIT which provides that: "*[t]he present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established* ***in accordance with the laws*** *and regulations in force in the latter Contracting Party's territory at the time the investment was made*. Thus, the tribunal had come to conclude that the BIT protection shall not apply to investments which have not been established in conformity with the

prevent the IIAs from protecting investments that should not be protected, particularly because they would be illegal[12] and whereby to allow for the host state to retain a certain degree of control over foreign investments by denying protection to those investments that do not comply with its laws and regulations,[13] and at times with the international general principles when such legality requirement has not integrated in the applicable IIA.[14]Because the requirement that only investments made "in accordance with the law" be protected under IIAs can either be explicit in an investment treaty,[15]or based on general principles of law which can be read as an implicit obligation.[16]

Respondent's laws and regulations. The Contracting Party cannot be deemed to have given its consent to arbitrate the dispute [...] and there would therefore be no consent to the Centre's jurisdiction within the meaning of Article 25(1) of the ICSID Convention. For detail analysis about such requirement, see in general, Moloo, and et al. *Supra* (n. 1); Ursula Kriebaum, "Chapter V: Investment Arbitration- Illegal Investments" in *Austrian Arbitration Yearbook 2010*, edited by Christian Klausegger, Peter Klein, et al.,(C.H. Beck, Stämpfli & Manz 2010), available at: http://www.law.yale.edu/documents/pdf/sela/Kriebaum_Illegal_Investments.pdf, accessed on September 21, 2015; Schill Stephan W., "Illegal Investments in International Arbitration" (January, 2012), available at SSRN: http://ssrn.com/abstract=1979734 or http://dx.doi.org/10.2139/ssrn.1979734 , accessed on February 13, 2015.

[12]*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco,*(ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001, ¶ 46, available at: http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf, accessed on July 27, 2015; *Tokios Tokelès v. Ukraine, supra* (n. 8),¶. 84.

[13]*Ioannis Kardassopoulos v. Georgia,*(ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007, ¶. 182, available at: http://www.italaw.com/sites/default/files/case-documents/ita0444.pdf, accessed on July 27, 2015.

[14]See in general *Plama Consortium Limited v. Republic of Bulgaria*, (ICSID Case No. ARB/03/24), Award, August 27, 2008, available at: http://www.italaw.com/documents/PlamaBulgariaAward.pdf, accessed on April 7, 2015; and *World Duty Free v. Kenya,*(ICSID Case No. ARB/00/7), Award, October 4, 2006, available at: http://www.italaw.com/documents/WDFv.KenyaAward.pdf, accessed on April 7, 2015.

[15]See, *Inceysa Vallisoletana, S.L. v. Republic of El Sal*, *supra* (n. 8), ¶¶. 186-187 (the tribunal precisely noted that there are various forms by which States establish the *"accordance with the laws of the host State* "clause. Among the mechanisms used to include this limitation is to add it into the *definition of investment* itself, making it clear that for the purposes of that reciprocal protection agreement only those made in accordance with the laws of the host State will be deemed *investments*. Furthermore, the signatory States may validly exclude from the protection of a BIT investments made illegally, precisely in the articles that indicate the *scope* of protection of the BIT in question).

[16]See in general, Moloo, and et al. *Supra* (n. 1), Ursula Kriebaum, *Supra* (n. 11); Schill, Stephan, *Supra* (n. 11); Specifically, in the *Plama supra* (n. 14) case, for example, the tribunal argued that unlike a number of BITs, the ECT does not contain a provision requiring the conformity of the investment with a particular law. But, by appealing to the fundamental aim of the Energy Charter Treaty which is to strengthen the rule of law on energy sector concluded that the substantive protection of the ECT cannot apply to investments that are made contrary to the law; *ibid*, ¶¶. 138-139; the tribunal in the *Phoenix Action* case by confirmation of the *plama* tribunal position argued that [...] the conformity of the establishment of the investment with the national laws–is implicit even when not expressly stated in the relevant BIT. For additional information about the case see *Phoenix Action, Ltd. v. Czech Republic,*(ICSID Case No. ARB/06/5), Award, April 15 2009,¶.101, available at: http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf, accessed on September 18, 2015.

In line with this requirement, arbitral tribunals at numerous occasions had thus to deal with the impact the illegality of an investment made in the host State had on its protection under IIAs through investor-State arbitration.[17] Accordingly, a rule that has seemed to be established from several investment treaty cases is that if the investment has been acquired by the foreign national in violation of the host State's laws or general international principles and the effect of that violation is to render the investment '*illegal per se*' or '*illegal as such*', then the tribunal is without jurisdiction to entertain the Claimant's claims in arbitration[18] or proceeded to entertain the claims some step further and therein may decline the claim as inadmissible or may deny the substantive protections under the treaty or verdicts no violation of a treaty standards because of a justified interference by the host state at the merit phase.[19] In any event, the decisions of investment arbitration tribunals, nonetheless, seemed to have not been consistent. In some cases, investment tribunals had refused jurisdiction to entertain the claims of foreign investors at the outset.[20] While in another cases, tribunals had declined the claim as inadmissible or found no violation of substantive protections of the treaty at the merits stage.[21]

Commentators who analyzed such requirement of arbitration clause of IIAs, in diverse literatures, have by now seem to have concluded by and large, on the one hand, when the applicable IIA contains a clause requiring the investment to be made in compliance with host-

---

[17]Schill, Stephan, *Supra* (n. 11), p.1

[18]Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration", *ICSID Review Foreign Investment Law Journal,* Vol. 29, N0.1 (January 9, 2014), p. 155; see also in general, Ursula Kriebaum, *supra* (n. 11).

[19]*World Duty Free v. Kenya Supra* (n. 14), ¶¶. 136, 188, and 192 (The case concerned an exclusive concession to run the duty free operations at Kenya's international airports in Nairobi and Mombasa. The contract under which the Claimant brought its ICSID claims, however, had been proven to be procured by a payment to the then sitting Head of State. The tribunal then held in the merit phase that 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 applicable laws found relevant to govern the contract).

[20]*Fraport AG Frankfurt Airport Services Worldwide v. Philippines,* (ICSID Case No. ARB/03/25), Award, August16, 2007, available at: http://www.italaw.com/sites/default/files/case-documents/ita0340.pdf, accessed on April 7, 2015 (in its decision the tribunal in *Fraport* specifically concluded that the claimant knowingly and intentionally circumvented the domestic law by means of secret shareholder agreements. As a consequence, it could not claim to have made an investment *"in accordance with law."ibid.* ¶.401. The tribunal in *Inceysa* equally concluded that, "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 EI Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, that Arbitral Tribunal declared itself incompetent to hear the dispute brought before it.", see *Inceysa Vallisoletana S.L. v. Republic of El Salvador, supra* (n. 8), ¶.257).

[21]In general see, for instance, *Plama Consortium Limited v. Bulgaria, supra* (n. 14) and *World Duty Free v. Kenya, supra* (n. 14).

state law unequivocally, such a requirement is a jurisdictional prerequisite.[22]The premise of their position is that, if states parties consent to exclude the application of an IIA to investments that do not accord with host-state law, a tribunal cannot defer the question of the investment's legality to the merits.[23]

Contrariwise, where States parties do not expressly exclude investments that are not made in accordance with the law from the IIA's coverage, to deprive the IIA protections at the jurisdiction level of the dispute would be to limit jurisdiction in a way not contemplated by the parties as unlike in cases where an explicit "in accordance with host State law" clause is present, the State's consent is not directly conditioned upon, or affected by, the illegality in such case.[24] Instead, concerns in this regard become a question of admissibility for the claimant's claims, *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.[25]

1.2 STATEMENT OF THE PROBLEM

As has succinctly explained above, the requirement that an investment be made in accordance with the law in order to benefit from IIA's protection is now uncontroversial.[26]Owing to this requirement, identification of a number of illegal investments have appeared to be settled as evidenced from case laws and literatures which, *inter alia*, include the acts of: fraud and misrepresentation, bribery and corruption, misuse of the system of international investment protection, the violation of good faith or transnational public policy, and other non-observance of domestic laws of the host state. For the purposes of this thesis, the term "illegal

[22]See in general, Moloo, and et al. *Supra* (n. 1); Ursula Kriebaum, *supra* (n. 11); Schill, Stephan W, *supra* (n. 11).

[23]Moloo, and et al. *Supra* (n. 1), 1499

[24]See in general, Moloo, and et al. *Supra* (n. 1); Schill, Stephan W, *supra* (n. 11).

[25]Moloo, and et al. *Supra* (n. 1), 1499; the tribunal in *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon,* however, in contrast to this conclusion, by appealing to the prior precedent hinted the requirement to make an investment in accordance with the law as a jurisdictional prerequisite even where no explicit requirement in this regard can be found in the applicable investment treaty. For detail information see *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon,*(ICSID Case No. ARB/07/12), Decision on Jurisdiction, September, 11, 2009, available at: http://www.italaw.com/sites/default/files/case-documents/ita0869.pdf, accessed on September 21, 2015.

[26]*Ioannis Kardassopoulos v. Georgia, supra* (n. 13),¶.174

investments" as further discussed in next chapters, therefore, refers to some or one of these mentioned wrongdoings in acquisition or sometimes in operation of the investments.

Nevertheless, in connection to those illegal investments, there is an on-going debate as discussed further in the subsequent chapters of this thesis, among legal scholars regarding whether having found illegal investment is a matter affecting the jurisdiction of treaty-based arbitral tribunals, requiring them to decline jurisdiction, or whether it is a matter only affecting the merits of a dispute. So far, many legal scholars who have studied the trend of this discourse seemed to have supported the idea that when there is explicit "in accordance with the law" requirement in the applicable IIA, tribunals must consider the claim as jurisdictional question.[27] Conversely, where there is no explicit "in accordance with the law" requirement in the applicable IIA, the instrument of consent to arbitration to cover only those investments that comport with law, such requirement cannot be a jurisdictional prerequisite in nature.[28] Instead, in such cases, the question of illegality will matter as regards the merit of the dispute either to affect the substantive protection or the amount of compensation due.[29]

In contrast, it appears that there are certain grounds, which they seem to be overlooking in reaching such conclusions. For instance, the conclusion in categorizing the matters of illegality as question of jurisdiction or of the merit seemed to have overlooked the influence of the specific terms and nature of the requirement in IIAs (given that currently, existing IIAs are spotted in more than 3200[30] which most of them are negotiated bilaterally), the type of illegal investment alleged to have been committed and the form in which the objection/claim is raised and by which/whom of the parties had been raised, the seriousness/insignificance of the alleged contraventions to the legality requirement, and the inseparability of facts related to jurisdiction and merit in the given case.[31]

---

[27] See in general Moloo, and et al. *supra* (n. 1), and Schill Stephan W, *supra* (n. 11).
[28] *Ibid*
[29] *Ibid*
[30] For additional information on this topic see in general chapter two, section 2.1 of this research.
[31] Detail analysis about the influence of those additional factors have made in chapter three of this thesis.

Therefore, in this thesis, in consideration of the above mentioned additional factors, I would try to follow-up the discourse and proposed a different perspective based on more inclusive and authoritative grounds.

1.3 RESEARCH OBJECTIVES

The overall objective of this research is critically to analysis the legality requirement found in many IIAs as interpreted by arbitral tribunals in the investment case laws either to affect their jurisdictions or the availability of substantive protections and whereby it tries to contribute some alternate approaching into the on-going debates about the practical and theoretical issues associated with interpretation and implementation of such requirement considered against concrete cases.

Besides, this research shall have also the following specific objectives:

- to analysis the impact of legality requirement on protection of the investments in case which is expressly provided or implicitly read to be obeyed by arbitral tribunals;
- to discuss:
  - the practice of investment treaty protections denials while as question of jurisdiction or that of merit;
  - the role of triviality of contravention to legality requirement in depriving the investment treaty protections as question of jurisdiction or that of merit;
  - the consequences of the illegal act claimed to have been committed by the investor and/or the respondent state in determining the disputed issue's phase to be disposed;
  - the effect of time as to when the illegal act was made and its impact in disposing the issue as jurisdictional or of merit matter;
  - some exceptions that the investor availed from in case the plea of illegality has risen by the host state.

1.4 RESEARCH QUESTIONS

In an effort to address the problems in view of the objectives, the research endeavors to address mainly the following research questions:

1. Whether classifying matters of legality requirement before international investment tribunals as question of jurisdiction or of the merit may only be a result of the treaty text?

2. Whether an illegal act claimed to have committed in contravention of the legality requirement by a foreign investor and/or a host state could have various influence(s) in classifying such matters to dispose before international investment tribunals as question of jurisdiction or of the merit?
3. Whether the seriousness/triviality of contravention to the legality requirements has impact in disposing the disputed issue as question of jurisdiction or of the merit?
4. Whether the date when the illegal act was committed has impact in adjudicating the disputed issue as question of jurisdiction or of the merit?
5. Whether there are exceptions that the investor could avail from in case the plea of illegality has risen and their impact in disposing the issue as question of jurisdiction or of the merit?

1.5 SIGNIFICANCE OF THE STUDY

The decision on when to address illegal investment is not a mere procedural formality.[32]Determination of the appropriate stage when should to be addressed is significant for investors, host states and development of investment arbitration in general.[33] In order to exhibit the importance of such determination, in this thesis, a distinction shall be drawn mainly between the stages of jurisdiction and of merit. Drawing the clear distinction between, as such, carries generally different consequences for an investor, a respondent state and investment arbitrations.[34] Consequently, given that investment arbitral tribunals by now have addressed the effect of a *renvoi* to national law conformity requirement by IIAs or read such requirement implicitly against the accepted general international principles, in different factual circumstances, it is time to analysis them and whereby to contribute a bit to the on-

[32]Ivar Alvik, "Impact of Investment Wrongdoing on Arbitration Proceedings How Far Should an Investment Wrongdoing Get?" *University of Oslo Faculty of Law Research Paper, Candidate No. 8005*, (2012), p.4, available at: https://www.duo.uio.no/bitstream/handle/10852/35644/8005.pdf?sequence=1, accessed on April 16, 2015.

[33]*Ibid*

[34]For detail information about the fundamental nature and different consequences of disposing the disputed issue at the outset as jurisdictional issue or later at the merit phase to a Claimant and a Respondent see chapter two part 2.3.2 of this thesis.

going legal debate on an emerging issue of international investment law. Moreover, by doing so, endeavors are made to forward an independent perspective based on the obvious understanding of the strengthens and weakness of the ideas found acceptable by many scholars, as further substantiated with authoritative and well considered arguments on the subject matter that happened to be a point of discourse.

1.6 METHODOLOGY

This research is more of non-doctrinal type that involves analysis of the various international investment tribunals' cases. By evaluating the various research questions from a critical legality requirement perspective, the thesis tries to elucidate the problem that is evidenced by the investment arbitral case laws. In view of that, the primary sources for this study have remained the arbitral case laws. The research also refers to arbitration rules of international investment tribunals, IIAs or conventions. Moreover, as a secondary source, the research has referred to the opinions of legal scholars who have commented the case-law and relevant legal principles as point of departure and to elucidate the loopholes.

1.7 SCOPE OF THE RESEARCH

This research will mainly focus on international investment tribunal cases analysis which have been decided and governed by the arbitration rules of the most known arbitration forums,[35] for the main reason that the awards, pleadings, and even sometimes the disputing parties' correspondence were made freely available online for download.

[35]The ICSID Convention and the UNCITRAL Arbitration Rules are the two sets of rules which are by far most often mentioned as possible forums for ISDS. The majority of known investor-State claims have been arbitrated under them. As cited in UNCTAD, World Investment Report 2014: Investing in the SDGs: An Action Plan for promoting private sector contributions (henceforth referred to as WIR-2014), (UN, New York and Geneva, 2014), p.125 by the end of 2013, when the total number of known ISDS cases were reached 568, the majority of those known disputes continued to accrue under the ICSID Convention and the ICSID Additional Facility Rules (62 per cent), and the UNCITRAL Rules (28 per cent). Other arbitral venues have been used only rarely. Moreover, as cited in the UNCTAD, Recent Trends in IIAs and ISDS, IIA Issues Note, *infra* (n. 55) p.7, in 2014, of the investors initiated new 42 known ISDS cases pursuant to IIAs, 33 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which three cases were under the ICSID Additional Facility Rules), six under the arbitration rules of UNCITRAL, two under the Stockholm Chamber of Commerce (SCC) and one under the International Chamber of Commerce (ICC) arbitration rules.

1.8 ORGANIZATION

In conducting this research, chapter two basically reviews related literatures in relation to the concept of ISDS and the "in accordance with the law" requirement alleged to have encompassed in most modern IIAs. Chapter three mainly analyses the various patterns which have been observed in the practices of investment arbitral tribunals by securitizing the different types of illegal investments purposely selected from cases laws of international investment arbitral tribunals and literatures. Chapter four then recaps the findings as concluding remarks and provides a general recommendation in light of the research questions.

1.9 LIMITATIONS

IIAs are not uniform as to the types of forums to which parties may submit their claims. However, for the time constraint and the maximum words restriction, this thesis would not deal with case laws decided by other ad hoc tribunals other than those decided under the ICSID and UNCITRAL rules. Likewise, though the very title of the thesis might have veiled to explore even the evolutionary nature of the IIAs regime, no more attempts is made to embrace it as is well researched and documented in literatures. Moreover, as the acts of illegal investments have seemed to be distilled almost into their definite level as evidenced from case laws and various literatures, extra in-depth investigative effort has not been explored to identify the techniques and the acts.

CHAPTER TWO
REVIEW OF RELATED LITERATURES

2.1 THE CONCEPT OF INVESTOR-STATE DISPUTE SETTLEMENT

Historically, bilateral and other investment protection treaties are the extension of the century-old idea within public international law that everyone is entitled to a minimum standard of treatment abroad at any given time.[36]Without ISDS, a foreign investor had two avenues to pursue if a host State wrongly interfered with its investment; the first was to seek relief in the local courts or administrative tribunals of the host State and thereof investors often encountered problems such as domestic sovereign immunity or a non-independent judiciary that could be influenced by the host State's political officials which prevented them from securing recovery for their losses.[37]

Secondly, if domestic courts were ineffective, a foreign investor's remaining hope was to convince its home government to espouse its claim (i.e. exercise diplomatic protection).[38]For investors from "powerful" States this could be an effective weapon; yet even "powerful" States would often prove reluctant to intervene on behalf of an investor should higher political considerations dictate.[39] For a small investor lacking political clout in a discrete dispute, the hurdle to obtain espousal could be very high indeed.[40] Even if an investor did obtain espousal, the claim would then belong to the investor's home State, which could decide how to prosecute or settle it and the proceeds from the dispute, would technically belong to the State, rather than the investor.[41] Moreover, transnational corporations with affiliates in numerous countries each possessing, in all probability, a different legal nationality and a highly

---

[36]Steffen Hindelang, "Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law" *in Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements, workshop paper vol.1,*(2014),p.15, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf, accessed on April 22, 2015. Investor-state dispute settlement is thus designed as the key mechanism to hold the host state accountable for conduct falling short of certain standards without having (exclusively) to rely on domestic judicial relief, which might be unavailable just in the moment when it is desperately needed.

[37]UNCTAD, Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II (henceforth referred to as UNCTAD, ISDS-Series II), (UN, New York and Geneva 2014),p.23

[38]*Ibid*

[39]*Ibid*

[40]*Ibid*

[41]*Ibid*

international shareholder profile might find it difficult to accurately define the firm's nationality for the purposes of establishing the right of diplomatic protection.[42]

In response to those, the ISDS was thus designed to depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal.[43]It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap and flexible process, over which disputing parties would have considerable control.[44] Given that investor complaints relate to the conduct of sovereign States, taking these disputes out of the domestic sphere of the State concerned provides aggrieved investors with an important guarantee that their claims will be adjudicated in an independent and impartial manner.[45]

Furthermore, there were/are also somewhat idealistic motives i.e. increasing the attractiveness of developing countries with weak institutions [...] for foreign investment from the developed world, since official development aid could no longer provide the amount of investment developing countries needed.[46]The degree of political risk to investments is inversely proportional to the strength of the government institutions and the rule of law in a jurisdiction: the weaker the institutions and rule of law, the greater the political risk.[47]Stability and predictability are attributes that are rarely ascribed to a regulatory environment created by embryonic public institutions and hence many developing countries might be expected to suffer from a serious competitive disadvantage.[48] Many of those developing countries have sought to redress that disadvantage by concluding IIAs; these operate to reduce the level of

---

[42]UNCTAD, ISDS-Series II, *supra* (n.37), p.23

[43]UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development (henceforth referred to as WIR-2013), (UN , New York and Geneva 2013),p.111

[44] *Ibid,* pp.111-112

[45]*Ibid,*p.112

[46]Pieter Jan Kuijper. "Investment Protection Agreements as Instruments of International Economic Law " *in Investor State Dispute Settlement (ISDS) provisions in the EU's international investment agreements, workshop paper vol.1,*(2014),p.12, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf, accessed on April 22, 2015.

[47]Ignacio .C and William K. Perry, "The Rise of Bilateral Investment Treaties: Protecting Foreign Investments and Arbitration", p.1, available at: http://www.chadbourne.com/files/Publication/f1898f01-febc-4fba-bb9487ff36d1b1a2/Presentation/PublicationAttachment/8c6065d3-c22f-4a1e-a187-8c94079e98bc/IDQ-2010-03-SuarezAnzorenaPerry.pdf, accessed on April 6, 2015.

[48]Zachary Douglas, *supra* (n. 5), p.1

sovereign risk inherent in every foreign direct investment by establishing a regime of international minimum standards for the exercise of public power by the host state in relation to investments made in its territory by the nationals of another contracting state.[49]In this way, a state that is unable to trade on an inherent confidence in its regulatory regime [...] can, nevertheless, compete for foreign direct investment by subjecting the conduct of its public institutions to exogenous minimum standards.[50]

Therefore, the advance consent to this form of adjudication, given by States in IIAs, domestic investment laws of a host state and/or in specific contracts between a foreign investor and a host state have solved the problem of sovereign immunity.[51] Consequently, even host states with less political power saw such neutral dispute settlement as a better alternative than submitting to the strong-arm tactics of a powerful home State.[52]

To cut a long story short, investment arbitration one of the fastest growing areas of international law has therefore emerged from the proliferation of BITs and MITs.[53] Since the conclusion of the first BIT in 1959,[54] the number of agreements designed to regulate a host of issues related to foreign investment has risen to nearly3271.[55]In addition to setting forth substantive obligations undertaken by the State parties, the vast majority of those IIAs, contain provisions for the settlement of disputes between investors and the host State through

[49]Zachary Douglas, *supra* (n. 5), p.1

[50]*Ibid*

[51]UNCTAD, ISDS-Series II, *supra* (n.37), p.24

[52]*Ibid*

[53]Sergio Puig, "The Role of Procedure in the Development of Investment Law: The Case of Section B of Chapter Eleven of NAFTA; in *Evolution in Investment Treaty Law and Arbitration*, edited by Chester Brown and Kate Miles, (Cambridge University Press, January 2012), p.1, available at SSRN: http://ssrn.com/abstract=2043339, accessed on April 27, 2015.

[54]UNCTAD, ISDS-Series II, *supra* (n. 37), p.18; see also Christopher. J Thomas Q.C. and Michael Ewing-Chow, *supra* (n. 5), p.4 (As the quoted therein the 50th anniversary of this first BIT concluded in 1959 between Federal Republic of Germany and Islamic Republic of Pakistan for the Promotion and Protection of Investments was celebrated in December 2009. That Treaty is considered to be the first of the modern era of BITs, but it lacks the defining feature of modern treaties, namely, the conferral of the right of direct access to international jurisdiction upon the investor. On its 50th anniversary, this Treaty was replaced by a new Agreement on the Encouragement and Reciprocal Protection of Investments between Pakistan and Germany. The Agreement incorporates significant new provisions in line with contemporary international standards. Notably, the new Agreement contains a new arbitration clause which permits the investor to file a claim against the State in which he invested).

[55]UNCTAD, World Investment Report 2015: Reforming International Investment Governance (henceforth referred to as WIR-2015), (UN , New York and Geneva 2015),p.106 ; UNCTAD, ISDS-Series II, *supra* (n.37), p.18

international arbitration.[56]Accordingly, there has been tremendous growth in investment treaty arbitration over the past twenty years.[57]

In addition to serving as a de-politicized forum, international investment arbitration was expected to offer other advantages for settling investor-State disputes. Here, in a nutshell, are a few of the salient features that have led to the prominence of arbitration in general and typically investment arbitration in the international arena:[58]

2.1.1 Enforceability: Unlike other ADR procedures such as mediation and conciliation which are consensual and will not result in a resolution of the dispute unless the parties agree on an outcome, international arbitral awards are final and binding.[59]Arbitration awards are more widely and readily enforceable than national court judgments as a result, primarily, of the 1958 New York Convention, a multilateral treaty for the recognition and enforcement of arbitral awards to which more than 154 states are parties.[60]Besides, investment arbitral

[56]UNCTAD, ISDS-Series II, *supra* (n. 37),p.18;Recent examples of IIAs without ISDS provisions are the Australia-United States FTA (2004), available at: http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-eleven-investment.aspx, accessed on September 15, 2015; the Japan-Philippines EPA (2006), available at: http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf, accessed on September 15, 2015 and the Australia-Malaysia FTA (2011)as cited in the UNCTAD, ISDS-Series II, *supra* (n. 37), pp.18-19.

[57] As cited in UNCTAD, "Recent Trends in IIAs and ISDS", IIA Issues Note, No. 1, (February 2015), p.5, for example, in 2014 only, investors initiated 42 known ISDS cases pursuant to IIAs, bringing the total known number of treaty-based cases to 608 at the end of that year. One hundred and one governments around the world have been respondents to one or more known ISDS claims. Developing countries continue to be the most frequent respondents in cases submitted to arbitration under IIAs, but the relative share of cases against developed countries was also on the rise-in 2014. As such, 60 per cent of all cases in 2014 were brought against developing and transition economies, and the remaining 40 per cent against developed countries.

[58]Latham and Watkins' International Arbitration Practice LLP, "Guide to International Arbitration," (2014), available at: https://www.lw.com/search?searchText=Guide+to+International+Arbitration, accessed on April 22, 2015.

[59]An arbitral tribunal's decision is final and binding upon the parties either because the parties have agreed this expressly in the arbitration clause, or because the arbitration rules referred to by the parties exclude any appeal against the award. For instance, see the UNCITRAL Arbitration Rules (as revised in 2010) under art.34 (2) provides that "the award shall be made in writing and shall be final and binding on the parties"; Arbitration Act of England (1996) sect. 58 (1) provides that unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them; New York Convention (1958) art. III: "Each contracting state shall recognize arbitral awards as biding…"

[60]For more information about the convention and states parties to, see the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Done in New York, on June 10, 1958 and entered in to force on 7 June 1959), available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html,accessed on April 22, 2015.

awards are readily enforceable in most jurisdictions under the ICSID Convention,[61] which is another MIT exclusively deal with the resolution of investment disputes.

2.1.2 Neutral Forum: In the international arena, the prospect of prosecuting or defending a case through a foreign national court system, using unfamiliar laws and procedures before a judge of the same nationality as the opponent, is perceived as a major disadvantage.[62] International arbitration, however, allows for a neutral, agreed or known procedure and a decision of a nationally neutral arbitrator.[63]

2.1.3 Procedural Flexibility: Arbitration rules are mostly streamlined, flexible and far less complex than most national rules of civil procedure, making them better suited to parties from different jurisdictions.[64] Therefore, they are relatively easy to understand for parties of different nationalities, and the proceedings are more easily focused on the substantive issues and the parties are better able to adapt the dispute resolution process to suit their relationship and the nature of their disputes.[65]

2.1.4 Arbitrators with the Appropriate Experience: Unlike court proceedings, where parties generally have no input into the choice of judge for their case, the parties to arbitration usually appoint, nominate or at least have some input into the selection of arbitrator(s).[66]Arbitrator(s) can be selected for their familiarity with relevant investment resolution practices, trade usages and legal structures, and their ability to apply different national laws and deal with comparative law issues.[67]

---

[61]See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention, done in Washington, on March18, 1965 and entered in to force on 14 October 1966), which is a multilateral international treaty ratified by over 151 states. According to article 54(1) of this Convention each Contracting State is obliged to recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as *if it were a final judgment of a court in that State.*

[62]Clayton Utz law firm, *Clayton Utz' "A Guide to International Arbitration,"* (Australia, 2012) https://www.claytonutz.com/docs/Guide%20to%20IA_2012.pdf, accessed on April 22, 2015.

[63] Latham and Watkins', *supra* (n. 56), see in general the introduction part; see also UNCTAD, ISDS-Series II, *supra* (n. 37), pp.23-24; UNCTAD, WIR 2013, *supra* (n. 43), p.111.

[64] Latham and Watkins', *supra* (n. 58), see in general the introduction part

[65]*Ibid*, p.4

[66]*Ibid*, p.5

[67]*Ibid*, see in general the introduction part

2.2 SOME CRITICISMS AGAINST ISDS

However, even with all the above mentioned significances, the actual functioning of ISDS in IIAs has also led to concerns about systemic deficiencies in the regime.[68] The growing number of cases, the broad range of policy issues rose in that context and other deficiencies have turned ISDS into arguably the most controversial issue in international investment policymaking.[69]Other systemic deficiencies, *inter alia*, include the following:

2.2.1 Legitimacy: In many cases, foreign investors have used ISDS claims to challenge measures adopted by States in the public interest, for example, policies to promote social equity, foster environmental protection or protect public health.[70]So, questions have been raised whether a sole arbitrator or three individuals, appointed on an *ad hoc* basis, have sufficient legitimacy to assess the validity of States' acts, particularly if the dispute involves sensitive public policy issues.[71]

2.2.2 Transparency:[72]Even though the transparency of the system has improved since the early 2000s,[73] ISDS proceedings can still be kept fully confidential in case where both disputing parties so wish even in cases where the dispute involves matters of public interest.[74]Public interest elements in investor-State disputes, in particular, have thus contributed to call for greater transparency within ISDS and such proposals have met with resistance, dividing economies, investors and various interest groups.[75]

2.2.3 Nationality Planning: Investors may gain access to ISDS procedures using corporate structuring, i.e. by channeling an investment through a company established in an

---

[68]UNCTAD, WIR-2013, *supra* (n. 43), p.112

[69]UNCTAD, WIR-2014, *supra* (n. 35), p.126; Steffen Hindelang, *supra* (n. 36),p.15.

[70]UNCTAD, ISDS-Series II, *supra* (n. 37),p.25

[71]*Ibid,* pp.25-26; see also UNCTAD, WIR 2013, *supra* (n. 43), p.112

[72]According to the UNCTAD, Transparency: Series on Issues in International Investment Agreements II (henceforth referred to as Transparency-Series II), (UN, New York and Geneva 2012), pp.5-10, the notion of transparency in international investment law is evolving within the legal framework of international investment agreements traditionally with an objective to eliminate information costs and institutional risks faced by potential and existing foreign investors. A second consideration has however emerged now in international investment law as to whether the rights and obligations of States and foreign investors are balanced in a way that facilitates not only increased investment but also the sustainable development of the host State.

[73] The 2006 amendments to the ICSID Arbitration Rules and the 2013 rules on transparency in ISDS proceedings adopted by UNCITRAL have ingrained to have contributed much in transparency of the ISDS.

[74]UNCTAD, WIR 2013, *supra* (n. 43), p.112; see also, UNCTAD, ISDS-Series II, *supra* (n. 37), p.26

[75] UNCTAD, Transparency-Series II, *supra* (n. 72), p. 9

intermediary country often with the sole purpose of benefitting from ISDS after the dispute arises.[76]

2.2.4 Inconsistency of Arbitral Decisions: Those arbitral decisions that have entered into the public domain have exposed recurring episodes of inconsistent findings.[77] These have included divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts.[78] Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and lack of predictability as to how they will be read in future cases.[79]

2.2.5 Erroneous Decisions: Substantive mistakes of arbitral tribunals, if they arise, cannot be corrected effectively through existing review mechanisms.[80] Arbitrators decide important questions of law without the possibility of effective review and existing review mechanisms, namely, the ICSID annulment[81] process or national-court review at the seat of arbitration (for non- ICSID cases), operate within narrow jurisdictional limits.[82]

2.2.6 Arbitrators' Independence and Impartiality: An increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed to a particular outcome, despite the fact that arbitrators are subject to ethical rules requiring

---

[76]UNCTAD, WIR 2013, *supra* (n. 43), p.112; see also, UNCTAD, ISDS-Series II, *supra* (n. 37), p.26; *Phoenix Action, Ltd. v. Czech Republic, supra* (n .16); Nathalie Bernasconi Osterwalder and Lise Johnson, eds, *International Investment Law and Sustainable Development: Key Cases from 2000–2010*, (Canada, International Institute for Sustainable Development), pp.105-111;Tania Voon, Andrew Mitchell and James Munro," Legal Responses to Corporate Manoeuvring in International Investment Arbitration," *Journal of International Dispute Settlement*, (2014), pp. 41-68.

[77]UNCTAD, ISDS-Series II, *supra* (n. 37), p.26

[78]*Ibid*, pp.26-27

[79]UNCTAD, WIR 2013, *supra* (n. 43), p.112

[80]*Ibid*

[81]Article 52(1) of the ICSID Convention stipulates watertight grounds for annulment. Generally, annulment is predicated on the fact that: (a), the tribunal was not properly constituted;(b), the tribunal has manifestly exceeded its powers; (c), there was corruption on the part of a member of the tribunal; (d), there has been a serious departure from a fundamental rule of procedure; or (e), the award has failed to state the reasons on which it is based. For additional related information see also Julien Fouret, "Stay(ing) on Track or Falling off the Edge: The Absence of Legal Security in the Ad Hoc Committees' Decisions under Article 52(5) of the ICSID Convention," *Foreign Investment Law Journal,* Vol. 27, N0.2, (November, 2012) , pp. 303–334

[82]UNCTAD, ISDS-Series II, *supra* (n. 37), p.27; The ICSID annulment committees besides having limited review powers on procedural irregularities given under Article 52(1) of the ICSID Convention, they are individually created for specific disputes and they may arrive (and have indeed arrived) at inconsistent conclusions, *ibid.* For more information about the practical analysis of the problems associated with the annulment procedures of ICSID. See also Ngangjoh-Hodu.Y and Ajibo.C, "ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration", *Journal of International Dispute Settlement* (Winter 2015), pp.1–24.

independence and impartiality.[83] Particular concerns have also arisen from a perceived tendency of each disputing party to appoint individuals sympathetic to their case and arbitrators' interest in being re-appointed in future cases and their frequent "changing of hats" (serving as arbitrators in some cases and counsel in others) amplify these concerns.[84]

2.2.7 Financial Stakes: The high cost of arbitrations can be a concern for both investors [...], and States.[85] From the State perspective, even if a government wins the case, the tribunal may refrain from ordering investors to pay the respondents' costs,[86] leaving the average $8 million spent on lawyers and arbitrators as a significant burden on public finances and preventing the use of those funds for other goals.[87]

Given these opportunities and challenges as succinctly explained above, over the past few years, the public discourse about the reforming of IIAs regime in general and about the pros and cons of ISDS in particular has thus continued to gain momentum.[88]Although the issue is not within the scope of this research to be investigated, for now it suffices to reiterate, given all the growing challenges that ISDS has faced; the concrete actions of some countries and regional integration organizations in reviewing their model IIAs, and the various proposed paths of actions for the reform of IIAs regime in general and the ISDS element in particular, a broad consensus is emerging that the regime of IIAs and the related ISDS need to be reformed to make them work better for sustainable development.[89]Today's questions are not hence

[83]UNCTAD, ISDS-Series II, *supra* (n. 37), pp.27-28, see also, UNCTAD, WIR 2013, *supra* (n. 43), p.112

[84]*Ibid*

[85] UNCTAD, WIR 2013, *supra* (n. 43), p.112

[86]For example in the case *Metal-Tech Ltd. v The Republic of Uzbekistan*, the tribunal precisely decided each party to bear its own costs and to share the costs that should be paid to ICSID, even if the Respondent was prevailed over the case. For detail information see *Metal-Tech Ltd. v. The Republic of Uzbekistan,*(ICSID Case No. ARB/10/3), Award, October 4, 2013, ¶. 420, available at:http://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf. accessed on July 27, 2015.

[87] UNCTAD, WIR 2013, *supra* (n. 43), p.112; see also, UNCTAD, ISDS-Series II, *supra* (n. 37), p.28; and for further detail information on this issue see, Gaukrodger .D and Gordon K, "Investor-State dispute settlement: a scoping paper for the investment policy community", *OECD Working Papers on International Investment, No. 2012/3*, OECD Investment Division, available at: http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf, accessed on April 24, 2015.

[88] UNCTAD, WIR 2014, *supra* (n. 35), p.126

[89]For detail information on those matters see in general UNCTAD, WIR 2013, *supra* (n. 43),pp.107-119; UNCTAD, "Reform of the IIA Regime: Four Paths of Action and a Way Forward," IIA Issues Note, No. 3, (June, 2014),pp. 1-8; and UNCTAD, WIR 2014, *supra* (n. 35), pp.124-134; Ngangjoh-Hodu.Y and Ajibo.C, *supra* (n. 82); and Schill Stephan W., "The Sixth Path: Reforming Investment Law from Within," (June 4,

about whether to reform international investment policymaking but how to do so comprehensively to balance investor protections with sustainable development considerations.[90]Nonetheless, it seems need some time to see as to how such reform would be shaped, for it will not have yet determined its final destiny and further for the reform efforts have so far been relatively modest.[91]

Consequently, even with all its challenges, the ISDS has seemed to have sustained for some years with modest evolutions to serve as an enforcement tool for the substantive commitments States undertake in their IIAs in favor of foreign investors. It is, therefore, important subsequently to describe some of the basic conditions for the commencement of arbitration and some limitations.

2.3 JURISDICTION OF INVESTMENT ARBITRAL TRIBUNALS AND ISSUE OF ADMISSIBILITY

2.3.1 Jurisdiction of Investment Tribunals: Generally, there are no international investment tribunals with general compulsory jurisdiction.[92]Rather, international arbitration is a voluntary and consent-based method of settling disputes. Consent of the respondent host state to arbitration in IIA is thus the most important condition for the vesting of adjudicative power in the tribunal.[93] In investment arbitration, consent is given by a host State on the basis of IIAs, in national legislation or through negotiated arbitration clauses in investor-State contracts.[94]

2014),*Fourth Biennial Global Conference of the Society of International Economic Law (SIEL) Working Paper No. 2014/02*, available at SSRN: http://ssrn.com/abstract=2446918, accessed on September 15, 2015.

[90]UNCTAD, Reform of the IIA Regime: Four Paths of Action and a Way Forward, *supra* (n. 89), p.3; UNCTAD, WIR 2014, *supra* (n. 35), p. 128.

[91] UNCTAD, WIR 2014, *supra* (n. 35),p.126; UNCTAD, Reform of the IIA Regime: Four Paths of Action and a Way Forward, *supra* (n. 89), p.2

[92] Michael Waibel, *infra* (n. 93),p.2

[93]Zachary Douglas, *supra* (n. 5), p. 151; see also UNCTAD, ISDS-Series II, *supra* (n. 37), p.31; Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility," *University of Cambridge Faculty of Law Research Paper No. 9/2014*,(January 31, 2014),p.2, available at SSRN: http://ssrn.com/abstract=2391789 or http://dx.doi.org/10.2139/ssrn.2391789, accessed on April 28, 2015.

[94]ICSID, "Background Information on the International Centre for Settlement of Investment Disputes (ICSID)," *supra* (n. 6); UNCTAD, ISDS-Series II, *supra* (n. 37), p.31.

Since, IIAs are agreements concluded between States, only States can give their consent to arbitration in IIAs.[95] According to the leading school of thought,[96]the relevant clauses in IIAs represent a *unilateral offer of consent* to arbitration by the contracting States, which can be accepted by the other party to the dispute, i.e. an investor.[97] Investors typically express their acceptance to arbitration by filing a request for arbitration and when this happens, the consent is "perfected" and can no longer be revoked unilaterally.[98]

From the point of view of a State's consent, IIAs can be categorized into several groups which, *inter alia*, may include: (1) Explicit consent;[99] (2) Implicit consent;[100] (3) Agreement to provide consent in the future;[101] and (4) Reservation of consent to arbitration.[102]

Besides, States have taken a variety of approaches to delineating the types of disputes that will be subject to ISDS and so its scope is required to be determined through holistic examination

---

[95]UNCTAD, ISDS-Series II, *supra* (n. 37), p.31

[96] Contractual school of thought is deeming to be the leading school of thought which supposes instruments of state consent in IIAs as inchoate and forward looking-they operate as an invitation to third parties to accept. They are a multi-stepped process, beginning with an offer of arbitration by the state which is perfected by means of an acceptance by an investor and as such when the consent is perfected it can no longer be revoked unilaterally.

[97]UNCTAD, ISDS-Series II, *supra* (n. 37), pp.31-32

[98] *Ibid,* p.32

[99]*Ibid*; for instance, the Kenya-Slovak Republic BIT (2011), in relevant part of *Article 9(5)* provides that "e*ach Contracting Party hereby* ***gives its unconditional consent*** *to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.*" To refer the full text of the BIT see in general the Agreement between the Government of the Slovak Republic and the Government of the Republic of Kenya for the Promotion and Reciprocal Protection of Investments (signed on 14 December 2011), available at UNCTAD: http://investmentpolicyhub.unctad.org/Download/TreatyFile/1794, accessed on September 15, 2015.

[100] For detail information with some actual illustrations see, UNCTAD, ISDS-Series II, *supra* (n. 37), pp.32-33

[101]*Ibid,* pp.33-34,for example, the 1998 BIT concluded between Australia and Lithuania provides in Article 13 that if an investor of one Party refers a claim to arbitration before ICSID, "*the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor* [...]." For detail information see also the Agreement between the Government of AUSTRALIA and the Government of the REPUBLIC of LITHUANIA on the Promotion and Protection of Investments (Signed on 24 November 1998 and Entered into Force on 10 May 2002), available at UNCTAD: http://investmentpolicyhub.unctad.org/Download/TreatyFile/157, accessed on September 15, 2015.

[102]UNCTAD, ISDS-Series II, *supra* (n. 37),p. 34, for example, the 1999 BIT between Argentina and New Zealand provides in Article 12(3) that unless the parties to the dispute agree otherwise, the dispute shall be submitted to either:(a) ICSID; or,(b) If both parties to the dispute agree, arbitration under the Arbitration Rules of the UNCITRAL, as then in force. However, as provided under sub-article (4) of same Article the implicit consent given under sub-article (3) ***shall not constitute, by itself, the consent of the Contracting Party required in Article 25(1) of the ICSID Convention.*** You can also consult the full text of the BIT available at UNCTAD: http://investmentpolicyhub.unctad.org/Download/TreatyFile/108, accessed on September 15, 2015.

of various provisions of a given IIA for the precise effect of any such express/implied limitation will obviously depend upon the wording used.[103]

Accordingly, some IIAs extend ISDS clauses to all kinds of disputes arising between an investor and the host contracting party.[104]Other ISDS clauses are worded more narrowly and refer only to those disputes where an investor alleges the breach of an IIA.[105]Still, some IIAs identify by means of a positive list, specific obligations whose violation can be a cause of action in an investor's claim and such list can be broad or narrow, depending on the agreement of the contracting parties.[106]

Likewise, IIAs also apply extra techniques to circumscribe the scope of ISDS. These can be done among other through: (1) exclusion of disputes in a particular sector or industry or specification of a limited number of provisions in particular sector or industry under which investors can make claims[107]; (2) exclusion of disputes in a particular regulatory area or relating to specific obligations[108]; (3) exclusion of "pre-establishment" disputed issues.[109]Still, as provided in some IIAs, states can also limit ISDS through setting a period of limitation.[110]

---

[103]*Gustav F-W Hamester GmbH & Co KG v. Republic of Ghana, supra* (n. 8), ¶ 125.

[104]UNCTAD, ISDS-Series II, *supra* (n. 37), pp.38-39; Zachary Douglas, *supra* (n. 5), pp. 234-245 ("Depending on other limitations on a tribunal's authority, such as those that might be found in the applicable law clause, such ISDS clause could include alleged violations of customary international law, investment contracts and possibly even the domestic law of the host State.")

[105]As cited in the UNCTAD, ISDS-Series II, *supra* (n. 37), p.39 (The India-Republic of Korea FTA (2009), Article 10.21, provides that *"[...] shall apply to disputes between a Party and an investor of the other Party* ***concerning an alleged breach of an obligation of the former Party*** *under this Chapter, which causes loss or damage to the investor or its investments.*"); Zachary Douglas, *supra* (n. 5), p. 235 argued towards that effect that it is this type of clause that features in the two most prominent multilateral investment treaties, NAFTA and the Energy Charter Treaty.

[106] For more information on this issue see, UNCTAD, ISDS-Series II, *supra* (n. 37),pp.39-40; August Reinisch, " How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?", *infra* (n. 146), pp. 115–174.

[107]UNCTAD, ISDS-Series II, *supra* (n. 37), p.42

[108]*Ibid*, pp.43-46

[109]*Ibid*, pp.46-47 Traditional investment treaties are of the "post-establishment" type-they apply to investments after the latter are established in the host State. Under such treaties, States retain full discretion in the matter of admitting investments. By contrast, a growing number of IIAs include in addition to post-establishment protections, pre-establishment obligations that guarantee non-discriminatory access to the host country market to investors from the other contracting party. However, some of these IIAs have excluded certain pre-establishment issues from the scope of ISDS.

[110]*Ibid*, pp.48-49; For instance, the US Model BIT (2012), *infra* (n. 126) provides under its article 26(1) that "no claim may be submitted to arbitration [...]if more than **three years** have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged [...]has incurred loss or damage. Accordingly, although such limitation may decreases the exposure of States to investor claims, which in that requires the claims to be lodged within a limited period of time after the events giving rise to the

Above all, the ISDS scope is very much depending on the scope of the treaty as a whole. Those treaty scope limitations are always in turn very crucial in establishing the various jurisdictional elements of arbitral tribunals. Those are composed of:

2.3.1.1 Jurisdiction *Ratione Materiae*: An important aspect of establishing the material scope of treaty coverage is determining what qualifies as an "investment."[111] The treaty's definition of "investment" identifies the range of transactions and assets to which the treaty applies.[112] Most IIAs have very broad and open-ended definitions of "investment", which has prompted tribunals to take an expansive approach towards the kinds of transactions and assets that qualify as investments.[113]While other IIAs have defined "investment" more carefully, creating a closed list of covered assets.[114] The definition of investment thus delineates the range of assets protected under the treaty, including those protected through the ISDS mechanism.[115]

2.3.1.2 Jurisdiction *Ratione Personae*: ISDS involves national or company of one State submitting a claim against another contracting host State.[116]The underlying issue is whether the protections contained in IIA should be extended to a specific claimant and actually there are a number of options to make the range of covered persons broader or narrower.[117]In case of natural person, IIAs typically apply to natural persons who are recognized as a national by

---

dispute, it is equally important to clearly specify whether the limitation period runs from the date of the measure or from the time the investor discovered, or reasonably should have discovered, the loss or damage

[111]UNCTAD, ISDS-Series II, *supra* (n. 37), p.50

[112]*Ibid*

[113]*Ibid*

[114]*Ibid*

[115]*Ibid*; see also Michael Waibel, *supra* (n. 93) pp.50-57; Zachary Douglas, *supra* (n. 5), pp. 233-283; Moreover, see Article 25 of the ICSID Convention vests subject matter jurisdiction in ICSID tribunals for *'any legal dispute arising directly out of an investment'*. However, the case law and the literature are divided on whether the definition of investment typically found in the instrument of consent, nowadays typically in BITs, should be the sole determinant or whether the reference to 'investment' in Article 25 establishes an objective jurisdictional threshold. To put differently, Tribunals have offered different interpretations as to what constitutes an investment under the Convention. Some tribunals find it sufficient when an investment satisfies the definition in the applicable IIA; others confirmed a double review by which the first question is whether the dispute arises out of an investment under Article 25, as opposed to an ordinary commercial transaction, followed by the question of whether the dispute arises out of an investment as defined in the IIA.

[116]UNCTAD, ISDS-Series II, *supra* (n. 37), pp.52-53; see also in general Michael Waibel, *supra* (n. 93) pp.31-38; and Zachary Douglas, *supra* (n. 5), p. 284.

[117]*Ibid*

the domestic law of the relevant contracting party and in accordance with the relevant provision in the treaty.[118] However, it also extends beyond nationals to cover person with dual nationality, permanent residents of the State and thereby increase the scope of coverage.[119] With respect to legal person, IIAs may include or exclude certain specific categories of entities.[120]

2.3.1.3 Jurisdiction *Ratione Loci*: The issue of geographical application of the treaty has two aspects.[121] The first is that most IIAs cover investments "*in the territory*" of the contracting party and thus exclude assets that may have some characteristics of an investment, but are not physically located in its territory.[122]Second, the geographical scope depends on the IIA's definition of the term "territory", in particular on whether the definition extends coverage beyond the boundaries of the territorial waters of a State to the continental shelf and exclusive economic zone.[123]

---

[118]UNCTAD, ISDS-Series II, *supra* (n. 37), pp.52-53; see also in general Michael Waibel, *supra* (n. 93) pp.31-38; and Zachary Douglas, *supra* (n. 5), p. 284; But, as Zachary well demonstrated in his book titled "International Law of Investment Claims", the difficulty that has emerged in practice is the relationship between the test for nationality prescribed in the investment treaty and the rules on nationality that form part of the law of the contracting state party. For additional information see Zachary Douglas, *supra* (n. 5), pp. 285-290.

[119]UNCTAD, ISDS-Series II, *supra* (n. 37), pp.52-53; see also in general Michael Waibel, *supra* (n. 93) pp.31-38; and Zachary Douglas, *supra* (n. 5),pp. 284-327

[120]*Ibid*; For instance, there are two alternatives under Article 25(2) of the ICSID Convention to fulfill the requirement of being a 'national of another Contracting State' in case the claimant is a legal person:

(1) a juridical person having the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to arbitration; or

(2) a juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention.

Likewise, some other IIAs excluded such as branches of enterprises, non-profit entities and/or government owned entities or entities without legal personality.

[121]UNCTAD, ISDS-Series II, *supra* (n. 37), p.54

[122]*Ibid*; see also in general Michael Waibel, *supra* (n. 93), pp.38-42; For instance, Article 1101 of the NAFTA's coverage of *ratione loci* is limited to *'investments in the territory of another party'*. For the ECT, it also incorporates an express territorial link in its Article 1(10) 'Area' *means with respect to a state that is a Contracting Party:(a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, seabed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.*

[123]*Ibid*; Furthermore, the UK Model BIT (2005) provides in relation to territorial extension to overseas territories that: *in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural*

2.3.1.4 Jurisdiction *Ratione Temporis*: The main issue here is whether treaty protection extends to investments made *before* the entry into force of the agreement.[124] Including them can significantly enlarge the number of covered investments.[125] However, this approach does not mean that IIAs acquire retroactive effect as the IIAs obligations apply only with respect to acts or facts occurring or continuing to exist after its entry into force.[126]

2.3.2 Admissibility: The Conditions for the Exercise of Jurisdiction

For an investment treaty tribunal to proceed to adjudge the merits of claims arising out of an investment, it must have jurisdiction over the parties and the claims, and the claims submitted to the tribunal must be admissible.[127]Hence, admissibility refers to the power of the tribunal to examine a case at a given point in time.[128] It concerns the exercise of the tribunal's adjudicative power in relation to one or several specific claims submitted to it,[129] or shortly, it deals with the suitability of the claim for adjudication on the merits.[130]

---

resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12. Article 12 in turn provides at the time of signature, entry into force, ratification of the Agreement, or at any time thereafter, the possibility of its extension to overseas territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes; Similarly, Article 70 of the ICSID Convention also provides the applicability of the Convention to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of the Convention either at the time of ratification, acceptance or approval or subsequently.

[124] UNCTAD, ISDS-Series II, *supra* (n. 37), p.54; see also in general Michael Waibel, *supra* (n. 93), pp.42-49; Zachary Douglas, *supra* (n. 5), pp. 328-343. Generally, the claimant's investment can have been made before or after the investment treaty entered into force, subject to an express provision to the contrary in the investment treaty.

[125] *Ibid*

[126]UNCTAD, ISDS-Series II, *supra* (n. 37), p.54; see also in general Michael Waibel, *supra* (n. 93), pp.42-49; Zachary Douglas, *supra* (n. 5), pp. 328-343.; under customary international law, international treaties do not as a general rule apply retroactively. The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts under its Article 13 and the Vienna Convention on Law of Treaties under its Article 28 respectively codified the general rule which confirmed that treaties do not apply retroactively to any acts or facts which occur or cease to exist before their entry in force. Moreover, non-retroactivity rule in investment treaties is generally implied too, but Article 2(3) of the US Model BIT (2012) expressly provides that for greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty. For detail information see the US Model BIT (2012), available at: http://www.state.gov/documents/organization/188371.pdf, accessed on October 14, 2015.

[127] Zachary Douglas, *supra* (n. 5), p.135

[128] Michael Waibel, *supra* (n. 93), p.5

[129] *Ibid*

[130]Zachary Douglas, *supra* (n. 5), p.148

However, frequently, the distinction between jurisdiction and admissibility is not altogether easy to articulate, for international law in general and for investment arbitration in particular.[131] Whether a matter pertains to admissibility or jurisdiction may also vary by field.[132] Nevertheless, scholars in some literatures and arbitral tribunals' in exceptional cases[133] try to put generally the conceptual distinction; as jurisdiction is the power of the tribunal to hear the case, and admissibility is, whether the case itself is defective i.e. whether it is appropriate for the tribunal to hear it.[134]

Furthermore, investment arbitration tribunals often diverge on classification of whether certain matters pertain to jurisdiction or to admissibility, but with potentially significant consequences for the outcomes of investment arbitrations.[135] Although the term 'admissibility' is found neither in the ICSID Convention[136] nor in the UNCITRAL Arbitration Rules, the *Methanex* tribunal underlined that the distinction between jurisdiction and admissibility was important even though 'it was perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day.[137]

---

[131] Michael Waibel, *supra* (n. 93), p.7

[132] *Ibid*, p.7 Michael further by reviewing the ICJ cases and literatures quoted for example the nationality of claims concerns admissibility in diplomatic protection, but is jurisdictional in investment arbitration.

[133] For instance, see the case of *Waste Management, Inc. v. Mexico*, (ICSID Case No. ARB (AF)/98/2), Dissenting Opinion of Keith Highet, June 2, 2000,¶.58, available at: http://www.italaw.com/sites/default/files/case-documents/ita0894.pdf, accessed on August 7, 2015.

[134] Michael Waibel, *supra* (n. 93), pp.7-8; (Jurisdiction typically focuses on the tribunal and the parties, whereas admissibility focuses on the claim(s); jurisdiction usually involves permanent defects which imply that tribunals are unable to exercise their mandate in line with the directions of the parties, whereas objections as to the admissibility of claims usually involve more transient circumstances which mean that a claim is not yet ready for adjudication. *ibid*, p. 65).

[135] *Ibid*, p. 66; the 'twilight zone' between jurisdiction and admissibility is also reflected in the interchangeable use of jurisdiction and admissibility by some investment tribunals.

[136] Arguably in this respect, Article 41(2) of the ICSID Convention provides that "any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the tribunal, shall be considered by the tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute." Following that, the tribunal in the case *CMS v. Argentina* observed that the "distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence. For more information see *CMS v. Argentina*,(ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003, ¶. 41, available at: http://www.italaw.com/sites/default/files/case documents/ita0183.pdf, accessed on August 7, 2015.

[137] *Methanex Corporation v. USA*,(UNCITRAL NAFTA), Partial Award on Jurisdiction and Admissibility, August 7, 2002, ¶. 139, available at: http://www.state.gov/documents/organization/12613.pdf,accessed on August 7, 2015; Michael Waibel, *supra* (n. 93), p.8

First, as the critical date for determining whether investment tribunals have jurisdiction is the date of the request for arbitration, new developments after that critical date cannot be taken into account for purposes of assessing the tribunal's jurisdiction unlike in that of assessing admissibility.[138] Second, tribunals have greater procedural flexibility with respect to cases over which they have jurisdiction but there is only a temporary barrier to the exercise of their jurisdiction because of inadmissible claim(s).[139] Third, where the impediment to exercising jurisdiction is embodied in a provision of a MIT, then it cannot be waived by the respondent host state either expressly or by its conduct in the proceedings.[140] No such problem arises in respect of objections to the admissibility of a claim.[141] Fourth, a question relating to jurisdiction can and must be raised by a tribunal *proprio motu*, whereas that would be inappropriate for issues of admissibility.[142] Fifth, there may be strategic reasons. If in case host States raise strong jurisdictional objections and tribunals regard them as concerning admissibility, they are likely to be joined to the merits.[143] Such cases, in proceeding to the merits stage, may involve additional expenses for host States, and could increase the risk of losing the case, compared to a situation where the tribunal dealt with the objection as a matter of jurisdiction, isolated from the merits of the case.[144] Strategically, this may be a concern for a host State with strong jurisdictional objections, but much weaker arguments on the merits.[145]

2.4 THE "ACCORDANCE WITH THE LAW" LIMITATION

The fact that most modern IIAs contain dispute settlement clauses, providing for different forms of settling investment disputes between States and nationals of the other contracting parties, should not be mistakenly, however, viewed as opening a guaranteed avenue to investment arbitration.[146] While it is true, that most dispute settlement clauses in IIAs contain an offer to choose arbitration, obviously there are also some limitations.

---

[138]Michael Waibel, *supra* (n. 93), p.66
[139]*Ibid*, p.67
[140]Zachary Douglas, *supra* (n. 5), p. 141; Michael Waibel, *supra* (n. 93),pp.67-68
[141]*Ibid*
[142]*Ibid*
[143]Michael Waibel, *supra* (n. 93), pp.68-69
[144]*Ibid*
[145]*Ibid*
[146]August Reinisch, "How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?" *Journal of International Dispute Settlement*, Vol.2, No.1 (2011), p. 116, available at: http://jids.oxfordjournals.org/content/2/1/115.full.pdf+html, accessed on September 4, 2015.

States use multiple mechanisms to limit the scope of application of the IIAs signed by them in addition to those diverse mechanisms briefly explained before. One of the most commonly used refers to the so-called "accordance with the laws of the host State clause."[147]

There are various forms by which States establish the "accordance with the laws clause."[148] Among the mechanisms used to include this limitation is to add it into the definition of *investment* itself, making it clear that for the purposes of that reciprocal protection agreement only those made in accordance with the laws of the host State will be deemed *investments.*[149] Furthermore, the signatory States may validly exclude from the protection of IIAs investments made illegally through encompassing of such clause in the articles that indicate the scope of protection of the IIA or even in the chapter related to "Promotion and Admission."[150] Likewise, the conformity of the establishment of the investment with the national laws is read implicit, even when not expressly stated in the relevant IIA by some tribunals.[151]

Owing to those limitation clauses, the requirement that an investment be made in accordance with the laws in order to benefit from IIAs' protection is now uncontroversial.[152]Such legality requirement clauses in IIAs is consistently interpreted by arbitral tribunals as depriving the IIAs from protecting investments that should not be protected, particularly because they would be illegal[153] and whereby to allow for the host state to retain a certain degree of control

---

[147]*Inceysa Vallisoletana, SL V. Republic of El Salvador, supra* (n. 8),¶.185; *Gustav F-W Hamester GmbH & Co KG V. Republic of Ghana, supra* (n. 8), ¶. 125

[148]*Inceysa Vallisoletana, SL V. Republic of El Salvador*, *supra* (n. 8), ¶. 186; See also in general Moloo, and et al. *supra* (n. 1), and Schill Stephan W, *supra* (n. 11).

[149]*Ibid*; see also *Mytilineos v. State Union of Serbia and Montenegro and Republic of Serbia*, (UNCITRAL), Partial Decision on Jurisdiction, September 8, 2006, ¶.138, available at: http://www.italaw.com/documents/MytilineosPartialAward.pdf, accessed on September 17, 2015; *Metal-Tech Ltd. v. The Republic of Uzbekistan, infra* (n. 86),¶. 130; *Tokios Tokelės v. Ukraine, supra* (n. 8) ,¶. 74; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, supra* (n. 12), ¶.45; *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16),¶. 56; and *Saba Fakes v. Republic of Turkey*, *supra* (n. 8), ¶.115.

[150]*Inceysa Vallisoletana, SL V. Republic of El Salvador, supra* (n. 8), ¶¶. 187-188; See also in general Ursula Kriebaum, *supra* (n. 11); Schill, Stephan W., *supra* (n. 11).

[151]*Plama Consortium Limited v. Republic of Bulgaria*, *supra* (n. 14), ¶¶. 138-141; *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16), ¶.101;For more detail analysis on these matters see also in general Ursula Kriebaum, *supra* (n. 11); Schill Stephan W, *supra* (n. 11); Moloo, and et al. *Supra* (n. 1).

[152]*Ioannis Kardassopoulos v. Georgia, supra* (n. 13),¶.174

[153]*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, supra* (n. 12),¶.46; *Tokios Tokelės v. Ukraine, supra* (n. 8), ¶. 84;*Inceysa Vallisoletana, SL V. Republic of El Salvador*, *supra* (n. 8), ¶¶. 205-207; Schill, Stephan W, *supra* (n.11),p.2

over foreign investments by denying protection to those investments that do not comply with its laws and regulations.[154]

In connection to this limitation clauses, the issue seems to have remained far from settled in the eye of many commentators is, however, whether such legality requirement limitation clause is a matter affecting the jurisdiction of treaty-based arbitral tribunals, requiring them to decline jurisdiction in case illegality is proven, or whether it is a matter only affecting the merits of a dispute.

Many commentators, who studied the trend, by giving too much stress on the treaty text have come to conclude that, where the applicable IIA is, contained an explicit "accordance with the law "clause, the issue is a bar to the tribunal's jurisdiction. While, in case the applicable IIA does not require "accordance with the law" clause expressly, the legality requirement has not been disposed at the onset as jurisdictional prerequisite by investment tribunals.

Moloo, Rahim and Khachaturian Alex in their scholarly commentary titled *"The Compliance with the Law Requirement in International Investment Law* "for instance, come to conclude 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.[155] Conversely, 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.[156]In their view, concerns in that regard becomes a question of admissibility for the claimants' claims, *i.e.*, claimants whose investments were not made in accordance with the law should be precluded

[154]*Ioannis Kardassopoulos v. Georgia, supra* (n. 13),¶.182,

[155]Moloo, and et al. *Supra* (n. 1) p. 1499 (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.)

[156]*Ibid*; in the commentators' view that was not to confirm 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, [...], there is a substantive obligation to make one's investment in accordance with the law. In their administration of justice, arbitral tribunals should not lend their 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 at the merit phase.

from their substantive claims being heard even though tribunals have jurisdictions over the disputes.[157]

As well, Schill Stephan in his scholarly Article titled *"Illegal Investments in International Arbitration"* has come with identical conclusion.[158] Nevertheless, he indicated also that even in that case, only illegality in the acquisition of an investment is relevant to bar arbitral tribunals' jurisdiction.[159]

However, the researcher is of the view, that the above conclusions are too abstracts which deem to have been made without considering the specific terms and nature of IIAs, the type and form in which the objection/claim is raised and by which/whom of the parties had been raised, the seriousness or insignificance of the contraventions to the legality requirement clauses and other factors, beyond the mere stressing on the treaty text i.e. the existence or not, of an explicit "accordance with the law." This thesis therefore in addressing the impact of the legality requirement clauses in IIAs to deprive treaty protections to investments made in breach of the domestic law or general international principle of law, either at the onset as jurisdictional issue or later at the merit phase, seeks to articulate the influences of those additional factors in next chapter based on a review of more inclusive and authoritative arbitral decisions and available commentary to date.

[157]Moloo, and et al. *Supra* (n. 1), p. 1499
[158]Schill, Stephan W, *supra* (n. 11), pp. 28-29
[159]*Ibid*

CHAPTER THREE

EMERGING PRACTICES OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS IN ADJUDICATING ILLEGAL INVESTMENTS: ANALYZING SELECTED CASES

3.1 INTRODUCTION

As mentioned before, the requirement that investments be made in compliance with the laws is becoming a common requirement in modern IIAs. However, the interpretations provided so far, to elevate the implementation of such clause into general principle in commentaries to date, seemed to have remained somewhat solidly impractical, especially as it is often considered within the context of treaty texts i.e. the existence, or not, of an explicit "in accordance with the law clause" in the applicable IIA, instead of analyzing it in light of a concrete type of illegal acts alleged to have identified from case laws and literatures. More than the likely requirement of compliance with laws and regulations of the host State's laws, an investment is also required to have invested/operated without mired in any fraud, corruption, lack of good faith etc. Such illegal acts are affirmed by arbitral tribunals to be more than likely a violation of the host State's laws.[160]

Generally, the types of "illegal investments" alleged to have identified from case laws and commentaries are numerous which, *inter alia*, include the "violation of the host State's laws"[161], "fraud"[162], "corruption"[163], violation of "good faith" or "transnational public

[160]For instance, even though the applicable BIT in *Gustav F-W Hamester GmbH & Co KG v. Republic of Ghana, supra* (n. 8), ¶¶. 123-124, contained a combined "in accordance with host State law"-clause, the tribunal towards that end made a more general statement that *"an 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; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law (as elaborated, e.g. by the tribunal in Phoenix). These are* ***general principles that exist independently of specific language to this effect in the Treaty.****"*

[161]Moloo, and et al. *Supra* (n. 1), pp. 1473-1501; Ursula Kriebaum, *supra* (n. 11); pp.1– 35; Schill, Stephan W, *supra* (n. 11), pp. 1-29; *Gustav F-W Hamester GmbH & Co KG v. Republic of Ghana, supra* (n. 8) ; *Inceysa Vallisoletana, S.L. v. Republic of El Sal, supra* (n. 8); *Saba Fakes v. Republic of Turkey, supra* (n. 8); *Tokios Tokelės v. Ukraine, supra* (n. 8); *Ioannis Kardassopoulos v. Georgia, supra* (n. 13).

[162]Moloo, and et al. *Supra* (n. 1), pp. 1473-1501; Ursula Kriebaum, *supra* (n. 11); pp.1– 35; Schill, Stephan W, *supra* (n. 11), pp. 1-29; *Inceysa Vallisoletana, SL V. Republic of El Salvador, supra* (n. 8); *Gustav F-W*

policy,"[164]etc. Accordingly, as the main objective of this chapter is to analyze and elucidate the emerging practices of international investment tribunals in adjudicating of such illegal investments from the perspective of the objectives and research questions, analyses are proceeding through selecting of a sample concrete types of illegal acts as are alleged to have been distilled, namely: (1) Corruption, (2) Fraud, and (3) Other Violation of Host state Laws. Because, time and space do not permit a comprehensive review of all types of illegal acts as identified from case laws and commentaries, taking into account the time period within which the thesis required to be completed and the maximum page limits set by the university in writing a thesis.

Towards that end, this chapter, therefore, proceeds as follows. Part 3.2 endeavors to analyze the practices of international investment tribunals in arbitrating the type of investment alleged to be tainted by corruption. Part 3.3 tries to analyze some case laws of international investment tribunals to elucidate the practices in arbitrating the type of investment claimed to be tainted by fraud. Part 3.4 likewise tries to analyze the practices of the international investment tribunals in adjudicating investments alleged to have been made in violation of the host state's laws and regulations. Moreover, the impact of the seriousness/triviality of contravention, the time when it had been alleged to have the illegal act committed and other factors that can influence the adjudication of illegal investments either at the jurisdictional or the merit phases have scrutinized in the next sub-sections.

Hamester GmbH & Co KG V. Republic of Ghana, supra (n. 8); *Plama Consortium Limited V. Republic of Bulgaria, supra* (n. 14); *David Minnotte & Robert Lewis v. Republic of Poland, infra* (n. 222).

[163]Moloo, and et al. *Supra* (n. 1), pp. 1473-1501; Ursula Kriebaum, *supra* (n. 11); pp.1-35; Schill, Stephan W, *supra* (n. 11), pp. 1-29; Florian.H and Christoph.L, "Investment Arbitration-Corruption and Investment Arbitration: Substantive Standards and Proof" ed. Christian Klausegger and Peter Klein, et al., *Austrian Yearbook on International Arbitration* (2009):pp.539–564; Carolyn B. Lamm, Brody K. Greenwald and Kristen M. Young, " From World Duty Free to Metal Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption," *ICSID Review Foreign Investment Law Journal,* Vol. 29, No. 2 (Spring, 2014), pp. 328–349;Menaker Andrea.J, *infra* (n. 165), pp. 1-9; *World Duty Free Company Limited v. The Republic of Kenya, supra* (n. 14); *Metal-Tech Ltd. v. Republic of Uzbekistan, supra* (n. 86); *EDF (Services) v Romania, infra* (n. 168); *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago, infra* (n. 172).

[164]Moloo, and et al. *Supra* (n. 1), pp. 1473-1501; Ursula Kriebaum, *supra* (n. 11); pp.1-35; Schill, Stephan W, *supra* (n. 11), pp. 1-29; Menaker Andrea.J, *infra* (n. 165), pp. 1-9; *World Duty Free Company Limited v.The Republic of Kenya, supra* (n. 14); *Plama Consortium Limited V. Republic of Bulgaria, supra* (n. 14); *Inceysa Vallisoletana, SL V. Republic of El Salvador, supra* (n. 8).

3.2 ILLEGAL INVESTMENT ARBITRATION-CORRUPTION

Allegation of corruption in investor-state arbitrations is commonplace, where they can be raised as either a sward or a shield. Consequently, tribunals are being called upon to determine whether an investor or a host state has acted corruptly in connection with the claimant's investment.[165] When used as a sword, alleged corruption on the part of the state forms the basis for the investor's claim and when used as a shield, corruption on the part of the investor becomes the linchpin of the state's defense and if proven, a finding of corruption can and should have grave consequences for the case.[166]Thus, they are discussed in turn separately below.

3.2.1 Corruption as an Investor Claim

As a sword, the form of corruption typically invoked by investors before international investment arbitral tribunals are bribe solicitations or extortion within the context of fair and equitable treatment or minimum standards violations, where investors allege that they have been made to pay to be spared arbitrary or unjust treatment from the host State.[167]The tribunal in *EDF v Romania*, for instance, the claimant alleged that Romania failed to extend contractual arrangements beyond their ten-year term because he had refused to pay a US$ 2.5 million bribe.[168] The tribunal acknowledged that corruption can be notoriously difficult to prove due to the dearth of physical evidence and found that the claimant had failed to meet its burden of proof.[169]The tribunal nevertheless indicated that, had proven, such a claim would prevail:

---

[165]Menaker Andrea.J, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations," *ICSID Review Foreign Investment Law Journal*, vol.25, issue No. 1, (Spring 2010), p.67

[166]*Ibid*, p.67; For instance, in *Metal-Tech Ltd supra* (n. 86),¶. 389, the tribunal while reaching the conclusion that the claims were barred as a result of corruption, the tribunal was sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. The idea, however, was not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.

[167]Aloysius Llamzon and Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct," in *ICCA Congress Series No. 18*, edited by Van den Berg A.J, (Miami 2014), pp.463-464

[168]*EDF (Services) v Romania,*(ICSID Case No.ARB/05/13),Award, October 8, 2009, ¶¶. 67-100, 221, available at: http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf, accessed on August 11, 2015.

[169]Menaker Andrea.J, *supra* (n. 165), p.68; *EDF (Services) v Romania*, *supra* (n. 168),¶. 221; The tribunal emphasized, however, that clear and convincing evidence should have been produced by the Claimant showing

> *"A bribe by a state agency is a violation of the fair and equitable treatment obligation owed to the claimant pursuant to the BIT, as well as a violation of international public policy, and that 'exercising a state's discretion on the basis of corruption is a [...] fundamental breach of transparency and legitimate expectation'."*[170]

The tribunal in *F-W Oil Interest v Trinidad and Tobago* likewise echoed same feeling.[171] The dispute was arisen from the awarding of a contract to redevelop state owned oil and gas fields located in the territorial waters of the host state.[172]When the dispute arise, the claimant, which was the winning bidder, alleged that the host state demanded payment of a US$ 1.5 million bribe, including an initial payment of US$ 200,000, as a condition for continuing negotiation of the operating agreement which was the subject of the bid.[173]The claimant further alleged that its failure to pay the bribe resulted in a disinformation campaign led by the host state that succeeded in its aim of withdrawing the award of the contract.[174]In that case, although the claimant eventually abandoned its allegation of corruption,[175] the tribunal simply observed it was bound to take the most serious view of allegation of state corruption-if backed by proper evidence.[176] Given that the dire and pernicious effect that corruption has been shown to have on economic development, and further noting that economic development is the ultimate purpose for which BITs [...] were created to serve, the tribunal avowed that, had allegations of corruption been made and had proven to be well founded, it would have had a most

---

not only that a bribe had been requested from [...], but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect. In the absence of such evidence, the tribunal was compelled to draw the conclusion that Claimant has not successfully shouldered its burden of proof with respect to its allegation of a bribery solicitation by Respondent, and therefore no FET violation can be held by the Tribunal to be present as to this aspect of the case. *Ibid*, ¶¶.232, 237.

[170]*EDF (Services) v. Romania, supra* (n. 168),¶.221

[171]Menaker Andrea.J, *supra* (n. 165), p.68

[172]*Ibid; F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago* (ICSID Case No. ARB/01/14), Award, March 3, 2006, available at: http://www.italaw.com/sites/default/files/case-documents/ita0350.pdf,accessed on August 11, 2015.

[173]*Ibid,* ¶¶.14, 36; Menaker Andrea.J, *supra* (n. 165), p.68.

[174]*Ibid*

[175]*F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago, supra* (n. 172), ¶¶. 49-50,210-211

[176]*Ibid,* ¶.212

substantial effect on the view of the cases taken by the tribunal typically in assessing the standards of treatments laid down in the BIT against the measures of the host state.[177]

In a nutshell, although in none of the above mentioned cases, eventually found that the state demanded a bribe, such finding, if supported by evidence that the investors were mistreated for refusing to pay; it would likely be found to establish a breach of the IIAs.[178] Moreover, as a form of investor claim, the allegations of corruption were treated by tribunals as issues to be decided on the merits, instead of peremptory issues, whenever raised by host States.[179]

3.2.2 Corruption as a Host State Defense

Allegation of corruption on the part of the claimant, if proven, similarly has a dispositive effect on a claim; it may bar the claim on either jurisdictional grounds[180] or on the merits, depending on the particular treaty at issue[181] and the time when the allegation was pleaded.[182]

Corruption is primarily raised by host States as a presumed complete defense against all claims made by the claimant in which a study of the significant corruption-related decisions in international investment arbitration has found that it has been raised or insinuated to a significant degree about three times as often by host States as by investors.[183]Unlike investor-alleged corruption, the fact patterns involved when corruption is raised by the host State

---

[177]*F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago, supra* (n. 172),¶. 212

[178]Menaker Andrea.J, *supra* (n. 165), p.69

[179]Llamzon and Anthony Sinclair, *supra* (n. 167), p.464.Specifically, in the case of *F-W Oil Interests, Inc. v Republic of Trinidad & Tobago, supra* (n. 172), ¶¶. 21, 102, the tribunal explained that questions of jurisdiction and merits were so inextricably entwined for the fact that the disputed issue of jurisdiction was closely linked to the questions of fact and law that lay at the same time at the heart of the substantive dispute and as a result it concluded that it would have been pointless to attempt a decision on jurisdiction in advance of a hearing on the merits.

[180] In *Metal-Tech Ltd. v. Republic of Uzbekistan, supra* (n. 86), the tribunal demonstrates that once a finding of corruption has been made, tribunals may dismiss the case for lack of jurisdiction as a form of illegality that strikes at the very consent of the host State to investment arbitration by virtue of the investment treaty's "legality clause", where one is present and possibly even when not.

[181]Menaker Andrea.J, *supra* (n. 163), p.69; see also Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), pp.464-466

[182]In *World Duty Free v Kenya*, *supra* (n. 14), ¶.52, the tribunal, for instance, invited the parties to present additional submissions and evidence specifically on the issue of Kenya's public policy defense, i.e. the bribery allegation, at a later stage of the procedure. Consequently, the form in which and the time when the objection was raised could also influenced the tribunal at what stage of the proceedings the treatment of illegal investments will be addressed. It will make a difference whether the Respondent claims that the tribunal should deny jurisdiction because of the illegality or whether the objection is only brought as a substantive defense.

[183] Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.463

almost always concern consummated corruption, where the offer of the bribe was met with acceptance.[184]Nevertheless, the bilateral nature of consummated corruption has not prevented host States from invoking corruption as a defense and its implications are existential for the claim; no matter how egregious the host State's conduct might have been, if the investor was complicit in corruption at the inception of the investment, no relief at all can be obtained.[185]

In *World Duty Free v. Kenya,* for example, based on its assessment of the facts and relevant principles of domestic and international law, the tribunal held the Claimant had in fact procured the 1989 Agreement through a payment of US$ 2 million (including US$ 500,000 directly to Kenya's Head of State) to set up duty-free airport concessions was a bribe, invalidated the investment contract, and denied the Claimant all right to pursue or recover under any of its pleaded claims, all of which arose from that of 1989 Agreement.[186]Likewise, in *Metal-Tech v. Uzbekistan,* the tribunal found itself without jurisdiction, as corruption (the payment of over US$ 4 million in "consultancy" fees to a group that included the brother of Uzbekistan's Prime Minister for services that could not be substantiated and were not within their expertise) placed the investment outside the protection of the BIT, the host State not having consented to the arbitration of such illegal investments.[187]

In both the above mentioned cases, the facts which were led to confirm the commission of corruption were emerged during the hearing in the course of the examination of the Claimants' principal witnesses.[188] However, unlike in the case of *Metal-Tech,* in the case of *World Duty Free,* the illegal investment objection was only brought as a substantive defense and further no evidence was adduced or argument submitted by either of the parties to the effect that the

[184]Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.464
[185]*Ibid,* pp.464-465
[186]See in general *World Duty Free Company Limited v. The Republic of Kenya, supra* (n. 14).
[187]Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.465; see in general *Metal-Tech Ltd. v. Republic of Uzbekistan, supra* (n. 86), ¶¶. 372-373; and for a critical analysis of *Metal-Tech,* see also Rose Cecily, "Circumstantial Evidence, Adverse Inferences, and Findings of Corruption: Metal-Tech v. The Republic of Uzbekistan," *The Journal of World Investment and Trade*, Leiden Law School Research Paper, (May 9, 2014), available at SSRN: http://ssrn.com/abstract=2435051 or http://dx.doi.org/10.2139/ssrn.2435051 , accessed on August 19, 2015.
[188]See respectively, *World Duty Free Company Limited v. The Republic of Kenya, supra* (n. 14), ¶¶.130-136,166 and *Metal-Tech Ltd v.The Republic of Uzbekistan, supra* (n. 86), ¶¶.240-243, 266.

bribe specifically procured also the agreement for arbitration.[189]The Arbitral tribunal then by resorting to the general principle of *Separability*[190]proceeded to conclude that the Parties' arbitration agreement remains subsisting valid and effective for the purpose of the proceeding until the merit award[191] and dismissed the claimant's claims only at the merit phase.[192]

3.3. ILLEGAL INVESTMENT ARBITRATION-FRAUD

Like that of corruption, fraud has been invoked in investment arbitration case laws by host state as a defense against investor's claims.[193]In general, a statement or omission is legally considered to constitute *fraud* when the following elements are present: (i) the *knowing* misrepresentation or concealment of a *material* fact, (ii) with a view to *deceiving* another; (iii) to that other's *disadvantage*.[194] However, for the term "fraud" is usually used loosely in investment arbitration cases, to describe all manners of undesirable behaviors of an investor (including violation of the host states laws, corruption and a lack of good faith etc…),[195] there is inconsistency in decision of the various tribunals as to whether the issue of fraud could be disposed at the outset as jurisdictional issue, or latter in the merit phase.

Moreover, fraud is frequently pursued through other means and which in turn result in examination of the same/related illegal act of an investor from different perspectives by different tribunals. Accordingly, in some cases, the finding of fraud leading tribunals to a decision that the tribunal had no jurisdiction over the case, whether for violation of the

[189]Article 9 of the Agreement concluded on April 1989 (as subsequently amended) between the contracting parties provides that the parties consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes. ("the Centre") all disputes arising out of the Agreement or relating to any investment made under it for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention").

[190]This principle requires that the existence, validity, and scope of agreement to arbitration is to be evaluated independently from the enforceability of the main contract (as the tribunal did there), which results in the fact that the invalidity of the main contract does not automatically extend to the arbitration clause contained therein, unless it is proven that the arbitration agreement itself is vitiated by fraud, corruption, initial lack of consent.

[191]*World Duty Free Company Limited v The Republic of Kenya, supra* (n. 14),¶. 187.

[192]*Ibid*, ¶¶. 188, 192

[193]For instance, see in general the cases of *Robert Azinian et al v. The United Mexican States, infra* (n. 225); *Inceysa Vallisoletana v. Republic of El Salvador, supra* (n. 8); *Plama Consortium Limited v. Bulgaria, supra* (n. 14); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, supra* (n. 8); and *David Minnotte & Robert Lewis v. Republic of Poland, infra* (n. 222).

[194] Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167),p.469

[195]*Ibid*, p.470

"legality clause" in an IIA, or on the basis of failure to prove that the claimant is a covered "investor", or because fraudulent conduct as a violation of national law and "international public policy" should result in a denial of jurisdiction.[196]In other cases, concerning IIAs without explicit "legality clauses", the issue is lasting contradictory. In some cases, finding of fraud veiled tribunals to decide that the tribunal would have not had jurisdiction over the case by accepting the general principle that investments made on the basis of fraudulent conduct cannot benefit from IIA protection, had the investment was proven to be made deceitfully. While in other cases fraud findings resulted in tribunals' determination that the investor's claims are inadmissible, or must be denied on the merits due to the invalidity of the underlying investment contract.[197]

In *Inceysa v. Republic of El Salvador,* the dispute was initiated under Spain-El-Salvador BIT concerning an exclusive concession contract for the installation, management, and operation of mechanical inspection for vehicles and emission control of contaminating gases, particles, and noise in El-Salvador.[198]The claimant was awarded the concession contract through a public bidding process organized by the Ministry of the Environment and Natural Resources of El-Salvador.[199] Following a dispute between the parties in relation to performance of the contract, the Ministry sought to terminate the concession contract in the Salvadoran courts and awarded same contract to other companies.[200]The claimant commenced ICSID arbitration, claiming expropriation of its contractual rights.[201]The respondent challenged the jurisdiction of the tribunal for the reason that the alleged fraud committed by claimant to obtain the award.[202]In view of the respondent's challenge to the jurisdiction, the tribunal examined in detail various misrepresentations claimed to have been made by the claimant in its bid, and considered whether the false information provided concerned a "central aspect of the bid",

---

[196]Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), pp. 472-473

[197] *Ibid*

[198]*Inceysa Vallisoletana v. Republic of El Salvador, supra* (n. 8), ¶¶.3, 23, 27

[199]*Ibid*, ¶¶.22-29

[200]*Ibid*, ¶¶.22-36

[201]*Ibid*, ¶¶.37-44 (specifically in its Request for Arbitration, Claimant argues that the noncompliance of El Salvador to execute the contract is equivalent to an unjustified unilateral termination of the Contract and an indirect expropriation of the rights granted to it under the contract; *ibid*, ¶.37)

[202] See in general, *ibid*, ¶¶.45-62 (particularly, the Respondent strongly argued that [...] the Investment Treaty by its terms and intent extends protection only to investments made in El Salvador in accordance with its laws. El Salvador never consented to treaty protection of investments, such as those based on contracts to provide services for the State, that were procured by fraud, forgery and corruption. *ibid*, ¶.45)

process.[203]Accordingly, the tribunal having found all instance of deceits constitute a central aspects of the bid requirement, it denied its jurisdiction to hear the disputes brought before it.[204]

The tribunal further coupled the fraud found to have committed by the claimant with violations of the principles of good faith,[205]*nemo auditur propiam turpitudinem allegans,*[206]international public policy,[207] and that prohibits unlawful enrichment.[208]

The tribunal in consideration of all the above fraudulent acts of the Claimant concluded that, because claimant'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 EI-Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, the tribunal declares itself incompetent to hear the dispute brought before it.[209]

In *Plama Consortium Limited v. Bulgaria,* the claimant initiated a request for arbitration alleging various violations of respondent's obligations under the Energy Charter Treaty (ECT)

---

[203]See in general, *Inceysa Vallisoletana v. Republic of El Salvador, supra* (n. 8). Particularly, the tribunal identified five instances of misrepresentation by Inceysa for analysis: (1) the submission of false and incorrect financial statements (*ibid,*¶¶. 103-110), (2) submission of false information on the identity of the claimant's strategic partner, as well as the capacity and experience of the claimant and its partner (*ibid,*¶¶. 111-118), (3) submission of false documents regarding the experience of the claimant's sole administrator (*ibid,*¶¶. 119-122), (4) omitting information about the connection between the claimant and another bid participant-ICASUR (*ibid,*¶¶. 123-127), and (5) submission of false documents allegedly signed with municipalities in the Philippines and Panama (*ibid,*¶¶. 128, 236); See also Aloysius Llamzon and Anthony Sinclair, *supra* (n. 165),p.475

[204]*Inceysa Vallisoletana v. Republic of El Salvador, supra* (n. 8), ¶.337

[205]*Ibid,* ¶¶. 230-239 (The tribunal in substantiating its ruling in this regard argued specifically that EI Salvador gave its consent to the jurisdiction of the tribunal, presupposing good faith behavior on the part of future investors and it did not have any basis to suppose that Inceysa would submit false information and would commit fraudulent acts for the purpose of establishing a legal relationship with the host state, which was embodied in the Contract that gives rise to that dispute. Had it known such violations of Inceysa, the host State, El Salvador, would not have allowed it to make its investment.)

[206]*Ibid,*¶¶. 240-244 (In this respect the tribunal that analyzed the fraudulent acts of the Claimant against such Latin maxim and six related Maxims affirmed that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud.)

[207]*Ibid,*¶¶. 245-252

[208]*Ibid,*¶¶. 253-256

[209]*Ibid,* ¶¶. 257, 339

for the investment it was made in Bulgaria.[210]Principally, the Claimant alleged that Bulgaria has failed: to create stable, equitable, favorable and transparent conditions for claimant's investment; to provide claimant's investment fair and equitable treatment; to provide claimant's investment the most constant protection and security and it had subjected claimant's investment to unreasonable and discriminatory measures, breached its contractual obligations in relation to claimant, and have subjected claimant's investment to measures having an effect equivalent to expropriation.[211]The respondent argued that the tribunal did not have jurisdiction as the claimant's investment was void *ab initio* under Bulgarian law due to misrepresentations made in the process of procuring the investment.[212]

The tribunal in its decision on Jurisdiction, nonetheless, concluded that respondent's allegation on misrepresentation did not deprive it of jurisdiction to arbitrate the case, and in light of the serious charges raised, the tribunal decided to examine the allegations during the merit phase.[213] The respondent, even then after, insisted that obtaining the investment via misrepresentation in violation of Bulgarian law made claimant's claims inadmissible and, in any event, such misrepresentations defeated its claims on the merits.[214]

The tribunal faced with such arguments of the parties next to decision on jurisdiction analyzed the occurrence of misrepresentations[215] in acquisition of the Claimant's investment and its consequences[216] as issue of admissibility and thereof found that the claimant had indeed engaged in fraud, having "represented to the Respondent that the investor was a consortium-which was true during the early stages of negotiations" but then "failed deliberately to inform [the] Respondent of the change in circumstances" when the investor became an individual acting alone, without significant financial resources.[217]The Tribunal recognized that, even though Bulgaria did not ask for the withheld information, the claimant was aware of new facts

[210] See in general *Plama Consortium Limited v. Bulgaria, supra* (n. 14).
[211] *Ibid*, ¶. 73
[212] *Ibid*, ¶¶. 11-20, 96-106; Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.473
[213] *Plama Consortium Limited v. Bulgaria, supra* (n. 14), ¶¶. 21, 97
[214] *Iibd*, ¶. 98; ("Even if the tribunal were to concluded that it did have jurisdiction, however , claimant having obtained its investment by unlawful means would render its claim inadmissible", *ibid*,¶. 96)
[215] See in general, *ibid*,¶¶. 116-129
[216] See in general,*ibid*,¶¶. 130-146
[217] *Ibid*, ¶, 133; Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), pp.473-474

about which it was obliged to inform State officials.[218]Hence, the tribunal found that the investor had engaged in "deliberate concealment amounting to *fraud*, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capabilities required…"[219]

Indeed, unlike the BIT in the *Inceysa* case and many other BITs, the ECT does not contain a provision requiring the conformity of the investment with a particular law. The tribunal, however, argued that, this does not mean that the protections provided by the ECT cover all kinds of investment, including those contrary to domestic or international law.[220] Anyway, though the tribunal decided in acknowledgement of the parties extensive efforts to consider further allegation on the merits, it concluded in the admissibility phase that even if Claimant would have had the benefit of the substantive protections of the ECT, Claimant's claims on the merits would have failed.[221]

However, unlike in the *Plama* case, in a recent case of *Minnotte and Lewis v. Poland*, the tribunal noted that although the Poland-US BIT does not explicitly requires the investment to be made in accordance with the host State's law, "*it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law.*"[222] The tribunal, however, added that it is only the case "*where fraud is so manifest, and so closely connected to facts [...]*

---

[218]*Plama Consortium Limited v. Bulgaria, supra* (n. 14), ¶¶. 133-134 (The claimant represented to the Bulgarian Government that the investor was a consortium-which was true in the early stage of negotiations. It then failed, deliberately, to inform respondent of the change in circumstances, which the tribunal considers would have been material to respondent's decision to accept the investment); see also Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.474.

[219]*Ibid*,¶. 135;The arbitral tribunal was persuaded that Bulgaria would not have given its consent to transfer the investment (shares of a gas refinery company) to the claimant had it known it was simply a corporate cover for a private individual with limited financial capacity, *ibid*.¶.133; See also Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.474

[220]*Ibid*,¶. 138

[221]*Ibid*, ¶.147 (In the merits phase the tribunal concluded that in any event the Respondent did not breach its obligations to Claimant under the ECT, and, consequently the tribunal did not address Claimant's claim for damages. *ibid*, ¶. 306)

[222]*David Minnotte & Robert Lewis v. Republic of Poland* (ICSID Case No.ARB(AF)/10/1), Award, May16, 2014, ¶.131, available at: , http://www.italaw.com/sites/default/files/case-documents/italaw3192.pdf, accessed on August 27, 2015; See also UNCTAD,"Investor-State Dispute Settlement: Review of Developments in 2014," IIA Issues Note, No. 2, (May, 2015),p. 8.

which form the basis of a tribunal's jurisdiction as to warrant a dismissal of claims [...] for want of jurisdiction."[223] The tribunal ultimately, but dismissed the jurisdictional objection as the circumstances in which the investment at issue was made were "*far from displaying such manifest fraud.*"[224]

Additionally, the tribunal in the *Robert Azinian et al v The United Mexican States,* which was an ICSID arbitration arising under Chapter Eleven of NAFTA, the respondent objected to the tribunal's jurisdiction on the basis of alleged misrepresentations made by the claimants in relation to their financial capabilities and experience in acquisition of the concession contract.[225] However, the arbitral tribunal ruled that although "the pleadings [...] raise a number of complex issues which may have the effect of restricting the competence of the tribunal [...] they seem unlikely to eliminate altogether the need to consider the merits[...]"[226]At the merit stage, while the tribunal did not discuss each element of fraud schematically, its analysis implicitly did so, focusing on whether there had been a knowing misrepresentation[227] of a material fact,[228] with an intent to deceive and on which government authorities had relied.[229]Accordingly, the tribunal found that the Respondent "was led to sign the Concession Contract on false pretences", and that denied the claimant any redress on the merits for "the claim has failed in its entirety."[230]

[223] *David Minnotte & Robert Lewis v. Republic of Poland, supra* (n. 222),¶. 132; UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2014," *supra* (n. 222), p.8

[224] *David Minnotte & Robert Lewis v. Republic of Poland, supra* (n. 222),¶. 133; UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2014," *supra* (n. 222), p.8

[225] *Robert Azinian et al v The United Mexican States* (ICSID Case No.ARB(AF)/97/2), Award, November 1, 1999, ¶¶.27-35,42, available at:http://www.italaw.com/sites/default/files/case-documents/ita0057.pdf, accessed on September 21, 2015.

[226] *Ibid,* ¶¶.48, 68, 77

[227] *Ibid,* ¶. 33 ("The evidence compels the conclusion that the Claimants entered into the Concession Contract on false pretences, and lacked the capacity to perform it.")

[228] *Ibid,* ¶. 109 ("an absolutely fundamental fact had changed: the Claimants had fallen out with Sunlaw Energy, who had disappeared from the project" before the signing of the Concession Contract).

[229] *Ibid,* ¶¶.104, 113 ("Respondent was misled as to Claimant's capacity to perform the concession and the contemporaneous written evidence relating to the period prior to signature shows reliance by the Respondent on the representations of the Claimant as to their own capabilities".)

[230] *Ibid,*¶.124; Aloysius Llamzon and Anthony Sinclair, supra (n. 167), p.474

3.4. ILLEGAL INVESTMENT ARBITRATION-BREACH OF OTHER HOST STATE LAWS

The "in accordance with host State law" condition found in many IIAs would almost certainly cover corruption and fraud, since these conducts will in all likelihood amounts to a violation of the laws of any host State.[231]That is why, host States have usually invoked also such "legality clause" to demonstrate that an investment has not been made or operated in compliance with national law, and are thus not covered "investments" to which the host State has offered the protection of the applicable IIA, even in cases, the claimant has found to commit corruption or fraud. Likewise, due this fact and other reasons arbitrators deal with corruption or fraud in many case seemed to have also opted them prove through other means, such as, the violation of the so-called "legality clause" present in IIAs. Apparently, however, it should be noted that such clauses might introduce much broader restrictions besides these on access to investment treaty arbitration.[232]That is why, though provided in succinct manner, an effort has made to analyze them separately in the above sub-sections.

Moreover, as the tribunals in the cases of corruption or fraud proven to have been committed did in disposing the disputes either at the jurisdictional phase or at the merits phase for various causes, tribunals have treated similarly arguments based on breach of host state law as going to jurisdiction or admissibility, while others have treated them as arguments going to the merits.

In *Fraport v. Philippines,* the Claimant was invested in a passenger terminal project in Philippines.[233] According, the Philippine Anti-Dummy Law (ADL) in the event of a public utility franchise, the proponent and facility operator must be Filipino or if a corporation, it must be duly registered with the Securities and Exchange Commission and owned and controlled up to at least 60% by Filipinos, as further required by the Philippine Constitution.[234]The Respondent, however, learned over the course of time that a secret

[231] Aloysius Llamzon and Anthony Sinclair, *supra* (n. 167), p.478
[232] *Ibid*
[233] See in general, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines, supra* (n. 20).
[234] *Ibid,* ¶. 86

shareholders' agreement had been entered into between the investor and its local partner that gave the investor managerial control over the joint venture formed to run the project beyond what was set by the ADL, expropriated the investment of the Claimant.[235] Then, when the Claimant initiated arbitration, the Respondent challenged the tribunal's jurisdiction on the basis that the protections afforded by the BIT at issue did not extend to investments made in violation of Philippine law.[236]The BIT entered into between the Philippines and Germany was provided the only possible basis for the tribunal's jurisdiction over the Claimant's claims.[237] In that regard, the Respondent refers to the "limited nature" of the BIT's application and contends that the Claimant's investment falls outside of the BIT's expressly limited scope because it was not made in compliance with Philippine law.[238]

The tribunal by accepting the Respondent argument concluded that the only plausible way for the Claimant equity investment to prove profitable was to arrange secretly for management and control of the project in a way which, the investor knew were not in accordance with the law of the Philippines.[239]It held that *Fraport* knowingly and intentionally circumvented the ADL by means of secret shareholder agreements.[240]Consequently, it cannot claim to have made an investment "in accordance with law". [...] Because there is no "investment in accordance with law", the tribunal lacks jurisdiction *ratione materiae*.[241]Latter, the tribunal in *Phoenix* referred to this case with approval.[242] Specifically, the tribunal recognized the applicable BIT contained an "in accordance with host State law" clause in its definition of investment;[243] it discussed the consequences of violations of such clause by an investor.

---

[235]*Fraport AG Frankfurt Airport Services Worldwide v. Philippines, supra* (n. 20), ¶¶. 228-279.
[236]*Ibid,* ¶¶. 285-291.
[237]*Ibid,* ¶. 285
[238]*Ibid;* The BIT entered into between the Philippines and Germany defined under article 1(1) the term 'investment' shall mean any kind of asset ***accepted in accordance with the respective laws and regulations of either Contracting State***, and more particularly, though not exclusively..., *ibid,*¶.281
[239]*Ibid,* ¶. 398
[240]*Ibid,* ¶. 401
[241]*Ibid*
[242]*Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16),¶.105.
[243]*Ibid,*¶.56 (the applicable Israeli-Czech Republic BIT as provided under Article 1(1) defined "the term 'investment' shall comprise any kind of assets invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party ***in accordance with the laws and regulations*** of the latter and shall include, in particular, though not exclusively....")

It stated in an *obiter dictum* then that in cases where it is manifest that the investment has been made contrary to law, a tribunal may deny its jurisdiction.[244]

Likewise in *Inceysa*, though the case could be classified primarily as a case concerning fraud, still the case is notable from the perspective of breach of host state's laws.[245]Because, *Inceysa's* investment was proven to have made in a manner that was clearly illegal, it was not included within the scope of consent expressed by Spain and the Republic of EI Salvador in the BIT and, consequently, the disputes arising from it were not subject to the jurisdiction of the Centre. Therefore, the tribunal declared itself incompetent to hear the dispute brought before it.[246]

In all the above mentioned cases for examination, the legality requirement clause was provided unequivocally in the applicable IIAs, and that is why, the respective tribunals disposed the disputes at the outset as jurisdictional issue arguing that the applicable IIAs are not deemed to create protections for investments not within jurisdictional *rationae voluntatis*[247]or *rationae materiae*[248] of the contracting states parties.

Nonetheless, many IIAs do not contain an "in accordance with the law" provision precisely, and even in such cases, investment tribunals have frequently requested to deny investment protections for violation of host state laws alleged to have committed in making/operating the disputed investment. But, the practices of tribunals in disposing such cases, appeared to have evolved contradictory.

---

[244]*Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16),¶¶. 102-104 (The purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction; *ibid*, ¶. 102)

[245]*Inceysa Vallisoletana v Republic of El Salvador, supra* (n. 8),¶¶. 190-207.

[246]*Ibid*, ¶¶.207, 257.

[247]*Ibid*, ¶¶.143,144, and 162; See also *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16), ¶.101(the tribunal therein argued that states cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.)

[248]Schill, Stephan, *supra* (n. 11), p.5; *Fraport AG v the Republic of the Philippines*, *supra*(n. 20), ¶¶.334, 401. (The BIT at issue in that arbitration has a `jurisdictional limitation *ratione materiae* in which the tribunal concludes that as there was no "investment in accordance with law", the Tribunal lacks `jurisdiction *ratione materiae*.)

In *Plama* case, the claimant had been found to have violated other laws of the respondent state in addition to the fraud, which had found being committed; the tribunal noted that the ECT does not include a provision calling for the investment's conformity with a given law.[249] The lack of such a provision, however, did not convince the tribunal to suggest that ECT's protections would apply to "all kinds of investments, including those contrary to domestic or international law."[250] The tribunal argued that, 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 [...]."[251]Basically, the tribunal indicates that "[t]he fundamental aim of the ECT is to strengthen the rule of law on energy sector."[252] Consequently, the tribunal confirmed the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law.[253]The tribunal then, in the admissibility phase, concluded that the substantive protections of the ECT cannot apply to investments that were made contrary to the laws of the respondent state.[254]

Interestingly, unlike in cases where the applicable IIA 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.[255]

The tribunal in the case of *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon,* however, contrary to the *Plama's* tribunal conclusion, inclined to entertain the requirement to make an investment in accordance with the law as a jurisdictional prerequisite even where no explicit requirement in this regard can be found in the applicable IIA.[256]

In that vein, the recent *Yukos* tribunal has also stated in *obiter dictum,* the principle that an investment "will not be protected if it has been created in violation [...] of "the host State's

---

[249] *Plama Consortium Ltd. v. Republic of Bulgaria, supra* (n. 14), ¶.138
[250] *Ibid*
[251] *Ibid*; See also Moloo, and et al. *Supra* (n. 1), p.1483; Ursula Kriebaum, *supra* (n. 11); p.2
[252] *Plama Consortium Ltd. v. Republic of Bulgaria, supra* (n. 14), ¶.139
[253] *Ibid*
[254] *Ibid*
[255] *Ibid* ,¶¶.140-146; Moloo, and et al. *Supra* (n. 1), p.1484
[256] See in general *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, supra* (n. 25); Moloo, and et al. *Supra* (n. 1), p.1491

law" which is claimed to be a "general principle [...] that exist[s] independently of specific language" in an investment treaty.[257]

However, contrasting to what has states in *obiter dictum*, the *Yukos'* tribunal had come to hold undeniably in its decisive reasoning that there was "no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment."[258] According to the tribunal, "if the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law [and] if the investor believes these sanctions to be unjustified [...], it must have the possibility of challenging their validity in accordance with the applicable investment treaty."[259] In the view of the tribunal, "it would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits."[260]

Consequently, the tribunal noted generally that it was "not persuaded that there exists a general principle of law [...] that would bar an investor from making a claim before an arbitral tribunal under an investment treaty [...]."[261]The Tribunal thus concluded that the Respondent's [...]argument does not operate to deprive its *jurisdiction* in that arbitration, or render *inadmissible* any of the Claimants' claims or otherwise bar Claimants' from invoking the substantive protections of the ECT.[262]

---

[257] *Yukos Universal Limited (Isle of Man) v The Russian Federation, infra* (n. 258), ¶. 1351; See also *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16), ¶ 101 ("it was the Tribunal's view 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")

[258] *Yukos Universal Limited (Isle of Man) v The Russian Federation* (UNCITRAL, PCA Case No. AA 227),Final Award, July 18, 2014, ¶.1355, available at: http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf, accessed on September 21, 2015; see also UNCTAD," Investor-State Dispute Settlement: Review of Developments in 2014,"*supra* (n. 220), p. 9.

[259] *Ibid*

[260] *Ibid*

[261] *Ibid,* ¶.1358

[262] *Ibid,* ¶.1373

3.5. TEMPORAL DIFFERENTIATION-ILLEGALITY AT THE TIME OF THE ESTABLISHMENT OR IN THE OPERATION OF THE INVESTMENT

Some tribunals have also maintained a strict temporal differentiation in the treatment of illegal Investments cases based on when in the course of the investments they occurred. An investment may be illegal *ab initio.*[263]But, it is also possible that an investment was in accordance with law at the moment of the initiation of the investment and the contraventions may occur later on during the operation of the investment.[264] So, the question that can be raised at this juncture is, should temporal sensitive illegalities have impacts in deprive a tribunal of its jurisdiction or be handled at the merits stage?

In light of this, in *Hamester* case, referencing to the Germany-Ghana BIT, the tribunal stated that "the legality of the creation of the investment is a jurisdictional issue," and "the legality of the investor's conduct during the life of the investment is a merits issue."[265]Likewise, in *Metal-Tech,* the tribunal when interpreted Article 1(1) of the Israel-Uzbekistan BIT concluded that the legality requirement covers only the establishment of the investment, not its operation once established.[266]

Moreover, the tribunal in *Fraport* stated in an *obiter dictum* that the relevant point in time for purposes of jurisdiction is the start of the investment. It affirmed that the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment.[267] 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.[268]

---

[263]Ursula Kriebaum, *supra* (. 11), p.19
[264]*Ibid;* See also *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16), ¶. 103
[265]*Gustaf F-W. Hamester GmbH & Co KG v. Republic of Ghana, supra* (n. 8), ¶. 127
[266]*Metal-Tech Ltd. v. The Republic of Uzbekistan, supra* (n. 86),¶. 267
[267]*Fraport AG Frankfurt Airport Services Worldwide v. Philippines, supra* (n. 20),¶. 345
[268]*Ibid;* The *Phoenix* tribunal by approving the *Fraport* case noted that "...the conformity of the investment with the host State's laws has to be performed taking into account the laws in force at the moment of the

Accordingly, commentators who analyzed the above mentioned cases and some others congregate to conclude that that unlawful conduct pertaining to the acquisition of the investment is relevant to the tribunal's jurisdiction; unlawful conduct *ex post* the acquisition of the investment is instead a question for the merits.[269]

This conclusion, however, seems somewhat misleading. One thing, it may be open to doubt whether an investment is necessarily a onetime event that can be reduced to a particular date.[270] Rather, the making of an investment is often a process than an instantaneous act, and often comprises a number of diverse transactions.[271] Ursula for instance, even citing a first case of ICSID argued that there is consistent case law showing that tribunals when examining the existence of an investment for purposes of their jurisdiction have not looked at specific transactions, but at the overall operation.[272] In accepting this "general unity of an investment operation" recently, the *Yukos* tribunal also concluded that the making of the investment is often consisting of several consecutive acts and all of these must be legal and *bona fide*.[273]In this respect, the conclusion could not be convincing in case were the time cannot be decided when exactly the illegal investment was made.

Second, counter to the above mentioned IIAs' legality requirements which have been interpreted to cover a single moment in time i.e. the establishment of the investment, there is also instance, where arbitral tribunal had rendered a claimant's claims inadmissible even in case the applicable IIA unequivocally imposes an on-going duty to observe the host state laws throughout the time that the investor operates in the host state. Such as, in *Al Warraq v. Indonesia,* although the tribunal affirmed that the legality requirement under the applicable

---

establishment of the investment. The State is not at liberty to modify the scope of its obligations under the international treaties on the protection of foreign investments, by simply modifying its legislation or the scope of what it qualifies as an investment that complies with its own laws. For detail information See also *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16), ¶¶. 103-105.

[269]Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration", *supra* (n. 18); Moloo, and et al. *Supra* (n. 1); Schill, Stephan, *supra* (n. 11).

[270] Ursula Kriebaum, *supra* (n. 11), p.22

[271] *Ibid*; see also *Yukos Universal Limited (Isle of Man) v. The Russian Federation, supra* (n. 258),¶.1368

[272] Ursula Kriebaum, *supra* (n. 11), pp.22-23

[273] *Yukos Universal Limited (Isle of Man) v. The Russian Federation, supra* (n. 258),¶.1369

treaty has imposed an on-going obligation upon the investor,[274]it decided only a Claimant's claims was found being inadmissible instead of dying simply its jurisdiction at the outset.[275]This is also another instance to refute the above conclusion.

3.6. EXCEPTIONS TO THE "LEGALITY REQUIREMENT" CLAUSE

3.6.1. The Exception for "*De Minimis*" Breaches or "Good Faith" Mistakes

One may consider further whether any illegality related to the investment, no matter how insignificant, should preclude the jurisdiction of an arbitral tribunal or the availability of substantive protection at the merit phase when arbitral tribunals faced with interpreting the "legality requirement" clause.[276] In this regard, on the one hand, when a respondent state has invoked the non-compliance with host state laws defense before investment tribunals, in several occasions, tribunals had refused to accept such defense by arguing that investors are not required to comply with *all* of the host state's law. Rather, these tribunals indicate, investors must only comply with the *'fundamental principles'* of host state law. For instance, the tribunals in *Rumeli v Kazakhstan*[277]stated that 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 and regulations, a certain level of violation is required.[278]By referring to a precedent of prior other cases confirmed that [...], such a provision will exclude the protection of

[274]Article 9 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (1981) provides that: *"The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."* For further analysis about such clause, see in general *Hesham T.M. Al-Warraq v. Republic of Indonesia* (UNCITRAL), Final Award, December 15, 2014,¶¶. 631-633, available at: http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf, accessed on September 21, 2015.

[275]*Ibid*,¶¶. 645-647

[276]Moloo, and et al. *Supra* (n. 1), p.1494

[277]*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan,* (ICSID Case No. ARB/05/16), Award, July 29, 2008, available at: http://www.italaw.com/sites/default/files/case-documents/ita0728.pdf, accessed on September 21, 2015.

[278]*Ibid*,¶.168; see also Jarrod Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration" (April 24, 2014), p.3, available at SSRN: http://ssrn.com/abstract=2428859 or http://dx.doi.org/10.2139/ssrn.2428859 , accessed on September 25, 2015; Ursula Kriebaum, *supra* (n. 10),p. 11

investments only if they have been made in breach of *fundamental legal principles of the host country.*[279]

Likewise, in *Desert Line v. Yemen,* the tribunal summarized arbitral precedents and resorted to the standard of a violation of fundamental principles of host State law as triggering the exclusion from investment protection.[280]The tribunal typically avowed that such clauses are 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.*[281]Besides, in *Phoenix* case, 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.*[282]The tribunal, accordingly, citing an extreme case noted that nobody would suggest that ICSID protection should be granted to investments made in violation of the *most fundamental rules of protection of human rights [...].*[283]

On the other hand, there are situations where arbitral tribunals have considered only minor errors in the observance of bureaucratic formalities of the domestic law as irrelevant. In *Tokios Tokeles v. Ukraine,* the respondent alleged that the full name under which the Claimant registered its subsidiary was improper, because it was not a recognized business organization under Ukrainian law.[284] The tribunal, however, focused on the fact that the Respondent did not allege that the Claimant's investment and business activities were illegal *per se.*[285]It also found relevant that despite the not entirely correct formalities, the in vestment had been

---

[279]*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, supra* (n. 277),¶.168 ("Investments in the host State will only be excluded from the protection of the treaty if they have been made in breach of fundamental legal principles of the host country."*Ibid,*¶.319).

[280]*Desert Line Projects LLC v. The Republic of Yemen,* (ICSID Case No. ARB/05/17), Award, February 6, 2008,¶.104, available at: http://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf, accessed on September 21, 2015; Jarrod Hepburn, *supra* (n. 278), p.3; Ursula Kriebaum, *supra* (n. 11),p.11.

[281]*Ibid*

[282]*Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16),¶.78

[283]*Ibid*

[284]*Tokios Tokeles v. Ukraine, supra* (n. 8),¶.83; see also Ursula Kriebaum, *supra* (n. 11),p. 12; Moloo, and et al. *Supra* (n. 1),pp.1494-1495

[285]*Tokios Tokeles v. Ukraine, supra* (n. 8),¶.86; see also Ursula Kriebaum, *supra* (n. 11),p. 12; Moloo, and et al. *Supra* (n. 1),pp.1494-1495

registered.[286]Consequently, 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.[287]

The tribunal in *Mytilineos v. Serbia* which rejected the host State's defense to deny investment protection also concentrated to the fact that the activity *per se* was not illegal. It referred to *Tokios Tokeles* with approval,[288]and stressed on the fact that it had not been argued by Respondents, nor was there any indication that any of the business transactions of Claimant, in particular concerning any of the investment, contravened the legal rules in force in the host state.[289]In effect, the tribunal expressly stated that "Respondents did not contend that the investments were not in compliance with the laws either-they only say that the Agreements were not registered as investment agreements [...]."[290] Consequently, the Tribunal concluded, by a majority, that for the purposes of the BIT the investment has been made in accordance with the laws of the respondent and is thus protected under the BIT.[291]

Furthermore, the tribunal in *Fraport* which examined the issue of whether all types of illegally made investments would result in the denial of investment protections seemed to have rather adopted a different standard-*good faith mistake*. Specifically, the tribunal articulated that 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.[292] In some circumstances, the law in question of the host state may not be entirely clear and *mistakes may be made in good faith.*[293]For this reason, the tribunal seemed that it would be willing to exclude good faith mistakes from the "legality clause" requirement in addition to the minor errors. In that case,

---

[286]*Tokios Tokeles v. Ukraine, supra* (n. 8),¶.86; see also Ursula Kriebaum, *supra* (n. 11),p. 12; Moloo, and et al. *Supra* (n. 1),pp.1494-1495

[287]*Ibid*

[288]*Mytilineos v. State Union of Serbia and Montenegro and Republic of Serbia, supra* (n. 149),¶.151; Ursula Kriebaum, *supra* (n. 11), p. 13

[289]*Mytilineos v. State Union of Serbia and Montenegro and Republic of Serbia, supra* (n. 149), ¶.153

[290]*Ibid*

[291]*Ibid,*¶.157

[292]*Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines, supra* (n. 20),¶.396

[293]*Ibid,*¶.396 (The tribunal provided that an indicator of a good faith error would be include 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); see also Moloo, and et al. *Supra* (n. 1), p.1495

nevertheless, the tribunal found that "the comportment of the foreign investor, as was clear from its own records, was egregious and cannot benefit from presumptions which might ordinarily operate in favour of the investor."[294]

Fortunately, though the aforesaid cases discuss the exception where the relevant IIA contained "in accordance with the law" clauses, there are some commentators who argued also the same reasoning applies *a fortiori* to an assessment of admissibility where no such clause exists.[295] Because, in all those related instances, good faith mistakes or minor errors in relation to the investment should not have the disproportionate effect of precluding a claimant from the benefits of treaty protection.[296]

Altogether, those cases would suggest that, when a state objects to the claims of an investor on grounds of the illegality of the investment, the tribunal's first task is to determine whether the laws allegedly breached constitute either *'fundamental principles'* or *'minor errors'* or breach of them were made in *good faith.* If the relevant laws do not constitute fundamental principles, or at least, in the judgment of the tribunal the alleged breach has classified as minor error or has been committed in good faith, the state's objection cannot possibly succeed. In the *Hochtief v. Argentina* case, the respondent argued that the claimant's loan transactions had not all been recorded as required by Argentine financial legislation and therefore, the loans had been made not in accordance with the laws and regulations of Argentina as required by Article 2(2) of the Argentina-Germany BIT.[297] The tribunal, nonetheless, concluded that there is not "a sufficient basis for rejecting the claims concerning the loans on the basis of their non-registration under Argentine regulations."[298] The tribunal noted that in previous cases, tribunals have focused on compliance with *"fundamental*

---

[294] *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines, supra* (n. 20), ¶. 397; Moreover, for additional analysis about the confirmation of the "minor error" test and "good faith' test see Moloo, and et al. *Supra* (n. 1),pp.1495-1497; Jarrod Hepburn, *supra* (n. 278),pp.2-13; and Ursula Kriebaum, *supra* (n. 11),pp.10-13.

[295] Moloo, and et al. *Supra* (n. 1),pp.1496-1497

[296] *Ibid*

[297] *Hochtief AG v.The Argentine Republic* (ICSID Case No.ARB/07/31), Decision on Liability, December 29, 2014,¶.195, available at:http://www.italaw.com/sites/default/files/case-documents/italaw4101.pdf, accessed on September 25, 2015.

[298] *Ibid*, ¶. 200.

principles of the host State's law."[299] In the tribunal's view, "investments that are forbidden or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT.[300] But not every technical infraction of a State's regulations associated with an investment will operate so as to deprive that investment of the protection of a treaty that contains such a provision."[301]

However, the primary problem that associates with the dichotomy of *"fundamental principles"* versus the *"minor errors"* of host state laws in a way to provide some exceptions to the legality requirement is that, it seems to have lacked any foundation in the respective applicable IIAs.[302]In these situations, it is only the tribunal which can decided whether the alleged breach of the host state's law had constituted *fundamental principle* or *minor error.* Moreover, in doing so, there have seemed no developed exact, consistent and objective standards in the case laws yet to scrutinize the relevance of a violation of host state law.[303] For this reason, this researcher have strongly believed that the basis by which tribunals could classified the alleged breach of host state law either into *fundamental principle* or *minor error,* can in turn affect as to whether the disputed issue could be disposed at the jurisdictional or merit phases.

3.6.2. Estoppel-Prohibiting the Host State from Raising the Investment's Illegality

In addition to the good faith mistakes or minor errors exception, as discussed above briefly, breaches of domestic law by the investor when making/operating the investment are widely

[299] *Hochtief AG v. The Argentine Republic, supra* (n. 297), ¶.199; specifically cited *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No.ARB/05/17), Award, 6 February 2008, ¶ 104, citing *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) and *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25).

[300] *Hochtief AG v.The Argentine Republic, supra* (n. 297), ¶.199.

[301] *Ibid*

[302] To ensure the fact that the respective applicable BITs in the above mentioned cases have not recognized the dichotomy of host state law either into *fundamental principle* or *minor error*, see *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, supra* (n. 277); *Desert Line Projects LLC v. The Republic of Yemen, supra* (n. 280),¶.92; *Phoenix Action, Ltd. v. Czech Republic, supra* (n. 16),¶. 56; *Tokios To keles v. Ukraine, supra* (n. 8),¶.17; *Mytilineos v. State Union of Serbia and Montenegro and Republic of Serbia, supra* (n. 149),¶. 50; and *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines, supra* (n. 20),¶.281.

[303] For detail analysis on this issue see in general, Ursula Kriebaum, *supra* (n. 11),pp. 9-16

considered as not excluding treaty protection in case the host State knew about the illegality and accepted it, either by incorrectly suggesting that the investment in question complied with its domestic laws, or by proceeding with cooperating with the investor on the basis of an illegal investment.[304] In both cases, arbitral tribunals regularly apply the concept of estoppel in order to reject the State's claim that breaches of domestic law entailed a loss of treaty protection of the relevant investment.[305]

Frequently, although IIAs make no mention of estoppel, the principle finds its application in investment law as a general principle of law within the meaning of Article 38(1)/c/ of the Statute of the ICJ.[306]For example, in the *Eastern Greenland Case* before the PCIJ, the court held that because Norway had previously "reaffirmed that it recognized the whole of Greenland as Danish," "it was debarred itself from contesting Danish sovereignty over the whole of Greenland."[307]

In the context of international investment law, where the host state knew of the illegality but still endorsed the investment, it should be estopped from raising that illegality before the tribunal.[308]In such case, investors have argued that, the question of their compliance with domestic law does not require an answer at all and rather they suggest that, as a result of representations of legality made to the investor by state officials or the acquiescence in, the state is estopped from relying on the illegality to remove the tribunal's jurisdiction or the availability of substantive protections at the merit phase.[309]

In *Kardassopoulos v. Georgia*, the state tried to claim somewhat counter-intuitively, that the Claimant's investment was unlawful because its officials did not have the authority to enter

---

[304]Schill, Stephan, *supra* (n. 11), p.16; Moloo, and et al. *Supra* (n. 1),p.1497

[305]*Ibid*

[306]Jarrod Hepburn, *supra* (n. 276),p.17; Moloo, and et al. *Supra* (n. 1),p.1497

[307]Moloo, and et al. *Supra* (n. 1), p.1497; also see in general *Legal Status of Eastern Greenland, Judgment* (Denmark. v. Norway.), April 5, 1933 P.C.I.J. (ser.A/B) No. 53, ¶. 86, available at: http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm, accessed on September 25, 2015.

[308]Moloo, and et al. *Supra* (n. 1),pp.1497-1498

[309]See in general, *Southern Pacific Properties (Middle East) Limited v. Egypt,* (ICSID Case No. ARB18413), Award, May 20, 1992, available at: http://www.italaw.com/sites/default/files/case-documents/italaw6314_0.pdf, accessed on September 25, 2015; *Ioannis Kardassopoulos v. Georgia, supra* (n. 13).

into the underlying investment agreements.[310]It further argued that the agreements were void *ab initio* and Claimant can have no claim under the applicable IIAs.[311] The tribunal, however, by accepting the Claimant position clarified that:

> *"'Protection of investments under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State.[...].This control, however, relates to the investor's action in making the investment. It does not allow a State to preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws. In other words, a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with its domestic law".*[312]

The tribunal in arriving at that conclusion, it invoked the concept of estoppel which prevented the Respondent from invoking domestic illegality when the State's conduct has been "cloaked with the mantle of Governmental authority."[313]

Nevertheless, the concept of estoppel seems not equivalent to the outright prevention of the host state ability to invoke its own failure to comply with its domestic law as a ground to preclude the investment treaty protections as mentioned on the surface of the *Kardassopoulos* case. Rather, an estoppel in order to counter the defense of investor's illegality by the host state, the investor, requires proving that the host State knew about the illegality and wherein it deliberately or by acquiescence had accepted to such violation. In view of that, the tribunal in *Kardassopoulos* observed that in the years following the execution of the investment agreements, Georgia never protested nor claimed that these agreements were illegal under Georgian law.[314]Accordingly, the tribunal found that the assurances given to Claimant regarding the validity of the investment agreements were endorsed by the Government itself,

---

[310]*Ioannis Kardassopoulos v. Georgia, supra*(n. 13),¶.50; Jarrod Hepburn, *supra* (n. 278), p.17
[311]See in general, *Ioannis Kardassopoulos v. Georgia, supra* (n. 13),¶¶.50-57
[312]*Ibid,*¶.182
[313]*Southern Pacific Properties (Middle East) Limited v. Egypt, supra* (n. 309),¶. 82; Schill, Stephan, *supra* (n. 11),p.16; *Ioannis Kardassopoulos v. Georgia, supra* (n. 13),¶¶.193-194
[314]*Ibid,* ¶.192

and some of the most senior Government officials of Georgia [...] were closely involved in the negotiation of the agreements.[315] The tribunal also noted that the Concession was signed and "ratified" by an organ of the Republic of Georgia.[316] The Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter.[317] Claimant, therefore, had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws.[318]

The *Fraport* tribunal equally argued that as a matter of law, the Claimant was correct that the cumulative actions of a host government may constitute an informal "acceptance" of a foreign investment that otherwise violates its law.[319] The Claimant is also correct that a failure to prosecute something of the order of a violation [...], such that, an investor reasonably inferred that it was acting lawfully and made further investments, could obviate an objection to jurisdiction *ratione materiae [...].*[320] The Claimant, knowing of the violation [...], consciously concealed it, however, any actions that might otherwise have been viewed by a foreign investor in good faith as endorsements by the Respondent cannot be deemed to have cured the violation or estopped the Respondent.[321] The Respondent could hardly have initiated legal action against the Claimant for violations which the Claimant had concealed.[322]

Still, arbitral tribunals seem to have also accepted some exceptions to the exception, in effect that investments that involve breaches of international public policy, by means of fraud or corruption, cannot be deemed legal via estoppel.[323]

---

[315] *Ioannis Kardassopoulos v. Georgia, supra*(n. 13),¶.191
[316] *Ibid*
[317] *Ibid*,¶.194
[318] *Ibid*
[319] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines, supra* (n. 20),¶.387
[320] *Ibid*
[321] *Ibid*
[322] *Ibid*
[323] For detail information and analysis on this matter see in general Jarrod Hepburn, *supra* (n. 278), pp.21-24; *World Duty Free v. Kenya, supra* (n. 14); *and Franck Arif v Moldova* (ICSID Case No ARB/11/23), Award, April 8, 2013, available at: http://www.italaw.com/sites/default/files/case-documents/italaw1370.pdf, accessed on September 25, 2015.

Over all, if the estoppel argument is accepted by the arbitral tribunals even in case where its effect is to contradict the express legality requirement clause in the applicable IIAs, certainly it could have made a difference at what stage of the proceedings the issue of the illegal investments will be addressed. Ultimately, the primary aim of the legality requirement clause in any IIA is to prevent the IIA from protecting investments because that should not be protected, particularly because they would be illegal. However, when it applies, estoppel is said to privilege fairness and consistency over objective legality and respect for law.[324] Consequently, those illegal investments have deemed legal via estoppel and whereby the tribunals become capable to entertain the case either at the outset as jurisdictional issue or later at the merit phase as the case may be.

[324]Jarrod Hepburn, *supra* (n. 278), p.18

CHAPTER FOUR
CONCLUDING REMARKS

As tried to be addressed in this research, save there are compelling reasons to the contrary, tribunals have strived to follow solutions established in a series of consistent cases comparable to the case at their hand. By doing so, they have been expecting also to meet their duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law. In view of that, nowadays for arbitral tribunals have interpreted the legality requirement condition in the applicable IIA, there is an established practices which requiring obedience with the law of the host state, and at times with general international legal principles that exist independently of specific language to this effect in the applicable IIA, in order to be granted the protections of the treaty. In relation to that, the issue seems to have remained far from settled in various literatures and/or the decisions of investment arbitral tribunals is, however, whether such legality requirement condition is a matter affecting the jurisdiction of treaty-based arbitral tribunals, requiring them to decline jurisdiction in case illegality is found, or whether illegality is a matter only affecting the merits of a dispute.

Most of interpretations so far offered to elevate the implementation of such clause into general principle in commentaries, seemed to have remained somewhat abstract, especially as it is often considered within the milieu of treaty texts i.e. the existence, or not, of an explicit "in accordance with law" clause in the applicable IIA. Accordingly, it has been avowed in many literatures repeatedly that if the treaty expressly incorporates the legality of the investment, with respect to domestic or international principles, it is shown to be a jurisdictional prerequisite. Alternatively, in case the IIAs have not expressly required that the investments in question comply with domestic or international principles, the legality of the investment is not a jurisdictional prerequisite. Rather, such requirement should be imposed only as a barrier to substantive protections at the merit phase.

This thesis, nothing like to the above conventional way of analyzing, however, the legality requirement is investigated besides by taking sample concrete type of illegal investments

already identified to have committed in violation of the host state laws or international principles from case laws and literatures. This outline is purposely selected to address the actual practices as a matter of fact, the procedural and substantive protections of IIAs are arguably found in nearly over 3270 IIAs from which most of them have negotiated by spotted parties as bilateral investment agreements, and are as such, with no trouble unlikely to be amenable to a consistent broad-spectrum and unified interpretation. Instead, it might so seem reasonable to contend that, collectively, they are far from constitute a "single undertaking" which underpins like the WTO treaty system, meaning that all its covered agreements are accepted as a package to bind almost equally all members' states and as such, can be invoked before the WTO dispute settlement mechanisms as a template.

Consequently, if tribunals are called upon to determine whether a Claimant or a Respondent has committed corruption in relation to the disputed investment, as has been analyzed in light of a tangible cases, the issue can be adjudicated either as jurisdictional matter or later at the merit phase depending on whether the allegation was raised either as a shield or a sword, or depending upon the nature and terms of the applicable IIA, and the form in which the allegation was raised.

Whereas, if tribunals are called upon to determine whether a Claimant's claim has tainted by fraud, even where the applicable IIA does/not contain an express requirement of compliance with laws, tribunals have veiled to adjudicate the issue either as jurisdictional matter or later at the merit phase mainly depending upon the arbitrators' mindset to accept the existence of a general international principle that dictates investments made on the basis of fraudulent conduct cannot benefit from IIA protection or shortly referred to as a clean hands doctrine.

What is more, there is support in the decisions of tribunals in investment treaty arbitrations for the notion that, even where the applicable investment treaty does/not contain an express requirement of compliance with host State laws, an investment that is made in breach of the laws of the host State (usually referred to as 'narrow investor legality')may either not qualify as an investment, thus depriving the tribunal of jurisdiction or be refused the benefit of the substantive protections of the IIA at the merit stage.

Besides, the specific conclusion made above in relation to the specific typologies of illegal investments, habitually, the fact that an investment is in violation of the laws of the host State or general international principles can be manifest and will therefore allow the tribunal to deny its jurisdiction or can only appear when dealing with the merits, whether it was not known before that stage or whether the tribunal considered it best to be analyzed at the merits stage in case where question of jurisdiction and merit are so inextricably entwined. For this reason, now it is well settled that whenever a jurisdictional issue is closely related to the facts to be examined at the merits phase of the case, it can be joined to the merits, even where the applicable investment treaty does contain an express requirement of compliance with host State laws or international principles as jurisdictional prerequisites.

Therefore, based upon the tangible evidences cited, arguments forwarded, the analysis made, and the findings attained in this thesis, the researcher would like to recommend for all intents and purposes that when arbitral tribunals have called upon to determine the precise effect of any legality requirement condition with an effect to dispose the disputed issue either as a bar to jurisdiction or as a defense on the merits, they should significantly grant emphasis to the specificity of a given qualification in the IIA, and of the circumstances of the actual case. Under the semblance of following solutions established in a series of prior cases comparable to the case at their hand, ideally, tribunals should not lingering their arbitral power to rewrite forcefully the spotted, multi-faceted and multi-layered regime of IIAs as a MITs which had repeatedly failed since the 1960s.

BIBLIOGRAPHY

A. Books or Chapters of a book

Alvarez Guillermo Aguilar and Reisman W. Michael, ed. *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* .USA: Martinus Nijhoff Publishers, 2008.

Begic Taida. *Applicable Law in International Investment Disputes.* Netherlands: Eleven International Publishing, 2005.

Bernasconi O. Nathalie and Johnson Lise, eds. *International Investment Law and Sustainable Development: Key Cases from 2000–2010.* Canada, International Institute for Sustainable Development, 2010.

Bungenberg Marc, Jorn Griebel and Hindelang Steffen, eds. *European Yearbook of International Economic Law: International Investment Law and EU Law.* Springer Heidelberg Dordrecht London New York, 2011.

Clayton Utz law firm, *Clayton Utz' "A Guide to International Arbitration.*" Australia, 2012. https://www.claytonutz.com/docs/Guide%20to%20IA_2012.pdf, accessed on April 22, 2015.

Creswell John w., 3rd ed. *Research Design: Qualitative, Quantitative and Mixed Approaches.* SAGE Publications, Inc., 2009.

Douglas Zachary. *The International Law of Investment Claims.* New York: Cambridge University Press, 2009.

Eicher Sharon, ed. *Corruption in International Business: The Challenge of Cultural and Legal Diversity.* USA: Gower Publishing Company, 2009.

Finizio Steven and et al. eds. *The International Comparative Legal Guide to: International Arbitration 2009.*Global Legal Group, 2009.

Fpunch Keith, 2nd ed. *Developing Effective Research Proposals.* SAGE Publications Inc., 2006.

H. Florian and L. Christoph, "Investment Arbitration-Corruption and Investment Arbitration: Substantive Standards and Proof" ed. Christian Klausegger and Peter Klein, et al., *Austrian Yearbook on International Arbitration,* 2009. https://www.lw.com/search?searchText=Guide+to+International+Arbitration, accessed on April 22, 2015.

K. Elisabeth Hege. *Applicable Law in Investor–State Arbitration: The Interplay between National and International Law.* Oxford University Press, 2013.

Kriebaum Ursula."Chapter V: Investment Arbitration-Illegal Investments" in *Austrian Arbitration Yearbook 2010.* edited by Christian Klausegger. Peter Klein, et al.C.H. Beck, Stämpfli & Manz 2010.

Latham and Watkins' International Arbitration Practice LLP. "Guide to International Arbitration." 2014. Available at: https://www.lw.com/search?searchText=Guide+to+International+Arbitration, accessed on April 22, 2015.

McConvill Mike and Chui Wing Hong, ed. *Research Methods for Law.* Universal Law Publishing: New Delhi, 2013.

Montt Santiago. *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation.* USA and Canada: Hart Publishing, 2009.

Organization for Economic Co-Operation and Development. *International Investment Law: Understanding Concepts and Tracking Innovations.* 2008.

Puig Sergio. "The Role of Procedure in the Development of Investment Law: The Case of Section B of Chapter Eleven of NAFTA," in *Evolution in Investment Treaty Law and Arbitration.* edited by Chester Brown and Kate Miles. Cambridge University Press, January 2012. available at SSRN: http://ssrn.com/abstract=2043339, accessed on April 27, 2015.

Rovine Arthur w.,ed. *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007.*USA: Martinus Nijhoff Publishers, 2008.

Sornarajah. M. 3rd ed. *The International Law on Foreign Investment.*. Cambridge University Press, 2010.

Stephan W. Schill. *The Multilateralization of International Investment Law.* Cambridge University Press, 2009.

Subedi P. Surya. *International Investment Law: Reconciling Policy and Principle.* USA and Canada: Hart Publishing, 2008.

_____UNCTAD-*Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II.*UN, New York and Geneva 2014.

_____UNCTAD-*Investor-State Disputes Arising From Investment Treaties: A Review Series on International Investment Policies for Development*. UN, New York and Geneva, 2005.

_____UNCTAD-*Transparency: Series on Issues in International Investment Agreements II*. UN, New York and Geneva 2012.

Voss Jan Ole. *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors.* USA: Martinus Nijhoff Publishers, 2011.

B. Articles, Research papers and Working Papers

Alvik Ivar. "Impact of Investment Wrongdoing on Arbitration Proceedings How Far Should an Investment Wrongdoing Get?" *University of Oslo Faculty of Law Research Paper, Candidate No. 8005*. 2012. available at :https://www.duo.uio.no/bitstream/handle/10852/35644/8005.pdf?sequence=1, accessed on April 16, 2015.

Andrea.J Menaker. "The Determinative Impact of Fraud and Corruption on Investment Arbitrations. "*ICSID Review Foreign Investment Law Journal*. vol.25. issue No. 1. Spring 2010.

C. Ignacio and Perry K. William. "The Rise of Bilateral Investment Treaties: Protecting Foreign Investments and Arbitration." available at:

:http://www.chadbourne.com/files/Publication/f189801febc4fbabb9487ff36d1b1a2/Presentation/PublicationAttachment/8c6065d3c22f4a1ea1878c94079e98bc/IDQ-2010-03-SuarezAnzorenaPerry.pdf, accessed on April 6, 2015.

Cecily Rose. "Circumstantial Evidence, Adverse Inferences, and Findings of Corruption: Metal-Tech v. The Republic of Uzbekistan." *The Journal of World Investment and Trade*. Leiden Law School Research Paper. May 9, 2014. available at SSRN: http://ssrn.com/abstract=2435051 or http://dx.doi.org/10.2139/ssrn.2435051 , accessed on August 19, 2015.

D. Gaukrodger and K. Gordon "Investor-State dispute settlement: a scoping paper for the investment policy community." *OECD Working Papers on International Investment, No. 2012/3*.OECD Investment Division. available at: http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf, accessed on April 24, 2015.

Douglas Zachary. "The Plea of Illegality in Investment Treaty Arbitration."*ICSID Review Foreign Investment Law Journal.* Vol. 29. N0.1 January 9, 2014.

Fouret Julien. "Stay(ing) on Track or Falling off the Edge: The Absence of Legal Security in the Ad Hoc Committees' Decisions under Article 52(5) of the ICSID Convention." *Foreign Investment Law Journal,* Vol. 27. N0.2. November, 2012.

Hepburn Jarrod. "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration." (April 24, 2014).available at SSRN: http://ssrn.com/abstract=2428859 or http://dx.doi.org/10.2139/ssrn.2428859 , accessed on September 25, 2015.

Hindelang Steffen. "Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law." *in Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements. workshop paper vol.1.* 2014. availableat:http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf, accessed on April 22, 2015.

J. Thomas Q.C. Christopher and Ewing-Chow Michael. "The Maturation of Investment Treaty Arbitration. "*ICSID Review Foreign Investment Law Journal*. Vol. 25. No.1 Spring 2010.

Kuijper Jan Pieter. "Investment Protection Agreements as Instruments of International Economic Law. " *in Investor State Dispute Settlement (ISDS) provisions in the EU's international investment agreements. workshop paper vol.1.* 2014. available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf, accessed on April 22, 2015.

Lamm B. Carolyn, Greenwald K. Brody and Young M. Kristen." From World Duty Free to Metal Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption." *ICSID Review Journal.* Vol. 29. No. 2 Spring, 2014.

Llamzon Aloysius and Sinclair Anthony, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct." in *ICCA Congress Series No. 18*, edited by Van den Berg A.J. Miami 2014.

Mirjam Anne Schneuwly. "International Investment Law and its Instruments: Managing Risks to Investors and Host States." (August , 2012). Available at SSRN: http://ssrn.com/abstract=2200347 or http://dx.doi.org/10.2139/ssrn.2200347, accessed on September 29, 2015.

Rahim Moloo and Alex Khachaturian. "The Compliance with the Law Requirement in International Investment Law." *Fordham International Law Journal*, Vol. 34. September 27, 2010. available at SSRN: http://ssrn.com/abstract=1683523, accessed on February 12, 2015.

Reinisch August. "How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?". *Journal of International Dispute Settlement.*Vol.2.No.1.January , 2011. available at: http://jids.oxfordjournals.org/content/2/1/115.full.pdf+html, accessed on September 4, 2015.

Stephan W. Schill "Illegal Investments in International Arbitration" January, 2012. available at SSRN: http://ssrn.com/abstract=1979734 or http://dx.doi.org/10.2139/ssrn.1979734 ,accessed on February 13, 2015.

Stephan W. Schill "The Sixth Path: Reforming Investment Law from Within." *Fourth Biennial Global Conference of the Society of International Economic Law (SIEL)Working Paper No. 2014/02.* June 4, 2014. available at SSRN: http://ssrn.com/abstract=2446918, accessed on September 15, 2015.

Waibel Michael. "Investment Arbitration: Jurisdiction and Admissibility." *University of Cambridge Faculty of Law Research Paper No. 9/2014*.January 31, 2014. available at SSRN: http://ssrn.com/abstract=2391789 or http://dx.doi.org/10.2139/ssrn.2391789, accessed on April 28, 2015.

Y. Ngangjoh-Hodu and C. Ajibo "ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration." *Journal of International Dispute Settlement.* Winter, 2015.

C. Cases and Arbitral Awards

Unless indicated otherwise, the texts of arbitral awards and decisions hereunder can be found at http://www.italaw.com/.

CMS v. Argentina.(ICSID Case No.ARB/01/8).Decision on Jurisdiction. July 17, 2003.

David Minnotte & Robert Lewis v. Republic of Poland.(ICSID Case No.ARB(AF)/10/1). Award. May 16, 2014.

Desert Line Projects LLC v. The Republic of Yemen.(ICSID Case No.ARB/05/17).Award. February 6, 2008.

EDF (Services) v Romania.(ICSID Case No.ARB/05/13).Award. October 8, 2009.

Franck Arif v Moldova.(ICSID Case No ARB/11/23). Award. April 8, 2013.

Fraport AG Frankfurt Airport Services Worldwide v. Philippines. (ICSID Case No.ARB/03/25).Award. August 16, 2007.

F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago.(ICSID Case No.ARB/01/14).Award. March 3, 2006.

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana.(ICSID Case No.ARB/07/24).Award. June 18, 2010.

Hesham T.M. Al-Warraq v. Republic of Indonesia.(UNCITRAL).Final Award. December 15, 2014.

Hochtief AG v. The Argentine Republic.(ICSID Case No.ARB/07/31).Decision on Liability. December 29, 2014.

Inceysa Vallisoletana, S.L. v. Republic of El Salvador. (ICSID Case No.ARB/03/26). Award. August 2, 2006.

Ioannis Kardassopoulos v. Georgia.(ICSID Case No.ARB/05/18).Decision on Jurisdiction. July 6, 2007.

Legal Status of Eastern Greenland, Judgment (Denmark. v. Norway.). April 5, 1933 P.C.I.J. (ser. A/B) No. 53, available at: http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm, accessed on September 25, 2015.

Metal-Tech Ltd. v.The Republic of Uzbekistan.(ICSID Case No.ARB/10/3).Award. October 4, 2013.

Methanex Corporation v. USA. (UNCITRAL NAFTA). Partial Award on Jurisdiction and Admissibility. August 7, 2002. available at: http://www.state.gov/documents/organization/12613.pdf,accessed on August 7, 2015.

Mytilineos v. State Union of Serbia and Montenegro and Republic of Serbia. (UNCITRAL). Partial Decision on Jurisdiction. September 8, 2006.

Phoenix Action, Ltd. v. Czech Republic.(ICSID Case No.ARB/06/5).Award. April 15, 2009.

Plama Consortium Limited v. Republic of Bulgaria.(ICSID Case No.ARB/03/24).Award. August 27, 2008.

Robert Azinian et al v The United Mexican States.(ICSID Case No.ARB(AF)/97/2). Award. November 1, 1999.

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan.(ICSID Case No.ARB/05/16).Award. July 29, 2008.

Saba Fakes v. Republic of Turkey.(ICSID Case No.ARB/07/20).Award. July 14, 2010.

Salini Costruttori S.p.A. and Italstrade S.p.A.v. Morocco.(ICSID Case No.ARB/00/4).Decision on Jurisdiction. July 23, 2001.

Tokios Tokelės v. Ukraine.(ICSID Case No.ARB/02/18).Decision on Jurisdiction. April 29, 2004.

Toto Costruzioni Generali S.P.A. v. Republic of Lebanon. (ICSID Case No.ARB/07/12).Decision on Jurisdiction. September 11, 2009.

Waste Management, Inc. v. Mexico.(ICSID Case No.ARB (AF)/98/2).Dissenting Opinion of Keith Highet. June 2, 2000.

World Duty Free v. Kenya.(ICSID Case No. ARB/00/7).Award. October 4, 2006.

Yukos Universal Limited(Isle of Man) v The Russian Federation. (UNCITRAL,PCA Case No. AA 227). Final Award. July 18, 2014.

D. International Conventions and Arbitration Rules

Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules), 5th ed. April, 2013. Available at: http://www.siac.org.sg/images/stories/articles/rules/SIAC-Rules-2013_English_31072014.pdf, accessed on September 29, 2015.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done in New York, on June 10, 1958 and entered in to force on 7 June 1959. available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, accessed on April 22, 2015.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID Convention, done in Washington, on March18, 1965 and entered in to force on 14 October 1966. Available at :https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf, accessed on September 29, 2015.

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. Adopted on 10 December 2014 but not yet entered into force. Available at: https://treaties.un.org/doc/Treaties/2014/12/20141210%2011-52%20AM/CH_XXII_3.pdf, accessed on September 29, 2015.

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Effective date:1 April 2014. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf, accessed on September 29, 2015.

Dubai International Arbitration (DIAC Arbitration Rules). May, 2007. Available at: http://www.diac.ae/idias/rules/, accessed on September 29, 2015.

International Chamber of Commerce: Arbitration and ADR Rules. 2012. Available at: http://www.rwi.uzh.ch/lehreforschung/alphabetisch/haas/lehrveranstaltungen/fs2015/int-comm-arb-bl-lp/2012_ICC-Rules-ENGLISH.pdf, accessed on September 29, 2015.

Swiss Chambers' Arbitration Institution: Swiss Rule of International Arbitration. June, 2012. Available at: https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf, accessed on September 29, 2015.

UNCITRAL Arbitration Rules (as revised in 2010). UN: New York, 2011. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf, accessed on September 29, 2015.

E. UNCTAD-Reports and Issue Notes

UNCTAD. "Investor-State Dispute Settlement: an Information Note on the United States and the European Union." IIA Issues Note, No. 2. June, 2014.

UNCTAD. "Investor-State Dispute Settlement: Review of Developments in 2014." IIA Issues Note, No. 2. May, 2015.

UNCTAD. "Recent Developments in Investor-State Dispute Settlement (ISDS)." IIA Issues Note, No. 1. April, 2014.

UNCTAD. "Recent Trends in IIAs and ISDS".IIA Issues Note.No.1.February 2015.

UNCTAD. "Reform of the IIA Regime: Four Paths of Action and a Way Forward." IIA Issues Note, No. 3. June, 2014.

UNCTAD. Investment Report 2013: Global Value Chains: Investment and Trade for Development. UN , New York and Geneva 2013.

UNCTAD. World Investment Report 2014: Investing in the SDGs: An Action Plan for promoting private sector contributions. UN , New York and Geneva, 2014.

UNCTAD. World Investment Report 2015: Reforming International Investment Governance. UN , New York and Geneva 2015.

F. Other Materials

European Commission. "Fact sheet Investment Protection and Investor-to-State Dispute Settlement in EU agreements." November 2013. Available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf, accessed on September 29, 2015.

European Commission. "Fact sheet on Investor-State Dispute Settlement." 3 October 2013. Available at: http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf, accessed on September 29, 2015.

ICSID "Background Information on the International Centre for Settlement of Investment Disputes (ICSID)." *Fact Sheet.* available at: https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf, accessed on April 6, 2015.

G. Web Sites

http://bookfi.org/
http://investmentpolicyhub.unctad.org/
http://unctad.org/en/pages/home.aspx
http://www.diac.ae/idias/
http://www.iccwbo.org/
http://www.italaw.com/
http://www.siac.org.sg/
http://www.ssrn.com/en/
http://www.uncitral.org/uncitral/en/index.html
https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx
https://treaties.un.org/Home.aspx?lang=en