Chapter V: Investment Arbitration - Illegal Investments

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I. Introduction

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

The purpose of such provisions is "to prevent the BITs from protecting investments that should not be protected, particularly because they would be "risky", as was explained by the Tribunal in Sa n v. Morocco.\(^1\) Ost States have sometimes argued that "n accordance with the laws of the host State" clauses would permit the definition of investment under the BIT to the domestic definition of investment instead of referring to the legal definition of the investment. This however was convincingly rejected by a number of tribunals.\(^2\)

Furthermore, these clauses also have to be distinguished from specific requirements contained in some investment protection treaties.\(^3\)

Some BITs contain a "n accordance with the laws of the host State" clause in the definition of investment. Examples are the Germany-Philippines BIT (Frapol), the Lithuania-Ukraine BIT (Tokyo Treaty), the Bang adesh-Italy BIT (Sapporo), the Spain-Mexico BIT (Tecmed) and the Oman-Yemen BIT (Desert).\(^4\) To include the clause in the definition of investment of BITs can lead to a paradox: On the one hand, host State law becomes a point of reference concerning the extent of the jurisdiction of the Tribunal. In that function on host State law can mitigate the scope of the definition.\(^5\) On the other hand, host State law is often the very subject of the definition by the Tribunal, which has to determine whether host State law is applicable to breaches of the BIT. Therefore, host State law becomes a tool in the object of review at once.

Other treaties contain a "n accordance with the laws of the host State" clause in the provisions on promotion, administration and protection.\(^6\)

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

The Tribunal in Phoen x\(^7\) operated under the Energy Charter Treaty which does not contain an "n accordance with host State law" clause. The Tribunal decided, however, that the existence of such a clause is not a prerequisite for a tribunal to be able to deny protection to an investment. The Tribunal in Phoen x took note of the fact that the ECT does not contain a provision regarding the conformity of the investment with a particular law.\(^8\)

But it stated:

This does not mean, however, that the protection provided for by the ECT covers investment not in accordance with a foreign law.\(^9\)

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

The possibility of an investment protect on to an equity investment is limited, however, to the cases committed by the investor. Investment protection on treaties as a "n for the host State to retain" a degree of control over foreign investments by denying...
protect on to those investments that do not comply with ts aw.

These treaties, however, do not allow a State to preclude an investor from seeking protect on under the BIT on the ground that ts own actions are ega under ts own aw. In other words, a host State cannot aow d jur sd ct on under the BIT by revoke ng ts own fa ure to comply wth ts domest c

aw.

Therefore, in Kardassopou  s, where Georg an State-owned enterpr ses vol ted Georg an aw by exceed ng the r author ty and thereby had rendered vo d ab initio the concess on under Georg an aw, Georg a was una b e to revoke an “n accordance wth host State aw” c ause n a BIT to deny nvestment protect on. The same approach had prevous y been taken by the Tr buna n SPP v. Egypt.

For th s reason th s art c onsiders on y vol ts of host State aw comm tied by the nvestor.

Tr bunas that dec ned to protect nvestments that were not n accordance wth host State aw have e ther den ed jur sd ct on or have dec ned protect on at the mer ts stage.

II. Denial of Jurisdiction

A. No Legal Investment

One opt on for a Tr buna s to deny jur sd ct on ratione materiae for ack of a ega nvestment. Th s what the tr buna n Fraport d.d. It he d that the nvestment ment was not n accordance wth aw and that the tr buna therefore acced jur sd ct on on ratione materiae Art c e 1 of the Germany Ph pp nes BIT conta ns the fo owng def nt on of nvestment:

Art c e 1 Def n t on of Investment

For the purpose of this Agreement:

1. the term “nvestment” sha mean any k nd of asset accepted in accordance wth the respective laws and regulations of either Contracting State …

Fraport nvested n a passenger Term na Project at Man a rport. The Tr buna found that “In the ev ent of a pub c ut ty franch se, the nvestor and fac ty operator must, n case of a corp onal on, be du y reg stred and owned and contro ed up to at least s xty percent (60%) by F p nos, as further requ red by the Ph pp nes Const tut on”. The Tr buna found t estab shed that

Fraport conc ud ed that the on y p aus b e way for ts equity nvestment to prove prof tab e was to arrange secret y for management and contro of the project n a way wh ch the nvestor knew were not n accordance wth the aw of the Ph pp nes.

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

Fraport know ng y and ntent ona y c recurved the Ant Dummy Law by means of secret shareho der agreements. As a consequence, t cannot c a m to have made an “n accordance wth aw,” …

Because there s no “nvestment n accordance wth aw”, the Tr buna acced jur sd ct on rat one mater ae.

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

In Sa uka the Respondent a eged that the C amant had not made ts nvestment n accordance wth host State aw and therefore should be den ed protect on under the Treaty. The def nt on of nvestment Art c e 1 of the Nether ands Czech BIT does not conta n an “n accordance wth host State aw” c ause. Such

In a number of other cases tr buna s exam ned the issue neverthe ess as part of the def nt on of nvestment s nice t cons dered comp ance wth host State aw to be an mp c t requirement of an nvestment:
204. The Tribunal notes that, although not part of the definition of an investment, it is necessary pursuant to Article 2 of the Treaty that an investment must have been made in accordance with the provisions of the host State's laws. In relevant part, Article 2 states that '[e]ach Contracting Party ... shall admit such investments in accordance with its laws'. Accordingly, and as both parties acknowledge, the obligation upon the host State to admit an investment by a foreign investor (i.e. in the present context, to a purchase of shares in a local company) only arises if the purchase is made in accordance with its laws.

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

'Where that provision [of an Official Communiqué of the Czech National Bank] requires the submission of a business plan on a number of occasions, the Tribunal has seen nothing to suggest that it imposes a duty on any investor to disclose its future long-term plans and objects going far beyond the immediate purposes of its investment in the bank whose shares are being purchased. A business plan is inherently a matter of consensual nature, and the Tribunal such as this must hesitate before reading into that matter such a particular and far-reaching content.'

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

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

In OKO Pank v. Estonia (30), a Loan and a Loan Agreement were the original investments. The question arose whether the relevant provisions of a Payment Agreement for the repayment of the Loan had a similar status to the Loan Agreement. On investments in accordance with the laws and regulations of the host country were protected by the applicable BITs. The Tribunal denied that an invalid date of the Payment Agreement would deprive the status of the investment as protected investments under the BITs.

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

B. No Valid Consent

Another option for a Tribunal to deny jurisdiction on the lack of consent to arbitrate on. In Inceysa (31), the Cambodian host State did not proceed with the concession contract in the public bidding process. Inceyusa brought a case under ICSID. The Tribunal objected to the jurisdiction on the ground that the investor had not obtained consent to proceed with the contract.

The cases analysed so far have a common that tribunals discussed whether the alleged contrary law deprived the investments of their status as protected investments under the BITs.
The “in accordance with host State law” cause in the Spanish Ecuador BIT is not included in the definition of investment but in the provisions on promotion, admission, and protection. The Tribunal found that an exclusion of illegal investments from the protection of a BIT need not be contained in the definition of investment itself. It may also be contained in the BIT’s articles that outline its scope of protection or even in the chapter relating to “Promotion and Admission”.[34] The relevant provisions in the Tribunal read:

Spanish – Ecuador BIT (courtesy translation from Spanish)

Art. 2 Promotion and Admission

Each Contracting Party [...] will admit investments according to its legal provisions. The present Article will also apply to investments made before its entry into force by investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter [...]  

Art. 3 Protection

[...]

Each Contracting Party shall protect its territory the investments made in accordance with its legislation [...][35]

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

The Tribunal found that Inceysa had submitted the bid for the concession on false grounds and had not presented its real financial documents and had not presented its real financial conditions.[37] Inceysa had represented its qualifications and capacities and concealed its relationship with another bidder.[38]

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

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

Furthermore, the Tribunal found that to protect investments made fraudulently would be a violation of international public policy and to be a crime under Kenyan and English law. It was not entirely clear whether Kenyan and/or English law was the applicable law. But both ex maxime contained similar rules on corruption and on the illegal effects of corruption.[42]

III. Denial of Substantive Protection

Not only can a tribunal deny protection of an illegal investment by decision, but also substantive protection at the merits stage.

A. No Substantive Protection for Illegal Investments

This approach was adopted by the Tribunal in World Duty Free.[45] The case concerned an exclusion of concessions to run the duty-free operations at Kenya’s national airports in Nairobi and Mombasa. The contract under which the Claimant brought its claim (the 1989 Agreement) had been procured by a payment to the then sitting head of State.[46]

The Respondent argued that the 1989 Agreement was unenforceable and requested the disallowance of the claim.[47] The Tribunal assessed the payment as bribe.[48] It found bribery to be a violation of Kenyan law and to be a crime under Kenyan law as well. It was not entirely clear whether Kenyan and/or English law was the applicable law. But both ex maxime contained similar rules on corruption and on the illegal effects of corruption.[49]
The Tribunal held that it could not enforce a contract secured by corrupt on:

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

Furthermore, the Tribunal held that there can be no affirmation or waiver in this case based on the knowledge of the Kenyan President attributable to Kenya. The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal of a state official engaged as its agent) to bribery. (61)

The Tribunal dismissed the claims against international public policy and against Kenyan and English law:

- The claims not established to maintain any of its pleaded claims in these proceedings as a matter of ordre public international and public policy under the contract’s applicable law. (52)
- The claim advanced by World Duty Free Limited was dismissed. (53)
- The Tribunal in Pama, a case decided under the Energy Charter Treaty, adopted a more nuanced approach. There, the Tribunal held at the merits stage the protection for an investment obtained through misrepresentation and dismissed a claim. (54)
- According to the Tribunal, the Claimant had misrepresented the actual composition of the investing consortium. The Claimant had presented itself as a consortium of major companies having substantial assets. In truth, an individual, who personally did not have significant financial resources, was acting on one as the sole investor in the guise of that “consortium”. The Arbitral Tribunal was persuaded that Bulgaria would not have given its consent to the investment had it been aware of these facts. (55)
- The Tribunal decided that the investment was obtained by deceitful conduct, that is, without the consent of Bulgaria. Like the Inceysa Tribunal, it was of the view that granting the protection to the Claimant’s investment would be contrary to the principle of nobody can benefit from his own wrong. The Tribunal found that “there would also be contrary to the basis of not obtaining of international public interest and public policy to enforce a contract obtained by fraudulent means of protection under the Treaty.” (56)
- Furthermore, the Tribunal found that the Claimant’s conduct was contrary to the principle of good faith which is part not only of Bulgarian law but also of international public policy, as also noted by the Inceysa case:

  - The principle of good faith encompasses, inter alia, the obligation on the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is necessary for obtaining the State’s approval of the investment. (57)

B. Justification for Government Interference

The egality of an investment has negative consequences for the protection of the investment if a host State successfully invokes a defence for its interference with the investment. In such cases tribunals did not find that the substantial protection on the investment protect under the Treaty do not apply. However, they held that these protect on standards had not been invoked by the host State when taking action in response to the egality committed by the investor.
EIB (Eston an Innov at on Bank). One of the Ca mants' arguments was that the Respondent, through ts agency, the Bank of Eston a, vo ated the BIT by rev ok ng EIB's bank ng cence. The Respondent successfu y just f ed the revocat on on the bank ng cence by rev ok ng ser ous vo at ons of the Eston an bank ng code by EIB.\(^{(59)}\)

Thunderb rd v. Mex co\(^{(60)}\) no ved a Canad an company operat ng three video gamb ng fac t es n Mex co. Mex can Law proh b ted gamb ng and uck-re ated games wth n Mex can terr tory. The government c osed the fac t es as ega . Thunderb rd cha enged the c oses before a NAFTA tr buna .

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

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

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

The Tr buna den ed a v o at on of fa r and equ tab e treatment and he d that no compensat on was owed for a regu atory tak ng s nce the nv estor never enjoyed a vested r ght n the bus ness act vty that was subsequ ently proh b ted.\(^{(62)}\)

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

- Den a  of jur sd ct on (no ega  nv estment or no v a d consent)
- Den a  of app cab ty of the substant v e standards at the mer ts stage
- No v o at on of a standard because of a just f ed nterference.

IV. Standards for the Relevance of a Viola on of Host State Law

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

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

It s c ear that not ev ery m nor nfract on w  ead to a den a  of nv estment protect on. On y breaches of fundamenta  norms of a ega  order w  have such an effect. The s gn f cance of the contrav ent on to host State aw w  be the most mportant factor n the dec s on on jur sd ct on or when dea ng on the mer ts. Som s mes the gravty of the contrav ent on on ts own w  not provde an exact ne between cases where nv estment protect on shou d be den ed and those where shou d be uphe . At the two ends of the spectrum very mportant norm and m nor forma ty dec s on w  be easy to take. In the m dd e other factors ke the ones ment oned be ow may contr bute to the assess ment.

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

The case-aw so far does not provde for exact standards to dec de when a breach of host State aw eads to the exc us on from nv estment protect on. owere, here are some ements wh ch were taken nto cons der on by tr buna s:
A. Major Infractions Affecting the Legitimacy of the Project as a Whole

1. The Gravity of the Contravention of Host State Law

The Tribuna s have examined whether the way in which the investments were obtained or the act vity per se was in vo at on of important pr nc p es of host State aw or interna ona  aw.

The Tribuna n Incosysa exp c ty stated that an nsvestment made n a m gnfcant contrav en on of Sa vador aw, such as through gross m srepresentat on or fraud n a government tender process does not enjoy nsvestment protect on.

In the cases n wh ch nsvestments were obta ned or the act vty per se was in vo at on of mport ant pr nc p es of host State aw or interna ona  aw, the Tribuna s found that m srepresentat ons, corrupt on, fraud or intent on a c rnument on of a const tut ona  norm and a norm of an nt dummy aw had occurred. In a of these cases the Tribuna s found that the nsvestment was obta ned as a consequence of the breach of ega requrements.

The Tribuna s n LESI and Astad v. A ger a nd n Rume v. Kazakhstan stated that a certa n ev e of vo at on of host State's aws and regu at ons s requred to defeat the Tribuna 's jur sd ct on based on a BIT's requrement that the d sputed nsvestments be n conform ty wth the host State's aws. The Rume Tribuna stated that...

168. ... As determ ned by the Arb tra Tribuna n the LESI case, such a provs on w  exc ude the protect on of nsvestments on y t they have been made in breach of fundamental legal principles of the host country ("en viola on des principes fon damentaux en vigueur") (70)

In Desert Lne v. Yemen the Tribuna summar zed arb tra precedents and a so resorted to the standard of a vo at on of fundamenta pr nc p es of host State aw as tr gger ng the exc us on from nsvestment protect on. It stated that such ca uses are ...

... intended to ensure the ega ty of the nsvestment by exc ud ng nsvestment made n breach of fundamenta pr nc p es of the host State's aw, e.g. by fraudu ent m srepresentat ons or d ss mu at on of true ownersh p. (71)

In Phoen x v. Czech Repub c, the Tribuna n an obiter dictum referred to a s tuat on n wh ch an nsvestment act vty per se s n contrad ct on wth fundamenta ns norm of interna ona  aw. The Tribuna conclud ed that n such a s tuat on no nsvestment protect on shou d be granted:

... nobody wou d suggest that ICSID protect on shou d be granted to nsvestments made n vo at on of the most fundamenta ns norm of protect on of human r ghts, ke nsvestments made n pursuance of torture or genoc de or n support of s aver y or traff ck ng of human organs. (72)

By contrast, arb tra tr buna s have cons dered m nor errors n the observence of bureaucrat c forma tes of the domest c aw as me event.

In Tok os Toke es v. Ukra ne the respondent a eged that the fu name under wh ch the Ca mant reg stered ts subs d ary was mproper because t was not a recgnzed ega form under Ukra n aw. The Tribuna took note of the fact that the Respondent d d not a ege that the Ca mant's nsvestment and bus ness act vty were ega per se It a so found me event that despite the not ent re y correct forma tes the nsvestment had been reg stered. The Tribuna he d that...

... to exc ude an nsvestment on the bas s of such m nor errors wou d be incon s lent wth the object and purpose of the Treaty. In our vew, the Respondent's reg strat on of each of the Ca mant's nsvestments nd cates that the "nsvestment" in quest on was made n accordance wth the aws and regu at ons of Ukra ne. (74)

In Meta par v. Argent na the ega ty concerned fa ures to
Registrierfirmaen an der angegebenen Zeit. Registrierung war eine Anforderung unter argentinskem Recht, die jedoch nicht im BIT genannt war. Argentinien argumentierte, dass diese Fehlleistung die Firma von ICSID ausnehmen sollte. Der Tribunal lehnte diese Ansicht ab. Er stellte fest, dass argentinskem Recht gesetzliche Strafen für solche Überschreitungen vorschreibt. Darüber hinaus wurde die Strafe für Registrierungsfehler, die Aussetzung der Investment-Abgrenzung, als unangebracht angesehen:

84. A j u c o de Tr buna , a fata de reg stro oportuno podria sanc onarse dene gando a nscr pc on de determ nados documentos de a soc edad, med ante e a pencer b m ento, o a rmos c on de una mu ta a a soc edad o a o [Page 321]: sus func onar os, pero seria desproporc onado casc gar esa om s on negando e a rvers on sta una protecc on esenc a como es e. acceso a os tr buna es arb tra es de CIADI. Adem as, seria do co ad mtr que determ nada conducta (a fa ta de reg stro oportuno) para a que e ordenan ento ega argent no pre el unas sanc ones espec ficas pud era sanc onarse, adem as, de otra forma no prevista en ese ordenam ento. (76)

Die Strafe konnte auf die Art und Weise der Überschreitung zurückgeführt werden, aber es wäre unangemessen, die Abgrenzung zu verweigern, falls der Investor die entscheidenden Dokumente nicht vorlegen konnte. Zudem wäre es zweifelhaft, ob bestimmte Verhaltensweisen (z. B. das Fehlen eines angemessenen Registrierungszeitpunkts), die von der argentinischen Regelung vorgesehen sind, als solche Strafen verfolgt werden sollten, die nicht im BIT vorgesehen sind.

Die Abgrenzungsforderung wurde vom Tribunal in Fraport v. Serbien (77) abgelehnt, in dem die Regierung die Forderung des Investors zurücklehnte. Es wurde betont, dass die Aktivität alleine nicht ausreichen, um eine Abgrenzung zu begründen. Es wurde vermerkt, dass der Tokos-Tokeos-Abkommen nicht als illegal angesehen werden durfte, da die Aktivität im Handel nicht illegal war. Der Tribunal war der Meinung, dass die Abgrenzung nicht ausreiche, um die Forderung des Investors abzulehnen.

154. In the present case, even Respondent did not contend that C a m a n's act v t es were ega . In fact they express y stated that Respondents do not contend that the Agreements were not n comp ance wth the aw of Montenegro and s thus protected under the BIT. (78)

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

The importance of the offending arrangement for the profitability of the investment can serve as further evidence in establishing whether the investment project as a whole lacks egality. It can be a supportive element for deciding whether investment protection should be denied given the fact that the state has not committed an egality that the host State has violated a substantive standard.

The Tribunal in Fraport discussed this element when it stated that it worked in favour of an investor who committed an egality that
396. Another nd cator that shou d work n fav our of an nv estor that had run afou  of a proh b t on oc a aw wou d be that the off end ng arrangement was not centra  to the prof tab ty of the nv estment, such that the nv estor m ght hav e made the nv estment n ways that accorded with oc a aw without any oss of projected prof tab ty. (80)

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

398. The record nd cates that oc a counse exp c t y warned that a part cu ar structure anangement wou d vo ate a seri ous provs on of Ph pp ne aw. Moreover, the vo at on qua vo at on was exp c t y d scussed at the eve  of the Board of D rectors. In v ew of the due d’ gence study prepared by fnanc a  experts (who had apparent y not been br efed on the oc a aw restr ct ons), the nv estor, Fraport, conc ud ed that the on y p aus b e way for ts equity nv estment to prov e prof tab e was to arrange secret y for management and contro  of the project n a way wh ch the nv estor knew were not n accordance wth the aw of the Ph pp nes. Th s was accomp shed by Art c e 2.02 of the FAGPAIRCARGO-PAGS-PTI Shareho ders’ Agreement of 6 Ju y 1999 wh ch a owed Fraport (or FAG as t was then known) to hav e a cast ng and contro ng v ote ov er matters wh ch fe wth n ts area of exper t se and competence’. Thus the vo at on cou d not be deemed to be nadventent and me e vent to the nv estment. It was centra  to the success of the project. The awareness that the arrangements were not n accordance wth Ph pp ne aw was man fested by the dec s on to make the arrangements secret y and to try to make them effect ve under fore gn aw. A  of these facts der ve from nt e Fraport documents whose cred b ty can hard y be mpeached by Fraport. (81)

3. The Investor’s Awareness of the Illegality

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

The Tr buna  n Fraport v. Ph pp nes took knowedge of and in format on on by oc a counse on the ex stence of an ega ty as a benchmark:

397. In th s case, the comportment of the fore gn nv estor, as s c ear from ts own records, was egreg ous and cannot benef t from presumpt ons wh ch m ght ord nar y operate n favour of the nv estor.

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

395. … The Tr buna’s concern here s … w th the secret shareho der agreements. In the context of the
nterna Fraport documents, the secret sharehold
agreements show that Fraport from the outset
understood, with precision on, the Ph pp ne ega
prohibition but be ev ed that t t comp ed wth t, the
prospect ve investmet cou d not be prof tab e. So t
eected to proceed wth the investmet by secret y
vo at ng Ph pp ne aw through the secret sharehol
d agreements. These agreements evidence that Fraport
annn ed and knew that ts investmet was not n
accordance wth Ph pp ne aw.

Bes de the actual awareness of the ega ty wh ch was estab shed
n Fraport, a certain due d gence can be requ red from an investor.
The Trubuna n Fraport [page "324"] stated, however, that n case
of an investmet made n good fa th, wh ch was not the case there,
a certain enency can be granted to invesors.

The Trubuna n Desert Lne v. Yemen approved ths approach.[83] In
that case Respondent argued that s nce Ca mant's investmet was
never forma y "accepted" by the Respondent as an investmet
accord ng to ts aws and regul at ons Ca mant shou d not have
access to investmet protect on. The investmet had, however, been
derned at the hghest eve of the State and benefts of the
Yemen te Investmet Law had been extended to the investmet by
an ad hoc dec s on of the V ce Prme M nster. Therefore, the Desert
Lne Trubuna found that the pure y forma requ rement of
"acceptance" shou d not ead to a depr va on of investmet
protect on but that the enency ment oned by the Fraport Trubuna
shou d be app ed:

117. Such enency wou d be approp rate n th s case, as s conirmed when one puts the hypothet ca
quest on: s the ke hood that the invesor wou d have
rece ved a certicate f he had be e ev ed t was
necessary and requested t? The answer s
overh mny y affmat ve, both because of the
genera endorsement of the investmet at the hghest
eve of the State, and n ght of the extens on on of YIL
benef ts by the ad hoc dec s on commun cated by the
V ce Prme M nster.

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

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

In SwemBa t v. Latva[84] the Latvan autho es removed a shp
owned by SwemBa t from ts berth where t was a eged y ega y
moored. It prevented the invesor from us ng the shp and then
auct one the shp wthout payment of compensat on. The Trubuna
repeated y re ed upon Respondents behavour to dec de upon the
ega ty of the invesor's act ons or the v a d ty of ega acts. Among
other thngs t found that four months to erance of the autho es of
an a eged y ega y moored shp was too ong. Therefore, the
government cou d not re y on the a eged y ega ty:

34. … We nd t surpr s ng that SwemBa t has not
been nforemed at an earer stage, when dur ng the
autumn of 1993 t negated t ed with … autho es about
the project, about the ega ty hereof. It s a so
surpr s ng that the harbour master … shou d have
taken part with a p ot and two tow [page
"328"] boats t ow ng the shp t K psa a, f the
moor ng of the shp was ega . F na y, t s surpr s ng
that the autho es we ed for more than four months
before tak ng any measures n that regard, f rea y the
who e enterpr se was ega .

35. In these c rcumstances we nd t SwemBa t has
shown, that n a ke hood t has comp ed wth Lavan
aw, that the Respondent has not shown that the
investmet was not made n accordance wth the aws
and regul at ons of Latva, and that n any event the
act ons of the Respondent were out of propr on wth
any non-comp ance that may have ex sted.[85]

In Tok os Toke es v. Ukra ne the Trubuna found that the regist on
of each of the Ca mant's investmens despe ncorrect forma t es
nd cated that the "investmen" n quest on was made n accordance
with the aws and regul at ons of Ukra ne. As a consequence, the
a eged y ega t es cou d no onger be re ed on by the
government.[86]
In Tecmed v. Mex co (87) Mex co just fed a resolut on deny ng the renewa on of a perm t for a waste d spas e fac ty wth megu art es comm t ed dur ng the and f’s operat on. The author es cou d not have been unaware of the ex stence of the a ed megu art es or nfr ngements. ovever, they d d not act and nform the inv es tor that these megu art es mght jeapord ze the perm t’s renewa . Therefore, the Tr buna d d not accept the megu art es as just f cat on and cons dered the den a on these grounds to be excess ve y forma st c. (88) It found that a v o at on of far and equ tab e treatment

It found that a v o at on of far and equ tab e treatment and an expropr at on had occurred. (89)

As a ready ment oned, the Tr buna n Kardassopou os v. Georg a (90) he d that Georg a cou d not re y on an “n accordance wth host State aw” c ause s nec e was the State-owned enterp ses that v o ated Georg an aw. (91) ovever, the Tr buna found Respondent a so to be estopped from argu ng that the agreements were v o d ab initio under Georg an aw. The Tr buna s rat ona e was that Ca mant had a eg t mate expecta on that h s inv estment n Georg a was n accordance wth re ev ant oca awes s nec e the content of the agreements had been approved by Georg an Government oﬀ ce s for many years wthout object ons as to the r ega ty. (92)

Other Tr buna s ment oned the poss b ty of an estoppe , acqu esence to a v o at on of host State aw or a wa ver to moke t but den ed t n prac ce: n Fraport v. Ph pp nes (93) the Tr buna ment oned the poss b ty of an estoppe :

346. There s, however, the quest on of estoppe . Pr nc pes of fa mes s shou d re u a tr buna to ho d a government estopped from ra ss ng v o at ons of ts own aw as a jur sd ct ona  defense when t know ng y over ooked them and endorsed an inv estment wh ch was not n comp ance wth ts aw.

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

347. But a covert arrange ment, wh ch by ts nature s unknown to the government oﬀ ce s who may have gven appro va on to the project, cannot be any bas s for estoppe : the covert character of the arrange ment woud depr ve any ega we d ty (assum ng that riforma and poss b y contra legem endorsements would have ega ve d ty under the re ev ant aw) that an express on of appro va on or an endorsement mght otherwse have had. There s no nd cat on n the record that the Repub c of the Ph pp nes knew, shou d have known or cou d have known of the covert arrangements wh ch were not n accordance wth Ph pp nes aw when Fraport f rst made ts inv estment n 1999. (94)

387. As a matter of aw, the Ca mant s correct that the cumu at v e act ons of a host government may const tute an riforma acceptance’ of a fore gn inv estment that otherwse would evo at es ts aw. The Ca mant s a so correct that a fa ure to prose cut someth ng of the order of a v o at on of the ADL, such that an inv es tor reasona bly inferred that t was act ng awfu y and made further mestments, cou d obvate an object on to jur sd ct on re evant materia e. The issue here, however, s fact. The Ca mant, know ng ng of the v o at on of the ADL, consc ous y concea ed t, such that any act ons that mght otherwse have been vene d by a fore gn inv es tor n good fa th as endorsement by the Ph pp nes government cannot be deemed to hav e cured the v o at on or estopped the Government. The Respondent cou d hard y have n tated ega act on aga nst Ca mant for v o at ons wh ch the Ca mant had concea ed. (95)

Furthermore, the Tr buna a so exc ued the poss b ty that a wa ver had occurred. It he d that the inv es tor cannot ca m that

Furthermore, the Tr buna a so exc ued the poss b ty that a wa ver had occurred. It he d that the inv es tor cannot ca m that

In Word Duty Free v. Kenya (97) Ca mant a eged that Kenya woud ther be estopped or woud have wa ved ts r ght to make the brbery. The Tr buna found n th s regard that Kenya on y earned of the fact when t rece ved Ca mant’s wr t (98) page “327” ten wness s tement. Therefore, t rejected the content on of an estoppe as we as of a wa er. It stated:

184. … There can be no aff mat on or wa er by Kenya
wthout knowedge; and as Lord Must stated n h s op on, [a] party cannot wa v e a rght wh ch he does not know to ex st'.

The knowedge of the Kenyan Pres dent was not attr buted to Kenya for the purpose of a wa v er:

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

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

In Desert L ne v. Yemen(99) the Tr buna found that Respondent had wa v ed the cert f cate requ rement because of the endorsement of the inv estment at the hghest eve of the State and the extens on on of ben ts under the Yemen te Inv estment Law by the V ce Pr me M n ster to the inv estment. It he d that the Respondent “s estopped from re y ng on t to defeat jur sd ct on”.(100) The Tr buna referred to the approach of the Fraport Tr buna concern ng estopor e wth appro s:

Pr nc p es of fa rness shou d requ re a tr buna to ho d a gov ernment estopped from ra s ng vo at on of ts own aw as a jur sd ct ona  defense when t knowng y ov er ooked them and endorsed an inv estment wh ch was not n comp ance wth ts aw.(101) Th s comment app es a fortiori when the a eged prob em s not a v at on of aw, but mere y as here the fa ure to accomp sh a forma ty foreseen by aw, and not even required by t except as a cond t on of obta ng ben ts unconnected wth those of the BIT tse t.(102)

The essent a cr ter a, as estab shed by these Tr buna s, are that a State knowng y ov er ooked a fa ure to comp y wth ts aw and endorses an inv estment wh ch was not n comp ance wth ts aw. Therefore, an informal acceptance can cure a vo at on of host State aw, f the host State knowng y to erates the conduct of the inv estor for a certa n t me.

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

A further ssue to be cons dered s the t me e ement. Sev era dff erent types of s tuat ons may ar se.

An inv estment may be ega ab initio But t s a so pos e that an inv estment was n accordance wth host State aw at the moment of the n t at on of the inv estment and the contrav ent on on of host State aw occurs a ter on during the operat on of the inv estment. Th s may e ther be the resu t of a change of host State aw during the t me of operat on of the inv estment or the resu t of a change of the inv estor's act ons.

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

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

344. W th respect to the tempora extens on of the cond t on n the re ev ant provs ons of the BIT, t has been contended by the Respondent and some of ts experts that an inv estment, n order to ma t a n jur sd ct on s tanding under the BIT, must not on y be n accordance wth re ev ant domest c aw at the t me of commencement of the inv estment but must cont nuous y rema n n comp ance wth domest c aw, such that a departure from some aws or regu at ons n the course of the operat on of the BIT wou d depr v e a tr buna under the BIT of jur sd ct on.

345. A though th s content on s not re ev ant to the ana y s of the prob em wh ch the Tr buna has before
t, namely the entry of the investment and not the way it was subsequently conducted, the Tribunal would note that the part of the Respondent’s interpretation appears to be a forced construct on the part of the parties and not the way the Tribunal would note that this part of the Respondent’s interpretation appears to be a forced construct on the part of the Tribunal. The language of both Article 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover, the effect would operate on the BIT regime, which might be a defense to the substantive element of non-consent to arbitration. The Tribunal in Phoenix held that modifications of host State law after the establishment of an investment should not lead to a matter on the jurisdiction of an investment tribunal:

102. The core lesson is that the purpose of international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is not at odds with the laws of the host State can be manifest and therefore a law to deny to jurisdiction. Or, the fact that the investment is not at odds with the laws of the host State can appear when dealing with the merits, whether it was not known before that stage or whether the Tribunal considered to be analyzed at the merits stage, known in the case of Plama.

103. Of course, the analysis of 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 establishment of the investment. The State’s not at liberty to modify the scope of its obligations under the international law on the protection of foreign investments, by simply modifying its law or what qualifies as an investment that complies with its own laws.

104. There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. The access can be denied through a decision on the merits. However, if the manifestation that the investment has been performed in accordance with its own laws, this non-jurisdiction is not to assert jurisdiction.

This approach, to address the issues that arise after the establishment of an investment at the merits stage, finds support in the language of many BITs on this issue. There are some examples:

The Chinese Model BIT (2003) contains the “in accordance with host State law” clause in the admission clause:

Art. 2 Promoting and Protecting Investment
1. Each Contracting Party shall … admit such investments in accordance with its laws and regulations.

The French Model BIT (2006) provides:

Art. 1 Definitions

1. Le terme ‘investment’ désigne …

I est entendu que ces dispositions doivent être ou avoir été consenties conformément à la législation de la Partie contractante …

Art. 3 Encouragement and Admission on Investment

Chacune des Parties contractantes encourage et
For the purposes of the present Agreement

1. 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:

The BITs which contain the causation in respect of assets on admissibility as a referent to the admissibility on the re-establishment of the investment. At that point the investment must be in conformity with host State law for jurisdictional purposes. The text of the French Mode BIT which contains such a causation in the definition of investment as well as in the regulations on admissibility also indicates that the relevant point in time’s when the investment is made.

The same is true for treaties which keep the Czech Republic-Israel BIT contain in the causation on the definition of investment. It also speaks of the past when it uses the phrase “any kind of assets invested ... in accordance with the laws ...”.

The treaties as well as the two decisions referred to above focus on the time of the establishment of the investment. At first sight this approach appears eminently reasonable. The problem, however, to the question on whether “the time of the investment” can always be determined with accuracy. In part, it may be open to doubt whether an investment is necessarily a one-time event that can be reduced to a particular date.

An investment is often a process rather than an instantaneous act. To take a relevant example: shares of a company are sometimes acquired in several steps over a longer period than at once. An investment operation is often composed of a number of discrete transactions and acts of which must be treated as an integrated whole. Therefore, an investment is often a complex process no longer discrete transactions which have a separate legal existence but a common economic aim.

To a certain extent this is already reflected in the definition of “investment” contained in BITs and other treaties covering a variety of different rights and transactions. Tribunals have emphasized in repeated cases that what mattered for the existence of an investment was not so much ownership of specific assets but rather the combined nature of rights that were necessary for the economic act of an investor. This doctrine of the “generality of an investment operation” was set out in the very first case that came before an ICSID tribunal, o. j. 1987. Inns v. Morocco. (109)

There is consistent case law showing that tribunals, when examining the existence of an investment for purposes of the jurisdictional claim, have not looked at specific transactions but at the overall operation. (108) Tribunals have refused to dissect an investment into discrete steps taken by the investor, even if these steps were distinct acts as separate legal transactions. What mattered for the determination of the existence of an investment on the admissibility of a claim at the merits stage was the entire operation directed at the investment’s overall economic goal.

Therefore, the approach described above would not lead to a satisfactory result when it cannot be decided when exactly the investment was established. The egality might have occurred at a time when certain steps in the process of establishment were a ready undertaken whereas others followed at a later stage.

What could a tribunal ask at such a moment? The issue is not “to react or not to react at all” but whether of the three options (1) denial of jurisdiction, (2) denial of applicability of the substantive standards at the merits stage or (3) no voating of a standard because of a justified interference should be chosen.

In such cases where the egality occurred a ready to obtain the investment is kept on or fraud a denial of jurisdiction or the denial of applicability of the substantive standards at the merits stage or no voating of a standard because of a justificable interference should be chosen.
The Tribunal in Berschader\(^\text{111}\) opted for the latter approach. It said:

\(^\text{111}\) The Respondent has further contended that the investments re ed upon by the Camants were egali
d and, as a result, do not satisfy the requirements of comp
ciance with the laws of the Russian Federation on con
tact in Art. 1.2 of the Treaty. The Tribunal is of the view that the awfulness of the investments re ed
upon by the Camants is a not an issue affecting the jurisdic
tion of the Tribunal, but rather a substantive issue pertai
ning to the merits of the case. It would, therefore, be inappropriate for the Tribunal to consider
the issue at this stage in the proceedings.

Modifications of host State laws during the investment process have
to be carefully scrutinized by tribunals. The paradox mentioned ear
er whereby host State law may the scope of egali review
and at the same time the object of that egali review may gain
relevance here.

To give an example, if the conduct of an investor was in accordance
with host State law at the time of the investment and the host State,
after the fact of the investment, adapts its egali order to
bring it into conformity with international human rights standards, the issue
would be complex.\(^\text{112}\) In such a case, the tribunal should decide as a
matter of substance whether investment protect should be
denied. Whether human rights abuses of an investor which were in
accordance with host State law at the time of the threat of
a investment but are a breach of a new national norm should lead to a loss of
investment protect which cannot be answered in the abstract. The same
holds true for new environmental or health norms. In such a situation,
the tribunal should consider the factors: amongst them the conduct and the egali
effect of the investor as well as the regulatory interests of the State and the
economic consequences for the State and the investor.

**V. Summary and Conclusions**

A declaratory function of egali investments from national protect on
is common to many investment protect on treat es. Efforts of
respondent States to use a host State law to impose defining norms of investment contact in
local law have failed. These causes on only concern the egali ty of an
investment and not ts defining on.

Furthermore, on y egali causes mputable to the investor lead to an
excuse from investment protect on. Th is not the case if the egali ty is attributable to State organs.

“In accordance with host State law” causes are found in different contexts (defining on of
investment, admission or proviso on etc.) in
bilateral investment protect on treat es. They relate to the way in
which the investment is established as well as to the investment
activity as such.

Causes in the defining on of investment referring to host State law
at the jurisdiction on are the egali ty of the investment.

The meaning of the term “investment” as such does not depend on
host State law. If the causes are contained in the defining on of
investment host State law has a paradoxical double role as point of
reference for the Tribunal and as object of review. The different contexts
in which the “host State law” causes are found in the various
investment treat es have not so far had any influence on the
interpretation of these causes by the Tribunal.\(^\text{113}\)

Despite the scarce case-law on the issue, arbitral practice provides
some guidance on re erent criteria for the exc us on of egali
investment from protect on. Major infrac on of host State law that
affect the eg t macy of an nv estment project as a who e hav e severe consequences for the protect on of an nv estment. Tribuna s use three approaches: 1) Tribuna s that den ed jur sd ct on hav e e ther he d that there s no protected nv estment or that there s no consent to arb trate. 2) In other cases they dec ded that there was an nv estment, but that it s not protected and hence d sm sied the case on the mer ts. 3) In s tuat ons, where Respondent successfu y invoked vo at ons of host State aw as a just f cat on for an interference, tribuna s dec ded that no substant a vo at on had occurred.

The key cr ter on for ega ty was the gravty of the nfract on. Supp ementary e ements were the in f uence of the ega ty on the prof tab ty of an nv estment project and the nv estor’s awareness of the ega ty. Efforts to h de ega tes w pay aga ns w an nv estor. M nor nfract ons d d not ead to a den a of nv estment protect on. But they may be taken nto account when dec d ng on the vo at on of the substant a guarantees.

Cure or estoppe wth regard to an ega ty n fav our of the nv estor s poss b e. One of the requ rements for an estoppe or a wa ver s act ve know edge of the State of the ega ty. If State organs to erate a certa n conduct ov er a certa n t me th s can be regarded as wa ver.

Un atera dec ons ons of the state to mod fy the def n t on of nv estment n a BIT v a a mod f cat on of the awds and regu at on n the host State after the estab shment of an nv estment w not ead to a oss of jur sd ct on. In such cases the ega ty w have to be taken nto cons derat on at the mer ts stage. If appropr ate, protect on shou d be den ed at that stage.
1. The term “investment” shall mean any kind of asset accepted in accordance with the respective laws and regulations of each Contracting State, … (emphasis added).

Ukraine BIT

Article 1 (1) of the BIT defines “investment” as “every kind of asset invested 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….” (Tokos v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, available at http://ta.uvc.ca/documents/Tokos-Jurisdiction_000.pdf, para. 74).

Bangladesh-Italy BIT

Article 1 (1)

The term “investment” shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other in conformity with the laws and regulations of the latter.

Oman-Yemen BIT

Article 1 (1)

The term “investment” shall mean every kind of asset owned and invested by an investor … and that is accepted, by the host Party, as an investment accorded to its laws and regulations, and for which an investment certificate is issued.

Spain-Mexico BIT

Article I, Definitions

4. Investment shall mean the following assets, property of or controlled by investors of one Contracting Party and established on the territory of the other Contracting Party in accordance with the laws of the latter: … (courtesy translation from Spanish).

See e.g., Spain-Ecuador BIT

Article 2 Promotion and Adoption

Each Contracting Party […] will admit investment according to its legal provisions.

The present Article also applies to investments made before its entry into force by investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter […]

Article 3 Protection

Each Contracting Party shall protect its territory the investments made, in accordance with its legislation […]

(courtesy translation from Spanish, emphases added).

Netherlands-Bolivia BIT

Article 2

Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation on through the protection on its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such
For the purposes of the present Agreement:

(a) the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively: …

Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law.

For the purposes of this Agreement:

1. 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: 

particular, though not exclusive: …

Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law.

For the purposes of this Agreement:

1. This Agreement shall only apply to investments made in accordance with the laws, regulations and procedures of the host country.

Art. 2 of the Estonian-Finnish BIT: Applicability of this Agreement

1. This Agreement shall only apply to investments made in accordance with the laws, regulations and procedures of the host country.

For the purposes of the present Agreement:

(a) the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively: …
15.
16. Id at paras. 196, 188.
17. Emphases added.
18. Id at para. 160. Although the argument that Inceya’s investment is not protected by the Agreement because it is an investment that was not made in accordance with the laws of El Salvador can be dismissed as a substantive defense related to the merits of the matter, th is presumption is incorrect. Indeed, if it is determined that the investment is not protected by the Agreement, it would imply recogniz ng that the necessary premise for the Arbitral Tribunal to assume jurisdiction was not met. Consequently, in the end, the Arbitral Tribunal would be decisiong on its own competence and not on the Claimant’s indemnity claims.
19. Id at paras. 103, 104, 110.
20. Id at paras. 122.
21. Id at para. 115.
22. Id at para. 187 referring to Sa n v. Morocco, Decision on Jurisdiction, supra note 2, at para. 46: In envisaging “the categories of invested assets […] in accordance with the laws and regulations of the said party,” the proviso on request refers to the egality of the investment and not to its definition. It amounts to part cu to ensure that the Subsequent Agreement does not protect investments which it should not, generally because they are egal.”
23. Id at para. 240.
24. Id at paras. 246, 252.
25. Id at para. 254.
26. Id at para. 257.
28. Id at para. 130.
29. Id at paras. 105 124.
30. Id at para. 136.
31. Id at para. 159.
32. Id at para. 157.
33. Id at para. 185.
34. Id at para. 188.
35. Id at para. 192.
37. The Claimant represented to the Bulgarian Government that the investor was a consortium which was true during the early stages 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. On the basis of the evidence in the record, Bulgaria had no reason to suspect that the original consortium of two major experienced companies had changed to an individual investor acting in the guise of that “consortum”, and no duty to ask.
38. Id at para. 143.
39. Id at para. 144.
40. Id at para. 144.
42. Internationa Thunderbird Gaming Corporation v. Mexico, Award, 26 January 2006, available at http://ta.aw.ucn.ca/documents/Gen-n-Award.pdf. Thunderbird had not offered to provide the regulator with a physical sample or respect on of the part of the game machine at issue but described the games. The request concluded that the proposed operation was not of the type prohibited by Mexico’s law and sought confirmation of this and was made by the gaming regulator. The gaming regulator issued an order on the egality of the machines to Thunderbird’s request. It restated the prohibition on
gamb ng and uck-re ated games under Mex can aw. It then
conf rmed that t had no power to proh b t mach n es that operate n
the form and cond t ons stated by the nv estor. It emphas zed that
the vdeo games sk  mach n es cou d be operated as ong as they
do not become, n any manner whatsoever, gamb ng or bett ng
mach n es.

62 Id at para. 208.
The tr buna found that

164. It cannot be d sputed that Thunderb rd knew when
it chose to nv est n gam ng act vt es n Mex co that
gamb ng was an ega  act vty under Mex can aw. …
Thunderb rd must be deemed to hav e been aware of
the potent a  r sk of c osure of ts own gam ng fac t es
and t shou d hav e exerc sed part cu ar caut on n
pursu ng ts bus ness v enture n Mex co. At the t me
EDM requested an off c a op n on from SEGOB on the
ega ty of ts mach n es, EDM must a so be deemed to
hav e been aware that ts mach n es nv o v ed some
degree of uck, and that do ar b  acceptors coup ed
w th wnn ng t ckets redeemab e for cash cou d be
reasonab y viewed as e elements of bett ng. Yet EDM
chose not to d sc ose those cr t ca  aspects n the
So c tud.

166. Cons der ng the forego ng, the Tr buna f nds that
there was no eg t mate expectat on created by the
Of c o to the effect of br ng ng Thunderb rd's c a ms n
the present case under Art c e 1102, 1105 and/or 1110
of the NAFTA.

63 Inceysa Va so etana S.L. v. Repub c of E Sa vador, supra note 15,
64 P arna Consort um L m ted v. Bu gar a, supra note 7.
65 Word Duty Free Company L m ted v. The Repub c of Kenya,
Award, supra note 45.
66 Inceysa Va so etana S.L. v. Repub c of E Sa vador, supra note 15.
67 In Fraport the Tr buna found that the nv estor knowng y and
ntent ona y c rcumv ented the ru e that n case of a pub c ut ty
franch se, the proponent and fac ty operator must be owned and
contro ed up to at east s xty percent (60%) by F p nos. Th s ru e
was conta ned n the const tuon and the Ant Dummy aw.

para. 83.
69 Rume Te ekom A.S. and Te s m Mob Te ekomun kasyon
zmet er A.S. v. Kazakhst an, ICSID Case No. ARB/05/16, Award,
29 Juy 2008, available at
70 Rume Te ekom A.S. and Te s m Mob Te ekomun kasyon
zmet er A.S. v. Kazakhst an, supra note 69, at para. 168.
Emphas s added. Footnote om tted.
71 Desert L ne Projects LLC v. The Repub c of Yemen, supra note 3,
at para. 104.
72 Phoen x Act on, Ltd. v. Czech Repub c, supra note 10, at para.
78.
73 Tok os To ke es v. Ukra ne, supra note 5.
74 Id at para. 86.
75 Meta pars A.S. and Buen A re S.A. v. Argent ne Repub c, ICSID
Case No. ARB/03/5, Dec s on on Jur sd ct on, 27 Apr  2006,
available at http://ta.aw.uvc.ca/documents/Meta-par-Ar gent-na-
Jur sd ct on.pdf.
76 Id at para. 84.
77 Myt neos v. State Un on of Serb a and Montenegro and
Repub c of Serb a, supra note 3.
78 Id at para. 151. Footnote om tted.
79 Id at paras. 154, 157. Footnote om tted.
80 Fraport AG Frankfurt A report Serv ces Wor dwde v. Ph np nes,
supra note 15, at para. 396.
81 Id at paras. 355, 388.
82 Id at para. 387.
83 Desert L ne Projects LLC v. The Repub c of Yemen, supra note 3,
at paras. 116, 117.
84 SwemBalt A B v. Latva, Award, 23 October 2000, available at
http://ta.aw.uvc.ca/documents/Swemba-l-Latva-Award-
23Oct2000.pdf; for a case note see Farouk Ya a, F nal Arb trat
Award Rendered in 2000 in UNCITRAL Ad Hoc Arb trat
SwemBalt AB v. Republic of Latvia, Stockho m Arb trat on Report
97 131 (2004:2).
85 Id at paras. 34, 35.
86 Tok os To ke es v. Ukra ne, Dec s on on Jur sd ct on, supra note
5, at para. 86.  
88 Id at para. 149.  
89 Id at par. 151, 174.  
90 Ioann s Kardassopou os v. Georg a, supra note 11.  
91 See supra p. 7.  
92 Id at para. 185, 194.  
93 Fraport AG Frankfurt Airport Services Wor dwde v. Ph pp nes, supra note 15.  
94 Id at para. 347.  
95 Id at para. 387.  
96 Id at para. 401.  
97 Wor d Duty Free Company Lm ted v. The Repub c of Kenya, supra note 45.  
98 Internat ona Thunderb rd Gam ng Corporat on v. Mex co, supra note 60, at para. 165.  
99 Desert Lne Projects LLC v. The Repub c of Yemen, supra note 3.  
100 Id at par. 117, 118.  
102 Desert Lne Projects LLC v. The Repub c of Yemen, Award, supra note 3, at para. 120.  
103 Fraport AG Frankfurt Airport Services Wor dwde v. Ph pp nes, supra note 15.  
104 Id at para. 344, 345.  
105 Phoen x Act on, Ltd. v. Czech Repub c, supra note 10.  
106 Id at para. 102 104. Footnotes om tted.  
107 See also the examp es of “n accordance wth host State aw c auses” n footnotes 5 and 6.  
108 BIT app cab e n Phoen x.  
1013 See also Andrea Car e a r s, The Conformity of Investments with the Law of the Host State and the Jurisdiction of Internat onal Tribunals, 9 The Journa  of Wor d Invesment and Trade 48 (2008).