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The Scope of the Legality Requirement in Relation to Investments: Recent Case Law

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Commentary

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I. Introduction

The requirement that investments subject to treaty protection must be made or owned in accordance with the law of the host State has arisen in several recent investment treaty arbitrations and has led to the refusal of jurisdiction where the tribunal was persuaded that the investment had been acquired illegally or made in bad faith. While the requirement of the legality of investments usually derives from "accordance with law" clauses found in many bilateral investment treaties, certain tribunals have also recognized the existence of an implied requirement of legality and good faith. As the tribunal observed in the *Phoenix Action* case:

> The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.[1]

The tribunal in *Saba Fakes v. Turkey*, however, recently rejected the notion of an implied requirement of legality and good faith in the ICSID context, finding that such principles "cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention."[2] According to the *Saba Fakes* tribunal, "an investment might be 'legal' or 'illegal,' made in 'good faith' or not; it nonetheless remains an investment."[3]

In analyzing the legality requirement, tribunals have adopted a variety of different approaches, with some tribunals considering that issues relating to the establishment of investments are a question of *ratione voluntatis* or *ratione materiae*, while others have considered that such issues present questions going to the merits of the dispute.

In light of the recent awards and decisions addressing the legality requirement, this article examines the context in which the requirement has arisen and the manner in which tribunals have analyzed and decided the issues presented. It should be pointed out that there exists an excellent article summarizing a number of

other cases published in the Wälde Liber Amicorum, by Abby Cohen Smutny and Petr Polášek.[4]

II. Inceysa v. El Salvador

Inceysa v. El Salvador[5] was an ICSID arbitration arising under the Spain-El Salvador bilateral investment treaty concerning an exclusive concession contract for the installation, management, and operation of mechanical inspection stations for vehicles and emission control of contaminating gases, particles, and noise in El Salvador.[6]

Inceysa was awarded the concession contract through a public bidding process organized by the Ministry of the Environment and Natural Resources of El Salvador.[7] Following a dispute between Inceysa and the Ministry, the Ministry sought to terminate the concession contract in the Salvadoran courts and awarded contracts to other companies.[8] Inceysa commenced ICSID arbitration, claiming expropriation of its contractual rights.

El Salvador objected to the tribunal's jurisdiction, arguing that the protections of the BIT extended only to investments made in El Salvador in accordance with its laws.[9] Inceysa's concession contract, El Salvador submitted, had been procured by fraud and thus was not subject to the BIT's protections.[10] In light of El Salvador's jurisdictional objections, the tribunal decided to suspend the proceeding on the merits and to address the objections in a separate jurisdictional phase.[11]

On the facts, the tribunal found that, during the public bidding process, Inceysa had, among other things, submitted false financial statements,[12] misrepresented its experience in the field of vehicle inspections,[13] and concealed its relationship with another bid participant,[14] "a deceit on one of the central aspects of the bid."[15] Concluding that Inceysa had thus engaged in deceit and misrepresentation in order to procure its concession contract, the tribunal proceeded to consider whether El Salvador had consented to submit to ICSID arbitration disputes arising from an investment made illegally.[16] According to the tribunal, this was a question of jurisdiction *rationae voluntatis*.[17]

The tribunal thus rejected Inceysa's argument that the issue of whether an investment was made in accordance with the laws of El Salvador was a substantive defense related to the merits, because "if it is determined that the investment is not protected by the Agreement, it would imply recognizing that the necessary premise for the Arbitral Tribunal to validly assume jurisdiction was not met."[18]

Turning to the terms of the Spain-El Salvador BIT, the tribunal found that, although there was no reference to the clause "in accordance with law" in the definition of investment contained in Article 1(2) of the BIT, there were two references in the BIT to the need for investments to have been made in accordance with the law of the host State.[19] Article II of the BIT provides that the BIT "will also apply to investments made before its entry into force by the investors of a Contracting Party <u>in accordance with the laws of the other Contracting Party</u> in the territory of the latter," while Article III states that "[e]ach Contracting Party shall protect in its territory the investments made, <u>in accordance with its legislation</u>," by investors from the other Contracting Party.[20]

The tribunal further found that the records of the treaty negotiations between Spain and El Salvador reflected an intention "to exclude from the scope of application and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State."[21] In particular, the *travaux preparatoires* showed that El Salvador had requested that the phrase "in accordance with law" be included in the definition of "investment" and that Spain had informed El Salvador that it was not necessary to include the limitation requested in the definition of "investment," because it was included in the text of the BIT and was thus "a necessary condition for an investment to benefit" from the BIT's protection.[22] The tribunal thus concluded that

> the consent granted by Spain and El Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment. Consequently, this tribunal decides that the disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them, for failure to meet the

> requirements of Article 25 of the Convention and those of the BIT.[23]

With respect to the legality of Inceysa's investment, the tribunal emphasized that, "as the legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case, i.e., by this Arbitral Tribunal."[24] Accordingly, any prior resolutions or decisions made by the BIT Contracting Parties "concerning the legality or illegality of the investment are not valid or important for the determination of whether they meet the requirements of Article 25 of the Convention and of the BIT, in order to decide whether or not the Arbitral Tribunal is competent to hear the dispute brought before it."[25]

The tribunal thus rejected Inceysa's argument that the legality of its investment had already been resolved by the Supreme Court of Justice of El Salvador, when the Court affirmed the validity of the public tender that had been challenged by two unsuccessful bidders.[26]

In determining the Salvadoran laws and legal principles applicable to Inceysa's investment, the tribunal first considered the text of the BIT, which, the tribunal noted, constituted a law of the Republic of El Salvador under Article 144 of the Political Constitution of El Salvador.[27] Because the BIT did not, however, "contain substantive rules that permit a determination whether Inceysa's investment was made in accordance with the law of El Salvador,"[28] the tribunal turned to consider the "generally recognized rules and principles of International Law" referred to in the BIT, which the tribunal equated with the general principles of law enshrined in Article 38 of the Statute of the International Court of Justice.[29] The tribunal found that Inceysa's conduct during the public bidding process had violated these general principles.[30] Specifically, the tribunal found that Inceysa's fraudulent conduct violated (i) the principle of good faith;[31] (ii) the principle that no one should be permitted to profit from their own fraud;[32] (iii) international public policy;[33] and (iv) the prohibition against unlawful enrichment.[34]

The tribunal 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 El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre."[35] The tribunal dismissed the case accordingly.[36]

III. Fraport v. Philippines

Fraport v. Philippines[37] was an ICSID arbitration arising under the Germany-Philippines bilateral investment treaty concerning a concession contract for the construction and operation of a new terminal for the airport in Manila.

Fraport had invested in a Philippine company, PIATCO, that was a party to the concession contract.[38] Prior to the completion of the terminal, disputes arose between Fraport and PIATCO and the Philippine Government. Following a ruling from the Philippine Supreme Court that PIATCO's concession contract and related agreements were null and void under Philippine law, Fraport commenced ICSID arbitration.[39]

The Philippines objected to the tribunal's jurisdiction on the ground that Fraport's investment in PIATCO violated Philippine law and was therefore not protected under the Germany-Philippines BIT.[40] The Philippines argued that Fraport had openly sought to evade nationality restrictions found in the Philippine Constitution and in the Anti-Dummy Law ("ADL") limiting foreign ownership of the capital of a public utility to 40%, by means of "indirect" ownership and a series of secret shareholder agreements.[41]

On the basis of Fraport's own internal and contemporaneous documents, the tribunal concluded that Fraport "was consistently aware that the way it was structuring its investment in the Philippines was in violation of the ADL and accordingly sought to keep those arrangements secret."[42]

The tribunal then turned to consider whether, in view of Fraport's violations of Philippine law, it was without jurisdiction *ratione materiae* to hear the substance of Fraport's claim. Noting that Article 25 of the ICSID Convention "does not define 'investment', leaving it to parties who incorporate ICSID jurisdiction to provide a definition if they wish,"[43] the tribunal observed that, "[i]n bilateral investment treaties which incorporate an ICSID arbitration option, the word 'investment' is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT

which serves as a *lex specialis* with respect to Article 25" of the ICSID Convention.[44] Accordingly, where a BIT defines the term "investment," "it is possible that an economic transaction that might qualify *factually and financially* as an investment (*i.e.* be comprised of capital imported by a foreign entity into the economy of another state which is party to a BIT), falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because *legally* it is not an 'investment' within the meaning of the BIT."[45]

With respect to the Germany-Philippines BIT, the tribunal affirmed that it contained a jurisdictional limitation *ratione materiae*.[46] Article 1(1) of the BIT provides that "[t]he term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [. . .]."[47] Article 2(1) of the BIT also provides that "[e]ach Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to Article 1, paragraph 1.[. . .]"[48]

In interpreting the term "investment" in the BIT, the tribunal also relied on the Protocol to the BIT, which contained a prohibition on foreign ownership of land in the Philippines, as well as the Philippines's Instrument of Ratification of the BIT, which stated that "the investment shall be in the areas allowed by and in accordance with the Constitutions, laws and regulations of each of the Contracting Parties."[49] Interpreting the BIT in light of its object and purpose, and taking into account the Protocol and the Instrument of Ratification, the tribunal noted that the references to compliance with host-State law indicated "the significance of this condition."[50] The tribunal thus concluded that "economic transactions undertaken by a national of one of the parties to the BIT had to meet certain legal requirements of the host state in order to qualify as an 'investment' and fall under the Treaty."[51]

Notably, the Philippines argued that "an investment, in order to maintain jurisdictional standing under the BIT, must not only be 'in accordance' with the relevant domestic law at the time of commencement of the investment but must continuously remain in compliance with domestic law, such that a departure from some laws or regulations in the course of the operation of the BIT would deprive a tribunal under the BIT of jurisdiction."[52] The tribunal rejected this argument, finding that such an interpretation of the Treaty's jurisdictional requirements would be a "forced construction," as "the language of both Articles 1 and 2 of the BIT emphasizes the *initiation* of the investment."[53]

Finally, the tribunal noted that, while "[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law [. . .], a covert arrangement, which by its nature is unknown to the government officials who may have given approbation to the project, cannot be any basis for estoppel [. . .]."[54]

The tribunal then considered whether Fraport's investment was in compliance with Philippine law. Based on the evidence presented, the tribunal found that Fraport knowingly violated Philippine law by entering into secret shareholders agreements, which effectively allowed Fraport to secure "*managerial* control in violation of the ADL."[55] Moreover, "[i]n the context of the internal Fraport documents, the secret shareholder agreements show[ed] that Fraport from the outset understood, with precision, the Philippine legal prohibition but believed that if it complied with it, the prospective investment could not be profitable."[56] These secret shareholder agreements, the tribunal found, evidenced "that Fraport planned and knew that its investment was not 'in accordance' with Philippine law."[57]

Notably, the tribunal concluded that it would not give weight to the fact that the Philippine authorities had previously dismissed domestic complaints that Fraport had acted in breach of the ADL. The tribunal emphasized the principle articulated by the *Inceysa* tribunal that "holdings of municipal legal institutions cannot be binding with respect to matters properly within the jurisdiction of this Tribunal."[58] The tribunal also noted that the local authorities had dismissed the complaint without being aware "of the actual secret shareholder agreements by which the management and control prohibited by the ADL was effectively assigned to Fraport."[59]

Ultimately, the tribunal concluded that "Fraport knowingly and intentionally circumvented the ADL by

means of secret shareholder agreements"[60] and that "it cannot claim to have made an investment 'in accordance with law.' "[61] The tribunal held that it lacked jurisdiction *ratione materiae* and dismissed the case accordingly.[62]

The *Fraport* Award included a dissent by one of the arbitrators, Dr. Bernardo M. Cremades, who found that the majority's approach to illegality was incorrect as a matter of principle. According to Dr. Cremades, PIATCO's shareholding remained "an asset accepted in accordance with Philippine law" and thus was not outside the protection of the BIT.[63] Dr. Cremades further stated that "it is [. . .] mistaken to adopt an interpretation of a standard phrase in investment instruments in a manner capable of leaving an investor without a remedy, and a Host State secure and immune in a gross violation of a Bilateral Investment Treaty."[64]

On the facts, Dr. Cremades was of the view that Fraport's investment did not breach the ADL because (i) the ADL criminalized the conduct of a dummy; (ii) there was no proof that Fraport violated the ADL, because Fraport had never relied on the secret shareholders' agreement and, as such, PIATCO never allowed itself to be used as a dummy; and (iii) the ADL requires the dummy to hold a public utility franchise, and since the relevant concession was declared null and void, PIATCO did not hold any such franchise.[65] Dr. Cremades emphasized that, in his opinion, "[a]s a matter of principle [. . .] the proper question is whether the kind of asset is legal under domestic law and, if so, the tribunal has jurisdiction and should move on to consider the merits."[66]

IV. Phoenix Action v. Czech Republic

Phoenix Action v. Czech Republic[67] was an ICSID arbitration arising under the Israel-Czech bilateral investment treaty relating to two Czech companies involved in the trading of ferroalloys.[68]

Phoenix was owned by Mr. Vladimír Beňo, a former Czech citizen who fled to Israel following allegations of tax and customs duty evasions and fraud.[69] At the time Phoenix purchased the two Czech companies, they were beneficially owned by Mr. Beňo's wife and daughter and were involved in ongoing legal disputes in the Czech Republic, one with a private party and the other with the Czech fiscal authorities.[70] Two months after Phoenix purchased the Czech companies, it commenced ICSID arbitration.

Phoenix initially claimed that the Czech companies had assigned their ICSID claims to it as part of the acquisition of the shares, but later abandoned that theory after the ICSID Secretariat questioned how Phoenix could bring claims as an assignee when the Czech companies could not themselves have had any claims arising under the Israel-Czech Republic BIT.[71] Phoenix subsequently argued that its claims arose out of the continuous freezing of one of the company's bank accounts and the continuous seizure of company documents, as well as the Czech court's delays in resolving the actions brought by the companies.[72]

The Czech Republic objected to the tribunal's jurisdiction, claiming that Phoenix was "nothing more than an *ex post facto* creation of a sham Israeli entity created by a Czech fugitive from justice, Vladimír Beňo, to create diversity of nationality" and that "such abusive treaty-shopping is directly at odds with the fundamental object and purpose of the ICSID Convention and the BIT, which are meant to encourage *international* investment,"[73] and a violation of "the principle of good faith, which applies to all bilateral investment treaties and the rights derived therefrom."[74] Phoenix's purchase of the Czech companies, the Czech Republic submitted, was thus not an "investment" within the meaning of the ICSID Convention and the BIT.[75]

The tribunal confirmed that "the jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT."[76] The tribunal observed:

> The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.[77]

With respect to the legality requirement, the tribunal noted that, in its view, "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws" and 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."[78] The tribunal further observed:

> The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law.
>
> [. . .]
>
> There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.[79]

With respect to the good faith requirement, the tribunal noted that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith."[80] As the tribunal observed, "[t]he protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance."[81]

While the tribunal recognized that "no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake," the tribunal noted that it was concerned "with the *international principle of good faith as applied to the international arbitration mechanism of ICSID*."[82] As the tribunal observed, "[t]he Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected."[83]

The question of whether the investment had been made in accordance with host-State law was not directly raised in the dispute, as there were no allegations that Phoenix had purchased the Czech companies in violation of Czech law.[84] Observing that the relevant "investment could certainly be considered as an investment under the Czech legal order,"[85] the tribunal then turned to the question of whether the investment could be considered to have been *bona fide*. Based on the evidence presented, the tribunal concluded:

> The evidence indeed shows that the Claimant made an 'investment' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the 'investment' was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.[86]

The tribunal considered the following factors to be relevant: (i) "Phoenix bought an 'investment' that was already burdened with the civil litigation as well as the problems with the tax and customs authorities," and Phoenix was aware of this;[87] (ii) Phoenix originally claimed that the Czech companies had assigned its claims to it, which demonstrated Mr. Beňo's, "true intent;"[88] (iii) Phoenix had notified the dispute under the BIT only two months after it had made its "investment;"[89] (iv) the transfers of the Czech companies were carried out entirely within the Beňo family;[90] and (v) "no economic activity in the market place was either performed or even intended by Phoenix."[91]

Concluding that Phoenix's "initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration,"[92] the tribunal held that it lacked jurisdiction over the Claimant's request, as "the Claimant's purported investment does not qualify as a protected investment under the Washington Convention and the Israeli/Czech BIT."[93] The tribunal dismissed the case accordingly.

V. Inmaris *et al.* v. Ukraine

Inmaris et al. v. Ukraine[94] is an ongoing ICSID arbitration arising under the Germany-Ukraine bilateral investment treaty relating to a series of contracts concluded between Inmaris Perestroika Sailing Maritime Services GmbH ("IPS") and the Kerch Maritime Technological Institute of Ukraine ("KMTI"), a Ukrainian State-owned education institution controlled by the Minister of Agricultural Policy of Ukraine, regarding a windjammer sail training ship known as *Khersones*.[95]

Pursuant to the contracts, IPS was to operate the *Khersones* and to market sailing tours and other onboard events, as well as to provide training to cadets for Ukraine's national fishing fleet.[96] In exchange for the exclusive right to market the ship and to receive the income from the ship's commercial activities, IPS was to cover all operational expenses for the *Khersones*, including cadet training.[97]

Following a change of government in Ukraine, disputes arose between IPS and the Ukrainian Government.[98] By telegram dated 5 April 2006, the Minister of Agricultural Policy of Ukraine prohibited the *Khersones* from leaving the territorial waters of Ukraine.[99] Inmaris commenced ICSID arbitration, alleging various breaches of the Germany-Ukraine BIT.[100]

Ukraine objected to the tribunal's jurisdiction and, in light of these objections, the tribunal decided to address the issues presented in a separate jurisdictional phase.[101] Ukraine articulated six jurisdictional objections, including an objection that "any alleged investments based on rights under the Bareboat Charter or related contracts were not made in accordance with Ukrainian law."[102]

Article 2(2) of the Germany-Ukraine BIT provides that "[i]nvestments, which have been undertaken by nationals or companies of the other Contracting Party <u>in accordance with the legal regulations of a Contracting Party</u> in the field of application of its legal system, shall enjoy the full protection of the Treaty."[103] Article 9 of the BIT, which extends the protection of the BIT to investments that pre-date the BIT's entry into force also specifies that the extension in available to such "investments [. . .] made in the territory of the other Contracting Party <u>in accordance with the legislation of the latter</u>."[104] Other substantive provisions of the BIT include this language as well.[105]

Ukraine first alleged that the Bareboat Charter was a fictitious agreement and that any alleged investments based upon rights under the Bareboat Charter or related contracts were not made in accordance with Ukrainian law, because fictitious contracts are void as a matter of Ukrainian law.[106] The tribunal rejected Ukraine's contention that the Bareboat Charter was a fictitious contract, finding that the Bareboat Charter and its associated contracts were *prima facie* valid and in operative effect.[107] The tribunal noted that the *Khersones* was extensively repaired after execution of the Bareboat Charter, and that a payment mechanism identified in the Bareboat Charter had actually been used by the parties.[108] The tribunal further observed that, even if the Bareboat Charter were void, the previous contract that the Bareboat Charter had superseded would, as a consequence, remain in effect and give rise to an "investment" on which at least some of the claimants could ground a claim under the BIT.[109]

Ukraine next alleged that the payment scheme under the contracts was not in compliance with Ukrainian laws on currency controls in effect at that time, which required Ukrainian entities to obtain licenses from, or declare assets located outside Ukraine to, the National Bank of Ukraine.[110] Upon review of Ukraine's foreign currency regulations, the tribunal found that these regulations placed the burden to obtain all required licenses, or make all required declarations, on the Ukrainian resident (*i.e.*, KMTI), and not on its foreign counterparty.[111] In such circumstances, the tribunal found that "it would be incongruous to declare Claimants' investments to be inconsistent with Ukrainian law based not on defaults by the foreign investors, but by a Ukrainian counterparty that was not under their control."[112] The tribunal explained:

> First, it is reasonable to expect state organs and officials to be cognizant of, and comply as necessary with, the state's own legal requirements. Second, this is not a case such as *Fraport v. Philippines* [. . .], in which the facts that rendered the investment illegal under the host state's laws were hidden from the state. Whatever Respondent might say about its lack of knowledge of the intra-Inmaris contracts, it cannot say that its representatives were

> unaware of the other contracts that established the payment scheme, [. . .] because KMTI was a signatory to all of them.[113]

The tribunal further observed that, during the course of the parties' negotiations prior to the arbitration, representatives of Ukraine had stated that the existing contracts were valid.[114] The tribunal viewed these prior statements "as indicating that Respondent did not at that time consider those contracts (or the payment scheme contained in them) to be illegal under Ukrainian law."[115]

Ukraine next alleged that the Bareboat Charter was not made in accordance with Ukrainian law, because government approval had not been obtained, which Ukraine argued was required in connection with the disposition of State-owned property, such as the *Khersones*.[116] Ukraine ultimately withdrew this objection after the claimants produced an approval letter in connection with the Bareboat Charter, but noted that this approval letter did not cover Addendum No. 2 to the Bareboat Charter, which had been signed more than a year after the approval letter had been issued.[117] The tribunal found that, although the approval letter could not have reflected direct approval of an Addendum signed more than a year later, "the validity of Addendum No. 2 does not affect this Tribunal's jurisdiction, given that the Bareboat Charter Contract itself has been determined to be a covered investment under the Treaty out of which this dispute directly arises."[118]

Finally, the tribunal considered a "possible" objection by Ukraine that neither the Bareboat Charter nor any of its associated contracts had been registered as an investment or investment contract in Ukraine.[119] Upon review of the foreign investment laws submitted by Ukraine, the tribunal found that the consequence of a failure to register was the loss of certain legal protections for foreign investments, as well as certain tax and customs benefits.[120] Neither the Ukrainian foreign investment law nor the regulations governing registration suggested that unregistered investments were illegal as such. Observing that "it is illegality that is the touchstone of our analysis under provisions such as Article 2(2) of the BIT," the tribunal concluded that it was "not prepared to deem the Claimants' investments to be contrary to Ukrainian law, and thus outside the Treaty's protection, by virtue of the fact that Claimants did not afford themselves of the benefits of Ukraine's foreign investment law through registration of their contracts."[121] The tribunal thus dismissed Ukraine's objection to the tribunal's jurisdiction.

VI. Anderson *et al.* v. Costa Rica

Anderson et al. v. Costa Rica[122] was an ICSID case arising under the Canada-Costa Rica bilateral investment treaty relating to funds deposited in a currency exchange in Costa Rica.[123]

The claimants, 137 nationals of Canada, had deposited funds in a currency exchange operated by two Costa Rican nationals, Luis Enrique Villalobos Camacho and his brother Osvaldo Villalobos Camacho (the "Villalobos brothers"), known first as Casa de Cambio Hermanos Villalobos (the "Villalobos Brothers Money Exchange") and later renamed Casa de Cambio Ofinter S.A. ("Ofinter").[124] Ofinter was licensed by the *Superintendencia General de Entidades Financieras* (SUGEF), the Costa Rican governmental financial regulatory agency under the supervision of the Central Bank of Costa Rica, to operate the currency exchange.[125]

Following a court-authorized raid of the offices of the Villalobos brothers in 2002,[126] the Costa Rican government investigated the Villalobos brothers' business activities. During the course of that investigation, the government concluded that the Villalobos brothers had been engaged in illegal financial intermediation and were operating a fraudulent Ponzi scheme in which they had used funds received from depositors to pay other depositors and themselves, rather than to invest the funds received.[127] The Costa Rican authorities (i) ordered the arrest of the Villalobos brothers, (ii) seized the assets and accounts of the brothers and their affiliated enterprises, and (iii) closed the currency exchange.[128] Shortly thereafter, the Central Bank of Costa Rica formally cancelled Ofinter's license to operate a currency exchange.[129]

Following the collapse of the Ponzi scheme and prosecution of Osvaldo Villalobos Camacho for fraud and illegal financial intermediation,[130] the claimants initiated ICSID arbitration, alleging that various acts and omissions of the Costa Rican authorities had caused their losses in violation of the Canada-Costa Rica BIT.[131]

Costa Rica raised five distinct jurisdictional objections, including an objection that the deposits made by the

claimants with the Villalobos brothers did not constitute an "investment" as that term is defined in Article 1 of the Canada-Costa Rica BIT.[132] Article 1(g) of the Canada-Costa Rica BIT provides that an " 'investment' means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws [. . .]."[133] The tribunal confirmed that, in order for it "to have jurisdiction over this dispute, the Claimants must, at a minimum, establish that their deposits and resulting legal relationship with the Villalobos brothers constituted 'investments' " as the term is defined by [Article 1(g) of] the Canada-Costa Rica BIT."[134]

While the tribunal found that the claimants' deposit of funds constituted "assets" owned by the claimants within the meaning of the Canada-Costa Rica BIT, relying on Article I(g) of the Treaty, the tribunal noted that, under the BIT, the claimants "must also demonstrate that they own or control those assets in accordance with the laws of Costa Rica."[135] The tribunal found that this requirement is stated in "objective and categorical terms" and that "[e]ach Claimant must meet this requirement, regardless of his or her knowledge of the law or his or her intention to follow the law."[136] Accordingly, the claimants' "statements that they intended to follow the law or that they did not know the law are irrelevant to a determination of whether they actually owned or controlled their investments in accordance with the laws of Costa Rica."[137]

The tribunal observed that not all bilateral investment treaties "contain a requirement that investments subject to treaty protection be 'made' or 'owned' in accordance with the law of the host country."[138] The tribunal thus considered that the inclusion of such a provision in the Canada-Costa Rica BIT was a "clear indication of the importance that [the BIT Contracting Parties] attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed."[139] As the tribunal further observed, "[t]he assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well being of any country."[140]

In order to determine whether an investment was "made" or "owned" in accordance with the law of a particular country, the tribunal noted that "one must of necessity examine how the possession or ownership of that property was acquired and in particular whether the process by which that possession or ownership was acquired complied with all of the prevailing laws."[141] In this case, the tribunal found that it was "clear that that the transaction by which the Claimants obtained ownership of their assets (*i.e.* their claim to be paid interest and principal by Enrique Villalobos) did not comply with the requirements of the Organic Law of the Central Bank of Costa Rica and that therefore the Claimants did not own their investment in accordance with the laws of Costa Rica."[142] Article 116 of the Organic Law of Costa Rica provides that only entities expressly authorized by law may engage in financial intermediation in Costa Rica, while Article 157 makes it a crime to engage in financial intermediation without authorization.[143] As the tribunal observed:

> By actively seeking and accepting deposits from the Claimants and several thousand other persons, the Villalobos brothers were engaged in financial intermediation without authorization by the Central Bank or any other government body as required by law [. . .] The entire transaction between the Villalobos brothers and each Claimant was illegal because it violated the Organic Law of the Central Bank. If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition by each Claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica.[144]

The tribunal further observed that its interpretation of the words "owned in accordance with the laws" of Costa Rica reflected "both sound public policy and sound investment practice." As the tribunal noted, "Costa Rica, indeed any country, has a fundamental interest in securing respect for its law," and Costa Rica "clearly sought to secure that interest by requiring investments under the BIT to be owned and controlled according to law."[145] The tribunal further observed that "prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal" and that "[b]ased on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken to assure

themselves that their deposits with the Villalobos scheme were in accordance with the laws of Costa Rica."[146]

Having found that the claimants did not own or control investments in accordance with the law of Costa Rica, the tribunal concluded that it lacked jurisdiction *ratione materiae* to hear the dispute and dismissed the case accordingly.[147]

VII. Hamester v. Ghana

Hamester v. Ghana[148] was an ICSID arbitration arising under the Germany-Ghana bilateral investment treaty relating to an alleged investment in a cocoa production joint venture between a German company, Gustav F W Gamester GmbH & Co KG ("Hamester"), and the Ghana Cocoa Board ("Cocobod").[149]

In 1992, the claimant entered into a joint-venture agreement ("JVA") with Cocobod for the purpose of rehabilitating a cocoa-processing factory located in Ghana ("Wamco I").[150] Wamco I subsequently purchased the assets of other local cocoa-processing companies (referred to collectively as "Wamco").[151] Pursuant to the JVA, Hamester held 60% of the shares in the joint venture.[152] The JVA provided that the price for cocoa beans purchased by Wamco from Cocobod would be agreed with Cocobod, but would be "based on the takeover prices approved by the Cocoa Producer Price Review Committee."[153] Following the creation of the joint venture, there were numerous conflicts between the joint-venture partners concerning various loan obligations, as well as the supply and pricing of cocoa. In 2001, the claimant and Cocobod entered into a new Pricing Agreement, which specified fixed prices per tonne for the supply of cocoa beans by Cocobod.[154] In 2002, Cocobod informed cocoa processing factories in Ghana that it was facing a shortage of cocoa beans.[155] Wamco subsequently informed Cocobod that the intermittent supply of cocoa breached the JVA and was causing losses to Wamco and that it would deduct such losses from payments due to Cocobod.[156] Following an ongoing dispute with Cocobod, the claimant informed Cocobod in 2003 that it wanted to abandon the joint venture.[157]

In 2008, Hamester commenced ICSID arbitration against the Government of Ghana.[158] The claimant contended, *inter alia*, that the 2001 Pricing Agreement was invalid because it was concluded under the threat of cessation of supply to the joint venture, which constituted duress, and that the Respondent had failed to supply properly cocoa beans to Wamco.[159]

Aside from rejecting Hamester's claims on their merits, the tribunal considered two jurisdictional objections made by Ghana,[160] including an assertion that the claimant had made no "investment" in accordance with Ghanaian law as required by Article 10 of the BIT.[161] Article 10 provides that "[t]his Treaty shall also apply to <u>investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation</u>."[162] The investment, Ghana submitted, was procured by fraud, and the claimant continued to defraud Wamco and Cocobod throughout the lifespan of the joint venture.[163]

In considering Ghana's jurisdictional objection, the tribunal confirmed 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 any specific language to this effect in the Treaty.[164]

Turning to the language of the Germany-Ghana BIT, the tribunal found that "Article 10 of the BIT contains an express requirement for compliance with the host State's legislation."[165] The tribunal further considered that it was necessary to draw a distinction "between (1) legality as at the *initiation* of the investment ('made') and (2) legality *during the performance* of the investment."[166] The tribunal concluded that:

> Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the <u>scope of application</u> of

> the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT.[167]

The tribunal thus found that, in considering Ghana's jurisdictional objection, it need only consider "allegations of fraud in the initiation of the investment."[168]

On the facts, Ghana claimed that the claimant had presented certain false invoices to Cocobod and Wamco for rehabilitation of Wamco I carried out prior to the JVA and had otherwise operated a scheme to defraud its joint-venture partner.[169] According to Ghana, Hamester had violated Ghana's Criminal Code of 1960,[170] and "[t]he very core of Hamester's so-called investment activities in Ghana [. . .] was thus from the outset planned and executed fraudulently."[171]

Having considered the evidence before it, the tribunal concluded that Ghana had not satisfied the burden of proof in regard to its jurisdictional objection.[172] Documents on the record, the tribunal found, suggested that Hamester had, without Cocobod's knowledge, overstated an invoice sent to Cocobod for some of the machinery it had to provide for the rehabilitation of Wamco I prior to the creation of the joint venture.[173] The tribunal concluded, however, that there was "no conclusive evidence proving that Cocobod would not have entered into the joint-venture had it known that some of the figures were overstated" and thus "no proof that the alleged fraud was decisive in securing the JVA."[174] The tribunal thus held that the claimant's original investment did not constitute "a fraud that would affect the Tribunal's jurisdiction" and dismissed Ghana's jurisdictional objection accordingly.[175]

VIII. Saba Fakes v. Turkey

Saba Fakes v. Turkey[176] was an ICSID arbitration arising under the Netherlands-Turkey BIT relating an alleged investment in Telsim Mobil Telekomunikayson Hizletleri A.S. ("Telsim"), a leading Turkish telecommunications company.[177]

The dispute in *Saba Fakes* arose out of "various investigations and lawsuits brought against the Uzans, a prominent family in Turkey who controlled a vast group of companies in a variety of business sectors including banking, electricity, television, and telecommunications."[178] As a result of these investigations and lawsuits, the Turkish authorities froze and sold various assets held directly or indirectly by the Uzans, including Telsim.[179] Mr. Fakes submitted that, through a series of share sale agreements, he became the legal owner of 66.96% of the shares in Telsim shortly before the Turkish authorities put Telsim in receivership and sold its assets to a third party.[180] Mr. Fakes commenced ICSID arbitration, claiming, among other things, expropriation of his investment through the arrest of his shares in Telsim and subsequent forced sale of Telsim's assets.[181]

Turkey objected to the tribunal's jurisdiction on three grounds, including that Mr. Fakes's alleged investment had been made in violation of the laws and regulations of the Republic of Turkey and in violation of the principle of good faith, and thus did not qualify as a protected investment under the ICSID Convention or the Netherlands-Turkey BIT.[182]

Article 2(2) of the Netherlands-Turkey BIT 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 <u>in accordance with the laws and regulations in force in the latter Contracting Party's territory</u> at the time the investment was made."[183]

With respect to the ICSID Convention, the tribunal found that "the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be 'legal' or 'illegal,' made in 'good faith' or not, it nonetheless remains an investment."[184] As regards the principle of good faith, the tribunal noted that, although "a treaty should be interpreted and applied in good faith, this is a general requirement under treaty law, from which an additional criterion of 'good faith' for the definition of investments, which was not contemplated by the text of the ICSID Convention, cannot be derived."[185]

As regards the legality of investments, the tribunal observed that this question does not relate to the definition of "investment" set out in Article 25(1) of the ICSID Convention and in Article 1(b) of the BIT, but rather to Article 2(2) of the BIT, which contains a legality requirement.[186] The tribunal noted that, in its opinion, while the ICSID Convention remains neutral

on the issue of legality, "bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another."[187]

With respect to the scope of the legality requirement contained in Article 2(2) of the BIT, the tribunal rejected Turkey's position that any violation of any of the host State's laws would result in the illegality of the investment within the meaning of the BIT and thus exclude the investment from the BIT's protection.[188] In the tribunal's view, the legality requirement in the BIT concerned "the question of the compliance with the host State's domestic laws governing the admission of investments in the host State."[189] As the tribunal observed, "it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation."[190] Moreover, "[i]n the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation."[191] The tribunal thus considered that the host State should not be able to rely on its domestic legislation "beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory."[192]

In the instant case, Turkey claimed that Mr. Fakes's transaction had been made in breach of Turkey's legislation relating to the encouragement of foreign investment, the regulation of the telecommunications sector, as well as Turkish competition law.[193] The tribunal noted that, while the first violation, if demonstrated, might be covered by the legality requirement contained in Article 2(2) of the BIT, a violation of the regulations in the telecommunications sector or of competition law requirements would not trigger the application of the legality requirement.[194]

Ultimately, the tribunal did not reach the issue of whether Mr. Fakes's transaction had been made in breach of Turkey's legislation relating to the encouragement of foreign investment, as the tribunal found that Mr. Fakes did not hold legal title over the Telsim share certificates (because the parties never had any intention to transfer any rights to Mr. Fakes, nor did they actually transfer the rights).[195] Mr. Fakes thus had not made an investment in Turkey that "would satisfy any of the three criteria for an investment to exist within the meaning of Article 25(1) of the ICSID Convention."[196] The tribunal dismissed the case accordingly.

IX. Conclusion

It is evident from the above discussion that consideration of the legality requirement may give rise to both jurisdictional objections and potential defenses on the merits, while also raising questions regarding the interpretation of BITs and/or the existence of an implied requirement of legality and good faith.

Compliance with host-State law has been considered by many tribunals to be a jurisdictional requirement under various BITs. As discussed above, this position was adopted in several recent arbitral awards, including *Inceysa v. El Salvador*, *Fraport v. Philippines*, and *Inmaris et al. v. Ukraine*. In each of these decisions, the tribunal relied primarily upon the text of the governing BIT, which either made reference to the "investment" being made in accordance with host-State law, or expressly required that the "investment" had been so made.

At the same time, some tribunals have identified an implied requirement of legality and good faith in the ICSID context. The tribunals in *Phoenix Action v. Czech Republic* and *Hamester v. Ghana*, for example, concluded that investments made in breach of host-State law or in beach of the principle of good faith cannot be protected under the ICSID Convention. The tribunals found that this principle is implicit, and thus can be invoked even where the governing BIT is silent on the question of legality. On the other hand, the tribunal in *Saba Fakes v. Turkey* adopted a contrary approach and explicitly rejected any implied legality or good faith requirement under Article 25(1) of the ICSID Convention.

Although the legality requirement frequently arises in the context of challenges to jurisdiction, the above discussion also illustrates that it may give rise to defenses on the merits. For instance, the tribunal in *Saba Fakes* relied on the definition of "investment" in the governing BIT to draw a distinction between illegality relating to encouragement of investments, which it viewed as a matter of jurisdiction, and illegality committed during the lifespan of the investment.[197] This finds echoes in the words of the tribunals in *Fraport v. Philippines* and *Hamester v. Ghana*.[198]

Appendix: Bilateral Investment Treaty Provisions on Legality in Discussed Awards

Award	Bilateral Treaty Provisions
Inceysa Villisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006	**Spain – El Salvador Bilateral Investment Treaty** Article 2(2): "This Agreement will also apply to investments made before its entry into force by the investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter [. . .]." Article 3(1): "Each Contracting Party shall protect in its territory the investments made, in accordance with its legislation [. . .]."
Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007	**Germany – Philippines Bilateral Investment Treaty** 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 [. . .]." Article 2(1): "Each Contracting Party shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1, paragraph 1."
Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award of 15 April 2009	**Czech – Israeli Bilateral Investment Treaty** Article 1(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 [. . .]."
Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010	**Ukraine – Germany Bilateral Investment Treaty** Article 2(2): "Investments, which have been undertaken by nationals or companies of the other Contracting Party in accordance with the legal regulations of a Contracting Party in the field of application of its legal system, shall enjoy the full protection of the Treaty." Article 9: "This treaty shall also apply to investments [. . .]. made in the territory of the other Contracting Party in accordance with the legislation of the latter."
Alasdair Ross Anderson et al. v Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010	**Canada – Costa Rica BIT** Article 1(g): " 'investment' means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws [. . .]."
Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award of 18 June 2010	**Germany – Ghana Bilateral Investment Treaty** Article 10: "This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."
Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award of 14 July 2010	**Netherlands – Turkey Bilateral Investment Treaty** Article 2(2): "The 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."

Endnotes

1. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, *available at* http://ita.law.uvic.ca ("*Phoenix Action v. Czech Republic*") ¶ 100 (internal citations omitted).

2. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010, *available at* http://ita.law.uvic.ca ("*Saba Fakes v. Turkey*") ¶ 112.

3. *Id.* ¶ 112 (internal citations omitted).

4. "Unlawful or Bad faith Conduct as a Bar to Claims in Investment Arbitration" in A Liber Amirocum: Thomas Wälde, Law Beyond Conventional Thought (2008; Cameron May), 277.

5. *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, *available at* http://ita.law.uvic.ca ("*Inceysa v. El Salvador*").

6. *Id.* ¶ 3.

7. *Id.* ¶¶ 22-29.

8. *Id.* ¶¶ 22-36.

9. *Id.* ¶¶ 45-62.

10. *Id.*

11. *Id.* ¶¶ 12-15.

12. *Id.* ¶¶ 103-110.

13. *Id.* ¶¶ 111-122.

14. *Id.* ¶¶ 123-127.

15. *Id.* ¶ 123.

16. *Id.* ¶¶ 190-207.

17. *Id.* ¶¶ 142-145.

18. *Id.* ¶ 160.

19. *Id.* ¶¶ 201-204.

20. *Id.* ¶ 204 (emphasis added).

21. *Id.* ¶ 195.

22. *Id.* ¶¶ 192-196.

23. *Id.* ¶ 207.

24. *Id.* ¶ 209.

25. *Id.* ¶ 210.

26. *Id.* ¶ 212.

27. *Id.* ¶¶ 219-220.

28. *Id.* ¶ 223.

29. *Id.* ¶ 224. Article 38 of the Statue of the International Court of Justice states that "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

30. *Id.* ¶¶ 225-229.

31. *Id.* ¶¶ 230-239.

32. *Id.* ¶¶ 240-244.

33. *Id.* ¶¶ 245-252.

34. *Id.* ¶¶ 253-258.

35. *Id.* ¶ 257 (emphasis in original).

36. *Id.*

37. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No.

ARB/03/25, Award of 16 August 2007, *available at* http://ita.uvic.law.ca ("*Fraport v. Philippines*"). The *Fraport* Award was annulled by Decision on Annulment dated 23 December 2010 on procedural grounds. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide of 23 December 2010, *available at* http://ita.uvic.law.ca.

38. *Fraport v. Philippines* ¶ 2.

39. *Id.* ¶¶ 77-225.

40. *Id.* ¶¶ 285-291.

41. *Id.*

42. *Id.* ¶ 332.

43. *Id.* ¶ 305.

44. *Id.*

45. *Id.* ¶ 306 (emphasis in original).

46. *Id.* ¶ 334.

47. *Id.* ¶ 300 (emphasis added).

48. *Id.* ¶ 335 (emphasis added).

49. *Id.* ¶ 337.

50. *Id.* ¶ 339.

51. *Id.* ¶ 340.

52. *Id.* ¶ 344.

53. *Id.* ¶ 345 (emphasis in original).

54. *Id.* ¶¶ 346, 347.

55. *Id.* ¶ 352 (emphasis in original).

56. *Id.* ¶ 355.

57. *Id.*

58. *Id.* ¶ 391.

59. *Id.* ¶ 367.

60. *Id.* ¶ 401.

61. *Id.*

62. *Id.*

63. *Fraport v. Philippines*, Dissenting Opinion of Mr. Bernando M. Cremades ¶ 13.

64. *Id.* ¶ 39.

65. *Id.* ¶¶ 15-27.

66. *Id.* ¶ 40.

67. *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 9 April 2009, *available at* http://ita.uvic.law.ca ("*Phoenix Action v. Czech Republic*").

68. *Id.* ¶ 25.

69. *Id.* ¶¶ 24-33.

70. *Id.* ¶¶ 24-33.

71. *Id.* ¶¶ 1-9.

72. *Id.* ¶ 8.

73. *Id.* ¶ 34.

74. *Id.* ¶ 35.

75. *Id.* ¶ 35.

76. *Id.* ¶ 74.

77. *Id.* ¶ 100 (internal citations omitted).

78. *Id.* ¶ 101 (emphasis added).

79. *Id.* ¶¶ 102, 104.

80. *Id.* ¶ 106.

81. *Id.*

82. *Id.* ¶ 113 (emphasis in original).

83. *Id.*

84. *Id.* ¶ 56. Article 1(1) of the Israel-Czech BIT expressly defines the term 'investment' as "any kind of assets invested in connection with economic activities by the investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter [. . .]."

85. *Id.* ¶ 134.

86. *Id.* ¶ 142.

87. *Id.* ¶ 136.

88. *Id.* ¶ 137.

89. *Id.* ¶ 138.

90. *Id.* ¶ 139.

91. *Id.* ¶ 140.

92. *Id.* ¶ 144.

93. *Id.* ¶ 145.

94. *Inmaris Perestroika Sailing Maritime Services GmBH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction of 8 March 2010, *available at* http://ita.uvic.law.ca ("*Inmaris v. Ukraine*").

95. *Id.* ¶ 33.

96. *Id.* ¶¶ 34-36.

97. *Id.* ¶ 35.

98. *Id.* ¶ 48.

99. *Id.* ¶ 49.

100. *Id.* ¶ 2 ("The Agreement between the Federal Republic of Germany and Ukraine for the Promotion and Reciprocal Protection of Investments signed on 15 February 1993 and entered into force on 29 June 1996.").

101. *Id.* ¶¶ 12-15.

102. *Id.* ¶ 60.

103. *Id.* ¶ 135 (emphasis added).

104. *Id.* ¶ 135 fn. 151 (emphasis added).

105. *See* Agreement between the Federal Republic of Germany and Ukraine for the Promotion and Reciprocal Protection of Investments signed on 15 February 1993 and entered into force on 29 June 1996, Art. 2(1) (promotion and admission of investments), Art. 3(1) (national and MFN treatment for investments).

106. *Inmaris v. Ukraine* ¶ 136.

107. *Id.* ¶ 83.

108. *Id.* ¶ 84.

109. *Id.* ¶ 71.

110. *Id.* ¶ 137.

111. *Id.* ¶ 139.

112. *Id.*

113. *Id.* ¶ 140.

114. *Id.*

115. *Id.*

116. *Id.* ¶ 141.

117. *Id.*

118. *Id.* ¶ 143.

119. *Id.* ¶ 144. The tribunal noted that it used "the term 'possible' because it is not entirely clear whether Respondent alleged that the claimed investments violated Ukrainian law in this respect." *See id.*

120. *Id.* ¶ 145.

121. *Id.*

122. *Alasdair Ross Anderson et al. v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010, *available at* http://ita.law.uvic.ca (*Anderson v. Costa Rica*).

123. As Canada is not a party to the ICSID Convention, Schedule C of the Rules Governing the Additional Facility for the Administration of Proceedings applied to this arbitration, as provided by Article XII 4(b) of the BIT. *See id.* ¶ 15.

124. *Id.* ¶ 17.

125. *Id.* ¶ 17.

126. *Id.* ¶ 24. The raid was carried out pursuant to a request for cooperation and legal assistance from the Department of Justice of Canada, which suspected that a criminal organization in Canada was using the Villalobos brothers' scheme to launder money obtained from criminal activities. *See id.*

127. *Id.* ¶¶ 25, 26.

128. *Id.* ¶ 25.

129. *Id.*

130. While Osvaldo Villalobos Camacho was arrested and prosecuted for fraud and illegal financial intermediation, his brother, Enrique Villalobos, managed to escape arrest. *See Anderson v. Costa Rica* ¶ 26. On May 16, 2007, the Trial Court of the First Circuit of San José found Osvaldo Villalobos Camacho guilty of aggravated fraud and illegal financial intermediation for his participation in operating the brothers' financial scheme, and sentenced him to eighteen years imprisonment. *See id.*

131. *Id.* ¶ 28.

132. *Id.* ¶ 30.

133. *Id.* ¶ 46.

134. *Id.* ¶ 47.

135. *Id.* ¶ 51.

136. *Id.* ¶ 52.

137. *Id.*

138. *Id.* ¶ 53.

139. *Id.*

140. *Id.*

141. *Id.* ¶ 57.

142. *Id.*

143. *Id.* ¶ 54.

144. *Id.* ¶ 55.

145. *Id.* ¶ 58.

146. *Id.*

147. *Id.* ¶ 65.

148. *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, *available at* http://ita.uvic.law.ca ("*Hamester v. Ghana*").

149. *Id.* ¶ 22.

150. *Id.* ¶ 23.

151. *Id.* ¶¶ 31-32.

152. *Id.* ¶ 24.

153. *Id.* ¶ 25.

154. *Id.* ¶ 40.

155. *Id.* ¶ 42.

156. *Id.* ¶ 43.

157. *Id.* ¶ 48.

158. *Id.* ¶ 66. The claimant originally sought to commence ICSID arbitration in 2004 on the basis of the dispute settlement provision in the JVA. The

ICSID Secretariat, however, refused registration of the claimant's request, because the Government of Ghana had not given its consent to ICSID arbitration and because Cocobod had not been designated as a subdivision or an agency of the Government for the purposes of Article 25(1) of the ICSID Convention.

159. *Id*. ¶ 73.

160. *Id*. ¶ 80.

161. *Id*. ¶ 81.

162. *Id*. ¶ 89 (emphasis added). Article 10 of the BIT was applicable in this dispute because the Germany-Ghana BIT entered into force on 3 November 1998, several years after the alleged investment was made by the Claimant into the Ghanaian joint venture.

163. *Id*. ¶ 81.

164. *Id*. ¶¶ 123-124.

165. *Id*. ¶ 126.

166. *Id*. ¶ 127 (emphasis in original).

167. *Id*. (emphasis in original).

168. *Id*. ¶ 129.

169. *Id*. ¶ 130.

170. *Id*.

171. *Id*.

172. *Id*. ¶ 132.

173. *Id*. ¶¶ 132-133.

174. *Id*. ¶ 135.

175. *Id*. ¶¶ 138-139.

176. *Saba Fakes v. Turkey*.

177. *Id*. ¶ 29.

178. *Id*. ¶ 28.

179. *Id*.

180. *Id*. ¶ 30.

181. *Id*. ¶ 32.

182. *Id*. ¶ 51.

183. *Id*. ¶ 115.

184. *Id*. ¶ 112.

185. *Id*. ¶ 113.

186. *Id*. ¶ 114.

187. *Id*.

188. *Id*. ¶ 119.

189. *Id*.

190. *Id*.

191. *Id*.

192. *Id*.

193. *Id*. ¶ 120.

194. *Id*.

195. *Id*. ¶ 147.

196. *Id*.

197. *Id*. ¶¶ 119-120.

198. *See Fraport v. Philippines* ¶ 345; *Hamester v. Ghana* ¶ 127. ■

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