Implicit Legality Requirements in Investment Treaty Arbitration: A Doctrinal Critique of Current Jurisprudence

Abstract | Various arbitral tribunals have made obiter statements that legality requirements relevant to their jurisdiction can be read into investment treaties, but only one such tribunal has gone a step beyond that by making such jurisprudence the ratio decidendi of its decision, namely the arbitral tribunal in Cortec Mining v. Kenya. The investor challenged the adverse decision on jurisdiction that came its way. The annulment committee has now issued its annulment decision - and it does not make for good reading for investors. Effectively, it green-lighted the practice of arbitral tribunals reading legality requirements into investment treaties. This contribution examines the doctrinal foundations of this jurisprudential practice. With specific regard to Article 31 of the Vienna Convention on the Law of Treaties, it argues that those doctrinal foundations are shaky, with the result that this jurisprudence on reading in legality requirements should be seen as bad law. But advocates for international investor accountability need not worry that investors will evade justice. There are other options for sanctioning investor misconduct, one of which could deliver better rule-of-law outcomes compared to subjecting an investor to an implicit legality requirement.
I. Background: Annulment Decision in Cortec Mining v. Kenya

1.01. The confirmation is in: in investment treaty arbitration, reading in implicit requirements stipulating that an investment must be established in accordance with host state law is legitimate. This is the new jurisprudence from the ICSID annulment decision for Cortec Mining v. Kenya.¹

1.02. In the preceding arbitration for this dispute, the arbitral tribunal declined to exercise jurisdiction.² The fundamental reason underpinning that decision was that the investment in question failed the legality requirement.³ What made that legality requirement unique was that it was read into the applicable investment treaty; in other words, this treaty did not contain words to the effect that the investment had to be established in accordance with host state law, but the arbitral tribunal effectively inserted such wording in there.⁴ That reasoning made the arbitral award a prime candidate to be challenged under Article 52 of the ICSID Convention, noting that this arbitration was conducted under the ICSID Convention Arbitration Rules. Now, the annulment decision has been rendered. It does not make for good reading for the investor. One of the grounds for the challenge was that the arbitral tribunal ‘manifestly exceeded its power’ by reading a legality requirement into the applicable investment treaty.⁵ The annulment committee held that to prove this ground for challenge, the investor had to show that the arbitral tribunal ‘failed to apply the applicable law’, as opposed to merely misapplying it.⁶ Additionally, that failure had to be ‘manifest’ which is a standard that would be reached if the legal reasoning in support of the conclusion (that a legality requirement could be read in) was untenable.⁷ The problem for the investors was that the legal reasoning was tenable, most specifically because the arbitral tribunal could rely on a body of case law to support its view of the law.⁸

¹ The author thanks August Reinisch and Stephan Schill for their comments and critique on an earlier draft of this contribution. All errors are my own.
³ Ibid., at 333.
⁴ Ibid., at 318-321.
⁶ Ibid., at 125.
⁷ Ibid., at 124.
⁸ Ibid., at 138.

1.03. The practical result is that the annulment committee in Cortec Mining v. Kenya has green-lighted the reading in of legality requirements. But this decision does not serve as confirmation of the correctness of this jurisprudence. Indeed, the annulment committee emphasised that ‘[w]hether that ruling was right or wrong is not a matter within the competence of this Committee.’¹⁰ It went on to further note that ‘perhaps many arbitrators’ would disagree with the jurisprudence that holds that legality requirements can be read into investment treaties,¹¹ but the fact that this jurisprudence might represent a minority view did not make its application a manifest excess of power.¹²

1.04. This reasoning cannot be objected to. Even if this jurisprudence represents a minority view, it is still ‘law’ of some sort, although not good law. The purpose of this contribution is to defend that thesis. That specifically means showing that the practice of reading legality requirements into investment treaties and declining to exercise jurisdiction when they are not satisfied,¹³ is doctrinally incorrect. The process towards that thesis comprises three steps, the first of which is to explore the doctrinal foundations of this jurisprudence. That exploration is undertaken in Section 2, while Section 3 proceeds to critique these doctrinal foundations. The conclusion of that critique is that this jurisprudence should be discarded, the practical consequence of which is apparently that ‘illegal investments’ will be given protection under investment treaties, and investor misconduct, more generally, will go unsanctioned. That apparent outcome is refuted in Section 4. There, it is shown that there are still various mechanisms that can be activated to exclude illegal investments and punish investor misconduct. The conclusions of this contribution are summarised in Section 5.

I.1. Doctrinal Foundations of Implicit Legality Requirements

1.05. What is the genesis of reading legality requirements into investment treaties? As the annulment committee in Cortec Mining v. Kenya noted,¹⁴ the arbitral tribunal could point to some other arbitral awards to support its view, the most prominent among them being Phoenix Action v. Czechia.¹⁵ The
arbitral award in *Phoenix Action v. Czechia* provides that an investment must be made (both) ‘bona fides’ and ‘in accordance with host state law,’ even if words to that effect do not appear in the applicable investment treaty for the case. The arbitral tribunal indicated that these were two separate jurisdictional requirements, although it failed to precisely define their scope.

**1.06.** In any case, the arbitral tribunal in *Phoenix Action v. Czechia* pointed to the arbitral award in *Plama v. Bulgaria* to support the reading in of legality requirements, where the arbitral award for *Inceysa v. El Salvador* provided support for the requirement of *bona fides.* Interestingly, in its reasoning, the arbitral tribunal in *Plama v. Bulgaria* relied on the jurisprudence coming from *Inceysa v. El Salvador,* with such reliance meaning that the genesis of reading in legality requirements is the arbitral award for *Inceysa v. El Salvador.* What this entails is that if an understanding of the documentary foundations of reading in legality requirements is sought, then a close examination of the legal reasoning in this arbitral award is required.

**1.07.** In *Inceysa v. El Salvador,* the investor won a bid for a government concession to provide car-inspection services on an exclusive basis. Subsequently, El Salvador engaged other companies to carry out these services. Additionally, it sought to invalidate the investor’s concession in the El Salvadorian courts. The investor initiated ICSID arbitration under the El Salvador–Spain BIT. During the jurisdictional phase, it came to light that the investor acted fraudulently to secure its concession.

It has to be said that these two requirements could be conceptually distinguished, particularly because the legality could be breached by conduct other than corruption and fraud, with *Cortec Mining v. Kenya* offering a prime example of this. But, generally speaking, there is a large degree of overlap between these jurisdictional requirements, because they should cover instances of both corruption and fraud.

Although the arbitral tribunal erred in this respect. When the arbitral tribunal in *Plama v. Bulgaria* found that the Energy Charter Treaty contained a legality requirement, it held that this legality requirement was relevant to the merits of the case, as opposed to its jurisdictional competence, see *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case no. ARB/03/24, Award of February 08, 2005. Note that the arbitral tribunal in *Phoenix Action v. Czechia* erred in its reasoning, the arbitral tribunal in *Plama v. Bulgaria* relied on the jurisprudence coming from *Inceysa v. El Salvador,* with such reliance meaning that the genesis of reading in legality requirements is the arbitral award for *Inceysa v. El Salvador.* What this entails is that if an understanding of the documentary foundations of reading in legality requirements is sought, then a close examination of the legal reasoning in this arbitral award is required.

For good measure, the arbitral tribunal then went through the El Salvador–Spain BIT in search of a legality requirement, locating one in the article on protection of investments:

> Each Contracting Party shall protect in its territory the investments made in accordance with its legislation... The travaux préparatoires attaching to the El Salvador–Spain BIT were referenced in order to argue that these words created a legality requirement in respect of the states’ consent to arbitration. The arbitral tribunal then turned its focus to determining whether the investor had fallen foul of this requirement. In a curious piece of legal reasoning, the arbitral tribunal concluded that ‘legislation’ only included the provisions of the El Salvador–Spain BIT. This treaty did not contain provisions that imposed obligations on investors regarding the establishment of their investment. Because of this absence, the arbitral tribunal concluded that it had to “analyse other legal instruments to decide this issue.” It then reverted to the governing law clause in the El Salvador–Spain BIT. That clause specified that ‘principles of international law’ were an applicable source of law. One of these principles was good faith. After concluding that the investor had breached the obligation to act in good faith towards El Salvador through its fraudulent acts, it followed that the investor failed to satisfy the legality requirement and the arbitral tribunal declined jurisdiction.

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26 Other arbitral tribunals that have looked at this issue have determined that ‘law’ refers to the corpus of rules in the host state’s domestic law, see Jean Kalicki, Malloy Silverman, and Bridie McAsey, *What Are Appropriate Remedies for Finding of Ineligibility in Investment Arbitration?* in *ANDREA MENAKER, INTERNATIONAL ARBITRATION AND RULE OF LAW: CONTRIBUTION AND CONFORMITY,* Alphen aan den Rijn: Kluwer Law International (2017), et. 726.


28 Ibid., at 223.

29 Ibid., at 223.

30 Ibid., at 224.

31 El Salvador–Spain BIT, Article 11(3).


33 Ibid., at 239.
on to hold that the investor had also breached other principles of international law through the illegality of its investment, including ‘nemo auditor propria turpitudinem allegans’; international public policy, and unlawful enrichment.\(^{36}\)

1.09. The arbitral tribunal in *Inceysa v. El Salvador* laid down a technique for adding implicit legality requirements to investment treaties. That technique consists of referring to the governing law clause, noting that this clause designates ‘principles of international law’ as an applicable source of law, which it invariably will,\(^{37}\) identifying good faith as one of those principles, and specifying that a manifestation of the principle of good faith is the obligation to establish investments in accordance with host state law. Since the pronouncement of this jurisprudence, numerous arbitral tribunals have held that implicit legality requirements can be read into investment treaties,\(^{38}\) with most citing the arbitral award in *Inceysa v. El Salvador* as their authority.\(^{39}\)

II. Critique of Doctrinal Foundations of Reading in Legality Requirements

II.1. Critique 1: Vagueness of Good Faith

1.10. Notwithstanding the arbitral authority that it now stands on, the technique of deriving an implicit legality requirement from the principle of good faith should be rejected. The first reason underpinning this rejection is the vagueness that afflicts good faith. Writing on the use of good faith in international investment law, Schill and Bray have noted that:

> Reliance on a vague principle may lead to legal uncertainty, create a risk of unpredictability for foreign investors, and provide decision-makers with an abundance of discretion that is subject to personal valuation and biases, which may lead to arbitrary results.

1.11. It is apparent that the risk of legal uncertainty has come to pass.\(^{40}\) For while some arbitral tribunals have been prepared to add implicit legal requirements to investment treaties via the principle of good faith, other arbitral tribunals have dismissed this practice.\(^{41}\) The arbitral tribunal in *Bear Creek v. Peru*, for example, reasoned that it was for the treaty parties to define what is consistent to arbitration, as opposed to the arbitrators.

1.12. Bearing in mind the *ad hoc* nature of investment treaty arbitration, it is unlikely that one line of jurisprudence will emerge as the correct line. The other factor that near guarantees this outcome is the fact that parties have the choice to select their arbitrators.\(^{42}\) In composing the arbitral tribunal, well-informed lawyers will seek to appoint arbitrators who subscribe to a view of legality requirements that suits their case. This inconsistency of jurisprudence is not a problem that states are prepared to live with. In the ‘identification and consideration of concerns’ phase of the UNCITRAL reform process for investor-state dispute resolution, the first concern that was identified was the ‘inconsistency of arbitral decisions.’\(^{43}\) And this is not a problem that states should tolerate. As Fuller famously explained with his story on the reforming-ruler King Rex, vague rules are one of the key ingredients for unpredictability in a legal order.\(^{44}\) For this reason, one of Fuller’s principles of legality is ‘clarity.’\(^{45}\) Every time that an arbitral tribunal relies on good faith to reach a decision, it does not pay due respect to this requirement for clarity, thereby putting it at odds with the formal rule of law.

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\(^{43}\) *Bear Creek v. Peru* supra note 41, at 329 (although the arbitral tribunal did indicate that there might be an exception in cases involving fraud, see et. 322); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case no. ARB/10/3, Award October 04, 2013; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case no. ARB/08/18, Award of February 07, 2011; *Achmea BV v. The Slovak Republic*, PCA Case no. 2008-33, Award of December 07, 2012; *Sahal Fakes v. Republic of Turkey*, ICSID Case no. ARB/07/30, Award of July 14, 2010; and *Flana v. Bulgaria*, Jurisdiction, supra note 19, at 130 & 229. The decision of the arbitral tribunal in *Lao Holdings v. Laos* also implicitly supports this view. There, the applicable investment treaty only contained an ‘in accordance with host state law’ clause in the article on the admission of investments. The arbitral tribunal analysed Laos’ allegations of investor misconduct as relevant to the merits, see *Lao Holdings NV v. Lao People’s Democratic Republic*, ICSID Case no. ARB(AF)/12/6, Award of August 06, 2019.

\(^{44}\) See ICSID Convention Arbitration Rules, Rule 3(1)(a)(ii); and UNCTRAL Arbitration Rules (as revised in 2010), Article 911.


\(^{46}\) LON FULLER, THE MORALITY OF LAW, Yale: Yale University Press (1964), et. 36.

\(^{47}\) *Ibid.*, at 63.

1.13. Another, and the main, problem with the technique of reading legality requirements into investment treaties with the help of governing law clauses concerns its technical correctness. By reverting directly to governing law clauses to interpret states’ consent to investment treaty arbitration, this technique defies the well-established rules on treaty interpretation. Those rules are authoritatively laid down in the Vienna Convention on the Law of Treaties. The core rule stipulates that interpreting treaty provisions involves giving the relevant words their ordinary meaning, as informed by the context in which those words appear and in light of the treaty’s object and purpose. The ‘context’ does include other provisions in the treaty, meaning that governing law clauses can assist in the interpretation of words expressing states’ consent to arbitration. But it is not the only factor having a bearing on the meaning thereof. When applying the core rule on treaty interpretation, what is required of the adjudicator is an ‘encircling process; where each of the ‘ordinary meaning,’ ‘context,’ and ‘object and purpose’ are used to determine the meaning. As detailed immediately below, if this encircling process is rigorously applied, it is doubtful whether legality requirements can be read into investment treaties.

1.14. Starting with the ordinary meaning, there is nothing in the ordinary meaning of the words expressing states’ consent to investment treaty arbitration from which an implicit legality requirement could be inferred. These words most commonly provide that if an investor-state dispute cannot be amicably settled, then the states that are parties to the treaty consent to investment treaty arbitration. The clause providing for investment treaty arbitration from the Greece-Kuwait BIT provides a useful example:

If such disputes cannot be settled within a period of six months...the dispute shall be submitted for resolution, at the election of the investor party to the

1.15. In other investment treaties, the state’s consent to arbitration is more explicitly spelled out, as is the case in the Austria-Kyrgyzstan BIT:

Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Part.

1.16. The only way that an implicit legal requirement could be inferred from any of these clauses is to assert that states’ consent is subject to some unexpressed condition regarding the lawful establishment of investments. In usual human discourse, statements of consent always come with implied conditions of consent. For example, if the consent-giver consents to the consent-recipient to use his or her car, there will presumptively be an unspoken condition that the car cannot be used for any illegal purpose, such as being the get-away car in a bank robbery. But states’ consent to investment treaty arbitration is not given in usual human discourse. It is usually expressed in treaties or, less often, another legal instrument, such as legislation relating to foreign investment. Given the time and effort that goes into drafting them, relative to the time and effort necessary to make a decision about lending a car to some person, arbitral tribunals should be slow to read in implicit conditions attaching to states’ consent. And even if it could be proven that states’ consent to arbitration should ordinarily be seen to be subject to conditions, then there is the challenge of proving that, in fact, one of the implicit conditions of the treaty parties was investment legality.

52 Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic (2016), Article 15.
53 See, for example, Phoenix Action v. Czechia, supra note 16, at 101 ("And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT"). and Mamidol Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case no. ARB/11/24, Award of March 30, 2015. ("...for their acceptance to enter into investment treaties and giving their consent to the resolution of investment disputes by arbitral tribunals, States expect that such protection would extend only to investments that have been made lawfully") (emphasis added).
55 Example inspired by ibid, at 8.
1.17. One place where some evidence for this purpose might be found is in the travaux préparatoires. As noted in Section 2.2. above, the arbitral tribunal in Inceysa v. El Salvador used this strategy.59 In the travaux préparatoires, there was evidence that the treaty parties intended that only legally established investments could benefit from their offers of arbitration.60 But this use of the travaux préparatoires is a paradigm case of how they should not be used. The use of the travaux préparatoires is regulated by Article 32 of the Vienna Convention on the Law of Treaties.61 It stipulates that travaux préparatoires may be used to confirm a meaning generated by application of Article 31(1), which is the core rule on treaty interpretation.62 In circumstances in which the application of Article 31(1) produces either an ambiguous or obscure meaning or a manifestly absurd or unreasonable result, then travaux préparatoires can be used to determine the meaning of treaty text,63 but this rule is hardly applicable in respect of clauses through which states express their consent to arbitration. The simple reason for this conclusion is that these clauses are ordinarily very clear in their meaning, as demonstrated by the two clauses included above. This excludes the application of the second rule on the use of travaux préparatoires, thereby meaning that only the first rule will usually be applicable. This is the end of the road for the use of travaux préparatoires to derive a legality requirement from the words that are used to express consent to investment treaty arbitration. This is because such use adds meaning to these words, as opposed to merely confirming their meaning.64 For this reason, even if there are words in the travaux préparatoires to the effect that the treaty parties’ consent to investment treaty arbitration is limited by a legality requirement, that evidence cannot ordinarily be marshalled to create an implicit legality requirement.

1.18. Turning to the context method, governing law clauses form part of the context of the words expressing states’ consent to investment treaty arbitration, thereby making them presumptively applicable when interpreting those words. But some caveats have to be registered against using governing law clauses to read in implicit legality requirements. First, this use might extend governing law clauses beyond their purpose.

That purpose is to provide the law to determine the legal issues that arise out of the dispute between the parties. ‘Dispute’ undoubtedly refers to all substantive legal issues that the arbitral tribunal needs to address, but whether it extends to matters of procedure is more doubtful, noting that the question of arbitral tribunals’ jurisdiction is a procedural issue.65 The answer to this question will turn on the meaning of the word ‘dispute’ as it appears in the relevant governing law clause. It would be imprudent to lay down any hard-and-fast rule for this purpose, as the meaning of ‘dispute’ can differ between investment treaties.

1.19. A second caveat is that this technique does not conform to how the context method is usually used. Most typically, the meaning of the treaty text that is the ‘context’ is used to shine a light on the meaning of the treaty text being interpreted. As Gardiner explains, treaty text will usually have two or more ordinary meanings, and, because of this, the context can be used to decide which meaning should be given preference.66 To illustrate this point, consider the following governing law clause:

An arbitration tribunal established under Articles 13 – 18 of this Agreement shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law.

1.20. As previously noted, ‘dispute’ could cover all the substantive issues and procedural issues between the parties, or just the substantive issues. Imagine that the investor advocates for the second definition. To make its argument, it points to another piece of context, specifically the clause in which the state consents to investment treaty arbitration. That clause also uses the word ‘dispute’. After showing that ‘dispute’ in this clause has a substantive import, it then argues that ‘dispute’ in the governing law clause should have the same meaning. Accordingly, the meaning of the word ‘dispute’ in one clause (the clause providing for investment treaty arbitration) informs the meaning of ‘dispute’ in another (the governing law clause). This is a traditional use of the context method of interpretation. The use that arbitral tribunals have made of the governing law clause is at odds with this tradition. More than looking at the words of this clause in order to give meaning to states’ consent to investment treaty arbitration, arbitral tribunals have operationalised it by taking

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61 Vienna Convention, Article 32.
62 Ibid., at Article 32(a) and (b).
63 For a detailed exposition on the meaning of ‘confirm’, see Gardiner, supra note 47, at 355.
64 YUVAL SHANY, QUESTIONS OF JURISDICTION AND ADMISSIBILITY BEFORE INTERNATIONAL COURTS, Cambridge: Cambridge University Press (2005), et. 84.
65 Gardiner, supra note 47, at 222.
moving on to 'object and purpose,' it is not helpful in advancing the case for reading in implicit legality requirements. There are two theories on the object of purpose of investment treaties.\textsuperscript{69} Traditionally, their object and purpose is viewed as economic,\textsuperscript{70} particularly the fostering of economic development in the host states via foreign investment.\textsuperscript{71} The other narrative is that investment treaties are fundamentally about promoting rule-of-law standards in host states.\textsuperscript{72} As regards the clause providing for investment treaty arbitration, this second theory cannot be doubted. These clauses give investors access to international adjudication of their investment disputes with states because of concerns about the impartiality of states’ domestic courts.\textsuperscript{73} Noting that access to impartial adjudication is a key attribution of any theory of the rule of law,\textsuperscript{74} this entails that clauses providing for investment treaty arbitration are fundamentally rule-of-law measures.

Accordingly, when clauses providing for investment treaty arbitration are interpreted with reference to their object and purpose, the best interpretation is one that delivers outcomes for promoting the rule of law. Reading in implicit legality requirements fails on this count. While it promotes the domestic rule of law by bringing down legal consequences on investors for disrespecting domestic law, it simultaneously sacrifices the international rule of law by ensuring that states do not face any legal consequences for their wrongful actions. If arbitral tribunals refrain from reading in implicit legality requirements, then the international rule of law is maintained. But if no implicit legality requirement is read in, the objection will be that the domestic rule of law is sacrificed. For the reasons outlined immediately below, this objection is without foundation.

### III. Lack of Requirement for Inherent Legality and Domestic Rule of Law

1.23. Putting together the analyses above, the conclusion is that deriving implicit legality requirements from the principle of good faith is doctrinally wrong. But that does not mean that arbitral tribunals should give a free hand to investors who have engaged in investment illegality.

1.24. As arbitral tribunals that have diverged from the jurisprudence originating in \textit{Inceya v. El Salvador} have frequently pointed out, if investment legality is not relevant to arbitral tribunals’ jurisdiction, it might still be relevant to the merits.\textsuperscript{75} For this purpose, there are various concepts in the substantive law of international investment law through which investment illegality could be made relevant. One such concept is contributory fault, although it could only apply if the investment illegality had some kind of causative role in the investor’s ultimate loss.\textsuperscript{76} Another concept is the defence of illegality. An example of its application can be seen in \textit{Plama v. Bulgaria}. There, after finding that the investment illegality was irrelevant to its jurisdiction,\textsuperscript{77} presumably because the applicable investment treaty did not contain an explicit legality requirement, the arbitral tribunal held that the investor’s fraudulent actions in acquiring his investment served as a full defence to any breach of an investment protection standard by Bulgaria.\textsuperscript{78}

\textsuperscript{68} For a good illustration of this idea, see the context-based canons of interpretation in ANTONIN SCALIA, BRYAN GARNEB, \textit{READING LAW: THE INTERPRETATION OF LEGAL TEXTS}, Toronto: Thomson West (2012), et. 24-37.


\textsuperscript{70} KENNETH VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION, Oxford: Oxford University Press (2010), et. 57-8.


\textsuperscript{72} Salacuse and Sullivan, supra note 69, at 75.

\textsuperscript{73} Doherty and Schreuer, supra note 57, at 235.

\textsuperscript{74} Kenneth Keith, \textit{The International Rule of Law}, 28 LEIDEN JOURNAL INTERNATIONAL LAW 403, 408 (2015).

\textsuperscript{75} Bear Creek v. Peru, supra note 41, at 324; Malicorp v. Egypt, supra note 41, at 117 – 8; and Plama v. Bulgaria, Jurisdiction, supra note 19, at 229.


\textsuperscript{77} Plama v. Bulgaria, Jurisdiction, supra note 19, at 130.

\textsuperscript{78} Plama v. Bulgaria, Merits, supra note 21, at 146.
1.25. Another option for dealing with an investment's illegality is via the requirement of ownership. This is an omnipresent requirement for arbitral tribunals' jurisdiction in investment treaty arbitration. As its name suggests, this requirement stipulates that the investor must own the thing that it designates as its investment. If the investment illegality was of such a nature that it meant that the investor was not the recognised owner of the investment under the host state's domestic law, then it would potentially follow that the investor failed to satisfy the ownership requirement. A good example of a case involving this kind of investment illegality is Fraport v. The Philippines. There, the investor partially owned an airport terminal. Under Filipino law, foreign ownership of such an asset could not exceed 40 per cent. It was found that the investor's partial ownership exceeded this percentage because of a 'secret shareholder agreement,' which was the conclusion of both the arbitral tribunals in the two investment treaty arbitrations to which this dispute gave rise. On the basis of this finding, its ownership was deemed illegal and the arbitral tribunals declined to exercise jurisdiction. A key assumption of these conclusions is that the ownership requirement in the applicable investment treaty means ownership under the host state's domestic law, as opposed to an autonomous concept of ownership under international law that focuses on whether the investor factually controlled its investment. What kind of ownership is needed for the investor to own the investment under the applicable investment treaty will turn on its exact wording. Some investment treaties, for example, only specify that the investment must merely be 'of' or 'controlled by' the investor. If the investor buys the investment and exerts day-to-day factual control over its operations, then it could argue that the investment is 'of' or 'controlled by' it, notwithstanding that its ownership is illegal under domestic law.

1.26. The final option for dealing with an investment's illegality is to bring it before states' domestic courts. If an arbitral tribunal accepts jurisdiction over an investor's claim, even though the investor has acted illegally when establishing its investment, there is no legal impediment to the state bringing an action against the investor in its domestic courts. Indeed, the state might ask that the arbitral tribunal stay the arbitration while it prosecutes the investor or its officers. If the outcome of this prosecution could materially affect the outcome of the investment treaty arbitration, an arbitral tribunal should be predisposed to ordering such a stay. What makes this course of action particularly appealing is that it encourages domestic courts to act against illegal investments or investor misconduct. Not only is this a good outcome for the rule of law in the host state, but it also preserves the integrity of states' international obligations in investment treaties. When an investment treaty declines jurisdiction because an investor fails to satisfy a legality requirement, the result is that the state faces no examination of its conduct. In cases of egregious state-treatment of an investor's investment, this is particular unfair on the investor.

IV. Conclusions

1.27. The point is that if the arbitral tribunal does not read a legality requirement into the applicable investment treaty, there are still various options through which investor misconduct can be addressed. And as regards the option of addressing such misconduct domestically, it might prove to deliver better rule-of-law outcomes compared to declining jurisdiction in investment treaty arbitration. Moreover, the governing law clause-based technique that arbitral tribunals use to import implicit legality requirements into investment treaties is doctrinally suspect. In addition to the problem of the inherent vagueness of 'good faith,' there is a bigger problem, specifically that if the rules from the Vienna Convention on the Law of Treaties on interpreting treaties are applied, it is difficult to see how a legality requirement can be derived from the words expressing states' consent to investment treaty arbitration. Such derivation cannot be made from the ordinary meaning of these words. Further, the use of the context method of interpretation to add a legality requirement, with the help of a governing law clause, is at odds with the usual manner in which this method of interpretation is used. Finally, if the object and purpose of these words is to give investors access to rule of law-compliant adjudication of their disputes with states, then the legality
requirement does little to further this goal, because states avoid their international obligations.

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**Summaries**

**DEU**  
[Implicite Legalitätsanforderungen im Schiedsverfahren gemäß Investitionsschutzabkommen: doktrinale Kritik an der aktuellen Rechtssprechung]  


**CZE**  
[Implizitní požadavky legality v rozhodčím řízení podle dohod o ochraně investic: doktrinální kritika aktuální judikatury]  

**POL**  
[Dorozumiany wymóg zgodności z prawem w postępowaniu arbitrażowym na gruncie umów o ochronie inwestycji: doktrylnalna krytyka aktualnego orzecznictwa]  
W świetle ryzyka, które oznacza dla państw postępowanie arbitrażowe w sprawach o ochronę inwestycji, państwa próbują ograniczać takie postępowania arbitrażowe, zwłaszcza przez wymóg dotyczący zgodności powstania inwestycji danych inwestorów z prawem. Wymóg ten często, choć nie zawsze, pojawia się w umowach o ochronie inwestycji. W przeciwnym razie dyskuarticję się o tym, czy dany wymóg istnieje jako dorozumiany. Zgodnie z najnowszym orzecznictwem za najbardziej trafny należy uznać pogląd, iż najprawdopodobniej taki wymóg rzeczywiście powstaje. Artykuł podważa to, czy przedmiotowe orzecznictwo jest właściwe doktrynialne.
Au vu du risque qui représente l’arbitrage dans les litiges relatifs à la protection des investissements, les États tendent à limiter ces procédures arbitrales, notamment à travers l’exigence d’une origine légale des investissements en question. Cette exigence figure habituellement, quoique non sans exception, dans les traités d’investissement. En son absence, on peut s’interroger sur l’existence d’une exigence implicite en ce sens. À la lumière de la jurisprudence récente, il convient de conclure qu’une telle exigence semble exister. Le présent article remet en question la solidité doctrinale de cette jurisprudence.

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