The Role of the Domestic Law of the Host State in Determining the ratione materiae Jurisdiction of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory

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Introduction to Chapters 2 & 3: The Role of Domestic Law in Determining the Jurisdiction *Ratione Materiae* of Investment Treaty Tribunals

1. A great majority of investment treaties contain an introductory provision which purports to define the term 'investment'. Such a provision usually starts with a brief introduction, followed by a long list of assets which are usually samples of properties or property rights protected by the treaty.[1] What we are principally concerned with here in this Part is the brief introduction of the provision mentioned above. To open the discussion with an example, Article 1(1) of the BIT between Germany and Philippines provides:

> [T]he term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State …[2]

2. There are two elements in this brief sentence which this Thesis concerns itself with: first, the term 'asset' which has not been defined in the Treaty, and second, the phrase 'accepted in accordance with the respective laws and regulations of either Contracting State', or the so-called 'legality requirement'. These two issues have generated great debate in both practice and theory. Many pages of commentaries, scholarly writings, awards, decisions, and briefs have been devoted to discussing the meaning, scope, and legal consequences of such terms and phrases in the field of investment treaty law.

3. Since the determination of the meaning, scope, and legal consequences of these terms and phrases is central to the scope of application of investment treaties and, therefore, to the jurisdiction of an arbitral tribunal owing its competence to such treaties, where appropriate, when faced with an investment treaty claim, state respondents tend to formulate dispositive defences according to which the investor has acquired no rights and/or interests over assets or properties it alleges it owned or possessed, or that the investment it has allegedly made has been obtained through some sort of 'illegality'.[3] In more recent years, the 'illegality' defence

[1] According to credible research carried out by UNCTAD, there are two major methods for the definition of the term 'investment' in investment treaties: a majority of investment treaties have used 'asset-based' definitions in investment protection agreements and a minority of investment agreements have opted for an 'enterprise-based' definition. See UNCTAD, *Scope and Definitions* (United Nations 2011) 21-22. While a great majority of investment treaties containing 'asset-based' definitions use open-ended and non-exhaustive listings of assets and properties, according to the same research conducted by UNCTAD, there are certain investment treaties which have used a closed-list approach. ibid 34-36.

[2] See Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, signed on 18 April 1997, entered into force on 01 February 2000.

[3] The following cases are some of the cases in which the issue of the legality requirement has been raised by respondent states: *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic* [I], PCA Case No. 2008-13; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB (AF)/07/3; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26; *Ioannis Kardassopolos v. Georgia*, ICSID Case No. ARB/05/18; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24; *Metal-Tech Ltd. v. Republic of Uzbekistan*,

and the defence that no rights and/or interests over assets or properties exists are being more frequently raised in investment treaty arbitrations by respondent states in jurisdictional phases. One reason for such a defensive strategy is that, if successfully pleaded, as recent case-law has proven, the respondent would have the investor's entire case dismissed based on and due to the investor's unlawful conduct at the time of acquiring the investment and/or the inexistence of rights and/or interests over properties and assets. Another explanation for the prevalence of such defences in investor-state arbitrations, and this is particular to the legality requirement, is the growing frequency with which these clauses recur in international investment agreements. As a result, international arbitral panels have to deal with such defences over and over again for ascertaining or dismissing jurisdiction.

4. As was discussed in Chapter 1, such defences are based on the legal system of the host state. Through such jurisdictional defences, the recipient states argue before investment treaty adjudicating forums that the investor has acquired no rights and/or interests over properties or assets under its legal system, and/or that the investor, in acquiring its investment, has violated the laws of the host state.

5. For an investment treaty arbitral tribunal to decide such issues, it should answer three critical questions: **first**, why such matters should be resolved by reference to the laws of the host state? **second**, if the laws of the host state are applicable to such issues, how is the tribunal supposed to ascertain the contents of such law? and **third**, how to apply the verified host state law to the specific questions concerning the legality requirement or the defence of the inexistence of rights/interests in practice? [4]

6. In order to answer these questions, in Chapters 2 and 3 of this Thesis, the discussion will be followed in three parts: first, the legal basis for referring to the laws of the host state in resolving these jurisdictional matters; second, the actual function of the verified host state law in resolving specific questions regarding these jurisdiction *ratione materiae* issues. Chapter 2 addresses these two questions with regard to the legality requirement and Chapter 3 will endeavour to answer these same issues with respect to the question of the creation and

ICSID Case No. ARB/10/3; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24; *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227.

The ensuing cases are some of the cases in which the issue of the non-existence of rights/interests over properties and assets has been raised by respondent states: *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL *(formerly EnCana Corporation v. Government of the Republic of Ecuador)*; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002.

[4] In this respect, see Y Banifatemi 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed) *Arbitration under International Investment Agreements* (OUP 2010) 191-192 (distinguishing between (i) the identification of the applicable law; (ii) the subsequent investigation concerning the determination of the content of the applicable law; and (iii) the actual application of the applicable law).

existence of property rights and interests.[5] Thirdly, Chapter 4 will then consider the method(s) of ascertaining the contents of the host state law.

[5] As was seen in Chapter 1, there is a further jurisdictional requirement in certain investment treaties that requires an investor to acquire an investment approval from the official authorities of the host state as a precondition to establishing its investment. Obviously, and as is stated in many of the relatively few investment treaties that contain this condition, the process of the application for and granting of the investment approval should be carried out in accordance with host state law. Therefore, once again, laws of the host state are determinative in ascertaining subject-matter jurisdiction for investment treaty tribunals. However, this precondition will not be discussed in the following Chapters as the condition is neither a general principle of law nor so widespread in investment treaties. Consequently, bar a few cases, it has not surfaced in investment arbitration cases, and as such, does not warrant a separate discussion here.