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HOST STATE RATIFICATION OF ILLEGAL CONDUCT

by Dan-Vlad Druta

I. INTRODUCTION

Objections to jurisdiction occupy an important place in the resolution of international investment disputes. As of June 30, 2019, 25% of the arbitration cases decided by arbitral tribunals under the ICSID Convention and the Additional Facility Rules ended with the arbitral tribunal declining jurisdiction.[1] One type of objection to the tribunal's jurisdiction or the admissibility of the claims is the illegality of the claimant's investment. When is such illegality relevant, and what factors should be considered in the analysis of the investor's conduct? Under what conditions, on the other hand, will such illegality not bar an investor's action based on a ratification of the investor's conduct by the host state?

The case law demonstrates that tribunals still grapple with finding the right answers to these questions. The recent awards in *Gavrilovic v. Croatia*,[2] *Karkey Karadeniz v. Pakistan*,[3] and *David Aven v. Costa Rica*[4] are indicative of these difficulties, despite the emergence of the new proportionality test in *Kim v.*

[1] *See* ICSID Secretariat, *The ICSID Caseload – Statistics*, *Issue* 2019-2, 4. Available at https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282019-2%20Edition%29%20ENG.pdf.

[2] Gavrilovic v. Republic of Croatia, ICSID Case No. ARB/12/39, Award (July 26, 2018).

[3] Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award (Aug. 22, 2017).

[4] David R. Aven et al. v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award (Sept. 18, 2018).

Uzbekistan.[5] Both *Gavrilovic* and *Karkey Karadeniz* raised the issue of the host state's involvement in the alleged illegality, and the tribunals found that there was no illegality considering the host state's own conduct.[6] However, the tribunals failed to offer a convincing rationale for this opinion. In addition, in *Karkey Karadeniz*, the tribunal found that the operation of estoppel precluded the host state from raising the illegality objection[7] without conducting a rigorous analysis of this concept. As regards the award in *David Aven*, the tribunal considered that the host state could not raise the objection due to its tacit acceptance of the illegal conduct of the investor.[8] Seemingly applying the concept of acquiescence, the tribunal did not analyze the conditions for the concept to apply, as established in general public international law.

This paper aims to further analyze and clarify the issues raised by these awards. In discussing the contours of the illegal conduct, this paper will, firstly, show that a distinction must be made between the normative sources of the legality requirement, as this has important effects on the interpretation and effects of the requirement. It will also demonstrate that the illegality cannot be successfully raised as an objection when the illegal conduct is exclusively attributable to the state. Grounded in interpretation rules based on the maxim *nemo auditur propriam turpitudem allegans*, this conclusion requires a case-by-case analysis when both the investor and the host state are involved in the illegal conduct, as was the case in *Gavrilovic*. Secondly, this paper argues that the host state's involvement in the illegality must be clearly distinguished from ratification. Thus, some of the factors identified by the tribunal in *Kim* are to be considered in the analysis of the ratification, and ratification of an illegal act cannot coexist, as a rule barring the objection, with the commission of the

[5] *See* Vladislav Kim et al. v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 413 (March 8, 2017) (arguing that, in the analysis of the illegality, the tribunal must balance the purpose of promoting investments with the consequences of admitting the objection, i.e., denying the protection).

[6] *See Gavrilovic*, *supra* note 2, ¶ 384 and *Karkey Karadeniz*, *supra* note 3, ¶ 624.

[7] *See Karkey Karadeniz*, *supra* note 3, ¶ 628.

[8] *See David Aven*, *supra* note 4, ¶ 324-25.

illegality exclusively by the host state. As regards the analysis of ratification, this paper will focus only on estoppel and acquiescence and will not consider waiver and recognition, which have a more limited applicability in the context of investment arbitration. It will show that a rigorous analysis of the conditions of estoppel and acquiescence, as understood in public international law, is required. Likewise, although the ILC Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") are not applicable for purposes of estoppel and acquiescence, the paper shows that *ultra vires* acts can give rise to an estoppel.

Considering the backlash against the international investment arbitration system,[9] the author believes that these clarifications may contribute to the development of a framework that ensures a nuanced balancing between the need to protect investors and the need to protect and foster transnational public policy. The clarifications and observations made in this paper are not intended to be exhaustive, the purpose being to contribute to the existing debate by pointing out some of the problems that have not been thoroughly analyzed.

The paper is structured as follows. Part II of this paper analyzes the concept of investors' illegal conduct, summarizing its main characteristics and effects by distinguishing between the different normative sources of the legality requirement. Part III then discusses estoppel and acquiescence as legal manifestations of the ratification of the illegal conduct by the host state. It analyzes the understanding of these concepts under public international law in order to establish the requirements that need to be met for their application and then addresses their application in international investment arbitration as defenses to the respondent state's illegality objection. Part IV briefly summarizes the observations of the author regarding the ratification of illegal conduct.

[9] See generally Michael Waibel, Asha Kaushal et al., The Backlash Against Investment Arbitration: Perceptions and Reality in THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel, Asha Kaushal et al. eds., 2010).

II. THE CONCEPT OF ILLEGAL CONDUCT

A. *General Considerations.*

Similar to national legal systems, the parties' illegal conduct produces legal effects in international investment arbitration solely if a set of specific conditions is met. As a system designed primarily to promote and protect the rights of investors,[10] international investment law has developed standards against which the conduct of the host state is assessed by arbitral tribunals. However, given the structure of investment protection treaties–namely that these treaties mostly define standards of protection and obligations for host states–the nature and effects of the investors' illegal conduct is mostly the result of jurisprudential development. Thus, alongside legal scholarship, arbitral tribunals have drawn distinctions between the different situations that can occur in practice, with the purpose of discerning the different legal effects this conduct might have.

As to terminology, this paper construes as "conduct" all legal acts attributed to investors, be they active or passive. However, considering the lack of specific rules designed to impose obligations on the investors in investment treaties, providing a sharp contour of the notion of illegality in those treaties is a much more challenging task. This part briefly discusses the different sources under which illegality can give rise to an objection to the tribunal's jurisdiction or the admissibility of the claims (B), the contours of the notion of illegality (C) and its different effects (D).

B. *Sources.*

Illegality can be sanctioned based on two sources: treaties and general international law.[11] Considering the consensual nature of the international arbitration system, it is mostly based on the investment treaties at play that arbitral tribunals discuss illegality as an objection to jurisdiction or admissibility. The case law has also considered the investor's conduct through the prism of transnational public policy

[10] *See* Rudolph Dolzer & Cristoph Schreuer, Principles of International Investment Law 20-21 (2nd ed. 2012).

[11] For a brief discussion regarding the sources of international law, *see generally* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW 18-35 (9th ed. 2019) (ebook).

and the doctrine of *clean hands*.

1. Investment Treaties.

A number of investment treaties refer to the legality of the investment in what is called the "in accordance with the law" clause.[12] Two main types of such clauses are generally used:[13] clauses qualifying the definition of the investment that is protected under the treaty,[14] and clauses regarding the applicability of the treaty.[15] In this context, the only provisions relevant to a tribunal's jurisdiction or the admissibility of the claims are those relating to the protection of investments, as opposed to those

[12] See generally with respect to "in accordance with the law clauses", August Reinsich, How to Distinguish in Accordance with Host State Law Clauses from Similar International Investment Agreement Provisions, 7 INDIAN J. ARB. L. 70 (2018); Gabriel Bottini, Legality of Investments under ICSID Jurisprudence, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 297 (Michael Waibel, Asha Kaushal et al. eds., 2010); Sam Lutrell, Fall of the Phoenix: A new Approach to Illegality Objections in Investment Treaty Arbitration, 44 U.W. AUSTL. L. REV. 120 (2019); Stephan W. Schill, Illegal Investments in Investment Treaty Arbitration, 11 LAW & PRAC. INT'L CTS. & TRIBUNALS 281 (2012); U. Kriebaum, Investment Arbitration - Illegal Investments in AUSTRIAN Y.B. INT'L ARB. 307 (Gerold Zeiler, Irene Welser et al. eds., 2010); Zachary Douglas, The Plea of Illegality in Investment Treaty Arbitration, 29 ICSID REV. 155 (2014); Jarrod Hepburn, In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration, J. INT'L DISPUT. SETTLEMENT 531 (2014); Rahim Moloo & Alex Khachaturian, The Compliance with the Law Requirement in International Investment Law, 34(6) FORDHAM INT'L L. J. 1473 (2011); Jean Engelmayer Kalicki, Mallory Silberman et al., What Are Appropriate Remedies for Findings of Illegality in Investment Arbitration? in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 721 (Andrea Menaker ed., 19 ICCA Congress Series, 2017) (e-book).

[13] See Reinsich, supra note 12, at 72; Bottini, supra note 12, at 298; Lutrell, supra note 12, at 122; See also Schill, supra note 12, at 283 (referring to a mixed second type of clauses that refer both to admission and protection of the investments).

[14] See Agreement between the Government of the French Republic and the Government of the Republic of Moldova on the Reciprocal Promotion and Protection of Investments, Sept. 8, 1997, art. 1(1), cited in Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, ¶ 361 (Apr. 8, 2013) ("it is understood that the mentioned assets must be or have been invested in accordance with the legislation of the Contracting Party, on the territory or maritime area of which the investment is made, before or after entry into force of the present Agreement.").

[15] See, Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey, Mar. 27, 1986, art. 2(2), cited in Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 115 (July 14, 2010) ("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.").

relating to the *admission* of investments.[16] While the former affect the protection offered to the investments–and, thus, whether such protection may be withdrawn in case of illegality–the latter are construed as imposing a limitation on the obligation of the host state to admit and accept foreign investments.[17] Both are designed to protect the host state, however, and thus re-establish the balance in its favor.

The contours of these clauses will be analyzed in Section C below, as they must be assessed comparatively with other notions deriving from general international law.

2. General International Law.

Tribunals have been asked to analyzed investors' illegal conduct from two different angles, when the investment treaty on the basis of which the arbitration has been initiated does not include a legality requirement. First, they have been asked to sanction illegality on the basis of public policy.[18]

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[16] *See* the Netherlands Model Bilateral Investment Treaty, art. 2 (Jan. 1, 2004), cited in Reinsich, *supra* note 12, at 75 ("either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments."). *See also* MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8), Award, ¶ 210 (May 4, 2016) ("Article 2 of the BIT reads as follows: "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments." The Tribunal observes that the first sentence in this article refers to the obligation of each State party to the BIT to promote investments and it is not addressed to the investors or the legality of the investments. Similarly, under the second sentence, each State undertakes to admit investments subject to the rights conferred by its laws and regulations.").

[17] See Reinsich, supra note 12, at 81. The admission clauses must, however, be distinguished from the type of clauses that include a requirement of such an approval/admission in the definition of investment, which raise the issue of the tribunal's jurisdiction. See Douglas, supra note 12, at 184-185 (mentioning the decision in Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶ 9 (Nov. 27, 2000), which analyzed article 1 of the Agreement between The Belgo-Luxembourg Economic Union and The Government of Malasya on Encouragement and Reciprocal Protection of Investments, stating that investment under the agreement included only assets that "are invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia.").

[18] *See generally* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 255 (Pieter Sanders ed., 3 ICCA Congress Series, 1987) (ebook); EMMANUEL GAILLARD & JOHN SAVAGE (EDS.), FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION

There are various approaches to this concept, including "international" or "transnational" public policy. The concept encompasses principles, "which are really essential and are supported by a widespread, if not universal consensus, or as possessing, owing to their importance, a particular force and a particular imperative nature."[19] Jan Paulson also remarked that this concept "requires the acknowledgement of a rare degree of global consensus."[20] Generally speaking, the threshold for finding a breach of public policy may be high, although questions of fraud and corruption should generally meet the required threshold, given that they are sanctioned in almost every legal system, thus being in breach of the public policy in national legal systems as much as international public policy.

Separately, tribunals have been asked to read an implied legality requirement in investment treaties, sometimes on the basis of the doctrine of *clean hands*.[21] However, to the extent the applicability of the *clean hands* doctrine as a general principle of international law is controversial,[22] as established by the tribunal in *Hulley*

860-64 (1999); Catherine Kessedjian, *Transnational Public Policy in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS 857 (Albert Jan Van den Berg ed., 13 ICCA Congress Series, 2007) (ebook); Jean-Michel Marcoux, *Transnational Public Policy as an International Practice in Investment Arbitration*, 10 J. INT'L DISP. SETTLEMENT 496 (2019); JAN PAULSON, THE IDEA OF ARBITRATION (2013) (ebook).

[19] Lalive, *supra* note 18, ¶ 109.

[20] Paulson, *supra* note 18, at 208.

[21] See generally for the discussion of the doctrine in international investment arbitration, Aloysius Llamzon & Anthony Charles Sinclair, Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 451, 508-517 (Albert Jan Van den Berg ed. 18 ICCA Congress Series 2015) (ebook); Patrick Dumberry, State of Confusion: The Doctrine of Clean Hands in Investment Arbitration after the Yukos Award, 17 J. WORLD INV. & TRADE 229 (2016); Mariano de Alba, Drawing the Line: addressing allegations of unclean hands in investment arbitration, 12 (1) BRAZ. J. INT'L L. 322 (2015); ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC 568-574 (Graduate Institute Publications, Geneva, 2000).

[22] *See* Hulley Enterprises (Cyprus) Limited v. Russia, PCA Case No. AA 226, Final Award, ¶ 1358-1359 (July 18, 2014) ("The Tribunal is not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands'. General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law.").

Enterprises v. Russia, this paper will only briefly refer to the *clean hands* doctrine, to the extent it has been raised by respondent states.

C. *Contours of the legality requirement.*

1. "In accordance with the law" clauses.

Regarding the "in accordance with the law" provisions included in investment treaties, most of the tribunals[23] and scholars[24] consider that the illegal conduct of investors produces legal effects only if the illegality has a certain level of gravity. Thus, the clause covers, undoubtedly, corruption,[25] fraud and misrepresentation,[26] breaches of the host state's foreign investment law,[27] as well as breaches of fundamental rules of the host state;[28] as regards other types of host state law breaches, some tribunals have held that the clause does not cover minor or trivial breaches of the host state law,[29] while others have considered breaches of the applicable rules of host state law, for example the imposition of permits for purposes

[23] *See*, *e.g.*, Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 85-86 (Apr. 29, 2004); *Saba Fakes*, *supra* note 15, ¶ 119-121; Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 483 (Mar. 30, 2015); Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶ 297 (Nov. 8, 2010); Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶ 104 (Feb. 6, 2008); Lesi SpA and Astaldi SpA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 83 (July 12, 2006); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 319 (July 29, 2008); *Kim*, *supra* note 5, ¶ 395; Metalpar S.A. and Buen Aire S.A. v. the Argentine Republic, ICSID Case No. ARB/03/5, Decision on Jurisdiction, ¶ 72-85 (Apr. 27, 2006).

[24] *See* Schill, *supra* note 12, at 301; Kriebaum, *supra* note 12, at 319; Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723, 740; Llamzon, Sinclair, *supra* note 21, at 506; Bottini, *supra* note 12, at 299; Yas Banifatemi, *The Impact of Corruption on 'Gateway Issues' of Arbitrability, Jurisdiction, Admissibility and Procedural Issues*, *in* ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION ¶ 40 (D. Baizeau, R. Kreindler eds., 2015).

[25] *See*, *e.g.*, Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 389 (Oct. 4, 2013).

[26] *See*, *e.g.*, Inceysa Vallisoletana S.L. v. Republic of EI Salvador, ICSID Case No. ARB/03/26, Award, ¶ 239-46 (Aug. 2, 2006).

[27] *See*, *e.g.*, *Saba Fakes*, *supra* note 15, ¶ 120.

[28] See, e.g., Rumeli Telekom, supra note 23, ¶ 319.

[29] See, e.g., Tokios Tokelės, supra note 23, ¶ 85-86.

of construction,[30] both in relation to jurisdictional objections and the merits of the dispute.

When determining whether an illegality has taken place, such that the investor cannot prevail in its claim, a factor that has been taken into account in case law is the investor's good faith. Thus, some tribunals have taken the view that the existence of due diligence performed by the investor might be a factor indicating the existence of its good faith,[31] and, as a result, the inexistence of an illegality.

Looking at the conduct of the state, tribunals have been asked to assess the effect of the involvement of the host state in the illegal conduct. For example, in *Kardassopoulos v. Georgia*,[32] a case where the investment consisted of a joint venture agreement and a concession agreement concluded with state-owned companies, the Georgian state invoked the illegality of the investment on the grounds that the agreements were void, as they had not been signed by the competent authorities under the Georgian law. After stating that this illegality cannot be invoked by the Georgian state, being caused by the state itself,[33] the tribunal went on to say that the

[30] *Cf. Mamidoil*, *supra* note 23, ¶ 370 *et seq.* (even though the tribunal considered it had jurisdiction, it did give effect to host State law and the illegality on the merits.).

[31] *See* Alasdair Ross Anderson et al. v. Costa Rica, ICSID Case No. ARB (AF)/07/13, Award, ¶ 58 (May 19, 2010) ("[p]rudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable. Based 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."); *See also*, *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, ¶ 529 (February 24, 2014) ("The inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP. This is further supported by the Claimants' lack of diligence in carrying out their investment.").

[32] Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction (July 6, 2007).

[33] *Id.* ¶ 183-184 ("Against this background, the Tribunal observes that Respondent does not allege that Claimant committed any act in violation of Georgian law. Quite the contrary, it is the Respondent which argues that its State-owned enterprises violated Georgian law by exceeding their authority, thus rendering void ab initio the JVA and the Concession. Accordingly, Article 12 of the BIT cannot be invoked by Respondent to exclude Claimant's

host state was estopped from raising the objection, given its approval of the investment.[34] A similar conclusion was reached by the tribunal in *Karkey Karadeniz*, a case where the host state argued that the investor had breached the provisions of its procurement laws.[35]

Although the legality clause under the treaties generally does not mention that the illegality must be committed by the investor, tribunals have been correct in concluding that, when the illegal conduct is attributable to the state, the investment is deemed to be legal. It should be noted, however, that the tribunals do not offer proper reasoning for this conclusion. In the author's view, the conclusion must rest on the rule of good faith interpretation provided by article 31 of the Vienna Convention on the Law of Treaties ("VCLT"). One of the manifestations of the principle of good faith is the maxim "*nemo auditor propriam turpitudem allegans*",[36] pursuant to which no one can benefit from her own fault. Thus, interpreting the

investment from protection under the BIT. It follows that notwithstanding the fact that the JVA and the Concession may be void ab initio under Georgian law, Claimant's investment nonetheless remains entitled to protection under the BIT and the Tribunal so finds.").

[34] *Id.* ¶ 194 ("[T]hus, even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were "cloaked with the mantle of Governmental authority". Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter. Claimant therefore had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws. Respondent is accordingly estopped from objecting to the Tribunal's jurisdiction *ratione materiae* under the ECT and the BIT on the basis that the JVA and the Concession could be void ab initio under Georgian law.").

[35] *See Karkey Karadeniz*, *supra* note 3, at ¶ 624, 628 (Aug. 22, 2017) ("[a] host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with domestic law. All the contractual modifications that Pakistan alleges were made in breach of its procurement laws were duly agreed by the contracting parties . . . Pakistan has consistently maintained that Karkey's investment was established in accordance with Pakistani laws, and it is now estopped from arguing that the investment must be deemed invalid on the basis of a breach of those laws.").

[36] *See* KOLB, *supra* note 21, at 488 (analyzing it as a particular manifestation of the principle of good faith, although Kolb rightly qualifies it as a maxim and not as a principle: "Toutefois il s'agit d'une maxime plus que d'un principe de droit au sens technique du terme. *Nemo auditur* est un *topos* de l'argumentation juridique plus qu'une norme d'application précisément circonscrite.").

legality clauses through the prism of this maxim, one may reach the conclusion that these clauses do not cover the case in which the illegal conduct is attributable to the state, as such a result would violate the principle of good faith interpretation included in article 31 of the VCLT.[37] This, in turn, leads to the question of how this rule applies when the investor is aware of, or takes part in, the illegal conduct of the host state.

This issue was analyzed in *Gavrilovic*, a case which involved the transfer of five companies to the investor as a method of awarding him for his services during the war with Serbia, when he smuggled money out of the country to Austria.[38] Even though the tribunal found that the investor was involved in smuggling and was at all times aware of the illegalities and their serious nature,[39] it considered that the involvement of the state in the illegality precluded it from raising it as a defense.[40] The tribunal seems to have desired to strike a balance between the need to protect investors and the need to protect the rule of law, and the award reflects its concern for safeguarding the protection afforded to investors by the international investment

[37] However, it should be noted that the maxim bears, in these cases, merely an interpretative role and is devoid of any normative force, as opposed to those cases where the maxim is applied as a general principle of international law. For a brief discussion about the analysis of the maxim as a principle of international law, *see infra*, sub-Section C of this Section.

[38] See Gavrilovic, supra note 2, at ¶ 325-29.

[39] *Id.* ¶ 383 ("[the] evidence points more strongly in the direction of the State's orchestrating the bankruptcy and thus the transfer of the Five Companies to Mr Gavrilović as a quid pro quo for his currency smuggling, as discussed above. In short, while this was plainly to the benefit of Mr Gavrilović and the Tribunal has no doubt that he understood exactly what was going on (particularly when his dealings with the Minister in early March 1992 and the visit to Mr Papeš are considered), the central plank of the Respondent's attack, namely, that he orchestrated it has not been proven and, for the reasons discussed above, seems to the Tribunal to be implausible."). *See also* ¶ 386 ("[Mr] Gavrilović knew how irregular it was for the Ministry of Finance to be financing the acquisition of assets in bankruptcy by a private party, but this fits within the larger picture of the Government's returning a favour during a period of wartime exigency.").

[40] *Id.* ¶ 384 ("it is not open to the State to plead the patent irregularities of a bankruptcy proceeding overseen and authorised at critical junctures by its own court or the making of an extraordinary loan approved by a senior government minister, which might or might not have been unlawful under Croatian law, in opposition to the BIT claim. Put another way, if this investment was not made in conformity with the legislation of Croatia, on the evidence before this Tribunal, this is due to the acts of organs of the State.").

treaty regime.[41] However, this concern cannot justify not applying established legal principles. As discussed above, the maxim of interpretation that underlies the conclusion in this type of cases is *nemo auditur propriam turpitudem allegans*. The applicability of this maxim is limited, however, in cases where the investor is also involved in the illegality. In such cases, the tribunal must analyze the gravity of each party's conduct and reach the conclusion that the investment is legal only if such a result would not lead to the protection of an illegal investment.[42]

In *Gavrilovic*, the tribunal attempted such an analysis, but in the author's opinion, it failed by overemphasizing the fact that the illegality was orchestrated by the authorities of the host state. A comparison with the classic example of bribery is useful in this context. In the case of bribery, a party commits an illegality (offering money or other benefits to an official) in exchange for an illegal act of an official. It is irrelevant who initiates the illegal exchange[43] and the entire purpose of the exchange

[41] See generally Kevin Lim, Upholding Corrupt Investors' Claims against Complicit or Compliant Host States—Where Angels should not Fear to Tread, 2011-2012 Y.B. ON INT'L INV. L & POL'Y 601, 620-622 (2013) (describing the arguments invoked against the implementation of an overly strict approach against corruption that would lead to the weakening of the investors' protections); See also Doak Bishop, Toward a more flexible approach to the international legal consequences of corruption, 25(1) ICSID Rev.—Foreign Invest. L. J. 63, 66 (2010) (cited by Lim and who considers that an important factor in deciding on issues of corruption is whether the investor or the state's officials had the initiative of the corruption acts). As regards the case law, see Metal-Tech, supra note 25, ¶ 389 ("[t]he Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.").

[42] *See* KOLB, *supra* note 21, at 498 ("L'application de la maxime pourrait être écartée si la turpitude de l'autre partie est supérieure à celle du demandeur et si des lors son application pourrait mener à ce qu'une situation plus immorale encore ne soit entérinée.").

[43] *See* Constatine Partasides, *Remedies for Findings of Illegality in Investment Arbitration in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 740, 743 (Andrea Menaker ed. 19 ICCA Congress Series 2017) (ebook) ("The message sent out by Lord Mansfield's rule is unambiguous. Participate in an illegality and, amongst other things, you forfeit the protections of the law. While this unequivocal legal position is regrettably not always sufficient to counteract the temptation to succumb to a 'sweetheart deal', imagine for a second how much this legal disincentive would be undermined if it was qualified by

is for the official to ensure, often by devising a complex plan, that a benefit is obtained ultimately by the bribing party. In the case at hand, the same pattern occurred: the investor committed an illegality (i.e., smuggling money to Austria) in exchange for an illegal act of the officials (i.e., ensuring the transfer of the companies). The "orchestration" to which the tribunal refers represents, in fact, no more than the illegal acts committed by the officials in exchange for the benefits received from the investor. More generally, the very concepts of corruption and bribe are based, by definition, on an illegal act by an official person. If tribunals were to not sanction such illegality based on the official character of the function of the corrupted or bribed person, then grave types of illegality such as corruption or bribery would never be sanctioned.

Starting from this line of cases that grappled with the issue of finding appropriate limits to the broad meaning of the "in accordance with the law" provisions included in the treaties, some tribunals have recently tried to use a more systematic and flexible theory based on the principle of proportionality. According to this principle, the tribunal's task is to "balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation."[44] The theory was developed by the arbitral tribunal in *Kim*, the proportionality analysis comprising the following three steps: (1) assessing the significance of the obligation with which the investor is alleged to not comply; (2) assess[ing] the seriousness of the investor's conduct; and (3) evaluating whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the host state to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a

considerations such as: "who initiated the illegality?"; or "who benefitted more from the illegality?"; or "whose conduct was worse?" These are questions that have no place in a legal forum."). *See also* Bottini, *supra* note 12, at 309 (arguing that corruption is prohibited by international public policy and, thus, the state is not precluded from raising the illegality even it its officials were involved.). *Cf. Bishop*, *supra* note 41, at 66.

[44] *See Kim*, *supra* note 5, ¶ 413.

proportionate consequence for the violation examined.[45]

The same reasoning was applied in *Cortec Mining v. Kenya*.[46] Although not expressly mentioned, it seems to also having been applied by the tribunal in Anglo *Adriatic v. Albania*: "this loss of protection is all the more clear where there is a relevant public purpose, which justifies the proportionality between the breach and the sanction of depriving an investor from international protection."[47] The proportionality test has also been well received by legal scholars,[48] considering its case-by-case basis approach. The author agrees with this test, given the appropriate nature of a case-by-case analysis in this type of cases. For instance, the application of the proportionality test would have offered a much better framework for cases such as *Gavrilovic*, allowing the tribunal to consider comparatively the gravity of each of the parties' conduct. However, certain observations are needed with respect to some of the factors considered relevant to the proportionality analysis by the *Kim* tribunal.

The *Kim* tribunal considered that the "general non-enforcement of an obligation . . . the specific decision of the host State not to investigate or prosecute the particular alleged act of noncompliance . . . evidence of widespread noncompliance"[49] are factors that should be taken into account for establishing the significance of the obligation of the investor, while the "failure of the state to investigate or prosecute the alleged particular act of noncompliance"[50] is a factor to be considered in the assessment of the investor's conduct. While the author agrees that the general non-enforcement and the widespread non-compliance existent in the host state can be taken into account when interpreting the notion of illegality at the initial phase of the

[45] *Id.* ¶ 406-408.

[46] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, ¶ 343-365 (Oct. 22, 2018).

[47] Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award, ¶ 288 (Feb. 7, 2019).

[48] *See* Lutrell, *supra* note 12, at 140-141.

[49] *Kim*, *supra* note 5, ¶ 406.

[50] *Id.* ¶ 407.

making of the investment, it may be more appropriate, under the interpretation rules of Article 31(3)(b) of the VCLT, to refer to the concepts of estoppel or acquiescence when looking at such practices during the lifetime of the investment. Furthermore, the failure to investigate the specific non-compliance of one particular investor cannot be considered as a factor showing the intention of host state for purposes of interpretation of the treaty, but should be analyzed as an acquiescence.[51]

2. Transnational Public Policy.

In addition to the legality clauses included in the treaties, the respondent states often invoke transnational public policy as a limit to the protection offered to the investor, irrespective of the treaty provisions. This concept has been used as a separate ground for respondent states when objecting to the legality of the investment, both when the treaty at play includes and when it does not include a legality provision.

The International Law Association considers that transnational public policy includes "fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'."[52] Thus, it has been argued that this concept covers, without a doubt, slavery, torture,[53] corruption and bribery.[54]

Fraud has been considered to be a part of the concept of transnational or international public policy. For instance, in *Inceysa v. El Salvador*, a case where the investor obtained the investment through fraud, the tribunal considered that "not to exclude Inceysa's investment from the protection of the BIT would be a violation of international public policy, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that Inceysa's investment is not protected by the BIT

[51] *See infra* Part III, Section C (*Acquiescence*).

[52] Marcoux, *supra* note 18, at 498 (quoting the International Law Association, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards 6-7 (2000)).

[53] *See* Douglas, *supra* note 12, at 181.

[54] *See* Llamzon & Sinclair, *supra* note 21, at 519.

because it is contrary to international public policy."[55] Also, in *Plama v. Bulgaria*, in the context of an Energy Charter Treaty claim, the tribunal decided that "granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[56] The awards have been strongly criticized by Zachary Douglas who considers that they have "pushed the concept of international public policy too far."[57] Although the author shares the same opinion regarding the restrictive interpretation of the transnational public policy concept, the idea of fraud being a part of transnational public policy should not be disregarded completely.[58]

The problem raised by these awards is not so much the alleged extension of the concept of transnational public policy, but the lack of any rigorous analysis which would establish that fraud is actually included in transnational public policy. In order to establish the existence of a subject/matter included in transnational public policy, one should find that the subject is widely considered by the international community as being of fundamental importance. However, in these cases, the tribunals did not analyze if such a consensus exists and assumed that fraud, as corruption, must be part of the transnational public policy. The conclusion of the two above-mentioned tribunals seems to have been facilitated by the fact that both found that offering protection to the investor would be contrary to the *nemo auditur propriam turpitudinem allegans* principle.[59] Thus, these decisions might be explained rather by the tribunals' belief that international public policy is equivalent to the *clean hands*

[55] *Inceysa*, *supra* note 26, ¶ 252.

[56] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, ¶ 143 (Aug. 27, 2008).

[57] *See* Douglas, *supra* note 12, at 181.

[58] The argument raised by Douglas (*supra*, note 57), according to which the option of the respondent to confirm the contract represents an indication that fraud is not part of the transnational public policy cannot be accepted, as the internal law of the host state is not the determining factor when ascertaining the content of transnational public policy.

[59] *See Inceysa*, *supra* note 26, ¶ 240.

doctrine.[60] To the extent that would be correct, however, different thresholds apply. If the doctrine of *clean hands* includes, in principle, a conduct which is illegal according to the laws of the host state, without being necessary to analyze it from the perspective of the international community, this does not suffice for transnational public policy, as shown above. In other words, while transnational public policy includes the illegalities covered by the *clean hands* doctrine, the reverse is not true.

In light of the above, it should be concluded that transnational public policy requires a higher threshold than the "in accordance with the law" clauses and, therefore, is to be applied cautiously by the tribunals. Thus, the failure to obtain a permit, for instance, or to comply with some other local, non-fundamental requirements of the host state would not constitute breaches of the transnational public policy, although it may result in the investment not being protected, depending on the circumstances of the case.

D. *Effects of the Investor's Illegal Conduct.*

In order to determine the legal effects of the illegal conduct of the investor, tribunals have distinguished between illegalities committed during the making of the investment and the illegalities committed during the lifetime of the investment. Thus, if the illegal conduct occurs at the initial phase of the making of the investment, it is generally considered to affect the jurisdiction of the tribunal or the admissibility of the claim, while if it occurs after the investment was made, during the lifetime of the investment, it qualifies as a merits issue.[61]

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[60] The *clean hands* doctrine is based on a similar maxim, namely the common law maxim "he who comes into equity must come with clean hands." Pursuant to this doctrine, as developed in municipal laws, the claimant cannot proceed with her action when, *inter alia*, the transaction at stake is fraudulent or illegal (*see* Llamzon & Sinclair, *supra* note 21, at 509). Thus, considering that fraud is encompassed, generally, by this doctrine, it might be reasonable to assume that the reasoning started from this doctrine.

[61] *See*, *e.g.*, Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Award, ¶ 344 (Aug. 16, 2007) ("[th]e effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."); Gustav F W Hamester GmbH & Co KG v.

This distinction is based on the usual wording included in the investment treaties, namely an investment made "in accordance with the law" or "assets invested in accordance with the law."[62] However, this distinction should also apply in the case in which no such provisions are included in the treaty, and the illegal conduct is analyzed as a violation of transnational public policy.

This conclusion results from applying the rule pursuant to which a state cannot invoke its own law in order to escape its international obligations.[63] Regarding the conduct of the investor occurring during the life of the investment, and possibly after the dispute has arisen, this might be analyzed as an abuse of rights and can, depending on the circumstances of the case, determine the denial of the tribunal's

Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 127 (June 18, 2010) ("The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ('made') and (2) legality during the performance of the investment. 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 scope of application 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. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue. In the Tribunal's view, the broader principle of international law identified in paragraphs 123-124 above does not change this analysis of Article 10, and in particular its distinction between legality at different stages of the investment."). *See also* Schill, *supra* note 12, at 307-309; Llamzon & Sinclair, *supra* note 21, at 500-501; Moloo & Khachaturian, *supra* note 12, at 1482.

[62] *See* Llamzon, *supra* note 21, at 501 ("Tribunals have concluded from the plain meaning of such terms and the past tense in which they are cast that the intention behind such treaty provisions is that the legality of the creation of the investment should be a jurisdictional issue, but subsequent illegality is not.").

[63] *See Hulley Enterprises (Cyprus) Limited*, *supra* note 22, ¶ 1354-1355 (July 18, 2014) ("[T]ribunal does need to address Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the making of the investment but also in its performance. The Tribunal finds Respondent's contention unpersuasive. There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law . . . It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.").

jurisdiction.[64]

Considering that this paper analyzes solely objections to jurisdiction and the admissibility of the claims, only the illegal conduct committed during the making of the investment is taken into consideration. When is illegal conduct a matter of jurisdiction, and when is it a matter of admissibility?

As remarked by August Reinsich, "a broad consensus has formed that, while jurisdiction goes to the power of an investment tribunal to decide a case, admissibility relates to the claims put forward in investment arbitration proceeding."[65] Given the limited scope of this analysis, the paper refers only to the general conditions included in the investment treaties, noting that other conditions could be imposed by other instruments chosen by the parties to regulate the dispute.[66] Thus, if the objection relates to the conditions or scope of the consent (ratione personae, ratione materiae, and ratione temporis), it affects the jurisdiction of the tribunal; on the other hand, the issue of admissibility arises only in relation to the claim itself and whether certain conditions are met for it to be brought.[67] Thus, prescription and mootness are generally considered as admissibility issues;[68] the denial of benefits clause has also

[64] See generally Emmanuel Gaillard, Abuse of process in International Arbitration, 32(1) ICSID REV. 17 (2017).

[65] August Reinsich, *Jurisdiction and Admissibility in International Investment Law*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 21, 23 (Andrea Gattini, Attila Tanzi et al. eds. 2018) (e-book).

[66] *See*, *e.g.*, Dolzer & Schreuer, *supra* note 10, at 65-76 (discussing the requirement of an investment under the ICSID Convention, which is a separate condition than that included in the bilateral treaty).

[67] For a detailed analysis of the jurisdiction and admissibility in public international law and investment arbitration, see *generally* Yas Banifatemi & Emmanuel Jacomy, *Compétence et Recevabilité dans le droit de l'arbitrage en matière d'investissements in* Droit International des Investissements et de L'arbitrage Transnational 773, 774 (Charles Leben ed. 2015), in particular at 778-780. *See also* Andrew Newcombe, *Investor misconduct: jurisdiction, admissibility or merits? in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187, 192-193 (Chester Brown & Kate Miles eds. 2011). These have to be, however, distinguished from simple conditions relating to the exercise of the consent (*See* Banifatemi & Jacomy, *supra* note 67, at 794-810).

[68] *See Newcombe*, *supra* note 67, at 196; *See also* Jan Paulson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 601, 616 (Gerald Aksen et al. eds., 2005).

been discussed as involving a condition of admissibility.[69]

Based on these distinctions, the defense of the host state regarding the illegality of the investment normally goes to the tribunal's jurisdiction when it is based on the "in accordance with the law" clauses, given that it affects the scope of the consent to arbitrate,[70] whereas it can be characterized as an issue of admissibility when no such provisions exist in the agreement, and the objection may then rest on transnational public policy or the *clean hands* doctrine.[71]

III. RATIFICATION BY THE HOST STATE OF ILLEGAL CONDUCT

A. *General considerations.*

Faced with objections to jurisdiction and admissibility raised by the host state, the investors' easiest defense is, of course, to argue that the illegality is not significant or that it was committed by the host state. These defenses relate to both the interpretation of legality clauses included in investment treaties or, as the case may be, the determination of the scope of transnational policy. Once the tribunal establishes that there was, indeed, an illegal conduct on the part of the investor,

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[69] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 468-472 (2009). *See also*, *Plama*, *supra* note 56, ¶ 148; *Hulley*, *supra* note 23, ¶ 440.

[70] *See*, *e.g.*, Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 320 (Nov. 30, 2017) ("The Tribunal agrees with Claimant that under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties. Indeed, the above considerations distinguish the FTA from the treaties applicable in Flughafen Zurich, Hamester, Inceysa, and Phoenix Action, which expressly required compliance with the host State's law. In fact, the wording of the FTA provides further clarity, because not only does it not mention such a limit, but, by the wording cited above, provides that such a limit is considered a formality which would have to be expressly included to be effective. Here, no such formality was expressly included."); Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)04/6, Award, ¶ 113 (Jan. 16, 2013) ("The majority accepts that good faith has an important role in the analysis but considers that, in the absence of a treaty provision ascribing some different effect to the principle of good faith, it is only in circumstances where the application of good faith as a principle of national law invalidates the acquisition of the investment that a lack of good faith means that there is no "investment" for jurisdictional purposes. In other circumstances, the question of good faith does not go to jurisdiction but is a matter to be considered by the Tribunal when exercising its jurisdiction and to be applied in the context of admissibility and/or the application of the substantive protections of the Treaty at the merits phase.").

[71] *See* Reinsich, *supra* note 65, at 38-40; Moloo & Khachaturian, *supra* note 12, at 1499–1501; Schill, *supra* note 12, at 288-291.

either based on treaty or general international law, can the investor invoke any other defenses?

The likely "candidate" that springs to mind is the ratification of the illegality by the host state, on the basis of the doctrine of unilateral acts developed in international law. Specifically, the notions of waiver, recognition, and acquiescence could all be applied as principles of international law deriving from the principle of good faith. In addition, related to the doctrine of unilateral acts, estoppel is the fourth concept that could be applied in this context. Given that the application of waiver and recognition require the fulfilment of stringent conditions,[72] resulting in a lower probability of being successfully invoked, this paper is limited to the analysis of estoppel and acquiescence, as means of ratifying the illegal conduct of the investor.

Before turning to the analysis of these concepts, it should be borne in mind that illegal conduct which is found to be contrary to transnational public policy cannot be ratified.[73] The rule is justified by the fact that transnational public policy does not protect the interests of the host state only, but those of the international community.

B. *Estoppel.*

1. Public International Law.

Estoppel is usually analyzed as a general principle of international law[74] whose

[72] As the acquiescence is understood either as tacit recognition or a tacit waiver (See *infra* Part III, Section C), only express waiver and recognition would qualify for a separate analysis. For a discussion regarding waiver and recognition, *see generally* Isabel Feichtner, *Waiver*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (online edition [https://opil.ouplaw.com/home/mpil] 2006) (discussing the effect of waiver, namely the "express renunciation of rights or claims") and Jochen A Frowein, *Recognition in* Max Planck Encyclopedia of Public International Law ¶ 1 (2010), *available at* https://opil.ouplaw.com/home/mpil (mentioning that recognition in a broader sense represents the "act by which a State confirms that a specific legal situation or consequence, which may have been in dispute, will not be put into question."). *But see* Lim, *supra* note 41, at 658-60 (discussing recognition in the context of investments tainted by corruption).

[73] *See generally* Douglas, *supra* note 12, at 180-181; *see also* Llamzon & Sinclair, *supra* note 21, at 523 ("Transnational public policy can also conceivably play a role in the absence of an "in accordance with host State law" provision, or when arbitral decision-makers deal with corruption in situations in which a particular State's formal law demonstrates tolerance or even condones such practices."). *Cf.* Lim, *supra* note 41, 670-77 (in the context of discussing *clean hands* doctrine which is broadly understood by the author).

[74] See CRAWFORD, *supra* note 11, at 407 (indicating also relevant case law); D.W. Bowett, *Estoppel*

effect is to preclude a party from making a statement or adopting conduct that contradicts one of its previous statements or conduct, when certain conditions are met.[75] Even though its terminology is imported from the common law systems,[76] the principle has acquired a particular meaning in the international system based on the notion of estoppel by representation used in the common law systems.[77] Two

before international tribunals and its relation to acquiescence, 33 BRIT. Y.B. INT'L L. 176, 176 (1957); KOLB, *supra* note 21, at 378-379; Emmanuel Gaillard, *L'Interdiction de se Contredire au Détriment d'Autrui comme Principe Général du Droit du Commerce International*, REV.D.ARB. 241, 255 (1985); Jack Wass, *Jurisdiction by estoppel and acquiescence in international courts and tribunals*, 86 BRIT. Y.B. INT'L L. 155, 159 (2015); I.C. MacGibbon, *Estoppel in International Law*, 7 (3) INT'L COMP. L. Q. 468, 470 (June 1958); Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. REV. 1777, 1778 (1986) (these authors agreeing that this is a general principle of international law, representing a concretization of the principle of good faith). As regards the case law, *see* Delimitation of the Maritime Boundary in Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246 (Oct. 12); Chagos Marine Protected Area (Mauritius/U.K.), 2015 I.C.J., Award, ¶ 435 (March 18). *But Cf.* ANTOINE MARTIN, L'ESTOPPEL EN DROIT INTERNATIONAL PUBLIC 240-46 (1979) (arguing that estoppel is a custom).

[75] Hans Das, *L'estoppel et l'acquiescement: assimilations pragmatiques et divergences conceptuelles*, 30 REVUE BELGE DE DROIT INTERNATIONAL 607, 608 (1997); CRAWFORD, *supra* note 11, at 406; Bowett, *supra* note 74, at 176; KOLB, *supra* note 21, at 357; MacGibbon, *supra* note 74, at 512; A. Martin, *supra* note 74, at 260; I. Sinclair, *Estoppel and Acquiescence*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 104, 105 (V. Lowe and M Fitzmaurice ed. 1996); S. Allen, *The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the Chagos Arbitration Award*, *in* 4 FIFTY YEARS OF THE BRITISH INDIAN OCEAN TERRITORY 231, 252 (S. Allen and Ch. Monaghan eds. 2018) (e-book).

[76] *See, e.g.*, A. Martin, *supra* note 74, at 9-62 (describing the application of the principle in the common law system). It suffices to say here that three initial forms of estoppel were used in the past as procedural concepts related to evidence, namely estoppel by record, estoppel by deed and estoppel by matter in paiis. In the modern times, the main usages of the concepts are estoppel by representation and estoppel by *res judicata*, only the former being implemented in international law.

[77] Although a similar principle is known in other continental systems, such as Switzerland or Germany (i.e., the *non concedit venire contra factum proprium* principle) (*see* Gaillard, *supra* note 74, at 248-50), the operation of the principle in international law follows closely the conditions required for its operation in the common law systems. As described by Gaillard, *supra* note 74, at 246, based on the award of the tribunal in *Amco v. Indonesia*, estoppel by representation "[d]ésigne un mécanisme de blocage qui fonctionne à la manière d'une fin de non- recevoir. C'est l'interdiction faite à la personne qui, par ses déclarations, ses actes ou son attitude, c'est-à-dire par la « représentation » qu'elle a pu donner d'une situation donnée, a conduit une autre personne à modifier sa position à son détriment ou au bénéfice de la première, d'établir en justice un fait contraire à cette « représentation » initiale". However, as opposed to estoppel by representation, which traditionally only had a procedural role, as an evidentiary rule, in international law, estoppel is generally considered as having a substantive effect, determining the extinguishment of the state's right. For this opinion, *see* KOLB, *supra*

competing views were advanced as to the conditions required for its operation.[78]

According to the restrictive or strict approach, estoppel produces legal effects only in the following conditions:

a) The statement of fact must be clear and unambiguous;

b) The statement of fact must be made voluntarily, unconditionally, and must be authorized; and,

c) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[79]

If in Bowett's view estoppel could only operate in the case of a statement of fact, this view has been abandoned by the modern proponents of the restrictive approach, who admit that estoppel applies also in cases of statement of law.[80] In addition, it should be observed that although the above definition refers only to statements, this is understood broadly as including also acts, actions and conduct of the state, including its silence.[81] On the other hand, according to the broader, opposing view, the third condition mentioned above is not necessary for estoppel to produce legal effects:

> What appears to be the common denominator of the various aspects of estoppel which have been discussed, is the

note 21, at 384 and Thomas Cottier & Jörg Paul Muller, *Estoppel*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 5 (2007), available at https://opil.ouplaw.com/home/mpil. *Cf.* A. Martin, *supra* note 74, at 271 and 316-20 (arguing that estoppel has an evidentiary role).

[78] See Das, supra note 75, at 611-12; A. Martin, supra note 74, at 71-72; Andreas Kulick, About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals, 27 EUR. J. INT'L L. 107, 109-12 (2016) (briefly describing these views).

[79] Bowett, *supra* note 74, at 202.

[80] *See* KOLB, *supra* note 21, at 362-63; *See also* Was, *supra* note 74, at 184-85 (arguing that jurisdiction can be based on estoppel and accepting, therefore, the premise of such an analysis, namely the possibility to have representations of law). *Cf.* Kulick, *supra* note 78, at 127 and Wagner, *supra* note 74, at 1799-1804. The extensive view, according to which statements of law are to be taken into account was embraced by international courts and tribunals as well. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar./U.S.), 1984 I.C.J. 392, at 413-415 (Nov. 26); See also, *Chagos*, *supra* note 74, ¶ 437.

[81] *See* Das, *supra* note 75, at 613; KOLB, *supra* note 21, at 360-61; A. Martin, *supra* note 74, at 274; Lim, *supra* note 41, at 645.

> requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflect the possible variations, in circumstances and effects, of the under- lying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est*.[82]

The case law indicates that the international courts and tribunals have adopted the restrictive approach over the past decades.[83] Thus, all three conditions mentioned by Bowett have to be fulfilled in order for the principle to operate, with the caveat that the statements of law are also considered, as mentioned above.

The fulfilment of the first condition, as has been rightly remarked by Kolb,[84] is essential, as a prerequisite, for establishing that the addressee could have reasonably relied on the statement.[85] Without a clear and unambiguous statement the other party cannot be considered to have placed reliance on the statement. This explains, in turn, the lack of formalism regarding the form of the statement which includes, as mentioned above, also silence. The meaning of the conduct should be interpreted in context, by considering all the external circumstances.[86]

As regards the second condition, the state must act freely, meaning that a statement made under duress or caused by fraud[87] is not considered for the application of estoppel. In addition, the statement must not depend upon certain conditions,[88] as this would not entitle the addressee to rely on the statement. If the first prongs of the condition formulated by Bowett did not raise any particular issues,

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[82] MacGibbon, *supra* note 74, at 512.

[83] *See*, *e.g.*, *Chagos*, *supra* note 74, at 438; North Sea Continental Shelf, (Ger./Den.; Germ./Neth.) 1969 I.C.J. 3, at 26 (Feb. 20); Island and Maritime Frontier Dispute (El Sal./Hond., Nicar. intervening), 1990 I.C.J. 92, at 118 (Sept. 13); *Gulf of Maine*, *supra* note 74, at 305. *See also* Das, *supra* note 75, at 612 n.21; Kulick, *supra* note 78, at 112 n.28 (referring to other cases as well).

[84] KOLB, *supra* note 21, at 360.

[85] *See* A. Sinclair, *supra* note 75, at 107-108.

[86] *See* Bowett, *supra* note 74, at 189.

[87] *Id.* at 190.

[88] *See* KOLB, *supra* note 21, at 373; Bowett, *supra* note 74, at 191.

the second prong related to the authority of persons making the statement raises important issues in the practice of international investment arbitration tribunals, as will be discussed below. It is worth mentioning briefly that following the rule provided by article 7 of the VCLT, there is a unanimous view that statements made by heads of state, heads of government, foreign ministers and heads of diplomatic missions are capable of binding the state, while the statements of other officials can be binding only if they are expressly authorized to represent the state internationally.[89] It is, however, arguable if and under what conditions a state is bound by lower-ranked officials. For instance, in *Gulf of Maine*, the ICJ considered that a letter sent by a certain Hoffman ("Hoffman letter"), a lower-ranked official in the Bureau of Land Management, could not bind the state under international law.[90]

The third condition is indispensable, protecting the necessary predictability of state-to-state relations.[91] As stated by Wagner:

> The reliance requirement may derive from the municipal law idea of detrimental reliance, but it performs an independent function in international law. Without it, international estoppel would severely limit the development of international policies by individual nations. States would feel bound to maintain outdated policies regardless of whether any other

[89] *See* Nuclear Tests Case (Austl./Fr.), 1974 I.C.J. 253, at 269 (Dec. 20). *See also* KOLB, *supra* note 21, at 374; A. Martin, *supra* note 74, at 277; Das, *supra* note 75, at 614 ("il convient toutefois de ne pas exagérer l'importance de la position constitutionnelle de l'organe.").

[90] *See Gulf of Maine*, *supra* note 74, at 307 ("The Chamber considers that the terms of the "Hoffman letter" cannot be invoked against the United States Government. It is true that Mr. Hoffman's reservation, that he was not authorized to commit the United States, only concerned the location of a median line; the use of a median line as a method of delimitation did not seem to be in issue, but there is nothing to show that that method had been adopted at government level. Mr. Hoffman, like his Canadian counterpart, was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled, and that the technical arrangements he was to make with his Canadian correspondents should not prejudge his country's position in subsequent negotiations between governments.").

[91] *See* Cottier & Muller, *supra* note 77, ¶ 3 ("[c]lear and unequivocal representation, prejudice, or detriment are not simply addenda; they trigger the very justification for specific protection of legitimate and settled expectations. A rule or principle which would easily prohibit any modification of conduct, statement, or representation vastly overestimates the potentials of law. This is neither suitable nor desirable in effectively promoting protection of good faith, reliance, and confidence in international relations between sovereign nations.").

> state had relied on the existence of those policies.[92]

Thus, the party invoking the operation of estoppel must prove firstly the materiality of the statement,[93] i.e., its capacity to be reasonably understood as intended to be relied upon. In the words of the *Chagos* tribunal, such reliance must be "legitimate."[94] It should be noted that this does not require an analysis of the real intention of the party making the statement.[95] The condition is fulfilled if the party relying on the statement shows that, objectively, such a statement might have been understood as intended to be relied upon. Secondly, the party invoking estoppel must prove that it relied on that statement and that this caused a change in the position of the parties, either by creating a benefit for the issuing party or a prejudice to the addressee.[96] This is not limited to material prejudice, but includes detriment in a variety of forms.[97] For instance, in the *Temple of Preah Vihear*, a stable frontier was considered sufficient,[98] while in the *Military and Paramilitary Activities in and Against Nicaragua*, the lack of jurisdiction was taken into account.[99] Also, in *Chagos*, the tribunal considered that foregone opportunities amounted to a prejudice that could

[92] Wagner, *supra* note 74, at 1780.

[93] *See* Das, *supra* note 75, at 615; A. Martin, *supra* note 74, at 288; KOLB, *supra* note 21, at 364.

[94] *Chagos*, *supra* note 74, ¶ 445 ("A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate. Nor does a State that relies upon an expressly revocable commitment render that commitment irrevocable.").

[95] *See* Temple of Preah Vihear (Cambodia/Thai.), 1962 I.C.J. 52, at 62 (June 15) (separate opinion by Sir Gerald Fitzmaurice) ("The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.").

[96] *See* A. Martin, *supra* note 74, at 292-93; Das, *supra* note75, at 617-18; KOLB, *supra* note 21, at 365-71; Cottier & Muller, *supra* note 77, ¶ 3.

[97] *See* KOLB, *supra* note 15, at 367; A. Martin, *supra* note 69, at 299 n.198 (arguing that a moral prejudice suffices). *See also* Was, *supra* note 69, at 165 (arguing that the time wasted with pursuing litigation qualifies as detriment). *Cf.* Das, *supra* note 70, at 618.

[98] See Temple of Preah Vihear, supra note 95, at 32.

[99] See Military and Paramilitary Activities in and Against Nicaragua, supra note 80, at 413-5.

be taken into consideration.[100]

2. International Investment Arbitration.

Estoppel has been discussed and applied in a fair number of cases at both the jurisdiction and merits phases in international investment arbitration.[101] As opposed to the constant trend of cases that apply the restrictive theory of estoppel in international law, investment tribunals seem to oscillate between the restrictive and broad views.[102] Kulick has noted that 15 out of the 53 cases identified used the

[100] *See Chagos*, *supra* note 74, ¶ 440.

[101] *See* Kulick, *supra* note 78, at 112 – 15 (identifying, in a quantitative analysis, 53 cases where the terms "estoppel" or "estopped" were used both in the jurisdiction and merits phases).

[102] For the restrictive view, *see*, *e.g.*, *Mamidoil*, *supra* note 23, ¶ 469 ("The Tribunal shares the opinion that the principle of estoppel is embedded in international law. It is a principle where for reasons of material justice a person is hindered from exercising an existing right. It is apparent that such a consequence must be restricted to exceptional circumstances. Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct. Mere inactivity, as opposed to an act, is not enough and is addressed by norms on statute of limitation"); Pan American Energy LLC, and BP Argentina Exploration Company v. the Argentine Republic, ICSID Case No. ARB/03/13 and BP America Production Company et al. v. the Argentine Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶ 159 (July 27, 2006) ("Estoppel is a recognized general principle of law that has been applied by many international tribunals. Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party. None of that has been shown by Argentina in this case."); Cambodia Power v. Kingdom of Cambodia and Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶ 266 (Mar. 22, 2011) ("With regard to the detriment requirement, the Tribunal finds that Claimant produced no evidence of detriment. Whatever was the situation, the Claimant always had recourse to arbitration under ICC Rules in the absence of ratification of the Convention by KOC, and therefore it is hard to see what detriment could have been suffered."); UAB E ENERGIJA (LITHUANIA) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award, ¶ 533 (Dec. 22, 2017) ("The Respondent has failed to discharge its burden of proof with respect to the first factual requirement of an estoppel defense. The Respondent has also failed to show its reliance on the Claimant's alleged conduct or statement that the investment claims would not be pursued beyond negotiations. The Tribunal therefore finds that no issue of estoppel arises on the facts of this case."). For the extensive view, *see*, *e.g.*, *Fraport*, *supra* note 61, ¶ 346 ("There is, however, the question of estoppel. Principles 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."); *Rumeli*, *supra* note 23, ¶ 335 ("[it] is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium."). *See also* Kulick, *supra* note 78, at 115-19 (discussing other cases as well).

restrictive view, while 13 seemed to apply the broad view and in the other cases it was either unclear or the tribunals misused the concept. [103] More interestingly, Kulick's analysis found that estoppel was found not to be applicable in all the 15 cases in which a restrictive view was taken.[104]

Although this might be an indicator that the test is too strict, the author agrees with Kulick that this should not lead to the conclusion that a broad view is preferable in international investment law.[105] The justification for the restrictive approach of estoppel in international law, namely the prevention of a "chilling effect" on the activities of states, is even more present in the context of investment law. As discussed below, estoppel is based in most of the cases on purely internal conduct or acts of a state's officials and the application of the broad view would drastically limit the exercise by the state of its sovereignty.[106] On the other hand, it is worth mentioning that even in the cases where the restrictive approach was applied, the solution to reject the estoppel claim was not always based on the third condition, but rather on the other two conditions which were analyzed rigorously.[107] In fact, the issue with the broad view applied in investment disputes is not only that the third condition is not taken into account, but, more importantly, the fact that the first two conditions are only summarily analyzed and estoppel seems to be used as a supporting argument.[108]

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[103] Kulick, *supra* note 78, at 114.

[104] Id.

[105] *Id.* at 124–28.

[106] This is justified by the fundamental difference between estoppel and consensual undertakings of the state. As discussed above, estoppel operates precisely in cases where there is an ambiguity with respect to the true intention of the state. Therefore, reliance performs a safeguarding function.

[107] *See*, *e.g.*, *Mamidoil*, *supra* note 23, ¶ 409, 417 (finding that the first condition of estoppel (i.e., clear and unequivocal statements) was not met); *UAB E ENERGIJA*, *supra* note 102, ¶ 533 (finding that neither the first condition, nor the reliance requirement were met; *Cambodia Power*, *supra* note 102, ¶ 264 (finding that the first condition was not met).

[108] *See* Kulick, *supra* note 78, at 120-121 ("most decisions rejecting estoppel under the strict view let the claim fail on the requirements that a broad view avoids discussing (clear and unequivocal representation, detrimental reliance on the representation).").

The award in *Karkey Karadeniz*[109] represents, in this respect, an indicative example of this approach in international arbitration. The case involved claims of an investor arising from the breach of a contract concluded with a Pakistani state-owned company following a public procurement process. The respondent objected that the tribunal lacked jurisdiction on the basis of an "in accordance with the law" clause, because the investment was obtained through alleged corruption and fraud and the contract was contrary to the Pakistani public procurement laws as found by the Pakistan Supreme Court.[110] As mentioned above,[111] the tribunal not only found that the breach of procurement laws was due to the state of Pakistan, but also that the respondent state was estopped from raising the defense. Although the respondent referred in its counter-memorial to the restrictive view of estoppel,[112] the tribunal did not make any reference to the requirement of reliance, nor did it proceed to a detailed analysis of the other two conditions of estoppel. If the conditions regarding the clear and unambiguous representation and the reliance of the investor seem to have been met in that case,[113] and, thus, the tribunal might have considered them self-explanatory, the fulfilment of the second condition raised an important question regarding the attribution of the representations to the state of Pakistan that required an in-depth analysis. In fact, the tribunal seemed to invoke estoppel only as a supporting, secondary argument in favor of its conclusion that there was no illegality, considering that it was committed by the host state.[114]

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[109] Karkey Karadeniz, supra note 3.

[110] *Id.* ¶ 75-160 (for the factual background of the case) and ¶ 277-335 (for Pakistan's contentions regarding the lack of jurisdiction based on the "in accordance with the law" clause).

[111] *Supra* note 36.

[112] *Id.* ¶ 336 ("Pakistan submits that the concept of estoppel prevents a party from exercising a valid legal right in circumstances where it has clearly and unequivocally stated that it would not exercise that right, and its counterparty has – in good faith – relied on this statement to its detriment.").

[113] *Id.* ¶ 627 (the contract concluded by the investor with the Pakistani company included a representation that the contract is valid and binding). As regards the reliance, *see* ¶ 75-160 (the factual background of the case evidencing the provision of electricity by the claimant and the presence of its vessels in Pakistan).

[114] For a similar reasoning, where estoppel was seemingly used only as a secondary argument, *see also Kardassopoulos*, *supra* note 32. This approach might be also explained by a

The conclusion of the tribunal raises two main issues. First, what is the relationship between estoppel and the commission of the illegality by the host state? Second, can the international law rules of attribution be used when analyzing estoppel, and if yes, which? This paper will try to answer these questions in the following sub-sections.

(i) Commission of the Illegality by the Host State.

As discussed above, when the illegality is committed by the respondent state, the dismissal of its objection to jurisdiction should be grounded on the interpretation of the applicable treaty in light of the maxim *nemo auditur propriam turpitudinem allegans*. Specifically, in such a case, there is no illegal conduct covered by the "in accordance with the law" clause included in the treaty, considering that it covers solely the illegal conduct of the investor. Since there is no illegality committed by the investor, is there a role for estoppel in this scenario?

In order to answer this question, a distinction between the theories regarding the effect of estoppel is necessary. If one applies the theory according to which estoppel only has a procedural effect that operates in matters of administration of evidence,[115] the operation of estoppel has to be considered before analyzing the existence of the illegality. This is because estoppel's effect would be precisely to preempt the opposing party from bringing any other evidence with respect to that particular matter. Thus, in such a case, the conclusion that the respondent is estopped would resolve the issue without being necessary to analyze the illegality itself.

On the other hand, if one regards estoppel as having a substantive effect,[116] extinguishing the right of the party to assert a certain fact, estoppel cannot play any role in this scenario. If there is no illegal conduct on the part of the investor, the right to be extinguished does not exist and, as a result, estoppel cannot operate. Therefore, irrespective of the theory embraced, it is not accurate to reject the defense of the

terminological confusion. As noted by Martin (*see* A. Martin, *supra* note 74, at 212), there was an inclination in practice to consider *nemo auditor propriam turpitudinem allegans* as an application of estoppel.

[115] *See supra* note 77.

[116] *Id.*

host state on the grounds of both estoppel and illegality committed exclusively by the host state.[117]

(ii) Rules of Attribution of Conduct under International Law.

The question relating to the attribution of the conduct of the state's officials might seem a non-issue at first glance. Indeed, most of the tribunals dealing with this question did not consider that it raised any particular issues,[118] as exemplified by *Karkey Karadeniz*. Although only some of the tribunals expressly referred to the ILC Articles,[119] it seems that other tribunals also based their decision on the rules included in the ILC Articles even without mentioning them.[120]

A notable exception is the award in Duke Energy v. Peru.[121] The tribunal in that case questioned the applicability of the ILC Articles and, in an extensive obiter, distinguished the attribution rules applicable to estoppel from those relating to international wrongful acts:

> The decisive element for estoppel is the reasonable appearance that the representation binds the State. In this regard, the competence, or rather, the manifest lack of competence, of a State organ is relevant, given that no one can reasonably have confidence in representations or statements coming from an organ which manifestly lacks the competence to make them . . . [for] purposes of estoppel, the Tribunal does not find helpful the principles on State attribution in the ILC's

[117] *Cf.* Kulick, *supra* note 78, at 113, 121 (arguing that in cases such as *Kardassopoulos or Arif* estoppel is used as an "argumentative *topos*", the issue being actually the "compliance of the investment with the domestic law").

[118] *See*, *e.g.*, *Kardassopoulos*, *supra* note 32, ¶ 194; Bernhard von Pezold et. al v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶ 411 (July 28, 2015); *See also Fraport*, *supra* note 61, ¶ 346-347 and *Rumeli Telekom*, *supra* note 23, ¶ 335.

[119] *See*, *e.g.*, *Kardassopoulos*, *supra* note 32, ¶ 190 ("It is also immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law. Article 7 of the Articles on State Responsibility provides that even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State.").

[120] *See*, *e.g.*, *Karkey Karadeniz*, *supra* note 3, ¶ 564-582 (the tribunal applying the test under the ILC Articles).

[121] Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Award (Aug. 18, 2008) (the tribunal applied the principle of *actos propios* under Peruvian law in the merits phase, but it considered that this is the equivalent of estoppel under international law).

> Articles on State Responsibility. Rather, the Tribunal draws inspiration, by analogy, from the test that applies in international law to determine whether a treaty is binding even though it was signed in violation of a country's internal law.[122]

The same opinion was expressed by Lim who considers that the ILC Articles do not apply in cases of estoppel, acquiescence or recognition, as their application is restricted to the domain of international wrongful acts.[123] However, while the tribunal in Duke refers to the application by analogy of the VCLT, Lim proposes the application of the rules under the framework of the Guiding Principles on Unilateral Declarations of States ("ILC Guiding Principles"). In the end, the difference is only apparent, as Lim concedes that in cases of *ultra vires* acts, article 46 of the VCLT would be applicable to unilateral acts under the ILC Guiding Principles as well.[124]

The question relating to the applicability of the ILC Articles in this context might seem surprising, considering the unambiguous provisions included in the commentary of the ILC Articles that circumscribe, on one hand, its general field of application[125] and, on the other hand, the rules on attribution.[126] Despite these provisions, in the context of construing the umbrella clauses included in the BITs, it has been argued that the ILC Articles have a general application to matters of attribution and are not limited to internationally wrongful acts.[127] In addition, the

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[122] *Id.* ¶ 244, 248.

[123] *See* Lim, *supra* note 41, at 616-17.

[124] *Id.* at 644.

[125] *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts, general commentary ¶ 4 (c) ("the articles deal only with the responsibility for conduct which is internationally wrongful.").

[126] *Id.* commentary of Chapter 2, ¶ 5 ("the question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State."). *See also* Lim, *supra* note 41, at 617-18; *Duke*, *supra* note 121, ¶ 250.

[127] As regards the umbrella clause, a classic example of such a clause is art. II(2)(c) of the US-Romanian bilateral investment treaty that was the basis of the dispute in Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2015) ("Each Party shall observe any obligation it may have entered into with regard to investments."). The question that arises is whether the umbrella clause covers agreements entered into by other entities than the state (e.g., private companies where the state is a shareholder), given the reference in the clause to

applicability of the ILC Articles has been extended to the representations giving rise to reasonable expectations, in the context of analyzing breaches of the fair and equitable treatment standard.[128]

While the author understands the inequitable consequences these solutions try to prevent, the nature of the ILC Articles cannot be changed. The ILC Articles represent a *lex specialis* which is applicable only to the narrow field of international responsibility and "it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation."[129] In fact, the issues raised by the umbrella clause and the fair and equitable treatment are not even related to attribution, but rather to the methods of interpretation of such treaty provisions. Therefore, the ILC Articles might be taken into consideration by applying article 31(3)(c) of the VCLT, in the context of interpreting the provisions of the treaty, but cannot be applied directly, considering that they are not of general application.

Having concluded that the ILC Articles apply only in the limited domain of state responsibility for internationally wrongful acts, the decision of the tribunal in Duke and the assertion of Lim are correct. Estoppel is not related to a breach of an

"it". *See* ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES. STANDARDS OF TREATMENT 461 note 133 (2009) (who consider that the ILC Articles have a general applicability and would cover this issue as well). *But see* Michael Feit, *Attribution and the Umbrella Clause – Is there a way out of deadlock?*, 21 MINN. J. INT'L LAW 21, 29-38 (2012) (describing the position of Newcombe and Paradell and arguing that this issue can be solved by applying flexible rules regarding the representation of the state). *See also* Shotaro Hamamoto, *Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause*, 30(2) ICSID REV. 449, 462 (2015) (who considers that the ILC Articles are not applicable in this case, and the issue should be solved by applying representation rules). For a contrary position, according to which this is a matter to be solved under the law governing the contract, *see* James Crawford & Paul Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 27, 34-35 (Meg Kinnear, Geraldine R. Fischer et al. eds., 2015) (e-book).

[128] *See* Georgios Petrochilos, *Attribution in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 293, ¶ 14.72 (Katia Yannaca-Small ed., 2010) (ebook) (arguing that the application of the attribution rules in this case "[m]ay rest on the basis that the non-wrongful conduct is a necessary part of the wrong complained of: the wrongfulness lies in the frustration of a prior representation.").

[129] *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts, *General Commentary* ¶ 4(a).

international obligation, nor does it apply on the basis of a treaty provision that needs to be interpreted. As to the framework that should be used for establishing the competent organs to bind the state through estoppel, the author believes that a flexible, case-by-case approach should be taken, in light of the good faith principle that guides its operation.

While the ILC Guiding Principles represent a good starting point, they do not dispose of the issue, given the express reference that they do not apply to conduct amounting to estoppel.[130] In addition, the alternative of applying article 7 of VCLT leads to a restrictive approach that contravenes to the rationale of estoppel which is firmly grounded in good faith. However, principle 4 of the ILC Guiding Principles[131] should be taken into consideration as a reflection of a general rule of international law allowing the representation of the states by other officials than the heads of states, heads of governments and foreign ministers, such as lower-ranked officials.[132] Thus, even though, conceptually, the ILC Guiding Principles do not apply per se, the general rule reflected in principle 4 should be considered when discussing the issue of estoppel.

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[130] The preamble of the ILC Guiding Principles that were finally adopted is clear in this respect (they "[r]elate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law."). *But see* Lim, *supra* note 41, at 636 (referring to the special rapporteur's comments included in his 9th report (Cedeño's Ninth Report A/CN.4/569/Add. 1) according to which the ILC Guiding Principles would apply *mutatis mutandis* to conduct of the states not envisaged by the Principles).

[131] Principle 4 of the ILC Guiding Principles on Unilateral Declarations of States ("A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs have the capacity to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.").

[132] *See* Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo/Rwanda), 2006 I.C.J. Rep. 6, ¶ 47 (Feb. 3, 2006) ("with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials."). This paragraph from the award is expressly mentioned in the commentary of principle 4 of the ILC Guiding Principles.

When determining the officials that are authorized to represent the state in its relations with foreign investors, a broad approach should be taken. As opposed to classical state-to-state relations, the interactions between foreign investors and host states are more informal, given the presence of the investments in the territory of the host state and their regulation by the municipal law. Thus, if a host state does not have a special framework requiring foreign investors to only deal with special authorities and accepts the direct interaction between these investors and its national authorities, the latter are to be considered as having been authorized to represent the state, in their area of competence, under the general international rule reflected in principle 4 of the ILC Guiding Principles.[133] The contrast with the state-to-state relations is explained by the fact that the formalism of the latter rests on the restrictions imposed internally on the competence of officials representing the state internationally. As a consequence, if a lower-ranked official, respecting her competence, makes a statement, this is a valid statement for the operation of estoppel.

The rule that naturally follows from this conclusion is that *ultra vires* acts cannot be attributed to the host state.[134] As regards the applicability by analogy of article 46

[133] *See* ALEXIS MARIE, LE SILENCE DE L'ETAT COMME MANIFESTATION DE SA VOLONTE 288-292 (2018) (who considers that this solution rests on the function of the *renvoi* to the municipal law operated by international law, and, thus, there is no difference between lower-ranked officials and other officials if the municipal law recognizes the lower-ranked officials power to represent the state). As stated by Marie at 292: "Qu'on pense aux actes de délimitation, de naturalisation ou encore d'immatriculation, et l'on admettra qu'il est suffisant qu'ils soient édictés par l'autorité interne en ayant le pouvoir, qu'il s'agisse d'un Parlement ou d'un fonctionnaire subalterne, pour être imputables en tant que volonté internationale de l'Etat. Les organes et autres agents peuvent reconnaître, protester ou encore engager l'Etat dès lors que leur fonction le permet et cela quel que soit leur rang hiérarchique. C'est par exemple précisément parce que telles autorités peuvent refuser une extradition ou que telles autres peuvent respectivement s'engager au nom de l'Etat à ne pas extrader ou à ne pas exécuter la décision de condamnation."

[134] *Id.* at 293; *But cf.* Lim, *supra* note 41, at 653 ("So long as a state official acts within the scope of his official duties in making a declaration on the state's behalf (take for instance a foreign minister who, naturally, is in charge of making foreign policy-related decisions, and can thus make binding declarations of foreign policy on the state's behalf), even if he does not have competence under domestic law to make that particular declaration (the foreign minister may not be conferred the power under his state's constitution to recognize the sovereignty of another state over a foreign territory, even though such is a foreign policy matter), such

of the VCLT in such a case, this article is not applicable, considering that, under the framework envisaged by the VCLT, this case would fall under the provisions of article 8 of the VCLT and not article 7.[135] If estoppel would be a classic case of application of the rules regarding the manifestation of will, the analysis would stop at this point. However, as discussed above, estoppel applies especially in those cases where there is a doubt regarding the manifestation of a state's consent and the addressee relies in good faith on that statement. Referring to the importance of reliance in analyzing the *ultra vires* acts of the state making the statement, Thirlway observed that:

> Whereby what matters is the effect produced on the Respondent State, the constitutional niceties of the position of a given official are less important than the impression produced ab extra as to his competence to speak for the State. Yet there must be some degree of authority to speak vested in the person concerned.[136]

Therefore, if in such a case the authority of the organ can be implied under the circumstances and it is reasonable, in accordance with the principle of good faith, to consider that the investor could have relied on such a statement, estoppel can operate.[137]

The tribunal in Duke followed closely this approach, despite referring to article 46 of the VCLT. The respondent argued that the representations regarding the tax treatment of the merger to which claimant was referring were not made by the tax authorities, and, thus, could not be considered for the operation of estoppel. It was

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declaration is still attributable to, and therefore capable of binding, the state."). While the author agrees that this reasoning applies to head of states, head of governments and foreign ministers, it does not apply to other lower-ranked officials given that principle 4 does operate a *renvoi* with respect to the latter.

[135] *Cf.* Frank Hoffmeister, *Article 8 in* VIENNA CONVENTION ON THE LAW OF TREATIES 148 (Oliver Dörr & Kirsten Schmalenbach eds., 2018).

[136] *See* Das, *supra* note 75, at 614 (quoting Thirlway, *The Law and Procedure of the International Court of Justice*, BRIT. Y. B. INT'L L. 45 (1989)).

[137] *See* KOLB, *supra* note 21, at 376 and Bowett, *supra* note 74, at 192 (arguing that the theory of apparent authority, concretization of the principle of good faith, applies in such a case). Kolb refers also to the possibility of an acquiescence or estoppel deriving from the subsequent conduct of the superiors of the official acting *ultra vires*. However, there is no need to refer to the statements of the official acting *ultra vires* once one establishes the existence of a subsequent acquiescence or estoppel, as these would produce the effects by themselves.

true that the representations were made by other organs, namely the representative of a company in which the state was a shareholder, but this did not deter the tribunal from attributing the conduct to the state. Taking into consideration, inter alia, the fact that the representative of the company said to have made the representations was also an official of the government's agency dealing with privatizations and the fact that the by-laws of the company were amended before the merger, stating expressly that the purpose was to give "the shares belonging to the State certain control powers through qualified majorities",[138] the tribunal held that the private company was representing the state.[139]

Returning to *Karkey Karadeniz*, the same conclusion could be reached with respect to the attribution of the representations included in the agreement concluded by the claimant with the Pakistani company, given the appearance that the government approved the conduct of the company and the reasonable reliance of the investor on these representations. Although the tribunal analyzed this relation under the framework of the ILC Articles for establishing whether the breaches of the treaty are attributable to the state, its factual findings are relevant in this context as well. The tribunal found that the bidding process was conducted by the government, through its specialized agencies that selected the private company as a counterparty for the winner of the tender[140] and the clauses included in the agreement clearly

[138] *Duke*, *supra* note 121, ¶ 397.

[139] *Id.* ¶ 410, 413 ("Everything that Electroperú did within the context of the privatization of Egenor was at the direction and on behalf of the Government. Indeed, Egenor's by-laws, the Privatization Agreement, and the Privatization Law all clearly indicate that Electroperú was one of the Government's agents in the privatization of Egenor . . . the Tribunal finds that it was reasonable for Dominion (and later Duke) to interpret the support for the merger from Electroperú's representatives as coming from the State itself."). *But see Duke*, *supra* note 121 (separate opinion Dr. Pedro Nikken ¶ 10) ("The relationship between a State and an investor, however, is not identical to the relationship between two States. An investor must know the legal order of the State within whose jurisdiction he has invested, at least in respect of the fundamental issues connected with his economic activity . . . If an agent of the State that is manifestly incompetent in tax matters has approved a taxable act, every investor must know that the tax authority remains entitled to object to it within the prescribed period.").

[140] *Karkey Karadeniz*, *supra* note 3, ¶ 573-75 ("It stems from the evidence on the record that Lakhra did not enter the Contract with Karkey out of its own free will and self-interest. It was Pakistan, through its organs and agents, which selected Lakhra to be the Buyer under the Contract . . . The Tribunal notes that Pakistan, and not Lakhra, solicited the RPPs and invited

showed that the state of Pakistan was the real party to the agreement.[141] These facts, as in Duke, show that it was reasonable for the claimant to rely on the representations as coming from the state itself.

In order to determine if there is apparent authority and the investor could have reasonably relied on it, certain factors should be considered, the *Kim* test being appropriate as a source of inspiration. Thus, one should, firstly, assess the importance of the rule/norm breached. If the obligation is of fundamental importance, the threshold is higher and the investor must clearly demonstrate that she relied on other statements coming from the lower-ranked official's superiors. Secondly, if, for instance, the breach was egregious, and not merely based on a negligence, showing a total disrespect of the host state's rules, it is reasonable to assume that the state would ratify the illegality only in limited circumstances. Other factors, such as the limitation period, as mentioned in the Nikken's dissent in Duke,[142] or the general attitude of the host state towards that particular matter could be relevant.

B. *Acquiescence.*

1. Public International Law.

Acquiescence is a tacit consent,[143] arising from the silence or passive conduct of

the RPPs to invest . . . Pakistan also determined the bulk of Lakhra's eventual obligations under the Contract (by way of the Pro Forma RSC attached to the RFP).").

[141] *Id.* ¶ 576 ("The Tribunal notes that the following provisions were set forth in the Pro Forma RSC, and were also incorporated in the 2008 RSC and 2009 RSC: [Clause 11 – BUYER Obligations] BUYER hereby covenants and agrees that throughout the duration of this Contract: (a) no direct or indirect expropriation, confiscation, compulsory acquisition, or seizure of all or any part of the SELLER's assets, business or operations shall be done by a Governmental Entity and/or state entity or private person or entity, any act, action, delay or omission of the Governmental Entity and/ or state entity.").

[142] *See supra* note 139.

[143] *See* Nuno Sérgio Marques Antunes, *Acquiescence in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (2006), *available at* https://opil.ouplaw.com/home/mpil; I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 182 (1954).

a state, having the effect of either an implied waiver[144] or a tacit recognition.[145] As a manifestation of the state's consent,[146] it has legal effects only if strict conditions are met.[147] This is justified by the natural uncertainty regarding the effects that silence may have depending on the circumstances:

> Le silence peut, en effet, signifier qu'une offre, une violation ou une menace laisse le destinataire totalement indiffèrent (qui tace negue negat neque utique fatetur). Il peut aussi exprimer l'opposition (qui tacet negat). Mais, dans la plupart des cas, le silence équivaut à l'acceptation tacite par le destinataire d'une offre ou traduit sa résignation devant une violation ou une menace à l'encontre de ses droits.[148]

The first element required to establish the existence of acquiescence is the legal relevance ("pertinence légale")[149] of the silence, meaning that, in the given circumstances, the state has an obligation to act (obligation de réagir), as a response

[144] Was, *supra* note 74, at 159 (citing Tams, *Waiver, Acquiescence and Extinctive Prescription in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1036 (James Crawford et al. eds. 2010).

[145] CRAWFORD, *supra* note 11, at 405; Das, *supra* note 75, at 618; Kulick, *supra* note 78, at 108; Lim, *supra* note 41, at 643.

[146] *See* A. Marie, *supra* note 133 (the main thesis of the book being that silence is a manifestation of state's consent). *Cf.* KOLB, *supra* note 21, at 352 (in his opinion, acquiescence does not represent a manifestation of consent). Acquiescence in a broader sense can be used also as an interpretative tool when, for instance, one of the parties to a treaty maintains its silence with respect to the interpretation of the treaty by the other party. For this latter sense, *see* MacGibbon, *supra* note 143, at 146-47 and Das, *supra* note 75, at 618.

[147] *See* Das, *supra* note 75, at 619.

[148] ERIC SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 61 (1962); *See also* Sophia Kopela, *The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals*, 29 AUST. YBIL 87, 90 (2010).

[149] A. Marie, *supra* note 133, at 47-48 and 54-55. The author rightly links this requirement to the rationale of the acquiescence, namely the protection of legal certainty ("Sans préjuger de la question de savoir si les effets en cause peuvent être attribues a une manifestation de la volonté, c'est en définitive la protection de la sécurité juridique qui justifie l'existence de règles écrites, ou non-écrites, qui attribuent des effets au silence étatique . . . [u]ne situation d'insécurité juridique peut résulte d'une difficulté des Etats a projeter un rapport de droit dans le future – elle consiste alors en un doute sur son existence et sa consistance futures – aussi bien qu'en un doute sur l'existence et la consistance actuelles d'un rapport de droit . . . [L]a pertinence légale du silence est en cela largement fonctionnelle. Elles se justifie précisément afin d'anticiper une indétermination future ou de remédier à une indétermination actuelle des rapports des droits.").

to the actions of another entity.[150] Even though the interest of the state to react is sometimes analyzed as a separate condition,[151] this is, in fact, a factor to be considered when establishing the pertinence légale of the silence.[152] As illustrated by the Fisheries case, such an obligation can arise even out of the internal acts of a state, which can be taken into account as a manifestation of the state's consent internationally.[153]

The second condition is that the acquiescing party is aware of the circumstances giving rise to its obligation to react. This condition is justified by acquiescence's nature of manifestation of consent[154] and raises the issue of attribution, as illustrated by the Hoffman letter in *Gulf of Maine*.[155] This issue is analyzed in a separate sub-section below, considering its importance in the context of international investment arbitration.

It has been argued that other conditions for the operation of acquiescence are "the notoriety of the facts and claims, their prolonged tolerance by the state(s) whose interests are specially affected, and general toleration."[156] While the toleration of the

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[150] *Id.* at 57-408 (for a detailed discussion regarding different cases where international law recognizes this obligation). International law recognizes that silence has legal significance (*pertinence légale*), in different hypotheses, ranging from state responsibility to treaty validity, but the prevalent field of application is the territorial disputes between states. *See*, *e.g.*, *Gulf of Maine*, *supra* note 74, at 307 and *Fisheries Case* (U.K./ Nor.), Judgement, 1951 ICJ Rep. 116 (December 18) (discussing acquiescence in the context of territorial disputes). *See also* Kolb, *supra* note 21, at 348 (arguing that such an obligation to react might also derive from the principle of good faith).

[151] *See* Das, *supra* note 75, at 623-25.

[152] *See Kopela*, *supra* note 148, at 105 (discussing the interest of the state in the context of the obligation to react).

[153] *See Fisher*ies case, *supra* note 150, at 132 ("The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessary a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.").

[154] *See* Lim, *supra* note 41, at 643. *See also* Das, *supra* note 75, at 620 ("Si l'acquiescement est l'équivalent d'un consentement ou d'un acceptation, il est essentiel que l'Etat ait connaissance des prétentions de l'autre Etat.").

[155] *See supra* note 90.

[156] *See* Crawford, *supra* note 11, at 406.

state, as a response to its obligation to react, represents the third essential requirement of acquiescence, the notoriety and the duration of the toleration are not separate conditions. The latter are only criteria[157] that can be used for ascertaining, on the one hand, the knowledge of the facts by the acquiescing state, and, on the other hand, the existence of a consistent toleration, as a manifestation of will. Having said that, these criteria play a crucial role in establishing the existence of acquiescence, as shown by the ICJ. Thus, in the *Fisheries* case, the court rejected Great Britain's claim that it had not known about Norway's internal acts, considering that, in light of the circumstances, this was a notorious fact[158] and, given its failure to protest, decided as follow: "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."[159]

As regards the duration of the toleration, two cases of the ICJ are worth mentioning: *Gulf of Maine* and the *Arbitral Award of the King of Spain*. In *Gulf of Maine*, Canada's contention of United States' acquiescence was based on the following facts: Canada issued permits for the exploitation of hydrocarbons in the area in dispute, a fact that was made known to the United States, as acknowledged by the Hoffman letter;[160] and this was then discussed using the diplomatic channels.[161] The United States replied only after more than three years, which meant, in Canada's

[157] See A. Marie, *supra* note 133, at 427; *See also* Sinclair, *supra* note 75, at 110 (who refers to the duration of the silence only as an important factor to be considered in the analysis of acquiescence).

[158] *See Fisheries* case, *supra* note 150, at 139 ("As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system.").

[159] *Id.*

[160] *See supra* note 90.

[161] *See Gulf of Maine*, *supra* note 74, at 305-307.

opinion, that it has acquiesced to its pretentions. The court did not accept Canada's arguments, holding that Hoffman, a mid-level official, could not bind the state internationally, as discussed above, but also that:

> While it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration on Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.[162]

Even if the Court refers to estoppel in the last part of the paragraph, given that it has analyzed together the conditions of both concepts, the paragraph is indicative of the manner in which the duration of the silence is taken into account.

In the Arbitral Award of the King of Spain case,[163] a dispute between Honduras and Nicaragua, the ICJ considered the effects of an arbitral award rendered by the King of Spain in 1906, in a territorial dispute between the parties. Following Nicaragua's contentions that the award was invalid and did not produce any legal effects, Honduras brought a claim against it, with the purpose of obliging it to abide by the award.[164] The court considered that Nicaragua has acquiesced in the validity of the award, given that between 1906 and 1912, not only did Nicaragua not raise any objections to the award, but there were also affirmative acts recognizing the validity of the award.[165] Therefore, the Court concluded that:

> Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the

[162] *Id.* at 308.

[163] Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18).

[164] For a detailed discussion of the case, *see* Lim, *supra* note 41, at 643-44.

[165] *See Arbitral Award of the King of* Spain, *supra* note 163, at 211-12 (the court refers to a note addressed by Nicaragua's foreign minister to Spain's chargé d'affaires in Central America in which he stated Nicaragua's appreciation regarding the award, as well as to an address of the Nicaraguan president to the National Legislative Assembly and to the publication of the award in the Official Gazette of Nicaragua).

> conclusion at which the Court has arrived.[166]

The fact that a period of three years was considered insufficient in *Gulf of Maine*, but a period of six years was deemed sufficient in *Arbitral Award of the King of Spain* should not lead to the conclusion that the sole difference between the cases was the duration. Rather, the cases show that while duration is certainly an important factor, it must be analyzed in light of all the other circumstances. Thus, there is no certainty that the conclusion would have been different in *Gulf of Maine* had the United States' inaction lasted for six years.

Taking into consideration the conditions mentioned above, one is not surprised to notice that the concept might easily be confused with estoppel. However, even though they are similar, acquiescence must be distinguished from estoppel. While acquiescence is a unilateral act, based on a clear manifestation of the state's will, estoppel, as discussed above, applies precisely in the cases where there is no certainty regarding the state's will, the most important element in the analysis of estoppel being the reliance of the addressee.[167] This difference was stated in the following terms by ICJ in *Gulf of Maine*:

> The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.[168]

2. International Investment Arbitration.

Just as estoppel, acquiescence has been applied in international investment arbitration as the investor's defense to the illegality objection raised by the

[166] *Id.* at 213.

[167] *See generally* Das, *supra* note 75, at 625-27; Bowett, *supra* note 74, at 197-201. However, this does not mean that silence cannot be considered for the purposes of estoppel. As discussed above, the conduct giving rise to estoppel might be a passive conduct, but, as opposed to acquiescence, proof of reliance and change in the relative position of the parties is needed.

[168] *Gulf of Maine*, *supra* note 74, at 305.

respondent state;[169] however, as opposed to the case law regarding the operation of estoppel, there are fewer cases that have expressly analyzed the conduct of the host state as acquiescence.[170] Still, similarly to the estoppel cases, tribunals do not usually conduct a step by step analysis by closely considering the fulfilment of all the conditions of acquiescence, but rather use it pragmatically. *Arif v. Moldova* and *David Aven*, two cases in which the investor's defense prevailed, illustrate this practice.

In *Arif*, the tribunal did not expressly refer to acquiescence,[171] but its reasoning indicates that it relied on this concept. The dispute arose from the termination of the agreements concluded by the claimant's local company with the Custom Service of Moldova and the state-owned company operating the Chisinau International Airport for the operation of duty-free stores, following their invalidation in the Moldovan courts. The contracts were concluded in 2008 after the claimant won the tender organized by the Moldovan government, but in 2009 one of the other bidders filed complaints, seeking the cancelation of the tender and the agreements, which were, in the end, invalidated by the Moldovan courts.[172] Taking these decisions into consideration and the "in accordance with the law" clause included in the BIT, the respondent argued that the tribunal lacked jurisdiction. The tribunal rejected respondent's objection, holding that:

> There are temporal limitations on a jurisdictional argument based on the illegality of an investment, where the legality of the investment has been accepted and acted upon in good

[169] *See*, *e.g.*, *David Aven*, *supra* note 4, ¶ 324; *Arif*, *supra* note 14, ¶ 374-76.

[170] *See*, *e.g.*, Mr. Franz Sedelmayer v. the Russian Federation, Ad Hoc Arbitration, Arbitration Award, at 66 (July 7, 1998); Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, ¶ 116 (Dec. 8, 2000) (cases where even though acquiescence was not mentioned expressly, the tribunals seem to apply it); *See also* Salini Impregilo S.p.a. v. the Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, ¶ 91 (Feb. 23, 2018) and UAB E ENERGIJA, *supra* note 102 (where acquiescence was invoked by the host state against the claimant).

[171] Considering that the tribunal did not expressly mention the concept of acquiescence, the award might be also understood as an application of estoppel. *See* Hepburn, *supra* note 12, at 555-57 and Kulick, *supra* note 78 at 121 (analyzing *Arif* as a case of estoppel). However, in the author's opinion, tribunal's references to "acceptance" and the "passage of time" indicate that it rather applied acquiescence.

[172] *See Arif*, *supra* note 14, ¶ 41-124 (for the factual background).

> faith by both parties over a period of time . . . the passage of time and the actions of the parties on the mutual assumption of legality cannot be ignored in the determination of jurisdiction. The 'normative power of facticity' requires illegality in a case like the present one to be treated as an issue of liability and not jurisdiction.[173]

In *David Aven*, the dispute concerned the development of a touristic project in Costa Rica, which was partly based on a concession agreement concluded with a local municipality. The respondent objected to the jurisdiction of the tribunal, based on, inter alia, the breach of the Maritime Terrestrial Law (the "MTZ Law"), pursuant to which the majority of the shares in the companies having such a concession must have been held by Costa Rican nationals, and the failure to pay local taxes.[174] Relying, among other evidence, on the statement of the attorney general of Costa Rica, who was examined by the tribunal, according to which the practice of having Costa Rican nationals holding the majority of the shares on behalf of foreign investors was common and no proceedings were started against such practices, the tribunal concluded that the respondent tacitly accepted the illegality:

> Costa Rica was aware of the situation in La Canícula, and it never challenged the Concession on the ground of Articles 47 and 53 of the MTZ Law. The Tribunal believes that, insofar as the Respondent has knowledge of these structures, and according to the testimony of Dr. Jurado, the Attorney General's office has even discussed the issue with the municipalities which have the authority to issue the MTZ concessions, but the government of Costa Rica has elected to tolerate said structures, and not take any action against any of the existing concessions that may be similar in nature, implies their tacit acceptance . . . [th]e challenge argued by Respondent based on the fact that Claimants had failed to pay municipal taxes for several years should be dismissed because neither the Municipality nor Respondent took any action prior to the filing by Claimants of the Notice of Arbitration to remedy such failure, whether by fining the concession holder or initiating a procedure to revoke the Concession.[175]

It is noticeable that neither of the tribunals mentions the word "acquiescence",

[173] *Id.* ¶ 376.

[174] *See David Aven*, *supra* note 4, ¶ 308-311.

[175] *Id.* ¶ 324-25.

nor do they mention the conditions that need to be fulfilled in order to apply it. Both tribunals seem to assume, however, the existence of a duty to react in such cases and refer to the duration of the silence, seemingly as an indicator of toleration by the host state. In addition, the tribunal in *David Aven* expressly refers to the knowledge of the government, implicitly recognizing that this is a necessary requirement, and expressly uses the term "tacit acceptance". Thus, it is safe to assume that acquiescence was the concept taken into account by the tribunal.

However, were the three conditions discussed above fulfilled? The first condition was fulfilled in both cases, considering that it is reasonable to expect a reaction from a state faced with an illegal conduct on its territory. The contrary conclusion would represent a significant weakening of legal certainty.[176] Therefore, in the particular context envisaged here, namely the acquiescence in case of an illegal conduct, it can be concluded that, generally, the first condition of acquiescence is fulfilled.

As *regards* the second and the third conditions, the answer is not straightforward, considering the difference between investor-state and state-to-state relations. As opposed to the latter, the relations between the host state and the investors are complicated by the myriad of municipal laws and regulations that are at issue in the analysis of illegal conduct. In particular, the analysis of the two conditions must take into account the issue of the authorities that are competent to ascertain the existence of the illegal conduct and the conditions that need to be fulfilled under the municipal law for taking an action against the investor. Thus, in *Arif* it is doubtful that there was an inaction of the host state, while in *David Aven* it seems that the competent authorities were not fully aware of the illegalities. These aspects are discussed in the following sub-sections in order to determine the factors that have to be considered when analyzing the fulfilment of the two conditions in the context of illegal conduct.

(i) Rules of Attribution of Conduct under International Law.

The knowledge of the host state regarding the illegal conduct is often dependent on the *knowledge* of its lower-ranked officials and local authorities, as shown by the

[176] *See supra* note 149.

David Aven case above. As discussed, the knowledge of a lower-ranked official was not deemed sufficient in *Gulf of Maine*. Is the case of investment law different? What rules should guide the tribunals when discussing attribution?

Taking into consideration that this is not a matter related to the breach of the international obligations of the host state, the ILC Articles are not applicable in this case. As emphasized above, the ILC Articles do not have general applicability,[177] and thus cannot be applied to other matters. However, considering that acquiescence is a manifestation of consent, the rule reflected by principle 4 of the ILC Guiding Principles is relevant. Therefore, the analysis conducted above in relation to estoppel applies *mutatis mutandis* with respect to knowledge of the officials, acting within their powers under the municipal law of the host state.

However, there is an important difference in terms of attribution of *ultra vires* acts. As discussed above, the consequence that follows from applying the rule reflected in principle 4 of the ILC Guiding Principles is that the *ultra vires* acts of lower-ranked officials cannot be attributed to the state. This is applicable even when there is a reasonable appearance that other state officials are involved, considering that, as opposed to estoppel, the investor's reliance does not play a role in this case. As a result, the failure of an official lacking the competence to act in a certain situation cannot be attributed to the state for the purposes of applying acquiescence.[178]

As regards the cases discussed above, in *David Aven*, the tribunal referred specifically to the knowledge of the municipal officials,[179] but did not mention the competences of these officers that allowed them to apply the MTZ Law, nor did it refer to the organs which had the authority to sanction the failure to pay the taxes, as it appears that only the municipal authorities knew of these irregularities. Even though they might have had the authority to investigate and apply sanctions for the

[177] *See supra* Part III, sub-section B.2 (ii).

[178] *See supra* note 134.

[179] *See David Aven*, *supra* note 4, ¶ 319 ("Finally, as to control over the Concession Site, Claimants argued that Municipal officials at Parrita were well aware that the U.S. investors exercised control over the Concession at all relevant times.").

breaches, it seems likely that other authorities had these powers as well, given that the MTZ Law was of general applicability. Thus, in such cases, the tribunals should carefully analyze the shared competences of the national authorities, as the knowledge of the authority that has only limited power with respect to the breach (e.g., apply a fine) might not be sufficient for the operation of acquiescence, if other circumstantial factors are not in place.

Notwithstanding the above, the facts that justify the existence of a reasonable appearance of involvement of the officials in cases of estoppel might, in certain cases, indicate the notoriety of the illegal conduct, meaning that the knowledge of the state can be implied from the circumstances. In contrast to estoppel, however, the threshold should be higher, considering that notoriety is difficult to be proven by referring solely to the acts of a particular official. The theory of notoriety might, in fact, explain the decision in *David Aven*, even though the tribunal did not analyze the facts from this perspective. As mentioned above, the tribunal considered that the practice to use a national as a nominee shareholder in order to comply with the national legislation was widespread, meaning that it was known to the government. In other words, it was notorious. This might explain its decision to apply acquiescence, despite the fact that the claimant based its defense mainly on the knowledge of the municipality.

(ii) Toleration of Illegal Conduct.

In the context of illegal conduct, the consistent toleration of the host state is usually manifested through a limited number of inactions: failure to investigate, prosecute, or fine the investor, failure to revoke a certain permit or to annul a certain contract, etc.[180] Undoubtedly, such inactions must be taken into account, but under what circumstances? This is a factual inquiry that is highly dependent on the specific

[180] *See* Lim, *supra* note 41, at 665-66 (discussing the *Wena Hotels* case, the author considers that the host state has the obligation to react where it is aware of corruption); *see also* Nassib Ziade, *Curing the illness without killing the patient: prescribing appropriate remedies for findings of illegality in investment arbitration in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 746, 755 (Andrea Menaker ed. 19 ICCA Congress Series 2017) (ebook) (considering also that in cases of corruption the state has an obligation to react).

circumstances of each case, but certain general distinctions can be made.[181]

First, it is beyond doubt that such a failure amounts to a consistent toleration if the limitation period for undertaking the specific action (i.e., investigation, revocation, etc.), under the relevant statute of limitation, lapses and the host state takes no action during this period. Second, where the host state acts by starting an investigation, but then it closes it, finding that no illegality has been committed by the investor,[182] there should be a strong presumption, absent new circumstances, in favor of the existence of a consistent toleration. Such a presumption could be rebutted if, for example, there is an ongoing appeal against the decision to close the investigation, which is filed by another authority or a third-party, in which case it can be argued that no final decision has been taken. Another situation would be if new elements of fact are uncovered after domestic investigations or legal action were started and closed, without wrongdoing having been found on that basis. Third, there should be also a strong presumption in favor of the toleration where, as in the *David Aven* case discussed above, there is solid evidence that inaction is a common practice and can be considered a state policy, even if none of the circumstances discussed under the first two hypotheses is present. In order to benefit from such a presumption, the investor must demonstrate that the failure is not specific to her particular situation by showing that this practice was present in other cases regarding other investors as well. Of course, this is not required where the investor can demonstrate that there is a specially designed state policy that regards only her investment, but this would be quite an extraordinary circumstance.

On the other hand, if none of the circumstances presented above is present, it is much more difficult for an investor to demonstrate that the host state has tacitly

[181] As mentioned above (*see supra* Part II, Section C.1), some of the factors mentioned by the tribunal in *Kim* are related to acquiescence, so that those factors should be taken into account.

[182] The closing of an investigation due to some procedural objections, such as the filing of the complaint by a non-competent person, that do not imply that the investment is legal and do not bar the opening of another investigation, without any other external factors, should not be considered a toleration. For a similar opinion, *see* Lim, *supra* note 41, at 666 (considering that there is no acquiescence where the host state conducts an investigation but closes it due to insufficient evidence).

accepted the illegality. The prolonged inaction is one of the main indicators in such a case and it should also be analyzed by taking into consideration the limitation periods under the statutes of limitation. For instance, if the limitation period under the relevant statutes for a certain criminal offence alleged to have been committed by the investor is 10 years, a toleration of two years beginning from the moment the host state knows of the illegality, might not be sufficient. In such cases, the tribunal should compare the case at hand with other cases in the host state as well. If there is evidence that in similar cases the authorities start investigations only right before the limitation period lapses, due to constrains related to their workload or insufficient funding, for example, then, a longer period is needed in order to find acquiescence.[183] This is not to say, however, that the limitation period included in the municipal law represents more than a simple criterion. If the host state's statutes of limitation provide for unreasonable limitation periods or even for no limitation periods, the tribunal should disregard this criterion and focus on other relevant circumstances, such as the general practice of the state in that particular area.

Regarding the cases discussed above, the consistent toleration is the main issue raised by the application of acquiescence in *Arif*. The competitor of the claimant filed the complaints approximately one year after the tender and the tribunals rendered the first annulment decision within another year.[184] Thus, in order to find a consistent toleration in this case, one should consider either the silence of the authorities during that year or the "silence" of the tribunal after the filing of the complaint as acquiescence. There is no evidence that the authorities were aware of the illegality before the filings,[185] and had they been aware, it would have been reasonable to conclude that the duration was too short to consider it a manifestation of will (given the lack of other relevant factual circumstances). On the other hand, the tribunal rendered a decision within a reasonable time, and thus, its inaction cannot be

[183] For a similar opinion, pursuant to which the resources of the authorities are a factor that should be considered, *see Kim*, *supra* note 5, ¶ 406.

[184] *See Arif*, *supra* note 14, ¶ 59, 68.

[185] Even though the authorities organized the tender that was invalidated, there is no irrefutable presumption that they knew of the illegality starting from that moment.

considered as an acquiescence of the respondent. It is worth noting that acquiescence based on the silence of the tribunals should be very strictly interpreted, by taking into account, on the one hand, the independence of the judiciary system in the host state and, on the other hand, the usual duration of a litigation in the host state.

IV. CONCLUSION

States have a legitimate power to offer legal protection solely to investments that are made in compliance with their own laws. The interest of the host states to protect their legal order is doubled by the interest of the international community which, in certain circumstances, requires the sanctioning of the investors for their illegal conduct even if no such requirement is imposed by the host state. The comparative analysis of these two types of illegal conduct reflects, however, important differences. Firstly, the threshold for finding an illegality based on transnational public policy is much higher. Thus, while a treaty-based legality requirement can be analyzed by using the proportionality test developed in *Kim*, the finding that a conduct is contrary to transnational public policy cannot rest solely on the analysis of the host state's regulations, the tribunal having to consider the illegality from a transnational perspective. Secondly, while a treaty-based legality requirement affects the jurisdiction of the tribunal, a situation of illegality recognized on the basis of transnational public policy renders the claims inadmissible. Thirdly, while the host state can ratify a treaty-based illegal conduct by way of unilateral acts and estoppel, any such ratification of conduct that contravenes the requirements of transnational public policy would have no effect, given the general interests of the international community.

In light of the above, it is proposed here that the ratification of illegal conduct apply conceptually only to treaty-based legality requirements and, if one accepts the existence of the doctrine as a separate principle of international law, to illegalities covered by the *clean hands* doctrine. The first step of any discussion regarding the ratification of illegal conduct is the determination of the illegal conduct. This paper has shown that the commission of the illegality exclusively by the host state does not

render the investment "illegal" for purposes of determining a tribunal's jurisdiction and must be distinguished from the concept of ratification. In addition, this paper has shown that even though the *Kim* test represents an important progress in the analysis of the legality requirement, factors such as the failure of the state to investigate the illegality and the general non-compliance in the host state with the provisions that were breached by the investor should be analyzed as manifestations of the state's will through silence, and not as factors relating to the existence of the illegality. The second step is the identification of the conditions that need to be met for the operation of the ratification. This paper has identified four concepts that can be used for the ratification of an illegal conduct, namely recognition, waiver, acquiescence and estoppel.

While the stringent conditions of an express manifestation of will, and, as a result, the reduced likelihood of their use as defenses by investors, are the reasons for which express recognition and waiver have not been analyzed in this paper, the analysis is different as regards estoppel and acquiescence: this paper has shown that a rigorous analysis of all the conditions of these concepts, as developed in public international law, is required before applying them to the facts of each case. One of the most problematic conditions of both estoppel and acquiescence in international investment law is the attribution of specific conduct to the respondent state. This paper has shown that the ILC Articles do not apply in this situation, and that a case-by-case analysis is required. While in the case of estoppel the *ultra vires* acts of the host state's officials can be considered, in the case of acquiescence, which is a manifestation of state's consent, such acts cannot be attributed to the state. However, these acts might, in certain circumstances, be construed as evidencing a notoriety of the illegal conduct and, thus, the constructive acknowledgement of the state.

The author concludes with the belief that these observations could be useful in the development by the tribunals of a framework capable of allowing them to strike a right balance between the need to protect investments and the need to protect the rule of law in the host state and the transnational public policy.

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