Doctoral Thesis Proposal for the 380034 SE Seminar in International Law (2020S)

Working Title:

The Illegality Objection in International Investment Arbitration: a Proportionality-based Approach to Determining the Legality of Investments

by Frederik Due Rabenschlag
(LL.B., LL.M. University of Copenhagen)

Supervisor: Univ.-Doz. Mag. Dr. Claudia Annacker

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1. Introduction

A foreign investor who wants to successfully bring a claim before an international arbitral tribunal to protect his investment from wrongful acts of the host State, must satisfy a number of procedural and substantive requirements for the tribunal to deem his investment worthy of investment protection. One such requirement is to have made an investment that is considered lawful. Some bilateral investment treaties (BITs) and other international investment agreements (IIAs) contain express legality requirements, so-called "in accordance with host State laws"-clauses, which serve the purpose of excluding illegal investments from the scope of application.[1] As the context and wording of legality requirements may vary considerably, it is necessary to determine the scope of the specific clause on a case-by-case basis. However, the general rationale of such clauses is that the access to investment protection and investor-state dispute settlement (ISDS) is reserved to investments that are made in compliance with the laws of the host State.[2] Even in the absence of an express legality requirement, the lawful character of investments remains a relevant factor as tribunals have found that there exists an implied legality requirement which has to be met in order for investments to enjoy treaty protection.[3]

The jurisprudence of investment tribunals illustrates that decisions and awards have played a dominant role in assessing the lawful character of investments. Indeed, observers have found that tribunals have displayed a tendency to rely on former decisions and awards to the detriment of the applicable treaty text as host States have developed a trend of objecting to the jurisdiction of the tribunal

[1] One of the early awards to address the legal nature of explicit legality requirements is *Salini v. Morocco* (ICSID Case No. ARB/00/4) Decision on Jurisdiction. The tribunal found that "this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Investment Treaty from protecting investments that should not be protected, particularly because they would be illegal.", see para. 46.
[2] See August Reinisch, *How to Distinguish 'In Accordance with Host State Law' Clauses from Similar International Investments Agreement Provisions?,* Indian Journal of Arbitration Law (2018, Volume VII Issue 1) p. 1, and Jarrod Hepburn, *In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration*, Journal of International Dispute Settlement (2014) p. 551.
[3] Ibid. See for instance *Phoenix Action v. Czechia* (ICSID Case No. ARB/06/5) paras. 101-104 and *Plama Consortium Ltd. V. Bulgaria* (ICSID Case No. ARB/03/24) paras. 138-139.

and the admissibility of the investor's claim on grounds that the investment was made in violation of their laws.[4] This 'defense strategy' has become known as the "illegality objection". With the proliferation of the illegality objection in investment arbitration, a number of related substantive and procedural legal issues have arisen and the amount of publications that address these issues speak to the relevance thereof.[5]

The purpose of this thesis proposal is to explore, classify, and to some extent critique recent developments of the law and practice of illegality objections in international investment arbitration. Specifically, with reference to principal research

[4] R Moloo and A Khachaturian, *The Compliance with the Law Requirement in International Investment Law* (Fordham International Law Journal, Vol. 34, Issues 6, 2011) 1489, A Reinisch (n 2) 5 and J Hepburn (n 2) 534-535.

[5] See J Kalicki, D Evseev and M Silberman, "Legality of Investment" in M Kinnear and others, *Building International Investments Law: The First 50 Years of ICSID* (Wolters Kluwer 2015), K Diel-Gligor and R Hennecke, "Investment in Accordance with the law" in A Reinisch and others, *International Investment Law: A Handbook* (C.H. Beck 2015), R Lorz and M Busch, "Investments in Accordance with the law – Specifically Corruption" in A Reinisch and others, *International Investment Law: A Handbook* (C. H. Beck 2015), S Schill, "Illegal Investments in Investment Treaty Arbitration" in *The Law and Practice of International Courts and Tribunals 11* (Brill 2012), U Kriebaum, "Illegal Investments" in *Austrian Yearbook on International Arbitration* (Manzche Verlags- und Universitätsbuchhandlung 2010), G Bottini, "Legality of Investments under ICSID Jurisprudence" in M Waibel and others, *The Backlash against Investment Arbitration* (Wolters Kluwer 2010), S Dajic, *Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantial and Procedural Value* (Novi Sad 2012), S Mbiyavanga *Improving domestic governance through international investment law: Should bilateral investment treaties learn from international anti-corruption conventions?* (2017 OECD Global Anti-Corruption & Integrity Forum), Z Douglas, *The Plea of Illegality in Investment Treaty Arbitration* (ICSID Review, Vol. 29, No. 1, 2014), A Llamzon, *Corruption in Investment Arbitration* (Oxford University Press 2014), C Miles, *Corruption, Jurisdiction and Admissibility in International Investment Claims* (Journal of International Dispute Settlement, 2012), R Moloo and A Khachaturian, *The Compliance with the Law Requirement in International Investment Law* (Fordham International Law Journal, Vol. 34, Issues 6, 2011), A Llamzon, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as both Omega and Alpha*, ICSID Review, Vol. 30, No. 2 (2015), A Llamzon and A Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation, and Other Investor Misconduct" in A Van den Berg, *Legitimacy: Myths, Realities, Challenges,* ICCA Congress Series, Volume 18 (Kluwer Law International; ICCA & Kluwer Law International 2015), S Luttrell, *Fall of the Phoenix: A New Approach to Illegality Objections in Investment Treaty Arbitration*, The University of Western Australia Law Review, Volume 44(2) (2019), A. Reinisch, *How to Distinguish 'In Accordance with Host State Law' Clauses from Similar International Investments Agreement Provisions?,* Indian Journal of Arbitration Law (2018, Volume VII Issue 1), J Hepburn, *In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration*, Journal of International Dispute Settlement (2014), M Gawhary, "Reflections on Recent ICSID Arbitral Awards in Which the "Illegality of the Investment" Defense Was Raised by the Host State", in Nassib Ziadé (ed), *Festschrift Ahmed Sadek El-Kosheri,* (Kluwer Law International 2015), T Obersteiner, "*In Accordance With Domestic Law" Clauses: How International Investments Tribunals Deal with Allegations of Unlawful Conduct of Investors*, Journal of International Arbitration (Kluwer Law International 2014, Volume 31 Issue 2), and C Lopez and L Martinez, *Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration* (The Investment Treaty Arbitration Review, Edition 4, 2019).

question 1) below, the thesis proposal focuses on how the concept of proportionality in light of recent jurisprudence has been used by tribunals to assess the legality of investments. Moreover, with reference to principal research question 2) below, the thesis proposal focuses on evidentiary rules, the burden and standard of proof, in relation to the adjudication of illegality objections.

As corruption in investment arbitration has received fairly significant academic attention recently,[6] this thesis proposal focuses on issues related to fraudulent behavior of investors and regulatory noncompliance of investments. Fraudulent behavior is understood in broad terms as behavior that contradicts the principle of good faith.[7] Regulatory noncompliance of investments is understood as investments which are found to be in breach of the host State's laws although made in good faith by the investor. The terms 'legality' and 'lawfulness' are used interchangeably. When referring to 'illegality objection', a reference is made without distinction between the express and implied legality requirement.

The thesis proposal's research questions and applicable methodology are presented in Section 2, followed by a description of the current state of scientific research in Section 3. Finally, an outline of the thesis' preliminary content is provided in Section 4, followed by a list of literature, list of databases, and table of investment arbitrations.

2. Research Questions and Applicable Methodology

The principal research questions are stated below under 1) - 2), the sub questions are indicated with letters a) - f). Additionally, the research questions are reflected in the outline of the thesis proposal's preliminary content in Section 4.

[6] See for instance A Llamzon, *Corruption in Investment Arbitration* (Oxford University Press 2014).
[7] Black's Law Dictionary refers to bad faith as "the opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." See https://thelawdictionary.org/bad-faith/

1) How do investment tribunals approach illegality objections concerning fraudulent behavior and regulatory noncompliance and determine the lawfulness of investments?

    a) Which factors with respect to investors' violations of host States' laws are relevant for determining the lawfulness of investments?

    b) To which extent is the concept of proportionality used to decide whether an investment is illegal?

    c) How are domestic law and international law applied to determine the lawfulness of investments?

    d) To which extent do illegality objections concern the jurisdiction of tribunals, the admissibility of claims, and the merits of cases?

    e) Under which circumstances should illegality objections be subject to bifurcation?

    f) How do tribunals order parties to pay costs in relation to illegality objections?

2) What is the applicable burden and standard of proof when adjudicating illegality objections?

    a) How do tribunals approach and assess evidence when adjudicating illegality objections?

To provide answers to the research questions, the thesis will contain a qualitative and quantitative analysis of relevant sources addressing illegality objections, in particular IIAs, foreign investment laws, arbitral decisions and awards, scholarly writings, and policy briefs.[8] As the central part of the thesis proposal concerns the

[8] Please refer to the lists of literature, databases, and the table of investment arbitrations below.

practice of investment tribunals, the main part of the applied methodology will consist of an analysis of arbitral awards and other documents such as procedural orders related to arbitral proceedings.

3. The Current State of Scientific Research

Concerning principal research question 1: How do investment tribunals approach illegality objections concerning fraudulent behavior and regulatory noncompliance and determine the lawfulness of investments?

Arbitral practice from the first decade and the beginning of the second decade of the twenty-first century concerning allegations of investor misconduct has been at the centre of academic attention[9] from which a rough consensus with regard to some of the aspects of the legal nature and scope of legality requirements can be traced. These observations are described in the following before turning to the latest developments in arbitral practice and the relevance of this thesis proposal.

The first observation concerns the role of arbitrators as it has been found that they to some extent have a duty to address and even "seek out" evidence *proprio motu* when faced with allegations of serious investor misconduct, such as corruption and fraud.[10] As this observation also concerns the evidence of illegality objections, it is also of relevance to the second principal research question addressed below.

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[9] Some of the frequent cases examined in scholarly writings include *Inceysa Vallisoletana v. El Salvador* (ICSID Case No. ARB/03/26), *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18) Decision on Jurisdiction, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17), *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), *World Duty Free Company Limited v. The Republic of Kenya* (ICSID Case No. ARB/00/7), *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), *Alasdair Ross Anderson v. Costa Rica* (ICSID Case No. ARB(AF)/07/3), *Saba Fakes v. Turkey* (ICSID Case No. ARB/07/20) *International Thunderbird Gaming Corporation v. Mexico* (Award, 26 January 2006), *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18) Decision on Jurisdiction and *Metal-Tech v. Uzbekistan* (ICSID Case No. ARB/10/3).

[10] A Llamzon and A Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation, and Other Investor Misconduct" in A Van den Berg, *Legitimacy: Myths, Realities, Challenges,* ICCA Congress Series, Volume 18 (Kluwer Law International; ICCA & Kluwer Law International 2015) 10.

The second observation concerns the law applicable to illegality objections. It is necessary to differentiate between IIAs with express legality requirements and IIAs without such clauses as this determines the "starting point" of the tribunal's legal analysis with respect to the application of domestic and international law. Subject to the specific treaty wording, express legality requirements contain a *renvoi* to the host State's domestic law, whereas the point of reference of IIAs without such clauses is international law.[11] In case of a clash between the host State's law and international law, the latter should prevail.[12] In addition, tribunals have referred to international public policy when assessing the lawfulness of investments.[13] General principles of law that are frequently addressed by tribunals include *nemo auditor propriam turpitudinem allegans* (i.e. nobody can benefit from his own wrong), the international principle of good faith, and the unclean hands doctrine.[14] It is, however, debatable whether the latter is recognized as a general principle of law in accordance with Art. 38(1)(c) of the Statue of the International Court of Justice (ICJ).[15]

The distinction between IIAs with and without express legality requirements is also relevant to the third observation which concerns whether illegality objections should affect the jurisdiction of the tribunal, the admissibility of the claim, or the merits of the case. Generally, express legality requirements are considered to limit the host State's consent to arbitrate and thereby the jurisdiction *ratione materiae* of arbitral tribunals to investments that are considered legal.[16] By contrast, if the applicable IIA does not contain an express legality requirement, the illegality objection would concern the admissibility of the claim and possibly the merits of the case depending on the seriousness of the investor's misconduct.[17] However, there are diverging views on this issue as some tribunals have found that there exists an implied *jurisdictional* legality requirement which operates in the absence of an

[11] K Diel-Gligor and R Hennecke (n 5) 572, S Schill (n 5) 310 and U Kriebaum (n 5) 308-309.
[12] K Diel-Gligor and R Hennecke (n 5) 572.
[13] See for instance K Diel-Gligor and R Hennecke (n 5) 572 and J Hepburn (n 2) 533.
[14] Z Douglas (n 5) 169, R Moloo and A Khachaturian (n 4) 1485-1486 and A Llamzon and A Sinclair (n 10) 15-22.
[15] A Llamzon, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as both Omega and Alpha*, ICSID Review, Vol. 30, No. 2 (2015).
[16] K Diel-Gligor and R Hennecke (n 5) 570, U Kriebaum (n 5) 308-309, S Schill (n 5) 310, A Llamzon and A Sinclair (n 10) 451-530.
[17] Ibid.

express legality requirement.[18] Furthermore, the timing of the alleged illegality bears significance in this respect. If the illegality took place at the time of establishment of the investment, the issue is likely to concern the jurisdiction of the tribunal which is due to the wording of express legality requirements as such clauses often refer to "investments *made* in accordance with host State law" thereby limiting the jurisdictional requirement to the making of the investment.[19] If, on the other hand, the illegality occurred at a later time during the operation of the investment, the issue is likely to concern the merits stage of the case and possibly the admissibility of the claim.[20]

The fourth observation concerns the method of tribunals to assess the lawfulness of investments. As IIAs provide no nuanced guidance on resolving illegality objections, tribunals have turned to a method based on various criteria when assessing the legality of investments and whether or not they qualify for treaty protection. Thus, the "seriousness" of the investor's wrongdoing is determined based on a differentiation between breaches of minor and fundamental laws of the host State, also referred to as the 'serious violation' test.[21] In this regard, tribunals have found that there exists a *de minimis* rule that encompasses minor breaches, while "breaches of fundamental legal principles of the host country"[22] should lead to a loss of treaty protection.[23] This distinction frequently relates to investments which host States plead to be *per se* illegal pursuant to express legality requirements and thereby often concern questions of regulatory compliance.[24] Another criterion applied by tribunals is the good faith of the investor when the investment was made, which also frequently concerns investments that are *per se* legal but obtained by illegal means such as fraud, forgery, misrepresentation, and corruption.[25] In these cases, where the investor is found to have known about the illegality, the investment in

[18] See for instance K Diel-Gligor and R Hennecke (n 5) 570, U Kriebaum (n 5) 321, R Moloo and A Khachaturian (n 4) 1494. See also *Phoenix Action v. the Czech Republic* (n 9) paras. 101-104 and *Hamester v. Republic of Ghana* (n 9) para. 124.
[19] U Kriebaum (n 5) 329 and Z Douglas (n 5) 175.
[20] Ibid.
[21] J Hepburn (n 2) 533, S Luttrell (n 5) 136.
[22] *Rumeli Telekom v. Kazakhstan* (ICSID Case No. ARB/05/16) para. 319.
[23] J Hepburn (n 2) 545 and K Diel-Gligor and R Hennecke (n 5) 573.
[24] S Schill (n 5) 291.
[25] Ibid., at 299.

question should be considered illegal and excluded from treaty protection.[26] By contrast, “mistakes” and minor errors made by investors in good faith do not necessarily render the investment illegal as tribunals have found that investors should be granted some “leniency” under the good faith standard.[27] Investors are, however, required to exercise due diligence, including when investing through third parties.[28] Moreover, it is understood that the illegality’s link to the profitability of the investment serves as a criterion when tribunals assess whether the investment in its entirety should be deemed unlawful.[29] Hence, if the illegality is to be considered central to the investment’s profitability, the investment as such is more likely to be considered illegal.[30] Furthermore, tribunals take the behaviour of host States into account when determining the lawfulness of investments. If, for instance, the host State was aware of the illegality of the investment and nevertheless tolerated the investment, tribunals are likely to preclude host States from raising the illegality by virtue of the principle of estoppel or find that the host State waived the legality requirement.[31]

Lastly, academia highlights that the approach of tribunals in terms of defining the lawfulness of investments does not provide a comprehensive catalogue of criteria for determining a breach of host State or international law.[32] It is not clear what constitutes minor and fundamental violations of host State law or how violations in the middle of the spectrum should be dealt with.[33] Indeed, the adjudication of illegality objections is generally referred to as unclear and more precision from investment tribunals is called for,[34] albeit observers disagree on in whose favour - host State or foreign investor - the subject-matter delineation of illegal investments should be made.[35] Moreover, as indicated above, tribunals have been criticized for

[26] Ibid. and U Kriebaum (n 5) 324.
[27] R Moloo and A Khachaturian (n 4) 1496, K Diel-Gligor and R Hennecke (n 5) 573. See also *Fraport v. Republic of the Philippines* (n 9) para. 396 and *Desert Line v. The Republic of Yemen* (n 9) para. 117.
[28] K Diel-Gligor and R Hennecke (n 5) 574. See *Alasdair Ross Anderson v. Costa Rica* (n 9) para. 58.
[29] U Kriebaum (n 5) 323. See also *Fraport v. Republic of the Philippines* (n 9) para. 396.
[30] Ibid.
[31] U Kriebaum (n 5) 335, K Diel-Gligor and R Hennecke (n 5) 574 and J Hepburn (n 2) 549.
[32] K Diel-Gligor and R Hennecke (n 5) 572 and U Kriebaum (n 5) 319.
[33] U Kriebaum (n 5) 319 and J Hepburn (n 2) 545.
[34] K Diel-Gligor and R Hennecke (n 5) 576, A Llamzon and A Sinclair (n 10) 7, J Hepburn (n 2) 533, T Obersteiner (n 5) 10.
[35] See for instance J Hepburn (n 2), who favors a narrow jurisdictional interpretation to the advantage of host States, whereas Z Douglas (n 5) calls for a broader jurisdictional interpretation.

relying too heavily on previous investment treaty decisions and awards (in a legal system where there is no formal doctrine of precedent) instead of paying attention to the applicable treaty text which leads to implications of both procedural and substantive nature.[36]

A remarkable attempt to create more clarity vis-a-vis illegality objections was delivered in 2017 by the Tribunal in *Kim v. Uzbekistan*,[37] which has received little attention in academia to date.[38] In that case, the host State objected to the jurisdiction *ratione materiae* of the Tribunal on the ground that the investor's investment in two cement companies violated the express legality requirement in the applicable BIT. Uzbekistan asserted that the investment was made contrary to a number of its domestic laws and that the investment was procured by means of fraud and corruption.[39] In its analysis of the substantive scope of the legality requirement, the Tribunal stated the following:

> "The legality requirement reflects a condition of great importance to the Host State, the international community and to investors contemplating a major undertaking. Numerous tribunals have addressed the legality requirement present in other BITs and forged, if not a test of the substantive scope of the legality requirement, a series of statements that have come to be employed by ICSID tribunals. The dominant tendency within these awards is (1) to state that the substantive scope of the legality requirement is limited to violations of fundamental laws of the Host State and (2) to state a variety of rule-like statements whereby the first proposition may be applied.
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> The Tribunal does not find the analysis thus far satisfactory. The rule-like statements in other awards are in several instances constructed without reference either to the text of the treaty in question or to underlying principles. A characteristic of rules is that they may include more situations than appropriate (over-inclusive) and simultaneously not include situations that should be captured (under-inclusive). Previous tribunals through rule-like statements, as a practical matter, have approximated what this Tribunal regards as the core of those acts that trigger a

[36] A. Reinisch (n 2) 5, J Hepburn (n 2) 534-535, Z Douglas (n 5) 172 and S Luttrell (n 5) 125.
[37] *Vladislav Kim & Others v. the Republic of Uzbekistan* (ICSID Case No. ARB/13/6) Decision on Jurisdiction.
[38] The only publication found to address the approach of the *Kim* Tribunal is S Luttrell (n 5). The author describes approach as being "a major contribution to the jurisprudence in this field" p. 140.
[39] *Kim v. Uzbekistan* (n 36) para. 358.

> legality requirement, but the lack of underlying principles makes problematic a nuanced articulation of the boundaries of that core. Although all proceedings are contested, unmoored rule-like statements have accentuated the contestation in this proceeding. Moreover, such rule-like statements are not necessarily phrased in ways that can be applied easily to other Host State laws, or adapted to the variety of legal systems encountered by ICSID tribunals."[40]

Furthermore, the Tribunal emphasised the importance of interpreting the applicable BIT's relevant provisions, including the preamble in accordance with the rules of treaty interpretation by virtue of Art. 31 of the Vienna Convention on the Law on Treaties (VCLT).[41] It then found that:

> "In the Tribunal's view, a more principled approach is to be guided in the interpretive task by the principle of proportionality. The Tribunal must 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. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by *noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State*."[42]

The Tribunal explained that this approach would enable it "to focus more sharply on the substantive scope of the legality requirement not on whether the law is fundamental but rather on the significance of the violation."[43] To carry out the analysis, it adopted a proportionality-test based on three steps:

1. "First the Tribunal must assess the significance of the obligation with which the investor is alleged to not comply."[44]

[40] Ibid., paras. 384-385.
[41] Ibid., para. 386.
[42] Ibid., para. 396.
[43] Ibid., para. 398.
[44] Ibid., para. 406. The Tribunal identified a non-exhaustive list of relevant considerations which can be summarized as follows: 1) "What does the level of sanction provided in the law suggest as to the significance of the obligation to the State?" 2) "What does a general non-enforcement on an obligation by the Host State suggest as to the significance of that obligation." 3) "What does the specific decision of the Host State not to investigate or prosecute the particular act of noncompliance suggest as to the significance to the State of the obligation in the specific context?" and 4) "What does evidence of widespread noncompliance suggest as to the significance of the obligation to the State?"

2. "Second, the Tribunal must assess the seriousness of the investor's conduct."[45]

3. "Third, the Tribunal must evaluate 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 proportionate consequence for the violation examined."[46]

Accordingly, the *Kim* Tribunal delivered an analytical structure based on objective criteria to assess illegality objections on a case-by-case basis. The approach entails a comprehensive method to determining the scope of express legality requirements but may also be applied *mutatis mutandis* to cases without express legality requirements when assessing the lawfulness of investments. As the approach fosters a treaty specific interpretation, it also bears significance to the debate whether legality requirements concern jurisdiction or merits.

The Tribunal in *Kim* is not the only tribunal that has applied the concept of proportionality when assessing the scope of legality requirements. In fact, the *Kim* Tribunal referred to *Metalpar v. Argentina*[47] which serves as a relatively early example from investment treaty jurisprudence.[48] Moreover, a proportionality-based approach for assessing illegality objections was endorsed by tribunals after the *Kim* case. Thus, in *Cortec Mining v. Kenya,* the Tribunal expressly endorsed and applied the *Kim* test to the host State's illegality objection, which concerned a mining license that the host State claimed was procured by fraud, corruption, and in violation of its domestic laws.[49] Furthermore, in *Anglo-Adriatic Group v. Albania*, the Tribunal referred to the "proportionality as between the breach and the sanction of depriving an investor from international protection" when assessing the illegality objection,

[45] Ibid., para. 407. The Tribunal identified a non-exhaustive list of relevant considerations which can be summarized as follows: 1) "Does the investor's conduct violate the obligation as alleged?" 2) "What does the investor's intent suggest as to the seriousness of the investor's conduct?" 3) "What does an unclear, evolving or incoherent law suggest as to the seriousness of an act of noncompliance?" 4) "What does the exercise of due diligence by an investor suggest as to the seriousness of an act of noncompliance?" 5) "What does a failure of the State to investigate or prosecute the alleged particular act of noncompliance suggest as to the seriousness of the investor's conduct?" and 6) "What does the subsequent conduct of the investor suggest as to the seriousness of the alleged act of noncompliance?"
[46] Ibid., para. 408.
[47] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No. ARB/03/5) Decision on Jurisdiction.
[48] *Kim v. Uzbekistan* (n 36) para. 397.
[49] *Cortec Mining Kenya Limited, Cortec (PTY) Limited and Sterling Capital Limited v. the Republic of Kenya* (ICSID Case No. ARB/15/29) paras. 319-369.

which concerned a purchase of shares in an investment fund during the privatization process in Albania.[50] Hence, it appears that a genuine alternative to the 'serious violation' test is emerging in case law. Against this background, the thesis proposal aims at exploring these developments, i.e. how investment tribunals assess the legality of investments by virtue of a principle of proportionality, what this means for the scope of legality requirements, and which effect this has on the balance of interests between host States and foreign investors.

Concerning principal research question 2: What is the applicable burden and standard of proof when adjudicating illegality objections?

In order to explore how investment tribunals determine the illegality of investments, it is beneficial to establish which party bears the burden of proof and what the applicable standard of proof is. Neither the ICSID Convention nor the ICSID Arbitration Rules contain any clear guidance in this respect. Instead, Rule 34(1) of the ICSID Arbitration Rules states that the tribunal "shall be the judge of the admissibility of any evidence adduced and of its probative value". The distinction between the burden and standard of proof was described by the Tribunal in *Rompetrol v. Romania*:

> "the distinction between the two can be stated quite simply: the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof if absolute, whereas the standard of proof is relative."[51]

It is notable that a relatively small amount of the publications that deal with alleged investor misconduct concerning fraud and regulatory noncompliance in investment arbitration address these evidentiary issues.[52] As illustrated in the

[50] *Anglo-Adriatic Group v. Albania* (ICSID Case No. ARB/17/6) para. 288.
[51] *Rompetrol Group v. Romania* (ICSID Case No. ARB/06/3) para. 178.
[52] The only publications of the ones in note 5 above that address these issues are A Llamzon and A Sinclair (n 10), T Obersteiner (n 5), S Luttrell (n 5) and C Lopez and L Martinez (n 5).

following, there are different views in academia and arbitral practice concerning both the applicable burden and standard of proof.

Generally, each party bears the burden of proving the facts on which it relies. This general principle is reflected in Art. 27 of the UNCITRAL Arbitration Rules and in the maxim of *actori incumbit probatio,* '*who asserts must prove*'. Thus, the burden of proof would fall on the host State as the party that advances the illegality objection. One author has noted that case law is clear in this respect.[53] Others have concluded that although this is the prevailing principle, the burden of proof might shift to the investor if the host State makes a *prima facie* showing of investor misconduct.[54] However, aside from corruption claims, the question has not been subject to further elaboration, i.e. what it would entail for the shift to occur.

Arbitral practice illustrates that investment tribunals have adopted different approaches with respect to the burden of proof when adjudicating illegality objections. As reflected in academia referenced above, tribunals have found that though the burden of proof initially lies on the host State, it might shift to the investor if "sufficient evidence" is supplied.[55] However, a similar approach - referring to a *prima facie* showing of investor misconduct - was rejected by the Tribunal in *Siag v. Egypt*, which stated that the approach could lead to a violation of due process as "negative evidence is very often more difficult to assert than positive evidence."[56] Furthermore, it has been found that the burden of proof lies on the investor in terms of proving that he has made a covered investment thereby integrating the *in casu* jurisdictional legality requirement into the Salini test.[57] Other tribunals have rejected this approach as "unreasonable" since it would require the investor to prove a negative.[58] In *Quiborax v. Bolivia*, the Tribunal found that the burden of proof was on the host State.[59] Then, however, despite having rejected to integrate the legality requirement into the Salini test as asserted by the host State, it chose in its analysis

[53] T Obersteiner (n 5) 7.
[54] A Llamzon and A Sinclair (n 10) 11, S Luttrell (n 5) 130 and C Lopez and L Martinez (n 5) 13.
[55] *Gavrilovic v. Croatia* (ICSID Case No. ARB/12/39) para. 231.
[56] *Siag & Vecchi v. Egypt* (ICSID Case No. ARB/05/15) para. 317.
[57] *Phoenix Action v. the Czech Republic* (n 9) paras. 114.
[58] See for instance *Gavrilovic v. Croatia* (n 54) 231.
[59] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. the Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) para. 259.

to join the burden of proof with regard to the illegality objection with the burden of proof with regard to the Salini test.[60] This approach too reflects a deviation from the conventional two-step approach of applying the maxim *actori incumbit probatio* sequentially when assessing illegality objections with respect to the tribunal's jurisdiction *ratione materiae*.

When it comes to the standard of proof and the question of which threshold of evidence suffices to establish that an investment should be considered unlawful, academia and arbitral practice also represent different views and do not offer many concrete answers. There seems to be, however, a general consensus that the most commonly applied standard of proof is the *balance of probabilities* standard, which applies in civil cases in common law jurisdictions.[61] Some authors consider that case law illustrates that the more serious the alleged investor misconduct is, the higher the standard of proof needs to be.[62] Pursuant to this approach, illegality of a particular serious nature, e.g. fraud and corruption, requires a higher quality of evidence from the party that alleges such conduct, sometimes referred to by tribunals as *clear and convincing evidence*.[63] Others have concluded that the matter is unsettled as some tribunals have adopted a more flexible standard of proof that "takes into account the difficulty of obtaining evidence of fraud, corruption and other improper conduct."[64] One commentator has explained that arbitral tribunals in general seem to be "moving away from the uniformity and rigidity of high standards of proof, with tribunals refusing to be pinned down *a priori* either by the particular standards or by formal rules on burden-shifting or presumptions".[65] It appears that the underlying questions with respect to the type, amount, and quality of evidence necessary to establish fraudulent behaviour and regulatory noncompliance in investment arbitration remain largely unanswered.

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[60] Ibid., para. 192.
[61] A Llamzon and A Sinclair (n 10) 1, S Luttrell (n 5) 130, T Obersteiner (n 5) 8.
[62] T Obersteiner (n 5) 8 and S Luttrell (n 5) 130.
[63] See *EDF v. Romania* (ICSID Case No. ARB/05/13) para. 221 and *Siag & Vecchi v. Egypt* (n 55) paras. 325-326.
[64] C Lopez and L Martinez (n 5). 13.
[65] A Llamzon and A Sinclair (n 10) 15. The authors refer to a publication on a number of commercial arbitrations dealing with corruption allegations, the Iran-US Claims Tribunal as well as the following investment arbitrations cases: *Libananco Holding v. Turkey* (ICSID Case No. ARB/06/8), *Rompetrol Group v. Romania* (n 50), and *AAPL v. Sri Lanka* (ICSID Case No. ARB/87/3).

This thesis proposal aims at exploring these evidentiary rules, particularly by analyzing arbitral awards and decisions addressing these issues and the evidence submitted in the cases.

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    b. Standard of Proof

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