

BEAR CREEK V. PERU AND THE LEGALITY OF THE INVESTMENT AS AN (IMPLIED) REQUIREMENT FOR INVESTMENT ARBITRATION TRIBUNALS' EXERCISE OF JURISDICTION

BEAR CREEK CONTRA PERÚ Y LA LEGALIDAD DE LA INVERSIÓN COMO REQUISITO (IMPLÍCITO) PARA EL EJERCICIO DE JURISDICCIÓN POR PARTE DE TRIBUNALES ARBITRALES DE INVERSIÓN

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Las preocupaciones sobre la falta de consistencia de los tribunales arbitrales en la aplicación de criterios de sus laudos están fuertemente presentes en el arbitraje de inversiones. Particularmente, los tribunales pueden tender a hacer uso de un enfoque diverso sobre jurisdicción cuando evalúan el requisito de legalidad que exige que las inversiones sean realizadas en sujeción al derecho del Estado receptor.

En este artículo, el autor busca analizar la decisión emitida en el caso de Bear Creek c. Perú, en el que la compañía minera canadiense demandó al Estado peruano por violar, inter alia, las medidas de protección contra la expropiación contenidas en el Tratado de Libre Comercio entre Canadá y Perú con respecto a sus inversiones en el proyecto minero de Santa Ana. Con este objetivo, en el primer capítulo aborda tres cuestiones principales relativas a la jurisdicción del tribunal, los derechos sobre los que la compañía basó su demanda y el debatible prerrequisito de legalidad o buena fe para el ejercicio de la jurisdicción del tribunal. En el segundo capítulo, evalúa la validez de la interpretación del tribunal con respecto al requisito de legalidad sobre la inversión como un elemento implícito en el tratado para determinar la existencia de jurisdicción por parte del tribunal.

PALABRAS CLAVE: Arbitraje de inversiones; Tratado de Libre Comercio; requisito de legalidad; jurisdicción del tribunal; Estado receptor

Concerns about inconsistency in the application of standards in arbitral awards are strongly present in investment treaty arbitration. In particular, tribunals can regularly exercise a varying scope of jurisdiction when they determine the legality requirement that demands foreign investments to be made in accordance with the law of the host state.

In this paper, the author seeks to analyze the decision rendered by the tribunal in Bear Creek v. Peru, in which the Canadian mining company alleged that the Peruvian State breach, inter alia, expropriation protections under the Canada-Peru Free Trade Agreement in relation to its investment in the silver mining project of Santa Ana. In order to achieve this aim, in the first chapter, he addresses three key issues regarding the tribunal's jurisdiction, the rights on which the company based its claim and the arguably prerequisite of legality or good faith for the tribunal's exercise of jurisdiction. In the second chapter, he analyzes the validity of the tribunal's interpretation on the legality requirement for investment as an implicit element in the relevant treaty to determine the tribunal's jurisdiction.

KEYWORDS: Investment treaty arbitration; Free Trade Agreement; legality requirement; tribunal's jurisdiction; host State

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I. INTRODUCTION

This paper is divided into two chapters. The first chapter is a case note on the key jurisdictional issues related to the legality of the investment and the interpretation principles used to solve these matters derived from the award of ICSID Case No. ARB/14/21 between the claimant, Canadian company Bear Creek Mining Corporation ("BC"), and the respondent, Republic of Peru. Based on said award, the second chapter provides an analysis and discusses the application of an implied legality of the investment requirement in order to determine the tribunal's jurisdiction, especially if that requirement is not expressly included in the relevant treaty.¹

II. CHAPTER I: CASE NOTE

The case under analysis is ICSID Case No. ARB/14/21 between the claimant, BC, and the respondent, Peru. The mining company requested that the tribunal declare that Peru had violated the Free Trade Agreement between Peru and Canada ("CAN FTA"), in force since August 1, 2009, and international law in connection with BC's investment in the Santa Ana Project (the "Project"). The respondent objected to the jurisdiction of the tribunal, claiming the illegality of BC's investment. The tribunal, however, declared it had jurisdiction over the claims.

This chapter analyzes three key legal issues from the Jurisdictional Section of the award rendered on November 30, 2017:² (i) whether an investment conferring jurisdiction on the tribunal existed; (ii) whether BC held the rights on which it based its claim; and (iii) whether legality or good faith was a prerequisite for the tribunal's exercise of jurisdiction.

A. Facts

BC's economic interests in Peru started in 2004 when it became aware of the existence of potential silver ore deposits in Santa Ana, an area located within 50 kilometers of the border between Peru and Bolivia (*Bear Creek v. Peru*, 2007, para. 123).

According to Article 71 of the Peruvian Constitution (1993), foreign nationals such as BC are not

permitted to acquire or possess mines within a distance of 50 kilometers from the borders, precisely where Santa Ana was located, unless they request the Peruvian Government for an express declaration of *public necessity* of the investment in that area, which is determined by the enactment of a Supreme Decree (para. 124).

Within that context, BC spent more than four years (from 2004 to 2008) on the legal path to gain the mining rights of the Project. To this end, the Canadian company made an agreement with its Peruvian employee and legal representative, Ms. Jenny Villavicencio, so that she would (i) fill in mining petitions in her own right as a Peruvian citizen in the Project area (para. 128), (ii) enter into six option contracts³ with BC, giving BC the option to acquire the mining concessions should it obtain the issuance of a Supreme Decree (para. 128), and (iii) register those rights with the authorities under her name, and comply with the preliminary legal procedures related to the Project, including some contact with local communities surrounding the Project, with some technical and economic support from BC (paras. 129-139).

BC then requested and eventually obtained a declaration of *public necessity* by the Peruvian Government (Ms. Villavicencio was identified as BC's representative in the documents) with the enactment of the Supreme Decree 083-2007 (2007), which authorized the mining company to acquire, own and operate the corresponding mining concessions and to exercise any rights derived from the ownership (paras 140 and 149). Subsequently, BC executed the option contracts and Ms. Villavicencio transferred all the rights that were initially under her name to BC (para. 150).

Between 2008 and 2011, before BC could begin the exploitation stage of the Project, various social protests, strikes, and massive disturbances took place, calling for the Peruvian Government to cancel the mining concession (paras 155-199). As a result, on June 24, 2011, said Government enacted Supreme Decree 032-2011-EM (2011), revoking Supreme Decree 083 and the Peruvian executive's public necessity findings. By doing so, Peru eliminated the constitutional prerequisite of BC's ownership of the Project (paras. 201-203). Additionally, the Peruvian Ministry of Mines and

¹ It is important to highlight that the legality issue is a complex matter and this paper only analyses one of its various implications regarding jurisdiction. Implications on admissibility or the merits of the dispute are beyond the scope of the proposed analysis.

² The Award has a partial dissenting opinion by arbitrator Philippe Sands on the Merits.

³ Art. 1419, Peruvian Civil Code (Código Civil):

By the option Contract, one of the parties remains obliged by its declaration of executing in the future a definite contract and the other has the exclusive right to execute or not.

Energy initiated civil proceedings to invalidate the legal path that BC took to acquire the mining concessions from Ms. Villavicencio through the execution of the option contracts (paras. 206-216).

B. Procedural Background Related to Jurisdiction

Given that context, on August 11, 2014, BC filed a Request for Arbitration before the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID). The tribunal was presided over by Karl-Heinz Böckstiegel (German), with Michael C. Pryles (Australian), nominated by BC, and Philippe Sands (British, French), nominated by Peru, as co-arbitrators.

The whole arbitration took almost three years, from 2014 to 2017. Since no bifurcation was requested by the parties, the tribunal decided the dispute in a single final Award.

C. The Three Jurisdictional Issues, Parties' Positions, and the Tribunal's Decisions

1. Whether an Investment Conferring Jurisdiction on the Tribunal Existed

a. *Peru's Position*

Peru argued that BC's investment rights were obtained in violation of Article 71 of the Peruvian Constitution. Therefore, as it occurs whenever there is a violation of this kind, the rights must revert to the State. Even though the civil proceedings initiated against BC's legal path to obtain the rights were still pending, Peru stated that the tribunal should not wait for the judicial decision on those and should determine for itself that BC's acquisition of the Santa Ana Project violated Peruvian Law (paras. 275-276).

Peru alleged that this violation of the Constitution, coupled with the awareness that the Santa Ana Project would not improve public welfare, served as the basis to enact Supreme Decree 032, repealing the previous public necessity declaration. Consequently, there was no investment under which BC could present a treaty claim and, thus, the tribunal had no jurisdiction over the matter (paras. 275-276).

b. *BC's Position*

BC argued that the CAN FTA and the Article 25 of the ICSID Convention (1966), constituted *lex specialis*, which had to be taken into consideration to establish whether BC's had a protected investment. According to the Canadian company, the il-

legality finding under Peruvian Law requested by Peru had to be dismissed. Moreover, the judicial decisions, which were still pending, were not binding for the tribunal (paras. 277-281).

Even if the legality issue was at stake, Peru had failed to satisfy its burden of proof concerning said illegality and, therefore, BC had lawfully obtained its rights following the government authorizations with the subsequent execution of its option rights under the option contracts. Indeed, neither the CAN FTA nor the ICSID Convention established an express legality requirement, so the tribunal was not empowered to import such a requirement to evaluate its jurisdiction (paras. 277-281).

c. *The Tribunal's Decision*

The tribunal established that, by enacting Supreme Decree 083 in 2007, Peru expressly undertook a declaration of public necessity authorizing BC "to acquire and possess concessions and rights over mines and supplementary resources, to acquire mining rights, and to engage in mining activities", and also stated that, as was undisputed between the parties, BC spent approximately USD 18 million after the governmental authorization was issued (paras 283-284).

Consequently, said declaration and costs incurred had to be interpreted in accordance with and in the sense that it fulfilled the definition of the term "investment" of "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under [...] concessions" under Article 847 of CAN FTA (para. 285).

1. Whether BC Held the Rights on Which It Based its Claim

a. *Peru's Position*

Peru argued that BC did not own or control the rights that it invoked as the basis of its claim. According to this position, the company did not obtain any right to operate a mining project or a right to mine. It had never undertaken any mining in the Santa Ana Project. At most, it could be said that BC only had obtained a right to seek a right to pursue a mining project. However, since BC's claim was based upon the ownership of a "right to mine" that it did not have, then the tribunal could not assert jurisdiction (paras. 286-288).

b. *BC's Position*

BC contended that Peru's argument of the company never undertaking any mining was limiting and

sought to minimize the importance of the various previous steps that BC had followed to own the rights on which it based its claim. Furthermore, the mining company had gained property rights after the public necessity decree and by executing its option rights under the option contracts. Even though there was a permitting process, the key issue was that, by virtue of owning the concessions, BC owned the rights of exploration and exploitation within the concession areas. These facts showed that the company held the rights on which it based its claim (paras. 289-294).

c. *The Tribunal's Decision*

The tribunal based its decision on the express declarations made by the respondent during the proceedings. Peru conceded that at most BC only "held an exclusive right to seek a right to mine and to pursue a mining project", and for the tribunal the sole existence of the "exclusive right" was enough to establish jurisdiction (para. 295).

Additionally, the tribunal found that the steps undertaken by BC to request the public necessity decree, the acquisition of the mining concessions, and the subsequent exploration and finding of mineral sites, confirmed "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (...) concessions", which fulfilled the definition of the term investment under Article 847 of the CAN FTA (paras. 296-297).

Thus, the tribunal found in the "exclusive right" and the steps followed by BC, the concepts needed to establish that the company held the rights on which it based its claim (paras. 295 and 297).

2. Whether Legality or Good Faith was a Pre-requisite for the Tribunal's Exercise of Jurisdiction

a. *Peru's Position*

Peru argued that BC's investment violated both national law (in other words, it was illegal) and the international principle of good faith, and therefore it would have been inappropriate for the Tribunal to grant jurisdiction (para. 299). Following *Inceysa v. El Salvador* (2006), Peru alleged that "extending treaty protections to investments made in bad faith or in violation of domestic law would reward investors' misconduct" (para. 299).

In the same vein, in accordance with *Phoenix Action v. Czech Republic* (2009) and *Hamester v. Ghana* (2010), Peru alleged that unlawful investments could not receive access to international dispute

resolution mechanisms, pointing out that the "legality requirement does not arise out of a specific treaty provision, but rather out of the *corpus* of international law and persuasive international arbitration jurisprudence" (para. 302). Following the *Mamidoil v. Albania* case (2015), they also argued that BC made an investment through illegal activity; therefore, "a State cannot be expected to have consented to an arbitral dispute settlement mechanism for investments made in violation of its legislation" (para. 303).

In addition, the respondent stated that the interpretation of Article 816 of the CAN FTA did not lead to the conclusion that Peru and Canada intended to protect unlawful investments. That provision only enabled the possibility to establish special formalities concerning how the investments must be made in the host State. Furthermore, the provision did not expressly exclude the legality requirement from the CAN FTA (para. 305).

Finally, the respondent stated that there was no need to prove fraud or even bad faith on BC's behalf. Instead, the sole illegality of BC's investment was enough to prove the tribunal's lack of jurisdiction. BC acted unlawfully from the beginning, using Ms. Villavicencio as a proxy or strawman to circumvent the restriction imposed by Article 71 of the Peruvian Constitution. This misrepresentation was even conducted before the local populations, who did not know who it was that really owned the Project and provided them with its benefits. The entire scheme violated the Constitution and prevented the Peruvian Government from exercising its sovereignty in the area of the concession. When the public necessity was declared, Peru did not know about this unlawful scheme. For these reasons, they argued that BC should have been deprived of being considered a protected investor (paras. 306-307).

b. *BC's position*

BC contended that the CAN FTA did not have any legality or good faith requirement in relation to the investment. The mining company partially agreed with the Peruvian interpretation of Article 816 of the CAN FTA; however, they specified that there was no express nor implied legality requirement in said provision.

BC stated that under international investment law, the tribunal was not empowered to import requirements that restrict jurisdiction if the parties had not agreed on them beforehand. Rebutting the application of the *Flughafen Zurich v. Venezuela* (2014), *Hamester* (2010) and *Phoenix Action* (2009) cases, BC clarified that the applicable trea-

ties established a clear requirement of compliance with the host State's law. Likewise rebutting the application of *Inceysa* (2006), BC alleged that the tribunal had declared its lack of jurisdiction due to an express consent to submit to arbitration investments made in accordance with the law. This way, the claimant interpreted that none of the cases cited by Peru established an implied requirement concerning the lawfulness of the investment and the principle of good faith (paras. 309-311).

In the end, BC identified three specific situations where, even though there was a breach of national law, a tribunal still had the power to exercise its jurisdiction on the merits of the dispute. First, when the illegality the investment renders it voidable rather than void. In BC's case, the Constitution's violation made the rights obtained voidable, not void, which meant that the company was then able to claim protection for an existing investment. Second, whether the unlawful conduct is not serious enough and only procedural or derives from a good faith mistake. In BC's case, Ms. Villavicencio was always transparent in relation to the option contracts and bad faith on her behalf was never proved by Peru. Third, if the host State had created legitimate expectations about a lawful investment being protected, then the investor is entitled to seek treaty protection. In BC's case, Peru had created these legitimate expectations, allowing BC to seek the CAN FTA protection (paras. 312-316).

c. *The Tribunal's Decision*

The tribunal first stated that in the absence of guiding case law to establish whether legality or good faith was a prerequisite for a tribunal's exercise of jurisdiction, Article 816 of the CAN FTA should be interpreted to find the answer. The following subsection of Article 816 of the CAN FTA was identified as the most relevant for this purpose (para. 319):

Nothing in Article 803 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, [...].

According to the tribunal's interpretation, this provision established the possibility for Peru to adopt a legality requirement for covered investments under the term "special formalities". The tribunal

concluded, however, that Peru did not make use of this option and therefore, the legality of BC's investment was not a jurisdictional requirement. Furthermore, the tribunal highlighted that the phrase "such as" would have applied in case Peru had adopted other prerequisites like good faith, but this was not the case (paras. 319 and 321).

Additionally, the tribunal agreed with BC that under international investment law it was not possible to import requirements as limits to the jurisdiction if those were not expressly agreed to by the parties. In the light of the facts, the CAN FTA did not have any provision to that regard. Since fraud was not claimed by Peru, the tribunal did not assess this issue and clarified that there was no evidence of fraud in the proceedings.⁴

D. Analysis of the Key Principles Derived from the Award

The *Bear Creek* case established two key principles in relation to (i) the interpretation and application of the investment's illegality or bad faith defense on jurisdiction, and (ii) the jurisdiction query for the existence of a protected investment. Indeed, two principles of interpretation could be derived from the Award. The first is the "express consent" principle, which dictates that to apply legality or even good faith requirements as a limitation for jurisdiction, these must be derived from the parties' consent with an express text included in the respective treaty. The tribunal was clear in applying this principle by using a two-step approach: (i) there was no express provision in the CAN FTA establishing legality or good faith as a requirement; (ii) Peru did not adopt the "special formality" expressly available in CAN FTA provisions as the only possible way of introducing legality or good faith as requirements. Consequently, no legality or good faith requirements could be applied to limit jurisdiction without express consent (or provision). To confirm the principle, one could say that if the treaty provisions or Peru's actions did not reflect the adoption of those kinds of requirements, then the arbitration proceedings are not the proper venue to "indirectly amend" or "incorporate" treaty provisions without the parties' agreement (Vienna Convention, 1980, Art. 39).

The second is the "investment's existence" principle. Even though BC did not begin the exploitation of the concessions, the tribunal gave substantial importance not only to the specific wording of Supreme Decree 032 enacted by Peru, which

⁴ The tribunal reserved at its discretion to analyze the issue of illegality or good faith in the merits of the dispute. This subject is not analyzed in this paper.

granted authorization to acquire and possess rights over the Project, but also to the various and complex stages that these kinds of mining projects imply, along with the corresponding capital invested in them by BC. In the CAN FTA, Peru agreed to cover investments qualified as interests arising from the commitment of capital and BC met that criteria. To confirm this principle, under Article 27 of the Vienna Convention on the Law of Treaties ("VCLT") (1980), Peru could not deny BC's investment the protection of the CAN FTA by invoking the company's failure to complete its internal regulatory procedures needed to start the mining process.

III. CHAPTER II: REVISITING THE LEGALITY OF THE INVESTMENT AS AN IMPLIED REQUIREMENT FOR THE TRIBUNALS' EXERCISE OF JURISDICTION

The recent Award in the *Bear Creek* case analyzed in the first chapter of this paper rejected a jurisdictional objection based on an implied requirement of legality of the investment. Indeed, since there was no express treaty provision establishing legality as a requirement for the investment, then it was not possible to limit the tribunal's jurisdiction on those grounds.⁵

This case has reopened the discussion about the existence and application of the legality of the investment as an implied requirement to determine the jurisdiction of investment arbitration tribunals, specifically in the cases where that requirement is not expressly incorporated in the relevant treaty.

It is necessary to address the question of consistency between the existence and application of the implied requirement of the legality of the investment as part of the interpretation of the term "investment" in Article 25 (1) of the ICSID Convention together with the relevant treaty provisions that define the same term, in order to assess a tribunal's jurisdiction. After reviewing the case law, it is necessary to establish which approach is more recommended as a means to promote some consistency for investment treaty arbitration.

A. The Case Law on the Legality of the Investment Requirement

The legality requirement is commonly referred to as the "in accordance with the host State's laws"

investment requirement (Protopsaltis, 2015, p. 1; Polkinghorne & Volkmer, 2017, p. 149). The case law is divided between tribunals that have considered the requirement is implied and tribunals that have denied the existence of an implied requirement in the treaties.

1. Tribunals Holding that There is a Requirement that an Investment Must Be Made in Accordance with the Host State's Law (Even Where the Treaty Does Not Expressly Regulate It)

The leading case in this first group is the already mentioned *Phoenix Action* (2009) that established that the investor's obligation to make an investment in conformity with national laws (legality requirement) was an implicit requirement for the tribunal's jurisdiction even when not expressly regulated in the treaty as such. Following the *Salini v. Morocco* path (2001), the *Phoenix Action* case added two more requisites to the Salini Test:⁶ legality and good faith as implied requisites in order to assess the definition of investment under Article 25 (1) of the ICSID Convention to determine the jurisdiction of the tribunal (*Phoenix Action, Ltd. v. Czech Republic*, 2009, paras. 100, 106 and 114).

In *Plama v. Bulgaria* (2008), the tribunal held that even in the absence of a provision in the treaty, the investment must be in accordance with the law of the host State (legality requirement) (paras. 138-140). In the *Fraport v. Philippines* case (2007), the tribunal concluded that investment treaty cases confirm that treaties do not afford protection to illegal investments either based on provisions of the treaties or, absent an express provision in the treaty, based on rules of international law, such as the clean hands' doctrine or doctrines to the same effect (para. 328).

In *Mamidoil Jetoil* (2015), the tribunal held that investments are protected by international law only when they are made in accordance with the legislation of the host State, since States cannot consent to the arbitration of investments that violate their laws (paras. 294 and 359). The *Hamester* case also established that an investment made in violation of the national laws could not be under the jurisdiction of the ICSID Convention, being that a general principle that exists independently of the specific language in the treaty (paras. 123-124).

⁵ See Second Chapter's Sections II.C. and II.D. of this paper.

⁶ To review the other requisites for the investment which are not under analysis in this paper: *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (2001, par. 52).

2. Tribunals Denying the Existence of an Implied Requirement That an Investment Must Be Made in Accordance With the Host State's Law

One of the leading cases, *Saba Fakes v. Turkey* (2010), established that it is not possible to incorporate legality as a principle in Article 25 (1) of the ICSID Convention, ensuring it remains neutral, not regulating the legality of the investment as a requirement for jurisdiction. Therefore, States are free to condition the application of their investment treaty protections and consent to arbitration based on a legality requirement condition, as the investment definition of the treaty is the only one that must be considered to analyze jurisdiction for that purpose (paras. 106, 112 and 114).

The decision in *Metal-Tech v. Uzbekistan* established that the parties to an investment treaty may bar the tribunal's jurisdiction by limiting the protections of the treaty with a legality requirement; therefore, such a requirement is not part of the definition of "investment" under Article 25(1) of the ICSID Convention (2013, p. 127). Even though it is not an ICSID case, *Achmea v. Slovakia* (2018) was important since it took a cautionary approach by stating that if there is no express legality requirement in the treaty, it could be difficult to undertake an interpretation of good faith of the definition of investment including that requirement, so the tribunal opted to refrain from declaring its existence (para. 176). It must be also noted that the tribunal in *MNSS v. Montenegro* (2016), giving a thorough interpretation of each of the treaty provisions, held that there was no provision that established a legality requirement. After that, it found it unnecessary to assess the existence of an implied legality requirement (paras. 210 and 212).

Finally, there is the more recent but very enlightening *Bear Creek* case analyzed in the first chapter, in which the tribunal concluded that it was not possible to import an implied legality requirement to limit jurisdiction if that was not expressly included in the treaty (2017, paras. 319 and 321).

B. Analysis of the Case Law and the Suggested Approach to Deal with the Legality of the Investment Requirement

On the one hand, some cases sustained the existence of an implied legality requirement. These considered the definition of investment under Article 25(1) of the ICSID Convention as subject to development due to the application of external parameters that are outside the investment treaty's definition of the protected investment. Therefore, making it immaterial if the treaty established the legality of

the investment as a requirement for jurisdiction or not. According to these external references to international law and general principles of law, the legality of the investment jurisdiction requirement is implicit and developed under the term "investment" of the Article 25 of the ICSID Convention.

On the other hand, some cases denied the existence of an implied legality requirement. These considered that it can be established only by an express provision and consent in the respective investment treaty; there is no possibility for the requirement to be implied. In order to interpret the legality requirement, these cases understood the term "investment" under Article 25 of the ICSID Convention as neutral. Therefore, it is the treaty (not the ICSID Convention) that is able to limit or amplify the jurisdiction of the tribunal by the express inclusion or incorporation of the legality requirement in the treaty's definition of investment.

The two approaches are irreconcilable. In order to promote the consistency required by Investment Treaty Arbitration users, regarding the application of the legality of the investment as a jurisdictional requirement, the approach followed by the cases that denied the implied requirement is the more recommended one for four fundamental reasons.

First, those tribunals' reasoning is rooted in the contracting parties' consent reflected in the treaties. In line with Lim, Ho and Paparinskis conceptualization, these tribunals followed a *sui generis* dual meaning approach with a strong subjective criterion to define their jurisdiction over a protected investment (2018, pp. 210-231). This means that they, correctly, give priority and prevalence to the treaty's provisions that established or omitted the legality requirement as a limit to the tribunal's jurisdiction; rendering the term investment in Article 25(1) of the ICSID Convention as merely neutral (for this requirement). Confirming this approach, Moloo and Khachaturian asserted that

where parties do not expressly exclude investments that are not made in accordance with the law from the investment treaty's coverage, to preclude jurisdiction of the dispute would be to limit jurisdiction in a way not contemplated by the parties (2011, p. 1499).

Second, the tribunals' interpretation of the investment treaties and ICSID Convention is in line with the VCLT (Arts. 26 and 39). By prioritizing the express text of the investment's treaties, the tribunals are giving effect to the *pacta sunt servanda* principle. If there is no express treaty provision on the legality requirement, then there is no binding limitation on the jurisdiction between the parties.

Third, the approach of these tribunals does not endanger the possible defense or legitimate interests of the State that faces the absence of an explicit legality of the investment requirement on jurisdiction. As correctly noted by Schill, if a manifest or fundamental breach of national or international law is committed by the investor and there is no legality requirement for jurisdiction to be established, then the merits of the dispute could be the proper venue to ask for the denial of the benefits of the treaty for that investor (2012, pp. 322-323).

Finally, issues of legality or good faith usually have two sides: the investor-action side and the State-action side (usually a public authority). Therefore, the "negative consequences" of this "wrongdoing" must be faced by both the investor and the State, and it is positive to find in investment arbitral tribunals the arena to discuss, discover, clarify and establish international liabilities for these kinds of unlawful practices within the investment relations. In other words, promote good investment relations practices.

IV. CONCLUSION

Currently, there is a strong criticism of the investment arbitration system due to the lack of consistency in arbitral tribunal's awards' interpretation of virtually the same treaty provisions (IBA, 2016, p. 2). The approach endorsed in this paper provides some tools to implement certainty and predictability about the interpretation of treaty provisions related to the legality requirement as a limit on tribunals' jurisdiction. The two *Bear Creek* interpretation principles ("express consent" and "investment's existence") identified in this paper are illustrative of the interpretation query of treaty provisions related to this requirement. It must be stated that the reasoning of the *Bear Creek* tribunal is based on the parties' consent as a fundamental pillar of the investment arbitration system, and it promotes certainty and predictability with a more cautionary approach to the subject matter.

Finally, the arguments and reasoning explained in this paper could be revisited considering the emergence of a new set of transnational investment treaty communities networks, and rules that govern their investment relations; however, this new approach is far beyond the scope of this paper and thus reserved for future research, which is currently in progress. 📖

REFERENCES

International Bar Association (IBA). (2016). *Report on the Subcommittee's Investment Treaty Arbitration survey*. IBA. <https://www.ibanet.org/>

[Search/Search.aspx?query=IBA%20Subcommittee%20on%20Investment%20Treaty%20Arbitration](https://www.italaw.com/sites/default/files/case_documents/italaw9381.pdf)

Lim, C., Ho, J., & Paparinskis, M. (2018). *International Investment Law and Arbitration. Commentary, Awards and other Materials*. Cambridge University Press.

<https://doi.org/10.1017/9781316847954>

Moloo, R., & Khachaturian, A. (2011). "The Compliance with the Law Requirement in International Investment Law". *Fordham International Law Journal*, 34(6), 1473-1501. <https://ir.lawnet.fordham.edu/ilj/vol34/iss6/1>

Polkinghorne, M., & Volkmer, S. (2017). "The Legality Requirement in Investment Arbitration". *Journal of International Arbitration*, 34(2), 149-168.

Protopsaltis, P. (2015). Compliance With the Laws of the Host Country in Bilateral Investment Treaties. *Transnational Dispute Management*, (6). <https://www.transnational-dispute-management.com/article.asp?key=2290>

Schill, S. (2012). Illegal "Investments in Investment Treaty Arbitration". *The Law and Practice of International Courts and Tribunals*, 11(2), 281-323. <https://doi.org/10.1163/157180312x640697>

STATUTES, CASE LAW AND OTHER DOCUMENTS

Bear Creek Mining Corporation v. Republic of Perú, ICSID Case No. ARB/14/21, Award (Sep. 12, 2017), IIC 1271 (2017), https://www.italaw.com/sites/default/files/case_documents/italaw9381.pdf

Canada-Peru Free Trade Agreement, Can.-Peru, May 29, 2008.

Case C-284/16, Achmea B.V. v. The Slovak Republic, 62016CJ0284 (Mar. 6, 2018), IIC 1316 (2018).

Código Civil [Cód. Civ.] [Civil Code] (Peru).

Constitución Política del Perú [Cons.] (Peru).

Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), IIC 664 (2014), <https://www.italaw.com/cases/1524>.

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

- ARB/11/12, Award (Dec. 10, 2014), IIC 731 (2014), <https://www.italaw.com/cases/documents/2853>
- Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (Jun. 18, 2010), IIC 456 (2010), <https://www.italaw.com/cases/527>
- Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), IIC 134 (2006), 28 ICSID Rep. 311 (2008), https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf
- Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award (Mar. 30, 2015), IIC 682 (2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf>
- Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), IIC 619 (2013), <https://www.italaw.com/cases/documents/2273>
- MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), IIC 982 (2016), <https://www.italaw.com/cases/2028>
- Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), IIC 367 (2009), <https://www.italaw.com/cases/850>
- Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), IIC 338 (2008), 17 ICSID Rep. 659 (2016), <https://www.italaw.com/cases/857>
- Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2014), IIC 439 (2010), <https://www.italaw.com/cases/documents/431>
- Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), 42 ILM 609 (2003), 6 ICSID Rep. 400 (2004), <https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>
- Supreme Decree No. 083-2007-EM, Nov. 29, 2007, D.O. El Peruano (Peru).
- Supreme Decree 032-2011-EM, June 25, 2011, D.O. El Peruano (Peru).
- United Nations, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 332.