HOW TO DISTINGUISH 'IN ACCORDANCE WITH HOST STATE LAW' CLAUSES FROM SIMILAR INTERNATIONAL INVESTMENT AGREEMENT PROVISIONS?

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Abstract

*While many bilateral investment treaties or other international investment agreements ["**IIA**"] contain straightforward 'in accordance with host State law' clauses, aimed at limiting the protection enjoyed by foreign investors under such treaties to only those investments which have been made in conformity with the law of the host country, some IIAs include provisions that may use similar terms, but serve different purposes. There seems to be some confusion in current arbitration practice about how to distinguish between 'in accordance with host State law' clauses, which stipulate that an investment must be made legally, i.e. in compliance with domestic laws and regulations, and other related provisions. This article aims at clarifying the issue.*

I. The Purpose of 'In Accordance With Host State Law' Clauses

The main function of 'in accordance with host State law' clauses[1] is to limit the scope of international investment agreements ["**IIA**"] protection to only those investments that have been made in conformity with the law of the host state. The underlying idea seems to reflect a basic bargain, through which a host state makes the grant of special protection enjoyed under an IIA contingent upon the investments being made in compliance with its domestic law.[2] It is generally accepted that the contracting parties to an investment treaty are free to subject their application and protection to a "*legality requirement of one form or another*."[3]

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1 *See* on 'in accordance with host state law' clauses, in general, Andrea Carlevaris, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9(1) J. WORLD INV. & TRADE 35 (2008); Christina Knahr, *Investments "in accordance with host state law", in* INTERNATIONAL INVESTMENT LAW IN CONTEXT 27 (A. Reinisch & C. Knahr eds., 2008); U. Kriebaum, *Illegal Investments*, AUSTRIAN Y.B. INT'L. ARB. 307 (2010); R. Moloo & A. Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34(6) FORDHAM INT'L L.J 1473 (2011); A. Reinisch*, Back to Basics: From the Notion of "Investment" to the Purpose of Annulment – ICSID Arbitration in 2007*, *in* GLOBAL COMMUNITY Y.B. INT'L L. & JURIS 1591 (2008); S. Schill, *Illegal Investments in Investment Treaty Arbitration*, 11(2) L. & PRAC. INT'L CTS & TRIBUNALS 281 (2012); T. Obersteiner, *"In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors*, 31(2) J. INT'L ARB. 265 (2014); J. Hepburn, *In Accordance with Which Host State Laws? Restoring the "Defence" of Investor Illegality in Investment Arbitration*, 5 J. INT'L DISP. SETTLEMENT 531 (2014); Z. Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV. 155 (2014).

2 *See* Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 46 (July 23, 2001), 6 ICSID Rep. 400 (2004) ("This provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.").

3 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 114 (July 14, 2010), *available at* https://arbitration.org/sites/default/files/awards/arb2122.pdf ("As far as the legality of investments is concerned, this question does not relate to the definition of "investment" provided in Article 25(1) the International Centre for Settlement of Investment Disputes ["**ICSID**"] Convention and in Article 1(b) of the BIT. In the Tribunal's opinion, while the ICSID Convention remains neutral on this issue, bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another. This is precisely the case of the Netherlands-Turkey BIT, which contains such a requirement in its Article 2(2). This question will now be addressed by the Arbitral Tribunal.").

In this connection, arbitral tribunals have generally held that minor errors and infractions of host state law do not lead to an exclusion of investment treaty protection. The tribunal in *Tokios Tokelés* v. *Ukraine*[4] held that "*to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.*"[5] Similarly, the tribunal in *Desert Line* v. *Yemen*[6] held that

> "*[a]s far as concerns the issue of the certificate, the threshold inquiry is whether Article 1(1) corresponds to mere formalism or to some material objective. The Arbitral Tribunal has no hesitation in opting for the second alternative. A purely formal requirement would by definition advance no real interest of either signatory State; to the contrary, it would constitute an artificial trap depriving investors of the very protection the BIT was intended to provide.*".[7]

Similarly, the tribunal in *Hochtief* v. *Argentina* ["**Hochtief**"][8] very expressly stated that

> "*[…] investments that are […] dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State's regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision.*".[9]

Nevertheless, the *Hochtief* tribunal was very explicit in stating that the main purpose of the clause is to deprive illegal investments of IIA protection.

II. Types of 'In Accordance With Host State Law' Clauses

'In accordance with host State law' clauses in bilateral investment treaties ["**BITs**"] are often contained in the definitions of 'investments'. Alternatively, 'in accordance with host State law' clauses may be included in other BIT provisions, such as those relating to the applicability of the treaty, the admission of investments, those dealing with substantive protection standards, or even in preambles.[10]

As the tribunal in *Inceysa* v. *El Salvador*[11] put it eloquently:

> "*[f]irst, many investment treaties incorporate limitations into their definition of investment. [...] Alternatively or in addition, State Parties sometimes incorporate a requirement of compliance with the host State's laws into provisions addressing the applicability of the treaty [...] A common variation in applicability provisions of investment treaties is to specify the prerequisite of*

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4 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (Apr. 29, 2004), 20 ICSID Rev.-Foreign Inv. L. J. 205 (2005).

5 *Id.* ¶ 86.

6 Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, (Feb. 6, 2008), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C62/DC791_En.pdf.

7 *Id.* ¶ 106.

8 HOCHTIEF Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, (Dec. 29, 2014), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C260/DC5392_En.pdf.

9 *Id.* ¶ 199.

10 *See also* R. Moloo & A. Khachaturian, *supra* note 1, at 1478; Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Austl.-India, Preamble, Feb. 26, 1999, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/2000/14.html.

11 Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, (Aug. 2, 2006), *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f26.

> *investment legality for the extension of treaty protections to investments made prior to the date the treaty entered into force [...] Third, State Parties frequently incorporate "in accordance with law" limitations into treaty provisions requiring host States to admit or accept foreign investments [...] Finally, State Parties frequently incorporate "accordance with law" requirements in the provision pledging protection and non-impairment of qualifying investments, which is usually the first substantive obligation section of the investment treaties.*"[12] (emphasis added)

Examples of the first type are most frequent. Many IIAs contain 'in accordance with host State law' clauses by defining 'investment' as those assets invested, implemented or accepted 'in accordance with host State law.'[13] Second, a number of IIAs contain an 'in accordance with host State law' requirement in their provisions governing the applicability of the treaty, stating that it should apply only to investments made 'in accordance with host State law'.[14] Sometimes, the 'in accordance with host State law' requirement is contained in the specific investment protection standards, stipulating that investments made 'in accordance with host State law' shall receive fair and equitable treatment, full protection and security, or protection against unjustified and discriminatory treatment, etc.[15]

One type of legality clause, also mentioned by the *Inceysa* tribunal, is controversial and this article will focus on it. According to the *Inceysa* tribunal, "*State Parties frequently incorporate 'in accordance*

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12 *Id.* ¶ 189 (quoting El Salvador in these proceedings).

13 *See* Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, Ger.-Phil., art. 1(1), Apr. 18, 1997, 2108 U.N.T.S. 19, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume 2108/v2108.pdf ("The term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State […]."). This clause was in issue in Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Award, (Aug. 16, 2007); *See also* Bilateral Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Isr.-Uzb., art. 1(1), July 4, 1994, 1997 U.N.T.S. 107, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume 1997/v1997.pdf ("The term 'investments' shall comprise any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including, but not limited to: […]"). This clause was in issue in Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, (Oct. 4, 2013).

14 *See* Tra Il Governo Della Repubblica Italiana E Il Governo Del Regno Del Marocco Sulla Promozione E Protezione Degli Investimenti (Agreement between the Government of the Italian Republic and the Government of the Kingdom of Morocco on the Promotion and Protection of Investments), It.-Morocco, art. 1(1), July 18, 1990, ("the term "investment" designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. […]"); Vertrag zwischen der Bundesrepublik Deutschland und der Republik Ghana über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (Arrangement between the Government of the Federal Republic of Germany and the Government of the Republic of Ghana concerning technical cooperation in the project 'Advisers in the Ministry of Agriculture'), Ger.-Ghana, art. 10, Feb. 24, 1995, 2068 U.N.T.S. 151 ("This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."). This clause was in issue in Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, (June, 18 2010).

15 *See* Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of El Salvador on the Promotion and Reciprocal Protection of Investment, Ger.-El Sal., art. 2(2), Dec. 11, 1997, BGBL. II at 2000, 673 ("Each State Party shall protect within its territory the investments made in accordance with its legal provisions by investors of the other State Party and shall not impede the administration, use, usufruct, extension, sale and liquidation of said investments through unjustified or discriminatory measures. The return of an investment, and in the case of its reinvestment also the return of this, will enjoy equal protection as the investment itself.").

with law' limitations into treaty provisions requiring host States to admit or accept foreign investments."[16] (emphasis added). However, it appears at least questionable whether a provision that requires host States to admit foreign investments 'in accordance with host State law' be construed to impose a legality requirement on investments in order to be protected, or merely limits the otherwise unqualified obligation of contracting states parties to admit foreign investments.

III. Implied Legality Requirements

Even in the absence of an express 'in accordance with host State law' clause, some form of a legality requirement has been viewed as an implied condition for any investment to be protected under IIAs.

Most prominently, the International Centre for Settlement of Investment Disputes ["**ICSID**"] tribunal in *Phoenix* v. *Czech Republic*,[17] while discussing the elements of an investment in the sense of Article 25 of the ICSID Convention, added that in addition to the *Salini* criteria,[18] what also had to be taken into account was whether assets were "*invested in accordance with the laws of the host State*" and "*in good faith*".[19] Of course, this extension of the *Salini* criteria was not generally accepted, as is evident from the criticism expressed by the tribunal in *Saba Fakes* v. *Turkey.*[20]

Other tribunals have followed the approach taken by the award in *World Duty Free* v. *Kenya*,[21] which held that as a result of corruption, certain claims could not be upheld "*as a matter of ordre public international and public policy under the contract's applicable laws.*"[22] Similarly, the tribunals in the second *Fraport* v. *Philippines* case[23] and in *Minnotte and Lewis* v. *Poland*[24] held that even without an

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16 Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 189, *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f26.

17 Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15 2009).

18 Since Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (23 July 2001), 6 ICSID Rep. 400 (2004) investment tribunals have focused on: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State's development to determine what can be categorised as 'investment'. *See* C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, THE ICSID CONVENTION: A COMMENTARY 128 (2d ed. 2009).

19 Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15 2009), ¶ 114 ("1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*."). More specifically, the *Phoenix* tribunal held that "this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT," and that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.".

20 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 112 (July 14, 2010), *available at* https://arbitration.org/sites/default/files/awards/arb2122.pdf ("[…] the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be "legal" or "illegal," made in "good faith" or not, it nonetheless remains an investment. The expressions "legal investment" or "investment made in good faith" are not pleonasms, and the expressions "illegal investment" or "investment made in bad faith" are not oxymorons.").

21 World Duty Free Company Limited v. The Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

22 *Id.* ¶ 188.

23 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12, Award, ¶ 332 (Dec. 10, 2014) ("[…] even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.").

express 'in accordance with host State law' clause, certain investment claims would not be admitted if the investment was made in a fundamentally illegal way.[25]

This article will not address the issue of implied legality requirements and the related questions as to whether such a possible requirement constitutes a jurisdictional or an admissibility criterion.[26] Rather, it will focus on the interpretation of express IIA provisions and their correct qualification.

IV. Variations of 'In Accordance With Host State Law' Clauses

A variation of 'in accordance with host State law' clauses are clauses which make IIA protection dependent upon formal admission and/or registration requirements under host State law as in the *Yaung Chi Oo* v. *Myanmar* case[27] or the *Churchill Mining* v. *Indonesia* case,[28] where protection was made conditional on granting admission pursuant to host State law.[29] Sometimes, 'in accordance with host State law' and formal admission are combined in BITs,[30] as is evident from the *Desert Line* v. *Yemen* case.[31]

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24 Minnotte and Lewis v. Poland, ICSID Case No. ARB/10/1, Award, ¶ 131 (May 16, 2014) ("[…] it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law.").

25 *See also* Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, ¶ 139 (Aug. 27, 2008) ("In accordance with the introductory note to the ECT "[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]". Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.").

26 *See* A. Reinisch, *Jurisdiction and Admissibility in International Investment Law*, 16 L. & PRAC. INT'L CTS & TRIBUNALS 21-43 (2017).

27 Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, ¶ 58 (Mar. 31, 2003) ("[…] express requirement of approval in writing and registration of a foreign investment if it is to be covered by the Agreement. Such a requirement is not universal in investment protection agreements. […] In this respect Article II goes beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.").

28 Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, ¶ 289-291(Feb. 24, 2014) ("[…] the admission requirement set forth in Article 2(1) is a one-time occurrence, a gateway through all British investors must pass once […] [it] applies at the time of entry into the country and not during the entire operation of the project. […] the admission requirement embodied in Article 2(1) is narrower than a traditional legality requirement in the sense that it only demands admission in accordance with the relevant domestic laws and not general compliance with the host State's legislation.").

29 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, Apr. 27, 1976, U.K.-Indon., art. 2(1), TS No. 62/1977, *available at* http://treaties.fco.gov.uk/docs/pdf/1977/TS0062.pdf ("This Agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it"); Agreement between the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments (The 1987 ASEAN Agreement), art. II(1), Dec. 15, 1987, *available at* http://asean.org/?static_post=the-1987-asean-agreement-for-the-promotion-and-protection-of-investments ("This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.").

30 Agreement on the reciprocal promotion and protection of investments (Oman-Yemen Bilateral Investment Treaty), Oman-Yemen, art. 1, Sept. 20, 1998 ("The term "Investment" shall mean every kind of assets owned and invested by an investor of one Contracting Party, in the territory of the other Contracting Party, and that is accepted, by the

What is less clear is the question of whether admission clauses, which regulate the conditions of access to foreign markets of a host State and which may contain references to 'host State law', intend to qualify only the admission obligation of the host State or also qualify the investment covered by the clause.

A typical example is a clause like Article 2 of the Netherlands Model BIT which provides:

> "*[e]ither 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.*".[32]

A similar clause is found in Article 3(1) of the Australia-India BIT which provides:

> "*[e]ach Contracting Party shall encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory. Each Contracting Party shall admit such investments in accordance with its laws and investment policies applicable from time to time.*".[33]

Another comparable clause can be found in Article 2(1) of the Switzerland-Uruguay BIT which states as follows:

> "*[e]ach Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law. [The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.]*".[34]

In the latter two examples, the 'in accordance with host State law' requirement conditions the obligation to admit foreign investments. This seems to have been recognized by the UNCITRAL tribunal in *White Industries* v. *India*.[35] Although the tribunal did not explicitly address the qualified obligation to "*admit such investments in accordance with its laws*" in the second sentence of Article 3(1)

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host Party, as an investment according to its laws and regulations, and for which an investment certificate is issued.").

31 Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, ¶ 108-109 (Feb. 6, 2008), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C62/DC791_En.pdf ("Others require that investors wishing to be protected must identify themselves, on the footing that only specifically approved investments will give rise to benefits under the relevant treaty. This is a different approach, but it too has a legitimate policy rationale, in the sense that the Governments of such States evidently wish to exercise a qualitative control on the types of investments which are indeed to be promoted and protected. Yemen and Oman opted for the second model".).

32 The Netherlands Model Bilateral Investment Treaty, art. 2, Jan. 1, 2004, *cited in* Nico Schrijver & Vid Prislan, *Netherlands, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 559 (Chester Brown ed., 2013).

33 Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Austl.-India, art. 3(1), Feb. 26, 1999, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/2000/14.html.

34 Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Promotion and Reciprocal Protection of Investments, Switz.-Uru. art. 2(1), Oct. 7, 1988, 1976 U.N.T.S. 389.

35 White Industries Australia Limited v. Republic of India, UNCITRAL (India-Australia BIT), Final Award, (Nov. 30, 2011).

of the Australia-India BIT, it clearly held "*that the pre-establishment obligations set out in the first sentence in Article 3(1) of the BIT lack sufficient content to be treated as a stand-alone, positive commitment giving rise to substantive rights.*".[36] Thus, it was clear that any admission 'obligation' was still qualified by host State legislation as stressed in the second sentence.

The third of the three above-mentioned clauses was discussed by the ICSID tribunal in *Philip Morris* v. *Uruguay*.[37] It was tasked with interpreting Article 2(1) of the Switzerland-Uruguay BIT, according to which *"[e]ach Contracting Party shall […] admit such investments in accordance with its law*", but it did not give a very clear answer as to its meaning. On the one hand, the tribunal seems to suggest that Article 2(1) functions as a genuine 'in accordance with host State law' clause limiting the BIT's protection to lawfully made investments.[38] On the other hand, the tribunal suggested that Article 2(1) may serve as a qualification of its duty to admit foreign investments when they are not "*in accordance with its law*".[39]

Further, in the first type of such a clause, as for example in the Netherlands Model BIT 2004 cited above, the reference to "*the framework of its laws and regulations*" remains ambiguous. It primarily seems to qualify the host state's duty of "*cooperation through the protection in its territory of investments of nationals of the other Contracting Party*." Further, the reference to "*its right to exercise powers conferred by its laws or regulations*" appears to qualify the host state's duty to 'admit such investments'. Alternatively, this reference could also be regarded as limiting the scope of protected investments to those made "*within the framework of its laws and regulations*". Investment tribunals faced with such or similar clauses have not provided clear answers in the past.

In *Aguas del Tunari, S.A.* v. *Bolivia*,[40] Article 2 of the Bolivia-Netherlands BIT,[41] which exactly corresponded to the above-cited Article 2 of the Netherlands Model BIT 2004, was invoked by the respondent who argued primarily that it implied exclusive jurisdiction of Bolivia's courts and tribunals. The tribunal, however, found "*that State Parties cannot have intended the references to national law in Article 2 to be so encompassing as to defeat the object and purpose of the Treaty*", i.e. access to an

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36 *Id.* ¶ 9.2.12.

37 Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, (July 2, 2013).

38 *Id.* ¶ 169 ("As the ordinary meaning of the word indicates, "admission" is the act by which each State, having verified the conformity of the proposed investments with internal legislation, allows them to be made in its territory, thus accepting that they are protected investments for purposes of the BIT.").

39 *Id.*¶ 171 ("Uruguay might exclude the admission of investments under the BIT for reasons of public health in two different ways, either (i) by providing for such exclusion in its internal legislation so that a proposed investments would not be admitted as being not "in accordance with its law" under Article 2(1), or […]").

40 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 142–155 (Oct. 21, 2005).

41 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, Bol.-Neth., art. 2, Mar. 10, 1992, *available at* http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=248310 ("Either Contracting Party shall, within the framework of its law 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.")

"*independent and neutral forum for the resolution of investment disputes in accordance with a substantive applicable law specified in the BIT*.".[42]

The *Aguas del Tunari* tribunal also elaborated on the meaning of the references to host State law in Article 2. It understood the qualification of the duty to promote economic cooperation by the phrase "*within the framework of its law and regulations*", contained in Article 2 first sentence,

> "*[…] as a reference limited to the details of how each contracting party undertakes in its national laws and regulations to promote economic cooperation through the protection of investments*.".[43]

With regard to the second sentence, providing that "*[s]ubject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments*", the tribunal found

> "*[…] that the inclusion of the term "subject to" indicates that the duty to admit investments is limited by the right to exercise powers conferred by its laws or regulations*.".[44]

Thus, the *Aguas del Tunari* tribunal did not consider that the reference worked as an 'in accordance with host State law' clause to the effect that only investments made lawfully deserved protection. Rather, it found that the reference subjected or limited the host State's duty to cooperate and to admit foreign investments.

Other tribunals found that the 'in accordance with its host State law' requirement limited the protected investments. For instance, in *Saluka Investments BV* v. *Czech Republic*,[45] the tribunal held that it was "*necessarily implicit*" in Article 2 of the Czech Republic-Netherlands BIT[46] that an investment must have been made in accordance with the provisions of the host State's laws.

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42 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 153 (Oct. 21, 2005).

43 *Id.* ¶ 146 ("Given this interpretation of the first sentence, what meaning is to be given to the subordinate phrase 'within the framework of its law and regulations?' The BIT not only provides a remedy for breaches, but also attempts to facilitate the creation of a climate in which economic cooperation can flourish. Thus, the Tribunal reads the reference to 'the framework of its laws and regulations' as a reference limited to the details of how each contracting party undertakes in its national laws and regulations to promote economic cooperation through the protection of investments.").

44 *Id.* ¶ 147 ("As to the second sentence, the Tribunal observes that if it omits the reference to Bolivian law, the second sentence states that both Bolivia and the Netherlands 'shall admit' the investments of nationals of the other Contracting Party. This obligation to allow the entry of foreign investment is a common provision in bilateral investment treaties, and is often termed an 'admission clause'. The obligation to admit is 'subject to' the decision of Bolivia ('its right') to 'exercise powers conferred by its laws or regulations'. The Tribunal concludes that the inclusion of the term 'subject to' indicates that the duty to admit investments is limited by 'the right to exercise powers conferred by its laws or regulations'").
The Tribunal notes that the reference specifically subjects the State's duty to admit investments not to the laws and regulations of Bolivia, but rather to the "right to exercise powers" conferred by such laws or regulations. The Tribunal finds this language significant as it implies an act at the time of admittance in accordance with the laws or regulations in force at that time.").

45 Saluka Investment BV (The Netherlands) v. The Czech Republic, Partial Award, (Mar. 17, 2006), 15 ICSID Rep. 250 (Perm. Ct. Arb. 2006).

46 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Czech.-Neth., art. 2, Oct. 1, 1992 ("Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law.").

However, it continued to say that it was the host State's obligation to admit a foreign investment which arose only if the investment was made in compliance with host State law.[47]

Other tribunals reverted to the view that such a clause limited the host State's obligation to admit investments.

For example, in *Achmea B.V. (formerly Eureko B.V.)* v. *Slovak Republic*,[48] the tribunal rejected the respondent's argument that the same clause[49] implied that only investments made in accordance with host State law were guaranteed protection.[50] The tribunal found that the provision did not 'qualify the definition of an investment.' Rather, it was held to be

> "*[…] concerned with the duty of each State Party to promote inward investment, and to admit investments in accordance with its law, where those investments [were] made by investors of the other State Party.*".[51]

In a similar way, the tribunal in *SAUR International SA* v. *Argentina*[52] held that a clause stipulating that "*each contracting party admits and encourages, within the framework of its legislation and the present agreement, investments made by investors of the other party within its territory or maritime zone*",[53] conditions and limits the duty of the State to admit and encourage investments by investors of the other contracting party, but not the acts of the foreign investors.[54]

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47 Saluka Investment BV (The Netherlands) v. The Czech Republic, Partial Award, ¶ 204 (Mar. 17, 2006), 15 ICSID Rep. 250 (Perm. Ct. Arb. 2006) ("The Tribunal notes in passing that, although not in terms part of the definition of an "investment", it is necessarily implicit in Article 2 of the Treaty that an investment must have been made in accordance with the provisions of the host State's laws. In relevant part, Article 2 stipulates that "[e]ach Contracting Party . . . shall admit such investments in accordance with its provisions of law". Accordingly, and as both parties acknowledge, the obligation upon the host State to admit an investment by a foreign investor (*i.e.* in the present context, to allow the purchase of shares in a local company) only arises if the purchase is made in compliance with its laws.").

48 Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic, UNCITRAL, Case No. 2008-13, Final Award, (Dec. 7, 2012) (Perm. Ct. Arb. 2008).

49 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Neth.-Slovk., art. 2, Apr. 29, 1991 ("Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law.") is the same provision as Article 2 Czech Republic-Netherlands BIT because after the *dismembratio* of Czechoslovakia in 1993 both successor states continued to apply the old Czechoslovak BIT.

50 Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic, UNCITRAL, Case No. 2008-13, Final Award, ¶ 165 (Dec. 7, 2012) (Perm. Ct. Arb. 2008).

51 *Id.* ¶ 166 ("The Tribunal construes this provision differently. Article 2 of the Treaty is concerned with the duty of each State Party to promote inward investment, and to admit investments in accordance with its law, where those investments are made by investors of the other State Party. Article 2 does not purport to qualify the definition of an investment. That definition is set out in Article 1(a) of the Treaty (set out in paragraph 158, above) which, unlike provisions in certain other bilateral investment treaties, does not contain a requirement that investments be made "in accordance with the laws and regulations" of the host State.").

52 SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction, (June 6, 2012) (Resubmitted).

53 Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments, Fr.-Arg., art. 2, July 3, 1991, *available at* http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=246799 ("Each Contracting Party shall admit and encourage, within the framework of its legislation and the provisions of this Agreement, investments made by investors of the other Party in its territory and in its maritime area.").

54 SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction, ¶ 307 (June 6, 2012) ("The BIT text leaves no doubt that the requirement to act "within the framework of its law" conditions and limits the duty of States to admit and encourage investments by the other Contracting Party, but does not

The tribunal in *Mamidoil* v. *Albania*[55] was not very explicit in its interpretation of a similar clause.[56] While it broadly elaborated on the policy issues that underlie 'in accordance with host State law' clauses,[57] it merely asserted that the "*principle of legality is specified in Article 2 of the BIT*".[58] From the fact that it found that a legality requirement was not specifically contained in the Energy Charter Treaty, one can conclude that the tribunal was of the view that such a requirement was effectively part of the admission clause of the applicable BIT.[59]

The tribunal in *Inceysa* v. *El Salvador* ["**Inceysa**"][60] had to address whether a similar admission clause[61] contained an 'in accordance with host State law' requirement. While the BIT contained a first sentence, similar to the one applicable in the *Mamidoil* case, it also had a second sentence expressly demanding that investments be made in accordance with host State law. The tribunal concluded that "*the consent granted by Spain and El Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment.*".[62]

It arrived at this conclusion on the basis of exchanges of notes between the negotiating parties,[63] indicating "*without any doubt that the will of the parties to the BIT was to exclude from the scope of application*

condition the actions of the foreign investor. On this point, there is therefore a difference between the present case and other cases in which an arbitral tribunal has declined jurisdiction because the investor had breached the host State's legal framework. In these cases, the corresponding BIT expressly required that the investment be made in accordance with the legislation of the host State.").

55 Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, (Mar. 30 2015).

56 Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments (Greece-Albania Bilateral Investment Treaty), Greece-Alb., art. 2, Aug. 1, 1991 ("Each Contracting Party shall in its territory promote, as far as possible, investments by investors of the other Contracting Party and admit such investments in accordance with its legislation.").

57 Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 359 (Mar. 30 2015) ("[…] the Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions.").

58 *Id.* ¶ 292, 360.

59 *Id.* ¶ 360 ("This principle of legality is specified in Article 2 of the BIT, and likewise applies to the substance of the protection when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality.").

60 Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, (Aug. 2, 2006), *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f26.

61 Acuerdo para la promoción y protección recíproca de inversiones entre el Reino de España y la República de El Salvador (Spain-El Salvador Bilateral Investment Treaty), El Sal.-Spain, art. 2, Feb. 14, 1995 ("Each Contracting Party shall promote the realization of investments in its territories by investors of the other Contracting Party and admit such investments in accordance with its laws").
The present agreement will also apply to investment made before its entry into force by the investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter.").

62 Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 207 (Aug. 2, 2006), *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f26.

63 According to the *travaux préparatoires* of the BIT between Spain and El Salvador, the latter wanted to include an "in accordance with host state law" clause into the definition of investment, but Spain answered that it was not necessary because the requirement was already present in the provision on admission.

and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State.".[64]

The *Inceysa* tribunal found further confirmation for this interpretation "*in other provisions of the BIT, specifically in two different articles that refer to the clause of 'in accordance with law.*"'.[65] On the one hand, Article III, titled 'Protection,' indicated that "*[e]ach Contracting Party shall protect in its territory the investments made, in accordance with its legislation...,"* by investors from the other Contracting Party, thus excluding from the protection of the BIT, investments made illegally.[66] On the other hand, the tribunal emphasized that Article II(2) of the BIT made it "*evident that the Agreement will not apply to investments made in the territory of any of the signatory parties before the enactment of the BIT, when they were made illegally.*".[67] The tribunal was thus driven by a "*harmonious interpretation*"[68] of the BIT to conclude that "*the Agreement will also not apply to investments which, having been made after the execution of the Agreement, were not made in accordance with the legislation of El Salvador.*".[69]

V. How to Identify "In Accordance With Host State Law" Clauses?

Against this background, one can safely conclude that there is no established jurisprudence as to whether a provision referring to the promotion and admission of investments 'within the framework of [the host State's] laws' effectively amounts to an 'in accordance with host State law' clause, which would result in limiting investor protection.

It obviously depends upon the interpretation of the words 'shall admit such investments in accordance with its law' or, more particularly, whether the 'in accordance with its law' phrase qualifies the 'admission of the investment' or the 'investments' themselves. In the former case, it would be clear that it reduces the substantive content of the obligation to admit and makes it basically dependent upon the domestic law of the host States. In the second case, it would imply that only lawful investments, i.e. those made 'in accordance with host State law' would have to be admitted. However, if it were to be read in this way, it would still broadly remain an admission obligation.

It is suggested that the interpretation maxim enshrined in Article 31 of the Vienna Convention on the Law of Treaties be followed, pursuant to which *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*".[70]

While it is generally accepted that all three main elements of Article 31 ('ordinary meaning', 'context' as well as 'object and purpose') enjoy equal relevance and should best be taken into

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64 Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case no. ARB/03/26, Award, ¶ 195 (Aug. 2, 2006), *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f26.

65 *Id.* ¶ 200.

66 *Id.* ¶ 201 (footnote omitted).

67 *Id.* ¶ 205.

68 *Id.* ¶ 206 ("The above affirmation is reinforced by a harmonious interpretation of the Agreement, as the clause "in accordance with law" appears both in the article on "Protection," and in the article that regulates "Promotion and Admission," indicating that investments that do not comply with the requisite of having been made "in accordance with the laws" of the signatory State will not be admitted (Article II, (1)). This clearly indicates that the BIT leaves investments made illegally outside of its scope and benefits.").

69 *Id.* ¶ 205.

70 Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

account in a "*process of progressive encirclement*",[71] it is also clear that a treaty's wording should be taken as a starting point for interpreting it.[72]

Indeed, as many investment tribunals have rightly held, "*the text must be presumed to be the authentic expression of the intention of the parties*".[73] One should thus first look at the text of a treaty provision in order to determine whether it should be interpreted as an 'in accordance with host State law' clause to the effect that only investments made 'in accordance with host State law' are protected by the BIT.

A provision according to which a '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' and '[s]ubject to its right to exercise powers conferred by its laws or regulations, […] shall admit such investments,' does not limit or condition the protection of foreign investments to those that have been made 'in accordance with host State law'. Rather, the references to the domestic law of the host state qualify (and potentially limit) the duty of the host state to 'promote economic cooperation' through investment protection and to 'admit' investments of nationals of the other Contracting Party.

See also the finding in *SAUR* v. *Argentina*[74] with regard to a similar clause in Article 2 of the APRI France-Argentine[75] in which the tribunal held:

> "*[t]he BIT text leaves no doubt that the requirement to act "within the framework of its law" conditions and limits the duty of States to admit and encourage investments by the other*

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71 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 91 (Oct. 21, 2005) ("Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. [I]t is critical to observe [that] the Vienna Convention does not privilege any one of these three aspects of the interpretation method.").

72 Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 8 (Mar. 3) ("The first duty of a tribunal which was called upon to interpret and apply the provisions of a treaty [is] to endeavour to give effect to them in their natural and ordinary meaning […]."); Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, 1994 I.C.J. Rep. 20, ¶ 41 ("Interpretation must be based above all upon the text of the treaty."); ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, ¶ 147 (Jan. 9 2003), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C185/DC600_En.pdf ("We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph.").

73 Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 78 (Dec. 8, 2008), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C39/DC1492_En.pdf ("The carefully-worded formulation in Artic1e 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the *travaux préparatoires*, or any predilections based on presumed intention."); Methanex Corporation v. United States of America, UNCITRAL (NAFTA), Final Award, Pt. II, Ch. B, ¶ 22 (Aug. 3, 2005), (2005) 44 I.L.M. 1345 ("[...] the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties.").

74 SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction, (June 6, 2012) (Resubmitted).

75 "Each Contracting Party shall admit and encourage, within the framework of its legislation and the provisions of this Agreement, investments made by investors of the other Party in its territory and in its maritime area.".

> *Contracting Party, but does not condition the actions of the foreign investor. On this point, there is therefore a difference between the present case and other cases in which an arbitral tribunal has declined jurisdiction because the investor had breached the host State's legal framework. In these cases, the corresponding BIT expressly required that the investment be made in accordance with the legislation of the host State.*".[76]

Without reference to and qualification by the domestic law of the host State ('its laws and regulations'), the obligatory language of Article 2 ("*shall promote*" and "*shall admit*") may be read as creating an obligation on 'each Contracting Party' to admit 'investments of nationals of the other Contracting Party'.

While a number of the United States and Canadian BITs intentionally contain such a right of admission, mostly through extending the national treatment obligations to the pre-establishment phase of an investment,[77] European BITs in general, and BITs concluded by the Netherlands in particular, do not provide for such 'admission liberalization'.

Rather, the reference to the 'laws and regulations' of the Contracting Parties in such clauses ensures that the 'obligation' to promote and admit foreign investments is made subject to domestic law, and does not constitute an immediately invocable treaty obligation to admit foreign investments.[78]

Though possibly misleading in their specific formulations, clauses like the above-discussed are understood to avoid a reading that would amount to a duty to admit foreign investors. They qualify the obligations of host States and do not amount to implicit 'in accordance with host State law' clauses, which condition the protection of investments to those made by investors in compliance with the 'laws and regulations' of the Contracting Party in which they invest.

Thus, such provisions should not be viewed as 'in accordance with host State law' clauses.

VI. Conclusion

IIAs often contain one or the other variation of 'in accordance with host State law' clauses aimed at limiting the protection enjoyed by foreign investors under such treaties to only those investments which have been made in conformity with the law of the host country. The underlying rationale that 'unlawful' investments should not enjoy the protection of IIAs is widely shared by investment tribunals. However, they sometimes seem to pay insufficient attention to the precise wording of clauses containing references to host State law, and in particular, to distinguishing them from clauses that aim at softening 'obligations' to promote and admit

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[76] SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction, ¶ 307, (June 6, 2012) (Resubmitted) (footnotes omitted).

[77] *See* the identical language in the US Model BIT art. 3(1) 2012 and Canadian Model FIPA art. 3(1) 2004 ("Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.").

[78] *See also,* Nico Schrijver & Vid Prislan, *Netherlands, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 559 (Chester Brown ed., 2013), commenting on Article 2 of the Netherlands Model BIT ("The duty to admission remains subject to the host State's 'right to exercise powers conferred by its laws and regulations'. This allows the host State to apply any admission and screening mechanisms it may have enacted in its legislation, as well as to determine the conditions under which foreign investments may enter, if at all.").

foreign investments. In fact, in a number of cases, references to 'in accordance with host State law' merely relate to the admission duties of host states and do not impose obligations on investors.