

THE TENSION BETWEEN INVESTORS' CRIMINAL MISCONDUCT UNDER HOST STATE LAW AND INVESTMENT TREATY PROTECTION: AN UNSETTLED CHALLENGE FOR INVESTMENT ARBITRAL TRIBUNALS

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ABSTRACT

The main focus of investment treaties is protecting investors rights and interests. With few exceptions, investment treaties fundamentally do not impose direct obligations on investors. Investor conduct is generally subject to host state laws and jurisdiction. Nevertheless, illegal conduct by an investor under host state laws, including criminal offenses, are not a purely domestic legal issue. Instead, such conduct would constitute a unique problem to be decided by an investor-state tribunal with regard to investment disputes. How the issue to be considered by the arbitral tribunal would further implicate investment treaty protection. As a result, the rights of investors afforded under investment treaties could be partially or completely nullified.

This paper focuses on investor-state tribunals' handling of investor criminal misconduct under host state laws in the context of investment treaties. The overlap of such domestic criminal misconduct and investment treaty protection may be a particular challenge for arbitral tribunals. Applying domestic law to specific

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factual cases with deference to domestic judicial authority and balancing such considerations against the interests of investment treaty protection constitutes a persistent and unsettled question for tribunals. In this context, safeguarding the rights of foreign investors and enhancing procedural equality between disputing parties are major concerns.

KEYWORDS: *investor-state disputes, investor misconduct, criminal law, legality clause, general principles of law, fair and equitable treatment, counterclaims, domestic law, domestic court, burden of proof*