

國際投資保障協定「適法性條款」之適用與效力——

以 *Fraport v. Philippines* 為核心

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摘要

透過簽訂國際投資保障協定承諾給予外國投資公平且合理待遇，並允許外國投資在受有侵害時利用「投資人對地主國爭端解決 (Investor-State Dispute Settlement, ISDS)」機制將爭端訴諸國際仲裁，已是各國吸引外國投資之主流趨勢。但鑑於 ISDS 機制之適用對國家規制權產生拘束和限制，晚近投保協定開始對「可受保護之外國投資類型」加以限制，並增訂「適法性條款 (conformity clause)」限縮 ISDS 機制之適用，在多次的投資爭端解決實務中，地主國也援引「非法性抗辯 (illegality plea)」，主張違法之投資應不得享有投保協定賦予之保護，且應排除 ISDS 機制對涉及非法投資爭端解決之可適用性。

在著名的 *Fraport v. Philippines* 案中，非法性抗辯的適用獲得充分的闡釋，特別是仲裁庭在判斷以及判斷撤銷程序中的論理，對非法性抗辯之理論和適用提供了權威性的指引。本文擬以 *Fraport v. Philippines* 案為核心，探討非法性抗辯適用涉及的四個問題。首先，本文欲釐清非法性抗辯適用之層次，究竟屬 ISDS 對案件管轄權有無的程序抗辯，又或為投資是否在投保協定保護範圍內之實體抗辯，以探詢此條款之作用和適當援引時點；其次，對於條款要求「投資須符合內國規範」要件，本文將分析此究竟是指僅符合內國法定義的投資始受保護，又或是指受保護之投資須合乎內國法規定；再者，對於「投資是否違法」判斷上，本文將分析究竟應以投資做成時為適法性認定時點，又或應以整體投資經營期間為判斷，並將探討違法性認定究竟是「有、無違法」之認定，又或須考量違法性之嚴重性，並僅在投資違法性達一定程度時此抗辯才有適用；最後，本文將分析「污手原則 (Unclean Hands Doctrine)」與適法性條款適用之競合問題，包括倘投資人之投資一部或全部違法時，其是否將因污手原則的適用，而不得援引國際投資協定賦予之保護，以及倘地主國政府促進或參與了外國投資之違法行為，此時地主國也是否將因污手原則之適用，而不得援引非法性抗辯而排除投資者之救濟主

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張。

由於我國在 2017 年與菲律賓簽定之《駐菲律賓臺北經濟文化辦事處與馬尼拉經濟文化辦事處投資保障及促進協定》(Agreement between the Taipei Economic and Cultural Office in the Philippines and the Manila Economic and Cultural Office in Taiwan for the Protection and Promotion of Investments)，已首次將適法性條款納入我國簽署之投保協定中，且鑒於東協和南亞各國均偏好將適法性條款納入其簽署之投保協定，未來我國在新南向政策下與此些區域國家簽定之投保協定，均極可能將此條款納入。基此，本文對適法性條款之適用及效力解析，除學理上的討論外，也有助於解決未來投資爭端實務適用此些條款時可能面對之問題，並能釐清適法性條款對投資者及地主國權益保護之衝擊和影響，供我國未來擬定洽談國際投資協定談判策略參考之用。

關鍵字：適法性條款、國際投資保障協定、管轄權、污手原則

Abstract

In recent years, International Investment Agreement (IIA) has flourished as states adopted hundreds of IIAs to attract foreign investment. Among the guarantees and assurances provided under the IIAs, the adoption of Investor-State Dispute Settlement (ISDS) mechanism was considered one of the most significant benefits as it ensures foreign investors an effective and less biased mechanism to settle investment disputes. Although the correlation between the adoption of IIAs and initiation of foreign investments remains unclear, the expanding application of the ISDS mechanisms has already attracted criticisms that the ISDS mechanism has unduly limited the national authority's regulatory power and has thus impeded the state's right to regulate. In order to limit the use of the ISDS mechanism, the "conformity clause", the provision which requires investors to act in conformity with the rules and laws of Host States, was regularly added to the recent adopted IIAs, and states have raised illegality plea to deprive illegal investments of the protections and benefits provided under the IIAs. In various ISDS proceedings, Host States has also invoked international law principles such as the "Unclean Hands Doctrine" to argue that illegal investment should be deprived of the protection provided under the IIAs and the investors cannot resort to the ISDS mechanism when wrongdoings taint their respective investments.

Although the "conformity clause" has been incorporated into many IIAs, its effect has not been fully explored. The arbitration tribunals' interpretation of the conformity clause and its effect are also mixed and inconsistent. In order to understand and assess the influence of the conformity clause and to clarify its effect, the analysis of this paper

shall center on the arbitral decisions of *Fraport v. Philippines* which provide a thorough analysis of the conformity clause. Questions like the thresholds for applying the “illegality defense”, the relationship between the application of conformity clause and Unclean Hands doctrines shall also be discussed. While noticing that the conformity clause was also incorporated into the IIA recently concluded between Taiwan and the Philippines and is likely to appear in other IIAs as Taiwan thrives to conclude IIAs with its trading partners in the Southeast Asia, it is hoped that the finding of this paper would alert the Taiwanese government the effect of conformity clause and its potential impact towards investor protections. It is also hoped that this study may help the Taiwanese government be more prudent about incorporating these provisions when negotiating IIAs in the future.

Keyword: Conformity Clause, International Investment Agreement, Jurisdiction, Unclean Hands Doctrine

