Provisional Measures in International Arbitration as a Response to Parallel Criminal Proceedings

by

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LL.M., Central European University, 2012
LL.B., National University of Kyiv-Mohyla Academy, 2010

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Abstract

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The central subject of this thesis is the power of an arbitral tribunal to order a state to refrain from pursuing criminal proceedings against a commercial enterprise if such an investigation constitutes an abuse of power or an attempt to obtain an unfair procedural advantage or harass of the investor, rather than a legitimate exercise of the state's police power. The first chapter addresses the nature of international arbitration and how different theoretical models may help to explain the limits of the arbitrators' adjudicative powers and the attitude of various national legal orders and domestic courts to arbitration agreements, proceedings and awards. The second chapter analyzes different approaches to investment arbitration as a form of global governance, and reviews arbitral jurisprudence on the interaction between protection of foreign investment and states' power to conduct criminal proceedings. The third chapter focuses on jurisprudence of the International Court of Justice (ICJ) and various arbitral tribunals on provisional measures affecting the conduct of criminal proceedings. It identifies key developments and trends in the jurisprudence, especially with respect to the rights that could be protected by such measures. Finally, the fourth chapter addresses the question how to balance the states' right (or even an obligation) to combat global corruption and crime, one the one hand, and the due process rights accorded to private entities when their commercial and investment disputes are resolved through international arbitration, on the other hand.

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Introduction: Setting Priorities between Settlement of Economic Disputes and Prosecution of Crimes?

As a result of the increasing globalization of international trade and investment, over the past several decades there has been a significant proliferation of international arbitration, which has reached the rank of the principal method of international dispute resolution in cases involving individuals, corporations, and sovereign states.[1] At the same time, the power to investigate and prosecute crimes, including those perpetrated by foreign individuals and entities, remains one of the core powers of sovereign states. Parallel arbitration and criminal proceedings, or the interplay between international arbitration, sometimes referred to as a system of "privatized justice," on the one hand, and the state's public authority in criminal law matters, on the other hand, constitutes the broad research focus of this thesis.

1. Key Concept: International Arbitration

In general, arbitration is a private and consensual dispute resolution system where two or more parties agree to submit their current or possible future dispute to a neutral third party (an individual or a panel of several individuals) whose decision will be final and binding on the parties, subject to limited judicial review.[2] The objectives of international arbitration agreements are to provide a neutral and centralized dispute resolution forum, free the parties from the influence of their respective national governments, avoid jurisdictional complications accompanying international civil litigation, ensure enforceability of awards, benefit from the commercial competence and expertise of the tribunal, avoid lengthy appeals, tailor the dispute resolution procedure to the parties' needs (on the basis of party autonomy and procedural flexibility), increase speed and reduce costs of dispute resolution, ensure confidentiality or privacy of the proceedings,

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[1] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford: Oxford University Press, 2015), para 1.01.

[2] *Ibid*, paras 1.04-1.05.

facilitate amicable settlements, and remove concerns surrounding state immunity and the partiality of state courts in disputes involving states and state entities.[3]

While legal practitioners and academics predominantly view international arbitration as a private, consensual and non-political system for resolution of economic disputes, some international relations and law and society scholars argue that the proliferation of international arbitration removes politically sensitive matters from public supervision and judicial oversight, and position the increasing role of international arbitration as the preferred dispute resolution mechanism in international trade and investment within the larger framework of juridification, pluralization, and privatization of commercial relations.[4] National governments are becoming increasingly open to allowing arbitration of corporate, licensing, public procurement, and public-private partnership disputes, as well as of claims involving allegations of corruption, fraud, or anticompetitive behavior. According to these scholars, this "expansion of arbitrable subject-matter, when combined with the secretive, closed, and highly discretionary and informal nature of international commercial arbitration," constitutes a significant challenge to democratically accountable institutions.[5]

2. Research Focus: State Sovereignty v. Privatized Justice

However broadly the boundaries of arbitral tribunal's adjudicative powers and jurisdiction are pushed, justified, and interpreted by different legal theories, international arbitration continues to be a dispute resolution mechanism for disputes arising out of international trade and investment, even if the adjudication of such disputes requires arbitral tribunals to apply or assess the state's laws, regulations and restrictions on capital transfers and securities circulation, mining and construction permits, land and real estate contracts, licensing or technical standards, public procurement or economic competition. Some of these disputes may involve allegations, made by one of the parties or independently by law enforcement authorities, that the economic activity in question has

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[3] Gary B Born, *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) at 73–93.

[4] A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003) at 26–29.

[5] *Ibid* at 223.

been tainted by illegality, such as forgery of documents, bribery and corruption, money laundering, antitrust violations or other types of so-called "white collar crime". However, the state or state entity's consent to arbitration does not necessarily imply its consent to have any aspect of criminal law matters, arising in the context of parallel criminal proceedings, to be addressed in any way within the private arbitration forum. This leads to the question of interaction and priority between parallel arbitral and criminal proceedings.

The significant increase in the number of international arbitrations, including the dramatic proliferation of investor-state arbitrations over the past 20 years,[6] was accompanied by a corresponding surge in the number of applications for more and more sophisticated types of provisional measures,[7] including the investors' requests to enjoin host states from pursuing inquiries into the legality of their investments.[8] This complex

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[6] For instance, whereas in 1994-1996 the International Centre for the Settlement of Investment Disputes (ICSID) registered only 3 disputes *per annum*, this number rose to as many as 48 new cases in 2016 and 53 in 2017. See ICSID, *The ICSID Caseload - Statistics (Issue 2018-2)* at 7, online: <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf>, last accessed on 28 December 2018.

[7] The term "provisional measures" or "interim relief" refers to the temporary measures ordered by the arbitral tribunal in order to protect the rights of the parties to the dispute pending the final resolution of the case. See *infra* Chapter 3.1 for more details.

[8] *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12 [*Caratube v Kazakhstan*], Decision Regarding Claimant's Application for Provisional Measures (31 July 2009); *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Cases No ARB/12/14 & 12/40 [*Churchill Mining v Indonesia*], Procedural Order No 9 (8 July 2014); *City Oriente Limited v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21 [*City Oriente v Eucador*], Decision on Provisional Measures (19 November 2007); *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14 [*EuroGas v Slovakia*], Procedural Order No 3, Decision on the Parties Request for Provisional Measures (23 June 2015); *Hydro Srl, Costruzioni Srl, Francesco Becchetti, Mauro de Renzis, Stefania Grigolon and Liliana Condomitti v Republic of Albania*, ICSID Case No ARB/15/28 [*Hydro v Albania*], Order on Provisional Measures (3 March 2016); *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6 [*Lao Holdings v Laos*], Ruling on Motion to Amend the Provisional Measures Order (30 May 2014); *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8 [*Libananco v Turkey*], Decision on Applicant's Request for Provisional Measures (7 May 2012); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 [*Quiborax v Bolivia*], Decision on Provisional Measures (26 February 2010); *Sergei Paushok et al v Government of Mongolia*, UNCITRAL [*Pauschok v Mongolia*], Order on Interim Measures (2 September 2008); *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1 [*Teinver v Argentina*], Decision on Provisional Measures (8 April 2016); *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18 [*Tokios Tokeles v Ukraine*], Procedural Order No 1, Claimant's Request for Provisional Measures (1 July 2003), Procedural Order No 3 (18 January 2005); *Bernard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe*, ICSID Case No ARB/10/25 [*Von Pezold v Zimbabwe*], Directions

legal phenomenon – the power of an arbitral tribunal to order a state to refrain from pursuing criminal proceedings against a commercial enterprise (an investor or a public procurement bidder, or its officers and directors, employees, suppliers or business partners) if such an investigation constitutes an abuse of power, an attempt to obtain an unfair procedural advantage or harass of the investor, or is only a pretext to distort the arbitration proceedings rather than a legitimate exercise of the state's police power – constitutes the core object of this research project.

This issue is particularly important in the Canadian context, as Canada is a party to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*ICSID Convention*),[9] 44 bilateral investment treaties (BITs) and 21 other treaties with investment provisions,[10] including the *North American Free Trade Agreement* (*NAFTA*),[11] the *Comprehensive Economic and Trade Agreement with the European Union* (*CETA*),[12] and recently signed *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (*CPTPP*)[13], as well as a frequent player in investor-state dispute resolution: Canada was named as a respondent state in 27 cases,[14] and Canadian companies appeared as claimants in 49 investor-state arbitrations.[15]

Concerning Claimant's Application for Provisional Measures of 12 June 2012 (13 June 2012), Procedural Order No 5 (3 April 2013).

[9] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159, entered into force on 14 October 1966 [*ICSID Convention*].

[10] UNCTAD Investment Policy Hub, *International investment Agreements Navigator - Canada*, online: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/35#iiaInnerMenu>, last accessed on 28 December 2018. Of those 44 BITs, 34 are currently in force (BITs with Argentina, Armenia, Barbados, Benin, Cameroon, China, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Egypt, Hong Kong, Hungary, Jordan, Kuwait, Latvia, Lebanon, Mali, Mongolia, Panama, Peru, Philippines, Poland, Romania, Russian Federation, Senegal, Serbia, Slovakia, Tanzania, Thailand, Trinidad and Tobago, Ukraine, Uruguay, and Venezuela), 4 were signed, but not in force (BITs with Burkina Faso, Guinea, Nigeria and South Africa), and another 6 were terminated (in this category are old BITs with Czech Republic, Latvia, Romania, Slovakia and Uruguay, as well as the recently terminated Canada-Ecuador BIT).

[11] *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289, entered into force on 1 January 1994 [*NAFTA*].

[12] *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, OJ L 11/23 (2017), entered into force on 21 September 2017 [*CETA*].

[13] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 23 January 2018, entered into force on 30 December 2018 [*CPTPP*].

[14] UNCTAD Investment Policy Hub, *Investment Dispute Settlement Navigator – Canada*, online: <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/35?partyRole=2>, last accessed on 28 December 2018.

[15] UNCTAD Investment Policy Hub, *Investment Dispute Settlement Navigator – Canada*, online: <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/35?partyRole=1>, last accessed on 28 December 2018.

The narrow research focus of this thesis is: to what extent should an arbitral tribunal (a body composed of one or several privately appointed individuals) be entrusted with powers to oversee criminal proceedings initiated and conducted by competent officials of a sovereign state, thus giving priority to the resolution of an underlying economic dispute over the determination of criminal culpability in a related criminal investigation, or, in other words, why, when and how should the arbitral tribunal be entitled to order the state to refrain from pursuing a criminal investigation or prosecution in parallel with ongoing arbitration proceedings?

This subject gives rise to a number of discrete research questions. To begin, what is the nature of international arbitration (or what is the theory that most coherently and persuasively explains the source of arbitral tribunal's authority to issue binding awards and orders) and what do these theories of international arbitration suggest an arbitral tribunal should do when faced with the question of whether or not to stay arbitration pending the resolution of related criminal proceedings? What role does international investment arbitration play in global governance, in particular what is the impact of investment arbitration on the enforcement of criminal law by sovereign states? For the protection of which rights (and for the prevention of which types of irreparable harm) may a private party seek interim relief suspending a criminal investigation or prosecution? Should tribunals in investment arbitration cases apply the same standards of "urgency" and "necessity" as the International Court of Justice (ICJ) when determining whether to grant such types of provisional measures? And, finally, should tribunal-ordered provisional measures that interfere with conduct of criminal proceedings be limited to investment arbitration cases or may they find their way into international commercial arbitration cases as well?

3. Overview of Theoretical Approaches

This research project touches on international economic law, public international law, international arbitration, criminal law and procedure, as well as political science (international relations), while analyzing the interplay between investors' interests in being accorded due process rights in the settlement of their disputes with the host state,

and the state's interests to achieve high levels of foreign direct investment on the one hand, and, on the other hand, to punish those individuals and entities who violate the laws and regulations promulgated by the state.

The thesis will, accordingly, build upon the existing literature exploring legal theories underlying international commercial and investment treaty arbitration,[16] and the development of international arbitration as an important element of the system of transnational global governance.[17]

By entering into international investment agreements (IIAs), sovereign states assume a variety of obligations towards foreign investors and investments, including an obligation to treat them "fairly and equitably", to accord to them "full protection and security" and non-discriminatory treatment, to ensure transparency and stability of regulation of business activity, as well as to refrain from imposing or maintaining arbitrary measures, performance requirements, expropriatory measures or measures having an equivalent effect.[18] International investment law in general, and investor-state dispute settlement in particular, is frequently studied and criticized by the new constitutionalism school of thought, a mode of analysis that has its roots in both international relations theory and constitutional law and advocates against the "varied and complex efforts … to develop a politico-legal framework for the reconstitution of capital on a world scale, and thus for the intensification of market forms of discipline."[19] Central to the new constitutionalism is a view of neoliberalism as a "theory of political economy that hypothesizes that human

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[16] Born, *supra* note 3 at 6–217; Emmanuel Gaillard, "International Arbitration as a Transnational System of Justice" in *Arbitration: The Next Fifty Years* (Kluwer Law International, 2012) 66; Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden/Boston: Martinus Nijhoff Publishers, 2010); Julian DM Lew, Loukas A Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at 71–97; Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2014).

[17] A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003); Walter Mattli & Thomas Dietz, eds, *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford: Oxford University Press, 2014); Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014).

[18] For more details, see *infra* Chapter 2.1.

[19] Stephen Gill, "Theorizing the Interregnum: The Double Movement and Global Politics in the 1990s" in Bjorn Hettne, ed, *International Political Economy: Understanding Global Disorder* (London: Zed Books, 1995) at 78.

well-being will be advanced by the practices associated with free markets."[20] Thus, Schneiderman suggests that economic globalization "represents the institutionalization of neoliberalism on a global scale."[21] Therefore, the analysis done by new constitutionalism scholars of the role that neoliberalism envisages, in the economically and legally globalized world, for sovereign states' governments is also of particular importance to this thesis.

Although new constitutionalism scholars have formulated a coherent explanation and critique of the "regulatory chill" and "immobilization of local agency" caused by IIAs and investor-state arbitrations with regard to the state's ability to freely legislate in the areas of economic, fiscal, trade, investment policies, and in respect of labour standards and environmental protection, the relationship between international arbitration and state authority in criminal law matters remains outside the focus of both mainstream legal academia and critical scholars. This thesis aims at filling this gap in existing research and will thus assess whether new constitutionalism and other critical views can provide unique insights to understand the interaction between international arbitration proceedings running and a parallel domestic criminal investigation or prosecution.

Another way to approach this issue is through the rapidly evolving literature on international arbitration and the "global fight against corruption". However, while legal scholarship on corruption and arbitration is plentiful,[22] it predominantly addresses the

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[20] David Schneiderman, "Transnational Legality and the Immobilization of Local Agency" (2006) 2 Ann Rev L & Soc Sci 387 at 390.

[21] *Ibid*.

[22] Doak Bishop, "Toward a More Flexible Approach to the International Legal Consequences of Corruption" (2010) 25:1 ICSID Rev 63; Antonio Crivellaro, "The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption" (2013) 10:3 Transnat'l Disp Mgmt 1; Stefan Dudas & Nikolaos Tsolakidis, "Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?" (2013) 10:3 Transnat'l Disp Mgmt 1; Michael Hwang & Kevin Lim, "The Judicial Scrutiny of Arbitral Awards in Setting Aside and Enforcement Proceedings Involving Issues of Corruption" (2013) 10:3 Transnat'l Disp Mgmt 1; Richard Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge With New Answers" in Laurent Lévy & Yves Derains, eds, *Liber Amicorum en l'honneur de Serge Lazareff* (Paris: Editions Pedone, 2011) 383; Sagar Kulkarni, "Enforcing Anti-Corruption Measures Through International Investment Arbitration" (2013) 10:3 Transnat'l Disp Mgmt 1; Daniel Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption" (2013) 10:3 Transnat'l Disp Mgmt 1; Michael A Losco, "Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction" (2014) 63 Duke L J 1201; Andrea J Menaker, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations" (2010) 25:1 ICSID Rev 67; Tamar Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration" (2013) 30:3 J Int'l Econ L 267; Mohamed Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?" (2009) 24:1 ICSID Rev 116; Giorgio Sacerdoti,

issues of the appropriate burden of proof for allegations of corruption,[23] transparency of international arbitration,[24] illegality of investment (including non-compliance with the host state's regulations, fraud and deceit, as well as good faith principle and "clean hands" doctrine),[25] and the arbitrator's power or duty to refer suspicions of corruption to national law enforcement authorities.[26]

Even those authors who address the power of arbitral tribunals to order provisional measures affecting parallel domestic criminal proceedings[27] do so only with respect to international treaty-based investment arbitration, primarily in the context of ICSID-

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"Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice" (2009) 24:2 ICSID Rev 565; Tidarat Sinlapapiromsuk, "The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?" (2013) 10:3 Transnat'l Disp Mgmt 1; Joe Tirado, Matthew Page & Daniel Meagher, "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship" (2014) 29:2 ICSID Rev 493.

[23] Florian Haugeneder & Christoph Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof" (2009) Aus Arb YB 539 at 544–558; Carolyn B Lamm, Brody Greenwald & Kristen M Young, "From *World Duty Free* to *Metal-Tech*: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption" (2014) 29:2 ICSID Rev 328 at 330–341; Carolyn B Lamm, Hansel T Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in Ángel Fernández Ballesteros Miguel & Arias David, eds, *Liber Amicorum Bernardo Cremades* (Kluwer Law International, 2010) 699 at 700–706; Sophie Nappert, "Public Interest in a Private Procedure - What Burden of Proof for Allegations of Corruption in International Arbitration?" (2013) 10:4 Transnat'l Disp Mgmt 1; Constantine Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World" (2010) 25:1 ICSID Rev 47; Markus S Rieder & Andreas Schoenemann, "Suspicion of Corruption in Arbitration: A German Perspective" (2013) 10:3 Transnat'l Disp Mgmt 1; Stephan Wilske & Todd J Fox, "Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?" in Stefan Kröll et al, eds, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution - Liber Amicorum Eric Bergsten* (Kluwer Law Int'l, 2011) 489.

[24] Nikolaos Theodorakis, *Transparency in Investor-State Dispute Settlement: Law, Practice, and Emerging Tools Against Institutional Corruption* (Cambridge, MA: Edmond J. Safra Center for Ethics at Harvard University, 2015).

[25] Gabriel Bottini, "Legality of Investments under ICSID Jurisprudence" in Michael Waibel et al, eds, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 297; Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration" (2014) 29:1 ICSID Rev 155; Aloysius Llamzon, "*Yukos Universal Limited (Isle of Man) v The Russian Federation*: The State of the 'Unclean Hands' Doctrine in International Investment Law: *Yukos* as both Omega and Alpha" (2015) 30:2 ICSID Rev 315; Abby Cohen Smutny & Petr Polášek, "Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration" in Jacques Werner & Arif Hyder Ali, eds, *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (London: CMP Publishing, 2009) 277.

[26] Kiera S Gans & David M Bigge, "The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities" (2013) 10:3 Transnat'l Disp Mgmt 1; Sara Nadeau-Séguin, "Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound by a Duty to Report Corrupt Practices?" (2013) 10:3 Transnat'l Disp Mgmt 1; Cecilia AS Nasarre, "International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator" (2013) 10:3 Transnat'l Disp Mgmt 1.

[27] Henry G Burnett & Jessica Beess und Chrostin, "Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings" (2015) 30 Md J Int'l L 31; Ruslan Mirzayev, "International Investment Protection Regime and Criminal Investigations" (2012) 29:1 J Int'l Arb 71; Melanie Willems, "ICSID Arbitrators - The World's Policemen?", *The Arbiter International Disputes Newsletter* (Autumn 2015) 3.

administered arbitrations, and choose not to devote space to analysis of this issue in international commercial and contract-based investment arbitration. Furthermore, international arbitration is a dynamic field and arbitral tribunals keep issuing new decisions[28] on the claimants' requests for interim measures concerning the host states' criminal investigations.

4. Research Methodology

Primarily, the thesis is based upon normative analysis (i.e. the analysis of legal texts and legal norms, values, and principles contained therein) and interpretative methods (i.e. the search for meanings of legal rules employing different interpretative techniques). It thus reviews and critically analyses the relevant texts of the ICSID Convention, IIAs, BITs and other international instruments, applicable arbitration rules, awards rendered in international arbitrations[29] and the practice of the ICJ on provisional measures affecting criminal proceedings.[30] I will engage in the discourse surrounding the nature and theories

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[28] See, eg, *Hydro v Albania*, Order on Provisional Measures (3 March 2016); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016).

[29] *Supra* note 8. On provisional measures in international arbitration see also Born, *supra* note 3, at 2424-2563; Emmanuel Gaillard, ed, *Anti-Suit Injunctions in International Arbitration* (Paris: Juris Publishing, 2005); Emmanuel Gaillard, "Anti-suit Injunctions Issued by Arbitrators" in Albert Jan van den Berg, ed, *International Arbitration 2006: Back to Basics?* (Kluwer Law International, 2007) 235; Gabrielle Kaufmann-Kohler & Aurélia Antonietti, "Interim Relief in International Investment Agreements" in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements. A Guide to the Key Issues* (Oxford: Oxford University Press, 2010) 507; Julian D.M. Lew, "ICSID Arbitration: Special Features and Recent Developments" in Norbert Horn & Stefan Kröll, eds, *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004) 267; Loretta Malintoppi, "Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order" in Christina Binder et al, eds, *International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 157; Caline Mouawad & Elizabeth Silbert, "A Guide to Interim Measures in Investor-State Arbitration" (2013) 29 Arb Int'l 381; Dan Sarooshi, "Provisional Measures and Investment Treaty Arbitration" (2013) 29 Arb Int'l 361; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005).

[30] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Provisional Measures, Order of 8 December 2000, ICJ Reports 2000, p 182; *Avena and Other Mexican Nationals (Mexico v United States of America)*, Provisional Measures, Order of 5 February 2003, ICJ Reports 2003, p 77; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p 102; *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Request for the Indication of Provisional Measures, Order of 7 December 2016, ICJ Reports 2016, p 1148; *LaGrand (Germany v United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p 9; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Provisional Measures, Order of 28 May 2009, ICJ Reports 2009, p. 139; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Provisional Measures, Order of 3 March 2014, ICJ Reports 2014, p 147 & Request for the Modification of the Order Indicating Provisional

of international arbitration, its (proper) role in promotion of the global rule of law and depoliticization of international economic relations, as well as the values and principles underlying the decisions ordering the state to refrain from interfering, through commencing or continuing criminal investigations or prosecutions, into private (or "privatized") dispute settlement mechanisms. The unit of analysis will be a decision (a procedural order or an award) issued by an arbitral tribunal, and (where necessary and appropriate) these decisions will be put in their political and historical context, especially taking into account direct involvement of sovereign states in such cases. To this end, the thesis may utilize a form of a media analysis, engaging in critical assessment of media and corporate reporting on international arbitration cases and parallel criminal proceedings.

This research project also contemplates interdisciplinary analysis, combining legal studies and political science (international relations) perspectives on international arbitration, as well as a comparative analysis, exploring the similarities and differences, points of connection and difference, between different international arbitration regimes: international commercial arbitration, international contract-based investment arbitration, international treaty-based arbitration under the ICSID Rules, and international treaty-based arbitration under arbitration rules other than ICSID Rules.[31] Ultimately, policy analysis will be utilized to formulate possible policy and legislation changes aimed at strengthening the legitimacy and ensuring efficiency of international commercial and investment arbitration without compromising the delivery of justice in criminal cases.

Measures of 3 March 2014, Order of 22 April 2015, ICJ Reports 2015, p. 556. On provisional measures in the ICJ practice, see also Rosenne Shabtai, *Provisional Measures in International Law. The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford: Oxford University Press, 2005); Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat & Christian J. Tams, eds, *The Statute of The International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) at 923 *et seq*.

[31] This thesis will address both international commercial arbitration and international treaty-based investment arbitration, whereas settlement of inter-state trade and boundary disputes remains outside the scope of this research project. This thesis also does not explore the jurisprudence of various human rights courts and tribunals.

5. Thesis Structure Overview

This thesis consists of four substantive chapters, an introduction and a conclusion. The first chapter will synthesize different "theories" and "representations" of international arbitration into four categories that perceive view arbitration as (i) a judicial process anchored in one national legal order; (ii) a contractual product of the parties' will alone; (iii) a dispute mechanism of a hybrid nature that may derive its validity from several national legal orders; and (iv) a product of an autonomous legal order. The relationship between international arbitration and criminal investigations or prosecutions is essentially a question of priority among parallel proceedings, one conducted by the authorities of a sovereign state and another by a privately-appointed panel of arbitrators. Critical analysis of the central issue of this thesis – whether a private tribunal may order a sovereign state to postpone the exercise of its criminal justice powers until after the resolution of an underlying economic dispute – necessarily raises the question whether the system of international arbitration should function the other way around, that is whether the settlement of an economic dispute has to be postponed until after the conclusion of related public (criminal) proceedings. Therefore, the first chapter will conclude by addressing the arbitrators' duty to stay the proceedings pending the resolution of a related criminal investigation.

The second chapter will concentrate on the "public" dimension of international arbitration, i.e. on the role of investor-state dispute settlement as a system of global governance with particular emphasis on the impact of investment arbitration on the enforcement of criminal law by sovereign states. First, it will describe the architecture of the international investment protection and investor-state dispute settlement regime. Second, it will explain that international investment agreements (IIAs) may be used as a way for developing countries to make credible commitments to liberal economic and trade policies in order to attract foreign investment, and then consider four different critical approaches to investment arbitration as a system of global governance, namely the views that consider investor-state dispute settlement to be an embodiment of (i) hegemonic international law, (ii) new constitutionalism, (iii) global administrative law, and (iv) humanity's law. Third, it will give a brief overview of cases where the dispute concerned alleged mistreatment or harassment of investor in the context of a criminal

investigation or prosecution. Finally, it will end with a conclusion on the arbitral tribunals' role as a private authority tasked with reviewing the exercise by sovereign states of an inherently public function, the enforcement of domestic criminal laws.

The third chapter will review and analyze the jurisprudence of the ICJ and arbitral tribunals on provisional measures affecting the conduct of criminal proceedings. First, it will explore provisional measures in international arbitration, including their purpose, types of provisional measures, prerequisites for granting them, and their binding nature. Second, it will map the jurisprudence of the ICJ and arbitral tribunals on provisional measures affecting parallel criminal proceedings in their chronological development. Third, it will identify key trends in the decisions of the ICJ and arbitral tribunals, including the rights that are capable of protection by such interim measures, and requirements of urgency and necessity. Finally, the third chapter will conclude that arbitral tribunals employ provisional measures to prevent the respondent state from using procedural measures to jeopardize arbitral adjudication of economic disputes, and the use of this power rests upon general principles of peaceful settlement of international disputes.

Finally, the forth chapter addresses the question how to balance the states' right (or even an obligation) to combat global corruption and crime, on the one hand, and the due process rights accorded to private entities when their commercial and investment disputes are resolved through international arbitration, on the other hand. It will analyze potential changes in both the international investment regime (including carve-outs for the matters of criminal law and the shift from international investment arbitration to a multilateral investment court) and international commercial arbitration that may improve the legitimacy of having transnational actors decide on the stay of criminal proceedings running in parallel with a commercial or investment dispute. It will conclude with a set of guidelines for the exercise of this power by arbitral tribunals in the future.

Chapter 1: International Arbitration, National Legal Orders and Criminal Proceedings

There is little agreement among legal scholars on the nature of international arbitration, i.e. on the theoretical foundations of this dispute resolution method. In other words, despite the increasing use of international arbitration in international trade and investment, there is no one generally accepted theory explaining the source of the arbitral tribunal's power to issue final and binding decisions upon the parties. Although some commentators suggest that "the practical implications of this debate are often unclear"[32] and call it a "tempest in a teapot",[33] theoretical models may help to explain the limits of the arbitrators' adjudicative powers, as well as the attitude of various national legal orders and domestic courts to arbitration agreements, proceedings and awards.[34] In particular, as this chapter will demonstrate, where arbitration and criminal proceedings run in parallel, different theories of international arbitration lead to divergent answers to the question whether arbitrators may (or have to) order a stay of arbitration proceedings until the related criminal case is resolved.

Leading treatises by Born[35] and Lew, Mistelis and Kroll[36] identify four theories of international arbitration, namely contractual, jurisdictional, mixed (or hybrid) and autonomous. The contractual theory views arbitration as a form of contractual relation where the agreement of the parties to arbitrate gives legitimacy and binding force to the arbitral award, and emphasizes that arbitrators are not judges as they do not perform a public function.[37] By contrast, the jurisdictional theory emphasizes the judicial character of international arbitration and the role of the national legal system in conferring adjudicative powers upon the arbitrators.[38] The hybrid (or mixed) theory, as its name suggests, builds upon elements of both contractual and jurisdictional theories, whereas

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[32] Born, *supra* note 3 at 214.
[33] Thomas E Carbonneau, *Cases and Materials on the Law and Practice of Arbitration*, 2nd ed, (Yonkers, NY: Juris Publishing, 2000) at 624, quoted in Born, *supra* note 3 at 214, and Lew, Mistelis & Kröll, *supra* note 16, para 5.5.
[34] Lew, Mistelis & Kröll, *supra* note 16, para 5.3.
[35] Born, *supra* note 3 at 214–217.
[36] Lew, Mistelis & Kröll, *supra* note 16, paras 5.2-5.33.
[37] Born, *supra* note 3 at 214.
[38] *Ibid* at 214–215.

the autonomous theory suggests that international arbitration is not to be treated as either contractual, jurisdictional, or hybrid.[39]

Gaillard[40] and Paulsson[41] approach this issue from another perspective. Rather than focusing on the "nature" of arbitration, whether it is a process, a contract or a mixture of them, these authors examine the interrelation between arbitration and various national legal orders to answer the question whether international arbitration is tied to one or more national legal orders, a multiplicity of such orders or to none of them. In particular, Gaillard identifies three approaches to international arbitration (calling them "representations"), namely the views that (i) the law of the seat of arbitration is the exclusive source of the arbitral award's legal force (the "monolocal approach"),[42] (ii) international arbitration is anchored in a plurality of national legal orders and the arbitral award derives its juridical effect from all legal orders that are willing, under certain circumstances, to give legal effect to such an award (the "Westphalian approach"),[43] and (iii) the view that recognizes the existence of an autonomous arbitral legal order (the "transnational approach").[44] Paulsson offers a slightly different classification as he distinguishes between four propositions: (i) the "territorial thesis" that any arbitration is national by definition as it is contingent upon the national law of the place of arbitration, (ii) the "pluralistic thesis" that arbitration may be given legal effect by several national legal orders neither of which is essential, (iii) the theory that arbitration is a product of an autonomous arbitral legal order, and (iv) the view that arbitration does not necessarily need to depend on any national law or judges to be effective.[45]

First, this chapter will synthesize different "theories" and "representations" of international arbitration into four categories that view arbitration as (i) a judicial process anchored in one national legal order; (ii) a contractual product of the parties' will alone; (iii) a dispute mechanism of hybrid nature that may derive its validity from several national legal orders; and (iv) a product of an autonomous legal order. Critical analysis of

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[39] *Ibid* at 215–216.
[40] Gaillard, *supra* note 16, paras 11–67.
[41] Paulsson, *supra* note 16 at 29–50.
[42] Gaillard, *supra* note 16, paras 11–22.
[43] *Ibid*, paras 23–39.
[44] *Ibid*, paras 40–67.
[45] Paulsson, *supra* note 16 at 30.

the central issue of this thesis – whether a private tribunal may order a sovereign state to postpone the exercise of its criminal justice powers until after the resolution of an underlying economic dispute – necessarily raises the question whether the system of international arbitration should function the other way around, that is whether the settlement of an economic dispute has to be postponed until after the conclusion of related public (criminal) proceedings. Therefore, this chapter will illustrate how different legal theories lead to different result with respect to the arbitrators' duty to stay the proceedings pending the resolution of a related criminal investigation.

1. Legal Theories of International Arbitration

1.1. Arbitration Is a Judicial Process Anchored in One National Legal Order

The jurisdictional theory of arbitration emphasizes the power of sovereign states to control and regulate arbitrations that take place within their respective jurisdictions.[46] The essence of this theory is that the arbitrator closely resembles the judge because they both derive their power and authority from the local law, the only distinction being that the judge's nomination *and* authority come *directly* from the sovereign, whereas the arbitrators draw their authority from the sovereign but their nomination is a matter of the parties' will.[47]

Proponents of this school emphasize the "public", or "judicial", nature of the arbitrators' functions,[48] and the arbitrator's role as a "private judge".[49] An illustration of the practical implications of the territorial approach to arbitration may be found, in particular, in the decisions on the arbitrators' immunity, independence and impartiality.[50] For instance, in *AT&T v. Saudi Cable* the English Court of Appeal concluded that "the test under English law for apparent or unconscious bias in an arbitrator is the same as that

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[46] Lew, Mistelis & Kröll, *supra* note 16, para 5.9.

[47] Julian DM Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Dobbs Ferry, N.Y.: Oceana Publications, 1978), para 66; Lew, Mistelis & Kröll, *supra* note 16, para 5.11.

[48] Born, *supra* note 3 at 214–215; Lew, Mistelis & Kröll, *supra* note 16, para 5.10.

[49] Henri Motulsky, *Etudes et notes sur l'arbitrage* (Paris: Dalloz, 1974) at 46, cited in Born, *supra* note 3, at 215.

[50] Lew, Mistelis & Kröll, *supra* note 16, paras 5.14-5.15.

for all those who make judicial decisions",[51] and in *Sutcliffe v. Thackrah* the House of Lords noted that, because "arbitrators are in much the same position as judges, in that they carry out more or less the same functions," public policy requires that they, like judges, be granted immunity from civil suits brought in respect of anything they say or do in court during the trial.[52] Also, recognizing the jurisdictional nature of arbitration, the Supreme Court of Colombia in 1991 declared unconstitutional a statute that permitted foreign nationals to act as arbitrators in cases with foreign element.[53]

Because the jurisdictional theory deems arbitration to be a privately-administered system of justice that the state allows to exist within its territory "by way of assignment or tolerance",[54] the parties are free to refer their disputes to arbitration precisely to the extent the applicable national law empowers or tolerates arbitration. This corresponds to the territorial (or monolocal) representation of international arbitration, which allows arbitrators to operate within a particular national legal system on the condition that arbitrators' decisions are subject to judicial control within that particular jurisdiction, and thus demotes the status of international arbitration to that of an element of a single national legal order, namely the legal order of the seat of arbitration (the *lex loci arbitri*).[55]

Relegation of arbitration to an element of a single national legal order has significant implications for the recognition and enforcement of arbitral awards. For instance, the 1927 Geneva Convention provides that, to be enforceable in another jurisdiction, the arbitral award has to become final in the country in which it has been made[56] and recognition and enforcement shall be refused if the award has been annulled in the country in which it has been made.[57] This requirement to prove the finality of the award in the state of its origin as a precondition to the award's enforceability in other

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[51] *AT&T Corporation and another v Saudi Cable Company* [2000] EWCA Civ 154, para 75 (per May LJ).
[52] *Sutcliffe v Thackrah and others*, [1974] AC 727 (HL) at 758, [1974] 1 All ER 859 at 881 (per Salmon LJ).
[53] Judgment of 21 March 1991, (1991) Revue de l'Arbitrage 720 (with note by Fernando Mantilla Serrano), declared unconstitutional the Decree No 2279 of 7 October 1989, Article 8. Subsequently, Colombian Law No 446 of 8 July 1998, Article 167, abolished all requirements as to the nationality of arbitrators. See Born, *supra* note 3, note 587.
[54] Lew, Mistelis & Kröll, *supra* note 16, para 5.10.
[55] Gaillard, *supra* note 16, para 11; Paulsson, *supra* note 16 at 29, 32–33.
[56] *Convention on the Execution of Foreign Arbitral Awards*, 26 September 1927, 92 LNTS 301, entered into force on 25 July 1929 [*1927 Geneva Convention*], Article 1(d).
[57] *Ibid*, Article 2(a).

jurisdictions became known as the "double exequatur requirement" and constituted a significant obstacle to the establishment of an effective mechanism for recognition and enforcement of foreign arbitral awards.[58]

In general, the validity of the territorial approach may be justified in two ways, which Gaillard refers to as the objectivist and the subjectivist views.[59] The former view was expressed, in particular, by Francis Mann in his often-cited[60] essay entitled "*Lex Facit Arbitrum*":

> In the legal sense no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.[61] … The *lex arbitri* cannot be the law of any country other than that of the arbitration tribunal's seat. No act of the parties can have any legal effect except as the result of the sanction given to it by a legal system.[62] … There is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign. If, in contrast to the national judge, the arbitrator is in many respects, but by no means with uniformity, allowed and even ordered by municipal legislators to accept the commands of the parties, this is because, and to the extent that, the local sovereign so provides.[63]

In other words, the objectivist view postulates that an arbitral award is binding solely because it is linked to the legal system of the seat of arbitration and emphasizes that, although the parties may be permitted to choose the law governing the underlying substantive dispute, they cannot choose the law governing the arbitration itself.[64] The

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[58] Born, *supra* note 3 at 3411, 3607–3608; Marike R P Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) at 4.

[59] Gaillard, *supra* note 16, para 12.

[60] *Ibid*, paras 13–14, 16, 18; Roy Goode, "The Role of the Lex Loci Arbitri in International Commercial Arbitration" (2001) 17:1 Arbitration International 19 at 29; Paulsson, *supra* note 16 at 33.

[61] Francis A Mann, "*Lex Facit Arbitrum*" in Pieter Sanders, ed, *International Commercial Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967) 157 at 159, reprinted in (1986) 2:3 Arb Int'l 241.

[62] *Ibid* at 161.

[63] *Ibid* at 162.

[64] Gaillard, *supra* note 16, para 13; William W Park, "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32:1 Int'l and Comparative L Quarterly 21 at 23.

faith of the award thus depends on the will of the legislator at place of arbitration, not on the subjective intentions of the parties.

Roy Goode, on the other hand, may be regarded as a proponent of the subjectivist view. He suggests that when the parties agree on the place of arbitration, they choose to subject their arbitration to the legal order at the seat, and disregarding their choice would thus frustrate the parties' legitimate expectations and contradict the principle of party autonomy.[65] In other words, the subjectivist approach emphasizes the parties' ability to agree on the settlement of their dispute in the jurisdiction they consider to be the most favorable from the legal standpoint. This argument presupposes that selection of the seat is not serendipitous or a matter of mere convenience, but a manifestation of the parties' intention to be bound by a particular legal order.[66]

The territorial or monolocal theory thus has its philosophical roots in the doctrine of legal positivism, as well as in the struggle for harmony and order among legal systems.[67] Indeed, Poudret and Besson explicitly state that "[t]he *lex arbitrii* builds the foundation (*Grundnorm*) for the effectiveness of the arbitration agreement."[68] In simple terms, the monolocal approach postulates that international arbitration owes its existence to states and, to avoid lawlessness and disorder that would prevail if arbitration-related decisions made at the seat were not recognized in other national legal orders, to a particular state.[69]

1.2. Arbitration is Based on the Parties' Will Alone

The contractual theory views international arbitration as a cluster of contractual acts, a form of private contractual relations, and emphasizes the freedom of contract and the role of party autonomy in the arbitration process.[70]

As early as in 1864, the Supreme Court of Missouri noted that the arbitral tribunal is "created by the will and consent of parties litigant"[71] and in 1937 the French Court of

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[65] Goode, *supra* note 60 at 31–32.
[66] *Ibid* at 32–33.
[67] Gaillard, *supra* note 16, paras 17–22.
[68] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (London: Sweet & Maxwell, 2007), para 112.
[69] Gaillard, *supra* note 16, paras 17, 21.
[70] Born, *supra* note 3 at 214; Lew, Mistelis & Kröll, *supra* note 16, paras 5.18-5.20.
[71] *Reily v. Russell*, 34 Mo 524 at 528 (1864).

Cassation stated that "arbitral awards, which have, as their basis, an arbitration agreement, form one entity with it and share its contractual character."[72] More recently, the Unites States Supreme Court determined that arbitration is "a matter of consent, not coercion'"[73] and "a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit".[74] Similarly, the Supreme Court of Canada noted that "arbitration is a creature that owes its existence to the will of the parties alone".[75] The UK Supreme Court acknowledged that arbitration "is consensual – the manifestation of parties' choice to submit present or future issues between them to arbitration."[76] In sum, different national courts have on multiple occasions confirmed that the consensual nature of international arbitration and the parties' agreement as it basis, and "[t]here is no contrary authority from either national courts or elsewhere."[77]

The contractual nature of international arbitration is most apparent in the definition of the group of persons and entities that are bound by, or may invoke, an arbitration agreement. Here the fundamental principle, embodied in international treaties, national arbitral legislation, decisions of domestic courts and arbitral awards, is that an arbitration agreement only creates rights and obligations for the "parties".[78] One arbitral tribunal explained the difference between arbitration and litigation in the following words:

> Contrary to litigation in front of State Courts where any interested party can join or be adjoined to protect its interests, in arbitration only those who are parties to the arbitration agreement expressed in writing could appear in

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[72] *Roses v Moller et Cie*, Judgment of 27 July 1937, (1938) I Dalloz 25 (French Court of Casation), quoted in Born, *supra* note 3, at 214, note 1530.

[73] *Stolt-Nielsen SA v AnimalFeeds International Corp*, 559 US 662, 130 SCt 1758 (2010) at 1773, quoting *Volt Information Sciences, Inc v Board of Trustees of Leland Stanford Junior University,* 489 US 468, 109 SCt 1248 (1989) at 1256.

[74] *Howsam v Dean Witter Reynolds, Inc*, 537 US 79 at 83, 123 SCt 588 (2002) at 591; *AT&T Tech, Inc v Commercial Workers of Am*, 475 US 643 at 648, 106 SCt 1415 at 1418 (1986), both quoting *Steelworkers v Warrior & Gulf Navigation Co*, 363 US 574 at 582, 80 SCt 1347 (1960) at 1353.

[75] *Dell Computer Corp v Union des consommateurs*, [2007] 2 SCR 801, 2007 SCC 34, para 51.

[76] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, para 24.

[77] Born, *supra* note 3 at 251.

[78] *Ibid* at 1405–1407; Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (The Hague: Kluwer Law International, 2006), paras 8–10.

> the arbitral proceedings either as claimants or as defendants.[79]

Even though persons and entities that did not formally sign an arbitration agreement may, in certain circumstances, rely upon or be bound by the arbitration agreement concluded between other parties, the theories underlining the application of the arbitration agreement to non-signatories "arise out of common law principles of contract and agency law."[80] Commentators caution that, despite common reference to the "extension" of an arbitration agreement to "third parties", such an expression is generally inaccurate because most of these theories serve not as an instrument to impose arbitration on an outsider, but as a means to ascertain whether a party's actions constitute consent to an arbitration agreement, despite the lack of its formal signature.[81]

Furthermore, an award issued by an arbitral tribunal "can neither directly confer rights nor impose obligations upon a person who is not a party to the arbitration agreement."[82] International arbitration is not subject to the doctrine of *stare decisis* or *jurisprudence constante*, although arbitral tribunals frequently do, in practice, consider and pay deference to past arbitral awards, orders and decisions rendered in other cases.[83] In recent years, the lack of consistency in arbitral jurisprudence dealing with claims by foreign investors alleging breaches of IIAs has been identified as a major concern.[84]

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[79] *Banque Arabe et Internationale D'Investissement (France) et al v Inter-Arab Investment Guarantee Corporation*, Award, 17 November 1994, (1996) 21 YB Comm Arb 13, para 6.

[80] *Thomson-CSF, SA v American Arbitration Ass'n*, (1995) 64 F3d 773, 776 (2nd Cir). See also *Bel-Ray Co, Inc v Chemrite (Pty) Ltd*, (1999) 181 F3d 435 (3rd Cir), 444 ("When asked to enforce an arbitration agreement against a nonsignatory, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law"); *EI DuPont de Nemours and Co v Rhone Poulenc Fiber and Resin Intermediates, SAS*, (2001) 269 F3d 187 (3rd Cir), 194 ("there is no dispute that a non-signatory cannot be bound to arbitrate unless it is bound 'under traditional principles of contract and agency law' to be akin to a signatory of the underlying agreement"); *Bridas SAPIC v Government of Turkmenistan*, (2003) 345 F3d 347 (5th Cir), 356 ("Ordinary principles of contract and agency law may be called upon to bind a nonsignatory to an agreement whose terms have not clearly done so"); *DK Joint Venture 1 v Weyand*, (2011) 649 F3d 310 (5th Cir), 314 (same).

[81] Born, *supra* note 3 at 1414.

[82] Blackaby et al, *supra* note 1, para 9.183.

[83] Dolores Bentolila, *Arbitrators as Lawmakers* (Kluwer Law International, 2017), paras 406–407.

[84] United Nations Commission on International Trade Law (UNCITRAL), *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters – Note by the Secretariat*, Document No A/CN.9/WG.III/WP.150 (28 August 2018), paras 9-18, online: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/056/80/PDF/V1805680.pdf?OpenElement>, last accessed on 28 December 2018.

In exploring the private nature of international arbitration, Jan Paulsson goes even further as he describes a view that is "the most autonomous of all ways of perceiving arbitration, given that it does not depend on national law or courts."[85] He relies on Santi Romano's[86] concepts that a legal order is necessarily grounded in social reality, that every organized social group, whether the international community, a professional organization or a voluntary association, constitutes a kind of a legal order, and that these legal orders are capable of being inferior, superior or parallel to that of a nation state.[87] Paulsson argues that, because arbitration in many respects closely resembles judicial forms of dispute resolution, it is "an obvious potential vehicle for social arrangements constituting legal orders outside the conventional statist model."[88]

Paulsson provides several examples of non-state systems that establish rules of conduct, create adjudicatory bodies to decide on their proper application, and that rely upon their internal sanctions to enforce these rules without recourse to national courts.[89] These cases show that private parties (natural persons, businesses, and non-governmental organizations) are capable of structuring their relationships through complex contractual arrangements that create mutual rights and obligations for them and that rely on arbitration as a mechanism to settle disputes arising out of or in connection with these contracts. In particular, the Internet Corporation for Assigned Names and Numbers (ICANN), which is responsible for "the stable and secure operation of the Internet's unique identifier systems",[90] is organized as a California nonprofit public benefit corporation and its Articles of Incorporation require ICANN to operate "for the benefit of the Internet community as a whole", to carry out its activities "in conformity with relevant principles of international law and international conventions" and to employ "open and transparent processes that enable competition and open entry in Internet-

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[85] Paulsson, *supra* note 16 at 45.
[86] Santi Romano, *L'ordre Juridique*, 2nd ed (Dalloz, 2002).
[87] Paulsson, *supra* note 16 at 46.
[88] *Ibid* at 47.
[89] *Ibid* at 48.
[90] ICANN, *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended 18 June 2018 [*ICANN Bylaws*], Article 1, s 1.1(a), online: <https://www.icann.org/resources/pages/governance/bylaws-en/>, last accessed on 28 December 2018.

related markets."[91] ICANN's Bylaws set out an "accountability and review" scheme, including the Independent Review Process (IRP) administered by a "well-respected international dispute resolution provider" and intended to "lead to binding, final resolutions consistent with international arbitration norms."[92]

Furthermore, ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) establishes an administrative mechanism, mandatory for generic top-level domains (.com, .net, .org, .biz and .info), that provides trademark owners with a speedy and cost-effective alternative to litigating disputes arising out of bad faith registration and use of domain names that are identical or confusingly similar to a registered trademark.[93] A panel, comprised of one or three independent panelists selected by an ICANN-approved dispute resolution service provider, decides a complaint in accordance with the UDRP, the UDRP Rules and "any rules and principles of law that it deems applicable."[94] If a panel decides to cancel the respondent's domain name or to transfer the domain name to the complainant, an ICANN-accredited registrar will perform such cancellation or transfer without any involvement of a national court.[95]

Professional sports are another example of a "broadly autonomous subsystem with an effective [non-state] norm enforcement regime".[96] Because a single athletic federation

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[91] ICANN, *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by ICANN Board on 9 August 2016, Article III, online: <https://www.icann.org/resources/pages/governance/articles-en>, last accessed on 28 December 2018.

[92] ICANN Bylaws, Article 4, ss 4.3(a)(viii), 4.3(m)(i). For more details on the IRP, see Flip Petillion & Jan Janssen, *Competing for the Internet: ICANN Gate - An Analysis and Plea for Judicial Review through Arbitration* (Kluwer Law International, 2017).

[93] ICANN, *Uniform Domain Name Dispute Resolution Policy*, as approved by ICANN on 24 October 1999 [*UDRP*], para 4, online: <https://www.icann.org/resources/pages/policy-2012-02-25-en>, last accessed on 28 December 2018. See Matthias Lilleengen & Eun-Joo Min, *Collection of WIPO Domain Name Panel Decisions* (Kluwer Law International, 2003) at 1-2.

[94] ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy*, as approved by the ICANN Board of Directors on 28 September 2013 [*UDRP Rules*], para 15(a), online: <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>, last accessed on 28 December 2018. ICANN-approved dispute resolution service providers are Arab Center for Domain Name Dispute Resolution (ACDR), Asian Domain Name Dispute Resolution Centre (ADNDRC), Czech Arbitration Court Arbitration Center for Internet Disputes, National Arbitration Forum, and World Intellectual Property Organization (WIPO). See ICANN, "List of Approved Dispute resolution Service Providers", online: <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>, last accessed on 28 December 2018.

[95] UDRP, paras 3(c) and 4(i).

[96] Gunnar Folke Schuppert, "From Normative Pluralism to a Pluralism of Norm Enforcement Regimes: A Governance Research Perspective" in Matthias Kötter et al, eds, *Non-State Justice Institutions and the Law:*

usually has exclusive responsibility for a particular sport within a designated territory ("single federation principle"), national and international sports federations enjoy a de facto geographic monopoly on setting regulations and sanctioning athletes and sports teams (primarily through short- and long-term suspensions and financial penalties) within their jurisdiction. The place "[a]t the apex of the athletic norm enforcement regime"[97] is occupied by the Court of Arbitration for Sport (CAS), an arbitration institution seated in Lausanne (Switzerland), financed and administered by the International Council of Arbitration for Sport (ICAS)[98] and "firmly established as the Supreme Court for sport internationally."[99] The predominant majority of the CAS caseload is appeals against decisions of sports federations on the issues of athlete compensation, transfers and sanctions for anti-doping violations, and most sports organizations have internal mechanisms for ensuring compliance with CAS awards.[100] For instance, the FIFA Statutes not only recognize the authority of the CAS to resolve disputes between FIFA, member associations, football leagues, clubs and players, but also prohibits recourse to ordinary courts of law[101] and provides that non-compliance with CAS decisions may result in fines, as well as deduction of points (for sports clubs) or expulsion from a FIFA competition (for FIFA member associations).[102]

In sum, the contractual theory puts an emphasis on party autonomy, privity of contract and consensual nature of international arbitration. Furthermore, some areas of human

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Decision-Making at the Interface of Tradition, Religion and the State (Basingstoke: Palgrave Macmillan, 2015) 188 at 202.

[97] *Ibid*.

[98] CAS, *Code of Sports-related Arbitration*, in force as from 1 January 2017, Arts S1, S2, online: <http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL__en_.pdf>, last accessed on 28 December 2018.

[99] Louise Reilly, "Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes" (2012) 2012:1 Journal of Dispute Resolution 63 at 80.

[100] *Ibid* at 64–65, 76.

[101] FIFA, *FIFA Statutes* (April 2016), Arts 57(1) ("FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents") and 59(2), ("Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited"), online: <http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf>, last accessed on 28 December 2018.

[102] FIFA, *FIFA Disciplinary Code* (2017), Art 64(1), online: <https://resources.fifa.com/image/upload/fifa-disciplinary-code-500276.pdf?cloudid=koyeb3cvhxnwy9yz4aa6>, last accessed on 28 December 2018.

activity and commerce, such as the Internet or professional sports, constitute a fertile ground for arbitration or quasi-arbitration dispute resolution mechanisms that rely on autonomous enforcement structures (ultimately founded on the basis of contractual arrangements between, for instance, athletes, sports clubs, and sports federations; or between top-level and lower-level domain name registrars and registrants, etc.) rather than on state apparatus.

1.3. Arbitration Has a Hybrid Nature and Derives Its Validity from Several National Legal Orders

The contractual theory is, however, not without its limits as it struggles with the reality that, although the parties' consent is a cornerstone for any arbitration, the tribunal has the power to make procedural decisions that may severely affect party autonomy once the proceedings are initiated.[103] Therefore, commentators have developed a hybrid (or mixed) theory of arbitration, which recognizes that arbitration has both jurisdictional and contractual characteristics.[104] In particular, Sauser-Hall argued that arbitration, "although deriving its effectiveness from the agreement of the parties, as set out in the arbitral agreement, has a jurisdictional nature involving the application of rules of procedure."[105] Similarly, Alan Rau speaks about the "dual nature" of arbitration:

> An arbitration is from one perspective an exercise of private ordering – it is formed by private agreement, and the particular shape it takes is a result of conscious private choice. And at the same time, from another angle, it is an exercise in adjudication – resulting in an award that the force of the state makes obligatory on the litigants in much the same way as the judgment of a public tribunal.[106]

Under the mixed theory, the arbitrators are neither state judges (as the jurisdictional approach suggests) nor agents or representatives of the parties that appointed them (as the

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[103] Lew, Mistelis & Kröll, *supra* note 16, para 5.22.
[104] Born, *supra* note 3 at 215; Lew, Mistelis & Kröll, *supra* note 16 at 5.23.
[105] Georges Sauser-Hall, "L'Arbitrage de droit international privé", (1952) 44:1 Annuaire de l'Institut de droit international 469, quoted in Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S., and West German Law* (Zurich: Schulthess Polygraphischer Verlag, 1989) at 60.
[106] Alan Scott Rau, "The Culture of American Arbitration and the Lessons of ADR" (2005) 40 Texas International Law Journal 449 at 451.

contractual theory contemplates). Although the arbitrators' decision-making powers in individual disputes are functionally similar to those of state judges, there is no delegation of state power to the arbitrators.[107] This position was affirmed in *Nordsee v. Reederei*,[108] where the European Court of Justice ruled that the arbitrator is not a "court or tribunal of a member state" of the European Economic Community, even though the arbitration is conducted within the framework of the law, the arbitrator has to decide the dispute in accordance with the law, the award has *res judicata* effect between the parties and may be legally enforceable.

The hybrid theory accepts that international arbitration cannot function outside of all domestic legal systems as it needs some rules of law to assess the validity of the arbitration agreement and the enforceability of the award.[109] Therefore, this theory acknowledges "the strong, though not overwhelming, connection between arbitration and the place where the tribunal has its seat"[110] and thus corresponds to the multilocal (or Westphalian) representation of arbitration.

The multilocal approach recognizes that validity and enforceability of an arbitral award stems from all national legal orders that are willing, if certain conditions are met, to recognize its binding nature.[111] Unlike the monolocal representation, which relegates arbitration to an element of a single national legal order, this theory does not view the *lex arbitri* as the only source of the arbitrators' power to adjudicate disputes between the parties.[112]

This conceptual difference is easily noticeable in comparing the 1927 Geneva Convention with the 1958 New York Convention.[113] While the former included the burdensome double exequatur requirement, the latter contains an obligation for the courts of contracting states to recognize foreign awards as binding and enforce them,[114] and an

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[107] Lew, Mistelis & Kröll, *supra* note 16 at 5.25.
[108] *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG*, Judgment of 23 March 1982, C-102/81, 1982 ECR 1095, para 10.
[109] Lew, Mistelis & Kröll, *supra* note 16, para 5.24.
[110] *Ibid*, para 5.26.
[111] Gaillard, *supra* note 16 at 23.
[112] *Ibid*.
[113] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3, entered into force 7 June 1959 [*1958 New York Convention*].
[114] *Ibid*, Article III. See Paulsson, *supra* note 58, at 124-125.

application to have an award enforced may only be refused on the basis of the exhaustive list of grounds enumerated in Article V.[115] The 1958 New York Convention also recognizes the parties' freedom to choose the law applicable to the arbitration agreement[116] and to agree on the composition of the arbitral tribunal and the arbitral procedure, with the law of the seat merely being a fall back option.[117] Although Article V(1)(e) of the 1958 New York Convention provides that enforcement *may* be refused if the award has not yet become binding on the parties or has been set aside in the country in which, or under the law of which, it was made,[118] "binding" is not to be interpreted as a "double exequatur",[119] and courts retain discretion not to refuse enforcement of the award.[120]

The multilocal or Westphalian theory manifests itself, in particular, in the diminished role of the courts of the seat in judicial control over arbitral awards and in the enforcement of arbitral awards set aside at the seat. For instance, between 1985 and 1998, the arbitration law of Belgium provided that local courts may not hear a request for setting aside an arbitral award rendered in a dispute between non-Belgian parties.[121] At present, the statutes in Belgium and Switzerland allow foreign parties to enter into agreements excluding or limiting the power of the courts at the seat to annual arbitral awards.[122] Also, courts in Belgium,[123] France,[124] the Netherlands[125] and the United

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[115] Paulsson, *supra* note 58 at 157–158, 165–166.
[116] 1958 New York Convention, Article V(1)(a).
[117] *Ibid*, Article V(1)(d).
[118] *Ibid*, Article V(1)(e).
[119] Born, *supra* note 3 at 3424–3425, 3607–3612; Paulsson, *supra* note 58 at 194–198.
[120] Paulsson, *supra* note 58 at 158–162.
[121] Belgian Judicial Code, Article 1717(4) (pre-1998 amendment) ("Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation."). See Born, *supra* note 3, at 3362.
[122] Belgian Judicial Code, Article 1718 ("By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having his domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium."); Swiss Private International Law, Article 192(1) ("If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Article 190(2)."). See Born, *supra* note 3, at 3365-3366.

States[126] have on several occasions confirmed that annulment of an arbitral award by courts of the arbitral seat does not necessarily prevent enforcement of the award.[127] In particular, French courts have on several occasions declared that international arbitral awards are not, as the monolocal approach would suggest, anchored in the national legal order of the place of arbitration:

> 1.The award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.[128]
>
> 2. The award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence remains established despite its being annulled and its recognition in France is not in violation of international public policy.[129]
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> 3. The annulment proceeding initiated in Belgium, where the arbitration was held, is irrelevant to the enforcement in France of the award rendered on 28 June 2002 in Antwerp,

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[123] *Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (Sonatrach) v Ford, Bacon & Davis, Inc*, Judgment of 6 December 1988, (1990) 15 YB Comm Arb 370 ([Brussels Court of First Instance).

[124] *Pabalk Ticaret Ltd Sirketi v Norsolor SA*, Judgment of 9 October 1984, (1986) 11 YB Comm Arb 484 (French Cour de cassation); *Polish Ocean Line v Jolasry*, Judgment of 10 March 1993, (1994) 19 YB Comm Arb 662 (French Cour de cassation); *Hilmarton Ltd v Omnium de traitement et de valorisation (OTV)*, Judgment of 23 March 1994, (1995) 20 YB Comm Arb 663 (French Cour de cassation) [*Hilmarton*]; *The Arab Republic of Egypt v Chromalloy Aeroservices, Inc*, Judgment of 14 January 1997, (1997) 22 YB Comm Arb 691 (Paris Court of Appeal) [*Chromalloy II*]; *Bargues Agro Industrie SA v Young Pecan Company*, Judgment of 10 June 2004, (2005) 30 YB Comm Arb 499 (Paris Court of Appeal) [*Bargues Agro*]; *Directorate General of Civil Aviation of the Emirate of Dubai v International Bechtel Co Limited Liability Company*, Judgment of 29 September 2005, (2006) 31 YB Comm Arb 629 (Paris Court of Appeal); *SA Lesbats et Fils v Dr Volker Grub*, Judgment of 18 January 2007, (2007) 32 YB Comm Arb 297 (Paris Court of Appeal); *PT Putrabali Adyamulia v Rena Holding, et al*, Judgment of 29 June 2007, (2007) 32 YB Comm Arb 299 (French Cour de cassation) [*Putrabali*].

[125] *Yukos Capital sarl v OAO Rosneft*, Judgment of 28 April 2009, (2009) 34 YB Comml Arb 703 (Amsterdam Court of Appeal).

[126] *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 FSupp 907 (DDC 1996) [*Chromalloy I*]; *Corporación Mexicana de Mantenimiento Integral, S de RL de CV v Pemex-Exploración y Producción*, 962 FSupp2d 642 (SDNY 2013), affirmed, 832 F3d 92 (2nd Cir 2016).

[127] On recognition and enforcement of annulled awards see Born, *supra* note 3, at 3622-3646; Marc J Goldstein, "Annulled Awards in the U.S. Courts: How Primary Is "Primary Jurisdiction"?" (2014) Am Rev Int'l Arb 19; Francisco González de Cossío, "Enforcement of Annulled Awards: Towards a Better Analytical Approach" (2016) 32 Arb Int'l 17; Paulsson, *supra* note 58, at 205-212.

[128] *Hilmarton* at 663-665, para 5 (French Cour de cassation).

[129] *The Arab Republic of Egypt v Chromalloy Aeroservices, Inc*, Judgment of 14 January 1997, (1997) 22 YB Comm Arb 691-695, para 2 (Paris Court of Appeal).

> since that award was rendered in an international arbitration implicating international commerce interests – as it concerns the sale of pecan nuts between parties established in different countries – and is not integrated in the Belgian legal system. Hence, its possible annulment by the court of the seat does not affect its existence and prevent its recognition and enforcement in other national legal systems.[130]
>
> 4. In fact, it is a fundamental principle of French law in respect of the denial of enforcement of awards rendered abroad that annulment by a court of the seat does not affect the existence of the award, hindering its recognition and enforcement in other national legal systems, because the arbitrator is not an integral part of the juridical system of the country of the seat – in the present case, Belgium.[131]

The multilocal theory of international arbitration is based on state positivism and the Westphalian model of state sovereignty, which presupposes that each sovereign state is entitled to make a decision as to the validity and enforceability of an arbitral award.[132] Although commentators sometimes refer to "delocalization" of arbitral awards under the Westphalian approach, a more proper term would be "plurilocalization", since awards are considered to be rooted in several national legal systems rather than being independent of any national legal order.[133]

Gaillard cautions that the Westphalian model of international arbitration, which presupposes that each national legal order where an arbitral award is likely to be enforced has an equal authority to assess the validity of the arbitration process, may lead to a "lex executionism", a race to the bottom where the arbitrators have to ground their decisions in the least-permissive of all potentially applicable national laws.[134] Indeed, some modern arbitration rules explicitly require the arbitrators to make every reasonable effort to ensure that an award is legally enforceable.[135] If taken to the extreme, this would make

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[130] *Bargues Agro Industrie SA v Young Pecan Company*, Judgment of 10 June 2004, (2005) 30 YB Comm Arb at 499-504, para 2 (Paris Court of Appeal).
[131] *SA Lesbats et Fils v Dr Volker Grub*, Judgment of 18 January 2007, (2007) 32 YB Comm Arb 297-298, para 3 (Paris Court of Appeal).
[132] Gaillard, *supra* note 16, paras 26–27, 30–31.
[133] Paulsson, *supra* note 16 at 36.
[134] Gaillard, *supra* note 16, para 39.
[135] International Chamber of Commerce, *Arbitration Rules*, in force as from 1 March 2017 [*ICC Rules (2017)*], Article 41, online: <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-

the arbitrators adhere to the most restrictive, rigid and idiosyncratic requirements (for instance, with respect to the form of the arbitration agreement or arbitral award, service of documents, etc.) found in each of the jurisdictions where the award could be subject to enforcement proceedings. Paulsson, however, points out that, in reality, the Westphalian model does not work in this fashion and the arbitrators do not examine the validity of the arbitration agreement, their appointment and procedural decisions in light of the laws of *every* jurisdiction where enforcement of the award might be sought.[136]

1.4. Arbitration and Multiplicity of National Legal Orders

The transnational representation of international arbitration implies that "the juridicity of arbitration is rooted in a distinct, transnational legal order, that could be labeled as an arbitral legal order, and not in a national legal order".[137] Philosophical foundations for the transnational representation of international arbitration may be found both in the natural law and the positive law theories.

On the one hand, some arbitration scholars expressed the idea of an arbitral legal order in jusnaturalist terms, as a legal system separate and superior to those generated by sovereign states.[138] In particular, René David considered the arbitrator-made "new commercial law" to be international in nature and inspired by natural law:

> The new commercial law, as developed by corporatist arbitral tribunals, is strongly influenced by natural law. Like natural law and ancient commercial law, and despite national codifications, this new commercial law is international in nature. As such, it moves away and distinguishes itself from positive national laws. Moreover, contrary to 'positive' law in various countries, it is characterized by arbitrators' desire to take into account the

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and-2014-Mediation-Rules-english-version.pdf.pdf>, last accessed on 28 December 2018; Stockholm Chamber of Commerce, *Arbitration Rules*, in force as from 1 January 2017 [*SCC Rules (2017)*], Article 2(2), online: <https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf>; Singapore International Arbitration Centre, *Arbitration Rules*, in force as from 1 August 2016 [*SIAC Rules (2016)*], Article 41.2, online: <http://www.siac.org.sg/our-rules/rules/siac-rules-2016>. *Cf* London Court of International Arbitration, *Arbitration Rules*, in force as from 1 October 2014 [*LCIA Rules (2014)*], Article 32.2, online: <https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx>, last accessed on 28 December 2018.

[136] Paulsson, *supra* note 16 at 40.

[137] Gaillard, *supra* note 16, para 40.

[138] *Ibid*, paras 45–46, 48.

> commercial interests of the parties, even if it entails sacrificing, if need be, their strict rights.[139]

This line of argument, which presumes that arbitrators are free to base their decisions on considerations of fairness rather than substantive rules of law, is out of step with modern theory of arbitration as a rule-based judicialized process.[140]

On the other hand, Gaillard offers an alternative philosophical justification for the existence of an arbitral legal ordered in the form of "transnational positivism",[141] which manifests itself in the use of the "transnational rules method" by the arbitrators.[142] Transnational law, Gaillard argues, is not a list of rules, but rather a method for identifying a point of convergence among different national legal systems on a particular issue and thus formulating an applicable transnational legal rule.[143] This method does not require unanimous acceptance of a particular legal rule in all legal systems, and the arbitrators are free to disregard an idiosyncratic norm if it conflicts with more generally accepted legal rules.[144] He argues that this transnational rule method may qualify as a distinct legal system because it satisfies the criteria of completeness, structured character, ability to evolve and predictability.[145]

It is important to note that, even if its name suggests otherwise, the "autonomous arbitral order" is not fundamentally detached from all national legal orders and does not exist in a legal vacuum. While the transnational approach abandons the idea that international arbitration owes its legitimacy to the will of a single sovereign, the main difference between the Westphalian and transnational representations is that the former emphasizes the *plurality* of states willing to recognize the validity of arbitration, whereas

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[139] René David, "Droit naturel et arbitrage" in *Natural Law and World Law. Essays to Commemorate the Sixtieth Birthday of Kotaro Tanaka* (Tokyo: Yuhikaku, 1954) 19 at 24, translated in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden/Boston: Martinus Nijhoff Publishers, 2010), para 48.

[140] Gaillard, *supra* note 16, para 48.

[141] *Ibid*, paras 50–58.

[142] *Ibid*, para 60.

[143] Emmanuel Gaillard, "Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules" in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICCA Congress Series 7 (Kluwer Law International, 1996) 582 at 583–586; Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?" (2001) 17(1) Arbitration International 59 at 62–63.

[144] Gaillard, *supra* note 143 at 586–588; Gaillard, *supra* note 143 at 68.

[145] Gaillard, *supra* note 143 at 65–71.

the latter considers the *collectivity* of states.[146] Gaillard argues that the legitimacy of arbitration stems from its widespread acceptance by national legal orders as a means of settlement of disputes in international business transactions, and that the arbitrators, while adjudicating the disputes referred to them by the parties, produce legal norms that are based on the normative activity of the international community of states and do not belong to the legal system of any particular state.[147] He also suggests that rule of law, formulated by the arbitrators using the "transnational rules method", are akin to the "general principles of law" category in the public international law:

> [The transnational representation of international arbitration] relies on the notion that the laws of various States, when considered collectively, make up the common rules of arbitration law in which the source of the arbitrators' power to adjudicate is rooted. Like general principles of law, which constitute one of the sources of international law, this representation is not defined in opposition to national laws. Rather, it is entirely based on the normative activity of states.[148]

Indeed, Article 38(1)(c) of the Statute of the ICJ provides that, to settle disputes in accordance with international law, the ICJ shall apply, among other sources, "the general principles of law recognized by civilized nations". However, general principles of law are not the only source of international law and their role "as a way of complementing custom and treaty law places [them] fairly firmly in third place."[149] The "general principles of law" were listed in Article 38 as a source of law to avoid the problem of *non liquet*, a situation where there is no rule to govern a particular situation,[150] whereas for many commentators the most important source of international law are treaties, agreements between the state parties that require their express consent.[151] Paulsson emphasizes that because sovereign states have never subscribed to the idea that the norms of international law are deduced from "progressive tendencies" supported by other states, and instead maintained that it is their individual consent (expressed in, for instance,

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[146] Gaillard, *supra* note 16, para 41.
[147] *Ibid*, para 62.
[148] *Ibid*, para 53.
[149] Malcolm N Shaw, *International Law*, 7th ed (Cambridge University Press, 2014) at 87–88.
[150] *Ibid* at 70.
[151] *Ibid* at 67.

ratification of a treaty) that makes them bound by a particular international legal instrument, states are even less likely to accept "amorphous" transnational norms as limits on their sovereignty in the private law area such as arbitration.[152]

In support of their position, the proponents of the transnational representation of arbitration often invoke various decisions of the French courts that arbitral awards rendered in international arbitration are not integrated in the legal order of the seat of arbitration, in particular the judgment in *Putrabali* case where the French Court of Cassation stated that

> An international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.[153]

This decision, however, merely confirms the fact that, when enforcement of an arbitral award is sought in France, the French legal order may give legal effect to the award without considering the decisions of the courts at the seat of arbitration.[154] It constitutes a response of one particular national legal order (the French legal order in this case) out of a multiplicity of national legal orders (potentially all jurisdictions where the respondents have assets) that may play a role in the development of a particular arbitration or its post-award stage.[155] Even in the *Putrabali* decision itself, right after referring to an arbitral award as "a decision of international justice", the court confirms that its validity is to be determined in accordance with the rules of the *enforcement jurisdiction*.

The decisions of the English courts in *Dallah v. Pakistan*[156] also support the skepticism about the existence of an autonomous "arbitral legal order". In this case Dallah, a Saudi company, sought to enforce in England an award rendered by an ICC arbitral tribunal sitting in Paris.[157] The award was made against the Government of Pakistan on the basis

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[152] Paulsson, *supra* note 16 at 41.
[153] *PT Putrabali Adyamulia v Rena Holding, et al*, Judgment of 29 June 2007, (2007) 32 YB Comm Arb at 299-302, para 2 (French Cour de cassation). See also cases cited in section 1.1.2.
[154] Paulsson, *supra* note 16 at 42.
[155] *Ibid.*
[156] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 [*Dallah v Pakistan*].
[157] *Ibid,* paras 1-10.

that it was "a true party" to the contract entered into by Dallah and a Pakistani trust established by a Presidential Ordinance and dissolved several months later. The arbitral tribunal, applying "transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business",[158] held that the Government was an "alter ego" of the Trust and thus a "true party" to the contract with Dallah.[159] Before the English courts, however, Dallah argued that it was "common intention" of the parties that the Government should be a party to the contract.[160] The UK Supreme Court ruled that the law applicable to the validity of the arbitration agreement is "French law as the law of the country where the award was made, … subject to the relevance of transnational law or transnational rules under French law",[161] and ultimately concluded that there was no such common intention for the Government to be bound by the arbitration clause in the contract between Dallah and the Trust.[162] The skepticism of the UK Supreme Court about the autonomous nature of arbitration and the absence of a close link between the seat of arbitration, the arbitration procedure and the arbitral award is particularly evident from the following passage in the judgment:

> The fact that the experts were agreed that an arbitral tribunal with a French seat may apply transnational law or transnational rules to the validity of an arbitration agreement does not mean that a French court would not be applying French law or that it is no longer a French arbitration. It simply means that the arbitration agreement is no longer affected by the idiosyncrasies of local law, and its validity is examined solely by reference to the French conception of international public policy... [163] Nor could there be any suggestion that the application of transnational law or transnational rules could displace the applicability in England, under article V(1)(a) of the New York Convention as enacted by section 103(2)(b) of the 1996

[158] *Ibid,* para 33.
[159] *Ibid,* para 39.
[160] *Ibid,* para 11.
[161] *Ibid,* para 78.
[162] *Ibid,* para 123.
[163] *Ibid,* para 115.

> [Arbitration] Act, of the law of the place where the award is made.[164]

In other words, if an arbitral tribunal may apply a transnational rule without jeopardizing the enforceability of the award, it is because the French law permits the arbitrators to do so, not because the tribunal is detached from all national legal systems and constitutes a part of an autonomous arbitral legal order. As Poudret and Besson point out, the rule that recognizes the validity of the arbitration agreement as long as it does not violate international public policy is "an international rule of French law and not a transnational rule."[165]

Interestingly, just several months after the decision of the UK Supreme Court to refuse enforcement of the award in England, the Paris Court of Appeal rejected the Pakistani Government's application to set aside the award,[166] thus reaffirming the Westphalian representation that contemplates pluralism of national legal orders, each of which may decide whether to give effect to an arbitral award. With respect to the transnational representation, Paulsson suggests that conflicting decisions of the English and French courts demonstrate that "reality can safely disregard the ["autonomous"] model, because, as seen, it is no more than pluralism masqueraded as something grander."[167]

The first section of this chapter outlined four theoretical approaches that view arbitration as (i) a judicial process anchored in one national legal order; (ii) a contractual product of the parties' will alone; (iii) a dispute mechanism of hybrid nature that may derive its validity from several national legal orders; and (iv) a product of an autonomous legal order. The second section will illustrate how these different legal theories lead to different result with respect to the arbitrators' duty to stay the proceedings pending the resolution of related criminal proceedings.

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[164] *Ibid,* para 116.
[165] Poudret & Besson, *supra* note 68, para 181.
[166] *Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company*, Judgment of 17 February 2011, (2011) 36 YB Comm Arb 590 (Paris Court of Appeal). See Jacob Grierson & Mireille Taok, "*Dallah*: Conflicting Judgments from the U.K. Supreme Court and the Paris Cour d'Appel" (2011) 28:4 J Int'l Arb 407
[167] Paulsson, *supra* note 16 at 45.

2. Arbitration and Criminal Proceedings

It may seem that commercial arbitration and criminal law have no points of convergence between them. However, although criminal matters are a typical example of nonarbitrable subjects and arbitrators may not conduct criminal investigations, adjudicate criminal liability or impose related sanctions, more and more jurisdictions recognize that civil claims pertinent to corruption, antitrust violations or other wrongdoing are capable of settlement by arbitration.[168] In Kurkela's words, "criminal law issues may penetrate in the safe harbours of arbitration proceedings as the snake in the paradise"[169] and force the arbitrators to make decisions that are related, perhaps indirectly, to criminal law matters. Of particular relevance to international arbitration is so-called "white collar crime" or "business crime", including corruption and bribery, money laundering, price fixing, bid rigging, market allocation and other antitrust law violations, insider trading and securities fraud, tax evasion and false accounting, fraud, usury, forgery, perjury and obstruction of justice.[170]

Where criminal investigations are initiated before or during the pendency of arbitration proceedings, the arbitrators may have to decide whether to stay the arbitration until the related criminal case is resolved or to continue the proceedings. As it is with parallel court proceedings, different answers to this question may be explained by reference to different approaches to international arbitration.

First, the jurisdictional/monolocal approach, which presupposes that the arbitrators exercise important public functions and relegates the status of arbitration to an element of a single national legal order, would not grant discretionary powers to the arbitrators and instead require them to put the public interest (i.e. the prosecution of crimes) before the private interest (speedy and cost-efficient resolution of commercial disputes). In particular, the Civil Procedure Code of the United Arab Emirates requires arbitrators to suspend the arbitration if criminal proceedings have been initiated for counterfeiting a

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[168] Born, *supra* note 3 at 945, 950, 989, 1042.

[169] Matti S Kurkela, "Criminal Laws in International Arbitration - the May, the Must, the Should and the Should Not" (2008) 26(2) ASA Bulletin 280 at 280.

[170] Florian Kremslehner & Julia Mair, "Arbitration and (Austrian) Criminal Law - Guidelines for Arbitrators and Counsels" (2012) Austrian Yearbook on International Arbitration 289 at 291–323; Kurkela, *supra* note 169 at 285.

document or "for any other criminal act".[171] Also, before 2007, the French Code of Criminal Procedure embodied the principle "le criminel tient le civil en l'état" ("criminal matters prevail over civil matters") and provided for a mandatory stay of civil proceedings pending resolution of a criminal case.[172] However, French court decisions left it to arbitrators to assess whether and to what extent criminal proceedings are likely to influence the resolution of a commercial dispute before them,[173] and concluded that this rule does not apply in international arbitration.[174]

Secondly, the contractual approach, which postulates that the only source of the arbitrators' powers is the will of the parties to the arbitration agreement, would make the tribunal's answer to this question (i.e. whether or not to stay the arbitration proceedings until the related criminal case is resolved) contingent upon the intentions of the parties as expressed in their contractual arrangements rather than upon any particular rule of law of

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[171] United Arab Emirates Civil Procedure Code, Federal Law No (11) of 1992, Article 209(2) ("If, during the course of arbitration, a preliminary issue, which is outside the powers of the arbitrator, arises or if a challenge has been filed that a document has been counterfeited, or if criminal proceedings have been taken regarding such counterfeiting or for any other criminal act, the arbitrator shall suspend the proceedings until a final judgement on the same has been passed."), online: New York Arbitration Convention <http://www.newyorkconvention.org/11165/web/files/document/2/1/21121.pdf>, last accessed on 28 December 2018.

[172] French Code of Criminal Procedure, Article 4, before the Law 2007-291 of 5 March 2007 ("The civil action may also be exercised separately from the public prosecution. However, the judgment in any action exercised before the civil court is suspended until a final decision is made on the merits of the public prosecution where such a prosecution has been initiated.").

[173] John Savage & Emmanuel Gaillard, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), para 1660. See *Bouyssou v Gaillard*, Judgment of 16 June 1994, (1996) Revue de l'Arbitrage 128 (Paris Court of Appeal); *Gruet v consorts Havet*, Judgment of 10 February 1995, (1996) Revue de l'Arbitrage 135 (Paris Court of Appeal); *Fabre et autre v Espitaller et autres*, Judgment of 30 March 1995, (1996) Revue de l'Arbitrage 131 (Paris Court of Appeal); *G Augier v société Hawker*, Judgment of 12 February 1996, (1996) Revue de l'Arbitrage 135 (Paris Tribunal de Grande Instance).

[174] *Société Sopip v société El Banco Arabe Espanol et autre*, Judgment of 14 December 1999, (2000) Revue de l'Arbitrage 471 (Paris Court of Appeal); *République du Congo et autre v SA Commisimpex*, Judgment of 1 March 2001, (2001) Revue de l'Arbitrage 583 (Paris Court of Appeal) ("If Article 4 of the French Code of Criminal Procedure, which obliges the civil court to stay the proceedings when, on the basis of the same facts, a civil action and a criminal action are carried out separately or when the decision to be rendered in the criminal case is likely to influence the civil one, is not applicable to the arbitrator ruling on an international matter because of the autonomy of the arbitration procedure, nothing prohibits the arbitrator to consider that a criminal proceeding is likely to influence the resolution of the dispute before him and to order, for that reason, a stay of the arbitral proceedings."); *SA Omenex v Hugon*, Judgment of 17 January 2002, (2002) Revue de l'Arbitrage 203 (Paris Court of Appeal);*République du Congo et autre v SA Commisimpex*, Judgment of 23 May 2002, (2002) Revue de l'Arbitrage 786 (Paris Court of Appeal); *Société Ordatech v Société W Management*, Judgment of 20 June 2002, (2002) Revue de l'Arbitrage 976 (Paris Court of Appeal); *Société Omenex v M Hugon*, Judgment of 25 October 2005, (2006) Revue de l'Arbitrage (French Cour de cassation).

any national legal order. In the absence of evidence to the contrary, arbitrators guided by the contractual approach are likely to continue adjudicating the commercial dispute without regard to the parallel criminal or regulatory proceedings.

Third, the hybrid/Westphalian approach, which recognizes that arbitration has both jurisdictional and contractual features and emphasizes that each national legal order is entitled to assess the validity of the arbitral award for itself, would lead to a conclusion that the arbitrators have a discretion whether to stay arbitration pending criminal investigation while each jurisdiction where enforcement of the award is sought may decide whether the arbitrators' decision with regard to the stay renders the award unenforceable.

Finally, the autonomous/transnational approach, which is based on the "transnational rules model" and recognizes the existence of the "arbitral legal order", in practice would lead to the same result as the hybrid/Westphalian approach. In theory, since arbitrators do not exercise judicial functions on behalf of any state and the award is not rooted in any national legal order, it would be inappropriate to require them to stay the arbitration proceedings pending resolution of the criminal case by the states' law enforcement authorities or in state courts. In reality, however, recognition and enforcement of arbitral awards is governed by the 1958 New York Convention and remains the domain of state courts.

Comparative analysis of the applicable legislation and court practice, as seen below, demonstrates that the "transnational rule" is to continue the arbitration rather to stay the proceedings pending criminal investigation. In other words, the preference seems to be given to private interests (resolution of the underlying commercial dispute) over the public interest (investigation of a potentially criminal related activity).

In particular, the Swiss Federal Tribunal in *B Fund v. A Group*[175] clarified that (i) an arbitral tribunal has discretion to stay the arbitration pending criminal investigation; (ii) in case of doubt, the principle of expediency prevails; and (iii) evidentiary difficulties *per*

[175] *B Fund Ltd v A Group Ltd*, Judgment of 19 February 2007, Case No 4P_168/2006 (Swiss Federal Tribunal) [*B Fund v A Group*], reported in Sébastien Besson, "Corruption and Arbitration" in Domitille Baizeau & Richard H Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* 13 (Kluwer Law International, 2015) 103, paras 8-11.

se do not constitute a sufficient reason to stay arbitration proceedings.[176] In this case, the arbitral tribunal refused to stay the proceedings until the criminal investigation was resolved, and found the contract to be tainted by illegality (money laundering) and thus null and void. When addressing the challenge to the award, the Swiss Federal Tribunal confirmed that arbitrators had jurisdiction to consider criminal law norms to assess the validity of the contract, and went on to state that

> The arbitral tribunal may order a stay of proceedings if it deems it appropriate as regards the parties' interests; however, in case of any doubt, it must uphold the principle of expeditiousness of the proceedings because the stay of proceedings may constitute a denial of justice or an unjustified delay (…). The stay of proceedings may in particular be justified until the legal situation is clarified under another procedure, when the latter concerns a preliminary question that the arbitral tribunal should otherwise settle itself (…) The difficulties arising in general in evidentiary measures due to the existence of a criminal investigation, do not constitute a compelling reason for a stay of the arbitration proceedings, this all the less when, as in the instant case, the arbitral tribunal straight away announces that, if need be, it will take measures appropriate to the circumstances.[177]

In France, Article 4 of the Code of Criminal Procedure was amended in 2007 and no longer provides for an automatic stay of arbitration proceedings, even in domestic arbitration or before French civil courts.[178] In Belgium, the principle "le criminal tient le civil en état" applies only to domestic arbitrations, whereas international arbitral tribunals retain discretion to suspend arbitration proceedings if there is a criminal complaint that is likely to affect the proceedings.[179] In Sweden, arbitrators may stay the proceedings if they

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[176] Sébastien Besson, "Corruption and Arbitration" in Domitille Baizeau & Richard H Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law 13 (Kluwer Law International, 2015) 103, para 11.

[177] Judgment of 19 February 2007, *B. Fund Ltd v A. Group Ltd*, Case No. 4P_168/2006 (Swiss Federal Tribunal), paras 6.1-6.2, translated in Besson, "Corruption and Arbitration", para 11.

[178] Besson, *supra* note 176, para 25; Pierre Heitzmann, "Arbitration and Criminal Liability for Competition Law Violations in Europe" in Gordon Blanke & Phillip Landolt, eds, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International, 2011) 1251 at 31.057.

[179] Maarten Draye, "Commentary on Part VI of the Belgian Judicial Code, Chapter V: Article 1700" in Niuscha Bassiri & Maarten Draye, eds, *Arbitration in Belgium* (Kluwer Law International, 2016) 279, para 255.

consider that determination of a criminal case is of "extraordinary importance" to the arbitration.[180]

English law does not recognize the principle "le criminal tient le civil en état" and, although the arbitrators have discretion to stay the proceedings if they deem it appropriately, the trend is for civil actions to continue in parallel with criminal proceedings.[181] In the context of litigation, the Court of Appeal in *Jefferson v. Bhetcha* ruled that there is no legal principle that prevents the plaintiff from pursuing a civil action because to do so would result in compelling the defendant to disclose what their defence was likely to be in the parallel criminal proceedings.[182] Instead, the Court clarified that "the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with."[183] A stay may be warranted, in particular, if the civil action is likely to obtain such publicity as to prejudice potential jurors in a criminal case, or if there is a real danger that the disclosure of the defence in the civil action might lead to potential miscarriage of justice in the criminal case (for instance, by enabling the prosecution witnesses to fabricate evidence or by interfering with witnesses in some other way).[184]

Besson identifies three general trends in case law and arbitration practice: (i) the stay of arbitration proceedings in case of a parallel criminal investigation is neither automatic nor mandatory, (ii) arbitrators have a broad discretion to assess the circumstances of each particular case and decide whether to stay the arbitration, and (iii) arbitrators are so

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[180] Pierre Heitzmann, "Arbitration and Criminal Liability for Competition Law Violations in Europe" in Gordon Blanke & Phillip Landolt, eds, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International, 2011) 1251. See Swedish Court of Judicial Procedure, SFS 1942:740, Chapter 32, section 5 ("If it is of extraordinary importance for the adjudication of a case that an issue sub justice in another court proceeding, or in a proceeding of another kind, be determined first or another impediment to trial of considerable duration is encountered, the court may order a stay of proceedings pending removal of the impediment."), online: Government Offices of Sweden <https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf>, last accessed on 28 December 2018.

[181] Heitzmann, *supra* note 178, para 31.061.

[182] *Jefferson Ltd v Bhetcha*, [1979] 1 W.L.R. 898 (CA) at 904-905.

[183] *Ibid* at 905.

[184] *Ibid*; *Petroliam Nasional Berhad and Others v Tan-Soon-Gin, also known as George Tan, and Others*, [1990] 1 HKLR 4 at 8.

reluctant to stay the proceedings that there appears to be a presumption against the stay.[185]

When faced with a request to suspend the arbitration until the decision is made in a criminal case, arbitrators have to engage in a delicate process of balancing the need to resolve the commercial dispute within a reasonable time and uphold the law.[186] Many arbitration rules require the arbitral tribunal to conduct the proceedings in an expeditious manner.[187] Some commentators suggest that lodging a criminal complaint and initiation of criminal proceedings may serve as a dilatory tactic, especially in jurisdictions where private party can initiate criminal proceedings by filing a complaint or where the judges hearing such complaints are slow or biased.[188] Besson suggests that arbitrators, while deciding whether to stay the arbitration pending resolution of a criminal case, should consider the following five factors: (i) the relevance of the criminal investigation, (ii) the timing of the request to stay arbitration proceedings and the stage of the criminal investigation, (iii) the efficiency, independence and impartiality of the authority in change of the criminal investigation, (iv) the likelihood of criminal investigation reaching a result within a reasonable time, and (v) the appropriateness of relying on the burden of proof.[189] Accordingly, if the criminal investigation is unlikely to produce information that may be used in the arbitration, the request for a stay was filed at an advanced stage of arbitration and on the basis of a newly initiated criminal investigation, then it is improbable that the arbitrators would suspend the proceedings.[190] Finally, the arbitrators may decide that it would be appropriate to shift the burden of proof to balance the rights of the parties involved, especially if the case involves allegations of corruption and the

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[185] Besson, *supra* note 176, para 7.
[186] Heitzmann, *supra* note 178, para 31.054.
[187] ICC Arbitration Rules (2017), Article 22(1); LCIA Arbitration Rules (2014), Article 14.4(iii); SCC Arbitration Rules (2017), Article 2(1); SIAC Arbitration Rules (2016), Articles 19.1 & 41.2.
[188] Besson, *supra* note 176, para 14; Heitzmann, *supra* note 178, para 31.062; John Savage & Emmanuel Gaillard, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), para 1660.
[189] Besson, *supra* note 176, paras 16–22.
[190] *Ibid*, paras 17–18.

party requesting the stay of arbitration could benefit from evidence unraveled in the course of criminal investigation.[191]

3. Conclusion

This chapter started by identifying four major theoretical approaches to international arbitration. First, arbitration may be viewed as a judicial process anchored in one national legal order. This approach is based on the doctrine of legal positivism and the need to maintain order among different national legal systems. It treats an arbitral tribunal as a quasi-domestic court and emphasizes the power of nation states to regulate and oversee arbitration proceedings taking place within their territory. The practical effect of this theory may be seen in the decisions on the arbitrators' immunity, independence and impartiality, as well as in the "double exequatur" requirement embodied in the 1927 Geneva Convention. Second, arbitration is sometimes considered to be an offspring of a private contractual arrangement. This theory emphasizes party autonomy, privity of contract and consensual nature of international arbitration; only those persons and entities that consented to arbitration are bound by, and may benefit from, the arbitration agreement. Furthermore, some social and professional communities (for instance, those engaged in professional sports), may rely on arbitration as a mechanism to resolve intra-group disputes and have their own autonomous (non-state) structures for enforcing such decisions. Third, there is a view that arbitration has a hybrid nature, combining both contractual and jurisdictional elements, and derives its validity from several national legal orders where each nation state is free to decide on the faith of the arbitral award. This theory is grounded in the doctrine of legal positivism and the Westphalian model of state sovereignty, and manifests itself in the diminished role of the courts of the seat in judicial control over arbitral awards and in the enforcement of arbitral awards set aside at the seat. Finally, the forth view postulates that legal force of arbitral awards comes from a "transnational arbitral legal order". This approach owes its existence primarily to the jurisprudence of French court, and "transnational law" in this context may be understood

[191] *Ibid*, paras 21–22; Carolyn B Lamm, Hansel T Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in Ángel Fernández Ballesteros Miguel & Arias David, eds, *Liber Amicorum Bernardo Cremades* (Kluwer Law International, 2010) 699 at 700–701.

as a method for formulating an applicable rule on the basis of a comparative law analysis, rather than as a set of pre-determined rules.

Where criminal proceedings are commenced before or during the pendency of arbitration proceedings, the arbitrators may have to decide whether to stay the arbitration until the related criminal case is resolved or to continue the proceedings to resolve an underlying economic dispute between the parties. Different answers to this question may be explained by reference to different theoretical approaches to international arbitration. On the one hand, the jurisdictional/monolocal approach would not grant discretionary powers to the arbitrators and instead require them to put the public interest (i.e. the prosecution of crimes) before the private interest (speedy and cost-efficient resolution of commercial disputes). Secondly, the arbitrators guided by the contractual approach are likely to continue adjudicating the commercial dispute irrespective of the parallel criminal proceedings. Third, the hybrid/Westphalian approach would lead to a conclusion that the arbitrators have a discretion whether to stay arbitration pending criminal investigation while each jurisdiction where enforcement of the award is sought may decide whether the arbitrators' decision with regard to the stay renders the award unenforceable. The autonomous/transnational approach in practice would lead to the same outcome as comparative analysis of the applicable legislation and court practice suggests that the "transnational rule" is to continue the arbitration rather to stay the proceedings pending the resolution of criminal proceedings. In theory, since arbitrators do not exercise judicial functions on behalf of any state and the award is not rooted in any national legal order, it would be inappropriate to require them to stay the arbitration proceedings pending resolution of the criminal case by the states' law enforcement authorities or in state courts. In reality, however, recognition and enforcement of arbitral awards is governed by the 1958 New York Convention and remains to be the domain of state courts.

Chapter 2: The Public Dimension of International Arbitration: Investor-State Dispute Settlement and Criminal Law Issues

The first chapter of this thesis focused on the "private" dimension of international arbitration – international commercial arbitration – and its position vis-à-vis national legal orders. In turn, this chapter will concentrate on the "public" dimension, the role of investor-state dispute settlement as a system of global governance with particular emphasis on the impact of investment arbitration on the enforcement of criminal law by sovereign states. First, this chapter describes the architecture of the international investment protection and investor-state dispute settlement regime. Second, it explains that international agreements may be used as a way for developing countries to make credible commitments to liberal economic and trade policies in order to attract foreign investment, and then considers four different approaches to investment arbitration as a system of global governance, namely the views that consider investor-state dispute settlement to be an embodiment of (i) hegemonic international law, (ii) new constitutionalism, (iii) global administrative law, and (iv) humanity's law. Third, this chapter gives a brief overview of cases where the dispute concerned alleged mistreatment or harassment of investor in the context of a criminal investigation or prosecution. Finally, it ends with a conclusion on the arbitral tribunals' role as a private authority tasked with reviewing the exercise by sovereign States of an inherently public function, the enforcement of domestic criminal laws.

1. International Investment Arbitration: Background

In general, a sovereign state may give consent to have its disputes with foreign investors arbitrated, rather than litigated in domestic courts, either (i) directly in a contract (for instance, in an investment, joint venture, production sharing or concession agreement) concluded with an individual foreign investor, (ii) in national legislation governing foreign investment, or (iii) in an international investment agreement (IIA) concluded between two or several states. Accordingly, depending on the source of state

consent, international investment arbitration may be contract-based, statute-based or treaty-based. [192]

A web of numerous IIAs, including bilateral investment treaties (BITs) and other treaties with investment provisions (TIPs), such as regional trade agreements/free trade agreements (RTAs/FTAs) containing investment chapters, provides a fertile ground for the proliferation of international treaty-based investment arbitrations. In 2017, 18 new IIAs were concluded (9 BITs and 9 TIPs), bringing the total number of IIAs to 3,322 (2,946 BITs and 376 TIPs) by the end of the year.[193] Furthermore, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP) and the Canada-United States-Mexico Agreement (CUSMA) were signed on 8 March and 30 November 2018, respectively.[194] Several other regional and megaregional IIAs remain at various stages of negotiation, among them the African Continental Free Trade Area (CFTA), the Economic Partnership Agreement (EPA) between the EU and Japan, the Free Trade Agreement (FTA) between the EU and Mexico, and the Regional Comprehensive Economic Partnership (RCEP) between the members of the Association of Southeast Asian Nations (ASEAN) and Australia, China, India, Japan, South Korea and New Zealand.[195]

Usually, IIAs contain mutual obligations that a state party (as a host state) will extend to the investments made by investors of the other state party (the home state) including treatment no less favourable than that it accords to its own investors (so-called "national treatment") and to investors of any third state party (so-called "most-favoured-nation treatment"); investments by investors of one state party will benefit from fair and

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[192] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed ed (Oxford: Oxford University Press, 2012) at 254-260. For more details on historical development of investment treaty law, see Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International, 2009) at 1-74.

[193] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2018: Investment and New Industrial Policies* (Geneva: United Nations, 2018) at 86, online: <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf>, last accessed on 28 December 2018.

[194] *See* Government of Canada, "Canada-United States-Mexico Agreement (CUSMA)", <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng>, last accessed on 28 December 2018; Government of Canada, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)", <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>, last accessed on 28 December 2018.

[195] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* at 90-91.

equitable treatment, as well as full protection and security, in the territory of the other state party; and that neither state party will expropriate or nationalize an investment, either directly or indirectly, except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and upon payment of a prompt, adequate and effective compensation. IIAs frequently contain provisions governing the settlement of investor-state disputes. If a dispute between the host state and an investor from the home state arises and cannot be settled amicably, the investor may submit the dispute to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), other designated arbitration institutions (usually the ICC, the LCIA or the SCC), or to *ad hoc* arbitration pursuant to the UNCITRAL Rules. In 2017, 65 publicly known investment treaty-based arbitrations were initiated against 48 countries and, as of 1 January 2018, the total number of such claims reached 855, with 113 countries being named as a respondent at least once.[196]

Another important element of the international investment protection regime is the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*,[197] which establishes the ICSID as part of the World Bank Group, delineates its jurisdiction[198] and sets out the parameters of ICSID arbitration and conciliation proceedings. In particular, the conduct of ICSID arbitrations is governed by the ICSID Convention, not national law, ICSID arbitral awards can be challenged only in accordance with the annulment procedure provided for in the ICSID Convention, and arbitration of investment disputes under the ICSID Convention is to the exclusion of diplomatic protection.[199] In contrast to arbitral tribunals that derive their powers from

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[196] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* at 91-92.

[197] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 [*ICSID Convention*].

[198] ICSID Convention, Article 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally").

[199] ICSID Convention, Article 27(1) ("No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute"); Article 44 ("Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on

national legal orders[200] and adjudicate disputes in accordance with UNCITRAL or other arbitration rules, the ICSID Convention thus creates a "delocalized" and "entirely self-contained" system that excludes the application of any national procedural rules.[201] Ibrahim Shihata, ICSID Secretary-General (1983-2000), described the Center as a "forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to 'depoliticize' the settlement of investment disputes."[202]

2. International Investment Arbitration as Global Governance

Foreign direct investment (FDI) necessarily implies a contribution of capital over a period of time and involves the creation or acquisition of certain fixed assets that cannot be moved easily without significant loss to their value. Accordingly, under the "obsolescing bargain" model, the bargaining power of the host state's government increases once the foreign investor has completed its investment, thus giving the government an incentive to secure greater benefits for itself by changing the original terms of the investment.[203] And while direct expropriation used to be the main concern of foreign investors until 1970s, in modern times host states' governments may rely on increases of taxes and fees, changes in regulations, or even selective law enforcement, to reap greater benefits from a successful investment made by a foreign person or entity.[204] Therefore, to encourage incoming FDI flows, host states need to reassure foreign

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which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question") & Article 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention").

[200] For more details, see *supra* Chapter 1.1.

[201] Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* (Alphen aan de Rhijn: Kluwer Law International, 2011) at 14; Tomáš Fecák, *International Investment Agreements and EU Law* (Alphen aan den Rijn: Wolters Kluwer, 2016) at 400, 414–415.

[202] Ibrahim FI Shihata, "Towards a Greater Depoliticization of Investment Disputes" (1986) 1 ICSID Review - Foreign Investment Law Journal 1 at 5.

[203] Tim Buthe & Helen Milner, "The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?" (2008) 52:4 American Journal of Political Science 741 at 743.

[204] *Ibid* at 741, 743–744; Tim Buthe & Helen Milner, "Foreign Direct Investment and Institutional Diversity in Trade Agreements: Credibility, Commitment, and Economic Flows in the Developing World, 1971-2007" (2014) 66:1 World Politics 88 at 92–93.

investors not only that their investments would not be expropriated, but also that regulatory framework would remain stable. In this regard, Tim Buthe and Helen Milner ague that whereas domestic policies usually can be modified relatively easily, especially if such changes come at the expense of foreigners, international agreements that bind host states to liberal economic policies favorable to foreign investors constitute "a more credible commitment regarding present and future economic policies".[205] On the basis of FDI statistical data for 122 developing countries for the period from 1970 to 2007, Buthe and Milner reach a conclusion that preferential trade agreements (PTAs), as well as the General Agreement on Tariffs and Trade (GATT) and other World Trade Organization (WTO) Agreements, help developing countries increase incoming FDI flows precisely because such agreements have political (as opposed to purely economic) effects as they indicate a commitment to liberal economic and trade policies and make it harder for host state's governments to backpedal on their promises to foreign investors.[206]

Further statistical analysis indicates that three features of international treaties make host states' commitments to foreign investors more credible. A treaty that (i) has actually entered into force, (ii) contains investment provisions, and (iii) provides for a dispute settlement mechanism (especially if the agreement contains specific provisions governing the treatment of foreign investors and their investments, and provides for third-party adjudication of disputes) constitutes a more credible commitment than a PTA that has been signed, but not ratified, and does not address foreign investment or dispute settlement.[207] Importantly, informational effects of international economic agreements and dispute resolution mechanisms embodied in such agreements make it possible not only for sovereign states, but also for private entities to extort costly pressure on host states' governments that default on their promises, and thus increase the role of transnational actors in the governance of the world economy.[208]

ICSID Secretary-General Ibrahim Shihata himself emphasized that ICSID is not merely a platform to resolve disputes concerning foreign investments, but an institution tasked with boosting the inflow of FDI into developing countries:

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[205] Buthe & Milner, *supra* note 203 at 742.
[206] *Ibid* at 745–747, 757; Buthe & Milner, *supra* note 204 at 89, 93–94.
[207] Buthe & Milner, *supra* note 204 at 91–92, 105, 108, 110, 112, 115.
[208] Buthe & Milner, *supra* note 203 at 743, 758; Buthe & Milner, *supra* note 204 at 94, 115–116.

> ICSID should not be solely regarded as a mechanism for the settlement of investment disputes. Its paramount objective is to promote a climate of mutual confidence between investors and States favorable to increasing the flow of resources to developing countries under reasonable conditions. Like the World Bank … or the Multilateral Investment Guarantee Agency …, ICSID must be regarded as an instrument of international policy for the promotion of investments and of economic development. The main features of the system ICSID's founders devised for this instrument include its voluntary character, its flexibility, and its effectiveness.[209]

In sum, developing countries may seek to increase inward FDI and achieve economic growth if they commit to liberal economic policies by entering into international agreements,[210] especially those with detailed provisions on promotion and protection of foreign investment and effective dispute settlement mechanisms.[211] However, these institutionalized commitments have "important implications for democratic governance"[212] as "governments pay for this increased inward FDI with a loss in policy autonomy".[213] In particular, it is often argued that implantation of arbitration, a private law instrument, into the realm of investor-state relations that often concern the exercise of public authority, coupled with the large number of IIAs, their often vague language and the considerable interpretative powers of arbitrators make investment arbitration a system of global governance.

This sub-chapter analyzes four different approaches to investment arbitration as governance, namely the views that consider investor-state dispute settlement to be an embodiment of (i) hegemonic international law, (ii) new constitutionalism, (iii) global administrative law, and (iv) humanity's law.

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[209] Shihata, *supra* note 202 at 4.

[210] The practical question whether entering into IIAs indeed produces the desired economic effect (i.e. whether increased number of concluded IIAs leads to increased inward FDI and greater economic growth) is outside of the scope of this thesis. The reality is that governments continue to make commitments to foreign investors through various standards of investment protection embodied in IIAs, and this thesis analyzes the global governance aspect of this phenomenon.

[211] Buthe & Milner, *supra* note 203 at 758; Buthe & Milner, *supra* note 204 at 115.

[212] Buthe & Milner, *supra* note 204 at 115–116.

[213] Buthe & Milner, *supra* note 203 at 758.

2.1. Hegemonic International Law

Some critics characterize international investment protection regime as a species of hegemonic international law (HIL)[214] that discards the idea of the sovereign equality of states.[215] According to this approach, norms of international law should recognize inequalities of power in the real world where weaker states pledge loyalty to the hegemon in exchange for security or economic assistance.[216] And because binding international legal regimes and potent international organizations may impose constraints on the hegemon and thus endanger its status, the hegemonists support the position that treaties lack legally binding effect and that abstention of a hegemonic power is enough to keep an emerging rule from being general and thus to prevent it from becoming part of customary international law.[217] Overall, HIL embraces a shift from a rule-based system towards a vague international legal order based on the projections of military force by the hegemon state and its routine interventions in internal affairs of weaker states.[218]

However, to conclude that hegemonic powers function in the absence of the law would oversimplify reality. In some areas, including international trade and investment, it may be beneficial for the hegemon to have a body of (suitably adapted) norms of international law.[219] After all, "[t]he hegemon is also a trading party and the world of trade needs rules."[220] For instance, although the United States is generally skeptical towards international institutions and lags behind other states in ratifying international treaties (such as the *Vienna Convention on the Law of Treaties*, the *United Nations Convention on the Law of the Sea*, and the *Rome Statute of the International Criminal Court*), this

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[214] Jose E Alvarez, "Is the International Investment Regime a Form of Global Governance?" in *Arbitration: The Next Fifty Years* (Kluwer Law International, 2012) 137 at 150.

[215] In the context of HIL, the terms "hegemon" and "hegemonic" refer to a particular state or a category of states (i.e. developed states of the Global North as opposed to the developing states of the Global South), not to a particular ideology. In contrast, the new constitutionalism, addressed *infra* in Chapter 2.2.3, focuses on neoliberalism as a hegemonic ideology reflected, in particular, in investment protection standards embodied in IIAs.

[216] Detlev F Vagts, "Hegemonic International Law" (2001) 95:4 American Journal of International Law 843 at 845; Jose E Alvarez, "Hegemonic International Law Revisited" (2003) 97:4 American Journal of International Law 873 at 873.

[217] Vagts, *supra* note 216 at 846–847.

[218] Alvarez, *supra* note 216 at 873.

[219] Vagts, *supra* note 216 at 845.

[220] *Ibid.*

trend does not apply to trade and investment norms.[221] In particular, the United States actively participated in the multilateral trade negotiations conducted within the framework of the *General Agreement on Tariffs and Trade* (GATT), as well as in establishing the World Trade Organization (WTO), conclusion of the *North American Free Trade Agreement* (NAFTA) and negotiations of the *Multilateral Agreement on Investment* (MAI) between members of the Organisation for Economic Co-operation and Development (OECD). Because formal equality with respect to trade and investment matters usually produces more favorable results for a superior economic power, the hegemon's skepticism towards binding international law in general and binding adjudication of international disputes in particular is much less evident in these areas.[222] As Krisch points out, "[i]n matters of trade, the equality of the rules is hardly a threat to the powerful."[223]

Furthermore, dominant states prefer to use international law in ways that put fewer constraints on their behaviour and provide for more space for non-egalitarian elements and unequal power relations.[224] For instance, the United States is active in concluding and enforcing *bilateral* treaties on trade, investment, tax and mutual legal assistance, because bilateral negotiations are prong to being influenced by the superior bargaining power of one party, whereas multilateral negotiations allow weaker states to pull together their resources and counterbalance the power of the dominant state.[225] This approach has been endorsed by the President of the United States Donald Trump who, on his first day in office, issued a memorandum directing the United States Trade Representative to withdraw from the TPP, a trade agreement between twelve states, and instead "to begin pursuing, wherever possible, bilateral trade negotiations to promote American industry, protect American workers, and raise American wages."[226]

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[221] Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16:3 European Journal of International Law 369 at 384.
[222] *Ibid* at 384–385.
[223] *Ibid* at 385.
[224] *Ibid* at 389.
[225] *Ibid* at 389–390.
[226] White House Office of the Press Secretary, "Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement", 23 January 2017, online: <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>, last accessed on 28 December 2018.

Guzman points out that developing countries that actively opposed the rule requiring "prompt, adequate and effective" compensation for expropriated investments in favor of a more relaxed standard ended up concluding bilateral investment treaties (BITs) that provide for a stronger protection of foreign investments than required by the minimum standard of treatment under the customary international law.[227] He argues that developing countries face a prisoner's dilemma, where it would be more beneficial for them *as a group* to enter into agreements that leave more flexibility for host states vis-à-vis foreign investors and do not provide for enforcement of such agreements in international forums, but, in the race to attract foreign investments, *individual* developing countries conclude BITs that give foreign investors enforceable rights and provide them with access to international investor-to-state arbitration mechanisms.[228] In sum, BITs give *individual* developing countries an ability to make enforceable promises to potential investors, making such countries more attractive to foreign investors and allowing them to attract larger volumes of foreign investments, but BITs may not be an appropriate tool to increase the overall welfare of developing countries *as a group* or even cause them to suffer an overall welfare loss.[229]

In summary, HIL scholars view the investment protection as a legal regime imposed by certain hegemonic powers with the aim to limit, through investment treaties and their subsequent interpretations by arbitral tribunals, the range of policy options available to developing countries.[230]

2.2. Global Administrative Law

Other commentators, who speak in "less loaded terms"[231] than "hegemonic international law", describe investment regime as species of global administrative law (GAR).[232] Kingsbury, Krisch and Stewart defined GAL as

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[227] Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1997) 38 Virginia Journal of International Law 639 at 643.
[228] *Ibid* at 643, 666–669.
[229] *Ibid* at 674, 688.
[230] Alvarez, *supra* note 214 at 150–151.
[231] *Ibid* at 151.
[232] Benedict Kingsbury, Nico Krisch & Richard B Stewart, "The Emergence of Global Administrative Law" (2005) 68:15 Law and Contemporary Problems 15; Benedict Kingsbury & Stephan W Schill, *Investor-State*

> the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.[233]

They argue that GAL encompasses the spectrum of actions (including rule-making, adjudication and other decision-making) that lies between making of international treaties and simple settlement of disputes between states,[234] and investment arbitration is a powerful tool for investors to challenge administrative actions of host states, thus imposing both procedural and substantive limitations on domestic regulators.[235]

Similarly, Kingsbury and Schill argue that investment arbitration serves as a review mechanism where the arbitral tribunal examines whether the government has duly balanced investor protection and other important public goals.[236] Furthermore, when interpreting broadly-worded standards of investment protection set out in various BITs, tribunals define the standards of good governance and rule of law that are enforceable by foreign investors against host states, and the awards rendered in investment arbitration thus have implications going beyond the parties to a particular dispute.[237] For instance, although the tribunal in *Glamis Gold v. United States* noted that its mandate is "similar to the case-specific mandate ordinarily found in international commercial arbitration",[238] i.e. to resolve a particular dispute arising out of or in connection with a particular commercial contract, the arbitrators acknowledged that they had to take into account implications of their decisions on the "significant public system of private investment protection"[239] contained in Chapter 11 of the NAFTA:

Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, Public Law Research Paper No 09-46 (New York: New York University School of Law, 2009); Gus Van Harten & Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17:1 European Journal of International Law 121.

[233] Kingsbury, Krisch & Stewart, *supra* note 232 at 17.

[234] *Ibid*.

[235] *Ibid* at 36–37; see also; Van Harten & Loughlin, *supra* note 232 at 122.

[236] Kingsbury & Schill, *supra* note 232 at 1.

[237] *Ibid*.

[238] *Glamis Gold, Ltd v The United States of America*, UNCITRAL, Final Award (8 June 2009), para 3.

[239] *Ibid*, para 5.

> The fact that any particular tribunal need not live with the challenge of applying its reasoning in the case before it to a host of different future disputes (the challenge faced by standing adjudicative bodies) does not mean such a tribunal can ignore that challenge. A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.[240]

Kingsbury and Schill argue that investment arbitration jurisprudence on the host states' obligation to accord "fair and equitable treatment" to foreign investors constitutes part of jurisprudence on modern public administration, and its role is to develop a body of standards for the exercise of public powers in administrative, judicial and legislative processes and proceedings.[241]

In turn, Van Harten and Loughlin write that if GAL is understood as a system similar to judicial review mechanism tasked with keeping the exercise of public authority within the bounds of legality and providing enforceable remedies to those negatively affected by unlawful actions of the government, then treaty-based investment arbitration appears to be "the *only* case of global administrative law in the world today."[242] They outline four characteristics of investment arbitration that highlight its resemblance to the GAL, namely (i) the absence of a duty to exhaust local remedies as a precondition to bringing a claim before international arbitral tribunal (the principle of individualization), (ii) availability of damages as a public law remedy (the damages principle), (iii) enforceability of arbitral awards with limited supervision by national courts (principle of direct enforceability), and (iv) the possibility to make use of a favorable BIT by incorporating a holding company in a desirable jurisdiction (the forum-shopping principle).[243]

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[240] *Ibid*, para 6.
[241] Kingsbury & Schill, *supra* note 232 at 8–9.
[242] Van Harten & Loughlin, *supra* note 232 at 149.
[243] *Ibid* at 122, 127–139.

2.3. New Constitutionalism

Some scholars observe that IIAs play a constitutional function as they provide a framework for the global rule of law and expansion of transnational investment activities.[244] The system of investor-sate dispute resolution has been criticized by new constitutionalism scholars as an instrument of "disciplinary neoliberalism".[245] Neoliberalism may be defined as "a theory of political economy that hypothesizes that human well-being will be advanced by the practices associated with free markets"[246] and relegates the state to "creat[ing] and preserv[ing] an institutional framework appropriate to such practices",[247] including defining and protecting property rights, guaranteeing the enforceability of contractual obligations, and providing security and policing so that to ensure stable functioning of free markets.[248] David Schneiderman considers globalization to be a "cultural project with the normative object of actively suppressing alternatives"[249] and notes that, in the context of economic globalization, "[l]egal disciplines erect barriers that cabin political possibilities and suppress alternative futures".[250] Globalization, therefore, "represents the institutionalization of neoliberalism on a global scale."[251]

Schneiderman analyzes the interplay between transnational legality and "local agency" (nation states) in what he calls "an age when powerful economic actors seek to supplant national state authority".[252] Schneiderman suggests that while transnational economic law distrusts local rule-making, it necessarily relies on various state institutions and legal forms as support structures in order to preserve the legitimacy of transnational legality over time.[253] In other words, democratic national states are paramount to the success of

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[244] A Claire Cutler, "Human Rights Promotion through Transnational Investment Regimes: An International Political Economy Approach" (2013) 1(1) Politics and Governance 16 at 18; Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009) at 17.
[245] Alvarez, *supra* note 214 at 152.
[246] David Schneiderman, "Transnational Legality and the Immobilization of Local Agency" (2006) 2 Annual Review of Law and Social Science 387 at 390.
[247] David Harvey, *A Brief History of Neo-Liberalism* (Oxford: Oxford University Press, 2005) at 2.
[248] Schneiderman, *supra* note 246 at 390.
[249] *Ibid*.
[250] *Ibid*.
[251] *Ibid*.
[252] *Ibid* at 388.
[253] *Ibid*; David Schneiderman, "How to Govern Differently: Neoliberalism, New Constitutionalism and International Investment Law" in A Claire Cutler & Stephen Gill, eds, *New Constitutionalism and Word Order* (Cambridge: Cambridge University Press, 2014) 165 at 165–166.

the neoliberal project[254] and "State actors, indeed, have been energetically working to maintain neoliberalism's supremacy."[255] In the age of economic globalization, sovereign states do not exercise their governance powers to the least possible extent, as proponents of the Chicago school of economics suggest.[256] Instead, Schneiderman argues, neoliberalism no longer operates solely with the aim of "mobilization and extension of markets (and market logics)", but also focuses on reconstruction of state functions along the line preferred by powerful market players, as well as on disciplining those who were marginalized by the neo-liberalization of the economy.[257] The role of states in the neoliberal project is thus two-fold: state involvement is necessary to, first, "erec[t] the scaffolding upon which the rules and structures of economic globalization operate" and, second, to "restructure domestic legal relations to augment the norms of transnational legality."[258] Stephen Gill identified three "dimensions", or "sets of 'productive constraints'" of new constitutionalism, including measures to (i) reconfigure the state apparatuses, (ii) construct and extend capitalist markets, and (iii) deal with dislocations and contradictions.[259] The new constitutionalism project thus isolates large sectors of the economy from the influence of politicians or citizen groups by placing binding constraints, both internal and external, on the making and execution of financial, trade and investment policies.[260]

In turn, the international investment protection regime is, in Schneiderman's opinion, an "institutional partner" of neo-liberalism and a "superconstitution" that seeks to impose a set of binding constraints on sovereign states to isolate economic policy-making from

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[254] Schneiderman, *supra* note 246 at 394; see also; Stephen Gill, *Power and Resistance in the New World Order* (Hampshire: Palgrave Macmillan, 2003) at 141; Ulrich Beck, *Power in the Global Age: A New Global Political Economy* (London: Polity, 2005) at 148.

[255] Schneiderman, *supra* note 253 at 165.

[256] *Ibid* at 166.

[257] *Ibid* at 171.

[258] Schneiderman, *supra* note 246 at 394.

[259] Stephen Gill, "Market Civilization, New Constitutionalism and World Order" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 29 at 38–42.

[260] Stephen Gill, "Globalisation, Market Civilisation, and Disciplinary Neoliberalism" (1995) 24 Millennium - Journal of International Studies 399 at 412; Gill, *supra* note 254 at 132; Schneiderman, *supra* note 246 at 391.

democratic process.[261] Substantive standards of investment protection, contained in various IIAs, prohibit a range of state actions interfering with foreign investment, and international investment arbitration mechanisms effectively remove foreign investment disputes from host states' courts and "elevate" them to a "depoliticized" dispute resolution forum.[262] In sum, the emergence of the global investment protection framework may be equated to the "arrival of new transnational legal rules and institutions intended to entrench constitution-like limits on the exercise of local political authority far into the future."[263]

2.4. Humanity's Law

A more optimistic[264] framework for analyzing the development of international dispute settlement was proposed by Teitel and Howse in the context of discussion on "tribunalization", a recent trend towards proliferation of international courts and tribunals, coupled with the increasing use of such adjudicative bodies to interpret the rules of international law and to settle disputes between states and other actors.[265] They argue that both the optimistic hypothesis, which praises tribunalization as depolitization, a move from a power-based to a rule-based system of international relations, and the pessimistic hypothesis, which objects to tribunalization as a threat to integrity and legitimacy of the international legal order, are too simplistic and misleading.[266] Instead, Teitel and Howse point out that some tribunals "become the most evident sites of the new global politics of contestation between diverse actors",[267] including not only sovereign states, but also private individuals, business corporations, non-governmental organizations (NGOs) and local communities, and that the emerging legal order,

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[261] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008) at 2–3.
[262] Schneiderman, *supra* note 253 at 172.
[263] Schneiderman, *supra* note 246 at 387–388.
[264] Alvarez, *supra* note 214 at 153.
[265] Ruti Teitel & Robert Howse, "CrossJudging: Tribunalization in a Fragmented but Interconnected Global Order" (2009) 41 New York University Journal of International Law and Politics 959 at 959–960.
[266] *Ibid* at 961–962.
[267] *Ibid* at 961.

informed by human rights law, puts persons and peoples, rather than states and state interests, at its core.[268] Teitel defines this new normative regime as "humanity's law".[269]

With respect to international investment law and tribunalization, Teitel and Howse argue that the forms and functions of investment protection differed during four historic periods. Traditionally, foreign investors had to rely on their home states to exercise diplomatic protection, premised on sovereign equality of states and harm caused to a foreign state's national being an injury caused to the foreign state itself.[270] Secondly, with decolonization and the Cold War, arbitral tribunals played a depoliticizing and de-escalating functions in investment disputes between corporations from North and West and governments from East and South.[271] Later on, with the emergence of the Washinghton Consensus and the end of the Cold War, IIAs and ISDS mechanism allowed developing countries to make credible commitment to foreign investors, providing them with enforceable rights, reducing the political risk and allowing them to attract larger volumes of foreign investment.[272] The arbitrators acknowledged this role of investment protection regime in *Tecmed v. Mexico*, where the tribunal stated that, by entering into the applicable BIT, Spain and Mexico "intended to strengthen and increase the security and trust of foreign investors that invest in the member States, thus maximizing the use of the economic resources of each Contracting Party".[273] Similarly, Thomas Wälde in *Thunderbird v. Mexico* noted that "international investment law is aimed at promoting foreign investment by providing effective protection to foreign investors".[274]

Finally, the fourth period has begun with cases where foreign investors filed claims against governments that backpedaled on their commitments to privatization and economic liberalization due to high human costs, political or economic crises, and such

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[268] *Ibid* at 968–969.
[269] Ruti Teitel, "Humanity's Law: Rule of Law for the New Global Politics" (2002) 35 Cornell International Law Journal 355 at 357; Teitel & Howse, *supra* note 265 at 969.
[270] Teitel & Howse, *supra* note 265 at 977, see also; Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) at 1–10.
[271] Teitel & Howse, *supra* note 265 at 977–978.
[272] *Ibid* at 978.
[273] *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2 [*Tecmed v Mexico*], Award (29 May 2003), para 156.
[274] *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL [*Thunderbird v Mexico*], Separate Opinion of Thomas Wälde (1 December 2005), para 4.

claims by foreign investors sparked sharp criticism from NGOs and civil society groups.[275] This backlash against investment arbitration forced the tribunals to function more transparently and to devote more attention to human rights and legitimate public policy interests in assessing the host state's conduct. For instance, in *Methanex v. United States* the tribunal declared that, because there was "an undoubtedly public interest in this arbitration" and the "substantive issues extend[ed] far beyond those raised by the usual transnational arbitration between commercial parties",[276] the arbitrators had the power to consider *amici curiae* submissions from the NGOs.[277] Most recently, in *Philip Morris v. Uruguay*, the arbitrators acknowledged that "investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health."[278]

Overall, Teitel and Howse suggest that if investment arbitration tribunals manage to take into account human rights law in their decisions, the outcome of the tribunalization process would be a "new international investment law that embodies what is perceived as a just, humanity-oriented balance of rights and obligations."[279]

3. International Investment Arbitration and the Exercise of Criminal Powers by the States

Two main concerns arise with respect to parallel international arbitration and criminal proceedings, including the fear that (i) states may initiate criminal investigations in bad faith, to expropriate the investment, or to harass or intimidate the investor, and (ii) even legitimately initiated criminal proceedings may adversely affect the integrity of ongoing arbitration proceedings, hamper access to evidence or tamper with witnesses.[280]

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[275] Teitel & Howse, *supra* note 265 at 979.
[276] *Methanex Corporation v United States of America*, UNCITRAL [*Methanex v United States*], Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*" (15 January 2001), para 49.
[277] *Ibid*, para 53.
[278] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 [*Philip Morris v. Uruguay*], Award (8 July 2016), para 399.
[279] Teitel & Howse, *supra* note 265 at 981.
[280] Ruslan Mirzayev, "International Investment Protection Regime and Criminal Investigations" (2012) 29:1 J Int'l Arb 71.

Before turning to the analysis as to how different conceptualizations of investment arbitration as a system of global governance capture the tensions arising from investor-state dispute settlement on the enforcement of criminal law by host states, this sub-chapter gives a brief overview of cases where the dispute concerned alleged mistreatment or harassment of investor in the context of a criminal investigation or prosecution.

3.1. Early Arbitral Jurisprudence: From *Benvenuti* to *Hamester*

The first modern investor-state arbitration cases concerning alleged irregularities and improprieties in criminal investigations, searches, seizures and arrests arose as early as the 1970s. For instance, in *Benvenuti v. Congo* the tribunal held that the host state violated a joint venture agreement with an investor, in particular, by military occupation of the property and initiation of criminal proceedings against the Italian manager of the company, prompting him to leave the Congo.[281] The tribunal noted that the host state had not provided "any document that would enable it [the tribunal] to determine the merits of this criminal proceeding."[282]

In *Mitchell v. DRC,* the dispute arose when the DRC military forces raided Mr. Mitchell's legal consulting firm under the suspicion that it was holding money for a company with ties to an anti-government rebel group.[283] As a result of this military intervention, the premises of the firm were put under seals, documents were seized and two lawyers were imprisoned for more than eight months.[284] The tribunal concluded that the claimant's investment was expropriated in violation of the Congo-USA BIT.[285] This award was subsequently annulled on the grounds of manifest excess of powers and failure to state reasons.[286]

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[281] *Benvenuti et Bonfant srl v The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/2 [*Benvenuti et Bonfant v Congo*], Award (8 August 1980), (1983) 8 YB Comm Arb 144 at 148-149. See Karel Daele, "Investment Arbitration Involving African States" in Lise Bosman, ed, *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International, 2013) 403 at 426.

[282] *Benvenuti et Bonfant v Congo*], Award (8 August 1980) at 148.

[283] *Mr Patrick Mitchell v The Democratic Republic of the Congo*, ICSID Case No ARB/99/7 [*Mitchell v Congo*], Award (9 February 2004), paras 1, 62-66, 71-72, 74. See Karel Daele, "Investment Arbitration Involving African States" in Lise Bosman, ed, Arbitration in Africa: A Practitioner's Guide (Kluwer Law International, 2013) 403 at 428.

[284] *Mitchell v Congo*, Award (9 February 2004), paras 62, 72.

[285] *Ibid*, para 102(2).

[286] *Mitchell v Congo*, Decision on the Application for Annulment of the Award (1 November 2006), para 67.

In *Ahmonseto v. Egypt*, the tribunal was called upon to decide, in particular, whether Egypt violated the Egypt-USA BIT by initiating "groundless, unfair and unreasonable" criminal investigations against the claimants and imprisoning one of them.[287] First, the arbitrators noted that although criminal prosecutions are "to a large extent" outside of the scope of the applicable BIT, the tribunal had the authority to assess whether such actions of the host state were of an arbitrary nature.[288] The tribunal then set out the framework for such assessment: a breach of the BIT occurs only when a criminal investigation is "fundamentally unjustified and groundless" and prevents the investors from managing their business.[289] Also, a breach would occur where detention of an investor amounts to a "measure that gravely violates the rights of the person placed in custody" and excessively impairs the investment.[290] The tribunal then acknowledged that its status is not one of an international court of human rights or a public authority entrusted with the application of criminal law, but one of a panel charged with adjudicating disputes over investments.[291] Ultimately, the majority of the tribunal concluded that conduct of the criminal investigations and the detention of one of the claimants did not lead to a direct impairment of the investment and did not amount to an inequitable treatment under the BIT.[292]

In *Tokios Tokeles v. Ukraine*, the claimant alleged that its wholly-owned Ukrainian subsidiary Taky Spravy had been the target of a lasting campaign of oppression by Ukrainian state agencies, prompted by persons in high authority and executed mainly by the state tax administration and the prosecutors' office, and taking the form of numerous instances of unjustified interference with Taky Spravy's business activities and management, disguised as lawful investigations into violations of Ukrainian economic

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[287] *Ahmonseto, Inc, E&D Industrial California Overseas Company of America, A BMH & Co, Inc., and others The Arab Republic of Egypt*, ICSID Case No ARB/02/15 [*Ahmonseto v Egypt*], Award (18 June 2007), (2008) 23:2 ICSID Rev 352 at 352, 354, para 250. See Karel Daele, "Investment Arbitration Involving African States" in Lise Bosman, ed, Arbitration in Africa: A Practitioner's Guide (Kluwer Law International, 2013) 403 at 423, 433-434.
[288] *Ahmonseto v Egypt*, Award (18 June 2007), para 254.
[289] *Ibid*, para 255.
[290] *Ibid*, para 262.
[291] *Ibid*, para 262.
[292] *Ibid*, paras 264-267.

laws.[293] The claimant argued that the state agencies' actions constituted an intentional and premeditated campaign of destruction of Taky Spravy's business as retaliation for supporting an opposition politician, and that overall interference of the state agencies with Taky Spravy's business was profound enough to constitute an unlawful expropriation of the claimant's investment and a breach of Ukraine's fair and equitable treatment obligation under the Ukraine-Lithuania BIT.[294] In particular, Mr. Oleksandr Danylov, Taky Spravy's general director, had been subject to criminal investigation for tax evasion since May 2002, and officially indicted in July 2002.[295]

The claimant filed a request for arbitration with the ICSID in August 2002 and re-submitted it in November 2002.[296] Meanwhile, Mr. Danylov left Ukraine for Lithuania, where he was granted refugee status in May 2003, and returned to Ukraine only in March 2005, after mass protests and a re-run presidential election pushed the exiting regime out of power.[297] Although in April 2005 the state tax administration notified Mr. Danylov that the case against him had been closed for lack of evidence, the case was subsequently re-opened and closed again several times.[298] At the hearing on the merits, Mr. Danylov testified that during his meetings with high level officials at the Prosecutor General's Office, as well as with the Head of the State Police, the officials linked the criminal case to the ICSID claim.[299]

The tribunal acknowledged that "a manifest and gross failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed towards an investor in the operation of his investment," may constitute a breach of an investment treaty, but was not persuaded that the claimant was a target of a politically-motivated campaign of harassment.[300] On the one hand, the state's actions against Taki Spravy began just days after the company published campaign materials for the opposition party, the tax authorities issued public statements that Taki Spravy was

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[293] *Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18 [*Tokios Tokeles v Ukraine*], Award (26 Jul 2007), paras 2, 4, 12.
[294] *Ibid*, paras 4, 12-13.
[295] *Ibid*, paras 2, 58.
[296] *Ibid*, paras 16-19.
[297] *Ibid*, paras 9, 58-59.
[298] *Ibid*, paras 59-60.
[299] *Ibid*, para 60.
[300] *Ibid*, para 133.

suspected of crimes that those authorities had already decided not to pursue further, and the character and duration of the investigation were consistent with the claimant's theory.[301] The tribunal also noted that "it is difficult to reconcile the criminal proceeding against O. Danylov, which the state has opened and closed a total of five times, with general principles of due process."[302] On the other hand, the investigation into Taky Spravy was the result of a separate investigation into Taky Spravy's contractors that had begun before Taky Spravy produced materials for the opposition party, and those companies showed signs of being sham enterprises.[303] Ultimately, the tribunal concluded that the claimant failed to furnish sufficient evidence that measures implemented by the state agencies were part of a politically-motivated conspiracy designed to put the claimant's Ukrainian subsidiary out of business.[304]

In *Hamester v. Ghana*, the claimant alleged that a police investigation commenced by the host state against the managing director of the joint venture company was a part of a scheme to expropriate the claimant's investment.[305] However, on the basis of documentary evidence, the tribunal determined that the criminal proceedings did not appear, *prima facie,* lo lack a foundation.[306] Furthermore, the legality of the criminal proceedings was irrelevant because the managing director himself admitted that "the matter was not pursued by the police."[307] Therefore, the investigation was not in violation of the host state's obligations under the Germany-Ghana BIT.[308] Also, the arbitrators noted that "[a] State may obviously exercise its sovereign powers to investigate and prosecute criminal actions."[309]

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[301] *Ibid*, para 114.
[302] *Ibid*.
[303] *Ibid*, para 115.
[304] *Ibid*, paras 134-137.
[305] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24 [*Hamester v Ghana*], Award (18 June 2010), para 292. See Karel Daele, "Investment Arbitration Involving African States" in Lise Bosman, ed, Arbitration in Africa: A Practitioner's Guide (Kluwer Law International, 2013) 403 at 431.
[306] *Hamester v Ghana*, Award (18 June 2010), para 298.
[307] *Ibid*.
[308] *Ibid*, paras 297, 300.
[309] *Ibid,* para 297.

3.2. The Turning Point: *Rompetrol v. Romania* and Subsequent Cases

While arbitral tribunals in some earlier cases had to decide on the claimants' submissions that their investments were harmed by the conduct of the host states' law enforcement agencies, *Rompetrol v. Romania*[310] was the first case where allegations of the host state's misconduct in the context of a criminal investigations were at the center of the investment dispute and required the tribunal to elaborate on the interrelationship between protection of foreign investment and enforcement of domestic criminal law.

In *Rompetrol v. Romania*, the dispute arose from the purchase of shares by the clamant (TRG) in RRC, a privatized Romanian oil and petrochemical company.[311] The claimant alleged that government-ordered investigations of RRC and its management, as well as arbitrary treatment of the company, violated the Netherlands-Romania BIT.[312] The host state answered that the investigations were merely part of implementation of the national anti-corruption strategy.[313]

The tribunal noted that the specific nature of the dispute, which "originate[d] in and focus[ed] on measures taken by authorities of the Respondent state in the area of investigation and possible prosecution of criminal offences."[314] These measures, however, were not directly aimed at the investor (TRG) or its investments in the host Sate, but were directed against two former TRG officers, Mr. Dan Patriciu and Mr. George Stephenson, and concerned their role in the affairs of the claimant's Romanian subsidiary and management of the Dutch holding company.[315] The tribunal thus set out three categories of state actions that would fall within the scope of protection under the BIT, namely the actions that target (i) the investment or the investor itself, (ii) the investor's executives for their activities on behalf of the investor, or (iii) the investor's executives personally, but with the aim to harm the investor.[316] While at times the tribunal appeared hesitant to make pronouncements on the conduct of criminal investigations by the authorities of the host state, the outcome of the case necessarily

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[310] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, [*Rompetrol v Romania*], Award (6 May 2013).
[311] *Ibid*, paras 1-3.
[312] *Ibid*, paras 3, 38-39.
[313] *Ibid*, para 39.
[314] *Ibid*, para 151.
[315] *Ibid*, para 151.
[316] *Ibid*, para 200.

depended on the claimant's ability to prove that the investigations against the persons associated with the investor had breached the claimant's rights itself, i.e. that these criminal investigations were incompatible with the treatment the claimant was entitled to expect under the terms of the applicable BIT.[317]

On the one hand, the arbitrators declared that the tribunal

> would be acutely sensitive to any well-founded allegation that the investment arbitration process before it was intended to (or was in fact operating in such a way as to) block or inhibit the legitimate operation of the State's inherent function in the investigation, repression and punishment of crime, including economic crime and corruption.[318]

The tribunal also several times confirmed that its role was not to second-guess the decisions of the Romanian law enforcement agencies:

> [T]he Parties are clearly in agreement that the Tribunal is not called upon to act as Romanian judge of final instance, either to pronounce on the rightness or wrongness of the pending criminal charges or to substitute a view of its own for the decisions of the competent Romanian instances on individual steps in the prosecutions or preliminary investigations, or on any other internal process.[319]
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> …
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> There was at a certain stage in the proceedings some debate between the Parties as to whether the criminal investigations were so devoid of substantial merit (i.e. of real and grounded suspicion of the possible commission of criminal offences) that they had to be presumed to have been initiated and then pursued out of improper motives. But the Parties were in the event agreed that it was not for this Tribunal to determine whether adequate grounds ('probable cause') did or did not exist under Romanian law to justify the opening of an investigation, and by so doing either to supervise or to supplant the decisions of the

[317] *Ibid*, para 151.
[318] *Ibid*, para 152.
[319] *Ibid*, para 174.

> competent organs of the Romanian judicial system. The Tribunal can only agree.[320]
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> …
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> The indictment would thus appear … to offer the necessary basis on which each of the accused can then set about preparing his defence. To note that is of course wholly without prejudice to whether the factual allegations are indeed accurate and sustainable, and the legal argument correct. As already noted however, those assessments are not for this Tribunal to make, but are a matter for the Romanian courts. The Parties are in agreement … that it is not for this Tribunal to determine whether or not there was a substantial basis for the criminal charges against Mr. Patriciu and his associates.[321]
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> …
>
> The Claimant advances a whole series of actions by the State prosecutors in charge of the PNA and DIICOT investigations which it says were unjustified or wrongful, and which it asks the Tribunal to find were part of a pattern of deliberately oppressive conduct against Mr. Patriciu and the others under investigation. It would be impossible for the Tribunal to investigate all of these accusations in detail – and indeed to do so would contradict the underlying proposition … that it is not for an investment tribunal to set itself up as a court of final review over the criminal justice systems of host States.[322]

On the other hand, the tribunal agreed with the claimant that "the pursuit of crime – or even its mere invocation – cannot serve on its own as a justification for conduct that breaches the rights of foreign investors under applicable treaties."[323] In particular, the tribunal examined the formal indictment against Mr. Patriciu and Mr. Stephenson, but was satisfied that this document laid the charges, the facts and evidence against them in sufficient detail, so that the indictment did not, "on its face, bear out any argument that it embodies a trumped-up set of criminal allegations that are accordingly only explicable as

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[320] *Ibid*, para 233.
[321] *Ibid*, para 237.
[322] *Ibid*, para 238.
[323] *Ibid*, para 152.

stemming from bias or improper motive."[324] Then, to address the claimant's allegations that persistent irregularities in the course of the criminal investigation constituted a pattern of intentionally oppressive conduct, the tribunal addressed the attachment of RRC shares, the arrest and attempted imprisonment of Patriciu and Stephenson, the press releases issued by the Romanian law enforcement authorities, the interception of Patriciu's and RRC's telephone conversations, the requests for information from banks and the tax audits.[325] While some law enforcement activities did not raise concerns, the tribunal noted that the attachment of TRG's shares in RRC evidenced "prosecutorial animus" towards the claimant,[326] and that the attempts to imprison Mr. Patriciu and wiretap his phones "reflect[] no credit on the … prosecutors"[327] and "suggest that there were elements in the State apparatus determined to pin something on Mr. Patriciu, if they could".[328]

In the end, although the arbitrators dismissed the claimant's contention of a politically-motivated campaign of harassment, the tribunal concluded that procedural irregularities during the criminal investigation, in the absence of any evidence that the respondent attempted to avoid or minimize the possibility of harming the foreign investor, amounted to a breach of the fair and equitable treatment obligation.[329] However, because the claimant failed to prove that it suffered economic loss or damage resulting from the host state's breach of the BIT, no compensation was awarded.[330]

For the purposes of this chapter, which focuses on investment protection and the exercise of the state power to investigate and prosecute crimes, two findings made by the *Rompetrol v. Romania* tribunal merit special attention. First, the tribunal found that foreign investors have legitimate expectations as to the conduct of criminal investigations where foreign investors' interests are implicated:

> [I]n this Tribunal's view, a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment to a

[324] *Ibid*, para 237.
[325] *Ibid*, para 238.
[326] *Ibid*, para 248.
[327] *Ibid*, para 251.
[328] *Ibid*, para 261.
[329] *Ibid*, para 277-279.
[330] *Ibid*, para 299.

> protected investor by a pattern of wrongful conduct during the course of a criminal investigation or prosecution, even where the investigation and prosecution are not themselves wrongful. The provisos are however that the pattern must be sufficiently serious and persistent, that the interests of the investor must be affected, and that there is a failure in these circumstances to pay adequate regard to how those interests ought to be duly protected. In the Tribunal's considered view, it is part of the legitimate expectations of a protected investor – without in any way trenching upon the sovereign right of the host State to prescribe and enforce its criminal law – that, if its interests find themselves caught up in the criminal process either directly or indirectly, means will be sought by the authorities of the host State to avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects.[331]

Second, the arbitrators warned that an inquiry into the conduct of a criminal investigation is necessarily fact-sensitive, and that host states are to be found liable only in isolated cases:

> [T]he Tribunal wishes to make it plain that it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and equitable treatment. All will depend on the nature and strength of the evidence in the particular case, on the impact of the events complained about on the protected investor or investment, and on the severity and persistence of any breaches that can be duly proved, as well as on whatever justification the respondent State may offer for the course of events. The Tribunal's finding is based entirely on the facts of the present case.[332]

In *Yukos Cases*, the dispute concerned various measures, including criminal prosecutions and tax reassessments, taken by the Russian Federation against OAO Yukos Oil Company (Yukos) and related persons and entities between July 2003 and November

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[331] *Ibid*, para 278.
[332] *Ibid*, para 279.

2007.[333] In February 2005, three controlling shareholders in Yukos (Hulley, YUL and Veteran Petroleum) initiated parallel arbitration proceedings arguing that the against the Russian Federation breached the Energy Charter Treaty[334] by expropriating the claimants' investments and failing to treat them in a fair and equitable manner.[335]

Claimants alleged that a series of criminal investigations and prosecutions, as well as accompanying searches and seizures, constituted a campaign of harassment against the executives, employees, auditors and lawyers of Yukos aimed at expropriating Yukos' assets and removing Mr. Mikhail Khodorkovsky, the then-principal shareholder and CEO of Yukos, as a political threat.[336] Mr. Khodorkovsky and Mr. Platon Lebedev, the then-director of Hulley and YUL, were arrested in 2003 on charges of fraud, embezzlement and tax evasion, and sentenced to nine years in prison in May 2005.[337] New charges were brought against them in February 2007, resulting in further convictions in December 2010.[338]

The respondent maintained that its actions were legitimate non-discriminatory law enforcement measures undertaken in compliance with the Russian law in response to illegal acts committed by Yukos' executives and shareholders.[339] Furthermore, the respondent argued that the treatment of Mr. Khodorkovsky, Mr. Lebedev and other individuals was mostly irrelevant in the context of the investor-state dispute because the ECT protections cover investments, not physical persons, and that the law enforcement actions did not impair the claimants' investments.[340]

While the tribunal notes that "it is not a human rights court", the arbitrators nevertheless found themselves competent to "consider the allegations of harassment and intimidation as they form part of the factual matrix of Claimants' complaints that the

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[333] *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 226; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 228; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227 [collectively, *Yukos Cases*], Final Award (18 July 2014), para 63.
[334] *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95, entered into force on 16 April 1998 [*ECT*].
[335] *Yukos Cases*, paras 1, 10, 63, 110.
[336] *Ibid,* paras 5, 81, 83, 761.
[337] *Ibid,* para 82.
[338] *Ibid.*
[339] *Ibid,* paras 81, 83-86, 763.
[340] *Ibid,* para 764, 795, 1556.

Russian Federation violated its obligations under … the ECT."[341] The tribunal than considered the conduct of criminal investigations, searches and seizures involving Yukos' executives, employees, lawyers and advisers, as well as arrest and trial of Mr. Khodorkovsky,[342] and proceeded to scrutinizing the credibility of the claimants' allegations about the campaign of harassment.[343] The arbitrators concluded that the respondent's actions were not justified as legitimate law enforcement measures:

> The Tribunal accepts that the Russian Federation had the power to conduct searches and seizures in Yukos' premises during the ongoing criminal investigations. Nevertheless, having reviewed the record, the Tribunal finds that the investigation of Yukos was carried out by the Russian Federation with excessive harshness. Respondent's counsel acknowledged that in the context of the large-scale fraud investigation "not everything is pretty in those circumstances, and we may each of us have circumstances that we would regret or have done differently." The Tribunal considers "not pretty" to be an understatement in this case. The treatment of Yukos senior executives, mid-level employees, in-house counsel, external lawyers and related entities as described in this chapter support Claimants' central submission that the Russian authorities were conducting a "ruthless campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent."[344]

Having reviewed the evidence, the tribunal decided that the respondent's aggressive law enforcement actions significantly impacted Yukos' management, disrupted its operations, contributing to its demise, and thus damaged the claimants' investment.[345] Ultimately, the arbitrators concluded that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets",[346] and the respondent had thus breached the non-expropriation guarantee under the ECT.[347] While the tribunal was primarily concerned with the USD 13

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[341] *Ibid,* para 765.
[342] *Ibid,* paras 766-793.
[343] *Ibid,* paras 795-804.
[344] *Ibid,* para 811.
[345] *Ibid,* para 819-820.
[346] *Ibid,* paras 756, 1579.
[347] *Ibid,* paras 1579-1585.

billion VAT assessments against Yukos and the auction of the Yukos' major subsidiary at a significantly deflated price,[348] there is no doubt that overzealous conduct of criminal investigations played a role in the finding of liability.

In *Al-Warraq v. Indonesia* the dispute concerned the bailout of Bank Century, a banking institution indirectly owned by the claimant, in November 2008, and the subsequent criminal investigation and prosecution of the claimant.[349] In December 2010, after a trial *in absentia*, the claimant was convicted in Indonesia of theft, corruption and money laundering, and his assets were confiscated.[350] In August 2011, Al-Warraq commenced arbitration proceedings under the Organisation of the Islamic Conference (OIC) Agreement,[351] alleging, *inter alia*, that the respondent breached the claimant's basic rights under Article 14 of the ICCPR[352] by prejudging his guilt, pursuing the criminal investigation for nefarious motives, failing to inform him about the nature and cause of the criminal charges, failing to properly summon him to attend the criminal trial, trying the claimant *in absentia*, barring him from being represented by counsel and not allowing the claimant to appeal the conviction.[353] The claimant argued that throughout the criminal investigation and prosecution he suffered from a number of procedural irregularities and corrupt practices, as well as arbitrary and discriminatory measures that impaired his investment and thus breached the respondent's obligation to accord fair and equitable treatment to the claimant's investment.[354] The claimant also alleged that the respondent's pre-bailout measures amount to expropriation, and that the illegal conduct of the respondent's investigatory and prosecutorial authorities breached the claimant's right to adequate protection and security.[355]

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[348] *Ibid,* para 1579.
[349] *Hesham T M Al Warraq v Republic of Indonesia*, UNCITRAL [*Al Warraq v. Indonesia*], Final Award (15 December 2014), paras 88, 96-98, 108-109, 123-125.
[350] *Ibid*, paras 139-141, 161.
[351] *Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, 5 June 1981, entered into force on 23 September 1986 [*OIC Agreement*], online: <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2399>
[352] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, entered into force on 23 March 1976 [*ICCPR*].
[353] *Al Warraq v. Indonesia*s, Final Award (15 December 2014), paras 10, 177, 184-193, 202, 206-207, 213, 217-218, 224-228, 238-239, 247-250.
[354] *Ibid*, paras 391-392.
[355] *Ibid*, paras 291, 427-430, 622.

In the context of the claimant's expropriation claim, the tribunal concluded that the words "basic rights" in Article 10(1) of the OIC Agreement[356] are properly understood as a reference to "basic property rights" and not as a general reference to civil and political rights such as a right to a fair trial guaranteed by Article 14 of the ICCPR.[357] Furthermore, because the adequate protection and security obligation covers only the investment, not the investor personally, the respondent's measures that affected the claimant's due process rights, without any detrimental effect to the investment, could not result in a breach of this standard of protection.[358] Because the criminal investigation and prosecution of the claimant occurred after the bailout, these actions did not deny adequate protection and security to the investment.[359]

The tribunal, however, examined the alleged breaches of the claimant's rights under the ICCPR as part of his fair and equitable treatment claim[360] and found that the respondent had failed to properly examine the claimant and inform him of the criminal charges, and that the conduct of the claimant's trial *in absentia* contravened Article 14 of the ICCPR and the Indonesian law.[361] Ultimately, although the tribunal held that the claimant's trial and conviction *in absentia* amounted to a denial of justice and a breach of the fair and equitable treatment standard,[362] the claimant's "unclean hands" rendered his claims inadmissible.[363]

Another case decided in 2014, *Belokon v. Kyrgyz Republic*,[364] also involved the banking sector. The dispute concerned conduct of the Kyrgyz National Bank and Kyrgyz prosecutors since April 2010, namely imposition of temporary administration regime in

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[356] OIC Agreement, Article 10(1) ("The host state shall undertake not to adopt or permit the adoption of any measure · - itself or through one of its organs, institutions or local authorities - if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his *basic rights* or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth.") (italics added).

[357] *Al Warraq v. Indonesia*s, Final Award (15 December 2014), paras 521-522.

[358] *Ibid*, para 629.

[359] *Ibid.*

[360] *Ibid*, paras 522, 556-621.

[361] *Ibid*, paras 581, 584, 588, 601-605, 621.

[362] *Ibid*, paras 618, 621 ("Failure to comply with the most basic elements of justice when conducting a criminal proceeding against an investor amounts to a breach of the investment treaty.").

[363] *Ibid*, paras 645-648.

[364] *Valeri Belokon v Kyrgyz Republic*, PCA Case No AA518 [*Belokon v Kyrgyz Republic*], Award (24 October 2014).

Manas Bank, in which the claimant was a sole shareholder, and criminal investigations into money laundering and other criminal offences allegedly committed by the claimant, his bank and its employees.[365] The claimant alleged, in particular, that criminal investigations instituted by the respondent breached the fair and equitable treatment standard and the prohibition of unreasonable interference with the investment as provided for in the Latvia-Kyrgyz Republic BIT.[366]

The tribunal found that the applicable BIT required the FET to be accorded to "investments of investors of either contracting party" and did not encompass the treatment of the former directors or managers of Manas Bank by the host state.[367] The arbitrators thus decided that they lacked authority to "consider the criminal proceedings, however abusive they may be, in its analysis under the FET standard … except insofar as they form a pattern which may be relevant in assessing the context as a whole."[368] Instead, the tribunal inquired whether the respondent's measures were unreasonable or discriminatory and if they impaired the claimant's ability to manage his investment.[369] On the one hand, the tribunal acknowledged that it could not award damages to the former Manas Bank officials, who were not investors within the meaning of the applicable BIT,[370] and that the respondent, a sovereign state, was "of course entitled to charge the Claimant with a violation of any crime they have the evidence to support."[371] On the other hand, the arbitrators affirmed that persistent pursuance of groundless criminal investigations constitutes a breach of the BIT:

> 270. Criminal allegations pursued against the Claimant in the absence of evidentiary support (or even cogent explanations) infringe on his rights to enjoy the benefits of his investment. A particular enjoyment of property is the right to be associated with that investment. Where that association is improperly characterised as criminal, the impairment is evident. The perfunctory but persistent allegations against the Claimant have curtailed his ability to manage his investment.

[365] *Ibid*, paras 4-9, 50-54, 122, 126-134.
[366] *Ibid*, paras 216,
[367] *Ibid*, para 245.
[368] *Ibid.*
[369] *Ibid*, para 246, 261-262, 267-272.
[370] *Ibid*, para 267.
[371] *Ibid*, para 271.

…

> 272. Where such criminal proceedings have consequences of depriving the investor of the management, use, and enjoyment of property, then the BIT requires that the underlying charges not be "unreasonable, discriminatory or arbitrary". The Tribunal recalls that Kyrgyz courts have twice remanded the case against the Claimant back to the Kyrgyz prosecutor. Further, the Respondent has not provided evidence to this tribunal of money laundering committed by Mr. Belokon, nor has it provided the reasoning of the prosecutor's office that justified the criminal proceedings. Whether under Kyrgyz law or under international law, Mr. Belokon has a right to know the case against him. The conclusion in light of the record is inescapable, to the effect that his investment was arbitrarily destroyed and that compensation is accordingly due.[372]

Overall, the tribunal awarded the claimant US$15 million as it decided that the respondent had indirectly expropriated Manas Bank by imposing a number of arbitrary and unjustified administrative measures, failed to accord FET to the claimant's investment and acted in a manifestly arbitrary and unreasonable manner.[373]

This arbitral award was, however, subsequently set aside in France. The Court of Appeal emphasized that prohibition of money laundering is part of French international public policy and, while the court was not called upon to decide on criminal liability of Mr Belokon, it ruled that recognition and enforcement of this arbitral award would violate international public order in a "manifest, effective and concrete" way because of the circumstances in which the claimant acquired its investment in the Kyrgyz bank.[374] Although criminal proceedings remain pending in the Kyrgyz Republic and Mr Belokon has not been convicted of any crime, the French court was persuaded by the state evidence that Mr Belokon acquired Manas Bank by virtue of his close ties with the

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[372] *Ibid*, paras 270, 272.
[373] *Ibid*, para 335.
[374] Nataliya Barysheva and Valentine Chessa, "*Kyrgyz Republic v. Mr. Belokon*, Court of Appeal of Paris, 21 February 2017", A contribution by the ITA Board of Reporters, online: Kluwer Arbitration <http://www.kluwerarbitration.com/document/kli-ka-ons-17-25-005>, last accessed on 28 December 2018.

Kyrgyz authorities, in order to conduct "money laundering operations that could not have flourished in the less favourable Latvian environment".[375]

4. Investment Arbitration as a System of Transnational System of Global Governance in the Area of Foreign Investment and Its Impact on Domestic Enforcement of Criminal Law

Overall, the global investment regime privatizes, denationalizes, and decentralizes cross-border investment, and thus *transnationalizes* the investor-state dispute settlement.[376] The conception of transnational law was articulated by Philip Jessup as early as sixty years ago (1956), in a series of lectures that anticipated the ways in which globalization forces "break the frames" of the historic unity between law and state.[377] Subsequently, Robert Keoghan and Joseph Nye defined transnational relations as "regular interactions across national boundaries when at least one actor is a non-state actor".[378] Claire Cutler suggests that the "transnational is, ontologically and epistemologically, not a level of analysis, distinct from the national or domestic levels," but "extends across and thereby links as well as transcends, different (territorial) levels", and brings together local and global orders through privatized dispute resolution procedures.[379] Similar to Phillipe Jessup, Harold Koh views transnational law as a "'hybrid of private and public, domestic and international law' involving a multiplicity of public and private legal actors and sources of law."[380] What makes transnational law unique, according to Harold Koh, is

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[375] Damien Charlotin, "BIT award against Kyrgyzstan is annulled in Paris, with Court giving weight to money-laundering allegations that had earlier failed to persuade arbitrators" (Investment Arbitration Reporter, 23 February 2017), online: <http://tinyurl.com/grrbxsa>, last accessed on 28 December 2018.

[376] A Claire Cutler, "Human Rights Promotion through Transnational Investment Regimes: An International Political Economy Approach" (2013) 1:1 Politics & Governance 16 at 17, 20.

[377] A Claire Cutler, "Legal Pluralism as the 'Common Sense' of Transnational Capitalism" (2013) 3:4 Oñati Socio-legal Series 719 at 723 (citing Gunther Teubner, "Breaking Frames: Economic Globalization and the Emergence of *Lex Mercatoria*" (2002) 5:2 Eur J Soc Theory 199).

[378] Robert Keohane & Joseph Nye. *Transnational Relations and World Politics* (Cambridge: Cambridge University Press, 1971) at xii–xvi (cited in Cutler, *supra* note 376 at 20).

[379] Cutler, *supra* note 376 at 20 (citing Bastiaan van Apeldoorn, "Theorizing the Transnational: A Historical Materialist Approach (2004) 7:2 J Int'l Relations & Dev 142 at 144).

[380] Cutler, *supra* note 377 at 725 (citing Harold Koh, "Transnational Public Law Litigation" (1991) 100:8 Yale L J 2347 at 2349, note 9; Harold Koh, "Why Transnational Law Matters" (2006) 24 Penn St Int'l L R 745 at 745).

> its melding of two conventional modes of litigation that have traditionally been considered distinct. In traditional domestic litigation, private individuals bring private claims against one another based on national law before competent domestic judicial fora. … In traditional international litigation, nation-states bring public claims against one another based on treaty or customary international law before international tribunals of limited competence.[381]

This chapter analyzed four different approaches to investment arbitration as a form of global governance, and each of these positions looks through a different lens at the way investment disputes are decided. HIL critics are likely to emphasize the North-South inequalities in investment relations, GAL scholars may prioritize the need for greater transparency, accountability and democratic participation in investment arbitration, new constitutionalism scholars warn that investment protection regime imposes quasi-constitutional binding constraints on host states' freedom to regulate, and advocates of humanity's law would argue for greater consideration of human rights norms in interpreting IIAs.[382] The above arbitral jurisprudence on the interaction between protection of foreign investment and states' power to conduct criminal investigations and prosecutions evidences several trends that highlight the role of investment arbitration as a system of global governance.

First, while tribunals have repeatedly noted that they do not play the role of a human rights court,[383] the arbitrators nevertheless have regularly accepted competency to rule on allegations of mistreatment and harassment in the context of criminal investigations and prosecutions where such actions significantly impacted the investors' ability to manage or benefit from their investments.[384] Arbitrators have been ready to apply human rights norms, such as the provisions of the ICCPR,[385] in assessing the treatment of investors or those sufficiently close to them. In other words, the investment tribunals are willing to act as quasi-human rights courts for capital exporters. Paradoxically, this trend may be invoked by both the HIL critics and humanity's law advocates. The former would

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[381] Koh (1991), *supra* note 380 at 2348 (cited in Cutler, *supra* note 377 at 726).
[382] Alvarez, *supra* note 214 at 160.
[383] *Ahmonseto v Egypt*, para 262; *Yukos Cases*, para 765.
[384] *Ahmonseto v Egypt*, paras 255, 262; *Belokon v Kyrgyz Republic*, paras 270, 272; *Rompetrol v Romania*, paras 151, 200; *Tokios Tokeles v Ukraine*, para 133; *Yukos Cases*, para 765.
[385] *Al Warraq v Indonesia*, paras 556, 621.

emphasize the danger that investment arbitration may insulate wealthy individuals from the legitimate law enforcement and thus hinder the fight against crime and corruption in developing countries, whereas the latter would see such cases as a sign that investment arbitration is becoming more receptive to human rights argument and may serve as a mechanism to advance human rights at least with respect to the interaction between foreign investors and the coercive law enforcement apparatus of host states.

Second, the tribunals create a quasi-constitutional framework for the exercise of states' power to prosecute and investigate crimes. While arbitrators have repeatedly acknowledged that every state is entitled to exercise this sovereign power,[386] arbitral tribunals also formulated the limits on the manner in which states enforce their criminal laws. For instance, the tribunal in *Al-Warraq v. Indonesia* set out the following framework for the conduct of criminal trials *in absentia*:

> The Tribunal agrees with the Claimant that, for the extreme measure of trial in absentia to be permissible under international law, the Respondent must provide evidence that the Claimant:
>
> was notified of the trial, i.e. proper service of process;
>
> had unequivocally and explicitly waived his right to be present at trial;
>
> had the legal right to be represented at trial and that he was actually represented;
>
> is able subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge.[387]

Also, in *Tokios Tokeles v. Ukraine* the tribunal pointed that repeated opening and closing of criminal proceedings is irreconcilable with general principles of due process,[388] and in *Rompetrol v. Romania* the arbitrators found that the "legitimacy of a criminal investigation cannot depend on the source from which the responsible investigating

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[386] *Belokon v Kyrgyz Republic*, para 271; *Hamester v Ghana*, para 297; *Rompetrol v Romania*, para 278; *Yukos Cases*, para 811.
[387] *Al Warraq v Indonesia*, para 595.
[388] *Tokios Tokeles v Ukraine*, para 114.

authority receives the information leading it to suspect that criminal offences may have been committed."[389]

Furthermore, in *Rompetrol v. Romania* the tribunal expressly stated that foreign investors have a legitimate expectation that the host state would engage in a balancing exercise, weighting the public goal of investigating crime against the private investor's interests, seeking to "avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects.[390] Similarly, in *Yukos Cases* the arbitrators found that "the investigation of Yukos was carried out by the Russian Federation with excessive harshness."[391]

Taken together, these cases support the new constitutionalism theory that investment arbitration puts quasi-constitutional limits of the exercise of sovereign power.

Third, the tribunals have maintained that applying domestic criminal law norms to a particular set of facts or assessing whether the domestic law enforcement authorities had probable cause to charge an individual is outside the tribunals' jurisdiction.[392] Neither it is for the tribunal to function as a court of final review for the system of criminal justice of a host state.[393] However, the arbitrators found that the host state committed a breach of the applicable IIA where the respondent pursues criminal allegations against the investor "in the absence of evidentiary support (or even cogent explanations)"[394] or fails to provide "any document that would enable it [the tribunal] to determine the merits of this criminal proceeding".[395] Similarly, in *Hamester v. Ghana* the claimant did not satisfy the burden of proof because, considering certain documents submitted to the tribunal, the criminal proceedings did not "not appear, *prima facie*, to have lacked a foundation."[396] The standard of review for the host state's decision to commence a criminal investigation thus appears to be cursory, akin to a patently unreasonableness standard, when the host state is only required to establish that it had some reasonable basis to put coercive state apparatus in motion. These cases might point in the direction of investment arbitration

[389] *Rompetrol v Romania*, para 232.
[390] *Ibid*, para 278.
[391] *Yukos Cases*, para 811.
[392] *Rompetrol v Romania*, paras 174, 233, 237 238.
[393] *Ibid*, paras 174 233, 238.
[394] *Belokon v Kyrgyz Republic*, para 270.
[395] *Benvenuti v Congo* at 148.
[396] *Hamester v Ghana*, para 298.

being a species of GAL, although “administration” here refers to the administration of criminal justice rather than issuance of permits or licenses.

In conclusion, the arbitral jurisprudence confirms that tribunals readily accept the role of a private authority tasked with reviewing the exercise of such an inherently public function as enforcement of criminal law by sovereign states. While such review is limited in scope (the inquiry is limited only to the actions that significantly impair the management or other enjoyment of the investment by the investor) and the burden is rather high (the investor is required to demonstrate that the host state’s law enforcement actions in the conduct of a criminal investigation or prosecution were manifestly without merit, excessively harsh or amounted to a campaign of harassment), the exercise of this power by arbitral tribunals, i.e. panels of private individuals, has potential long-reaching implications for the state sovereignty and democratic accountability.

Chapter 3: The Jurisprudence on Parallel Criminal and Arbitration Proceedings: Case and Trend Analysis

This thesis focuses on both international *commercial* and international *investment* forms of international arbitration. The author, however, is not aware of any decision on provisional measures that was rendered in the course of international *commercial* arbitration and directed a sovereign state to suspend parallel criminal proceedings. Therefore, this chapter deals with arbitral jurisprudence on investor-state disputes only, and potential implications of these decisions in the broader context of international arbitration (whether commercial or investment) are analyzed in Chapter 4.

Because arbitral tribunals in investment disputes from time to time refer to the ICJ jurisprudence, this chapter addresses relevant decisions of the ICJ as a background for the subsequent inquiry into arbitral tribunals' jurisprudence on provisional measures affecting the conduct of criminal proceedings. Nevertheless, settlement of inter-state trade and boundary disputes remain outside the scope of this research project. The thesis also does not explore the jurisprudence of various international human rights courts and tribunals.

This chapter extensively deals with publicly available decisions on provisional measures and will show that both judges of the International Court of Justice (ICJ) in inter-state disputes and arbitrators in cases involving claims of foreign investors against host states have had opportunities to rule on the parties' applications for provisional measures that, if granted, would interfere with the sovereign states' power to enforce their criminal laws. However, before proceeding to case studies and analysis of trends found in reported cases, it is worth setting out a general framework for provisional measures in international arbitration and in the jurisprudence of the ICJ.

The first subchapter thus explores provisional measures in international arbitration, including their purpose, types of provisional measures, prerequisites for granting them, and their binding nature. The second subchapter focuses on the jurisprudence of the ICJ and arbitral tribunals on provisional measures affecting parallel criminal proceedings, mapping the cases in their chronological order in order to demonstrate the demonstrate

the development of jurisprudence on this issue. The third subchapter identifies key trends in the decisions of the ICJ and arbitral tribunals, including the rights that are capable of protection by such interim measures, and requirements of urgency and necessity. Finally, the chapter concludes that arbitral tribunals employ provisional measures to prevent the respondent state from using procedural measures to jeopardize arbitral settlement of economic disputes, and the use of this power rests upon general principles of peaceful settlement of international disputes.

1. Provisional Measures in International Arbitration

1.1. Provisional Measures, Their Role and Typology

There is no uniform concept of provisional measures in international law and arbitration, and the terms "interim", "provisional", "conservatory", "urgent", "precautionary" or "protective measures", as well as "preliminary injunctive measures", "interim measures of protection" and "interim relief" are often used in arbitral jurisprudence and legal scholarship interchangeably.[397] It should be noted that while the reference to the adjectives "interim" or "provisional" refer to the nature of the arbitral tribunal's decision, i.e. that a grant of provisional measures does not pre-judge the merits of the case, the references to the terms "protective" or "conservatory" emphasize the purpose of such measures, that is to protect the parties' rights pending final resolution of the dispute.[398] For the sake of uniformity, the term "provisional measures" is used consistently throughout the text of this thesis.

In general, a provisional measure may be characterized as "a remedy or relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution."[399] As the European Court of Justice (ECJ) stated in *Van Uden v. Deco-Line*, court-ordered provisional measures "are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having

[397] Savage & Gaillard, *supra* note 188, para 1303; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005), paras 1.6, 1.8-1.9.
[398] Savage & Gaillard, *supra* note 188, para 1303; Yesilirmak, *supra* note 397, para 1.8.
[399] Yesilirmak, *supra* note 397, para 1.6.

jurisdiction as to the substance of the case".[400] Advocate General General Tesauro explained the importance of provisional measures with even greater clarity in his often-cited opinion for the ECJ in *Factortame*:

> Sometimes the right's existence is established too late for the right claimed to be fully and usefully exercised, which is the more likely to be the case the more structured and complex, and the more probably rich in safeguards is the procedure culminating in the definitive establishment of the right. The result is that in such a case the utility as well as the effectiveness of judicial protection may be lost and there could be a betrayal of the principle, long established in jurisprudence, according to which the need to have recourse to legal proceedings to enforce a right should not occasion damage to the party in the right.
>
> Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right[.][401]

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[400] *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, Judgment of the Court of 17 November 1998, C-391/95, 1998 ECR 7091, para 37. See Julian DM Lew, Loukas A Mistelis & Stefan Kröll, Comparative International Commercial Arbitration (The Hague: Kluwer Law International, 2003), para 23.2.

[401] *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Opinion of Mr Advocate General Tesauro (17 May 1990), C-213/89, 1990 ECR 2433, para 18. Current version of the *Treaty on the Functioning of the European Union*, 17 December 2007, OJ C 326/47 (2012), entered into force on 1 December 2009 [*TFEU*], Article 27, provides that "The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures." *Rules of Procedure of the Court of Justice of 25 September 2012*, as amended on 18 June 2013 and on 19 July 2016 [*ECJ Rules*], online: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf>, last accessed on 28 December 2018, Article 160(3), specify that an application for adoption of interim measures "shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for." While there are certain similarities in the governing documents of the ECJ, the ICJ and the ICSID with respect to their power to order provisional measures, this chapter addresses only the practice of the ICJ and international arbitral tribunals (both *ad hoc*, established under UNCITRAL Arbitration Rules, and ICSID arbitral tribunals) and does not cover the

Arbitral tribunals enjoy relative flexibility in determining which type of provisional measures to order, in particular because most arbitration rules refer to the tribunal's power to order provisional measures broadly, without limiting them to an exhaustive list of available types of relief.[402] Legal scholars, however, usually assign various types of provisional measures into five categories on the basis of their purpose: (i) measures concerning the preservation of evidence, (ii) injunctions related to the conduct of arbitration proceedings and relationship between the parties to the dispute, (iii) measures aimed to secure the enforcement of the arbitral award, (iv) security for costs, and (v) orders for interim payments.[403] For instance, provisional measures may be ordered to prevent fragile or perishable evidence from fading away in a routine course of events or as a result of intentional conduct of the opposing party.[404] Also, a tribunal may order a party to do or refrain from doing something in order to safeguard its own jurisdiction, protect the other party's legal rights or prevent aggravation of the dispute.[405] Because this thesis focuses on a specific subset of provisional measures – those that interfere with the conduct of criminal proceedings – rather than with provisional measures in general, the jurisprudence reviewed in this chapter deals with the first two categories of provisional measures, i.e. those aimed at preservation of evidence and protection of the parties' legal rights in the proceedings, including non-aggravation of the dispute. The latter three categories, while important for the preservation of the parties' financial interests, will not be dealt with in this chapter. The following subsections will address the requirements for the issuance of provisional measures and the binding nature of such measures.

1.2. Prerequisites for Granting Provisional Measures

In general, commentators conclude that successful application for the issuance of provisional measures requires the requesting party to demonstrate that there is (1) urgency, (2) a threat of substantial or irreparable harm to the party's right or property, (3)

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practice of the ECJ, human rights courts, international trade or other public international law dispute resolution mechanisms.

[402] Yesilirmak, *supra* note 397, para 1.10.

[403] Lew, Mistelis & Kröll, *supra* note 16, paras 23.35-23.56; Yesilirmak, *supra* note 397, paras 1.10-1.15, 5.71-5.86.

[404] Yesilirmak, *supra* note 397, paras 1.11, 5.72.

[405] *Ibid*, paras 1.13, 5.73.

prima facie jurisdiction over the subject matter of the party's request, as well as, in certain circumstances, (4) *prima facie* case on the merits and (5) that the grant of provisional measures would not unduly inconvenience the other party.[406] The remainder of this subsection would analyze the treatment of these prerequisites in the jurisprudence of the ICJ and arbitral awards issued under the ICSID Convention and UNCITRAL Arbitration Rules. ICSID, created by an international treaty, "remains rooted in public international law" and "comes under … public international law logic".[407] As a result, ICSID and other investment arbitration tribunals not only refer to the ICJ jurisprudence, but also "show a particular deference to it",[408] especially on procedural issues and general questions of public international law.[409]

Because this thesis concerns only one particular type of provisional measures, i.e. those that affect the conduct of criminal proceedings by the host state, this subsection focuses primarily on the requirements of urgency, necessity to prevent substantial or irreparable harm, and proportionality, leaving aside the issues of *prima facie* jurisdiction and *prima facie* case on the merits, as these issues concern more general questions as to the existence of an investment and the status of the claimant as a foreign investor.

1.2.1. International Court of Justice

Article 41 of the ICJ Statute provides for the ICJ's power to order provisional measures:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

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[406] Caline Mouawad & Elizabeth Silbert, "A Guide to Interim Measures in Investor-State Arbitration" (2013) 29:3 Arbitration International 381 at 387.
[407] Alain Pellet, "The Case Law of the ICJ in Investment Arbitration" (2013) 28:2 ICSID Review 223 at 227–228.
[408] *Ibid* at 230.
[409] *Ibid* at 239–240.

This power is set out in further detail in Articles 73 to 78 of the ICJ Rules of Court (1978), which, in the relevant part, provide that:

> *Article 73*
>
> 1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.
>
> 2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. …
>
> …
>
> *Article 75*
>
> 1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.
>
> 2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.
>
> 3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.
>
> *Article 76*
>
> 1. At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.
>
> 2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant.

The ICJ has on several occasions stated that, in deciding whether to indicate provisional measures, the Court has to consider whether the rights, for the preservation of which the provisional measures are sought, may be subsequently adjudicated by the ICJ to belong to either party, as well as if there is a threat of irreparable prejudice to such rights and if there is urgency:

> Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent.[410]

Because the aim of provisional measures is to preserve the party's rights, the requesting party has to demonstrate a link between the measures sought and the rights in dispute.[411]

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[410] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, 1993 ICJ Rep 3, para 34 ("Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent"). See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Provisional Measures, Order of 15 March 1996, 1996 ICJ Rep 13, para 35; *LaGrand (Germany v United States of America)* [*LaGrand*], Provisional Measures, Order of 3 March 1999, 1999 ICJ Rep 9, para 22; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [*Arrest Warrant*], Provisional Measures, Order of 8 December 2000, 2000 ICJ Rep 182, para 69; *Avena and Other Mexican Nationals (Mexico v United States of America)* [*Avena*], Provisional Measures, Order of 5 February 2003, 2003 ICJ Rep 77, paras 48-50; *Certain Criminal Proceedings in France (Republic of the Congo v France)* [*Certain Criminal Proceedings*], Provisional Measure, Order of 17 June 2003, 2003 ICJ Rep 102, para 22; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* [*Racial Discrimination*], Provisional Measures, Order of 15 October 2008, 2008 ICJ Rep 353, para 118.

[411] *Racial Discrimination*, Order (15 October 2008), para 118 ("whereas a link must therefore be established between the alleged rights, the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [*Obligation to Prosecute or Extradite*], Provisional Measures, Order of 28 May 2009, 2009 ICJ Rep 139, para 56; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* [*Certain Activities Carried Out by Nicaragua*], Provisional Measures, Order of 8 March 2011, 2011 ICJ Rep 6, para 54 ("Whereas, moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought"); *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [*Seizure and Detention of Certain Documents*], Provisional Measures, Order of 3 March 2014, 2014 ICJ Rep 147, para 23.

Moreover, while the requesting party need not conclusively prove the existence of its rights in dispute (that is a question for the merits), it nonetheless has to satisfy the ICJ that the rights asserted "are at least plausible".[412]

The urgency requirement was interpreted in the early ICJ jurisprudence as requiring a demonstration of "imminent harm in the near future", but has since been somewhat relaxed.[413] At present, the consensus appears to be that the requirement of urgency is satisfied if "action prejudicial to the rights of either party is likely to be taken before such final decision is given"[414] or, in other words, if "there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision".[415]

1.2.2. ICSID Convention

The power of the ICSID arbitral tribunal to order provisional measures is provided for in Article 47 of the ICSID Convention:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

This power is set out in greater detail in Article 39 of the ICSID Arbitration Rules, which, in the relevant part, provide that:

> *Rule 39*
>
> *Provisional Measures*
>
> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the

[412] *Obligation to Prosecute or Extradite*, Order (28 May 2009), para 57; *Certain Activities Carried Out by Nicaragua*, Order (8 March 2011), para 53; *Seizure and Detention of Certain Documents*, Order (3 March 2014), para 22.
[413] Mouawad & Silbert, *supra* note 406 at 387.
[414] *Passage through the Great Belt (Finland v Denmark)*, Provisional Measures, Order of 29 July 1991, 1991 ICJ Rep 12, para 23; *Avena*, Order (5 February 2003), para 50.
[415] *Obligation to Prosecute or Extradite*, Order (28 May 2009), para 62; *Certain Activities Carried Out by Nicaragua*, Order (8 March 2011), para 64; *Seizure and Detention of Certain Documents*, Order (3 March 2014), para 32.

> preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> …
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

The rule quoted above shows that, as it is the case with the ICJ Statute and Rules of Court, the ICSID Convention and Arbitration Rules provide that the aim of provisional measures is to preserve of the party' rights. In turn, the circumstances that require provisional measures "are those in which the measures are *necessary* to preserve ta party's rights and that need is *urgent.*"[416] Thus, the requesting party's application will be successful only when (1) the rights to be protected are in existence and the measures requested are (2) urgent and (3) necessary.[417]

Various ICSID arbitral tribunals have followed the practice of the ICJ with respect to the requirements of threat of irreparable harm and urgency.[418] For instance, in *Quiborax v. Bolivia* the tribunal agreed that "the criterion of urgency is satisfied when 'a question cannot await the outcome of the award on the merits'" and noted that this conclusion is

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[416] *Tokios Tokeles v Ukraine*, Procedural Order No 3 (18 January 2005), para 8.
[417] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5 [*Burlington v Ecuador*], Procedural Order No 1 (29 June 2009), para 51 ("There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist … , and the measures are urgent … and necessary … , this last requirement implying an assessment of the risk of harm to be avoided by the measures"); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 [*Quiborax v Bolivia*], Decision on Provisional Measures (26 February 2010), para 113; *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Cases No ARB/12/14 & 12/40 [*Churchill Mining v Indonesia*], Procedural Order No 9 (8 July 2014), para 69 ("Various ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) meet the requirement of urgency; and (iii) the requirement of necessity, which implies the existence of a risk of irreparable or substantial harm") & Procedural Order No 14 (22 December 2014), para 62.
[418] Mouawad & Silbert, *supra* note 406 at 388, 395–396.

"is in line with the practice of the [ICJ]."[419] Similarly, in *Von Pezold v. Zimbabwe* the tribunal asserted that "[i]t is well established that Article 47 of the Convention is based on Article 41(1) of the ICJ Statute" and "an ICSID tribunal may, in certain circumstances, have recourse to the jurisprudence of the ICJ for guidance".[420] The arbitrators then relied on the ICJ definition of "urgency"[421] and agreed that provisional measures are necessary where "the acts complained of are capable of causing or of threatening irreparable prejudice to the rights invoked."[422]

The text or legislative history of the ICSID Convention does not mention the possibility for provisional measures to be ordered in respect of criminal proceedings. However, the wording of Article 47 sets out the tribunal's power in broad terms as the Tribunal may order "any" provisional measures for the preservation of the parties' rights. The breadth of this provision caused some disagreement among the negotiating states. For instance, during a consultative meeting of legal experts in 1964, the representative of China cautioned that this provision "was too broad, even after taking into consideration that the parties could by agreement limit its scope."[423] In turn, A. Broches, General Counsel of the IBRD, explained that broad authority to order provisional measures is a necessity for effective resolution of international disputes in arbitration:

> The CHAIRMAN stated that at the other meetings questions had also been asked about this provision. In international practice authority to prescribe provisional measures was left to the appreciation of the tribunal, presumably because it was difficult to foresee the types of situations that might arise. If a dispute was properly before the arbitral tribunal, it would seem reasonable to empower

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[419] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 150.

[420] *Von Pezold v Zimbabwe*, Procedural Order No 5 (3 April 2013), para 56. See also *Tokios Tokeles v Ukraine*, Procedural Order No 3 (18 January 2005), para 8.

[421] *Von Pezold v Zimbabwe*, Procedural Order No 5 (3 April 2013), para 57. For the ICJ definition of "urgency" see *supra* note 414.

[422] *Aegean Sea Continental Shelf*, Interim Protection, Order of 11 September 1976, 1976 ICJ Rep 3 at 11 (Separate Opinion of President Jiménez de Aréchaga), cited in *Von Pezold v Zimbabwe*, Procedural Order No 5 (3 April 2013), para 58.

[423] International Centre for Settlement of Investment Disputes (ICSID), *The History of the ICSID Convention* (1970), Vol II at 515 ("If such provisional measures related to matters like execution and attachment of property they would encroach upon the jurisdiction of the local courts and thus create more obstacles to the acceptance of this Convention."), online: <https://icsid.worldbank.org/en/Pages/resources/The-History-of-the-ICSID-Convention.aspx>, last accessed on 28 December 2018.

> it to order the parties not to take action which would make it impossible to comply with a later award.[424]

1.2.3. UNCITRAL Arbitration Rules

Both the 1976 and the 2010 versions of the UNCITRAL Arbitration Rules empower the arbitral tribunal to grant provisional measures. In particular, Article 26(1) of the 1976 UNCITRAL Arbitration Rules provides that:

> At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

The 2010 version of the UNCITRAL Arbitration Rules is more detailed and, in its relevant part, provides that:

> *Interim measures*
>
> *Article 26*
>
> 1. The arbitral tribunal may, at the request of a party, grant interim measures.
>
> 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
>
> (a) Maintain or restore the status quo pending determination of the dispute;
>
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
>
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

[424] *Ibid.*

> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
>
> 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
>
> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
>
> 4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
>
> 5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Unlike the ICJ Rules of Court and the ICSID Arbitration Rules, both the 1976 and the 2010 UNCITRAL Arbitration Rules do not limit the purpose of provisional measures to preservation of the party's rights. As arbitrators noted in *Paushok v. Mongolia*, the tribunal's discretion to grant provisional measures under Article 26(1) of the 1976 UNCITRAL Arbitration Rules ("any interim measures … in respect of the subject-matter of the dispute") is broader than under Article 47 of the ICSID Convention ("provisional measures … to preserve the respective rights of either party").[425] The same is true for Article 26 of the 2010 UNCITRAL Arbitration Rules, which lists a number of aims of the issuance of provisional measures, but specifies that those are enumerated "for example and without limitation". However, despite this broad authority, provisional measures "are

[425] *Sergei Paushok et al v Government of Mongolia*, UNCITRAL [*Paushok v Mongolia*], Order on Interim Measures (2 September 2008), para 36.

extraordinary measures not to be granted lightly" and may be ordered only when the arbitrators deem them "urgent and necessary to avoid "irreparable" harm and not only convenient or appropriate."[426]

In summary, a tribunal will grant provisional measures when five conditions are satisfied, namely (1) *prima facie* jurisdiction over the subject matter of the dispute, (2) *prima facie* establishment of the case on the merits, (3) urgency, (4) necessity (imminent danger of serious prejudice to the party's rights or to the arbitral process itself) and (5) proportionality.[427] The remainder of this chapter will give a brief overview of the ICJ and arbitral cases involving the party's requests for provisional measures affecting the conduct of criminal proceedings and then synthesize the trends as to the rights invoked by the requesting party and the requirements of urgency and necessity. It does not cover the jurisprudence of human rights courts and tribunals on this topic.

1.3. Binding Nature of Provisional Measures

This subchapter analyzes the binding nature of provisional measures ordered by the ICJ and ICSID arbitral tribunals.

1.3.1. International Court of Justice

Article 41 of the ICJ Statute states that the Court has "the power to indicate … any provisional measures which ought to be taken to preserve" the party's rights. This wording, based on Article 41 of the PCIJ Statute,[428] continued to cause the controversy whether such provisional measures were binding.[429] In particular, the ICJ Statute uses a more ambiguous word "indicate" instead of a more certain "order" or "determine"; "the word "ought" is English legal texts "is normally the language of recommendation or exhortation, not of a binding instruction"; and English words "indicate" and "which

[426] *Ibid*, para 39.
[427] *Ibid*, para 45.
[428] *Statute of the Permanent Court of International Justice*, 16 December 1920, 6 LNTS 379, entered into force on 20 August 1921, Article 41 ("The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.")
[429] Shabtai Rosenne, *Provisional measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford; New York: Oxford University Press, 2005) at 34.

ought to be taken" do not directly correspond to the terms used in the French language version of the ICJ Statute ("doivent être prises" and "indication de ces mesures").[430]

The controversy, however, has been resolved by the ICJ judgment in *LaGrand*,[431] which held that provisional measures "indicated" by the ICJ are legally binding and that non-compliance would be an internationally wrongful act that may give rise to a claim for reparation.[432] In that judgment, the ICJ made several important findings. First, the ICJ made it clear that the absence of a power to order (rather than merely suggest or recommend) provisional measures would be contrary to the object and purpose of the ICJ Statute, which established the ICJ as an institution tasked with judicial settlement of disputes between sovereign states by legally binding decisions:

> The object and purpose of the [ICJ] Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[433]

Secondly, the ICJ noted that the principle of non-aggravation of the dispute, already entrenched in the PCIJ and the ICJ jurisprudence, also "points to the binding character of [provisional measures] orders made under Article 41".[434] Third, the Court explained that

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[430] *Ibid* at 35.
[431] *LaGrand*, Judgment, paras 92-116.
[432] Rosenne, *supra* note 429 at 36.
[433] *LaGrand*, Judgment, para 102.
[434] *LaGrand*, Judgment, para 103. See *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, (1939) 79 PCIJ Series AIB 199 ("the principle universally accepted by international tribunals and likewise

inability of the ICJ to ensure the execution of provisional measures orders by itself (since the ICJ does not have its own army or police forces) does not render such orders non-binding:

> The preparatory work of Article 41 shows that the preference given in the French text to "indiquer" over "ordonner" was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders.[435]

As the following subchapter demonstrates, in finding that ICSID provisional measures are binding on the parties, investment arbitration tribunals have relied, among other authorities, on the interpretation of Article 41 of the ICJ Statute in *LaGrand* judgment.

1.3.2. ICSID Tribunals

Article 47 of the ICSID Convention provides that an arbitral tribunal "may … recommend any provisional measures". Early drafts of this provision included stronger wording ("the Tribunal shall have the power to prescribe" and "may … prescribe"),[436] but these proposals were met with considerable opposition.[437] In particular, the delegate from China suggested that a tribunal should have power to *recommend*, rather than *order*, provisional measures, especially when such measures are against "the State party to the proceedings whose government might have to take particular actions for reasons of necessity on national policy."[438] Christoph Schreuer thus concluded that ICSID Convention's drafting "history shows clearly that a conscious decision was made not to grant the Tribunal the power to order binding provisional measures."[439]

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laid down in many conventions … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute").

[435] *LaGrand*, Judgment, para 107.

[436] ICSID, *The History of the ICSID Convention* (1970), Vol I at 206.

[437] Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge; New York: Cambridge University Press, 2001), Art 47, paras 3, 27.

[438] ICSID, *The History of the ICSID Convention* (1970), Vol II at 515, 518, 655, 813.

[439] Schreuer, *supra* note 437, Art 47, para 28.

The jurisprudence of ICSID arbitral tribunals, however, took a different path. The tribunal in *Maffezini v Spain* was the first to decide, in 1999, that a tribunal's "recommendation" of provisional measures is binding on the parties:

> While there is a semantic difference between the word "recommend" as used in Rule 39 and the word "order" as used elsewhere in the Rules to describe the Tribunal's ability to require a party to take a certain action, the difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word "dictación". The Tribunal does not believe that the parties to the [ICSID] Convention meant to create a substantial difference in the effect of these two words. The Tribunal's authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word "recommend" to be of equivalent value as the word "order."[440]

Subsequent decisions clearly affirmed this approach:

> It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures "recommended" by an ICSID tribunal are legally compulsory; they are in effect "ordered" by the tribunal, and the parties are under a legal obligation to comply with them.[441]

> The Tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word "recommend", the Tribunal is, in fact, empowered to order provisional measures. This has been recognized by numerous international tribunals[.][442]

> It is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed[.][443]

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[440] *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7 [*Maffezini v Spain*], Procedural Order No 2 (28 October 1999), para 9.

[441] *Tokios Tokeles v Ukraine*, Procedural Order No 1 (1 July 2003), para 4.

[442] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11 [*Occidental v Ecuador*], Decision on Provisional Measures (17 August 2007), para 58.

[443] *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No ARB/08/6 [*Perenco v Ecuador*], Decision on Provisional Measures (8 May 2009), para 74.

> Although Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules use the word "recommend", it is generally recognized that arbitral tribunals are empowered under these provisions to order provisional measures with binding force and that the parties are obliged to comply with such orders. The Parties to the present arbitration have not contested the binding nature of provisional measures.[444]
>
> 578. It is true that the ordinary meaning of this provision, especially the terms "recommend" and "should be taken" do not convey the notion of a binding order. The same can be said for the context; other provisions of the ICSID Convention use different language when referring to binding obligations. Similarly, the *travaux préparatoires* of the ICSID Convention, to the extent relevant as supplementary means of interpretation, show that an earlier draft using the word "prescribe" was then changed to "recommend."
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> 579. Despite this, ICSID tribunals have consistently found that they have the power to make binding orders for provisional measures. The rationale is that these decisions derive their mandatory force from the function of provisional remedies, which is to secure the applicant's rights while the proceedings are pending.[445]

On several occasions, ICSID tribunals referred to the power of the ICJ to order binding provisional measures, this power being set out in Article 41 of the ICJ Statute and considered by the Court in its *LaGrand* decision:

> To use the words of the ICJ in *LaGrand*, "the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court." While the wording and the context of Article 41 of the ICJ Statute are not strictly identical to those of the ICSID Convention ("indicate" instead of "recommend"), the function of the measures is the same.[446]
>
> If the binding character of the word "indicate" in Article 41 of the ICJ's Statute empowering it to impose binding

[444] *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1 [*Tethyan v Pakistan*], Decision on Claimant Request for Provisional Measures (13 December 2012), para 120.
[445] *Quiborax v Bolivia*, Award (16 September 2015), paras 578-579.
[446] *Quiborax v Bolivia*, Award (16 September 2015), para 579.

> provisional measures on parties was ever in doubt, the ICJ explicitly eliminated any lingering thoughts to the contrary in the *LaGrand* case … The parallels between "recommend" in the ICSID Convention and "indicate" in the ICJ Statute are quite clear, suggesting that one cannot rightly assume that a "request" is comparatively weaker than a "recommendation", or that neither is binding.[447]

In sum, "it is now well settled that ICSID tribunals have the power to order provisional measures, and that such orders are legally binding."[448]

2. Jurisprudence on Provisional Measures Affecting Parallel Criminal Proceedings

This subchapter first gives an overview of the ICJ orders on provisional measures and then proceeds to address arbitral jurisprudence on this issue. The cases are in chronological order, depending on the date a decision on provisional measures was issued by the ICJ or an arbitral tribunal.

2.1. Jurisprudence of the International Court of Justice

2.1.1. LaGrand Case

The first of ICJ cases studied in this chapter is *LaGrand*,[449] where Germany instituted proceedings and filed a request for provisional measures at 7.30 p.m. (The Hague time) on 2 March 1999, just hours before Walter LaGrand was scheduled to be executed in Arizona at 3.00 p.m. (Phoenix time) on 3 March 1999.[450] Karl and Walter LaGrand were born in Germany and, despite moving to the United States at a very young age, they both remained German nationals and never acquired the United States citizenship.[451] On 7 January 1982, the LaGrands were arrested on suspicion of having been involved in a

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[447] *Perenco v Ecuador*, Decision on Provisional Measures (8 May 2009), para 69.
[448] Sam Luttrell, "ICSID Provisional Measures 'In the Round'" (2015) 31(3) Arbitration International 393 at 395.
[449] *LaGrand (Germany v United States of America)* [*LaGrand*], Provisional Measures, Order of 3 March 1999, 1999 ICJ Rep 9.
[450] *Ibid*, para 12.
[451] *LaGrand*, Judgment (27 June 2001), 2001 ICJ Rep 466, para 13.

bank robbery, and in 1984 they were convicted and sentenced to death for first degree murder by the Superior Court of Pima County, Arizona.[452] The United States failed to provide the LaGrands with the information required by Article 36(1)(b) of the Vienna Convention on Consular Relations[453] and did not inform the relevant German consular post of their arrest.[454] Only in June 1992 Germany was made aware of this case by the LaGrands themselves, and an official of the Consulate-General of Germany subsequently several times visited the LaGrands in prison.[455] The LaGrands filed applications for writs of *habeas corpus* in the United States District Court for the District of Arizona seeking to have their convictions set aside, but their claims was rejected on the basis of "procedural default" rule, which provides that before a state criminal defendant can obtain relief in federal court, the claim has to be presented to a state court first.[456] On 15 January 1998, the Supreme Court of Arizona decided that Karl and Walter LaGrand were to be executed on 24 February and 3 March 1999, respectively.[457] Despite all appeals and various German diplomatic interventions, Karl LaGrand was executed as scheduled.[458]

In its application filed on 2 March 1999, Germany argued that the United States violated its international legal obligations as provided in the VCCR and that (i) the criminal liability imposed on the LaGrands was void, (ii) the United States should provide reparation for the execution of Karl LaGrand, (iii) the United States should restore the *status quo ante* in the case of Walter LaGrand, i.e. restore the situation that existed before his detention and conviction, and (iv) the United States should provide Germany a guarantee that such illegal acts would not be repeated.[459]

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[452] *Ibid*, para 14.
[453] *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 262, entered into force on 19 March 1967 [*VCCR*], Article 36(1)(b): "1.With a view to facilitating the exercise of consular functions relating to nationals of the sending State: … (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph".
[454] *LaGrand*, Judgment (27 June 2001), para 15.
[455] *Ibid*, para 22.
[456] *Ibid*, para 23.
[457] *Ibid*, para 25.
[458] *Ibid*, paras 26-29.
[459] *LaGrand*, Order (3 March 1999), para 5.

Germany also requested the ICJ to indicate that "[t]he United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings".[460] Germany argued that provisional measures were urgently needed to protect the life of Walter LaGrand (Germany's citizen) and the ability of the ICJ to order the restoration of the *status quo ante* (the relief requested by Germany).[461] On 3 March 1999, the ICJ found that the execution of Walter LaGrand "would cause irreparable harm to the rights claimed by Germany in this particular case"[462] and indicated the provisional measures requested by Germany, as well as ordered the Government of the United States to transmit this order of the ICJ to the Governor of Arizona.[463]

However, in the course of the proceedings brought by Germany on the same day in the United States Supreme Court to enforce the ICJ order, the United States Solicitor General took the position that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief".[464] The Supreme Court dismissed the motion by Germany, and Walter LaGrand was executed later that day.[465]

In its judgment of 27 June 2001, the ICJ confirmed that its order of 3 March 1999 was "binding in character and created a legal obligation for the United States."[466] The ICJ observed that the order was transferred to the Governor of Arizona without any comment, the United States Solicitor General argued that the order is not binding, the Governor of Arizona decided not to give effect to the order, and the United States Supreme Court rejected an application by Germany for a stay of execution.[467] The ICJ thus concluded that the United States failed to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the ICJ in this case.[468] Overall, *LaGrand* case demonstrated that the ICJ is ready to use provisional measures to protect

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[460] *Ibid*, para 9.
[461] *Ibid*, para 8.
[462] *Ibid*, para 24.
[463] *Ibid*, para 29.
[464] *LaGrand*, Judgment (27 June 2001), para 33.
[465] *Ibid*, paras 33-34.
[466] *Ibid*, para 110.
[467] *Ibid*, paras 112-115.
[468] *Ibid*, paras 115, 128(5).

human life from state interference in a situation where criminal proceedings involved an alleged breach of an international a treaty (in this case – the VCCR).

On the merits of the case, the ICJ found that:

- the United States breached its obligations under the VCCR by not informing the LaGrands of their rights after the arrest and by thus depriving Germany of the possibility to provide them with consular assistance in a timely manner;
- the United States also breached the VCCR by not permitting the review and reconsideration of the LaGrands' convictions and sentences after the aforementioned violations of the VCCR had been established; and
- if German nationals were convicted and sentenced to severe punishments without their rights under the VCCR being respected, the United States had to allow the review and reconsideration of these convictions and sentences by taking into account of the violations of the VCCR.[469]

2.1.2. Arrest Warrant Case

On 11 April 2000, an investigative judge of the Brussels court issued an arrest warrant against Mr. Abdulaye Yerodia Ndombasi, the then-Minister for Foreign Affairs of the Democratic Republic of the Congo (the "Foreign Minister"), charging him with grave breaches of the 1949 Geneva Conventions and crimes against humanity.[470] The warrant, based on the Belgian law that provided for the universal jurisdiction of the Belgian courts with respect to serious violations of international humanitarian law, accused Mr. Yerodia of making speeches inciting racial hatred in August 1998.[471] It was uncontested, however, that the alleged acts were committed outside Belgian territory, Mr. Yerodia was not a Belgian national and was not present at Belgian territory when the arrest warrant was issued, and no Belgian nationals were victims of the violence that was allegedly incited by Mr. Yerodia's speeches.[472]

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[469] *LaGrand*, para 128(3),(4),(7).
[470] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [*Arrest Warrant*], Judgment (14 February 2002), 2002 ICJ Rep 5, para 13.
[471] *Ibid*, para 15.
[472] *Ibid*.

On 17 October 2000, the Congo instituted proceedings against Belgium, asking the ICJ to order Belgium to annual the arrest warrant as it violates the principle of sovereign equality of states, the principle that a state may not exercise its authority on the territory of another state, and the diplomatic immunity of the Minister of Foreign Affairs of the Congo.[473] In its request for the indication of provisional measures, filed on the same day, the Congo stated that the disputed arrest warrant effectively barred the Foreign Minister from "leaving [the Congo] in order to go to any other State which his duties require him to visit and, hence, from carrying out those duties"[474] and the applicant thus sought "an order for the immediate discharge of the disputed arrest warrant".[475]

The Congo argued, in particular, that although certain states considered that the arrest warrant could not be enforced against the Foreign Minister and he had been able to travel to some of those states and to the United Nations Headquarters, the requirement of urgency was satisfied because the Foreign Minister could not "visit any State to which his duties [might] call him and, as a result … [was] unable to carry out those duties in a proper manner".[476] Furthermore, the "consequences of excluding the qualified representative of the … Congo from the international arena for an undetermined period of time [were], by their very nature, … irreparable".[477]

The ICJ, however, took into account that on 20 November 2000 Mr. Yerodia ceased to be the Minister for Foreign Affairs and became the Minister of Education, and on 8 December 2000 issued an order denying the Congo's request for the indication of provisional measures.[478] Because Mr. Yerodia's new position involved less frequent foreign travel, the ICJ found that the Congo had failed to demonstrate the urgency that would warrant the indication of provisional measures and the irreparable prejudice that might be caused to the Congo's rights in the immediate future.[479]

On the merits of the case, the ICJ concluded that, by issuing the arrest warrant against Mr. Yerodia, Belgium failed to respect the immunity from criminal jurisdiction that the

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[473] *Arrest Warrant*, Provisional Measures, Order of 8 December 2000, 2000 ICJ Rep 182, paras 1, 7.
[474] *Ibid*, para 9, 71.
[475] *Ibid*, para 11.
[476] *Ibid*, para 20.
[477] *Ibid.*
[478] *Ibid*, paras 51, 72, 78(2).
[479] *Ibid*, para 72.

Congo's incumbent Foreign Minister enjoyed under international law, and Belgium thus had to cancel the arrest warrant.[480] The ICJ noted that it is firmly established in international law that certain high-ranking public officials of a state, including the Head of State, the Head of Government and the Minister of Foreign Affairs, enjoy immunities from civil and criminal jurisdiction in other states,[481] and found that under international law there is exception to this immunity where a public official is suspected of having committed war crimes or crimes against humanity.[482]

In sum, *Arrest Warrant* was the first time the ICJ had to deal with a request for provisional measures that, if ordered, would interfere with the state's power to issue and enforce arrest warrants. However, due to change of circumstances (the individual concerned ceased to be a Minister of Foreign Affairs) the Court did not have to address this question at length in its order.

2.1.3. Avena Case

On 9 January 2003, Mexico instituted proceedings against the United States and requested the indication of provisional measures in *Avena* case,[483] the facts of which resemble those of *LaGrand*. The applicant alleged that 54 Mexican nationals were arrested, tried, convicted and sentenced to death penalty following proceedings in which the United States authorities failed to comply with their obligations under Article 36(1)(b) of the VCCR.[484] Mexico thus asked the ICJ to declare that the United States had to (i) restore the *status quo ante*, i.e. restore the situation that existed before the detention and conviction of Mexican nationals, (ii) take necessary steps to ensure that its municipal law enables full effect to be given to Article 36 of the VCCR, (iii) take necessary steps to establish a meaningful legal remedy for violations of Article 36 of the VCCR, and (iv) provide Mexico with a guarantee that such illegal acts would not be repeated.[485]

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[480] *Arrest Warrant*, Judgment (14 February 2002), paras 70, 71, 78(2), 78(3).
[481] *Ibid*, paras 51, 54.
[482] *Ibid*, para 58.
[483] *Avena and Other Mexican Nationals (Mexico v United States of America)* [*Avena*], Provisional Measures, Order of 5 February 2003, 2003 ICJ Rep 77.
[484] *Ibid*, para 2.
[485] *Ibid*, para 8.

In its request for the indication of provisional measures, Mexico stated that three Mexican citizens could be executed within the next six months and asked the ICJ to order, in particular, that the United States, pending final resolution of the case, had to take all measures necessary to ensure that no Mexican citizens were executed and no execution dates were set for Mexican citizens.[486] Mexico argued that, should the provisional measures requested not be granted, Mexican citizens would be executed and "Mexico would forever be deprived of the opportunity to vindicate its rights and those of its nationals."[487] Accordingly, provisional measures were alleged to be necessary to "protect Mexico's paramount interest in the life and liberty of its nationals and to ensure the Court's ability to order the relief Mexico seeks"[488] and urgent in light of "the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican citizen."[489] In turn, the United States maintained that, in cases where Mexican citizens were prosecuted and sentenced without being informed of their rights as required by Article 36(1)(b) of the VCCR, the individuals concerned were accorded an opportunity for review and reconsideration of their convictions through executive clemency process,[490] and that no execution dates had been scheduled with respect to the Mexican citizens concerned, thus making the request for provisional measures premature.[491]

On 5 February 2003, the ICJ issued an order where it found that the fact that no execution dates had been set did not by itself preclude the Court from indicating provisional measures requested by Mexico,[492] and because three Mexican citizens risked execution in the coming months or even weeks and their execution would cause irreparable prejudice to Mexico's rights as adjudicated by the ICJ, the Court ordered the United States to take all measures necessary to ensure that three individuals concerned were not executed pending the final judgment in this case.[493] The ICJ thus re-affirmed its readiness, indicated in *LaGrand*, order provisional measures necessary to protect human

[486] *Ibid*, para 18.
[487] *Ibid*, para 12.
[488] *Ibid*, para 13.
[489] *Ibid*, para 18.
[490] *Ibid*, para 44.
[491] *Ibid*, para 53.
[492] *Ibid*, para 54.
[493] *Ibid*, paras 55, 59(I)(a).

life from interference by law enforcement agencies where a breach of an international treaty is alleged.

On the merits of the case, the ICJ concluded that the United States breached its obligations under the VCCR by, in particular, not informing Mexican citizens of their rights under Article 36(1)(b) of the VCCR upon their detention, not notifying the appropriate Mexican consular post of the detention of Mexican citizens, and not permitting the review and reconsideration of the conviction and sentences of three Mexican nationals after violations of Article 36(1)(b) of the VCCR had been established.[494]

2.1.4. Certain Criminal Proceedings in France

If *Avena* bears similarity to *LaGrand*, then *Certain Criminal Proceedings in France*[495] may be called a "sister case" to *Arrest Warrant*, but this time it was the exercise of universal jurisdiction by France, rather than Belgium, that sparked the controversy.

The dispute arose when, following a complaint certain human rights organizations filed on 5 December 2001 with the prosecutor of the High Court of Paris for crimes against humanity and torture allegedly committed by several Congolese nationals, including President of the Congo Denis Sassou Nguesso, Minister of the Interior General Pierre Oba and Inspector-General of the Congolese Armed Forces General Norbert Dabira, the investigating judge of Meaux started a criminal investigation.[496] General Norbert Dabira, who possessed a residence in Meaux area, was subsequently taken into custody and questioned by judicial police officers and by the investigating judge in July 2002.[497] He then returned to the Congo, and on 16 September 2002 the investigating judge issued against him a warrant for immediate appearance.[498] The applicant also argued that, when President Sassou Nguesso was on an official visit to France, the investigating judge issued a warrant instructing judicial police officers to take testimony from him, but no

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[494] *Ibid*, paras 153(4), (5), (8).
[495] *Certain Criminal Proceedings in France (Republic of the Congo v France)* [*Certain Criminal Proceedings in France*], Provisional Measure, Order of 17 June 2003, 2003 ICJ Rep 102.
[496] *Ibid*, para 10.
[497] *Ibid*, paras 13-14.
[498] *Ibid*, para 15.

such warrant was produced by the Congo and France informed the ICJ that the investigating judge sought to obtain evidence from President Sassou Nguesso pursuant to the norm of the French Code of Criminal Procedure that governs the procedure when evidence is sought through the diplomatic channels from a representative of a foreign state.[499] No investigative actions were taken in respect of General Pierre Oba.[500]

On 9 December 2002, the Congo filled an application with the ICJ alleging that France violated the criminal immunity of a foreign Head of State and that, by unilaterally assuming universal jurisdiction in criminal matters and attributing to itself the power to prosecute the Minister of the Interior of the Congo for the crimes he allegedly committed in connection with the exercise of his powers for the maintenance of public order in the Congo, France also violated the principle that a state may not exercise its authority on the territory of another state in breach of the principle of sovereign equality.[501] The Congo thus requested the ICJ to declare that France had to annul the measures of criminal investigation and prosecution taken by the prosecutors and investigating judges of the High Court of Paris and the High Court of Meaux.[502] The applicant also filed a request for the indication of provisional measures, seeking an order for the immediate suspension of the proceedings conducted by the investigating judge of the High Court of Meaux.[503] The Congo maintained that continuation of the criminal proceedings would cause irreparable prejudice to the honor and reputation of the Congolese government, the internal peace in the Congo, international standing of the Congo and to the links of Franco-Congolese friendship.[504]

The ICJ, however, concluded that the circumstances of the case did not require the Court to indicate provisional measures.[505] The judges noted that they had not been informed as to how the international standing of the Congo, its internal situation or Franco-Congolese friendship had deteriorated since the commencement of the criminal

[499] *Ibid*, para 16.
[500] *Ibid*, para 17.
[501] *Ibid*, paras 1, 23.
[502] *Ibid*, paras 2, 23.
[503] *Ibid*, paras 4, 24.
[504] *Ibid*, paras 26-27.
[505] *Ibid*, para 41.

proceedings in France.[506] Furthermore, General Oba had not been subject to any actions of the investigating judge,[507] and France contended that, pursuant to the French Code of Criminal Procedure, evidence from President Sassou Nguesso could not be taken without express consent of the Congo, and the proceedings in France could not breach his immunities and cause any damage to the Congo.[508] The ICJ, therefore, reached a conclusion that there was neither a risk of irreparable prejudice nor urgency in justify the indication of provisional measures as regards President Sassou Nguesso and General Oba.[509] The Court also pointed out that, with respect to General Norbert Dabira, the provisional measure requested by the Congo would enable him to visit France without fear of any legal consequences.[510] The Congo had failed to demonstrate the possibility of any irreparable prejudice to the rights it claimed – "the right to require a State … to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law" and "the right to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State"[511] – resulting from the procedural measures taken by the investigating judge in France.[512]

In sum, similar to the ICJ's decision in *Arrest Warrant*, in the absence of compelling evidence as to the urgency and necessity of provisional measures, the ICJ was reluctant to interfere with the conduct of a criminal investigation. However, unlike *Arrest Warrant*, no judgment on the merits was issued by the ICJ in this case, since the proceedings were discontinued and the case removed from the Court's docket in November 2010 following the Congo's decision to withdraw its application instituting the proceedings.[513]

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[506] *Ibid*, para 29.
[507] *Ibid*, para 37.
[508] *Ibid*, para 31.
[509] *Ibid*, para 35.
[510] *Ibid*, para 38.
[511] *Ibid*, para 28.
[512] *Ibid*, para 38.
[513] *Certain Criminal Proceedings in France*, Order of 16 November 2010, 2010 ICJ Rep 635.

2.1.5. Seizure and Detention of Certain Documents and Data

Of special interest for the purposes of this thesis is the ICJ case *Seizure and Detention of Certain Documents and Data*,[514] since it involved a situation where one party to arbitration proceedings alleged that the other party interfered with the preparation and conduct of its case and requested provisional measures that, if granted, would constrain the activities of law enforcement agencies.

On 23 April 2013, Timor-Leste commenced arbitration proceedings at the Permanent Court of Arbitration (PCA)[515] against Australia under the Timor Sea Treaty[516] entered into between these two countries on 20 May 2002, the same day Timor-Leste gained independence from Indonesia. The dispute took a new turn when, on 3 December 2013, the Australian authorities seized documents and data from the business premises of Timor-Leste's legal counsel in Australia pursuant to a warrant issued under the Australian Security Intelligence Organization Act 1979.[517] In just two weeks, on 17 December 2013, Timor-Leste instituted proceedings against Australia at the ICJ, where it requested the Court to declare that the seizure and continuing detention of documents and data constituted a violation of Timor-Leste's sovereignty and rights under international and domestic law, and to order Australia to immediately return all the seized documents and data, as well as to destroy any copy of such documents and data in Australia's possession.[518] The applicant also submitted a request for the indication of provisional measures, asking the court to order (i) that all documents and data seized be immediately sealed and delivered into the custody of the ICJ, (ii) that Australia provide a list of all documents and data disclosed to any person either in Australia or in any third state, as well as a list of all copies made of the seized data and documents, (iii) that Australia destroy all copies of the documents and data seized, and (iv) that Australia give an

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[514] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [*Seizure and Detention of Certain Documents*], Provisional Measures, Order of 3 March 2014, 2014 ICJ Rep 147.

[515] *Arbitration under the Timor Sea Treaty (Timor-Leste v Australia)*, PCA Case No 2013-16 [*Timor Sea Arbitration*], online: PCA, <https://pcacases.com/web/view/37>, last accessed on 28 December 2018.

[516] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, 20 May 2002, 2258 UNTS 4, entered into force on 2 April 2003.

[517] *Seizure and Detention of Certain Documents*, Order (3 March 2014), para 1.

[518] *Ibid*, paras 1-2.

assurance that it would not intercept communications between Timor-Leste and its legal counsel.[519]

Timor-Leste contended that, as a sovereign state, it was entitled to inviolability and immunity of its property (in this case – the documents and data seized by the Australian authorities) and that, as a general principle of international law, its communications with its legal counsel were privileged and confidential.[520] It alleged that, by obtaining these documents and data, Australia had placed itself in a more advantageous position in the midst of the Timor Sea Arbitration, especially taking into account that oral proceedings were scheduled to begin in September 2014.[521]

Australia, however, disputed the existence of a general principle of immunity or inviolability of state documents and property, and that privilege does not attach when the communication "concerns the commission of a crime or fraud, constitutes a threat to national security or to the higher public interest of a State, or undermines the proper administration of justice."[522] Furthermore, the Attorney-General of Australia provided several undertakings concerning the use of the documents and data seized.[523] Most importantly, on 21 January 2014, the Attorney-General provided the ICJ with a written undertaking that, before the final judgment in these proceedings was issued, he would not make himself aware of the content of the materials seized, the materials would not be used by the Australian government for any purpose other than ensuring national security, and that the materials would not be shared with any part of the Australian Government in relation to the exploitation of resources in the Timor Sea or related negotiations, or in relation to the conduct of these ICJ proceedings or the Timor Sea Arbitration proceedings.[524]

On 3 March 2014, the Court issued an order where it noted that the parties did not dispute that the seized documents and data concerned communications between Timor-Leste and its lawyers and that at least some of those documents and data were related to

[519] *Ibid*, paras 4-5
[520] *Ibid*, para 24.
[521] *Ibid*, paras 33-34.
[522] *Ibid*, para 25.
[523] *Ibid*, para 35.
[524] *Ibid*, paras 38, 43.

the Timor Sea Arbitration and possible future maritime boundary negotiations.[525] The judges pointed out that preservation of equality of the parties is particularly important when they seek to resolve their international disputes by peaceful means,[526] and found that Timor-Leste's right to conduct arbitral proceedings and possible future negotiations without interference could be irreparably harmed if Australia had failed to safeguard the confidentiality of the documents and data seized.[527] However, despite the undertakings provided by the Attorney-General, the ICJ concluded that the risk of irreparable prejudice to Timor-Leste's rights remains since (i) Australia still envisaged the possibility that the seized materials may be used for national security purposes, (ii) there was a risk that information from the seized materials, if disclosed to designated officials, could reach third parties, and (iii) the undertakings were valid only until the ICJ issues a decision on the request for the indication of provisional measures.[528]

The Court thus ordered Australia (i) to ensure that the information contained in the seized materials was not used to the disadvantage of Timor-Leste until the conclusion of the ICJ case, (ii) to keep the seized documents and data under seal, and (iii) not to interfere in communications between Timor-Leste and its legal counsel.[529]

On 25 March 2015, Australia indicated that it was willing to return the seized materials,[530] and on 22 April 2015 the ICJ authorized such return of the documents and data, as well as their copies, and lifted the second provisional measure indicated on 3 March 2014.[531] On 12 May 2015, Australia returned the said materials, and Timor-Leste subsequently discontinued the proceedings at the ICJ.[532]

This case thus demonstrated that the ICJ was prepared to use provisional measures to safeguard peaceful resolution of international disputes where actions of law enforcement authorities of one of the parties pose a threat to the integrity of arbitration proceedings and equality of the parties. As discussed in the subsequent subchapter, arbitral tribunals

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[525] *Ibid*, para 27.
[526] *Ibid*.
[527] *Ibid*, para 42.
[528] *Ibid*, paras 46-48, 50.
[529] *Ibid*, para 55.
[530] *Seizure and Detention of Certain Documents*, Modification of the Order Indicating Provisional Measures of 3 March 2014, Order of 22 April 2015, 2015 ICJ Rep 556, para 7.
[531] *Ibid*, para 21.
[532] *Seizure and Detention of Certain Documents*, Order of 11 June 2015, 2015 ICJ Rep 572.

are similarly sympathetic to claimants requesting provisional measures to safeguard procedural integrity of the proceedings and prevent aggravation of the dispute, even if ordering such interim relief would interfere with the conduct of criminal proceedings.

2.1.6. Immunities and Criminal Proceedings

In *Immunities and Criminal Proceedings*,[533] the most recent ICJ case where the Court was requested to indicate provisional measures that would interfere with the conduct of a criminal investigation, the dispute once again – following the *Arrest Warrant* and *Certain Criminal Proceedings* cases – concerned the exercise of criminal jurisdiction by a Western European country against an African public official.

On the basis of a complaint filed by Transparency International France with the Paris public prosecutor in December 2008, a judicial investigation was opened into the misappropriation of public funds, including the acquisition of certain real estate and movable property in France by the son of the President of Equatorial Guinea and the-then Minister for Agriculture and Forestry Mr. Teodoro Nguema Obiang Mangue.[534] In the course of this investigation, a building located at Avenue Foch in Paris was several times searched, and in July 2012 the investigating judge ordered the attachment of the building.[535] Also, when the police sought to question Mr. Obiang Mangue, who in May 2012 became Second Vice-President of Equatorial Guinea, he asserted immunity and declined to appear before French courts, prompting the French authorities to issue an arrest warrant and, pursuant to Article 18 of the Convention against Transnational Organized Crime,[536] to send a mutual legal assistance request to Equatorial Guinea asking the local judicial authorities to transmit a summons to Mr. Obiang Mangue.[537] He

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[533] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* [*Immunities and Criminal Proceedings*], Request for the Indication of Provisional Measures, Order of 7 December 2016, 2016 ICJ Rep 1148.
[534] *Ibid*, paras 20-21.
[535] *Ibid*, para 22.
[536] *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209, entered into force on 29 September 2003 [*UNTOC*].
[537] *Immunities and Criminal Proceedings*, Order (7 December 2016), paras 23-25.

was indicted in France on 18 March 2014, and in October 2016 his trial was scheduled for January 2017.[538]

Meanwhile, on 13 June 2016, Equatorial Guinea initiated proceedings at the ICJ and asked the Court, in particular, to declare that, by initiating criminal proceedings against Mr. Obiang Mangue and attaching the building located at Avenue Foch in Paris, France acted in violation of the UNTOC and the Vienna Convention on Diplomatic Relations,[539] and to order France to put an end to these criminal proceedings, recognize the status of the building as the premises of Equatorial Guinea's mission in Paris and to provide for its protection as required by international law.[540] On 29 September 2016, the applicant submitted a request for the indication of provisional measures, asking the ICJ to order France to (i) suspend all criminal proceedings against Mr. Obiang Mangue and to refrain from starting new proceedings against him, which may aggravate the dispute submitted to the ICJ; (ii) ensure that the building located at Avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission and is protected from any search or attachment, and (iii) refrain from taking any measure that might aggravate the dispute or prejudice the rights claimed by Equatorial Guinea.[541]

Equatorial Guinea's claim regarding Mr. Obiang Mangue's immunity failed to pass the *prima facie* jurisdiction test. The applicant argued that there was a dispute between the parties (France and Equatorial Guinea) concerning the application of Article 4 of the UNTOC, which requires state parties to carry out their obligations under the UNTOC "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States", and pursuant to Article 35(2) the ICJ had jurisdiction to settle the dispute "concerning the interpretation or application" of the UNTOC.[542] The Court, however, disagreed as it noted that the UNTOC mainly requires the states to criminalize certain offences under their domestic legislation, and found that Article 4 of the UNTOC does not either create new rules concerning immunities of high-ranking public officials or incorporate rules of

[538] *Ibid*, para 26-30.
[539] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95, entered into force on 24 April 1964 [*VCDR*].
[540] *Immunities and Criminal Proceedings*, Order (7 December 2016), paras 1-2.
[541] *Ibid*, paras 8-9.
[542] *Ibid*, paras 32, 41.

customary international law governing such immunities.[543] The true disagreement between the parties, the ICJ concluded, was not related to the manner in which France performed its obligations under the UNTOC, but concerned a separate issue whether Mr. Obiang Mangue, the Vice-President of Equatorial Guinea, enjoyed immunity under customary international law and whether France had violated this immunity by commencing criminal proceedings against him.[544]

The Court, however, ordered France to take all available measures to ensure that the building at Avenue Foch in Paris enjoys treatment required by Article 22 of the VCDR.[545] The judges noted that, because France did not accept that the building formed part of Equatorial Guinea's diplomatic mission, there was a continuous treat of intrusion by the French law enforcement authorities, and the presence of police officers on the premises or the seizure of potentially highly confidential documents would impede the functioning of the diplomatic mission.[546] Accordingly, there existed "a real risk of irreparable prejudice to the right to inviolability of the premises that Equatorial Guinea presents as being used as the premises of its diplomatic mission in France."[547] Such potential prejudice was irreparable since it might be impossible to restore the situation to the *status quo ante* after an infringement of the inviolability of the diplomatic premises, and the criteria of urgency was satisfied because an intrusion into the building "could occur at any moment."[548]

The case remains pending and no decision on the merits has been made yet.

In sum, this section explored six ICJ cases where the Court had to address a request for provisional measures having implication for the conduct of criminal proceedings by a sovereign state. Three cases (*Arrest Warrant*, *Certain Criminal Proceedings in France*, and *Immunities and Criminal Proceedings*) involved attempts to halt criminal proceedings into alleged corruption and crimes perpetrated by high-ranked public officials. Another two cases (*LaGrand* and *Avena*) concerned the situation where foreign

[543] *Ibid*, paras 48-49
[544] *Ibid*, para 49.
[545] *Ibid*, paras 94, 99(I).
[546] *Ibid*, paras 88-89.
[547] *Ibid*, para 90.
[548] *Ibid*.

nationals (citizens of Germany and Mexico, respectively) were convicted and sentenced to death penalty in the United States without being accorded their rights under the VCCR. And *Seizure and Detention of Certain Documents and Data* involved an alleged attempt by one state party to use law enforcement and security agencies to gain a procedural upper hand in parallel arbitration proceedings. As the following section demonstrates, some of the questions raised in the ICJ jurisprudence – safeguarding procedural integrity of international dispute resolution proceedings, ensuring procedural equality of the parties, protecting human life from state interference, and not turning a public international law court into a court of criminal appeal jurisdiction – are also reflected in the jurisprudence of various arbitral tribunals.

2.2. Decisions of Arbitral Tribunals

2.2.1. Tokios Tokelés v. Ukraine

The decision in *Tokios Tokelés v. Ukraine*[549] was the first case where the arbitral tribunal held that it had authority to order provisional measures that would preclude a state from continuing criminal proceedings against the investor's corporate executive.[550] The case concerned Taki Spravy, claimant's wholly-owned Ukrainian subsidiary engaged in advertising, printing and publishing business under the control and management of Oleksandr Danylov and Serhiy Danylov.[551] The claimant alleged that Taki Spravy had been the target of a long-running politically-motivated campaign of oppression by state agencies, incited by persons in high authority, executed mainly by the state tax administration and the prosecutors' office, and disguised as lawful investigations into violations of Ukrainian economic laws.[552] The claimant further asserted that the state

[549] *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18 [*Tokios Tokeles v Ukraine*]. For more information about this case, see Chapter 2 of this thesis.

[550] Henry G Burnett & Jessica Beess und Chrostin, "Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings" (2015) 30 Md J Int'l L 31 at 40. This statement refers to modern (adjudicated after the establishment of the ICSID) publicly known treaty-, statute- and contract-based investment arbitration cases. The author is not aware of any modern international commercial arbitration case where a tribunal ordered a state party to suspend or terminate criminal proceedings.

[551] *Tokios Tokeles v Ukraine*, Award (26 July 2007), para 2.

[552] *Ibid*, para 4.

agencies' actions constituted an intentional and premeditated campaign of destruction of Taki Spravy's business as retaliation for supporting an opposition politician (printing campaign materials).[553] In particular, the tax police initiated criminal proceedings against Oleksandr Danylov on 13 March 2002 and issued an indictment on 3 July 2002. Meanwhile, in May 2002 Oleksandr Danylov left Ukraine for Lithuania, where on 13 May 2003 he was granted refugee status, and returned to Ukraine only on 3 March 2005.[554]

The claimant filed a request for arbitration on 16 August 2002, re-submitted it on 22 November 2002 upon expiration of the six-month cooling-off period provided for in the Lithuania-Ukraine BIT, and submitted its request for provisional measures on 3 June 2003.[555] On 1 July 2003, the arbitral tribunal decided that

> Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokeles or its investment in Ukraine, namely Taki Spravy … which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute[.][556]

On 14 September 2004, the claimant filed another request for provisional measures, this time requesting the arbitral tribunal to "reaffirm" its procedural order No. 1 and to direct the respondent to, *inter alia*, "refrain from, suspend and discontinue" the criminal proceedings against Oleksandr Danylov.[557] In response to the respondent's objection that "Claimant has not cited, nor is Respondent aware of, any case in which an ICSID tribunal has imposed a provisional measure with respect to a criminal proceeding",[558] the tribunal found that the respondent was "incorrect when it argue[d] that a request for provisional measures must be supported by precedent in ICSID jurisprudence."[559] The arbitral tribunal, however, denied the request to enjoin the criminal proceedings against

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[553] *Ibid*, paras 4, 12.
[554] *Tokios Tokeles v Ukraine*, Order No 3 (18 January 2005), para 3; Award (26 July 2007), paras 2, 58, 59.
[555] *Tokios Tokeles v Ukraine*, Award (26 July 2007), paras 16–19.
[556] *Tokios Tokeles v Ukraine*, Order No 1 (1 July 2003), para 7(a).
[557] *Tokios Tokelés v Ukraine*, Order No 3 (18 January 2005), para 2.
[558] *Ibid*, para 10.
[559] *Ibid*, para 11.

Oleksandr Danylov, because the claimant failed to show that such a measure was either necessary or urgent to protect its rights.[560] Nevertheless, as the tribunal did not conceptually reject a possibility of issuing an order enjoining criminal proceedings concerning the investment in the host state, this case seems to have paved the way forward for similar requests in subsequent cases.

2.2.2. City Oriente v. Ecuador

The first publicly known case where the tribunal granted the claimant's request for provisional measures that interfered with a criminal investigation initiated by the host state's authorities came in 2007 with *City Oriente v. Ecuador*.[561] On 10 October 2006, the claimant commenced arbitration against Ecuador and state-owned oil company Petroecuador alleging that, by amending its Hydrocarbon Law in April 2006, Ecuador attempted to unilaterally modify the hydrocarbons production-sharing agreement that had been in place between the parties since March 1995.[562] City Oriente relied on the ICSID arbitration clause included in the 1995 contract and argued that, as a result of the amendments, Petroecuador demanded payments in amount of US$ 28 million that were not provided for in the original contract.[563] The claimant refused to comply with the amended law and, on 9 October 2007, requested the tribunal to order the respondents to refrain from instituting any proceedings for collection of the amounts disputed in the arbitration or for termination of the concession on the grounds of non-payment of the disputed amounts.[564] The Ecuador's State Attorney General then announced that a criminal complaint would be filed with the Prosecutor's Office against the claimant's representatives and managers for non-compliance with the amended law.[565] Indeed, on 17 and 18 October 2007 criminal complaints were filed against the former Minister of Energy and Mines and several of City Oriente's executives on charges of embezzlement

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[560] *Ibid*, paras 12–13.
[561] *City Oriente Limited v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21 [*City Oriente v Ecuador*], Decision on Provisional Measures (19 November 2007).
[562] *Ibid*, paras 1-5.
[563] *Ibid*, paras 8, 15, 39-40.
[564] *Ibid*, para 10.
[565] *Ibid*, para 12.

and refusal to make payments provided for in the amended law.[566] The claimant asked the tribunal to order the respondents to maintain the *status quo ante* pending resolution of this dispute in arbitration.[567] Ecuador, in turn, invoked its sovereignty and stated that

> anywhere in the world, a national or foreign citizen who commits a crime that qualifies as such and for which a sentence is defined will obviously be imposed the relevant sentence by the appropriate court, due process observed and after being afforded an opportunity to defend themselves, without this entailing an impairment of City Oriente's rights, as it seeks to establish, misleading the members of the Tribunal[.][568]

The arbitrators acknowledged that "[i]t is the duty and right of the branches of the Ecuadorian government to enact such laws as they may deep appropriate in furtherance of common good for Ecuador"[569] and noted their "great respect for the Ecuadorian Judiciary",[570] but nevertheless sided with the claimant on the issue of provisional measures. The tribunal pointed out that City Oriente's alleged crimes were perpetrated through non-payment of the amounts due pursuant to the amended law, while the legality of Petroecuador's demands for payments was the main issue in dispute in the arbitration proceedings.[571] The arbitrators thus concluded that Ecuador's sovereign right to punish crimes within its territory may not be used to secure payment of disputed amounts by City Oriente, because to hold otherwise "would entail a violation of the principle that neither party may aggravate or extend the dispute or take justice into their own hands."[572] Consequently, the tribunal ordered the respondents to refrain from (i) instituting or prosecuting any judicial proceedings or actions against the claimant, its officers or employees in connection with the 1995 contract or the amended hydrocarbons law, (ii) demanding that the claimant pay any additional amounts as a result of application of the

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[566] *Ibid*, paras 16-17.
[567] *Ibid*, paras 15, 42, 56.
[568] *Ibid*, para 23.
[569] *Ibid*, para 43.
[570] *Ibid*, para 62.
[571] *Ibid*, paras 62-63, 65-66.
[572] *Ibid*, para 62.

amended hydrocarbons law to the 1995 contract, and (iii) engaging in any conduct that may alter the legal situation agreed upon under the 1995 contract.[573]

Later, the respondents unsuccessfully requested the tribunal to revoke these provisional measures[574] and the arbitration proceedings were eventually discontinued[575] without giving the tribunal an opportunity to further reason on the legality of the criminal proceedings aimed at securing the payment of an obligation the existence of which is the main issue in controversy.

In sum, *City Oriente v Ecuador* is a landmark case as it is the first publicly know decision of an arbitral tribunal that granted investor's request for provisional measures aimed at curtailing the actions of the host state's law enforcement authorities. Furthermore, it started a line of cases where arbitral tribunals affirmed the state's right to investigate and prosecute crime within their jurisdiction, but also cautioned that this right may not be used to aggravate the economic dispute between the parties.

2.2.3. Libananco v. Turkey

Although in *Libananco v. Turkey*[576] the claimant, strictly speaking, did not request the tribunal to order provisional measures (at least, no request for provisional measures was filed before the case reached the annulment stage), this case is nevertheless important to understand the tools that arbitrators have to safeguard integrity of the arbitration, ensure procedural fairness and equality of the parties. On 23 February 2006, Libananco, a Cypriot company, filed a request for arbitration with the ICSID alleging that the seizure of two Turkish utility companies (CEAS and Kepez) and the cancellation of concession agreements on 12 June 2003 constituted violations of the Energy Charter Treaty by Turkey.[577] From the very beginning, the proceedings were accompanied by "a repeated series of heated exchanges between the Parties", which the tribunal characterized as a

[573] *Ibid*, para 1 (dispositive).
[574] *City Oriente v Ecuador*, Decision on Revocation of Provisional Measures and Other Procedural Matters (12 May 2008), para 96.
[575] *City Oriente v Ecuador*, Order Taking Note of the Discontinuance of the Proceeding ((12 September 2008).
[576] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8 [*Libananco v Turkey*].
[577] *Libananco v Turkey*, Award (2 September 2011), paras 1, 9, 95, 102.

"war of words".[578] Eventually, on 1 August 2007 the claimant filed a request for production of documents related to the alleged surveillance of the claimant's legal counsel and potential witnesses by the respondent, and informed the tribunal that one of the claimant's Turkish expert witnesses refused to testify out of fear of the respondent's reprisals and harassment.[579] On 17 September 2007, Turkey responded that no surveillance of the claimant's counsel, or in relation to these arbitration proceedings, had been carried out.[580] The claimant thus withdrew its request for the production of documents, acknowledging that the tribunal could not order the respondent to produce documents the existence of which Turkey denied, but reserved its right to bring the same application again if additional information surfaced concerning the surveillance conducted by the respondent.[581]

On 29 February 2008, the claimant brought such an amended application, this time backed up by Turkish court orders obtained by the respondent in 2007 and 2008, which granted the respondent access to emails and instant messages sent to, from and between the claimant's counsel and the persons associated with the claimant.[582] Because this allegedly gave the respondent access to thousands of the legal counsel's privileged communications with their clients and potential witnesses in Turkey, the claimant requested the tribunal to issue a decision both on jurisdiction and merits of the case on the basis of the evidence as it stood before the tribunal, without admitting any further evidence from either party.[583] The respondent acknowledged the authenticity of the court order presented by the claimant, but contended that the investigation was not directed at the claimant or the claimant's counsel (the investigation, the respondent explained, concerned money laundering and banking fraud), the investigation was conducted by the police and no information or documents related to the arbitration were provided to the respondent's counsel or the Ministry of Energy and National Resources of Turkey, and the claimant thus had not been prejudiced by this unrelated surveillance.[584]

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[578] *Libananco v Turkey*, Decision on Preliminary Issues (23 June 2008), para 72.
[579] *Ibid*, paras 9-10, 72.
[580] *Ibid*, paras 11, 72.
[581] *Ibid*, paras 12-13, 72.
[582] *Ibid*, paras 19, 42-44, 72.
[583] *Ibid*, paras 44, 73.
[584] *Ibid*, paras 45-46, 49, 75.

The arbitrators ultimately decided that it was unwarranted for the tribunal to grant the relief requested by the claimant, i.e. to render a final decision in this case without admitting any further evidence from either party.[585] Instead, on 1 May 2008 the tribunal directed the respondent to ensure that no information or documents coming into possession of its criminal investigation authorities is made available to any person on the respondent's defense team in this arbitration.[586] The tribunal also required the respondent not to intercept the communications between the claimant's legal counsel and its representatives; to permit the claimant's counsel to have access (free from surveillance) to any person in Turkey for the purposes of preparing the claimant's case; to provide a statement from the prosecutor's office that all intercepted communications that in any way related to this arbitration had been destroyed; and to ensure that the respondent's criminal investigation authorities did not provide copies or communicate the contents of the intercepted communications to any persons on the respondent's defense team in this arbitration.[587] Furthermore, any privileged documents or information disclosed to the tribunal would be excluded from the evidence.[588]

More than three years later, on 2 September 2011, the tribunal not only concluded that it had no jurisdiction over the present case because Libananco failed to prove that it owned shares in CEAS and Kepez before 12 June 2003, but also ordered the claimant to reimburse the respondent US$ 15 million in respect of Turkey's legal fees and out of pocket expenses.[589] At the same time, the arbitrators refused to award the respondent its costs and expenses arising from the claimant's complaints related to the surveillance of the claimant's representatives, legal counsel and witnesses.[590]

The case, however, did not end at that point, as on 12 December 2011 the claimant filed an application for annulment of the award and, on 14 March 2012, the claimant also filed a request for provisional measures alleging that the respondent had continued its

[585] *Ibid*, paras 72, 81.
[586] *Ibid*, para 82, citing the tribunal's letter to the parties of 1 May 2008, para 1.2.
[587] *Ibid*, para 82, citing the tribunal's letter to the parties of 1 May 2008, para 1.1.1-1.1.4.
[588] *Ibid*, para 82, citing the tribunal's letter to the parties of 1 May 2008, para 1.1.6-1.1.7.
[589] *Libananco v Turkey*, Award, paras 570.1, 570.3
[590] *Ibid*, para 546(a).

surveillance of the claimant's representatives, counsel, witnesses and experts.[591] The claimant argued that no new findings of fact were required to order the provisional measures requested and asked the *ad hoc* committee to reproduce the tribunal's orders of 1 May 2008.[592] In the absence of any new evidence that the respondent was indeed engaged in activities prejudicial to the claimant's procedural rights, the *ad hoc* committee found that there was insufficient basis to issue order identical to those issued by the tribunal four years ago.[593] Accordingly, on 7 May 2012 the *ad hoc* committee dismissed the claimant's request for provisional measures[594] and on 22 May 2013 the claimant's application for annulment was also dismissed.[595]

The factual circumstances in *Libananco v Turkey* were thus somewhat similar to those in the ICJ's case *Seizure and Detention of Certain Documents and Data*, as both cases involved allegations that actions of state agencies with the other party's ability to communicate with its legal counsel. However, while there was sufficient evidence to warrant granting provisional measures in the ICJ case, the investor in *Libananco v Turkey* was less successful in proving that privileged communications with its legal counsel, as well as with its witnesses, were specifically targeted by state surveillance.

2.2.4. Paushok v. Mongolia

In *Paushok v. Mongolia*,[596] the claimants, two companies incorporated in the Russian Federation and their Russian shareholder, alleged that the respondent breached its obligations under the Mongolia-Russia BIT by, *inter alia*, enacting and enforcing the windfall profit tax law and the minerals law.[597] The claimants issued a notice of arbitration under the 1976 UNCITRAL Rules on 30 November 2007,[598] and on 14 March 2008 submitted a request for interim measures asking, in particular, to direct the

[591] *Libananco v Turkey*, Decision on Applicant's Request for Provisional Measures (7 May 2012), paras 1-2, 8.
[592] *Ibid*, para 7.
[593] *Ibid*, para 17.
[594] *Ibid*, para 19(a).
[595] *Libananco v Turkey*, Decision on Annulment (22 May 2013), para 227(a).
[596] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL [*Paushok v Mongolia*].
[597] *Paushok v Mongolia*, Order on Interim Measures (2 September 2008), paras 1–4; Award on Jurisdiction and Liability (28 April 2011), paras 1–6, 11.
[598] *Paushok v Mongolia*, Order on Interim Measures, para 1; Award on Jurisdiction and Liability, para 10.

respondent to "suspend any criminal action against Claimants or their investments" and "suspend any other conduct that aggravates the dispute" during the pendency of the arbitration proceedings.[599]

The arbitral tribunal issued a temporary restraining order on 23 March 2008, where, pending the decision on interim measures, it "urge[d] the Parties to refrain from any action which could lead to further injury and aggravation of the dispute between the Parties."[600] On 30 May 2008, the claimants amended their request and limited the relief sought to the extension of the temporary restraining order in an order on interim measures,[601] which was issued on 2 September 2008. The tribunal did not direct the respondent to suspend criminal proceedings against the claimants, but ordered that "[t]he Parties shall refrain, until a final award is rendered in this case, from any action which could lead to further injury and aggravation of the dispute between the Parties",[602] which presumably was broad enough to encompass the criminal proceedings initiated by the respondent.[603]

Later, in the course of arbitration proceedings, the claimants asserted that Respondent retaliated against them for pursuing this arbitration by initiation of a criminal investigation against one of the claimants, Mr. Sergei Pauschok, seven days after the notice of arbitration had been filed.[604] The tribunal, however, was not persuaded by this argument and denied the claim:

> 648. As to Claimants' allegation that a criminal investigation against Mr. Paushok would have been instigated by Mongolia as a retaliation against the initiation of this arbitration, no significant evidence in its support was introduced by Claimants. The fact that the investigation started seven days after the filing of the Notice of Arbitration cannot be considered as probative of the allegation.

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[599] *Paushok v Mongolia*, Order on Interim Measures, para 12; Award on Jurisdiction and Liability, para 18.
[600] *Paushok v Mongolia*, Order on Interim Measures, para 16; Award on Jurisdiction and Liability, para 22.
[601] *Paushok v Mongolia*, Order on Interim Measures, para 22; Award on Jurisdiction and Liability, para 29.
[602] *Paushok v Mongolia*, Order on Interim Measures, para 11 (dispositive).
[603] Burnett & Beess und Chrostin, *supra* note 27 at 50.
[604] *Paushok v Mongolia*, Award on Jurisdiction and Liability (28 April 2011), para 638.

649. The claim is therefore denied.[605]

Ultimately, the tribunal denied the claimants' claims concerning the windfall profits tax law, the foreign workers fee, the negotiations of a stability agreement, the actions of Mongolia's tax authorities and judiciary, the delay in approval of a mining project and conversion of exploration licenses into mining licenses, and the claims concerning denial of justice.[606] While the investors' claims proved unsuccessful, the tribunal's order on provisional measures, similarly to that in *City Oriente v Ecuador*, demonstrated that arbitrators may exercise their procedural powers to prevent aggravation of the dispute even if such provisional measures would have implication for the actions of the host state's law enforcement agencies.

2.2.5. Caratube v. Kazakhstan

In *Caratube v. Kazakhstan*,[607] the claimant, Caratube International Oil Company (CIOC), initiated arbitration proceedings against Kazakhstan under the USA-Kazakhstan BIT on 16 June 2008, following the unilateral termination of the contract for exploration and production of hydrocarbons.[608] Despite the termination order issued by the Ministry of Energy and Mineral Resources of Kazakhstan on 30 January 2008, the claimant continued to operate certain wells, allegedly to avoid potentially adverse technical consequences.[609] In turn, Kazakhstan initiated criminal proceedings against the claimant and its directors for unlawful operation of the oil wells.[610]

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[605] *Ibid*, paras 648–649.
[606] *Ibid*, s 9(2)-(4) & (6)-(9).
[607] *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No ARB/08/12 [*Caratube v Kazakhstan*].
[608] *Caratube v. Kazakhstan*, Decision Regarding Claimant's Application for Provisional Measures (31 July 2009), para 4.
[609] *Ibid*, paras 4, 58 (citing Claimant's Amended Request for Provisional Measures of 29 April 2009, paras 3, 22, 54).
[610] *Ibid*, para 58 (citing Claimant's Amended Request for Provisional Measures of 29 April 2009, paras 3, 22-23, 54).

On 14 April 2009, the claimant filed the request for provisional measures.[611] Subsequently, on 16 and 17 April 2009 (on the day the tribunal held its first session and the day after), officers of the Kazakhstan's Committee of National Security (KNB) searched the claimant's offices, seized various documents and materials, and interrogated the claimant's employees.[612] In light of these events, the claimant submitted its amended request on 29 April 2009, asking the arbitral tribunal to order that "for the duration of these arbitration proceedings, the Kazakh authorities do not act upon any existing criminal complaints against CIOC or file any new complaints arising out of CIOC's continued occupation of the field and activities after 1 February 2008."[613]

Overall, the claimant told its side of the story in rather colorful words, alleging that the dispute between the investor and the Kazakh authorities arises out of a political controversy between the President of Kazakhstan and his son-in-law, rather than being about the non-performance of a contractual agreement:

> 9. For five years CIOC had successfully, and without any serious controversy, pursued its investment. … Suddenly in mid 2007, the political landscape changed. A political rivalry that had developed between President Nazarbayev and his powerful son-in-law, Rakhat Aliyev flared into open hostility. In Kazakhstan's campaign to persecute Rakhat Aliyev that followed, it seems it became no longer politically convenient for Kazakhstan to allow CIOC to continue its business since the brother of Devincci Hourani, CIOC's majority owner, is Rakhat Aliyev's brother-in-law. A reasonable person might have thought that CIOC was sufficiently far removed from the dispute between the President and Rakhat Aliyev however, in Kazakhstan, "politics is a family affair". Family, business partners and associates of Rakhat Aliyev have all been victimised in the course of the fall out between the President and Mr Aliyev.
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> 10. As a result, CIOC, its majority owner, senior management and employees have been subjected to a campaign of harassment, intimidation and persecution at the hands of the Kazakh authorities. As at the date of this Memorial the victimisation continues. Armed guards

[611] *Ibid* (citing Claimant's Amended Request for Provisional Measures of 29 April 2009, para 1).
[612] *Ibid*, para 19.
[613] *Ibid*, paras 54, 129 (citing Claimant's Amended Request for Provisional Measures of 29 April 2009, para 53).

remain at the site of CIOC's oilfield and its offices in Aktobe. Kazakh authorities have seized and still retain (amongst other items) large numbers of CIOC's documents and files, as well as corporate seals and computer hard drives from CIOC's head office in Almaty, its branch office in Aktobe and from the oil field itself. Devincci Hourani, his brothers and his senior manager Omar Antar feel unable to return to Kazakhstan. ...

12. … In the normal course, a contractual counterpart does not substantiate its grounds for termination by seizing the other party's majority owner from his bed in the middle of the night and subject him to hours of questioning at its interior Ministry. In the normal course, the focus of such questioning would not be on the owner's family relationship with the President's sworn political enemy. In the normal course, it would also be highly unlikely that parties would mutually agree to extend a contract by a further two years, for one party later to allege that all along the other had been in material breach. But this is not a normal case, and the dispute at its heart is not at all about contractual termination.[614]

41. … the majority owner of CIOC, Mr Devincci Hourani, his family, and CIOC's employees have been subjected to a sustained and protracted campaign of harassment and intimidation by Kazakhstan's organs and agencies including the Kazakhstan national security agents. Devincci Hourani was, on one occasion, dragged from his bed in the middle of the night and taken to an undisclosed location to be subjected to interrogation by armed Government agents. Devincci Hourani and his brothers have also been threatened that they would face criminal charges, in at least one case expressly on the basis that this would happen if they did not assist the Government in its dispute with the President's former son-inlaw, Rakhat Aliyev.

42. All of Devincci Hourani's business assets in Kazakhstan, including a number of companies besides CIOC, have been taken from him. He finally fled Kazakhstan in March 2008, fearing for his safety, and has not returned since. However members of his family remain, as do CIOC employees who since mid-2007 and to this day continue to be subject to harassment and intimidation.

[614] *Ibid*, para 2 (citing Claimant's Memorial on the Merits of 14 May 2009, paras 9–10, 12).

> CIOC staff have been subjected to repeated interrogations that have led to a number of employees resigning without notice and had a significant negative impact on the morale of those who remain. Some individuals appear to have suffered health issues caused by the stress of working in such a tense and intimidating environment.[615]

The arbitral tribunal thus had to engage in careful balancing of the investor's interest in being able to present its case against the host state's interest in enforcing its criminal law. It noted that, one the one hand, criminal investigations "are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory",[616] but, on the other hand, "in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings."[617]

The arbitrators found that, as a rule, "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state."[618] Accordingly, the tribunal rejected the claimant's request, because the claimant failed to demonstrate that the criminal proceedings had precluded it from participating in the arbitration, and, since the claimant was seeking monetary compensation rather than specific performance, any injury to the claimant's substantive rights could be remedied through award of damages.[619]

On the merits of the case, the claimant made several claims of harassment and intimidation of the CIOC, its employees, and members of the Hourani family.[620] In particular, in 2007 several criminal investigations were initiated against Issam Hourani, brother of the CIOC's purported shareholder Devincci Hourani; offices of Hourani family's businesses were raided by the police, documents and materials seized, and CIOC's employees questioned; Devincci Hourani was questioned at the police station and had to leave Kazakhstan in March 2008. The claimant viewed this alleged intimidation and harassment of Hourani family as a part of the Kazakhstan authorities' wider campaign against Rakhat Aliev, who was married to the daughter of the President

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[615] *Ibid*, para 58 (citing Claimant's Amended Request for Provisional Measures of 29 April 2009, paras 41–42).
[616] *Ibid*, para 135.
[617] *Ibid*, para 136.
[618] *Ibid*, para 137.
[619] *Ibid*, paras 139–140.
[620] *Caratube v Kazakhstan*, Award (5 June 2012), paras 170–179.

of Kazakhstan, as the President's son-in-law was the brother-in-law of the CIOC's majority shareholder.[621] Ultimately, the tribunal decided that it did not have jurisdiction over the claims raised in this case due to the claimant's failure to prove that the CIOC was an investment of a US national as required by the USA-Kazakh BIT.[622] The CIOC attempted to challenge the award, but its application for annulment was dismissed on 21 February 2014.[623]

Although in this case the tribunal did not grant the investor's request to order the state from continuing criminal investigation against the company and related persons, the arbitrators did not envisage such an order as impossible. Rather, a "particularly high threshold" was required and not met by the investor.

2.2.6. Quiborax v. Bolivia

Quiborax v. Bolivia[624] is a landmark case on the issue of the tribunal's authority to interfere with the state's authority in criminal law matters, as in this case the investor's request to enjoin criminal proceedings was granted by the tribunal. Here the dispute concerned revocation of mining concessions held by the claimants, a Bolivian company Non Metallic Minerals (NNM) and its two purported Chilean shareholders Quiborax and Allan Fosk.[625] The claimants requested friendly consultations with the government of Bolivia in accordance with the Bolivia-Chile BIT on 22 July 2004.[626] The dispute continued to escalate, and on 8 December 2004 the inter-ministerial task force, established by the Bolivian government to evaluate the merits of the claimants' claims, issued an internal memorandum concluding that the government's position had serious flaws, the case was about to become "an international predicament for Bolivia", and recommended to demonstrate that processing of the mining concessions had

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[621] *Ibid,* para 180.
[622] *Ibid,* paras 457, 468-469.
[623] *Caratube v Kazakhstan*, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014), para 308(1).
[624] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 [*Quiborax v Bolivia*].
[625] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), paras 4–7.
[626] *Ibid,* para 6.

deficiencies.[627] In January 2005 and October 2008, the Bolivian Superintendancy of Companies ordered corporate audits of NMM, which concluded that Chilean nationals were NMM's shareholders and that there were no irregularities that would lead to annulment of the NMM's corporate acts or its incorporation.[628]

The parties continued their settlement negotiations after the claimant filed their request for arbitration with the ICSID on 4 October 2005, and on 20 March 2008 they informed the arbitral tribunal that they had reached an oral settlement agreement.[629] Nevertheless, the Bolivian authorities continued review of the claimants' corporate documentation, and on 8 December 2008 the Superintendancy of Companies filed a criminal complaint against several persons related to the claimants (including co-claimant Allan Fosk, claimants' Bolivian business partner David Moscoso, and claimants' legal counsel) accusing them of forgery of corporate minutes and fraud.[630] Claiming that the respondent had thus repudiated the settlement agreement, the claimants requested the arbitral tribunal to resume arbitration proceedings.[631]

David Moscoso, the claimants' local business partner, was sentenced to two years of imprisonment on 14 August 2009, but received immediate pardon based on his previous clean record.[632] On the same day, he gave an affidavit in the arbitration, confessing to his participation in the crimes of forgery and use of forged documents, and acknowledging that altered minutes of the shareholders meeting of NMM were used, in particular, to grant powers of attorney related to the ICSID arbitration.[633]

Furthermore, criminal charges of malfeasance in office were brought against the judge who did not grant the preventive measure against David Moscoso as asked by the Superintendancy of Companies: instead of arrest, the judge ordered him to report to the court every week, not to leave the country and to present two witnesses as sureties.[634] The judge was accused of not "taking into consideration the importance of this case that concerns the protection of the goods and interests of the State that are subject of an

[627] *Ibid*, para 8.
[628] *Ibid*, paras 23–28.
[629] *Ibid*, paras 6, 10.
[630] *Ibid*, para 27–30.
[631] *Ibid*, para 11.
[632] *Ibid*, para 41.
[633] *Ibid*, para 42.
[634] *Ibid*, paras 38, 43.

international arbitration"; "without valuing the procedural risks that continue to exist, and that affect the arbitration that the State of Bolivia confronts before an international tribunal" and by delaying the proceedings "which negatively affects the interests of the Bolivian state, since this causes harm and delay in the international arbitration".[635]

On 14 September 2009, the claimants filed a request for provisional measures[636] asking the arbitral tribunal to order Bolivia to refrain from engaging in and to discontinue criminal proceedings against persons directly or indirectly involved in the arbitration, alleging that the criminal proceedings were "motivated by and aimed at the present arbitration," had "no self-standing merit" and were "instrumental to Bolivia's defense strategy to avoid arbitration on the merits."[637] Claimants asserted that Bolivia was "prosecuting Claimants and persons related to them or a crime that consists in presenting a claim in an international arbitration."[638]

In its decision on provisional measures, the arbitral tribunal noted that it "has every respect for Bolivia's sovereign right to prosecute crimes committed within its territory," but "the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants *because* they had initiated this arbitration."[639] The tribunal further elaborated on the host state's authority to investigate and prosecute crimes:

> Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect. But such powers must be exercised in good faith and respecting Claimants' rights, including their *prima facie* right to pursue this arbitration.[640]

The arbitrators found that, taken together, the 2004 inter-ministerial task force memorandum, the corporate audit, and the criminal proceedings "appear to be part of a

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[635] *Ibid*, para 43.
[636] *Ibid*, para 1.
[637] *Ibid*, para 46.
[638] *Ibid*, para 47.
[639] *Ibid*, para 121.
[640] *Ibid*, para 123.

defense strategy adopted by Bolivia with respect to the ICSID arbitration"[641] and, therefore, "there is a direct relationship between the criminal proceedings and this ICSID arbitration that may merit the preservation of Claimants' rights in the ICSID proceeding."[642]

Ultimately, the tribunal ordered the respondent to suspend the criminal proceedings until the arbitration is completed, to refrain from initiating any criminal proceedings directly related to the this arbitration, as well as to refrain from engaging in any action which may jeopardize procedural integrity of this arbitration.[643] The message was clear: the arbitral tribunal, entrusted with the task to render a decision in investor-state dispute, has necessary authority to order a state to suspend criminal investigation into the investor and related parties until the final award, resolving the underlying economic dispute, is rendered, if the tribunal deems that such an investigation is harmful to the integrity of arbitration proceedings.

On the merits of the case, the tribunal found that Bolivia had breached the BIT by failing to accord fair and equitable treatment to the claimants' investments, by impairing the free use and enjoyment of the investment by unreasonable or discriminatory measures, and by expropriating the investments, and therefore awarded the claimants US$ 48.6 million in damages.[644]

2.2.7. Von Pezold v. Zimbabwe

In *Von Pezold v. Zimbabwe*,[645] several members of Von Pezold family filed a claim under the Germany-Zimbabwe and Switzerland-Zimbabwe BITs concerning alleged expropriation of land and other properties as a result of the host state's land reform program.[646] The ICSID received Von Pezolds' request for arbitration on 11 June 2010, and a separate request was filed on 3 December 2010 by three companies incorporated in

[641] *Ibid*, para 122.
[642] *Ibid*, para 124.
[643] *Ibid*, paras 1–2 (dispositive).
[644] *Quiborax v Bolivia*, Award (16 September 2015), para 626(a)-(d).
[645] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15 [*Von Pezold v Zimbabwe*].
[646] *Von Pezold v Zimbabwe*, Award (28 July 2015), paras 1–2, 9–10.

Zimbabwe and claiming Swiss nationality through alleged collective control by Von Pezold family.[647]

The claimants applied for provisional measures on 12 June 2012, claiming that on that day a letter from Zimbabwe's Attorney-General was delivered to one of their offices "by a government lawyer and – peculiarly – two policemen", and "[t]he tone of the Letter [was] menacing and threaten[ed] criminal proceedings if the Claimants do not follow the disclosure regime proposed by the Respondent by Thursday, 14 June 2012".[648] The claimants requested the tribunal to order the respondent "not [to] invoke its domestic law for procedural advantage in these proceedings".[649]

The president of the tribunal considered it appropriate to make an interim order preserving the *status quo*, "especially given the potential consequences that might result from the Respondent's proposed actions."[650] Therefore, on 13 June 2012 the respondent was directed to refrain from visiting the claimants' offices on 14 June 2012 and to "take no further steps in relation to matters contained in its letter to the Claimants dated 11 June 2012 without the consent of the Claimants or the prior authorization of the Tribunals."[651] The decision provided no other reasons in support of the tribunal's grant of provisional measures, which may be explained by the urgency of the situation and the short time (one day) between the claimant's request and the issuance of the tribunal's order.[652] It shows that investor-state arbitral tribunals may be inclined to order the state to refrain from threatening criminal proceedings if the arbitrators consider that the host state is attempting to use its powers to obtain a procedural advantage.

On 8 March 2013, the claimants brought an application for even more unusual provisional measures as they alleged that the respondent's Central Intelligence Organization (CIO) planned to kill one of the claimants, Mr. Heinrich von Pezold.[653] The claimants contended that on 6 March 2013 "a reliable source" within the respondent's

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[647] *Ibid*, paras 9, 12 (see *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe*, ICSID Case No ARB/10/25).
[648] *Von Pezold v Zimbabwe*, Directions Concerning Claimants' Application for Provisional Measures of 12 June 2012 (13 June 2012), para 3.
[649] *Ibid*.
[650] *Ibid*, para 7.
[651] *Ibid*, para 8.
[652] Burnett & Beess und Chrostin, *supra* note 27 at 46–47.
[653] *Von Pezold v Zimbabwe*, Procedural Order No 5 (3 April 2013), paras 1-2.

Government informed Mr. von Pezold of the CIO's plan to kill him in order to avoid negative publicity that stems from the claimants' case, and that while "[t]he Claimants are not prone to hysteria", the German embassy in Zimbabwe confirmed that "the source and the threat must be taken very seriously."[654] Accordingly, the claimants requested the tribunal to order the respondent to instruct its law enforcement agencies not to harm the claimants, their families and staff, to instruct the police to accord full protection and security to the claimants, as well as not to take any actions to aggravate the dispute.[655] In support of their application, the claimants cited evidence of past threats and assaults against Mr. von Pezold and his staff, the fact that the German embassy took the threat seriously enough to raise it with the Zimbabwean Government, and press reports critical of the respondent's security and police forces.[656] The respondent maintained that the claimants' allegations were unfounded, there was no plot to kill Mr. von Pezold and that the tribunal did not have jurisdiction to issue an order concerning the security of an individual person rather than of an investment.[657]

The tribunal found that the claimants provided sufficient *prima facie* evidence that the respondent's CIO had been instructed to kill Mr. von Pezold[658] and thus ordered the respondent to "immediately take all necessary measures to protect the life and safety of the Claimants, and in particular Mr. Heinrich von Pezold and his family, from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent".[659] This decision is unprecedented in the sense that it appears to be the first case where, in the context of an investment dispute, an arbitral tribunal issued an order aimed at the preservation of the investor's life from the harm that the host state or its law enforcement and security agencies could potentially cause.

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[654] *Ibid*, para 16.
[655] *Ibid*, para 21.
[656] *Ibid*, paras 27-30, 36-38.
[657] *Ibid*, para 22, 39.
[658] *Ibid*, para 61.
[659] *Ibid*, para 65(a).

2.2.8. Lao Holdings v. Laos

In *Lao Holdings v. Laos*, the claimant, a company incorporated in Aruba (the Netherlands Antilles), alleged that the respondent had effectively expropriated its investments in gambling and related businesses in Laos through confiscatory taxation on casino revenues and other measures, including unfair and oppressive audits.[660] These investments were held through Sanum, a company incorporated in Macau.[661] On 14 August 2012, Sanum brought a PCA arbitration case pursuant to the China-Laos BIT[662] and Lao Holdings commenced ICSID Additional Facility arbitration proceedings under the Netherlands-Laos BIT.[663] At the same time, there were pending court proceedings to collect US$ 20 million in unpaid taxes from the claimants, as well as an investigation into money laundering allegedly committed by the claimants.[664]

In an unpublished decision of 17 September 2013, the tribunal granted Lao Holding's request for provisional measures and prohibited the respondent from "taking any steps that would alter the *status quo* or aggravate the dispute."[665] The respondent appears to have consented to the stay of the money laundering investigation as part of the host state's "conciliatory efforts to allow the arbitration process to proceed in an environment conducive to timely action by the Tribunal."[666] However, in its subsequent written submissions the respondent argued that the claimants' investment was tainted by bribery, embezzlement and money-laundering[667] and requested the tribunal to modify its order of 17 September 2013 to permit Laos to conduct a criminal investigation into alleged illegality by obtaining necessary documents in Laos, interviewing potential witnesses and seeking assistance from the governments and courts of foreign countries, as well as from

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[660] *Lao Holdings NV v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6 [*Lao Holdings v Laos*], Ruling on the Motion to Amend the Provisional Measures Order (30 May 2014), para 2; Decision on the Merits (10 June 2015), paras 1-2, 15-16.

[661] *Lao Holdings v Laos*, Ruling on the Motion to Amend the Provisional Measures Order, para 2; Decision on the Merits, para 15.

[662] *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013), paras 1-3.

[663] *Lao Holdings v Laos*, Decision on the Merits, para 1.

[664] *Lao Holdings v Laos*, Ruling on the Motion to Amend the Provisional Measures Order, para 4(i).

[665] While this procedural decision remains unpublished, it was cited in the tribunal's subsequent decisions. See *Ibid*, paras 1, 4(ii).

[666] *Ibid*, paras 4(i), 48.

[667] *Ibid*, para 2.

international organizations.[668] The respondent provided an assurance that it would not attempt to interview current employees of Sanum or its Savan Vegas casino, would not seize any documents from Sanum or Savan Vegas, or prohibit Lao Holdings from transferring funds outside Laos.[669] The claimants denied any unlawful activity, corruption, money laundering or embezzlement and contended that the respondent was "simply seeking improperly to use its criminal law machinery to collect evidence on the eve of the June arbitration hearing to advance its defence on the merits in the current arbitral proceedings."[670]

The tribunal refused to entertain the respondent's request as the arbitrators concluded that the respondent failed to demonstrate a change of sufficient to justify modification of the order of 17 September 2013 or the urgency and necessity to do so a month before the hearing on the merits.[671] For the criminal proceedings to run in parallel with the parties' preparations for the arbitration, the tribunal reasoned, would lead to the aggravation of the dispute and threated the integrity of the arbitration proceedings,[672] especially in light of the respondent's admission that criminal proceedings may be used to collect evidence to be used in the defense of these arbitration proceedings.[673] This case is unusual as it involved a situation where the state agreed to stay the criminal proceedings pending the resolution of the investment dispute, and the tribunal thus dealt not with the claimant's application to enjoin criminal proceedings, but with the respondent state's request to amend the tribunal's earlier provisional measures order to allow the criminal case to be re-opened shortly before the hearing on the merits.[674]

As the claimant and their beneficial owners "wanted to rid themselves of threatened criminal investigations and to withdraw entirely from Laos and the Government [of Laos] wanted to see them gone",[675] on 15 June 2014 Sanum and Lao Holdings entered into a settlement agreement. The parties agreed that the claimants would relinquish their

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[668] *Ibid*, para 1.
[669] *Ibid*, para 1.
[670] *Ibid*, para 7.
[671] *Ibid*, paras 4(iv), 71, 75.
[672] *Ibid*, para 4(iii).
[673] *Ibid*, paras 27-28.
[674] Burnett & Beess und Chrostin, *supra* note 27 at 48.
[675] *Lao Holdings v Laos*, Interim Ruling on Issues Arising under the Deed of Settlement (19 December 2014), para 11.

monetary claims against Laos and would be given an opportunity to sell their assets for whatever price they could get, and Laos would discontinue all criminal investigations against Sanum, Savan Vegas, their management and employees.[676]

The settlement, however, proved to be short-lived. On 4 July 2014, Lao Holdings alleged that the respondent had committed a material breach of the settlement agreement by "approving and granting" gambling licenses to the third parties and thus depriving the claimant's casino project of its monopoly rights, and requested reinstatement of investment arbitration.[677] The tribunal concluded that the claimant had failed to establish that the respondent "approved and granted" a permit for a rival casino in violation of the settlement agreement.[678] Furthermore, any alleged wrongful conduct was "cured" by the respondent within the prescribed 45-day time period, and the actions of Savan City (the company that allegedly had been permitted to develop a casino in violation of the claimant's monopoly rights) were not attributable to the respondent state that owned 30% of its shares.[679] The tribunal thus dismissed the claimant's request to reopen investment arbitration proceedings.[680]

2.2.9. Churchill Mining v. Indonesia

In *Churchill Mining v. Indonesia*,[681] the dispute concerned the revocation of four mining licenses that the claimants allegedly acquired though their partnership with the Indonesian group of companies Ridlatama.[682] On 22 May and 26 November 2012, Churchill Mining and its wholly-owned subsidiary Planet Mining filed requests for arbitration with the ICSID pursuant to the UK-Indonesia and Australia-Indonesia BITs, and these two cases were subsequently consolidated.[683] Just days after the tribunal issued

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[676] *Lao Holdings v Laos*, Interim Ruling on Issues Arising under the Deed of Settlement (19 December 2014), paras 11-12, 117; Deed of Settlement, paras 1, 10-11, 23.
[677] *Lao Holdings v Laos*, Decision on the Merits (10 June 2015), para 26.
[678] *Ibid*, paras 10, 34-35, 64-65.
[679] *Ibid*, paras 12-13, 66, 81-85, 94, 104.
[680] *Ibid*, paras 14, 112.
[681] *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 & 12/40 [*Churchill Mining v Indonesia*].
[682] *Churchill Mining Plc v Republic of Indonesia*, ICSID Case No ARB/12/14 & 12/40, Decision on Jurisdiction (24 February 2014), paras 15-38; *Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 & 12/40, Decision on Jurisdiction (24 February 2014), paras 15-38.
[683] *Churchill Mining v Indonesia*, Award (6 December 2016), paras 2-3, 5, 7.

its decisions on jurisdiction of 24 February 2014, the Regent of East Kutai announced its intention to initiate criminal proceedings against the claimants and their potential witnesses, and on 21 March 2014 the Regent filed criminal charges against the Ridlatama group for forgery.[684] The claimants considered these actions to be "not a good faith exercise of sovereign powers, but rather a calculated act designed to obstruct or derail these ICSID proceedings"[685] and on 27 March 2014 filed an application for provisional measures asking the tribunal to order Indonesia to refrain from commencing any criminal investigations or prosecutions against the claimants and persons associated with them, as well as against the claimants' witnesses, and to suspend any criminal investigations or prosecutions pending against the claimants' present and former employees, affiliates and business partners.[686]

The tribunal ultimately decided that the rights for the protection of which the claimants sought provisional measures were not affected and rejected the claimants' request.[687] In particular, the arbitrators pointed out that Ridlatama companies were not parties to the arbitration proceedings and no criminal proceedings were pending against the claimants or their witnesses.[688] The tribunal nevertheless saw it necessary to "expressly stress the Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of this arbitration."[689]

However, the claimants submitted another request for provisional measures just a few months later, on 2 September 2014.[690] They argued that the situation concerning the claimants' rights had changed as a result of the police raid on the premises of the claimants' wholly-owned Indonesian subsidiary on 29 August 2014 and the accompanying abusive questioning of the subsidiary's employees and seizure of documents and computer hard drives, as well as the fact that one of the claimants' witnesses was named a suspect in a criminal investigation into alleged forgery.[691] The tribunal, however, once again decided that the claimant failed to establish that the

[684] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 5.
[685] *Ibid*, para 5.
[686] *Ibid*, para 1(a).
[687] *Ibid*, paras 103, 106(1).
[688] *Ibid*, paras 87-88.
[689] *Ibid*, para 104.
[690] *Churchill Mining v Indonesia*, Procedural Order No 14 (22 December 2014), para 1.
[691] *Ibid*, para 67.

respondent's actions amounted to intimidation or harassment and jeopardized the claimants' rights in these arbitration proceedings.[692] Accordingly, on 22 December 2014 the tribunal denied the claimants' application for provisional measures, but nevertheless ordered the respondent to seek leave from the tribunal before filing any evidence obtained in the course of the criminal investigation into alleged forgery.[693]

It is interesting to note that, on the merits of this case, the tribunal reached a conclusion that the mining licenses and related documents were indeed forged, most probably by the claimants' local business partner Ridlatama.[694] Although the respondent's criminal investigations "ha[d] not led to evidence used by the Respondent in the present proceedings proving that the Claimants were directly involved in the fraud",[695] the tribunal decided that seriousness of the fraud and the claimants' lack of due diligence rendered all of the claimants' claims in this arbitration inadmissible.[696]

Churchill Mining v Indonesia thus suggests that arbitral tribunals may be hesitant to order provisional measures that interfere with the conduct of criminal proceedings if less drastic means are available and sufficient to safeguard investors' rights (for instance, the tribunal's inherent power to decide on the admissibility and probative value of the evidence submitted by the parties). Furthermore, the tribunal's finding on the merits – that the alleged investment was tainted by fraud and forgery – may make future arbitral tribunals more reluctant to grant provisional measures that risk undermining the state's ability to uncover crime and corruption in relation to the investment.

2.2.10. EuroGas v. Slovakia

Another example of a case where the claimants unsuccessfully requested the tribunal to order the host state to suspend criminal proceedings is *EuroGas v. Slovakia.*[697] On 27 June 2014, EuroGas and Belmont filed a request for arbitration with the ICSID pursuant

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[692] *Ibid*, paras 72, 87, 89.
[693] *Ibid*, para 94(1),(2).
[694] *Churchill Mining v Indonesia*, Award (6 December 2016), paras 254, 476.
[695] *Ibid*, para 473.
[696] *Ibid*, paras 509, 515, 527-529, 557(3).
[697] *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14 [*EuroGas v Slovakia*], Procedural Order No 3 – Decision on the Parties' Requests for Provisional Measures (23 June 2015).

to the United States-Slovak BIT and Canada-Slovak BIT.[698] The underlying dispute arose out of the claimants' alleged ownership of Rozmin, a Slovak company that had held exclusive mining rights at a talc deposit in Slovakia.[699] The claimants contended that cancellation of Rozmin's mining rights was unlawful and successfully challenged it in Slovak courts, but the respondent allegedly refused to reinstate Rozmin's rights.[700] On 26 May 2014, even before the claimants referred the dispute to arbitration, the Slovak financial police received a criminal complaint alleging that fraud was underway with respect to potential investment arbitration against Slovakia.[701] Accordingly, on 23 June 2014, an order for handing over of computer data was issued against Rozmin and its external accountant, and on 25 June 2014, just two days before the claimants filed their request for arbitration, a search warrant was issued for the accountant's house.[702] On 2 July 2014, a search was carried out and documents and data seized from the accountant's house.[703]

In light of these facts, on 8 July 2014 the claimants submitted their application for provisional measures asking the tribunal to order Slovakia (i) to maintain the *status quo* as of the date of the request for arbitration, (ii) to return all originals of documents and materials seized on 2 July 2014, (iii) to refrain from using any of those documents and materials in the arbitration proceedings, and (iv) to refrain from taking any measure that may aggravate the dispute, alter the *status quo* or threaten the integrity of the arbitration proceedings.[704] The claimants alleged that the Slovak law enforcement authorities' actions "were taken … in reaction to the Claimants' legitimate exercise of their right to initiate ICSID arbitration proceedings against the Slovak Republic"[705] and put the host state in a privileged position, giving the respondent full access to the claimants' files, including to those covered by legal privilege, and intimidated the claimants and their potential witnesses in the arbitration proceedings.[706] On 5 September 2014, the criminal

[698] *Ibid*, paras 1-3, 5.
[699] *Ibid*, para 38.
[700] *Ibid*, para 43-45.
[701] *Ibid*, para 48.
[702] *Ibid*, paras 49-50.
[703] *Ibid*, paras 51-53.
[704] *Ibid*, paras 4, 6, 55, 62.
[705] *Ibid*, para 59.
[706] *Ibid*, para 60.

proceedings were suspended pending the resolution of the arbitration proceedings, and on 1 October 2014 the originals of the seized documents and materials were returned to the claimants, although the respondent acknowledged that copies of the seized documents have been retained.[707] The claimants thus amended their request for provisional measures and, in addition to the measures previously requested, asked the tribunal to order Slovakia to withdraw permanently the criminal proceedings initiated on 23 June 2014 and to provide a written undertaking that the documents and materials returned to the claimants constitute a full set of documents and materials seized and that the respondent kept no copies.[708]

The tribunal, however, accepted the respondent's arguments that, because the originals of the seized documents had been returned, the criminal proceedings suspended and the respondent undertook not to read the copies of the seized documents and not to use them in the arbitration proceedings, as well as due to the lack of evidence that the claimants or their potential witnesses were intimidated or harassed, the withdrawal of the criminal proceedings was neither necessary nor urgent.[709] The tribunal also noted that there was no evidence in the record evidencing an actual threat of aggravation of the dispute[710] or showing that Rozmin's accountant was put under undue pressure, abused or mistreated,[711] as well as no reason to believe that respondent did not return the full set of the documents and materials seized.[712]

In sum, the arbitrators refused granting any of the provisional measures requested by the claimants,[713] but nevertheless decided to "[r]emind the parties of their general duty arising from the principle of good faith not to take any action that may aggravate the dispute or affect the integrity of the arbitration."[714] In other words, in the absence of sufficient evidence that the respondent's actions intimidated the claimants' witnesses or otherwise threatened to aggravate the dispute, the tribunal was hesitant to interfere with criminal proceedings that the respondent had already suspended. It also appears that, had

[707] *Ibid*, paras 56-58.
[708] *Ibid*, paras 64(a),(d).
[709] *Ibid*, paras 65, 81, 84-86.
[710] *Ibid*, para 90.
[711] *Ibid*, para 108.
[712] *Ibid*, para 103.
[713] *Ibid*, paras 86, 91, 99, 104, 109, 125(1).
[714] *Ibid*, para 125(4).

the respondent attempted to use the documents and materials seized from the claimants, the tribunal (similarly to the decision in *Churchill Mining v Indonesia*) would have relied on its power to decide on the admissibility and probative value of the evidence submitted by the parties.

On 18 August 2017, the tribunal concluded that it lacked jurisdiction over the claimants and thus dismissed their requests for relief.[715]

2.2.11. Hydro v. Albania

Another recent case where parallel criminal and arbitration proceedings were at issue is *Hydro v. Albania*.[716] Two Italian companies and their four individual shareholders commenced the arbitration on 10 June 2015 under the Italy-Albania BIT.[717] They argued that the respondent had undermined their investments in Albania in a number of ways, in particular through the launch of tax audit proceedings against the claimants' Albanian subsidiaries as a pretext for not issuing VAT refunds, the launch of money laundering investigations into the individual shareholders and the Albanian subsidiaries, the seizure and sequestration of the Albanian subsidiaries' assets and bank accounts, and the issue of arrest warrants against two individual claimants (Francesco Becchetti and Mauro De Renzis) and their business partner Erjona Troplini.[718] Arrest warrants for the charges of money laundering, falsification of documents and tax evasion were obtained by the Albanian prosecutors on 5 June 2015, and on 21 July 2015 requests for extradition were submitted to the Home Office of the United Kingdom[719] as the individuals concerned resided in the UK.

On 5 December 2015, the claimants filed their request for provisional measures asking the arbitral tribunal to order the respondent to, *inter alia*, suspend the criminal proceedings, withdraw its request for extradition and arrest warrants, as well as to refrain from initiating any other proceedings (criminal or otherwise) that are directly or indirectly related to the present arbitration and may aggravate the dispute, jeopardize the

[715] *EuroGas v Slovakia*, Award (18 August 2017), para 476(a),(b),(e).
[716] *Hydro Srl and others v Republic of Albania*, ICSID Case No ARB/15/28 [*Hydro v Albania*].
[717] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), paras 1.1–1.2.
[718] *Ibid*, para 1.4.
[719] *Ibid*, paras 1.5(a), 2.34.

procedural integrity of the arbitration, or violate the exclusivity of the ICSID arbitration proceedings.[720]

The tribunal noted that "it is necessary to ascertain what test is appropriate in the circumstances of a case, such as this, where the relief sought would interfere with the exercise of a sovereign state's rights and duties to investigate and prosecute crime"[721] and cited the decision in *Caratube v. Kazakhstan* that "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state."[722]

In other words, in this case the tribunal once again acknowledged that while it is the sovereign power of a state to investigate and prosecute crimes within its jurisdiction, such a power is not without limitations:

> It is trite to say that criminal law and procedure are a most obvious and undisputed part of a State's sovereignty. That (trite) fact supports the approach adopted here by the Tribunal, namely that any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary. As will be seen, the Tribunal is satisfied that this is such a case.[723]

Therefore, on 3 March 2016 the tribunal ordered the respondent to suspend criminal and extradition proceedings against the claimants (but did not grant broader measures requested by the claimants).[724] The claimants subsequently complained about the respondent's alleged non-compliance with this order and the respondent, in turn, requested the tribunal to revoke or modify the terms of the order.[725] Meanwhile, on 20 May 2016, the UK court ordered the stay of extradition proceedings to allow the respondent to comply with the order on provisional measures issued by the tribunal.[726]

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[720] *Ibid*, para 1.5.
[721] *Ibid*, para 3.15.
[722] *Caratube v Kazakhstan*, Decision Regarding Claimant's Application for Provisional Measures (31 July 2009), para 137, cited in *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 3.15.
[723] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 3.16.
[724] *Ibid*, para 5.1.
[725] *Hydro v Albania*, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures (1 September 2016), paras 1.5-1.8.
[726] *Government of Albania v Francesco Becchetti and Mauro de Renzis*, Judgment of the Westminster Magistrates' Court (20 May 2016), paras 43, 56.

Mr. Becchetti and Mr. De Renzis could thus remain in the UK and participate in the arbitration proceedings without fear of being extradited and prosecuted in Albania, the respondent state.

In light of these developments, on 1 September 2016 the tribunal issued a decision whereby it revoked provisional measures previously recommended, but nevertheless ordered Albania (i) not to recommence extradition proceedings and (ii) to take all necessary actions to maintain the suspension of extradition proceedings with respect to Mr. Becchetti and Mr. De Renzis until the tribunal issues a final award in this arbitration case.[727] The arbitrators explained that because the main reason for the original order on provisional measures was the potential inability of the claimants to fully participate in the arbitration proceedings if they were incarcerated in Albania, this is no longer a concern as long as extradition proceedings in the United Kingdom remain suspended.[728]

Hydro v Albania thus demonstrated that investment arbitration proceedings tainted by allegations of criminality are necessarily complex and may involve multiple jurisdictions and dispute resolution forums (in this case the respondent state was Albania, the claimants were nationals of Italy, their extradition was sought from the United Kingdom and required a decision of an English court). The tribunal also confirmed that primary focus of the arbitrators, when faced with requests for suspension of criminal investigation or extradition proceedings, is on safeguarding the claimants' rights to participate in the arbitration proceedings and present their case. So far, a decision on the merits has not been made in this case.

2.2.12. Teinver v. Argentina

In *Teinver v. Argentina*, the claimants' request for provisional measures came unusually late in the proceedings, after the oral hearing on the merits and after the parties submitted their post-hearing briefs.[729] The request for arbitration in this case was filed on

[727] *Hydro v Albania*, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures, paras 1.31, 4.16, 5.1.
[728] *Ibid*, paras 1.32, 4.12-4.16.
[729] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1 [*Teinver v Argentina*], Decision on Provisional Measures (8 April 2016), para 163, 191.

11 December 2008 by three members of a Spanish group of companies named the Grupo Marsans and concerned the alleged nationalization by Argentina of two commercial airlines in which the claimants allegedly had invested.[730] Several years later, on 23 February 2015, the Treasury Attorney General, who represented Argentina in this arbitration, submitted a criminal complaint to the respondent's Public Prosecutor of the Nation against the legal representatives, officers and directors of the claimants, their Spanish subsidiary Air Comet and their third-party funder Burford ("TAG Complaint").[731] The TAG complaint alleged that the assignment agreement and the funding agreement concluded in 2010 between the claimants, Air Comet and Burford, coupled with the claimants' voluntary insolvency proceedings, constituted fraud on the Grupo Marsans' creditors, and the Treasury Attorney General had learnt of this alleged fraud in the context of the arbitration proceedings initiated by the claimants.[732]

On 29 July 2015, the claimants submitted their request for provisional measures alleging that the respondent had orchestrated negative media coverage of the claimants' legal case and threatened criminal prosecution against the claimants' and Air Comet's legal representatives, Burford and its directors, as well as against the claimants' legal counsel for their role in these arbitration proceedings.[733] The claimants thus asked the tribunal, in particular, to order the respondent to "refrain from harassing Claimants through baseless domestic litigation and unlawful resort to the media" and "cease and desist from its criminal investigation".[734] Meanwhile, law enforcement authorities in Argentina continued their inquiry into this matter, and on 14 September 2015 the head of the Office of the Prosecutor for Economic Crimes and Money Laundering (PROCELAC) filed another criminal complaint against all the parties named in the TAG Complaint as well as against the claimants' legal counsel and all of the court-appointed receivers in the claimants' and Air Comet's insolvency proceedings ("PROCELAC Complaint").[735] The

[730] *Teinver v Argentina*, Decision on Jurisdiction (21 December 2012), paras 1-2, 9.
[731] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 30.
[732] *Ibid*, paras 30-32.
[733] *Ibid*, paras 2, 41, 74.
[734] *Ibid*, para 44.
[735] *Ibid*, para 53.

filing this complaint was announced at a joint press conference held by the Treasury Attorney General and the head of PROCELAC.[736]

The tribunal found that there was a close relationship between the criminal complaints and the arbitration proceedings, and that pursuit of this arbitration could be seen as a motivation for filing of the complaints.[737] However, in light of the advanced stage of the proceedings, absence of specific indications as to how the claimants or their officers and directors had been harassed or intimidated, and uncertainty as to the scope of the criminal investigation conducted by the Federal Prosecutor (whether the claimants' counsel and/or court-appointed receivers were included in the scope of the investigation), the tribunal rejected the claimants' request for suspension of criminal proceedings against the claimants and Burford.[738] The arbitrators, however, ordered the respondent to refrain from publicizing the criminal investigation and decided to defer their decision on the claimants' application for the suspension of criminal proceedings against the claimants' legal counsel and court-appointed receivers, giving the claimants an opportunity to bring this issue before the tribunal later, if it becomes necessary.[739]

On 21 July 2017, the tribunal awarded the claimants US$ 320.8 million as a breach for the respondent's failure to accord fair and equitable treatment to the claimants' investments, as well as for adopting unjustified measures that interfered with the claimants' rights in respect of their investments and for unlawfully expropriating the claimants' investments.[740]

3. Emerging Trends

The previous subchapter offered a comprehensive chronological overview of the ICJ and arbitral jurisprudence, making it possible to identify key trends and developments. First, this subchapter will consider the rights that may by protected by tribunal-ordered provisional measures affecting the criminal proceedings threatened, initiated or conducted by the host states. The tribunals appear to be most sympathetic to the need for

[736] *Ibid*, para 53.
[737] *Ibid*, para 184.
[738] *Ibid*, paras 191, 200, 206, 230, 239(d).
[739] *Ibid*, paras 239(a),(b).
[740] *Teinver v Argentina*, Award (21 July 2017), para 1147(a)-(d),

protection of the claimants' rights to non-aggravation of the dispute and to the procedural integrity of arbitration proceedings, whereas the right to exclusivity of ICSID arbitration is generally not infringed by parallel criminal proceedings. Secondly, this subchapter summarizes the tribunals' findings as to the circumstances that render such provisional measures urgent and necessary. In general, it appears that a risk of aggravation of the dispute or a threat to procedural integrity of arbitration proceedings satisfies the "urgency" requirement, and the tribunal's decision on provisional measures thus hinges upon the outcome of the balancing test where the arbitrators carefully weigh the investors' and the states' interests.

3.1. Rights to Be Protected by the Tribunal's Order

The majority of investment arbitration cases where the claimants requested provisional measures implicating the sovereign right of the host state to investigate and prosecute crime were conducted under the ICSID Arbitration Rules, which expressly provide that the aim of provisional measures is to protect the party' rights.[741] The question thus arises what are the rights that are susceptible of protection by provisional measures, i.e. whether the spectrum of such rights includes only substantive rights under the ICSID Convention and international investment agreements or also procedural rights common to arbitration proceedings under various arbitration rules.

The review of arbitral practice leads to a conclusion that provisional measures may indeed be ordered to preserve procedural rights of the parties[742] and that "the applicable

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[741] International Centre for Settlement of Investment Disputes, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, in force as from 10 April 2006 [*ICSID Rules*], Article 39, online: <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>, last accessed on 28 December 2018.

[742] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22 Procedural Order No 1 (31 March 2006), para 71 ("The type of rights capable of protection by means of provisional measures are not only substantive rights but also procedural rights"); *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5 Procedural Order No 1 (9 June 2009), para 60 ("In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights"); *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 117 ("In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the

criterion is that the right to be preserved bears a relation with the dispute."[743] In particular, in *Quiborax v. Bolivia* this requirement was satisfied because "both the conduct alleged and the harm allegedly caused relate closely to Claimants' standing as investors in the ICSID proceeding."[744] Similarly, in *City Oriente v. Ecuador* the arbitrators noted that "the alleged crime – embezzlement – was precisely perpetrated through the non-payment of the amounts accrued on account of the application of the new Law."[745] In the recent decision in *Teinver v. Argentina*, the tribunal in a similar fashion took into account the facts that the actions in respect of which the criminal complaints were filed by the Treasury Attorney General's office and the PROCELAC were "matters which Respondent has placed before the Tribunal in these arbitral proceedings" and that "Respondent essentially argue[ed] that the Tribunal and any eventual award in Claimants' favor will be the instrument of the fraud it allege[d] against Claimants."[746] Furthermore, the respondent alleged the invalidity of the powers of attorney held by the claimants' legal counsel, questioned their authority to represent claimants in the arbitration proceedings, and requested the tribunal to admit a criminal complaint in the arbitration.[747] In light of a close relationship between the criminal complaints and the investment arbitration proceedings, the arbitrators concluded that "these arbitral

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general right to the preservation of the *status quo* and to the non-aggravation of the dispute"); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 177 ("In the Tribunal's view, the rights available for protection by provisional measures are not restricted to rights which may form the subject matter of the dispute between the Parties. As a number of tribunals have found, the rights which may be protected include procedural rights, such as the preservation of the integrity of the proceedings and the preservation of the status quo and non-aggravation of the dispute").

[743] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 118. See also *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24 [*Plama v Bulgaria*], Order (6 September 2005), para 40 ("The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date."); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 177 ("As found in the *Quiborax v. Bolivia* and *Plama v. Bulgaria* decisions, the applicable criterion is that the right or rights to be preserved are related to the dispute in the sense that those rights must relate to the applicant's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants the relief sought to be effective and capable of carrying out.").

[744] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 120.

[745] *City Oriente v Ecuador*, Decision on Provisional Measures (19 November 2007), para 63.

[746] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 180.

[747] *Ibid*, paras 183-184.

proceedings could be seen as the motivation, at least in part, for the filing of the Complaints"[748] and that there was "a direct relationship between the Complaints and the criminal investigation commenced by the Federal Prosecutor and this ICSID arbitration such that certain rights of Claimants in this arbitration may warrant protection."[749]

Another objection to the tribunal's grant of provisional measures concerns the identity of the holder of the rights requiring protection. Because in some cases the criminal proceedings may be initiated not against the investors or their investment vehicles, but against the employees, business partners or potential witnesses, the claimants may seek provisional measures that appear to be aimed at the protection of rights of non-parties to arbitration proceedings. The tribunal, however, dismissed this argument as unmerited:

> In the view of the Tribunal, the Claimants are not seeking provisional measures to protect rights of non-parties. Rather, they seek to protect their own rights in the present proceedings. More specifically, the Claimants seek to secure their right to provide evidence through witness testimony. To this end, they seek to avoid that such right be impaired by criminal investigations brought against actual and potential witnesses. The fact that the Claimants seek to protect their right to submit evidence through potential witnesses does not make this right hypothetical.[750]

It should also be noted that the spectrum of rights that may be protected by provisional measures, which affect the conduct of criminal proceedings by the host state, varies depending on the stage of the arbitration proceedings. Whereas at the earlier stages the investor's request for provisional measures may be aimed at preservation of evidence and prevention of possible harassment and intimidation of witnesses, at the later stages the investor is likely to request measures aimed at ensuring enforceability of the final award. Some other rights, such as safeguarding the procedural integrity of arbitration, preservation of the *status quo* and non-aggravation of the dispute, may need protection throughout the entire process of arbitral dispute settlement. This correlation between the purpose of provisional measures requested and the development of arbitration proceedings was well-captured by the tribunal in *Teinver v. Argentina*:

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[748] *Ibid*, para 184.
[749] *Ibid*, para 185.
[750] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 79.

> 163. Claimants' Application is somewhat unusual. Unlike the situations addressed by other ICSID tribunals to which the Parties have referred, the alleged conduct giving rise to the request for provisional measures comes near the end of the proceedings. In this case, the oral hearing has been completed, the Parties have submitted their post-hearing briefs and submissions on costs and what remains is for the Tribunal to formally close the proceedings and issue its award.
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> …
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> 165. Given the timing of Claimants' Application, it does not address the "usual" arguments made in this type of application like the possible effect that the criminal proceedings at issue could have on the obtaining of evidence, the possible intimidation of witnesses or other effects which would impede the procedural progress of the arbitration. Rather, Claimants say the Complaints and the criminal investigation, together with the publicity that Respondent has given to these, have affected or threatened to affect rights related to this arbitration which are entitled to protection, despite the late stage of the proceedings. These rights are said to be: the right to enforce Claimants' rights under the BIT through ICSID arbitration conducted in good faith; the right to the integrity of the proceedings, including the right of exclusivity of the Tribunal's jurisdiction under Article 26 of the ICSID Convention; the right for the Tribunal to determine its own jurisdiction and the merits of the case; the right of immunity of Claimants, their counsel, representatives and funder; and the right to an enforceable award under Article 53 of the ICSID Convention.[751]

This subchapter will now address various categories of the rights that may be protected through provisional measures, namely the right to the exclusivity of the ICSID arbitration proceedings, the right to the preservation of the *status quo* and non-aggravation of the dispute, the right to procedural integrity of arbitration proceedings, the right to confidentiality of documents and communications with the legal counsel, and immunities under international law.

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[751] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), paras 163, 165.

3.1.1. The Right to the Exclusivity of the ICSID Arbitration Proceedings

Tribunals have, on several occasions, confirmed that the exclusivity of ICSID arbitration proceedings is among the rights that may be protected by provisional measures ordered by the tribunal.[752] The basis for this finding is Article 26 of the ICSID Convention, which in the relevant part provides that "[c]onsent of the Parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." In other words, "once the parties have consented to ICSID arbitration, they must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID."[753] The right to the exclusivity of the ICSID arbitration proceedings was set out in *Tokios Tokeles v Ukraine* along the following lines:

> (a) that the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, and in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult; and
>
> (b) that the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions and refrain from commencing any further such proceedings in connection with the dispute before the ICSID tribunal.[754]

However, it is equally entrenched in the arbitral jurisprudence that, as a general rule, the continuation of the criminal proceedings against the claimants, their employees or

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[752] *Tokios Tokeles v Ukraine*, Procedural Order No 3 (18 January 2005), para 7 ("Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative"); *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 127 ("The Tribunal has no doubt that the right to exclusivity of the ICSID proceedings is susceptible of protection by way of provisional measures"); *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 83 ("It is undisputed that the exclusivity of ICSID proceedings is a procedural right which may find protection by way of provisional measures under Article 47 of the ICSID Convention"); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 193 ("As has been recognized previously, the right to exclusivity of ICSID proceedings under Article 26 of the ICSID Convention can be protected by way of provisional measures.").

[753] *Tokios Tokeles v Ukraine*, Procedural Order No 1 (1 July 2003), para 1.

[754] *Tokios Tokeles v Ukraine*, Procedural Order No 1 (1 July 2003), para 2.

potential witnesses does not threaten the exclusivity of the ICSID arbitration proceedings. As several arbitral tribunals have held, "criminal proceedings do not *per se* threaten the exclusivity of ICSID proceedings."[755] This conclusion logically stems from the tribunals' acknowledgement that their role is limited to settling economic disputes between foreign investors and host states and does not extend to other domains, such as investigation and prosecution of corruption and bribery, tax evasion and money laundering, fraud and other categories of white collar crime. In particular, the arbitrators in *Quiborax v. Bolivia* made it clear that being a foreign investor, or a person associated with a foreign investor, is not a shield from prosecution:

> 128. … *the exclusivity of the ICSID proceedings applies only to investment disputes*, i.e. here to the determination of whether Respondent has breached its international obligations under the BIT and whether Claimants are entitled to the relief they seek.
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> 129. Consequently, *the exclusivity of the ICSID proceedings does not extend to criminal proceedings. Criminal proceedings deal with criminal liability and not with investment disputes, and fall by definition outside the scope of the Centre's jurisdiction and the competence of this Tribunal*. *Neither the ICSID Convention nor the BIT* contain any rule enjoining a State from exercising criminal jurisdiction, nor do they *exempt suspected criminals from prosecution by virtue of their being investors*.
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> 130. Thus, the Tribunal finds that the criminal proceedings initiated by Respondent do not threaten the exclusivity of the ICSID proceedings. Even if the criminal proceedings result in evidence that is later used by Respondent in this arbitration, that would not undermine the Tribunal's jurisdiction to resolve Claimants' claims, if such

[755] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 85. See also *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 128 ("Although it finds that the criminal proceedings are related to the ICSID arbitration, that does not *per se* threaten the exclusivity of the arbitration proceedings under Article 26 of the ICSID Convention"); *Lao Holdings v Laos*, Ruling on the Motion to Amend the Provisional Measures Order (30 May 2014), para 30 ("In other words, a criminal proceeding does not *per se* violate the principle of exclusivity of ICSID arbitration, or aggravate the dispute. Something more has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation.").

> jurisdiction is established at the appropriate procedural instance.[756]

This conclusion as to non-applicability of the principle of the exclusivity of ICSID arbitration proceedings to criminal investigations and prosecutions was confirmed by the tribunal in *Lao Holdings v. Laos*:

> This rule however applies only to civil proceedings having the same parties and same subject matter as the arbitral proceeding and does not concern criminal procedures. *The ICSID Convention extends only to investment disputes*. In this case, the criminal provisions at issue are not ad hoc measures aimed at influencing the outcome of the dispute but the ordinary criminal laws of general application prohibiting bribery, corruption, money laundering and embezzlement. *Issues of such criminal liability by definition fall outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT* imposes a prohibition on a State that enjoins it from exercising criminal jurisdiction over such matters. In particular, they *do not exempt suspected criminals from investigation or prosecution by virtue of their being investors*. The Tribunal rejects any suggestion that ordinary domestic criminal law of general application was intended to be or is constrained by the initiation of ICSID proceedings under the BIT. As expressed by the Respondent, plain arbitration clause is not a license for general lawlessness.[757]

Once again, the tribunal in *Churchill Mining v. Indonesia* adopted an almost identical wording in rejecting the investors' allegation that criminal proceedings may threaten the exclusivity of the ICSID arbitration proceedings:

> 85. … *the jurisdiction of the Centre and the competence of the Tribunal extend to investment disputes*, i.e. for present purposes, whether the Respondent breached its international obligations under the UK-Indonesia BIT with respect to Churchill Mining and under the Australia-

[756] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), paras 128–130 (emphasis added).

[757] *Lao Holdings v Laos*, Ruling on the Motion to Amend the Provisional Measures Order (30 May 2014), para 21 (emphasis added).

> Indonesia BIT with respect to Planet Mining, *and not to criminal proceedings, which fall outside the scope of the Centre's jurisdiction and the Tribunal's competence*.
>
> 86. A breach of Article 26 of the ICSID Convention only occurs if a claim or right forming part of the subject matter of these proceedings is the object of parallel proceedings in another forum. *In the present case, the subject matter of the criminal proceedings (to impose sanctions for the alleged criminal act of document forgery) and of the present arbitration (to grant monetary relief for alleged breaches of the investment treaty) are not the same*. It is true that the Tribunal may have to consider documents allegedly forged in the context of its power to determine the admissibility and evidentiary weight of the evidence on record. Yet, this does not imply an identity of subject matter.[758]

This conclusion was further validated by the tribunal in *Hydro v. Albania*:

> The Tribunal is not persuaded that any provisional order should be made in order to protect the right of exclusivity of the arbitral proceedings. *The prosecution of an offence is of a very different nature to the resolution of a civil claim where compensation is sought for the infringement of an alleged right*.[759]

In summary, investors' attempts to obtain an order suspending criminal proceedings in the host state on the basis that such investigation or prosecution infringed the claimants' right to exclusivity of the ICSID arbitration proceedings were unsuccessful. The tribunals drew a clear line between the disputes as to the investors' rights under applicable international investment agreements, on the one hand, and criminal proceedings concerning the application of general criminal laws. In other words, being a foreign investor and having a dispute with the host state does not *per se* shield the person from being implicated in criminal proceedings. As the subsequent sections of this subchapter demonstrate, claimants were more successful in obtaining provisional relief when they invoked procedural rights that are not unique to international investment regulation but relate to arbitral dispute settlement in general, namely the right to the preservation of the *status quo* and non-aggravation of the dispute, the right to procedural integrity of

[758] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), paras 85-86 (emphasis added).
[759] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), paras 3.23 (emphasis added).

arbitration proceedings, and the right to confidentiality of documents and communication with legal counsel. Therefore, it appears that, if requested to order provisional measures interfering with the conduct of criminal proceedings, an arbitral tribunal in an international *commercial* arbitration case involving a state party would follow the same logic and guiding principles that arbitral tribunals in *investor-state* disputes have used in the past.

In light of this established practice, the decision in *Teinver v. Argentina* is somewhat unusual as the tribunal did not outright reject the possibility that parallel criminal proceedings could threaten the exclusivity of ICSID arbitration. First, the arbitrators followed earlier arbitral practice and concluded that, because the "right of exclusivity relates to the resolution of investment disputes only and does not include or extend to criminal proceedings which deal with criminal liability and not with investment disputes", the criminal investigation commenced in the host state did not threaten the exclusivity of the ICSID arbitration proceedings.[760] However, the tribunal then noted that matters alleged in the criminal complaints (the indirect nature of the claimants' claims presented in the arbitration proceedings, the lack of authority of the claimants' legal counsel, and the documents related to arbitration proceedings being part of a fraudulent scheme) constituted "matters which the Tribunal must and will address and determine in its award" and thus there was "some basis for concern that despite the distinction between the rights at issue in an investment dispute and criminal proceedings, the exclusivity of these proceedings is being infringed."[761] Nevertheless, despite highly unusual circumstances of the case, the arbitrators concluded that the criminal proceedings at issue did not "sufficiently threaten the exclusivity of these ICSID proceedings" to warrant the grant of provisional measures.[762] Furthermore, the tribunal noted that, in any event, "both Parties have repeatedly stated and accepted that the judgments of criminal courts in Spain and in Argentina do not and will not bind this Tribunal"[763] and that the claimants framed

[760] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 193.
[761] *Ibid*, para 194.
[762] *Ibid*, para 197.
[763] *Ibid*, para 196.

their argument on the right to exclusivity of the ICSID arbitration proceedings as part of the *procedural integrity of arbitration proceedings* rather than a free-standing right.[764]

3.1.2. The Right to the Preservation of the Status Quo and Non-Aggravation of the Dispute

Same as the right to exclusivity of the ICSID arbitration proceedings, the right to the preservation of the *status quo* and non-aggravation of the dispute is generally recognized to be among the rights that may be protected by tribunal-ordered provisional measures.[765] This right, however, was first established in the context of settlement of public international law disputes among sovereign states[766] and may be invoked by parties in both ICSID- and non-ICSID arbitrations, whether contract-based or treaty-based.[767]

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[764] *Ibid*, para 192.

[765] *Tokios Tokeles v Ukraine*, Procedural Order No 3 (18 January 2005), para 7 ("A provisional measure may also be granted to protect a party from actions of the other party that threaten to aggravate the dispute or prejudice the rendering or implementation of an eventual decision or award"); *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 90 ("It is undisputed that the right to the preservation of the status quo and the non-aggravation of the dispute may find protection by way of provisional measures") & Procedural Order No 14 (22 December 2014), para 71 ("It is well settled that provisional measures may be recommended to protect the rights to the status quo and to the non-aggravation of the dispute, which are self-standing rights vested in any party to ICSID proceedings").

[766] See *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 134 ("The existence of the right to the preservation of the status quo and the non-aggravation of the dispute is well-established at least since the case of the *Electricity Company of Sofia and Bulgaria*"); *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)*, Judgment of 5 December 1939, (1939) 79 PCIJ series A/B 199 ("the principle universally accepted by international tribunals and likewise laid down in many conventions … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute"), cited in *LaGrande*, Judgment (27 June 2001), para 103.

[767] See *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision dated 25 September 2001 ("It relates to the general principle, frequently affirmed in international case-law, whether judicial or arbitration proceedings are in question, according to which 'each party to a case is obliged to abstain from every act or omission likely to aggravate the case or to render the execution of the judgment more difficult'."), cited in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11 [*Occidental v Ecuador*], Decision on Provisional Measures 17 August 2007, para 96 ("It is not contested that provisional measures can be granted in order to avoid aggravation of a dispute, and international tribunals have often done so"); *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 90 ("The Tribunal agrees with previous decisions holding that within the ICSID framework the right to the preservation of the status quo and the non-aggravation of the dispute is a self-standing right vested in any party to ICSID proceedings."); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 198 ("The right to the preservation of the status quo and the non-aggravation of the dispute is well established in arbitral case law. In addition, several tribunals, with which this Tribunal agrees, have found that preservation of the status quo and the non-aggravation of the dispute are self-standing rights.").

It is self-evident that, during pendency of arbitration proceedings, "the threat or the initiation of criminal charges is not conducive to lowering the level of antagonism between the Parties."[768] However, the general rule appears to be that "a criminal proceeding does not *per se* … aggravate the dispute" and "[s]omething more has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation."[769] Therefore, "while an aggravation of the dispute is always possible," a request for the indication of provisional measures would be denied in the absence of an "actual threat" of aggravation.[770]

The investor's request is unlikely to be granted by the tribunal in the situations where:

- there is no evidence showing that the investors or their witnesses have been subject to intimidation or undue pressure;[771]
- there is no specific indication of how the investors, their officers and directors have been harassed or intimidated in the course of the criminal investigation, even if "there is no doubt that the criminal proceedings have exacerbated the already difficult climate in which this dispute has unfolded";[772]
- police raids, searches and seizures were conducted in accordance with the host state's law, there was no indication of abusive behavior on the side of the law enforcement authorities, the employees of the claimants' wholly owned subsidiary were presented with a search warrant prior to the search, received a list of documents seized and were then served with a summons to appear for questioning;[773]

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[768] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), paras 92.
[769] *Lao Holdings v Laos*, Ruling on Motion to Amend the Provisional Measure Order (30 May 2014), para 30; *EuroGas v Slovakia*, Procedural Order No 3, para 89 ("a recommendation for the preservation of status quo should only be granted if the claimant provides sufficient evidence of an actual threat of aggravation of the dispute. Something more has to be at stake in order to allow an arbitral tribunal to conclude that there is a threat of aggravation of the dispute.").
[770] *EuroGas v Slovakia*, Procedural Order No 3 (23 June 2015), para 90.
[771] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), paras 91-95; *EuroGas v Slovakia*, Procedural Order No 3 (23 June 2015), para 90.
[772] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 200.
[773] *Churchill Mining v Indonesia*, Procedural Order No 14 (22 December 2014), para 73.

- the scope of the criminal investigation includes the claimant's funder, but "there is no indication that this has affected, or is likely to affect, Claimants' funding";[774]
- the claimants have no more presence or activities in the host state, there is no ongoing investment in the host state to protect, and the claimant implicated in the criminal investigation has not been formally charged with a crime and does not reside in the host state;[775]
- no criminal investigation has been initiated and no criminal charges have been pressed against the investors or their witnesses, even if criminal charges have been lodged against the investors' corporate business partner and the respondent threatened to initiate criminal proceedings against an unidentified group of persons associated with the claimants' investment;[776] or
- the host state has already suspended the criminal proceedings, returned originals of the documents seized from the investor or its associates, and provided an undertaking not to read the copies of the seized documents and not to use the seized documents in the arbitration proceedings.[777]

Tribunals' reluctance to grant provisional measures affecting the host states' sovereign right to prosecute and punish criminal acts appears to be based on the principle that merely being a foreign investor is not a shield from criminal investigation and liability. As the arbitrators noted in *Quiborax v. Bolivia*:

> the Tribunal cannot concur with Claimants' argument that the criminal proceedings have changed the *status quo* of the dispute because they have turned them into defendants in Bolivia. <u>If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct</u> in Bolivia.[778]

On the other hand, provisional measures affecting domestic criminal proceedings have been ordered in several cases where they were viewed a threat to the claimants' right to

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[774] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 201.
[775] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 138.
[776] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), paras 91-95.
[777] *EuroGas v Slovakia*, Procedural Order No 3 (23 June 2015), para 90.
[778] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 138 (emphasis added).

non-aggravation of the dispute and preservation of the *status quo*. This was the case, for instance, in *Pauschok v. Mongolia*, where the tribunal ordered that "[t]he Parties shall refrain, until a final award is rendered in this case, from any action which could lead to further injury and aggravation of the dispute between the Parties".[779] Similarly, in *Von Pezold v. Zimbabwe* the presiding arbitrator agreed with the claimants that "the Tribunal may consider it appropriate to make an interim order preserving the *status quo*".[780]

Arbitral practice, however, suggests that the arbitrators will be willing to enjoin the host state from continuing a criminal investigation only in "exceptional"[781] circumstances. In particular, in *City Oriente v. Ecuador* the tribunal stated that the host state's sovereign right to investigate and prosecute crimes committed within its territory should not be used as a means to pressure the investor into paying the amounts allegedly due pursuant to the April 2006 to the Hydrocarbon Law, because "this would entail a violation of the principle that neither party may aggravate or extend the dispute or take justice into their own hands."[782] Since the investor's wrongdoing (embezzlement) was allegedly committed precisely through the non-payment of the amounts due under this new legislation, the applicability of which was disputed by the parties, the host state was ordered "to stay any proceedings and actions stemming from the criminal investigation underway that may affect Claimant or Claimant's officers or employees or may require them to make an appearance."[783]

Another possible area of concern is the initiation of criminal proceedings against the claimants' legal counsel or their court-appointed receivers (where the claimants are going through some form of insolvency proceedings), because such proceedings may impair the claimants' right to be represented by legal counsel of their choice and pressure the receivers into either desisting from pursuing the claimants' claims in arbitration proceedings or withdrawing from their role altogether.[784] The tribunal's decision in such unusual cases would, however, depend on the precise scope of the given criminal

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[779] *Paushok v Mongolia*, Order on Interim Measures (2 September 2008), para 11 (dispositive).
[780] *Von Pezold v Zimbabwe*, Directions Concerning Claimants' Application for Provisional Measures of 12 June 2012 (13 June 2012), para 7.
[781] *Lao Holdings v Laos*, Ruling on Motion to Amend the Provisional Measure Order (30 May 2014), para 30.
[782] *City Oriente v Ecuador*, Decision on Provisional Measures (19 November 2007), para 62.
[783] *Ibid*, para 63.
[784] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 205. In such circumstances, the claimants' right to procedural integrity of arbitration proceedings may also be implicated.

proceedings and their potential impact on the claimants' legal counsel and court-appointed receivers.[785]

It is worth noting that, even in cases where provisional measures affecting criminal proceedings were denied, the tribunals deemed it necessary to remind the parties that non-aggravation of the dispute is an obligation arising out of the principle of good faith and is a general duty of a parties participating in arbitral dispute settlement.[786]

3.1.3. The Right to the Procedural Integrity of Arbitration Proceedings

Once again, same as the rights to exclusivity of the ICSID arbitration proceedings, preservation of the *status quo* and non-aggravation of the dispute, there is general agreement that the right to the procedural integrity of arbitration proceedings, including the access to evidence, may be protected by tribunal-ordered provisional measures.[787] The leading case on the protection of procedural integrity of arbitral dispute settlement through provisional measures affecting domestic criminal proceedings is *Quiborax v Bolivia* and in some subsequent cases both parties would rely on this precedent, the investor arguing that their case is analogous to *Quiborax v Bolivia* and the host state maintaining that both cases have to be distinguished.[788]

In *Quiborax v. Bolivia*, the claimants alleged that the criminal investigation initiated by the respondent had obstructed their access to corporate records, alienated potential witnesses, and provided the respondent with the possibility to fabricate *ex posto facto*

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[785] *Ibid*, para 207.

[786] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 104 ("While the request for provisional measures must be denied, the Tribunal wishes to expressly stress the Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.") & Procedural Order No 14 (22 December 2014), para 92 ("The Tribunal again stresses the Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration."); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 239(c) ("The Tribunal … reminds the Parties that they are obligated to refrain from aggravating the dispute").

[787] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), paras 141 ("The Tribunal has no doubt that it has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings, in particular the access to and integrity of the evidence."), 148 ("the Tribunal finds that Claimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses.").

[788] See *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 98.

evidence by forcing false confessions.[789] The tribunal agreed with these arguments, pointing out that (i) the respondent had formally charged several persons directly involved in the claimants' operations in Bolivia, including their business partner and former counsel; (ii) at least one witness, David Moscoso, had become legally prevented from testifying in the arbitration as a result of his confession in the criminal proceedings; and (iii) in the context of the criminal proceedings, Bolivian authorities characterized the arbitration brought by Quiborax as harm to Bolivia, a necessary element of some categories of crimes, which makes it unlikely for potential witnesses to be willing to participate in the arbitration proceedings.[790]

The relevant legal test is whether (1) "there is a strong linkage between the criminal proceedings and the legal dispute arising out of the investment which is before it" and (2) "such a situation threatens the integrity of the arbitral process."[791] Because this inquiry is necessarily fact-specific, another issue of great importance is one of timing of the host state's investigation. In particular, in *Lao Holdings v. Laos* the tribunal found that, a month before a hearing of the merits in arbitration proceedings, "allowing … the Laotian police and prosecutors to pursue criminal proceedings, depose witnesses and collect documentation would aggravate the dispute in the prohibited sense of harming the integrity of the arbitral process."[792] However, while the timing of police activities is an important factor in the tribunal's determination, the arbitrators may be reluctant to grant provisional measures in the absence of evidence that law enforcement activities were conducted in breach of the host state's law or were abusive in nature, especially in situations where the host state's representatives in the arbitration proceedings assert that they already had sufficient evidence to substantiate the illegality defence and were not aware of the police raids in question.[793]

In summary, the arbitrators are likely to grant provisional measures affecting the conduct of criminal proceedings where "[t]he allegations the Respondent intends to make the subject of the criminal investigation relate directly to the subject matter of the

[789] *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 139.
[790] *Ibid*, paras 142–148.
[791] *Lao Holdings v Laos*, Ruling on Motion to Amend the Provisional Measure Order (30 May 2014), para 37.
[792] *Ibid*, para 31.
[793] *Churchill Mining v Indonesia*, Procedural Order No 14 (22 December 2014), paras 86-87.

arbitration",[794] the respondent intends to "run a criminal investigation concurrently with the arbitration directed to the same people and the same facts at the same time",[795] and the criminal proceedings would have a "chilling effect" on the claimants' witnesses and divert the claimants' resources from preparation for the arbitration hearing.[796] However, to have potential to undermine the procedural integrity of the arbitration process, there has to be an *ongoing* criminal proceeding, not merely a *threat* of initiation of criminal proceedings by the host state.[797]

The importance of the right to procedural integrity of arbitration was highlighted in *Hydro v. Albania*, where the claimants invoked all three groups of rights (the procedural integrity of the arbitration, the preservation of the *status quo* and non-aggravation of the dispute, and the exclusivity of the ICSID proceedings),[798] but tribunal was "satisfied that a real question arises in relation to the procedural integrity of the arbitral proceedings."[799] The arbitrators took into account that criminal proceedings were brought against two of the claimants whose possible extradition from the United Kingdom and subsequent imprisonment in Albania "would prevent them from effectively managing their businesses, and fully participating in this arbitration" and therefore this situation was "a grave concern to the procedural integrity of the proceeding."[800]

The tribunal decided that criminal proceedings were sufficiently related to the investment dispute referred to arbitration and, although the arbitrators were "reluctant" to interfere with the host state's sovereign authority in criminal law matters, they nonetheless ordered Albania to suspend the investigation until the investor-state dispute is resolved through arbitration:

> 3.19. The Tribunal notes that there may be situations where incarceration of a claimant would disrupt an arbitration but where it would be improper for the tribunal to intervene. An example given by counsel is where a person is charged with a serious offence totally unrelated to the factual circumstances of the dispute being arbitrated, such as

[794] *Lao Holdings v Laos*, Ruling on Motion to Amend the Provisional Measure Order (30 May 2014), para 38.
[795] *Ibid*, para 39.
[796] *Ibid*, paras 40-41.
[797] *Churchill Mining v Indonesia*, Procedural Order No 9 (8 July 2014), para 99.
[798] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 3.17.
[799] *Ibid*, para 3.18.
[800] *Ibid*.

> murder. But that is not the situation here. *The alleged offences here are not divorced from the investments made by the Claimants*.
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> 3.20. While the Tribunal is reluctant to interfere with the sovereignty of the Respondent, subject to considering whether the requirements of urgency, necessity and proportionality are met (…), it sees no difficulty in recommending an order, the effect of which is not to deny the prospect of Mr Becchetti (and Mr De Renzis) being prosecuted for their alleged criminal conduct, but merely postpones that eventuality until the conclusion of this proceeding. That is to say, the Tribunal is satisfied that *the procedural integrity of the proceeding would be protected by recommending that the criminal proceedings (and the associated extradition proceedings) be stayed pending resolution of this proceeding*.[801]

In conclusion, the tribunal is likely to grant provisional measures affecting the conduct of criminal proceedings where the aim of such measures would be to secure the claimants' due process rights, protect integrity of the arbitral process that involves parties having different powers (the power to prosecute and punish crimes, and related powers concerning the collection and presentation of evidence, are necessarily possessed only by sovereign states, not foreign investors or any other commercial enterprises) and ensure that all the parties to arbitration act in good faith. As the arbitrators phrased it in *Teinver v. Argentina*, "the Tribunal has the inherent jurisdiction and powers required to preserve the integrity of its own process and the duty to ensure that the Parties comply with their obligation to arbitrate fairly and in good faith."[802] Ultimately, as any other provisional measures, interim relief affecting the conduct of criminal proceedings is ultimately aimed at safeguarding the claimant's "ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal".[803]

3.1.4. The Right to Arbitration Proceedings Conducted in Good Faith

[801] *Ibid*, paras 3.19–3.20 (emphasis added).
[802] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 186.
[803] *Plama v Bulgaria*, Order (6 September 2005), para 40, cited in *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 148.

The right to the procedural integrity of arbitration proceedings, analyzed in the above section, is intimately connected with the general principle of good faith applicable to any arbitration and is thus rarely invoked as a free-standing right. Among such rare cases is *Teinver v. Argentina*, where the claimant alleged that the criminal investigation was initiated and conducted in bad faith and constituted guerilla tactics aimed at derailing the arbitration proceedings.[804] In line with the established practice concerning protection of the procedural integrity of arbitration proceedings, the tribunal found that, in exceptional circumstance where the continuation of criminal investigation by the host state would threaten the procedural fairness of arbitration, an order ordering the suspension of such criminal proceedings may be warranted:

> As has been held by a number of arbitral tribunals, Respondent clearly has the sovereign right to conduct criminal investigations and it will usually require exceptional circumstances to justify the granting of provisional measures to suspend criminal proceedings by a State. Nevertheless, where exceptional circumstances do exist and threaten the integrity of the arbitration proceedings and the principle of due process, provisional measures may be warranted. In addition, separate from the question of whether provisional measures are warranted, the abuse of the sovereign power of a State to pursue criminal proceedings may give rise to damage and a claim for the breach of rights protected by a BIT or international law, more generally. In addressing Claimants' Application currently before it, the Tribunal must focus on the former and restrict its inquiry to the question of whether Claimants have demonstrated that their right to continue or pursue this arbitration in procedurally fair conditions is threatened.[805]

However, due to the advanced stage of the proceedings (the only remaining steps for the tribunal to do were to close the proceedings and issue a final award), provisional measures requested by the claimants were unwarranted.[806]

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[804] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 188.
[805] *Ibid*, para 190.
[806] *Ibid*, para 191.

The tribunal in *Libananco v. Turkey* offered perhaps the most comprehensive summary of legal principles applicable to the conduct of arbitration proceedings:

> These allegations and counter-allegations strike at principles which lie at the very heart of the ICSID arbitral process, and the Tribunal is bound to approach them accordingly. Among the principles affected are: basic procedural fairness, respect for confidentiality and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well. For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention. It requires no further recital by the Tribunal to establish either that these are indeed fundamental principles, or why they are. Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. *The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).*[807]

In other words, the rights to the procedural integrity of arbitration proceedings, the right to confidentiality of documents and communications with legal counsel, immunities under international law (both discusses below) may be viewed as components of the right to arbitration conducted in good faith and the parties' corresponding obligation to arbitrate their disputes in good faith.

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[807] *Libananco v Turkey*, Decision on Preliminary Issues (23 June 2008), para 78 (emphasis added), cited in *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 186.

3.1.5. The Right to Confidentiality of Documents and Communication with Legal Counsel

Several arbitral decisions addressed the concern that initiation of criminal proceedings brings imbalance into arbitration, allowing the state to access the claimants' confidential information and disrupting the communication between the claimants and their legal counsel. In particular, in *Eurogas v. Slovakia* the claimants invoked the breach of their "right to the protection of privileged and confidential information and of the most basic procedural rules and principles, including the principles of equality of arms, fairness and due process", and requested the tribunal to order the respondent to refrain from using in the arbitration proceedings of any information or materials obtained in the course of a criminal investigation and to return all copies of the seized documents and materials.[808] The tribunal, however, once again drew the line between the investment dispute, which the parties agreed to refer to arbitration, and the criminal proceedings, which are the domain of the sovereign state, and emphasized that "the copies of the seized documents are part of the criminal proceedings, in relation to which the Tribunal has not made any order."[809] Moreover, in this case the respondent had already returned the originals of the seized documents, represented that the Ministry of Finance had not read the seized documents, and undertook not to examine the content of the seized documents and not to produce them in the arbitration proceedings.[810] While the respondent left open the possibility to read or produce the aforementioned documents if the claimants argued that the criminal investigation amounted to a violation of the applicable BIT, any potential prejudice could be remedied by the tribunal's power to independently assess the evidentiary value of any such document, taking into account its source.[811]

The arbitrators were more sympathetic to the investors' arguments in *Churchill Mining v. Indonesia*, where the tribunal stated that it was

> mindful of the Claimants' argument that Indonesia may obtain an unfair advantage in the present proceedings by

[808] *EuroGas v Slovakia*, Procedural Order No 3, para 92.
[809] *Ibid*, para 95.
[810] *Ibid*, para 96.
[811] *Ibid*, para 97.

> gathering evidence through investigative techniques applicable under its criminal procedure law, thus circumventing the document production procedure available to the Parties in this arbitration. While it takes note of Indonesia's statement that it has all the evidence necessary on the forgery and does not need to obtain additional proof by way of the criminal investigation, the Tribunal is also aware that Indonesia is currently in possession of documentation and hard drives obtained through the raid [of the claimants' wholly owned subsidiary] of 29 August 2014. It can thus not rule out that Indonesia may seek to file evidence into the record obtained through the criminal investigation.[812]

However, instead of ordering the host state to suspend criminal proceedings, the tribunal prescribed the respondent to seek leave before introducing in the arbitration proceedings any evidence obtained in the course of the criminal investigation, and reserved the right to assess the evidentiary value of such evidence in light of all the circumstances, including its source.[813]

It is also important to note that these two decisions (*Eurogas v. Slovakia* and *Churchill Mining v. Indonesia*), unlike the cases discussed below, did not concern the documents subject to attorney-client privilege or prepared solely for the purposes of the pending arbitration proceedings.

In particular, in *Libananco v. Turkey* the claimant alleged that its legal counsel was subject to surveillance by the respondent, which thus obtained access to privileged communications. The tribunal eventually concluded that, whether or not the claimant has suffered prejudice *in the past* due to interception of its communications with the legal counsel by the host state's government, the claimant was entitled to *future* protection for its agents, legal counsel and witnesses:

> If, as the arbitration progresses, it turns out that the Respondent has used, in any way, privileged or confidential information obtained during the surveillance, the Claimant will be at liberty to bring an appropriate application to the Tribunal. The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been

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[812] *Churchill Mining v Indonesia*, Procedural Order No 14 (22 December 2014), para 81.
[813] *Ibid*, paras 82, 94(2).

> given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises, the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information.[814]

Therefore, the tribunal made a number of orders aimed at ensuring the equality of parties and protection of the claimant's communication with its legal counsel and potential witnesses:

> 1.1.1) Subject to paragraph 1.2 below, the Respondent must not intercept or record communications between legal counsel for the Claimant on the one hand and representatives of the Claimant and other persons in Turkey on the other hand.
>
> 1.1.2) The Respondent must permit legal counsel for the Claimant to have access, free from surveillance, to any person within Turkey for the purposes of preparing or conducting Claimant's case in this arbitration.
>
> …
>
> 1.1.4) The Respondent must take steps to ensure that its criminal investigators and others having access to or knowledge of intercepted emails and other communications falling within paragraph 1.1.1 above do not provide copies or communicate the contents of (or information deriving from) such documents to any persons having any role in the defence of this arbitration.
>
> …
>
> 1.1.7) Any privileged documents or information which may be introduced into evidence in future proceedings of this arbitration will be excluded as well as any evidence derived from possession of privileged documents or information.
>
> 1.2 The Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in Turkey. The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be

[814] *Libananco v Turkey*, Decision on Preliminary Issues (23 June 2008), para 80.

> made available to any person having any role in the defence of this arbitration.[815]

The need to protect the confidentiality of the parties' documents and communications with their legal counsel while the arbitration proceedings remain pending was affirmed not only by arbitral tribunals, but also by the ICJ decision in *Seizure and Detention of Certain Documents and Data* in the context of peaceful settlement of disputes between sovereign states:

> The principal claim of Timor-Leste is that a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties. The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means. *If a State is engaged in the peaceful settlement of a dispute with another State through arbitration or negotiations, it would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case*. It would follow that in such a situation, a State has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context.[816]

There was no dispute between the parties that at least some of the seized documents concerned the then-ongoing Timor Sea Treaty Arbitration, and these documents related to the Timor-Leste's communications with its legal counsel.[817] The ICJ thus concluded that there was sufficient link between Timor-Leste's right "to conduct, without interference

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[815] *Ibid*, para 82.
[816] *Seizure and Detention of Certain Documents*, Order (3 March 2014), para 27 (emphasis added).
[817] *Ibid.*

by Australia, arbitral proceedings and future negotiations, and to communicate freely with its legal advisers, counsel and lawyers to that end", and the provisional measures sought by Timor-Leste and aimed at preventing access by Australia to the seized documents.[818]

In conclusion, the right to confidentiality of documents and communication with legal counsel has been invoked several times and affirmed by various tribunals and the ICJ, the remedy granted concerned the admissibility of evidence rather than interference with the states' sovereign right to conduct criminal proceedings.

3.1.6. Immunities under International Law

Immunities under public international law have also been invoked in several ICJ cases dealing with criminal proceedings. In particular, in *Arrest Warrant* case the Congo requested the ICJ to discharge the arrest warrant issued by a Belgian judge against the then-Minister of Foreign Affairs of the Congo Mr. Yerodia Ndombasi alleging the "breach of international law in regard to the jurisdiction of national criminal courts and to the immunity of Heads of State and members of governments".[819] Also, in *Certain Criminal Proceedings in France* case the Congo alleged the "violation of the criminal immunity of a foreign Head of State – an international customary rule recognized by the jurisprudence of the Court".[820] It is, of course, difficult to imagine a situation in which the arbitral tribunal would need to address the question of the immunity of heads of state and members of governments, unless the investor is indeed a head or a sovereign state or a senior government official. Other hypothetical situations where an arbitral tribunal would need to deal with immunities under international law include a situation where criminal proceedings target an official of a sovereign wealth fund (SWF) who is also a senior government official, or a situation where a state allegedly attempts to use criminal proceedings to interfere with the claimants' witnesses who are senior government officials or officials of an international organization.

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[818] *Ibid*, para 30.
[819] *Arrest Warrant*, Order (8 December 2000), para 70.
[820] *Certain Criminal Proceedings in France*, Order (17 June 2003), paras 23, 28 ("the right to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State").

Nevertheless, the ICSID Convention itself contains a provision providing for immunities of the parties to the ICSID arbitration proceedings and of their "agents, counsel, advocates, witnesses [and] experts":

> Article 21
>
> The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat
>
> (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
>
> (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.
>
> Article 22
>
> The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

The applicability of these provisions was tested in *Teinver v. Argentina*, where the claimants argued that the respondent, by commencing criminal proceedings, breached the immunity of the parties, their legal counsel, court-appointed receivers and third-party funder.[821] Because the respondent did not dispute the applicability of Article 22 of the ICSID Convention in principle, the relevant question was whether the conduct of persons listed in this Article was "in the exercise of their functions" and thus subject to immunity from legal process.[822] The tribunal, however, deferred the determination of this question

[821] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), para 211.
[822] *Ibid*, paras 213-214.

until the later date, particularly in light of the uncertainty as to the scope of the criminal investigation, i.e. whether it implicated the claimants' legal counsel and their court-appointed receivers.[823] As to the claimants' funder (Burford Capital, Ltd.), the arbitrators noted that "the Tribunal ha[d] not been persuaded that Burford falls within the scope of the immunity afforded by Article 22 of the ICSID Convention"[824] and "there was no indication that the Complaints or the criminal investigation had affected, or were likely to affect, Burford's willingness or ability to fund Claimants at this stage of the arbitration."[825]

3.1.7. The Right to Life

Several of the ICJ cases analyzed above concerned the right to life where nationals of one sovereign state (Germany in *LaGrand* and Mexico in *Avena*) were to be executed in another sovereign state (the United States). In particular, in *LaGrand* Germany emphasized that:

> The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law;
>
> [and]
>
> Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the status quo ante. Without the provisional measures requested, the United States will execute Walter LaGrand - as it did execute his brother Karl - before this Court can consider the merits of Germany's claims, and Germany will be forever deprived of the

[823] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016), paras 221-222.
[824] *Ibid*, para 220.
[825] *Ibid*, para 219.

> opportunity to have the status quo ante restored in the event of a judgment in its favour[.][826]

Similarly, Mexico argued that provisional measures were "clearly justified in order both to protect Mexico's paramount interest in the life and liberty of its nationals and to ensure the Court's ability to order the relief Mexico seeks".[827] These two cases, however, concerned the interpretation of the VCCR and had no relation to foreign investment or other commercial relations.

It is thus surprising that the right to life has been also invoked in international investment arbitration where claimants in *Von Pezold v. Zimbabwe* alleged the existence of a plan by the host state's intelligence agency to kill one of the investors and requested the tribunal to preserve their "right to participate in these proceedings without threats to their lives by the Respondent".[828] The tribunal concluded that the claimants provided enough *prima facie* evidence to support the finding that the instruction to kill one of the investors were indeed issued to the host state's central intelligence agency[829] and thus ordered the respondent to "immediately take all necessary measures to protect the life and safety of the Claimants … from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent".[830]

While this case appears to involve unique circumstances that are unlikely to be repeated in the future, at least two other scenarios may be envisaged involving requests for provisional measures aimed at protection of the right to life. For instance, an investor may be arrested and argue that conditions in the detention facility threaten the investor's right to life, or, somewhat similar to the ICJ cases considered in this chapter, an investor convicted of a crime punishable by death penalty may seek provisional measures staying the execution until the final resolution of the investment dispute. Whereas in these situations the arbitral tribunal may appear to be acting as a self-proclaimed human rights court, the effect of its decision on provisional measures would be limited to *postponing*

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[826] *LaGrand*, Order (3 March 1999), para 8.
[827] *Avena*, Order (9 January 2003), para 13.
[828] *Von Pezold v Zimbabwe*, Procedural Order No 5 (3 April 2013), paras 2, 17, 60.
[829] *Ibid*, para 61.
[830] *Ibid*, para 65(a).

the threat to the investor's life or security of the person until after the resolution of an underlying economic dispute.

3.2. Urgency and Necessity

It is entrenched in arbitral practice that provisional measures aimed at protection of the rights to procedural integrity of the arbitration and non-aggravation of the dispute satisfy the urgency requirement by definition,[831] and this conclusion was affirmed in the above cases.[832] In this regard, it is perhaps more interesting for the purposes of this thesis to look at the balancing test the tribunals undertook to assess the proportionality of the provisional measures requested by the investors, i.e. whether the harm caused to the host state if the criminal proceedings are suspended or terminated outweighs the harm caused to the investors if the criminal proceedings continue.[833] In *Quiborax v. Bolivia*, the tribunal took into account that, on the one hand, the respondent had already committed to collaborate with the investors' access to documentary evidence and witnesses,[834] and that "the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors".[835] On the other hand, however, there was close relationship between the initiation of the investment arbitration case by the claimants and commencement of criminal proceedings by the host state, which significantly hindered the claimants' access to potential witnesses.[836] Furthermore, in that

[831] Mouawad & Silbert, *supra* note 406 at 389.

[832] *City Oriente v Ecuador*, Decision on Provisional Measures (19 November 2007), para 69 ("In the Tribunal's opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very own nature of the issue."); *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 153 ("The Tribunal agrees with Claimants that if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.")

[833] See *Quiborax v Bolivia*, Decision on Provisional Measures (26 February 2010), para 158.

[834] *Quiborax v. Bolivia* (26 February 2010), para 160

[835] *Ibid*, para 164.

[836] *Ibid*, paras 163-164:

case the suspension of criminal investigation was not contrary to the host state's own criminal law.[837]

Not surprisingly, the requirements of urgency and necessity were also met in cases involving the right to life and the possibility that a human being would be killed or executed pending the final decision of the ICJ or arbitral tribunal.[838] In particular, once the tribunal found that there was enough *prima facie* evidence that the respondent's central intelligence agency had been given an instruction to kill one of the claimants, it reached a conclusion that the requirements of urgency and necessity were satisfied in the following two brief paragraphs:

> 62. Accordingly, the measures which the Claimants seek, in the view of the Tribunals, are urgent and necessary since any action of any member, organ or agent of the Respondent or any person or entity instructed by the Respondent which could endanger the life and safety of the Claimants, in particular of Mr Heinrich von Pezold, is capable of causing irreparable prejudice to their right to participate in the present proceedings.
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> 63. The Tribunals are also of the view that any prejudice caused to the Respondent by issuing an order for provisional measures in this respect is far lesser than the

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> 163. … Regardless of whether the criminal proceedings have a legitimate basis or not (an issue which the Tribunal is not in a position to determine), the direct relationship between the criminal proceedings and this ICSID arbitration is preventing Claimants from accessing witnesses that could be essential to their case. No assurance of cooperation from Respondent can guarantee that persons who are being prosecuted for having allegedly caused harm to Respondent by permitting Claimants to present this arbitration will be willing to participate as witnesses in this very same arbitration. Under these circumstances, the Tribunal considers that Claimants' access to witnesses may improve if the criminal proceedings are stayed until this arbitration is finalized or this decision is reconsidered.
>
> 164. … The Tribunal has been convinced that there is a very close link between the initiation of this arbitration and the launching of the criminal cases in Bolivia. It has become clear to the Tribunal that one of the Claimants is being subjected to criminal proceedings precisely because he presented himself as an investor with a claim against Bolivia under the ICSID/BIT mechanism. Likewise, the Tribunal has been convinced that the other persons named in the criminal proceedings are being prosecuted because of their connection with this arbitration (be it as Claimants'' business partners or counsel, or as authors of a report ordered by a state agency). Although Bolivia may have reasons to suspect that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the Tribunal suggest that the underlying motivation to initiate the criminal proceedings was their connection to this arbitration, which has been expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.

[837] *Ibid*, para 165.

[838] *LaGrand*, Order (3 March 1999), para 26.

> risk to the life and safety of Mr Heinrich von Pezold if the Tribunals declined to issue an order.[839]

In turn, in *LaGrande*, a case involving a person scheduled to be executed the day after the date of the request for provisional measures, Germany phrased its successful request in the following terms:

> 7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, *provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order* the relief to which Germany is entitled in the case of Walter LaGrand, namely *restoration of the status quo ante*. Without the provisional measures requested, the United States will execute Walter LaGrand - as it did execute his brother Karl - before this Court can consider the merits of Germany's claims, and Germany will be forever deprived of the opportunity to have the status quo ante restored in the event of a judgment in its favour.
>
> …
>
> 9. In view of *the extreme gravity and immediacy of the threat that authorities in the United States will execute a German citizen* in violation of obligations the United States owes to Germany, *Germany respectfully asks the Court to treat this request as a matter of the greatest urgency*.[840]

Mexico's request for provisional measures in *Avena* was worded in similar terms,[841] but had a somewhat different outcome. The ICJ agreed that the circumstances required it to indicate provisional measures with respect to three Mexican nationals who were at risk of being executed within the coming weeks, whereas other Mexican nationals, although

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[839] *Von Pezold v Zimbabwe*, Procedural Order No 5 (3 April 2013), paras 62-63.

[840] *LaGrand*, Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Federal Republic of Germany (2 March 1999), paras 7, 9.

[841] *Avena*, Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States (9 January 2003), paras 12 ("Unless the Court indicates provisional measures directing the United States to halt any executions of Mexican nationals until this Court's decision on the merits of Mexico's clairns, the executive officials of constituent states of the United States will execute Messrs. Fierro, Moreno Ramos, Torres, or other Mexican nationals on death row before the Court has had the opportunity to consider those claims. In that event, Mexico would forever be deprived of the opportunity to vindicate its rights and those of its nationals."), 15 ("There can also be no question about the urgency of the need for provisional measures.").

being on death row, were not in the same position and the ICJ reserved the right to indicate provisional measures in respect of those individuals at a later date, if necessary.[842]

This further demonstrates the importance of timing in consideration of a request for provisional measures. In particular, in *Tokios Tokelés v. Ukraine* the tribunal decided that it was nether neither necessary nor urgent to enjoin the respondent from continuing criminal investigation against Oleksandr Danylov, the director general of the claimant's subsidiary in Ukraine.[843] Because criminal proceedings commenced in March 2002, nine months before the claimant filed its request for arbitration, and the claimant did not include these proceedings into its first request for provisional measures in June 2003, the tribunal decided that the claimant thus "cannot credibly claim that circumstances it did not consider urgent 18 months ago are urgent now."[844] Furthermore, the claimant failed to demonstrate that Oleksandr Danylov's absence from Ukraine had caused "a decline in profits of such magnitude as to impair Claimant's ability to finance the present ICSID proceeding."[845]

4. Conclusion: Provisional Measures as an Instrument to Prevent the Respondent State from Using Criminal Proceedings to Jeopardize Arbitral Settlement of Economic Disputes

This chapter started by exploring the purpose and types of provisional measures, prerequisites for granting them, and their binding nature. It explained that provisional measures are a remedy that may be granted by an arbitral tribunal in order to protect the parties' rights pending final resolution of the dispute. In general, arbitral tribunals enjoy relative freedom in deciding on the type and scope of provisional measures to be ordered. However, because this thesis focuses on a specific subset of provisional measures – those that interfere with the conduct of criminal proceedings – rather than with provisional measures in general, this chapter dealt only with the jurisprudence on provisional measures aimed at protection of the parties' procedural rights, preservation of evidence

[842] *Avena*, Order (5 February 20030, paras 55-56.
[843] *Tokios Tokeles v Ukraine*, Procedural Order No 3 (18 January 2005), paras 12–13.
[844] *Ibid*, para 13.
[845] *Ibid*, para 12.

and non-aggravation of the dispute, and did not address other categories of provisional measures, such as security for costs. For the same reason, this chapter focused on the criteria of urgency, necessity, and existence of a threat to the party's rights as prerequisites for ordering provisional measures, whereas more general requirements to establish *prima facie* jurisdiction and *prima facie* case on the merits remained outside the scope of this research project.

Importantly, both the ICJ Statute and the ICSID Convention provide for the power of the Court and ICSID arbitral tribunals to order provisional measures, and similar provisions are contained in the UNCITRAL Arbitration Rules that may be used in both international commercial and in international investment arbitration cases. Furthermore, decisions of the ICJ and awards of ICSID arbitral tribunals have confirmed that provisional measures are binding on the parties to the dispute. Therefore, the issue is how arbitral tribunals interpret this broad and general power to order provisional measures in cases where the claimant askes the tribunal to order the state to suspend criminal proceedings pending the resolution of the criminal case.

To answer this question, the second section of this chapter provided a chronological overview of relevant ICJ and arbitral jurisprudence. First, it explored six ICJ cases where the Court had to address a request for provisional measures having implication for the conduct of criminal proceedings by a sovereign state. Three cases (*Arrest Warrant*, *Certain Criminal Proceedings in France*, and *Immunities and Criminal Proceedings*) involved attempts to halt criminal proceedings into alleged corruption and crimes perpetrated by high-ranked public officials. Another two cases (*LaGrand* and *Avena*) concerned the situation where foreign nationals were convicted and sentenced to death penalty without being accorded their rights under the VCCR. And *Seizure and Detention of Certain Documents and Data* involved an alleged attempt by one state party to use law enforcement and security agencies to gain a procedural upper hand in parallel arbitration proceedings. Secondly, it reviewed 12 investment arbitration cases brought under various BITs and conducted in accordance with both ICSID and UNCITRAL arbitration rules.

This chapter then proceeded to identifying key developments and trends in the aforementioned jurisprudence. One important conclusion is that provisional measures may be used not only to protect substantive rights under international investment

agreements, but also to safeguard the parties' procedural rights common to arbitration proceedings under various, not necessarily ICSID, arbitration rules. Also, the spectrum of rights that may be protected by provisional measures affecting the conduct of criminal proceedings varies depending on the stage of the arbitration proceedings. Whereas at the earlier stages the investor's request for provisional measures may be aimed at preservation of evidence and prevention of possible harassment and intimidation of witnesses, at the later stages the investor is likely to request measures aimed at ensuring enforceability of the final award. Some other rights, such as safeguarding the procedural integrity of arbitration and preventing aggravation of the dispute, may need protection throughout the entire process of arbitral dispute settlement.

Undoubtedly, different theoretical approaches to international investment arbitration[846] would offer different perspectives on the power of arbitral tribunals to suspend parallel criminal proceedings pending the resolution of the investment dispute. Hegemonic international law approach would portray this power as yet another instrument for foreign investors from developed countries of the Global North (i.e. for big corporations and high-net-worth individuals) to perpetuate inequalities in their relations with developing countries of the Global South by inhibiting the letter countries' right to investigate and prosecute crime within their territory. The global administrative law theory would caution against arbitral tribunals, stuffed with commercial lawyers and academics, exercising supervisory functions over the conduct of criminal proceedings by sovereign states and against the tribunals acting as an appellate mechanism with respect to the decisions made by national law enforcement agencies. New constitutionalism scholars would warn that investment arbitration regime imposes quasi-constitutional constraints on host states' powers in the sphere of criminal justice, in particular on the powers to interrogate witnesses, seize assets and documents, and arrest and extradite suspects. Finally, advocates of the rule of law approach would emphasize the role that the arbitral tribunal's power to stay parallel criminal proceedings can play in ensuring the procedural equality of parties to the arbitration proceedings and in safeguarding fundamental human rights of

[846] For more details, see *supra* Chapter 2.2.

the investors pending resolution of economic disputes they have with the governments of the states-recipients of foreign investments.

In general, cases studied in this chapter show that claimants were more successful in obtaining provisional relief when they invoked procedural rights that are not unique to international investment regulation but relate to arbitral dispute settlement in general, namely the right to the preservation of the *status quo* and non-aggravation of the dispute, the right to procedural integrity of arbitration proceedings, and the right to confidentiality of documents and communication with legal counsel. Therefore, it appears that, if requested to order provisional measures interfering with the conduct of criminal proceedings, an arbitral tribunal in an international *commercial* arbitration case involving a state party would follow the same logic and guiding principles that arbitral tribunals in *investor-state* disputes have used in the past.

In sum, the arbitral jurisprudence on provisional measures affecting national criminal proceedings suggests that arbitral tribunals are willing to order host states to suspend criminal proceedings where there is a strong connection between such criminal investigation or prosecution, on the one hand, and pending arbitration proceedings, on the other hand, so that to create a threat of aggravation of the dispute or violation of procedural integrity of arbitration. This power, which has been exercised by arbitral tribunals in the context of investor-state disputes, appears to be rooted in the parties' agreement to submit their dispute to arbitration and rests upon general principles of peaceful settlement of international disputes, rather than on rules applicable solely to international investment arbitration (for instance, exclusivity of ICSID arbitration or immunity of the parties pursuant to Articles 21-22 and 26 of the ICSID Convention).

Chapter 4: Balancing Competing Interests: Fair Resolution of International Economic Disputes vs Combatting Global Corruption and Crime

At present, "international investment arbitration is coming increasingly under fire, [and] it is important that the intersection with domestic criminal law should not become additional fuel to the flame."[847] Arbitral jurisprudence explored in Chapter 3 of this thesis suggests that investment arbitrators readily accept the role of a private authority tasked with reviewing the exercise by the host states of their powers with respect to enforcement of criminal laws. While the optimistic view is that, by doing so, arbitral tribunals help to uphold the rule of law and protect human rights of persons who happen to be foreign investors, critics of investor-state dispute settlement argue that arbitrators impose quasi-constitutional constraints on sovereign states in an inherently anti-democratic manner and interfere with the exercise of public functions by governments and their law enforcement agencies. This issue has already ceased to be merely a topic of academic discussed and found its way into mainstream media. For instance, Chris Hamby, an investigative reporter for BuzzFeed news, alleges that "[c]ompanies and executives accused or even convicted of crimes have escaped punishment by turning to this special forum", although the "usefulness [of ISDS] as a shield for the criminal and the corrupt has remained virtually unknown."[848]

It is safe to assume that arbitral tribunals ordering sovereign states to suspend investigations into crimes allegedly committed by foreign investors may contribute to the perception of international investment protection mechanisms as a "shield for the criminal and the corrupt". However, in situations where the initiation of criminal

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[847] Burnett & Beess und Chrostin, *supra* note 27 at 53.

[848] Chris Hamby, "The Court that Rules the World" BuzzFeed News (28 August 2016), online: <https://www.buzzfeed.com/chrishamby/super-court>, last accessed on 28 December 2018. This thesis focuses on the arbitral tribunal's procedural power to order provisional measures interfering with the conduct of criminal proceedings, whether or not the underlying substantive dispute concerns the exercise by the state of its powers in criminal law matters. A related issue – the concern that allowing investment arbitration tribunals to decide on the allegations that initiation or conduct of a criminal investigation or prosecution constitute a breach of the host state's substantive obligations to the foreign investor would turn the ISDS system into a tool for criminals – merits further research and consideration, but remains outside the scope of this thesis.

proceedings is not a legitimate exercise of the state's power to combat crime and corruption, but rather an attempt to get a procedural advantage or a pretext to pressure the investor into abandoning its arbitration claim, the tribunal may need to issue a provisional measures order to prevent the state from further aggravating the dispute or threatening the integrity of arbitration proceedings. In other words, as Burnett and Beess und Chrostin phrased it,

> while a tribunal's issuance of I[nterim] M[easure]s that interfere with a State's sovereign power to prosecute crimes may *appear* to overstep the tribunal's proper powers, they are in fact a necessary corollary of the investor's right to access investment arbitration as an alternative forum to domestic courts and criminal prosecutions can be, and have been, used to try to prejudice this right.[849]

Thus, the question is how to balance the states' right (or even an obligation) to combat global corruption and crime, one the one hand, and the due process rights accorded to private entities when their commercial and investment disputes are resolved through international arbitration, on the other hand. This chapter will analyze potential changes in international investment regime (including carve-outs for the matters of criminal law and the shift from international investment arbitration to a multilateral investment court) and international commercial arbitration that may improve the legitimacy of having transnational actors decide on the stay of criminal proceedings running in parallel with a commercial or investment dispute. Finally, it will provide a set of guidelines for the exercise of this power by arbitral tribunals in the future.

1. International Investment Arbitration

International investment protection regime, including its ISDS component, goes through a protracted crisis of legitimacy and several measures have been proposed to reform it. This section deals with two proposals that have implications for the arbitral tribunal's power to interfere with criminal proceedings conducted by sovereign states. First, it addresses the possibility to "carve out" criminal law matters from the scope of international investment agreements, a solution that could potentially alleviate the

[849] Burnett & Beess und Chrostin, *supra* note 27 at 53.

concerns raised by new constitutionalism scholars by precluding arbitral tribunals from imposing binding quasi-constitutional restraints on the states' powers to exercise their sovereignty in the sphere of criminal justice. Secondly, this section explores the implications of the proposed shift from arbitration-based ISDS system towards a (multilateral) investment court, an approach that could respond to the criticism voiced by the advocates of the global administrative law theory concerning the lack of transparency and accountability in the current international investment arbitration system.

1.1. Carve-outs for Matters of Criminal Law: A Solution to a Different Problem?

Perhaps, the most radical solution to prevent unelected arbitrators from deciding on matters relating to the conduct of criminal investigations and trials by host states' governments is to completely exclude criminal law matters from the scope of international investment agreements. "Carve-outs" from the applicability of general investment protection standards have already been envisaged for taxation and tobacco-control measures.

It is not uncommon for international trade and investment agreements to specifically exclude taxation measures from their scope, although such "carve-outs" are themselves often subject to exceptions and qualifications. For instance, although the North American Free Trade Agreement (NAFTA) does not, as a general rule, apply to taxation measures, the rules on expropriation and compensation in Article 1110 NAFTA "shall apply to taxation measures and arbitration may proceed unless it has been determined that the measure is not an expropriation."[850] Similarly, while the Energy Charter Treaty (ECT) expressly states that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties",[851] it also contains a "claw-back" provision that makes Article 13 ECT ("Expropriation") applicable to taxes.[852] Furthermore, the tribunal in *Yukos cases* concluded that the "carve-out" in Article 21(1)

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[850] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Decision on Jurisdiction (6 December 2000), para 42. See NAFTA Article 2103(1), (3).

[851] *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95, entered into force on 16 April 1998 [*ECT*], Article 21(1).

[852] *Ibid*, Article 21(5)(a).

ECT "can apply only to bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State."[853] Accordingly, the host state may not benefit from the "carve-out" if their actions "are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent)",[854] because to hold otherwise would mean that a host Sate may escape its obligations with respect to foreign investment merely by labelling its measures as "taxation".[855]

Within the present investment protection framework a carve-out is unlikely to guarantee that questions related to the enforcement of criminal laws by host states do not find their way to international investment arbitration. First, even if there is a carve-out in place with respect to criminal law matters, such an exclusion of the applicability of international investment protection mechanism is likely to be subject to additional exemptions and qualifications. Second, while interpreting such a carve-out, arbitrators may well follow the lead of their colleagues in the *Yukos Cases* and conclude that only *bona fide* criminal law enforcement measures are shielded from arbitral scrutiny, whereas gross abuses of investigatory and prosecutorial powers, as well as selective prosecution, remain within the domain of international investment protection. One way to overcome this situation would be for state parties to agree on a "strong" wording of a contemplated carve-out provision. For instance, an IIA may provide that (i) the host state has a power, within six months from the moment the investor notifies it of the dispute, to declare that an underlying dispute concerns enforcement of the host state's criminal law and is thus not within the scope of the host state's consent to arbitration, and (ii) the declaration is not reviewable by the arbitral tribunal.

More recently, a carve-out for tobacco-control measures has been introduced into international investment practice. Its history starts when international investment arbitration became subject of increased public criticism after companies affiliated with Philip Morris, a global manufacturer of cigarette and tobacco products headquartered in

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[853] *Veteran Petroleum Limited (Cyprus) v Russian Federation*, PCA Case No AA 228, Final Award (18 July 2014); *Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014); *Hulley Enterprises Limited (Cyprus) v Russian Federation*, PCA Case No AA 226, Final Award (18 July 2014) [collectively, *Yukos cases*], paras 1407, 1431.

[854] *Ibid*.

[855] *Ibid*, para 1433.

the United States, filed claims against Australia and Uruguay alleging that their tobacco-control measures, including the so-called "plain packaging" requirement and other restrictions on presentation and marketing of tobacco products, improperly interfered with the claimants' intellectual property rights and thus violated the provisions of applicable BITs.[856] Ultimately, both cases proved to be unsuccessful for tobacco companies. In *Philip Morris v. Australia* the tribunal held that the initiation of arbitration proceedings constituted an abuse of rights, because the claimant's corporate restructuring was carried out primarily (if not solely) for the purpose of obtaining BIT protection at the time when it was reasonable to anticipate that an investment dispute would materialize, and the claimant's claims were this ruled inadmissible.[857] In *Philip Morris v. Uruguay* the majority dismissed the claimants' claims after concluding that the host state's measures were a valid exercise of the state's police powers for the protection of public health and did not amount to indirect expropriation or a violation of the fair and equitable treatment standard.[858] While the advocates of ISDS argue that the outcome in these cases demonstrates that "the 'regulatory chill' argument simply remains unconvincing and failed yet again",[859] the opponents of the international investment regime maintain that "public interest takes a hit even when Phillip Morris' investor-state attack on Australia is dismissed"[860] and that Philip Morris seeking multi-million dollars compensation from Uruguay after it adopt tobacco-control regulations is "absurd" and "gives [one] moral vertigo".[861]

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[856] See *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12 [*Philip Morris v Australia*], Award on Jurisdiction and Admissibility (17 December 2015), paras 1-9; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (*formerly FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*), ICSID Case No ARB/10/7 [*Philip Morris v Uruguay*], Award (8 July 2016), paras 1-14.

[857] *Philip Morris v Australia*, Award on Jurisdiction and Admissibility (17 December 2015), para 588.

[858] *Philip Morris v Uruguay,* Award (8 July 2016), paras 286-287, 307, 434, 590(1).

[859] Nikos Lavranos, "After Philip Morris II: The 'regulatory chill' argument failed – yet again" Kluwer Arb Blog (18 August 2016), online: <http://arbitrationblog.kluwerarbitration.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/>, last accessed on 28 December 2018.

[860] Lori Wallach, "Public Interest Takes a Hit Even When Phillip Morris' Investor-State Attack on Australia Is Dismissed" The Huffington Post (5 January 2016), online: <http://www.huffingtonpost.com/lori-wallach/public-interest-takes-a-h_b_8918010.html>, last accessed on 28 December 2018.

[861] Alfred de Zayas, "How can Philip Morris sue Uruguay over its tobacco laws?" The Guardian (16 November 2015), online: <https://www.theguardian.com/commentisfree/2015/nov/16/philip-morris-uruguay-tobacco-isds-human-rights>, last accessed on 28 December 2018.

Perhaps as a result of increased public hostility towards new international trade and investment agreements in general, the Trans-Pacific Partnership Agreement (TPP) gave birth to another "carve-out": a State Party to the TPP may choose to deny the benefits of the TPP investment protection chapter to claims challenging tobacco-control measures.[862] Because the TPP has not come into force as the United States officially declared its withdrawal from this Agreement in January 2017,[863] the tobacco carve-out provision has not been tested in arbitral practice and it remains to be seen whether this exception to standards of investment protection will follow the faith of taxation carve-out in its occasionally broad interpretation by arbitral tribunals.

When considering how to strike an appropriate balance between the interests of the state (i.e. to enforce criminal law to combat crime and corruption) and private individuals (i.e. inviolability of private property, protection of due process rights in arbitral settlement of disputes with sovereign states and state entities), it is important to distinguish two categories of investment arbitration disputes potentially implicating the host states' power to enforce their criminal laws. First, claimants may argue that the conduct of criminal proceedings or of a criminal trial violates substantive provisions of an applicable international investment agreement (IIA) because it amounts to expropriation of the claimants' investment or constitutes a breach of the fair and

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[862] *Trans-Pacific Partnership Agreement*, 4 February 2016 [*TPP*], Article 29.5 ("A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed"), online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/29.aspx?lang=eng>, last accessed on 28 December 2018; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, entered into force on 30 December 2018 [*CPTPP*], online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>, last accessed on 28 December 2018.

[863] Office of the United States Trade Representative, "The United States Officially Withdraws from the Trans-Pacific Partnership" (January 2017), online: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>, last accessed on 28 December 2018. Subsequently, on 8 March 2018, the remaining eleven signatories to the TPP (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) signed the CPTTP, which entered into force on 30 December 2018 among the first six countries to ratify this agreement. *See* Government of Canada, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)", online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>, last accessed on 28 December 2018.

equitable treatment (FET) or full protection and security (FPS) standards. In such cases measures purportedly aimed at the enforcement of criminal laws constitute the subject matter of the investors' claim against the host state, and the investors seek compensation for the wrongs they allegedly suffered as a result of the activities of the host states' law enforcement officials.[864] Critics may argue that the ISDS system thus has a "chilling effect" on the global fight against crime and corruption as puts a heavy price tag on the enforcement of criminal law by sovereign states. Furthermore, given that majority of arbitrators come from private law background, it may be inappropriate to allow them to act as a quasi-human rights court.

Secondly, there are cases where the host state's conduct giving rise to the dispute is unrelated to criminal law (for instance, expropriation of an enterprise, revocation of a mining license or casino license, discriminatory regulatory measures or a breach of an investment contract by the host state's agency), but at some point during the pendency of the dispute, the host state initiates criminal proceedings targeting the claimants or their subsidiaries, affiliates, officers and directors, employees or witnesses, and the claimants ask the tribunal to order the host state to stay or suspend these criminal proceedings.[865]

While the inclusion into IIAs of a carve-out for criminal law matters potentially could preclude arbitral tribunals from asserting their jurisdiction over the first type of claims (those directly based on the activities of the host states' law enforcement officials), their practical usefulness with respect to the latter categories of cases (those where the tribunals are called upon to make a pronouncement on criminal proceedings only to the extent they interfere with the resolution of the underlying economic dispute) is at best questionable. In the majority of investment arbitration cases where claimants requested the tribunal to order the state to stay related criminal proceedings, the core of the underlying dispute was economic and concerned revocation of mining licenses,[866] termination of oil exploration and production contracts,[867] cancellation of concession

[864] For examples of such cases, see Chapter 2 of this thesis.
[865] For examples of such cases, see Chapter 3 of this thesis.
[866] *Quiborax v Bolivia*, Award (16 September 2015), paras 7-34; *Churchill Mining v Indonesia*, Decision on Jurisdiction (24 February 2014), paras 6-47; *EuroGas v. Slovakia*, Procedural Order No 3 (23 June 2015), paras 38-45.
[867] *Caratube v Kazakhstan*, Award (5 June 2012), paras 2-4, 129-169.

agreements in the electricity sector,[868] expropriation of land,[869] nationalization of airlines,[870] tax treatment of the claimants' investment in the gaming and tourism industry,[871] as well as changes to the legislation governing revenue sharing from oil production[872] and employment of foreign workers and taxation of the sales of gold.[873] Even in cases where the host state's allegedly improper enforcement of its criminal laws (the launch of money laundering investigations and the issue of arrest warrants in *Hydro v Albania*,[874] and repeatedly opened and closed criminal investigation against the director of the claimant's subsidiary in *Tokios Tokeles v Ukraine*[875]) was among the measures complained of by the claimants, the conduct of criminal proceedings was just one out of several allegations of wrongdoing since the claimants also alleged that local tax authorities had treated their investments in an unduly harsh and oppressive manner while conducting tax audits and investigations.[876] In other words, in the vast majority of cases the tribunals had to deal with the claimants' requests for provisional measures affecting the conduct of criminal proceedings not because such criminal proceedings were in the focus of the dispute, but rather as an incidental matter.

Furthermore, in some investment arbitration cases host states acknowledged that arbitral tribunals may interfere with the conduct of criminal investigations and prosecutions. In particular, in *EuroGas v. Slovakia* the respondent did not "contest that exceptional circumstances may justify that an arbitral tribunal interfere with criminal proceedings",[877] but argued that particular circumstances of that case did not warrant such an interference, and in *Lao Holdings v Laos* the respondent consented to the provisional measures order prohibiting "any steps that would alter the *status quo ante* or aggravate the dispute", thus precluding it from pursuing a criminal investigation in

[868] *Libananco v Turkey*, Award (2 September 2011), paras 1, 88-96.
[869] *Von Pezold v Zimbabwe*, Award (28 July 2015), paras 2-3.
[870] *Teinver v Argentina*, Decision on Jurisdiction (21 December 2012), paras 2, 8.
[871] *Lao Holdings v Laos*, Decision on Jurisdiction (21 February 2014), paras 1, 15-61.
[872] *City Oriente v Ecuador*, Decision on Provisional Measures (19 November 2007), paras 2-9.
[873] *Paushok v Mongolia*, Award on Jurisdiction and Admissibility (28 April 2011), paras 94-181.
[874] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 1.4.
[875] *Tokios Tokeles v Ukraine*, Award (26 July 2007), paras 4, 58-60.
[876] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 1.4; *Tokios Tokeles v Ukraine*, Award (26 July 2007), paras 4, 46-57.
[877] *EuroGas v Slovakia*, Procedural Order No 3 (23 June 2015), para 81.

alleged criminal conduct of the claimant's employees and alleged corruption of the respondent's public officials.[878]

In sum, the most radical solution to prevent arbitrators from deciding on the matters relating to the conduct of criminal proceedings by host states' governments is to completely exclude criminal law matters from the scope of IIAs. Similar "carve-outs" have already been envisaged for taxation and tobacco-control measures, although such provisions are themselves often subject to exceptions and qualifications.[879] Furthermore, while interpreting such a "carve-out" provision, an arbitral tribunal may conclude that only *bona fide* criminal law enforcement measures are excluded from application of the treaty, whereas malicious prosecution and other abuses of investigatory and prosecutorial powers remain within the jurisdiction of the arbitrators. State parties, nevertheless, may still agree on a "strong" wording of a contemplated carve-out provision to ensure that disputes concerning criminal law matters are not within the scope of their consent to arbitration.

More importantly, whereas "carve-outs" may be a suitable solution for a situation where the claimant argues that the conduct of criminal proceedings violates *substantive provisions of an applicable IIA*, they are unlikely to be effective in cases where the host state's conduct giving rise to the dispute is unrelated to criminal law, but the claimant argues that subsequently initiated criminal proceedings threaten the procedural integrity of arbitration proceedings or undermine other due process rights. A possible solution would be for state parties to agree on an arbitration procedure that excludes the arbitral tribunal's power to order provisional measures affecting the conduct of criminal proceedings, but such a restriction may be viewed by investors as opening floodgates for abuses of their due process rights by the host state's law enforcement agencies.

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[878] *Lao Holdings v Laos*, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014), para 1.

[879] While there is a similarity between carve-outs for taxation and tobacco control measures, on the one hand, and for criminal law measures, on the other hand, since they both exclude an area from the tribunal's jurisdiction, the fundamental difference is that a criminal law exception, if implemented, could permit states to use their criminal powers to impede investors from bringing a wide range of claims, as well as grant states a procedural upper hand in arbitration proceedings.

1.2. Bringing Legitimacy to the System: From International Investment Arbitration to Investment Court System

The previous subsection addressed the question whether criminal law matters should be outside the jurisdiction of international tribunals because these issues properly belong to the jurisdiction of domestic courts. However, as demonstrated in Chapter 3, the ICJ has previously decided cases relating to criminal proceedings without attracting as much controversy as international investment arbitration. This section explores whether the shift from the ISDS system towards a multilateral investment court would help bring legitimacy to deciding on criminal law matters in the context of investment disputes.

Out of six ICJ cases analyzed in Chapter 3, in three cases both parties made declarations recognizing jurisdiction of the Court,[880] and in other three cases the ICJ based its jurisdiction on the Optional Protocol to the Vienna Convention on Consular Relations.[881] Also, in one case the applicant unsuccessfully sought to rely on the United Nations Convention against Transnational Organized Crime.[882] In other words, with exception of a failed attempt to invoke the UNTOC as a basis of the Court's jurisdiction, the ICJ had the necessary authority to decide on the requests for provisional measures implicating criminal proceedings either (i) with express consent of the other state or (ii)

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[880] *Arrest Warrant*, Order (8 December 2000), para 61; *Seizure and Detention of Certain Documents and Data*, Order (3 March 2014), para 21; *Certain Criminal Proceedings in France*, Order (17 June 2003), para 21 (in its application for provisional measures Congo proposed the jurisdiction of the ICJ on consent yet to be given by France, as provided for in Article 38(5) of the ICJ Rules, and France subsequently consented to the jurisdiction of the ICJ over this case). *Statute of the International Court of Justice*, 26 June 1945, 59 US Stat 1031, entered into force on 24 October 1945 [*ICJ Statute*], Article 36(2) provides that "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation."

[881] *LaGrand*, Order (3 March 1999), para 18; *Avena*, Order (5 February 2003), para 42; *Immunities and Criminal Proceedings*, Order (7 December 2016), paras 32, 69. *Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 487 [*Optional Protocol*], Article 1 provides that "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

[882] *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209, entered into force on 29 September 2003 [*UNTOC*], Article 35(2) ("Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.").

by ruling the dispute concerned interpretation and application of an international treaty, rather than exercise of the state's sovereign power to investigate and prosecute crimes. The ICJ made the latter point clear in *LaGrande* when the Court stated that:

> the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and … the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal.[883]

Subsequently, in *Avena*, the United States argued that, if granted, Mexico's request for provisional measures would "prejudice the sovereign right of the United States to operate its criminal justice system", "constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States", "amount to a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law", and transform the ICJ into a "general criminal court of appeal".[884] The Court, once again, was not persuaded by these arguments as it cited its earlier statement in *LaGrande* and concluded that the United States' arguments could not be accepted.[885]

If states have in the past entrusted (even if hesitantly at times) the ICJ – an international court – with decision-making power over the interpretation and application of international treaties having implications for the exercise of their sovereign authority in matters of criminal law, perhaps the adoption of an "investment court system" (ICS) and establishment of a multilateral investment court system could increase the legitimacy not only of settling international investment disputes outside of national courts, but also of a supranational body deciding on requests for provisional measures affecting the conduct of criminal proceedings.

In September 2015, Cecilia Malmström, European Commissioner for Trade, announced the proposal to create an ICS as "a modern and transparent system for resolving disputes

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[883] *LaGrand*, Order (3 March 1999), para 25.
[884] *Avena*, Order (5 February 2003), paras 32, 47.
[885] *Ibid*, para 48.

between investors and states".[886] She noted that "[s]ome have argued that the traditional ISDS model is private justice. What I'm setting out here is a public justice system – just like … the international courts which Europe has so actively promoted in the past."[887]

Investment arbitration has been subject to some sharp criticism and perceived as non-transparent, democratically unaccountable and biased in favor of foreign investors. As a general rule, international investment disputes are settled by private individuals chosen by the parties, the proceedings are confidential, the final award is binding and the recourse against the final award is very limited. Usually each party, i.e. the foreign investor and the host state, appoints its own arbitrator and the third arbitrator, who serves as a president of the tribunal, is jointly chosen by the parties themselves, or by two party-appointed arbitrators, or is appointed by an appointment authority chosen by the parties (for instance, by a particular court or a chamber of commerce). There are no restrictions on the qualification, nationality[888] or affiliation of potential arbitrators, so some private attorneys may wear "double hats", serving as an arbitrator in one investment arbitration dispute and as a party's legal counsel in another.

The proposed ICS seeks to remedy these perceived shortcomings. In particular, the European Union's proposal for the Transatlantic Trade and Investment Partnership (TTIP) investment chapter, the first embodiment of the ICS idea in a treaty text, to a significant extent modifies the traditional ISDS system.[889] First, if adopted, it would depart from the traditional one-level arbitration model with limited possibility to review the award, and would introduce a system somewhat similar to that of the WTO as it would establish a two-tier investment court comprised of the Tribunal of First Instance

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[886] Cecilia Malmström, "Proposing an Investment Court System" (European Commission, 16 September 2015), online: <https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en>, last accessed on 28 December 2018.

[887] *Ibid*.

[888] The ICSID Convention (Article 39) provides, however, that the majority of arbitrators on the tribunal have to be nationals of states other than the respondent state and the investor's home state (except in cases where the sole arbitrator, or each individual member of the tribunal, has been appointed by agreement of the parties).

[889] *Transatlantic Trade and Investment Partnership* (September 2015 Draft) [*TTIP*], Chapter II - Investment, online: <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>, last accessed on 28 December 2018. The author uses the TTIP as an example of an ICS because it constitutes the first attempt to implement the "investment court" idea in an international treaty between two major economies. The TTIP text, however, remains a proposal only and it is uncertain whether this treaty will ever be concluded.

and a permanent Appeal Tribunal.[890] Second, the ICS proposal in the TTIP draft provides for the appointment of "judges", rather than *ad hoc* arbitrators, and would introduce a nationality requirement. The Tribunal of First Instance would be comprised of fifteen judges appointed by the Services and Investment Committee to be established under the TTIP (five of the judges would be required to be nationals of EU member states, five – nationals of the United States, and other five – nationals of third countries)[891] and the Appeal Tribunal would consist of six judges, with EU members states, the United States and third countries equally represented.[892] Judges would be appointed for a six-year term, renewable once.[893] Third, the TTIP draft provides that judges would have to possess the qualifications required in their countries for appointment to judicial office (and members of the Appeal Tribunal would need to satisfy the requirements for appointment to the highest judicial office) or be "jurists of recognised competence",[894] with demonstrated expertise in public international law. Forth, the parties to an investment dispute would not be able to choose their own judges. Instead, for each case the President of the Tribunal of First Instance would appoint a panel of three judges (one national of a member state of the European Union, one national of the United States, and a chair of the panel-a third country national), ensuring that the composition of each panel is random and unpredictable.[895] Finally, the judges would not be allowed to act as a counsel in any other international investment dispute.[896]

Since the first announcement of the ICS proposal in September 2015, the European Union has already included this mechanism in the text of the EU-Vietnam Investment Protection Agreement[897] and of the Comprehensive Economic and Trade Agreement (CETA) with Canada.[898] The European Union's recent international investment

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[890] *Ibid*, Ch II, s 3, Arts 9, 10.
[891] *Ibid*, Art 9(2).
[892] *Ibid*, Art 10(2).
[893] *Ibid*, Arts 9(5), 10(5).
[894] *Ibid*, Arts 9(4), 10(7).
[895] *Ibid*, Arts 9(5),(6).
[896] *Ibid*, Art 11(1).
[897] *EU-Vietnam Investment Protection Agreement* (September 2018 Draft) [*EU-Vietnam IPA*], Arts 3.38, 3.39, 3.40, online: <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf>, last accessed on 28 December 2018.
[898] *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, OJ L 11/23 (2017), entered into force on 21 September 2017 [*CETA*], Arts 8.27, 8.28, 8.30, online:

agreements (IIAs) also contemplate the possibility that in future a multilateral treaty will be concluded establishing a multilateral investment tribunal (and possibly a multilateral appellate mechanism), so that parts of EU's IIAs dealing with the settlement of international investment disputes will cease to apply.[899] European Union's proposal to reform investor-state dispute settlement mechanism, including the possible creation of a multilateral investment court, received another boost in July 2017, when members of the United Nations Commission on International Trade Law (UNCITRAL) agreed that a Working Group will start discussing ISDS reform.[900] The European Commission, the driving force behind the ICS and multilateral investment court ideas, argues that such a court would be a permanent institution comprised of highly qualified, tenured judges, work transparently, remove the possibility for the parties to choose their judges, and provide for an appeal mechanism.[901]

In its present form, however, the EU's proposed ICS retains arbitration as its cornerstone.[902] First, as is the case with many existing IIAs, questions of procedure will be governed either (a) by the ICSID Convention and Rules of Procedure for Arbitration Proceedings or (a) by the UNCTRAL arbitration rules (or other rules of procedure agreed upon by the disputing parties).[903] Second, enforcement of the award will be "governed by the laws concerning the execution of judgments or awards in force where the execution is sought",[904] resulting in application of either the ICSID Convention or, in cases of non-ICSID arbitration proceedings, of the New York Convention.[905] Therefore, the ICS best

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<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng>, last accessed on 28 December 2018.

[899] See *TTIP*, Art 12; *EU-Vietnam Investment protection Agreement*, Art 3.41; *CETA*, Art. 8.29.

[900] European Commission, "UN agrees to start work on multilateral reform of investment dispute settlement", Factsheet (10 July 2017), online: <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf >, last accessed on 28 December 2018. For commentary on the multilateral investment court project, see Robert Howse, "Designing a Multilateral Investment Court: Issues and Options" (2017) 36 YB Eur L 209.

[901] European Commission, "The Multilateral Investment Court project" (10 October 2018), online: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>, last accessed on 28 December 2018.

[902] See August Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? - The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016) 19 J Int'l Economic L 761 at 768 ("[E]ven a semi-permanent dispute settlement institution with panel members that have been appointed by states and not by the parties to a specific dispute can qualify as arbitration.").

[903] *CETA*, Article 8.23(2); *EU-Vietnam IPA*, Article 3.33(2).

[904] *CETA*, Article 8.41(4); *EU-Vietnam IPA*, Article 3.57(5).

[905] Pursuant to *CETA*, Article 8.41(5), and *EU-Vietnam IPA*, Article 3.33(7), an award issued by the "investment court" will be deemed an arbitral award related to claims arising out of a commercial

fits within the multilocal (Westphalian) theory of international arbitration, which derives the validity of international arbitration from a multiplicity of national legal orders that recognize binding nature of the award and thus give it legal effect.[906]

Furthermore, these proposals do not directly affect the jurisdiction of a future investment court, whether bilateral or multilateral, to adjudicate disputes having implications for the enforcement of criminal laws. However, this shift from a private arbitration model towards a permanent international court for investment disputes may increase the overall legitimacy of international investment arbitration regime and, by implication, of provisional measures issued to preserve the claimants' procedural rights in such disputes. The shift from an arbitration-based ISDS towards an institutional ICS would thus respond to some of the criticism voiced the proponents of the global administrative law theory of international investment protection regime concerning the lack of transparency and accountability.

This, however, once again leads to an important caveat noted in the previous subsection: arbitral tribunals are called upon to decide on provisional measures not to preserve the claimants' substantive rights, but rather to protect the integrity of arbitration proceedings and the claimants' right to present their case without undue interference by the host state's government and law enforcement authorities. Necessary "ingredients" for the indication of provisional measures affecting the conduct of criminal proceedings include a close link between the criminal proceedings and the dispute being arbitrated, and the use of such criminal proceedings by the state to collect evidence for use in arbitration, to have a "chilling effect" on potential witnesses, or to intimidate or harass the claimants or persons affiliated with them.[907] In other words, by granting provisional measures affecting the conduct of criminal proceedings, an arbitral tribunal seeks to

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relationship for the purposes of the New York Convention, Article I. In turn, *CETA*, Article 8.41(6), and *EU-Vietnam IPA*, Article 3.33(8), provide that, if an investor submits its claim pursuant to the ICSID Convention, an award issued by the "investment court" will "qualify as an award" under ICSID Convention, Article 54(1) (which requires each State party to the ICSID Convention to "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State"). August Reinisch, *supra* note 902 at 785-786, concludes that, while inclusion of an "investment court" mechanism into an investment treaty constitutes a permissible *inter se* modification of the ICSID Convention, the resulting award would be enforceable under the New York Convention.

[906] For more details about theoretical approaches to international arbitration, see *supra* Chapter 1.1.

[907] Willems, *supra* note 27 at 7.

ensure a "level playing field" between a private entity and a state, to remove power imbalances caused by participation of a state in a privatized system of dispute resolution. However, as the next subchapter illustrates, international investment arbitration is not the only form of arbitration which involves sovereign states with their criminal law powers.

2. International Commercial Arbitration

2.1. Public-Private Arbitrations: An Elephant in the Room

The number of treaty-based investment arbitration disputes has been increasing in the past two decades, with 62 known new cases initiated in 2016[908] and 65 in 2017,[909] but is still relatively low if compared to the volume of international commercial arbitration cases. For instance, 810 new cases were filed with the International Court of Arbitration of the International Chamber of Commerce (ICC) over the course of 2017, and 15.4% of those cases involved states or state-owned entities.[910] In other words, the number of ICC-administered arbitrations involving states and state entities exceeds the number of known investment arbitration cases. Overall, Born estimates that more than 300 new international commercial arbitration cases involving states or state entities are initiated every year and explains that this trend results from practical considerations, such as neutrality of the arbitral forum and arbitral awards being easier to enforce against state assets than court judgments:

> In practice, many states and state-related entities must accept international arbitration as a necessary condition to concluding significant international commercial and financial transactions: unless the state accepts international

[908] UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (Geneva: United Nations, 2017) at xii, 114, online: <https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf>, last accessed on 28 December 2018.

[909] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (Geneva: United Nations, 2018), at xiii, 91, online: <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf>, last accessed on 28 December 2018.

[910] International Chamber of Commerce, "ICC Court releases full statistical report for 2017" (31 July 2018), online: <https://iccwbo.org/media-wall/news-speeches/icc-court-releases-full-statistical-report-for-2017/>, last accessed on 28 December 2018; International Chamber of Commerce, "2017 ICC Court Statistics: ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes" (31 July 2018), online: <https://www.flickr.com/photos/international-chamber-of-commerce/sets/72157694229086035>, last accessed on 28 December 2018.

> arbitration, it will not be able to conclude commercial arrangements, at least not with serious counter-parties.[911]

While investor-state dispute settlement has attracted significant attention and critics both from academic commentators and the public, "public-private arbitration", i.e. "arbitration between a public entity and a private entity under a contract which implicates the public interest",[912] has largely escaped public scrutiny and remains an "elephant in the room".

The rise of public-private arbitration is intrinsically linked with two trends in modern administration. First, governments routinely enter into contracts with private entities to provide services and perform functions traditionally viewed as public, prompting some commentators to speak about the rise of the "contracting state".[913] As a result of this "outsourcing" of formerly public functions to private entities, private actors play an increasingly important role in a number of spheres, including large infrastructure projects, healthcare (e.g., private hospitals and health insurance companies), social security and welfare (e.g., private pension funds and meal voucher systems), civil and criminal justice (e.g., private prisons, bailiffs, notaries and investigators), and security and defence (e.g., private security firms and military contractors). Modern governments may contract with private entities in such important and sensitive areas as production of national ID cards or development of border security infrastructure. Purchasing goods, services and works by governments also involves a sizable portion of public funds – for instance, in 2013 public procurement in OECD countries amounted to EUR 4.2 trillion and accounted for 12% of their GDP.[914] It should be noted that, due to high financial interests at stake, multiplicity of transactions and stakeholders, and complexity of the procurement process, which necessarily involves close interaction between public officials and commercial actors, public procurement is also among the sectors of

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[911] Born, *supra* note 3 at 92.

[912] Stavros L Brekoulakis & Margaret B Devaney, *Public-Private Arbitration and the Public Interest under English Law*, Legal Studies Research Paper 248/2016 (Queen Mary School of Law, 2016) at 8–9.

[913] Andreas Abegg, "The Legitimacy of the Contracting State" (2013) 76:2 Law and Contemporary Problems 139 at 139; Jody Freeman, "The Contracting State" (2000) 28:1 Florida State University Law Review 155 at 155–156.

[914] Organization for Economic Co-operation and Development (OECD), "Preventing Corruption in Public Procurement" (2016) at 5, online: <http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf>, last accessed on 28 December 2018.

government activity especially vulnerable to bribery and corruption.[915] In particular, out of 427 enforcement actions for the foreign bribery offence concluded by OECD countries between 15 February 1999 and 1 June 2014, in 57% of cases bribes were promised, offered or given to obtain a public procurement contract.[916]

The second factor contributing to the rise of public-private arbitration is the expansion of the doctrine of arbitrability. Overall, over the past four decades judicial practice and legislative amendments "have progressively narrowed the scope of the nonarbitrability doctrine and the subjects which are considered to be nonarbitrable",[917] and some commentators even argue that, "in recent years, the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability … has virtually died in real arbitral life."[918] It is now widely accepted that arbitrators may not only resolve disputes as to the formation and performance of contracts for the sale of goods, but also decide on claims involving questions of antitrust, competition and tax law, allegations of fraud and corruption, and claims arising out of natural resources projects and securities transactions.[919]

The combination of these two factors – the rise of the "contracting state" and the expansion of arbitrability – results in international arbitration, not litigation in national courts, being favored as a means for settlement of monetary disputes arising out of public-private contracts.[920] Public-private arbitration necessarily implicates the public interest because, first, disputes settled through public-private arbitrations concern the expenditure of public funds and distribution of public resources, and, second, they may affect the implementation of governmental policies in such sensitive sectors of the economy as healthcare, social assistance, immigration or national defence.[921] Inherent

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[915] *Ibid* at 6.

[916] OECD, "OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials" (2014) at 8, online: <http://www.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en>, last accessed on 28 December 2018.

[917] Born, *supra* note 3 at 973.

[918] Karim Abou Youssef, "The Death of Inarbitrability" in *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library (Kluwer Law International, 2009) 47 at 47, para 3.1.

[919] Born, *supra* note 3 at 973–1039; Brekoulakis & Devaney, *supra* note 912 at 5.

[920] Brekoulakis & Devaney, *supra* note 912 at 7; Guido Santiago Tawil, "On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine" in Albert Jan van den Berg, ed, *Arbitration Advocacy in Changing Times*, ICCA Congress Series 15 (Kluwer Law International, 2011) 325 at 340–341.

[921] Brekoulakis & Devaney, *supra* note 912 at 12.

vulnerability of public procurement to corruption, in addition to general risks of white collar crime associated with commercial transactions (e.g., fraud and embezzlement, tax evasion, money laundering, antitrust violations, infringement of intellectual property rights, etc.) creates a real possibility that arbitral tribunals will either deal with allegations of illegality raised by the "public" party to the administrative contract, or conduct arbitration proceedings in a situation where a private entity, its officers or employees, are subject to a criminal investigation conducted by the state where the state entity-party to the contract is located.

Chapter 1 of this thesis, which addressed the question whether arbitrators have a duty to suspend arbitration proceedings pending the outcome of a criminal investigation, concluded that modern theories of international arbitration (Westphalian and transnational approaches) do not require an automatic stay of arbitration and instead entrust arbitrators with a broad discretion to assess the circumstances of each individual dispute. While a different situation – one party to arbitration proceedings asking the tribunal to order the other party (a state) to suspend criminal proceedings until the economic dispute is finally resolved through arbitration – have been made in international investment cases discussed in Chapter 3, there seems to be no principled reason why such requests cannot be made in international commercial arbitration cases where one party is a state or a state entity. For instance, it is not unrealistic to envisage a scenario where a foreign company wins a lucrative bid to develop a piece of software for a larger e-government project implemented by a state-owned corporation, commences work, has a disagreement as to the scope of the agreement and terms of payment, files an arbitration case and finds itself under investigation for alleged forgery of bidding documents and bribery to secure the contract. Here the state entity is likely to request the tribunal to stay the proceedings to allow the government to finish its criminal investigations and use the evidence of contract illegality as a defence, whereas the private entity may view criminal proceedings as a tactical tool to intimidate and harass its witnesses and bully the private company into settling the case on more favorable terms or dropping it altogether.

In sum, the proliferation of public-private arbitrations has potentially drastic consequences for public interest, but remains outside the spotlight of mainstream media and academic discourse. The rise of the "contracting State" and the decline of the non-

arbitrability doctrine, coupled with inherent corruption risks in public procurement and globalization of white collar crime, inevitably leads to a situation where arbitral tribunals deciding on international *commercial* disputes (and not only foreign *investment* controversies) will be called upon to decide whether to shield a private party from a criminal investigation or prosecution.

2.2. Arbitration and Transparency

Brekoulakis and Devaney argue that transplantation of a private law arbitration mechanism into the realm of public-private contracts "leaves the public interest both unaccounted for, and unprotected, in public-private arbitrations".[922] The emphasis on party autonomy and confidentiality as foundational principles of international commercial arbitration, as well as limited review of arbitral awards by national courts, creates two particular dangers for the public interest: (i) the threat to openness, transparency and accountability of democratic government, and (ii) the risk that arbitral tribunals will not be guided by public law norms, including such fundamental doctrines of administrative law as *ultra vires* and the rule against fettering.[923] While the latter problem, which concerns the application of substantive rules in international arbitration, is outside the scope of thesis, the former issue – the lack of transparency – is especially important in cases involving allegations of illegality. Here international commercial arbitration may look to recent developments in investor-state dispute settlement, namely the adoption of the UNCITRAL Rules on Transparency[924] and the Mauritius Convention on Transparency.[925]

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[922] *Ibid* at 34.

[923] *Ibid* at 12–13, 41–44. Because capacity of local government and statutory corporations to enter into contracts is usually provided for (and limited) by their enabling legislation, a contract that is *ultra vires* ("beyond the powers") will be unenforceable: Nicholas Seddon, *Government Contracts: Federal, State and Local*, 4th ed (Sydney: The Federation Press, 2009) at 81-86. The rules against fettering provide that the government cannot by contract limit its *future* freedom to legislate and/or to undertake execute action, and a contract that infringes upon this freedom will be wholly or partially ineffective to the extent of the inconsistency with subsequently adopted legislation or executive act: *Ibid* at 234, 249-254.

[924] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective as of 1 April 2014 [*UNCITRAL Rules on Transparency*].

[925] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014, UNTS I-54749, entered into force on 18 October 2017 [*Mauritius Convention on Transparency*].

UNCITRAL Rules on Transparency were drafted and adopted in recognition of the "need for provisions on transparency in the settlement of … treaty-based investor-State disputes to take account of the public interest involved in such arbitrations" and with the aim to establish a "harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance".[926] They seek to increase transparency of treaty-based investment arbitration proceedings in two aspects, namely through (i) publication of documents and information at the commencement and throughout the course of arbitration proceedings,[927] and (ii) providing opportunity for non-disputing parties to file written submissions with the arbitral tribunal (i.e. so-called "amicus curiae briefs").[928] Most importantly for the purposes of this thesis, UNCITRAL Rules on Transparency require that any "written statements or written submissions" by the parties, as well as "orders, decisions and awards of the arbitral tribunal", be made public.[929] Accordingly, as a general rule, if an investor requests the tribunal to order the stay of criminal proceedings, then the request for provisional measures, the host state's response and the tribunal's order would all be publicly available. Furthermore, UNCITRAL Rules on Transparency provide that, after consultation with the disputing parties, the tribunal may allow third parties to file *amicus curiae* briefs regarding a matter in dispute.[930] Therefore, if an international investment dispute has potential implications for the enforcement of criminal laws and/or protection of human rights, a number of civil society organizations and other NGOs (for instance, Amnesty International, Human Rights Watch, American Civil Liberties Union or Transparency International) may file written submissions to "assist the arbitral tribunal … by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[931]

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[926] *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)*, 16 December 2013, UNGA Res 68/109 [*UNCITRAL Rules on Transparency*], online: UNCITRAL <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>, last accessed on 28 December 2018.

[927] *UNCITRAL Rules on Transparency*, Articles 2, 3.

[928] *Ibid*, Article 4.

[929] *Ibid*, Article 3(1).

[930] *Ibid*, Article 4(1).

[931] *Ibid*, Article 4(3)(b).

If considerations of public interest are to be taken seriously not only in treaty-based international investment arbitration, to which UNCITRAL Rules on Transparency apply, but also in public-private arbitration, then the application of rules on transparency and accountability should be extended to commercial arbitrations involving states and state entities. Such rules may be based on UNCITRAL Rules on Transparency and apply in cases where a certain monetary threshold is reached and one of the parties is a sovereign state, a sub-division of a state (a province, region, municipality, etc.) or a state-owned enterprise. It is also important to note that the contemplated shift towards an investment court system outlined in section 1.2 above would not increase the transparency of public-private arbitrations. Whereas ICS, once fully implemented, will deal only with *investment* disputes between foreign investors and sovereign states, public-private arbitrations are a broader category that also includes disputes over supply of goods and services not considered an "investment".

The concerns identified by theorists of international investment arbitration,[932] however, would remain equally valid with respect to provisional measures interfering with the conduct of criminal proceedings even if such measures are ordered by the tribunal in the context of international commercial (as opposed to investment) arbitration. One perspective would be to see this power as yet another instrument for foreign providers of goods of services from developed countries of the Global North to perpetuate inequalities in their relations with developing countries of the Global South by inhibiting the letter countries' right to investigate and prosecute crime within their territory. The global administrative law theory would caution against commercial arbitrators, individuals trained in resolving disputes between merchants, exercising supervisory functions over the conduct of criminal proceedings by sovereign states and against the tribunals acting as an appellate mechanism with respect to the decisions made by national law enforcement agencies. New constitutionalism scholars would warn that this power is nothing but an attempt by private panels of arbitrators to imposes quasi-constitutional constraints on states' powers in the sphere of criminal justice, in particular on the powers to interrogate witnesses, seize assets and documents, and arrest and extradite suspects.

[932] For more details, see *supra* Chapter 2.2.

Finally, advocates of the rule of law approach would emphasize the role that the arbitral tribunal's power to stay parallel criminal proceedings can play in ensuring the procedural equality of parties to the arbitration proceedings and in safeguarding fundamental human rights of the businesspeople pending resolution of economic disputes they have with foreign governments or state-owned enterprises.

3. Granting Provisional Measures Affecting the Conduct of Criminal Proceedings: Future Directions

Increasing the transparency of arbitral proceedings having implications for public interest will not, however, by itself significantly increase the legitimacy of arbitral tribunals interfering with the host state's exercise of their power to investigate and prosecute crime within their territory, even if such interference only takes a form of provisional measures temporarily suspending criminal proceedings. Therefore, in making their orders, arbitral tribunals have to act consistently, provide opportunity for the parties and other stakeholders to give their observations on the matter in dispute, and fully appreciate the totality of circumstances in each individual case. This subsection seeks to provide a basic set of guidelines that arbitrators may follow while considering whether or not to grant interim relief affecting the conduct of criminal proceedings.

In general, arbitral tribunals should be careful in the exercise of their power to interfere with the conduct of criminal proceedings. Here the principle that "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state",[933] first established in *Caratube v. Kazakhstan* and subsequently cited on at least four different occasions by other arbitral tribunals,[934] should also guide arbitrators deciding on provisional measures in commercial and non-ICSID investment arbitrations. When faced with a request for provisional measures, arbitral tribunals may follow the following four-step process.

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[933] *Caratube v Kazakhstan,* Decision Regarding Claimant's Application for Provisional Measures (31 July 2009), para 137.

[934] *Lao Holdings v Laos*, Ruling on the Motion to Amend Procedural Measures Order (30 May 2014), paras 10, 33, 35; *Churchill Mining v Indonesia*, Procedural Order No 14 (22 December 2014), para 72; *EuroGas v Slovakia*, Procedural Order No 3 (23 June 2015), para 82; *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 3.15. As there is no publicly available decision disagreeing with *Caratube v Kazakhstan* requirement for a "particularly high threshold", it appears to be unanimously recognized in arbitral jurisprudence.

First, the arbitrators have to establish whether there are ongoing criminal proceedings (an investigation, prosecution or court proceedings) or merely a threat of or unconfirmed information about the possibility that criminal proceedings may be commenced in future. In the former case, the tribunal should proceed to the next step. In latter case, the inquiry should end and the claimants' request for provisional measures denied, but the arbitrators should remain ready to deal with an updated request should the situation change and the threat of a criminal investigation materialize into pending criminal proceedings.

Second, to come within the ambit of the arbitral tribunal's powers, criminal proceedings have to be closely related, or at least "not divorced from",[935] the subject matter of the commercial or investment dispute. For instance, a tribunal should not grant claimants protection from a criminal investigation into a murder, sexual assault, non-payment of child support or other alleged wrongdoing having no connection to the economic dispute between the claimant and the state or state entity. Here arbitral tribunals may find some guidance in the ICJ jurisprudence and require a "link" between the provisional measures sought and the subject matter of the dispute.[936]

Third, the claimants have to clearly specify the rights in need of protection and the form of provisional measure sought. In broad terms, granting interim relief interfering with the conduct of criminal proceeding may be warranted if such proceedings inhibit the claimants' rights:

1) to confidentiality of communications with the claimants' legal counsel (for instance, if the claimant's or legal counsel's communications are intercepted or recorded by law enforcement agencies);
2) to present the claimants' case through documentary and other tangible evidence (for instance, in the circumstances where documents or materials are seized from the claimants' offices) or through the live testimony of witnesses (for instance, where current or potential witnesses are intimidated or harassed in the course of criminal proceedings) or to otherwise present the claimants' case (for

[935] *Hydro v Albania*, Order on Provisional Measures (3 March 2016), para 3.19.
[936] *Seizure and Detention of Certain Documents*, Order (3 March 2014), para 23; *Immunities and Criminal Proceedings*, Order (7 December 2016), para 72 ("a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought").

instance, if claimants are arrested, detained, otherwise restricted in their movement, subjected to prolonged interrogations or even threatened with the possibility of a death penalty); or

3) to procedural integrity of arbitration proceedings (for example, where criminal proceedings are initiated on the eve of an oral hearing and distract the claimants' resources from preparation to the hearing).

Fourth, the tribunal has to assess the urgency and necessity for granting interim relief.[937] In particular, the claimants have to adduce sufficient evidence that their rights would not be adequately protected by measures less invasive than the stay of criminal proceedings. For example, instead of ordering the host state to refrain from exercising its power to investigate and punish crimes, the tribunal may exercise its inherent power to assess the probative value of evidence furnished by the host state taking into account the source of such evidence, i.e. whether it resulted from coercive law enforcement actions or not. Also, where the law enforcement agencies seized documents or intercepted claimants' communications, the tribunal may order the state or state entity to refrain from adducing such evidence in arbitration proceedings and/or to return seized documents and materials to the claimants. The tribunal may also order any such evidence to be inadmissible.

Furthermore, if the tribunal does order interim relief affecting the conduct of criminal proceedings, it may also conduct periodic review of its order either on its own initiative or upon request by the state or state entity concerned, so that the claimants are not insulated from criminal proceedings for longer than necessary to ensure that the procedure employed to resolve the underlying commercial or investment dispute gives the parties full opportunity to present their case, respects their due process rights and treats the parties equally. For instance, the tribunal may revoke provisional measures once the arbitration proceedings are closed, but before the final award is issued.

In summary, although until now arbitral tribunals had to deal with the claimants' requests for provisional measures affecting the conduct of criminal proceedings only in the context of treaty-based *investor-state* disputes, similar considerations may arise in

[937] In doing so, the arbitrators may choose to rely on a more stringent test developed in the ICJ jurisprudence, rather than a more relaxed standard used in international commercial arbitrators.

commercial arbitrations involving states and state entities, which also have significant implications for public interest. While arbitrators should be deferential to the state's power to investigate and punish crimes within their territory in the quest to combat international crime and corruption, they may not be willfully blind in cases where this power is not exercised in good faith and is aimed at obtaining an unfair advantage over a private entity in a commercial or investment dispute. And because the rights protected through provisional measures affecting the conduct of criminal proceedings (for instance, the rights to non-aggravation of the dispute, procedural integrity of arbitration proceedings, and other due process rights) are not unique to international *investment* cases, the above framework is equally applicable to both commercial and investment disputes involving states and state entities. Such an approach would advance the optimism of the "humanity's law" (rule of law) approach to international arbitral dispute settlement by promoting peaceful and equitable settlement of international commercial and investment disputes, while simultaneously alleviating the concerns raised by new constitutionalism scholars about imposing excessive quasi-constitutional restraints upon the states' power to exercise their sovereignty in the sphere of criminal justice.

Conclusion: Provisional Measures in International Arbitration as a Response to Parallel Criminal Proceedings

The central subject of this thesis was the power of an arbitral tribunal to order a state to refrain from pursuing criminal proceedings against a commercial enterprise (an investor or a public procurement bidder, or its officers and directors, employees, suppliers or business partners) if such an investigation constitutes an abuse of power or an attempt to obtain an unfair procedural advantage or harass of the investor, rather than a legitimate exercise of the state's police power.

The first chapter addressed the nature of international arbitration and how different theoretical models may help to explain the limits of the arbitrators' adjudicative powers and the attitude of various national legal orders and domestic courts to arbitration agreements, proceedings and awards. It identified four major theoretical approaches to international arbitration. First, arbitration may be viewed as a judicial process anchored in one national legal order. This approach is based on the doctrine of legal positivism and the need to maintain order among different national legal systems. It treats an arbitral tribunal as a quasi-domestic court and emphasizes the power of nation states to regulate and oversee arbitration proceedings taking place within their territory. The practical effect of this theory may be seen in the decisions on the arbitrators' immunity, independence and impartiality, as well as in the "double exequatur" requirement embodied in the 1927 Geneva Convention. Second, arbitration is sometimes considered to be an offspring of a private contractual arrangement. This theory emphasizes party autonomy, privity of contract and consensual nature of international arbitration; only those persons and entities that consented to arbitration are bound by, and may benefit from, the arbitration agreement. Furthermore, some social and professional communities (for instance, those engaged in professional sports), may rely on arbitration as a mechanism to resolve intra-group disputes and have their own autonomous (non-state) structures for enforcing such decisions. Third, there is a view that arbitration has a hybrid nature, combining both contractual and jurisdictional elements, and derives its validity from several national legal orders where each nation state is free to decide on the faith of the arbitral award. This theory is grounded in the doctrine of legal positivism and the

Westphalian model of state sovereignty, and manifests itself in the diminished role of the courts of the seat in judicial control over arbitral awards and in the enforcement of arbitral awards set aside at the seat. Finally, the forth view postulates that legal force of arbitral awards comes from a "transnational arbitral legal order". This approach owes its existence primarily to the jurisprudence of French court, and "transnational law" in this context may be understood as a method for formulating an applicable rule on the basis of a comparative law analysis, rather than as a set of pre-determined rules.

Where criminal proceedings are commenced before or during the pendency of arbitration proceedings, the arbitrators may have to decide whether to stay the arbitration until the related criminal case is resolved or to continue the proceedings to resolve an underlying economic dispute between the parties. Different answers to this question may be explained by reference to different theoretical approaches to international arbitration. On the one hand, the jurisdictional/monolocal approach would not grant discretionary powers to the arbitrators and instead require them to put the public interest (i.e. the prosecution of crimes) before the private interest (speedy and cost-efficient resolution of commercial disputes). Secondly, the hybrid/Westphalian approach would lead to a conclusion that the arbitrators have a discretion whether to stay arbitration pending criminal investigation while each jurisdiction where enforcement of the award is sought may decide whether the arbitrators' decision with regard to the stay renders the award unenforceable. The autonomous/transnational approach in practice would lead to the same outcome as comparative analysis of the applicable legislation and court practice suggests that the "transnational rule" is to continue the arbitration rather to stay the proceedings pending the resolution of criminal proceedings. In theory, since arbitrators do not exercise judicial functions on behalf of any state and the award is not rooted in any national legal order, it would be inappropriate to require them to stay the arbitration proceedings pending resolution of the criminal case by the states' law enforcement authorities or in state courts. In reality, however, recognition and enforcement of arbitral awards is governed by the 1958 New York Convention and remains to be the domain of state courts.

The second chapter analyzed four different approaches to investment arbitration as a form of global governance. "Hegemonic international law" theory emphasizes the North-

South inequalities in investment relations, whereas global administrative law view prioritizes the need for greater transparency, accountability and democratic participation in investment arbitration, and new constitutionalism scholars warn that investment protection regime imposes quasi-constitutional constraints on host states' freedom to regulate. More optimistic commentators argue that investment protection regime may benefit from applying human rights norms.

Arbitral jurisprudence on the interaction between protection of foreign investment and states' power to conduct criminal proceedings, reviewed in the second chapter of this thesis, exhibits several trends that highlight the role of investment arbitration as a system of global governance. First, while tribunals have repeatedly stated that they are not human rights courts, the arbitrators on multiple occasions have accepted jurisdiction to rule on allegations of mistreatment and harassment in the context of criminal proceedings where such actions impaired the investors' ability to benefit from their investments. Second, decisions of various arbitral tribunals create a quasi-constitutional framework for the exercise of the states' power to investigate and prosecute crime and corruption. While arbitrators have repeatedly affirmed that every state is entitled to exercise this inherently public power, arbitral tribunals also formulated the limits on the manner in which states enforce their criminal laws. Third, tribunals have maintained that their task was not to apply domestic criminal law norms to a particular set of facts or to act as a court of final review in criminal matters. However, the arbitrators found that host states breached their obligations under applicable IIAs in cases where states failed to demonstrate that they had some reasonable basis to put coercive state apparatus in motion. In sum, arbitral jurisprudence confirms that tribunals readily accept the role of a private authority tasked with reviewing the exercise of such an inherently public function as enforcement of criminal law by sovereign states. While such review is limited in scope and the burden on the investor is rather high, the exercise of this power by arbitral tribunals has potential long-reaching implications for the state sovereignty and democratic accountability.

The third chapter focused on jurisprudence of the ICJ and various arbitral tribunals on provisional measures affecting the conduct of criminal proceedings. It started by exploring the purpose and types of provisional measures, prerequisites for granting them, and their binding nature. It explained that provisional measures are a remedy that may be

granted by an arbitral tribunal in order to protect the parties' rights pending final resolution of the dispute. In general, arbitral tribunals enjoy relative freedom in deciding on the type and scope of provisional measures to be ordered. However, because this thesis focuses on a specific subset of provisional measures – those that interfere with the conduct of criminal proceedings – rather than with provisional measures in general, it only deals with the jurisprudence on provisional measures aimed at protection of the parties' procedural rights, preservation of evidence and non-aggravation of the dispute, and does not address other categories of provisional measures, such as security for costs.

Importantly, both the ICJ Statute and the ICSID Convention provide for the power of the Court and ICSID arbitral tribunals to order provisional measures, and similar provisions are contained in the UNCITRAL Arbitration Rules that may be used in both international commercial and in international investment arbitration cases. Furthermore, decisions of the ICJ and awards of ICSID arbitral tribunals have confirmed that provisional measures are binding on the parties to the dispute. Therefore, the issue is how arbitral tribunals interpret this broad and general power to order provisional measures in cases where the claimant askes the tribunal to order the state to suspend criminal proceedings pending the resolution of the criminal case.

To answer this question, the thesis included a chronological overview of relevant ICJ and arbitral jurisprudence. First, it explored six ICJ cases where the Court had to address a request for provisional measures having implication for the conduct of criminal proceedings by a sovereign state. Three cases (*Arrest Warrant*, *Certain Criminal Proceedings in France*, and *Immunities and Criminal Proceedings*) involved attempts to halt criminal proceedings into alleged corruption and crimes perpetrated by high-ranked public officials. Another two cases (*LaGrand* and *Avena*) concerned the situation where foreign nationals were convicted and sentenced to death penalty without being accorded their rights under the VCCR. And *Seizure and Detention of Certain Documents and Data* involved an alleged attempt by one state party to use law enforcement and security agencies to gain a procedural upper hand in parallel arbitration proceedings. Secondly, it reviewed 12 investment arbitration cases brought under various BITs and conducted in accordance with both ICSID and UNCITRAL arbitration rules.

This thesis also identified key developments and trends in the aforementioned jurisprudence. One important takeaway is that provisional measures may be used not only to protect substantive rights under international investment agreements, but also to safeguard the parties' procedural rights common to arbitration proceedings under various, not necessarily ICSID, arbitration rules. Also, the spectrum of rights that may be protected by provisional measures affecting the conduct of criminal proceedings varies depending on the stage of the arbitration proceedings. Whereas at the earlier stages the investor's request for provisional measures may be aimed at preservation of evidence and prevention of possible harassment and intimidation of witnesses, at the later stages the investor is likely to request measures aimed at ensuring enforceability of the final award. Some other rights, such as safeguarding the procedural integrity of arbitration and preventing aggravation of the dispute, may need protection throughout the entire process of arbitral dispute settlement.

In general, claimants were more successful in obtaining provisional relief when they invoked procedural rights that are not unique to international investment regulation but relate to arbitral dispute settlement in general, namely the right to the preservation of the status quo and non-aggravation of the dispute, the right to procedural integrity of arbitration proceedings, and the right to confidentiality of documents and communication with legal counsel. Therefore, it appears that, if requested to order provisional measures interfering with the conduct of criminal proceedings, an arbitral tribunal in an international commercial arbitration case involving a state party would follow the same logic and guiding principles that arbitral tribunals in investor-state disputes have used in the past.

In sum, the arbitral jurisprudence on provisional measures affecting national criminal proceedings suggests that arbitral tribunals are willing to order host states to suspend criminal proceedings where there is a strong connection between such criminal investigation or prosecution, on the one hand, and pending arbitration proceedings, on the other hand, so that to create a threat of aggravation of the dispute or violation of procedural integrity of arbitration. This power, which has been exercised by arbitral tribunals in the context of investor-state disputes, appears to be rooted in the parties' agreement to submit their dispute to arbitration and rests upon general principles of

peaceful settlement of international disputes, rather than on rules applicable solely to international investment arbitration (for instance, exclusivity of ICSID arbitration or immunity of the parties pursuant to Articles 21-22 and 26 of the ICSID Convention).

Finally, the fourth chapter addressed the question how to balance the states' right (or even an obligation) to combat global corruption and crime, one the one hand, and the due process rights accorded to private entities when their commercial and investment disputes are resolved through international arbitration, on the other hand. It analyzed potential changes in international investment regime (including "carve-outs" for the matters of criminal law and the shift from international investment arbitration to a multilateral investment court) and international commercial arbitration that may improve the legitimacy of having transnational actors decide on the stay of criminal proceedings running in parallel with a commercial or investment dispute. It also provided a set of guidelines for the exercise of this power by arbitral tribunals in the future. In a nutshell, although until now arbitral tribunals had to deal with the claimants' requests for provisional measures affecting the conduct of criminal proceedings only in the context of treaty-based *investor-state* disputes, similar considerations may arise in *commercial* arbitrations involving states and state entities, which also have significant implications for public interest. While arbitrators should be deferential to the state's power to investigate and punish crimes within their territory in the quest to combat international crime and corruption, they may not be willfully blind in cases where this power is not exercised in good faith and is aimed at obtaining an unfair advantage over a private entity in a commercial or investment dispute. And because the rights protected through provisional measures affecting the conduct of criminal proceedings (for instance, the rights to non-aggravation of the dispute, procedural integrity of arbitration proceedings, and other due process rights) are not unique to international *investment* cases, the framework set out in the fourth chapter is equally applicable to both commercial and investment disputes involving states and state entities.

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