UNIVERSITÀ
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Scienze giuridiche

THE MOMENTUM OF DOMESTIC CRIMINAL PROCEEDINGS SUPERVISION THROUGH INVESTMENT TREATY ARBITRATION

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Agosto 2017
n. 79

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Università di Catania - *Online Working Paper* 2017/n. 79

URL: http://www.cde.unict.it/quadernieuropei/giuridiche/79_2017.pdf

Università degli Studi di Catania - *Online Working Paper*/ISSN 1973-7696
Il periodico è registrato presso il Tribunale di Catania, n. 15 del 22 ottobre 2013

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The Momentum of Domestic Criminal Proceedings Supervision Through Investment Treaty Arbitration

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Abstract

Gli arbitrati in materia di protezione degli investimenti costituiscono un soggetto interessante anche perché rimangono da definire in maniera chiara i rapporti con il diritto dell'Unione europea. Tali arbitrati hanno progressivamente assunto un rilievo crescente per la pratica legale penale in quanto i tribunali arbitrali mostrano di prendere in considerazione e, talora, emettere misure preliminari che interferiscono con procedimenti penali nello Stato ospitante. In passato, gli arbitrati in materia di investimenti sono stati accusati di sostenere gli interessi degli investitori stranieri e di essere veicolo per imporre regole neo-liberali. L'intrusione negli ambiti della giurisdizione penale ha inoltre suggerito l'idea di una strumentalizzazione degli arbitrati per sottrarre alla giustizia i dirigenti, quadri e consulenti di imprese multinazionali. Tuttavia, sebbene l'esercizio della giurisdizione da parte dei tribunali arbitrali sia in linea di massima apprezzabile e condivisibile, la base legale rimane discutibile e alcune recenti digressioni nell'ambito penale in arbitrati "intra-EU" aggiungono ulteriori dubbi.

Investor-State arbitration represents an intriguing topic whose relationship with EU law remains partially unsettled. It is becoming increasingly relevant for criminal law practitioners as the jurisprudence of arbitral tribunals shows to consider interim measures interfering with or impacting upon criminal investigations in the so called "host State". In the past, Investor-State arbitration has been accused of upholding economic interests of multi-national companies (MNC) against at the detriment of developing States and other values and purported as a vehicle of domination imposing "neo-liberal rule of law". The intrusions into spaces pertaining to the exercise of criminal jurisdiction by host States has further suggested a possible misuse to escape prosecution. Although the exercise of supervisory jurisdiction by arbitral tribunals jurisdiction may mostly be praised, its legal base is still questionable and some recent "intra-EU" digressions in the field of criminal law raise even more doubts.

Keywords

Trattati di investimento bilaterali - arbitrato tra Stato ed investitori esteri – ICSID – protezione diplomatica – *res iudicata* - aventi causa - giurisdizione di riesame - misure provvisorie - sospensione del procedimento penale - integrità del procedimento - esclusività dei rimedi - Unione europea - diritti dell'uomo - estradizione - esecuzione di decisioni arbitrali

Bilateral Investment Treaties - investor State arbitration – ICSID – diplomatic protection – *res iudicata* – privies - supervisory jurisdiction - interim measures – stay of criminal proceedings – integrity of the proceeding – Exclusiveness of remedies - European Union - human rights – extradition – enforcement of arbitral awards

THE MOMENTUM OF DOMESTIC CRIMINAL PROCEEDINGS SUPERVISION THROUGH INVESTMENT TREATY ARBITRATION

by Jean Paul Pierini[1]

1. Premise

Investor-State arbitration is for most criminal law practitioners a somehow exotic topic[2] which is becoming increasingly relevant because the jurisprudence of arbitral tribunals is progressively considering interim measures interfering with or impacting upon criminal investigations in the so called "host State".

Investor-State arbitration has been in the past accused of upholding economic interests of multi-national companies (MNC) against at the detriment of developing States and other values and purported as a vehicle of domination imposing "neo-liberal rule of law"[3]. The intrusions into spaces pertaining to the exercise of criminal jurisdiction by host States has further suggested a possible misuse to escape prosecution[4], weakening the fight against international corruption.

Investor-state arbitration represents a kind of "grand bargain" that capital-importing states make with capital-exporting states, by which the importing states voluntarily promise to provide legal protections to foreign capital in order to attract more such capital[5].

Daily criminal practice implies nowadays the need to preliminary check and assess the circumstances of a case having in mind the provisions, either substantive or procedural, of the European Human Rights Convention (ECHR). It also implies the development of courses of action for cases within the reach of the said convention, having in mind worst case scenarios implying an individual claim for the violations of the convention and assessing the perspective of the enforcement under domestic law of a finding of Human rights violation and how such enforcement could eventually be hampered by constitutional counter limits. The recourse to interim measures under the ECHR and the Court rules are relatively seldom.

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[1] This Paper represent a personal attempt to catch, as a non-specialist in the subject matter and from the perspective of criminal procedure, the elusive footprint of the relationship between International Treaty Arbitration and domestic criminal proceedings. The aim of the Paper is to progressively explore, within a wider project about "lawfare", the prospects of exploitation (but also abuse) of judicial proceedings for strategic purposes.

[2] B. WHITES, *About Lawfare: A Brief History of the Term and the Site*, at https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site.

[3] For an empirical analysis, *See* T. SCHULTZ, C. DUPONT, *Investment Arbitration: Promoting the Rule of Law or Over- empowering Investors? A Quantitative Empirical Study,* in *EJIL,* Vol. 25 no. 4 (2014), pp. 1147–1168. The Authors, conclude, at page 1168, that since the mid/late '90, «investment arbitration has seemed more oriented towards serving the function for which most international courts and tribunals are created – that is, to strengthen the international rule of law».

[4] This perspective is embraced by C. HAMBY, *The Court that Rules the World*, *Buzzfeed*, August 28, 2016, available at: https://www.buzzfeed.com/chrishamby/super-court?utm_term=.gmW7eAVBx , and suggests the idea of a «private, global super court that empowers corporations to bend countries to their will [and] operates unconstrained by precedent or any significant public oversight, often keeping its proceedings and sometimes even its decisions secret.».

[5] J. W. SALACUSE, N.P. SULLIVAN, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, in *HarvILJ,* 46 (2005) pp. 67, 77; quoted by A.B. SPALDING, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, *University of California, Davis*, Vol. 49 (2015), pp. 440, 447.

Similarly, the circumstances of a case criminal case are preliminarily evaluated having in mind the fundamental freedoms under the Treaty on European Union (TEU) and the Treaty on the functioning of the European Union (TFEU) and derivate legislation, imposing the disapplication of conflicting domestic legislation – even positive criminal provisions - and eventually requiring a preliminary ruling to interpret the said provisions. The said body of EU principles and rules may to some extent work at the accused's detriment and in such situations, could require an assessment in respect of eventual constitutional counter-limits impeding their application.

The later reference is to the case of the EU mandated disapplication of instrumental criminal provisions setting lapse of time to prosecute tax fraud affecting EU financial interests and impacting on a domestic understanding of the relationship between the legality principle and lapse of time for prosecution.

The above "interactions" between the ECHR and the EU legal systems framework on one side and domestic criminal proceedings are differently assessed based upon "how" the said legal systems are implemented and related to or integrated into the domestic legal order, to include eventually their constitutional or "quasi" constitutional status.

In an extreme simplification, the relations between the said legal systems is viewed as a matter of integration of different systems, the international (or supra-national) and the domestic one.

It is not the aim of this paper to examine the said relationship and it suffices here to observe that despite different views as to how the whole theoretic construction may be thought and fit together, interactions are - perhaps with the sole exceptions of those cases in which there is the perception of an invasive imposition of foreign values - regarded as an integrated system of values.

What is noteworthy such interactions between legal systems and between "courts" are not confined to academic debates, but part of ordinary daily application of criminal law. Much less is known and discussed about how the protection of foreign investments under bilateral investment treaties (BITs), which could in their dispute resolution phase impact on and interfere with domestic criminal prosecutions. Arbitral decisions ordering as an *interim* measure, the stay of criminal proceedings, are mainly discussed within a specialized legal literature about commercial and investment arbitration.

Such legal literature examines issues like the "threshold" for a decision interfering with a State's sovereign prerogative, as the exercise of itself criminal jurisdiction to include the fair and equitable character of criminal legislation enacted for the protection of financial, environmental[6] and other interests of the host State.

Currently two of these arbitral decisions have been adopted in respect of EU members States and are an expression of *intra*-EU BITs, which have come under the loupe of the EU Commission whilst the Court of Justice of the EU (CJEU) has yet to decide on the compatibility of such treaties with the provisions of the TFEU[7]. The enforcement of an *intra*-EU award blocked by an injunction issued by the EU Commission, has been stayed by a Court in the United Kingdom[8].

It is also worth observing that whilst the relationship of investor State arbitration and State to State arbitration for the protection of nationals has recently benefited from a renewed interest in legal scholarship, the said relationship is still unclear when it comes to the enforcement of such decisions.

The aim of this paper is to briefly examine in the second and third paragraph the nature of investment treaty arbitration (ITA) and its relationship with the EU legal framework. In the fourth paragraph, we will focus on the practice of arbitral tribunals dealing with requests to stay or set the rhythm for domestic criminal prosecutions, whilst in the fifth paragraph principles applied or claimed by arbitral tribunals will be considered critically.

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[6] Z. DOUGLAS, *The enforcement of environmental norms in investment treaty arbitration*, in *Harnessing Foreign Investment to Promote Environmental Protection. Incentives and Safeguards*, Edited by P.M. DUPUY, - J.E. VIÑUALES, 2013.

[7] E. MATEI, *Putting the cart before the horse: a doomed constitutional strategy for negotiating the T-TIP*, in *EULA*, August 20, 2015, http://eulawanalysis.blogspot.it/2015_08_01_archive.html.

[8] A this purpose, See A. Welsh, *The English court sidesteps intra-EU BIT complexities*, in *The Law of Nations*, January 31, 2017, https://lawofnationsblog.com/2017/01/31/english-court-sidesteps-intra-eu-bit-complexities. As pointed out by the A. the Court intervened upon request by the injuncted State, Romania, for the setting aside of the registration order of the award in the UK, in a phase technically preceding the enforcement.

2. The characterization of Investment Treaty Arbitration (ITA)

The legal nature of Investor State Dispute Settlement (ISDS) is quite controversial and mostly dealt by from a descriptive and pragmatic viewpoint.

2.1 The debate about the private v. public character of ITAs

On one side, there is the issue of the "private vs public" nature of the underlying disputes and the answer in the affirmative is a major reason why many, from the EU to the UN's Independent Expert on the Promotion of a Democratic and Equitable International Order, want to replace ISDS with an international investment court[9].

The public nature is asserted based upon the application by arbitrators of public international law and due to the intersections between the international investment regime and public international law[10]. Accordingly, ISDS as such is seen a wrong-headed attempt to "privatize" what should stay in the "public" domain that it violates the rule of law[11]; this despite its reliance in procedural rules and enforcement mechanisms developed in the context of private commercial arbitration[12].

It has also been observed that investor-State arbitration is mostly available to large scale investment contracts and to situations in which the investor has sufficient bargaining power to negotiate such protection, whilst «contractual solutions are unavailable to investors that make their investments based on a country's general investment legislation»[13].

Descriptive claims suggesting the public nature of ISDS include *inter alia* the "regulatory *relationship*" between States and investors, allegedly generates a "*global governance*" or a "*global administrative law*", actions are based on rights proclaimed in treaties and more notably that arbitrators «*engage in forms of review over public national law* [to include criminal law and its enforcement] *that resembles in form and outcome the quintessentially public constitutional or "judicial review" undertaken by supreme courts around the world*»[14]. Such review has been described as emulating form and impact of a constitutional adjudication[15].

The public law paradigm calls in its prescriptive implicates, for standards of review that are more deferential to State sovereignty and encourages greater role for national Court in terms of exhaustion of domestic remedies and/or judicial review over the enforcement of awards and consideration by Investor- States arbitrators that the investment law is not a self-contained public law regime[16]. Under this perspective, foreign investment contracts show sometimes the characters of a species of "economic development agreement".

Legitimacy challenges are strictly related with the claimed public nature of ISDS. On the other side, "privity" is asserted based upon the State's consent to arbitration and the enforcement mechanism which is often a common feature with private international commercial arbitration. Nevertheless, ITAs based on the ICSID Convention represent a significant departure from the private enforcement model.

The conduct most commonly challenged in ITAs includes the cancellation or the alleged violations of contracts and the denial or revocation of licenses.

A not infrequent feature of BITs is represented by "Stabilization clauses" preventing states from changing their laws to the detriment of the investor and correspondingly expanding the ambit of ISDS.

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[9] JOSÉ E. ALVAREZ, *Is Investor-State Arbitration 'Public'?*, *IILJ Working Paper* 2016/6 (GAL Series), https://ssrn.com/abstract=2820325, 1.

[10] On the specific aspect of direct binding effect of investor – State arbitral provisions in BITs, See J. PAULSSON, *Arbitration Without Privity*, 10, in *ICSIDRev–FILJ,* (1995), pp. 232, 256.

[11] JOSÉ E. ALVAREZ, *Is Investor-State Arbitration 'Public'?*, p. 3.

[12] *Ibidem*.

[13] S. SCHILL, *The Virtues of Investor-State Arbitration, EJIL: Talk!*, November 19, 2013, http://www.ejiltalk.org/the-virtues-of-investor-state-arbitration/

[14] Such claims are listed by A. ROBERTS, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, *Am. Jr. International Law*, 107 (2013), pp. 45-62. The A. ultimately concludes for the *sui generis* nature of ISDS.

[15] R. DOLZER, *The impact of International Investment Treaties on Domestic Administrative Law*, 37 *NYUJIL* (2006), p. 943.

[16] E. ALVAREZ, cit., p. 5.

Some BITs contain a so called "government clause", limiting or excluding dispute resolution mechanism established for merely "commercial breaches" of obligations and therefore drawing a distinction between private and commercial issues on one side and those issues involving the exercise of public powers on the other.

Further special features of ITA are asserted to be represented by the qualification of arbitrators, manly with an international law background (as opposed to World Trade Organizations - WTO - Panels) and principles of law applied and invoked in ISDS, which are basically principles of international public law[17]. Investment treaties traditionally coupled short and broadly worded obligations with strong enforcement mechanisms[18].

In the language of legalization theories, these investment treaties involved a high level of obligation and delegation, because they established legally binding commitments and delegated enforcement power to tribunals, but a low level of precision, because the commitments themselves are broad and vague (for example, the promise to treat investors fairly and equitably)[19].

2.2 The relationship between Investors – State arbitration and State to State arbitration and diplomatic protection.

Investment protection shows, over the years, a progressive shift from State to State dispute resolution, as usual under international law, friendship, commerce and navigation treaties, towards investor to State, providing investors with effectiveness remedies not conditioned by political concerns of the investor's home State[20].

The fact that several BITs contain separate clauses allowing for investor to State and State to State dispute resolution has called for an examination of the "interdependence" of the disputed rights[21]. As observed, such «development is highly controversial because it implicates fundamental but unresolved questions about which rights have been given to investors and which rights and powers have been retained by States»[22].

Interestingly the State to State dispute resolution clauses have been recently triggered by host States to bring interpretative claims or seeking declaratory relief in the form of an ascertainment that a treaty has or has not been violated after investors had already started arbitration proceedings.

According to a jurisdictional double track theory, «*investor-state tribunals have wide jurisdiction to interpret and apply the substantive provisions of investment treaties. State-to-state tribunals have limited jurisdiction over residual issues, such as the failure of a state to pay an investor-state award*»[23].

Consequently, the two arbitration tracks are alleged to be characterized by different jurisdiction *ratione personae* and *ratione materiae*, although the later differences do not emerge from the provisions enshrined in BITs[24], but are rather asserted based upon the circumstance that BITs create rights for third parties like the investors.

As observed in legal scholarship «a treaty regime may provide that a home state may no longer engage in diplomatic protection after its investor brings an investor-state claim, as is specified by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention", art. 27)», but such a clause does not exist in most BITs[25]. Its *rationale* is rather argued from the presumption in favor of investment protection and from the aim of the depoliticization of dispute resolution mechanisms[26]. At this purpose, it has also been observed that the

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[17] JOSÉ E. ALVAREZ, *Is Investor-State Arbitration 'Public'?*, *cit.*, p. 23.

[18] *Ibidem.*

[19] A. ROBERTS, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, in *AJIL*, 107 (2013), p. 76.

[20] A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* in *HarvILJ,* Vol. 55, numbered 1, 2014, p. 1.

[21] A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority, cit.*, p. 1.

[22] A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* cit., p. 1.

[23] *Ecuador v. United States, Expert Opinion with Respect to Jurisdiction of Professor W. MICHAEL REISMAN*, pp. 20-22.

[24] A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* cit., p. 11.

[25] A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* cit., p. 15.

[26] At this purpose, See M. PAPARINSKIS, *Limits of Depoliticisation in Contemporary Investor-State Arbitration*, in *Select Proceedings of the European Society of International Law*, 3, pp. 271-282.

scope of depoliticization was not exhausted by the protection of investors, but realized also, in the ICSID Convention, the aim of the protection of less powerful host States in respect of powerful investor home States[27].

Article 16 of the Draft Articles on Diplomatic Protection[28] states that «the rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected» by the draft articles[29].

The subsequent article 17 of the Draft Articles on Diplomatic Protection, states that «the present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments». The Commentaries observe that some treaties dealing with the protection of foreign investment contain «special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection» and further that such rules «*abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies*». The commentaries finally observe that «the dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection».

Construed as "independent", the joint rights of investors and home states could, in the event of a violation, give rise to independent claims, one not foreclosing or affecting a claim by the other and no issues of res judicata would arise because the claims would be understood as involving different claimants (the investor and the host state) and different causes of action (violation of the investor's rights and violation of the home state's rights), although the remedies sought may identical[30]. A mitigation of the "independence" construction could be represented by equity preventing double recovery of damages; an aspect which has been recently neglected by the ECtHR (*infra*).

A conceptualization of the shared rights of the investor and the investor's home State as "interdependent" may avoid some inconsistencies of the construction of such rights as "independent". Specifically, as «substantive investment treaty rights are held jointly by investors and their home states, investor-state and state-to-state arbitration should be understood as two avenues for redressing violations of the same substantive obligations … [and] either the investor or the home state, but generally not both, could bring a claim, as one claim would preclude the other»[31].

The "interdependence" patterns have been claimed to be suitable for analysis with respect to the doctrines of *res judicata* or *lis pendens* and alternatively with the doctrine of collateral estoppel or issue preclusion, preventing the re-litigation of findings concerning a right by a party or its privies where the issue was distinctly put before a previous tribunal, decided by it and the resolution of the issue was necessary to resolving the claims before previous tribunal[32].

The implications of the interdependence and the possibility to treat claims hierarchically (prioritizing either the investor's claim or state's claim), sequentially (prioritizing the first-in-time claim), or somewhere in between[33] remains unsettled in most cases where no express provision is to be found in the applicable treaty. An analysis should move from the nature of the relationship between the

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27 A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* cit., p. 16.

28 *Draft Articles on Diplomatic Protection with commentaries*, 2006, the text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). The commentaries on the draft articles, are published in Yearbook of the International Law Commission, 2006, vol. II, Part Two.

29 *Draft Articles on Diplomatic Protection with commentaries*, 2006.

30 A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* cit., p. 40.

31 A. ROBERTS, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* cit., p. 43.

32 *Ibidem*.

33 *Ibidem*. The A. compares the provision to be found in the Organization for Economic Co-operation and Development (OECD), Draft Convention on the Protection on Foreign Property, of 1967, establishing priority for State to State arbitration (art.7) and the ICSID Convention embracing a "sequencing approach".

"shared rights" of the investor and the investor's home State and their respective claims, whilst the *res judicata* and *lis pendens* principles could eventually support an assessment of the consequences of a prior finding and/or claim.

Perhaps, the definition of "privies" is key in international as it is under domestic law for the understanding of the essence of the interdependence of the shared right[34] and the different interests between investors and investor's home States. The latter ones could embrace general security concerns, views about the interpretation of the BIT, but could also diverge from those of the investor when its home State supports the exercise of the same regulatory powers exercised by the host State to the alleged detriment of the investor[35]. The last-mentioned perspective may eventually apply also to the interest of the home State to the preservation of criminal jurisdiction from interferences deriving from interim measures adopted in ISDS.

As to privity, the expanded concept applies ordinarily to mutual or subsequent relationship in the same right of property and in certain cases dealt by domestic law to relationships as ancestor-heir, assignor-assignee, attorney-client, bailor-bailee, husband-wife, and principal-agent[36]. Non-parties may further be bound domestically under the theory of "virtual representation"[37] on a basis other than privity.

In legal literature, rights under BITs have been considered from an analytical perspective under different patterns, depending upon as direct rights (by analogy with human rights), as beneficiary rights (resulting from rights established under the law of treaties for third parties – the investors) and finally under "agent relationship" whereas the investor may exercise "delegated" diplomatic protection[38].

Each of the above construction entails some unexpected consequences. A construction articulating a "delegation" to the investor to exercise directly claims otherwise exercised by the home State[39] would, by equating claims brought by investors to those which could have been brought by home States, close the distance (if any) between investor – State disputes and those between States under international law.

This implies that rights would not be regarded, having in mind the wording article 33.2 of the *Draft Articles on State Responsibility*,[40] as accrued directly to the investors. A perspective which, as been observed in legal literature, is underscored by those arbitral tribunals relying, without additional explanation, on the obligation of States under Part two of the Draft Articles, and therefore implicitly treating the investor as an "agent" of his home State[41].

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[34] At this purpose, See J. K. MORRIS, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, in *CalLR*, 56, 1098 (1968), available at: http://scholarship.law.berkeley.edu/californialawreview/vol56/iss4/5. Recently on the topic of estoppel as construed in investment arbitration, *See* A. KULICK, *About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, in *The European Journal of International Law*, Vol. 27 no. 1, 107–128.

[35] For an analysis of the impact of international obligations under international trade law and international investment law on regulatory powers, See M. WAGNER, *Regulatory Space in International Trade Law and International Investment Law*, in *UPJIL*, Vol. 36, n. 1 (2014), p. 1.

[36] J. K. MORRIS, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, cit. p. 1098, p. 1101ff..

[37] D. SCHNEIDERMAN, *Listening to Investors (and Others): Audi Alteram Partem and the Future of International Investment Law*, in ARMAND DE MESTRAL (ed.), *Second Thoughts: Investor State Arbitration between Developed Democracies* (Montreal and Kingston: McGill-Queen's University Press, 2017), Available at SSRN: https://ssrn.com/abstract=2819838 .

[38] See M. PAPARINSKIS, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, *in EJIL*, Vol. 24 no. 2 (2013), p. 629 ff..

[39] Against this "derivative" model, supported mainly in *Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID, Case No. ARB(AF)/98/3, Award, June 26, 2003, para 233, Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge University Press, 2009, pp. 11-38.

[40] *Draft articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The Commentaries reads (95) as follows: "*In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State* … [t]*his is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected* … [i]*t is also true in the case of rights under bilateral or regional investment protection agreements.*".

[41] See M. PAPARINSKIS, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, in *EJIL*, p. 637.

2.3 Investment arbitration remedies under the loupe of the ECtHR

The nature of international arbitration under the Energy Charter Treaty and its relationship with an individual claim under the ECHR has surfaced emerged in the Case of *OAO Neftyanaya Kompaniya Yukos v. Russia*[42] which has been otherwise troubled, upon its just satisfaction follow, by a decision of the Constitutional Court of the Russian Federation invoking constitutional constraints preventing the enforcement of the decision. Nor the arbitration under the Energy Charter Treaty (under the uncertainties of its anticipated application compatibility clause) appears, to have incurred a more favorable fate (…)[43].

In the said case, after the admissibility decision, but prior to the hearing, the Court was informed that arbitration proceedings brought against the Russian Federation by the applicant company's former owners, were pending and considered that these developments raised an issue of the applicant company's compliance with the requirements of Article 35 para 2 (b) of the Convention.

Under the said Article, «The Court shall not deal with any application submitted under Article 34 that ... (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information».

The Russian Federation asserted that the applicant company had brought arbitration proceedings for the alleged breaches of the Energy Charter Treaty in the Permanent Court of Arbitration in The Hague (and that several arbitration proceedings brought against the Russian Federation by groups of minority shareholders under bilateral investment treaties) and invited the Court to discontinue the case under article 35, para 2 (b) of the Convention[44].

The applicant company denied any participation in and any knowledge of any other international proceedings that may be of relevance and invited the Court to rule that the parties in the proceedings before this Court (the applicant company) and in The Hague arbitration proceedings (the applicant company's controlling shareholders) were not the same[45] and further contended «that the arbitration proceedings in The Hague were conducted before *ad hoc* tribunals, constituted by the parties, and were not comparable to the Court in their structure, permanence or authority» and argued that its application complied with Article 35, para 2 (b) of the Convention and that any parallel proceedings should not undermine its case before the Court. The Court has clarified the legal framework by referring to prior decisions on rejection claims due to parallel applications to the (*olim*) Human Rights Council under the ICCPR[46] and prior applications to the organs of the ILO[47], to its decision on the competence of the Court to give an advisory opinion[48] as well as decisions excluding the rejection of the claim when confidential complaints were submitted by others than the applicant[49] and a complaint submitted by the applicant but to a non-governmental body[50].

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[42] ECtHR, 1st Section, *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, Application no. 14902/04, judgment September 20, 2011.

[43] M. ALTENKIRCH, J. FROHLOFF, *The Hague District Court Sets Aside Yukos Awards, Global Arbitration News*, April 26, 2016, https://globalarbitrationnews.com/the-hague-district-court-sets-aside-yukos-awards-20160426/.

[44] *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, cit., para 517.

[45] *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, cit., para 518.

[46] *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, Commission decision of 6 July 1992, Decisions and Reports (DR) 73, p. 214.

[47] *Cereceda Martin and Others v. Spain*, no. 16358/90, Commission decision of 12 October 1992.

[48] Decision on the competence of the Court to give an advisory opinion [GC], para 31, ECHR 2004-VI, para 31 … where the question if the CIS Commission was "another procedure", was synthetically addressed … and left open by not excluding «that the Court might have to consider in another procedure of international investigation or settlement».

[49] 1st Section, *Celniku v. Greece*, Application no. 21449/04, judgment July 5 2007, paras 39-41; 5th Section, *Peraldi v. France*, Application no. 2096/05, admissibility decision, 7 April 2009. Both decisions are related to parallel submissions by others than the applicant, under the Procedure established in 1970 by the ECOSOC Resolution 1503 (XLVIII) and subsequent modifications.

[50] *Lukanov v. Bulgaria* (dec.), 21915/93, Commission decision of 12 January 1995. In its decision, the Commission held that (then) article 27, para 1 (b) refers to judicial or quasi-judicial proceedings similar to those set up by the Convention and that the term "international investigation or settlement" refers to institutions and procedures set up by States, thus excluding non-governmental bodies. In the circumstances of the case, the prior complaint had been submitted to the Human Rights Committee of Inter-Parliamentary Union, an association of parliamentarians which qualified as a non-governmental organization.

The Court considered the issue «whether the case before it is substantially the same as a matter that has already been submitted to a parallel set of proceedings» to be preliminary in respect of the need to investigate the subsequent question «if the simultaneous proceedings may be seen as "another procedure of international investigation or settlement" within the meaning of Article 35, para 2 (b) of the Convention»? [51].

Subsequently, the Court resolved the first issue in the negative as it was clear that the cases were not «substantially the same within the meaning of Article 35 § 2 (b) of the Convention»[52] «despite certain similarities in the subject-matters of the ECtHR case and of the arbitration proceedings, the claimants in those arbitration proceedings are the applicant company's shareholders acting as investors, and not the [at the relevant time defunct] applicant company itself, which at that moment in time was still an independent legal entity»[53].

The keeping of the defunct applicant company in an "undead" status for purposes of ascertaining violations of the Convention may appear to some extent justified. The neglecting of the concurring arbitration by the shareholders in the "undead" company in subsequent "just satisfaction" decision[54], is appears less justified.

The entitlement to reparations awarded should have considered for excluding duplications the shareholder/investors would have "inherited". Instead, the Court shortly observed that «the case file contains no information regarding the enforcement of these awards" and did not "find it necessary to take this information into account in the context of the present judgment and at this stage of the proceedings».

The carefully weighted wording seems to article 35 para 2 (*b*) aimed preserving the exclusivity of claims under the ECHR and serving the need to avoid conflicting findings and holding that in the said case the "remedies" although originally not triggering the mentioned provisions, had become potentially concurring. The reference to the stage in which the decision was adopted leaves accordingly a door open to prevent duplications but also to ensure at least the enforcement of one decision awarding reparation. Beyond the above speculations, the nature of the investment arbitration under article 35 para 2 (*b*) remains unresolved.

3. The European Union legal framework and Bilateral Investment Treaties

The relationship between EU law and BITs is multi-facetted and shaped by the transfer of competencies to the EU and the proactive attitude of the EU Commission, the resilience of Member States competencies in respect of dispute solutions and derogations to jurisdiction and by the wider debate about ISDS.

The ECJ, in its opinion 2/15[55], has examined the Free Trade Agreement (FTA) between the European Union and the Republic of Singapore, a so called "New generation" trade agreement

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[51] *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, cit., para 522.

[52] *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, cit., para 523.

[53] *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, cit., para 524.

[54] ECtHR (former) 1st Section, *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, Application no. 14902/04, Judgment, Just satisfaction, July, 31 2014. The decision reads (paras 43 – 44) as follows «the respondent Government referred to various parallel proceedings allegedly brought by some of the applicant company's shareholders in other international fora, the Court notes that there have been two final arbitral awards in cases brought against the Russian Federation by a group of the applicant company's minority shareholders under bilateral investment treaties. These awards were made on 12 September 2010 and 20 July 2012 respectively by the Arbitration Institute of the Stockholm Chamber of Commerce. There is also a pending set of arbitration proceedings brought by the applicant company's majority shareholders … in which no final award has been adopted so far. As regards the former two cases, the Court would note that the case file contains no information regarding the enforcement of these awards. In such circumstances, the Court does not find it necessary to take this information into account in the context of the present judgment and at this stage of the proceedings. The Government's reference to the pending case is thus irrelevant».

[55] ECJ, Opinion 2/15 (Full Court), 16 May 2017, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=816546. On the opinion *See* A. ROBERTS, *A Turning of the Tide against ISDS?*, *EJIL Talk!*, May 19 2017, asserting that «In deciding that the European Union did not have exclusive competence to enter into agreements including ISDS clauses, the Court made it

negotiated after the entry into force of the EU and FEU Treaties[56] and containing provisions on the protection of investment which could extend to indirect foreign investment[57].

The words "foreign direct investment" in Article 207(1) TFEU is, according to the Court, an unequivocal expression of the intention not to include other foreign investment in the common commercial policy and commitments *vis-à-vis* a third States and therefore other foreign investment do not fall within the exclusive competence of the European Union pursuant to Article 3(1)(e) of the TFEU. The Court further clarified that only the protection of foreign direct investment and not its "admission" falls within the common commercial policy. As to arbitration and dispute solution, the ECJ held that the submission of a dispute to arbitration, without that Member State being able to oppose this, as such a regime, which removes disputes from the jurisdiction of the Courts of the Member States, cannot be of a purely ancillary nature and cannot, therefore, be established without the Member States' consent[58].

The opinion casts some light on the relationship between treaties EU and BITs negotiated by member States. EU "accession Protocols" contain so called "sunset clauses" for the termination of conflicting free trade agreements with third Countries. Article 351 of the TFEU, which governs the relationship between EU law and the preexisting treaties between Member States and non-EU States, establishes that rights and obligations arising from agreements prior to the entry into force of the ECC Treaty or the accession are not affected by the EU Treaties, nonetheless, to the extent that such agreements are incompatible with the EU treaties, Member States shall take all appropriate steps to eliminate the incompatibilities. The provision has been interpreted by some arbitral tribunals as inferring paradoxically a more lenient regime for the intra-EU BITs – check[59] in respect of BITs with third States.

At this purpose, it is worth observing that Regulation 1219/2012/EU, dealing with investment treaties between EU Member States and non-Member States, doesn't establish any general incompatibility, but rather «concrete examples relate for instance to the exclusive prerogatives of the Council to regulate capital movements under Article 64(2) TFEU or Article 75 TFEU». On the other side, a general incompatibility could undermine the efforts to establish a level playing field for outbound investment[60].

From a purely legal perspective the situation of double standards covering areas of law defining the very foundation of the Union – the economic freedoms and the trans-judicial dialogue based on sincere cooperation and mutual trust – may be direct threats to the political integrity and the autonomy of the EU legal order[61].

This consideration should apply *a fortiori* to situations impairing the mutual recognition of judicial decisions among Member States, by introducing forms of *ad hoc* scrutiny by arbitral tribunals, staying or otherwise conditioning the exercise criminal jurisdiction by a Member State eventually applying EU harmonized criminal law.

The fear that ITAs under BITs could be used by non-EU investors to challenge regulatory or administrative measures adopted by EU host States to comply with EU law, was already addressed in a 2003 Memorandum of Understanding between the EU Commission, the U.S. government and certain

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significantly more likely that the EU would jettison these clauses from its Free Trade Agreements (FTAs) and seek to conclude separate, parallel agreements dealing with dispute resolution».

[56] The opinion had been requested by the EU Commission to clarify the question if the Union have the requisite competence to sign and conclude alone the FTA, which provisions fall within the Union's exclusive competence? which fall within the Union's shared competence? And finally, if any provision of the agreement falls within the exclusive competence of the Member States?

[57] In its opinion 2/15, the Court recalled, 78, that «direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity […]. [a]cquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control».

[58] Opinion 2/15, 291, 292.

[59] *Ibidem*.

[60] *Ibidem*.

[61] *Ibidem*.

acceding states from Central and Eastern to challenge regulatory or administrative measures adopted by the Member States with the aim of complying with EU law[62]. The same consideration about investors challenging EU regulatory or administrative measures applied by an EU host State has turned into a strong argument for keeping ITAs due to difficulties for non-EU investors to protect otherwise their right within the EU legal framework. More specifically, the questions have been framed as to whether foreign investors affected by Member States and/or EU measures could effectively invoke the provisions of a free trade agreement before the CJEU to challenge the legality of EU acts pursuant to Article 263(4) TFEU, and/or before national jurisdictions, to challenge the validity of national law, to obtain an interpretation of EU law under Article 267 TFEU or challenge its validity under the same provision[63].

At this purpose it has been observed that «the EU judges remarked that, according to settled case law, the provisions of an international agreement to which the EU is a party can be relied on in support of an action for annulment of an act of secondary EU legislation only where the nature and broad logic of that agreement do not preclude it, and those provisions appear to be unconditional and sufficiently precise»[64], to argue that investors would face difficulties in directly relying on provisions of an EU agreement on protection of non-EU direct investment.

Accordingly, investor-State adjudication mechanism seems to be necessary, at least if the approach of the EU to the incorporation of international law in the EU system remains unchanged, i.e., as long as this mechanism is the only one currently capable of providing a direct procedural remedy to foreign investors[65].

The EU Commission has requested the termination of *intra*-EU Bits as relations between EU member States in the matter are, in the word of the CJEU in its advisory opinion 2/2013 on the EU accession to the ECHR, «governed by EU law to the exclusion, if EU law so requires, of any other law»[66].

With specific reference to ITAs, the presence of a clause on investor state dispute settlement (ISDS), is deemed to eventually involve "concerns of inequality before the law" as well as a limitation to the access of individuals to the judicial system of the EU.

Further, issues of substantive discrimination could be prompted by an «*alleged superior level of protection of investment under the BIT* [if] *compared with EU law*»[67].

Incidentally, as this paper focusses in interferences between ITA and criminal proceedings, it should be noticed that, the incompatibility of superior levels of protection under domestic laws has been specifically addressed by the CJEU in respect of the enforcement of the European Arrest Warrant (EAW)[68].

The clash between EU Regulations and rights exercised under intra-EU BITs has recently emerged with respect of the prohibition of State-Aid in the *Micula v. Romania* ICSID case decided under the 2003 Sweden-Romania BIT after that the EU Commission has prohibited the payment of the award and its enforcement under the "*Lucchini* jurisprudence" of the CJEU[69] as such payment - awarded

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[62] *Ibidem*.

[63] D. GALLO, F. NICOLA, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, in *FordhamILJ*, 38, (2016), p. 1081, p. 1097.

[64] D. GALLO, F. NICOLA, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, cit. p. 1099, referring to *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, Joined Cases C-404/12 P and C-405/12 P, [2015].

[65] D. GALLO, F. NICOLA, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, cit., p. 1102. The Authors refer, to this purpose, 1107, to *Eco Swiss China Time Ltd v. Benetton International NV*, Case C-126/97, [1999] E.C.R. 3055 arbitration voided by CJEU as award was issued in violation of EU anti-competition laws and that the enforcement of the award would be against public policy.

[66] E. MATEI, *Putting the cart before the horse: a doomed constitutional strategy for negotiating the T-TIP*, in *EULA*, August 20, 2015, http://eulawanalysis.blogspot.it/2015_08_01_archive.html.

[67] *Ibidem.*

[68] Case C-399/11 Meloni EU:C:2013:107. As observed by S. PEARS, *Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper? EU Law Analysis*, 12 November 2016, the judgment has placed a ceiling on the application of national human rights protection to resist execution of an EAW.

[69] Case C-119/05 *Lucchini,* EU:C:2007:434.

under an ITA as a matter of fair and equitable treatment with reference to an investment incentives scheme - was deemed to integrate a prohibited State-aid[70].

As known, under the said jurisprudence national courts are prevented from applying national law where the application of such law, to include provisions about the finality of judicial decisions, would have the effect of frustrating the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law. The *Micula*-decision of the Commission has been challenged in front of the EU Court of first instance and the case is pending but the enforcement of the award has been stayed in the UK[71].

Arbitral panels established pursuant to ISDS have addressed the question of the termination of *intra*-UE BITs under art. 59 of the Vienna Convention on the Law of Treaties (VCLT)[72].

Under the said provision a former treaty is to be considered terminated a later treaty among the parties relating to the same subject matter, must be either intended to govern the matter or be incompatible to the extent that the two treaties are not capable of being applied at the same time.

The relevant EU provisions sometimes alleged to prevent the application of *intra*-EU BITs have been often alleged to be represented by articles 18 (prohibition of discriminations of nationals of member States), 49 (right to establishment and prohibition of restrictions of rights of nationals of member States) and 63 (freedom of movements of capitals within the EU) of the TFEU, and in articles 16 (freedom to conduct business in accordance with EU laws) and 17 (prohibition of deprivation of property) of the Charter of Fundamental Rights.

The arbitral jurisprudence doesn't seem to consider the TFEU and the Charter of Fundamental Rights as not addressing the same subject matter as *intra*-EU BITs; accordingly, article 59 of the VCLT would not apply and an express termination procedure would be required[73].

The supervening incompatibility of ISDS established in *intra*-EU BITs is argued regarding to article 344 of the TFEU prohibiting the submission by member States of «a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein» and, as observed previously, also with reference to article 267 of the TFEU about the jurisdiction of the CJEU to give ruling about the interpretation of the EU treaties[74].

The incompatibility of specific provisions is relevant for the application of article 30(3) of the VCLT establishing, in a situation of incompatibility between provisions of non-terminated treaties between the same parties, the application of less recent treaties to the extent that they are non-incompatible with subsequent ones. Article 344 refers nonetheless to Member States and its applicability to ITAs would require considering such DR as "delegated" by the Host State of the investor to the investor itself.

4. The recent practice of arbitral tribunals dealing with applications requesting measures impacting on domestic criminal proceedings

The practice of arbitral tribunals to assert jurisdiction to hear (and sometimes grant) requests for interim measures requesting the stay of criminal proceedings in the host State against companies, shareholders, executives, employees, lawyers representing the investor and witnesses, is relatively

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[70] See Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania-Arbitral award *Micula v Romania* of 11 December 2013 (notified under document C(2015) 2112).

[71] Judgment rendered in *Micula v Romania* [2017] EWHC 31 (Comm).

[72] Most recently, See *Anglia Auto Accessories Limited v. The Czech Republic,* final award, 10 March 2017, Stockholm Chamber of Commerce, Arbitration case V 2014/181, p. 12.

[73] *Anglia Auto Accessories Limited v. The Czech Republic*, cit., 15.

[74] On the ability *in abstracto* of arbitral tribunals established under ICSID to refer questions, based upon the criteria developed by the jurisprudence of the ECJ see J. BASEDOW, *EU Law in International Arbitration: Referrals to the European Court of Justice*, in *JIA*, Vol. 32, (2015), pp. 367, 376 381. The A. has been recently quoted in the conclusions of the Advocate general Melchior Wathelet, March 17, 2016 in the cause C-567-14, available at: http://curia.europa.eu/juris/document/document.jsf?text=ICSID%2B&docid=175146&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=899634#Footnote34.

recent[75] and developed in the wake of the progressively anabolized invocation of inherent powers doctrine of international courts and tribunals.

Accordingly, arbitral tribunals have interpreted the notion of 'rights' expansively, just as they do the reference to "any" provisional measures[76].

Nevertheless, it is worth considering if certain wording safeguarding the application in an equitable and non-discriminatory manner by a host State its law relating to … criminal or penal offences don't provide a legal base for the devolution of the scrutiny of such application the arbitration mechanisms[77].

A comprehensive analysis conducted about requests[78] shows that among different right suitable of protection through interim measures, the forefront for such measures in cases of "parallel" criminal proceedings are sought (and sometimes granted) to «protect a party's procedural rights, including the right to preserve the status quo, to prevent the aggravation or exacerbation of the dispute, and to preserve the integrity of the arbitral proceedings»[79].

The preservation of the respective rights of either party is expressively mentioned by art. 47 of the ICSID Convention and further amplified under Rule 39 of the Rules of arbitration, as the subject of "interim measures" an arbitral tribunal may "recommend".

Tokios Tokelés v. Ukraine[80], was apparently the first case in which an investor sought a provisional measure ordering the respondent State to refrain from, suspend, and discontinue criminal proceedings instituted prior to the arbitration proceeding, against one of its executives; the requested measure, although argued to be within the jurisdiction of the arbitral tribunal was not granted because the claimant had failed to show urgency and necessity of the measure. Interestingly, the arbitral tribunal held that interim measures do not need to meet the jurisdictional requirement established in article 25 of the ICSID Convention, if the actions of the host State giving rise to the request «relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters»[81].

In the *Rompetrol Group NV v Romania* case, under the Netherlands – Romania BIT, the respondent State submitted that, to the extent that the claimant was seeking through the arbitration to terminate or to hinder legitimate criminal proceedings and investigations in Romania, that constitutes an abuse of the arbitral process and should not be entertained by the tribunal[82]. The tribunal held that «given that an ICSID tribunal, under the Washington Convention as interpreted, is bound to exercise a jurisdiction conferred on it», deciding nevertheless not to entertain the application to hear the dispute … «needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in the case-law under it»[83]. As the upon the claimant's clarification that it was challenging the way the criminal proceedings were being conducted but not the proceedings themselves, the abuse of process preliminary objection was no longer maintained by the respondent.

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[75] At the International Law Association's Biennial Conference in The Hague in 2010, the Committee on International Commercial Arbitration was mandated to study the topic of the inherent powers of arbitrators in international commercial arbitration. The final Report by the Committee was presented for the Biennial Conference in Washington, in April 2014, www.ila-hq.org/.../C3C11769-36E2-4E93-8FDA357AA1DABB2F, retrieved January 19, 2014.

[76] M. WILLEMS, *ICSID Arbitrators - The World's Policemen?, The Arbiter*, Fall 2015. Available at: https://www.andrewskurth.com/assets/pdf/article_1269.pdf

[77] Reference is Free Trade Agreement negotiated by the EU and Singapore.

[78] Reference is to H. G. BURNETT, J. 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,* 30, in *MdJIL*, 31 (2015). Available at: http://digitalcommons.law.umaryland.edu/mjil/vol30/iss1/5.

[79] H. G. BURNETT, J. 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,* cit., p. 31.

[80] *Tokios Tokelés v. Ukraine*, ICSID, Case No. ARB/02/18, Order No. 3, July 1, 2003.

[81] H. G. BURNETT, J. 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,* cit., p. 41.

[82] *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008. On the issue of abuse of process in arbitration, See E. GAILLARD, *Abuse of Process in International Arbitration*, *ICSID Review*, (2017), doi:10.1093/icsidreview/siw036, p. 11.

[83] *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, para 115.

The fact that criminal proceedings were initiated against executives of the investor when the investment arbitration had already been started eased the granting of the requested interim measure in the *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*[84] which was deemed to be urgent and necessary; in its decision, the arbitral tribunal held also that the procedural requirements established under art. 47 and Rule 39 were met as the host State was afforded with an opportunity to raise its observations[85]. Interestingly, the arbitral tribunal held the substantive law provisions contested in the claim by the investor were the same underlying the criminal complaints.

In the *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* case[86] the arbitral tribunal dealt with criminal proceedings related with the forgery of documents allegedly aimed at permitting to bring a claim under the relevant BIT against the co-claimant and part of the legal team of the claimant. The arbitral tribunal considered the criminal proceedings are related to this arbitration because both the conduct alleged and the harm allegedly caused relate closely to claimants standing as investors in the ICSID proceeding. The subject matter of the criminal proceedings related to the access to the arbitration and the criminal proceeding was itself part of the host State's defensive strategy[87]. The Respondent committed to collaborate with the claimants to grant access to documentary evidence and witnesses. Nevertheless, such guarantees were considered insufficient. The arbitral tribunal, while rejecting the contention that the criminal proceedings threatened the exclusivity of the arbitration, aggravated the dispute, or had modified the status quo ante, but granted the interim measures establishing that Respondent shall take all appropriate measures to suspend the relevant criminal proceedings and any other criminal proceedings directly related to the arbitration, until its completion or until reconsideration of this decision and that the Respondent shall also refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration[88].

Whilst in the previous case the defensive strategy went through a criminal investigation of facts prejudicial to the legitimation to claim under the BIT, in the *Bernhard von Pezold and Others v. Republic of Zimbabwe*[89] case, the host State relied on the threat to use means established under its criminal procedure to compel the disclosure of documents relevant to its defensive strategy in the arbitration and the tribunal issued an order to the host State to refrain from any further action threatening the integrity of the arbitral proceeding. The award in the case considered that the amendments to domestic legislation «also criminalized the continued possession or occupation of agricultural land expropriated pursuant to the amendment» and that «these steps did not constitute a "constraint" on due process, but rather its total elimination»[90].

Criminal proceedings in a third State were considered in the *Abaclat and Others v. Argentine* case[91] dealing with an alleged breach of the arbitral tribunals confidentiality rules set out in a prior procedural order. The claimants asked the tribunal to order the respondent «to immediately provide an accounting of its involvement in any and all criminal investigations [to include those in Italy] against claimants and

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[84] *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, paras 1–5 (Nov. 19, 2007). According to R. AGUIRRE LUZI, G. CASTELAN, *The Guide to Energy Arbitrations. International Energy Arbitrations, Criminal Proceedings and Provisional Measures*, October 2, 2015, in *GAR*, Available at http://globalarbitrationreview.com/chapter/1036054/international-energy-arbitrations, the City Oriente case was rather a "contract case under Equadorian law than an investment case".

[85] H. G. BURNETT, J. 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,* cit., p. 43.

[86] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID, Case No. ARB/06/2, Decision on Provisional Measures, para 4 (Feb. 26, 2010).

[87] H. G. BURNETT, J. 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,* cit., p. 45.

[88] *Ibidem*, V 1 - 3.

[89] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID, Case No. ARB/10/15, Directions Concerning Claimants' Application for Provisional Measures of 12 June 2012, 3 (June 13, 2012), available at: https://www.italaw.com/sites/default/files/case-documents/ita1024.pdf.

[90] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, award, (July 28, 2015), available at: https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf .

[91] *Abaclat and Others v. The Argentine Republic,* ICSID Case No. ARB/07/5, procedural order n. 13, (September 27, 2012).

former claimants» and to «to immediately discontinue, or cause to discontinue, all outside proceedings … with respect to confidential claimant documentation or any other issues related» to the arbitral proceeding[92]. The tribunal ruled about the respondent's obligation to provide the detailed information requested, but didn't order the discontinuance of the outside proceedings as it was not «*in a position to prohibit a Party from conducting criminal court proceedings before competent state authorities*»[93].

In the *Lao Holdings N.V. v. The Lao People's Democratic Republic*[94] case the arbitral tribunal enjoined the host State (investigating tax offenses and money laundering against the claimant and seeking the assistance from U.S. authorities) from taking any step which would broaden and aggravate the dispute between the parties and threaten the integrity of the arbitral process[95]. The case was also characterized by the abidance of the host State to the interim measure which later led to the dismissal of a request of the respondent for an amendment of the abided measure in the absence of new circumstances[96]. The parties later entered into a "settlement agreement"[97] establishing that «*Laos shall discontinue the current criminal investigations against Sanum / Savan Vegas and its management or other personnel and shall not reinstate such investigations provided that the terms and conditions agreed herein are duly and fully implemented by the Claimants*». Under the concept of the agreement the claimant would withdraw entirely from Laos and the Government wanted to see them gone and the money necessary to achieve this mutually desired objective would come from a third-party purchaser of the claimant's assets in Laos and the Government itself did not agree to pay any compensation.

In *Churchill Mining PLC v. Republic of Indonesia*[98]*,* the host State revoked mining licenses previously issued to the investor through their partnership with a local group of companies. Following the initiation of the arbitration preceding the host State started criminal proceedings against individuals belonging to the local partnership of the investor[99]. The interim measure requested, an order to be issued to the host State to refrain from criminal proceedings, was rejected as the "targeted" subjects were not party to the arbitration.

In the *Teinver S.A. et al v. the Argentine Republic* case[100], the claimants contended, when the final award was already pending in the proceeding, that respondent had threatened criminal prosecution against them, their representatives, lawyers and their funder. The arbitral tribunal observed that the criminal investigation, as described by the respondent, was based on the complaints and while its precise scope remained somewhat uncertain, it was closely connected with the arbitration and the issues before the Tribunal[101]. More specifically, the respondent alleged before that the claimants had attempted to mislead the tribunal and that the purpose behind the "assignment agreement and funding agreement" was to exclude from the insolvency proceedings in a third State any sums possibly awarded to claimants, thereby defrauding the creditors.

The arbitral tribunal while stressing that it had already been held by a number of arbitral tribunals, that the respondent State clearly has the sovereign right to conduct criminal investigations and it will usually require exceptional circumstances to justify the granting of provisional measures to

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92 Argentine Procurators had submitted to the Italian authorities tens of thousands of pages of confidential material from the ICSID arbitration.

93 *Abaclat and Others v. The Argentine Republic,* ICSID Case No. ARB/07/5, procedural order n. 13, cit., para 45 in reference to para 39.

94 *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 2 (May 30, 2014). Available at: http://arbitration.org/sites/default/files/awards/arb2466.pdf.

95 H. G. BURNETT, J. 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,* cit., p. 47.

96 On the decision, See J. CARTER, *ICSID tribunal refuses to allow state to recommence criminal investigation that would disrupt arbitration proceedings*, *International Arbitration Newsletter*, September 22, 2014.

97 *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID, Case No. ARB(AF)/12/6, Settlement Agreement, (June 15, 2014). Available at: http://arbitration.org/sites/default/files/awards/arb2467.pdf.

98 *Churchill Mining PLC v. Republic of Indonesia*, ICSID, Case No. ARB/12/14, Procedural Order No. 9, Provisional Measures, Provisional Measures, para 80 (July 8 2014).

99 H. G. BURNETT, J. 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,* cit., p. 48.

100 *Teinver S.A. et al v. the Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures (8 April 2016), 190, available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C520/DC7892_En.pdf .

101 *Teinver S.A. et al v. the Argentine Republic*, cit., 178.

suspend criminal proceedings by a State, in the end ordered that «*respondent refrain from publicizing the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by communications to the press or otherwise*»[102].

In addressing the immunity issue under Article 22 of the ICSID Convention, the tribunal held that «*even assuming that only the Funding Agreement were relevant to the Complaints and criminal investigation, there are serious, plausible grounds on which some, if not all, of claimants, their counsel, their court-appointed receivers and their funder are entitled to immunity*», but concluded not to be in a position to make a determination as whether the investigation includes counsel or the court-appointed receivers.

Hydro v. Albania[103], involved a claim by Italian investors in a hydroelectric plant and two television stations in Albania, based on allegations of regulatory harassment and discrimination. While the arbitration was underway, the Albanian government froze the investors' assets in the country and pursued criminal forgery, money laundering and tax evasion proceedings against the claimants, issued arrest warrants and initiated extradition proceedings in the United Kingdom[104]. The arbitral tribunal established pursuant to the BIT between Italy and Albania, considered the criminal proceedings a grave concern to the integrity of the proceeding and ordered the Respondent State to suspend the criminal proceeding until the issuance of a final award in the proceeding and to take all actions necessary to suspend the pending extradition proceedings until the issuance of a final award.

Upon interim measure, the extradition proceedings in the United Kingdom were stayed *sine die* by the district court[105] and the applicants could remain on bail. The District Court held the decision on *interim relief* the arbitral tribunal binding on Albania as it was "accepted by it" and thereof binding for the extradition tribunal and acknowledged an abuse of process by Albania. Subsequently the arbitral tribunal rejected a request by Albania for the modification of the prior order[106].

In a similar shape, in an unpublished decision in the *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus* case[107] (under the "intra EU" BIT between Greece and Cyprus) the arbitral tribunal issued an interim decision recommending the respondent State to delay until the completion of the proceeding the issuance European arrest warrant (EAW) for bribery against individuals related to the claim[108]. The delaying of the arrest warrants was justified by the need to allow the appearance of the applicants at the hearings of the arbitral tribunals as a matter of procedural integrity and the issuance of an arrest warrant was approved later[109].

In the *Italba Corporation v. Oriental Republic of Uruguay* case[110], the claimant informed the tribunal that, one of its witnesses, had received a notice to appear before a criminal court in host State in connection with the investigation associated testimony in the arbitration. In its application for interim measures, the claimant sought, *inter alia*, to enjoin the criminal prosecution in the host State of the said

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[102] *Teinver S.A. et al v. the Argentine Republic*, cit., 210, 239. Aggressive media campaign as a threat to the integrity of the proceeding has been addressed in *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia* (ICSID Case No. ARB/14/24), Decision - Respondent's Application for Provisional Measures, May 12 2016, available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/c3845/dc8212_en.pdf.

[103] *Hydro S.r.l. and others v. Republic of Albania*, (ICSID Case No. ARB/15/28), Order on provisional measures, March 3, 2016.

[104] J. M. ROBBINS, *Yes, We Can (Order a Country to Suspend Criminal Prosecution and Extradition): Hydro v. Albania Redux*, *Lexiology,* October 27, 2016.

[105] United Kingdom District Court, *Albania v. Mr. Becchetti and Mr. De Renzis*, Decision on request to stay the extradition proceeding, May 20, 2016, p. 43ff., p. 49.

[106] *Hydro S.r.l. and others v. Republic of Albania*, (ICSID Case No. ARB/15/28), Decision on Claimants' Request for a partial award and Respondent's Application for Revocation or modification of the order on Provisional Measures, September 1, 2016.

[107] *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, (ICSID Case No. ARB/13/27), Procedural Order No. 7, November 7, 2016.

[108] E. ANDREOU, *Zolotas to be extradited to Cyprus on Thursday*, *CyprusMail Online*, available at http://cyprus-mail.com/2016/12/22/zolotos-extradited-cyprus-thursday/ .

[109] E. HAZOU, *Greek suspect Magiras released on conditions*, *CyprusMail Online*, available at: http://cyprus-mail.com/2017/02/02/greek-suspect-magiras-released-conditions/; J. M. ROBBINS, *Another International Arbitral Tribunal Orders Extradition and Criminal Proceedings Halted*, in *International Arbitration*, September 22, 2016.

[110] *Italba Corporation v. Oriental Republic of Uruguay* (ICSID Case No. ARB/16/9), Decision on Claimant's Application for Provisional Measures and Temporary Relief, February 15, 2017, available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5306/DC9973_En.pdf.

individuals pending the resolution of this arbitration. In the proceeding, the respondent State recognized that the witnesses might also be called upon by claimant to assist in the preparation of its reply or testify at the oral hearings and, to avoid prejudice to claimant, stated to be prepared to guarantee that its investigation into the circumstances of the apparently forged signatures and fraudulent documents, regardless of its course, would not prevent either of the witnesses from participating in the preparation or presentation of the remainder of claimant's case. The tribunal recalled the need to assess *prima facie* jurisdiction, but as the respondent had agreed that its jurisdictional objection should have been determined at the same time as its defenses on the merits, in a final award, considered the respondent to have accepted that the Tribunal was vested with the necessary adjudicative powers to conduct this arbitration[111]. Ultimately the tribunal rejected the application for provisional measures and temporary relief filed by *Italba*[112].

Cases dealt under UNCITRAL Rules quoted in legal literature[113] include *Paushok v. The Government of Mongolia*[114] and the "set" of decisions issued in the *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*[115]. In the former case the arbitral tribunal granted the requested interim measure as criminal prosecution could aggravate the dispute. In the latter case the claimants, sought and obtained interim measures requesting to maintain the *status quo* and preventing the host State from continuing its criminal proceedings against the lawyers of the second mentioned company. A more recent case is represented by *Astro and South Asia Entertainment v. India*[116] in which the claimant alleged allegedly unfair and biased criminal investigation relating to the suspected biased investigations bribery by the claimants of Indian government officials.

5. Some consideration about applied principles

As pointed out in one of the latest decisions by the ICJ[117] the first contemporary international tribunal "*which explicitly held that its provisional measures are binding, was the Inter-American Court of Human Rights [IACtHR], which stated that the relevant provision of the Convention "makes it mandatory for the State to adopt the provisional measures ordered by this Tribunal*"[118]. Investment arbitration seems to have anticipated, to some extent, such an assertion despite a less compelling wording of the ICSID Convention. The meaning of the term "recommend" as juxtaposed to "order" has been addressed by arbitral tribunals established under the Convention[119] holding the said expressions to be equivalent. Incidentally, it

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111 *Italba Corporation v. Oriental Republic of Uruguay*, cit., 114. The fact that respondent has raised jurisdictional objections does not deprive the tribunal of its power to issue provisional measures, when prima facie jurisdiction is based on the consent between the claimant and the respondent has been affirmed in *Víctor Pey Casado and President Allende Foundation v. Republic of Chile ("Pey Casado v. Chile"),* ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001.

112 On the decision, See C. RAE, *ICSID Tribunal Upholds a State's Right to Investigate Criminality in Arbitral Proceedings*, Latham. London, April 20, 2017, available at: http://www.latham.london/2017/04/icsid-tribunal-upholds-a-states-right-to-investigate-criminality-in-arbitral-proceedings/ .

113 H. G. BURNETT, J. 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,* cit., p. 50.

114 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, paras 1-6 (Sept. 2, 2008).

115 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, pt. I, at 9 (Feb. 27, 2012).

116 Astro and South Asia Entertainment Holding Limited v. India, case details available at: http://investmentpolicyhub.unctad.org/ISDS/Details/735.

117 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Order of 19 April 2017, Request for the indication of Provisional Measures, Separate Opinion of Judge Cancado Trinidade, 5, quoting A. A. CANÇADO TRINDADE, "*The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)*", 24, *HRLJ* - Strasbourg/Kehl (2003) n. 5-8, pp. 162-168.

118 Reference of the quote was to the *case of the Constitutional Tribunal versus Peru, Provisional Measures of Protection*, Resolution of 14.08.2000.

119 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/06, Order on provisional measures, 74, May 8, 2009, quoting *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/06/21, Decision on Request for Provisional Measures, 28 October 1999, 9. In the later, the arbitral tribunal hold that «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

should be noted that recommended measures under ITAs have been recently compared with non-binding "communications" by the President of the International Court of Justice (ICJ) Rules of Court[120].

Almost all decisions, either granting or denying the requests for interim measures, tend to stress the fact that any pending investment arbitration as such does not deprive the host State of its criminal jurisdiction and that only exceptionally, whereas a "high threshold" is met, an order staying a criminal proceeding or enjoining the respondent from initiating or continuing criminal proceedings may be issued. Similar assertions have become, in the words of an arbitral tribunal, "trite" sayings[121].

Despite styled cautions and assurances of due regard towards sovereign States, the power of arbitral tribunals to issue such orders is asserted based upon the broader meaning of rights requiring protection and powers to issue, at least under the ICSID Convention, "any provisional measure" and interpretations asserting the binding character of such "recommended" measures.

The coherence between what is claimed as applicable standards and the evaluation of the factual situation determined by the criminal proceeding in the host States and its legal qualification appears, from the perspective of an outside observer, sometimes weak and more often merely formal.

Accordingly, it doesn't seem worth entertaining some recent case, whereas the declared standards include "urgency" and "proportionality", as in the *Hydro v. Albania* case[122], or consider proportionality in the context of the necessity requirement.

Formal differences in the listing of relevant standards between relevant decisions look rather distracting from the core question which is: "how could ISDS develop such a self-contained system, interfering with binding orders with sovereign State's prerogatives to exercise criminal jurisdiction and outrunning in smartness and timing human rights bodies and despite the weak wording of the applicable legal provisions?".

The above questions should not be raised because the answer appear to be too simple and may be expressed in one word: interests. Nonetheless, sticking by the question, it is possible consider some current trends.

It can be observed that upon the *Quiborax* and *Churchill Mining* arbitral tribunals determined that criminal proceedings could not threaten the right to non-exclusivity of ICSID proceedings *per se*[123] such assessment have become part of the reasoning of most decisions. In the former case the arbitral tribunal held nonetheless that «*although the criminal proceedings do not deal with the same subject matter as the ICSID proceeding, they are sufficiently related to merit the protection of Claimants rights to the non-aggravation of the dispute and the preservation of the status quo*»[124].

In its decision, the tribunal recalled prior decisions dealing with parallel bankruptcy proceeding[125] and established that «*it is not necessary for the criminal proceedings to deal with the same subject matter as the ICSID proceeding to constitute such "other remedy"* [under article 26], *and that it is sufficient that the proceedings refer to matters under consideration*».

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party to take a certain action, the difference is more apparent than real … The Tribunal does not believe the parties to the 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'».

120 C. MILES, S. RANGANATHAN, *Some Thoughts on the Jadhav Case: Jurisdiction, Merits, and the Effect of a Presidential Communication*, *EJIL Talk*, May 12 2017, https://www.ejiltalk.org/some-thoughts-on-the-jadhav-case-jurisdiction-merits-and-the-effect-of-a-presidential-communication/#more-15246 .

121 *Hydro S.r.l. and others v. Republic of Albania*, (ICSID Case No. ARB/15/28), Order on provisional measures, March 3, 2016, para 3.16.

122 *Hydro S.r.l. and others v. Republic of Albania*, (ICSID Case No. ARB/15/28), Order on provisional measures, March 3, 2016, para 3.11.

123 R. AGUIRRE LUZI, G. CASTELAN, *The Guide to Energy Arbitrations. International Energy Arbitrations, Criminal Proceedings and Provisional Measures*, cit., p. 10.

124 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, cit., para 133.

125 *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4 ("CSOB v. Slovak Republic"), Procedural Order No. 4 of 11 January 1999, preamble, available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/c160/dc561_en.pdf. The subsequent Procedural Order No. 5, date March 1, 2000, reaffirmed the prior decision suspending domestic insolvency proceedings and called for its enforcement.

Under article 26 of the ICSID Convention, consent to the arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy[126]. The provision is interpreted as excluding domestic proceedings[127] and to set «a rule of priority vis a vis other systems of adjudication in order to avoid contradictory decisions»[128]. The exclusivity of the arbitral proceeding remedy in the ICSID Convention is structured differently than under article 35 of the ECHR mentioned in paragraph 3, whereas the pursuance of "other remedies" by the claimant determines the inadmissibility of the claim[129]. The purpose of article 26 is to prevent parallel proceedings, either domestic or international, by the respondent once bound by consent to the arbitration.

The reach of the exclusivity of the arbitration *vis a vis* domestic proceedings is nevertheless to be assessed based upon the terms of the consent by the respondent State – which may be expressed through "direct agreement" with the investor, national legislation (outlining consent to arbitration) or a bilateral or multilateral treaty[130] – and ordinary principles about identity of the dispute and the parties.

The need to safeguard the integrity of the proceeding has proved to be easier to rely on even though the concept of the "integrity" of the proceeding[131], perhaps as a matter of fragmentation of international law, appears to be far more reaching in respect of investment arbitration, than under "ordinary" international law and obviously also in comparison with most domestic legal systems.

While the integrity of the proceeding may ordinarily be threatened by judicial misconduct and by misconduct by office holders, parties and witnesses and led international courts and tribunals to assert inherent jurisdiction, the integrity of arbitration proceedings encompasses the right to participate in proceeding. The arbitral tribunal in *Hydra v. Albania*[132] felt satisfied «that a real question ar[ose] in relation to the procedural integrity of the arbitral proceedings" and observed that "criminal proceedings have been brought against, inter alia … one of the claimants". Further "as a result of the arrest warrants, their possible incarceration in Albania would prevent [the claimants] from effectively managing their businesses, and fully participating in this arbitration».

The arbitral tribunal considered this «a grave concern to the procedural integrity of the proceeding" [133] and noted "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 murder». Further, the claimants' ability to effectively participate in the arbitration could not be adequately remedied by damages[134]. The arbitral

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126 The provision reads as follows: «Consent 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. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.».

127 According to C. SCHREUER, *Denunciation of the ICSID Convention and Consent to Arbitration*, in M. WAIBEL, A. KAUSHAL, KYO-HWA LIZ CHUNG, C. BALCHIN, *The Backlash against Investment Arbitration: Perceptions and Reality*, 361, «resort to domestic courts or to other forms of arbitration becomes unavailable, in principle, from the date of consent».

128 C. SCHREUER, in C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention. A Commentary,* 2 ed., Cambridge University Press, 2009, p. 359.

129 On the decision and on the perspective of arbitral tribunals, See G. CROISANT, *Are a Bilateral Investment Treaty Arbitration and a Proceeding Before the European Court of Human Rights Compatible?*, *Kluwer Arbitration Blog*, available at: http://kluwerarbitrationblog.com/2015/01/27/are-a-bilateral-investment-treaty-arbitration-and-a-proceeding-before-the-european-court-of-human-rights-compatible/. The A. recalls the flexible approach taken by *Yukos and Amto cases* (PCA Case No. AA 226, *Hulley Enterprises Ltd (Cyprus) and others v. Russia*, Interim award on jurisdiction and admissibility, 2009, paras 586 to 593; Final award, 2014, paras 1256 to 1272 / Arbitration Institute of the Stockholm Chamber of Commerce, n°080/2005, Amto v. Ukraine, 2008, p. 44.

130 Module prepared by C. SCHREUER at the request of the United Nations Conference on Trade and Development (UNCTAD), 2.3 Consent to Arbitration, UNCTAD/EDM/Misc.232/Add.2, Available at: http://unctad.org/en/docs/edmmisc232add2_en.pdf .

131 A. NEWCOMBE, *Criminal investigations and the right to the procedural integrity of arbitration proceedings, Kluwer Arbitration Blog*, April 5, 2010, available at: http://kluwerarbitrationblog.com/2010/04/05/criminal-investigations-and-the-right-to-the-procedural-integrity-of-arbitration-proceedings/ .

132 J. M. ROBBINS, *Yes, We Can (Order a Country to Suspend Criminal Prosecution and Extradition): Hydro v. Albania Redux*, *Lexiology,* October 27, 2016.

133 *Hydro S.r.l. and others v. Republic of Albania*, (ICSID Case No. ARB/15/28), Order on provisional measures, March 3, 2016, paras 3.18, 3.19.

134 A. NAIM, *Criminal Proceedings and Provisional Measures in ICSID Arbitrations: The Legitimate Exercise of a State's Police Powers Versus the Ability to Advance Claims in Arbitration*, *Kluwer Arbitration Blog*, April 30, 2016, available at:

tribunal's finding that «the alleged offences … are not divorced from the investments made by the claimants» together with stereotype findings on urgency and proportionality describe a routine rather than exceptional supervisory interference with domestic proceedings.

The need of a "plausible" link between the rights asserted and the measure sought has been affirmed by the ICJ[135]. The required relationship between the investors claim and the actions of the counterparts are not further defined by the arbitral tribunals and most legal systems would consider a domestic claim brought by an investor unrelated with criminal proceedings against one of its executives for tax fraud, environmental offenses. Further, investor's rights are separate from the fate of its executives in a criminal proceeding.

The decision in *Caratube International Oil Company LLP v. The Republic of Kazakhstan*[136] deemed the requested interim measure (asking for the suspension of criminal proceedings arising out of the continuing operations of oil wheels despite the withdrawal of the permits to run them) lacking the necessity and urgency requirements as the claim by the investor was for pecuniary damage and not for injunctive relief to continue operations.

The *Teinver* tribunal observed that despite the distinction between the rights at issue in an investment dispute and criminal proceedings, the exclusivity of the arbitral proceeding were infringed[137]. The tribunal held nevertheless that, as the outcome of the criminal proceedings did not bind the tribunal … even if the criminal investigation infringed on the exclusivity of the arbitral proceeding, it was unlikely to have any effect on the continuation of the arbitration and the award[138].

At this purpose, it is worth observing that the body of decision dealing with interim measures in some way interfering with criminal proceedings does not show the development of advanced patterns articulating how criminal proceedings in the host State may interlink with the object of the arbitration.

In some situations, the criminal provisions the host State attempted to enforce were part of the enacted laws that allegedly harmed the interest of the investor. In other cases, criminal proceedings were aimed at establishing forgery of documents which would have granted the right to trigger the arbitration of otherwise related with evidence to be submitted in the arbitration process. As a matter of fact, criminal proceedings for environmental offences may be strictly connected with counter-claims of the host State as well as those aimed at enforcing human rights obligations[139].

The fact that increasingly often, one party or another alleges that bribery of some kind played a part in the underlying transaction on which the arbitration turns should not come as a huge surprise as a plurality of arbitrations involve energy and mineral resources in places that would be considered the usual suspects in any corruption survey[140].

These issues first appeared in arbitration more than half a century ago. At the time, "consulting" agreements with third parties – the kind we warn clients today are red flags in international business transactions – were commonplace for companies seeking to do business with sovereigns and state-

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http://kluwerarbitrationblog.com/2016/04/30/criminal-proceedings-and-provisional-measures-in-icsid-arbitrations-the-legitimate-exercise-of-a-states-police-powers-versus-the-ability-to-advance-claims-in-arbitration/ .

135 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, p. 8, para. 31, where it reads that «the rights asserted by the party requesting provisional measures are at least plausible in the sense that a link must exist between the rights which form the subject of the proceedings and the provisional measures being sought».

136 *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, para 4 (July 31, 2009).

137 *Teinver S.A. et al v. the Argentine Republic*, cit., 194.

138 *Teinver S.A. et al v. the Argentine Republic*, cit., 196.

139 The recent *Urbaser v. Argentina* award triggered a debate about human rights counter-claims. At this purpose, See E. GUNTRIP, *Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, *EJIL: Talk!*, February 10, 2017, available at: https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/; A. YILMAZ-VASTARDIS, *Is International Investment Law moving the ball forward on IHRL obligations for business enterprises*?, EJIL: Talk!, May 15, 2017, available at: https://www.ejiltalk.org/is-international-investment-law-moving-the-ball-forward-on-ihrl-obligations-for-business-enterprises/ .

140 P. COHEN, *When Worlds collide: How International Arbitration Deals With Corruption*, *FCPA Professor*, September 2, 2014. At this purpose, See also H. RAESCHKE-KESSLER, D. GOTTWALD, *Corruption in Foreign Investment-Contracts and Dispute Settlement Between Investors, States, and Agents, 9 Journal of World Investment & Tade* 5, 15-16 (2008).

owned entities[141]. The decision came in 1963, fully 14 years before the enactment of the FCPA when bribing foreign officials was not yet a crime in the US and in most other Countries, but that did not make contracts for which the very purpose was corrupt enforceable. Several arbitral decisions followed in similar vein dealing with the issue of whether arbitrators could enforce contracts that effectively rewarded a party for funneling bribes to foreign officials[142].

In the later and most known case, the arbitral tribunal did not award any damages to the investor, *World Duty Free*[143] and the Kenyan government escaped liability for a wrongful taking; it did so by invoking a transaction in which its own President solicited and received a $2 million bribe for which, naturally, he was never prosecuted[144]. As observed by commenters, "*despite its proffered intent to help the poor and advance global anticorruption policy, the award does neither* [and] *in practice it will tend to do the opposite … creating an absolute defense for state officials who solicit and accept bribes exacerba*[ting] *existing imbalances and distortions in anti-bribery enforcement and ultimately undermin*[ing] *global anti-corruption policy*" [145].

To date, States have not been required to prosecute the alleged wrongdoers in order to raise successful jurisdictional and admissibility defenses based on corruption or other violations of law[146] on the other side non-investigation of corrupt practice by competitors in the host State has been considered a violation of the essential foundation of "favorable environment for investments"[147]. The fight against international corruption considers mainly the supply side of bribes whereas home States pursue bribe givers within their jurisdiction, but foreign public officials taking bribes are mostly beyond the reach of substantive criminal law provisions or, at least beyond the jurisdictional reach, of investors home States. Accordingly, the repression of international corruption is often "asymmetric" with the supply side pursued and bribe takers escaping liability, if not alleging foreign interferences. An exception is perhaps represented by those rare examples of prosecution of foreign public officials taking bribes, through charges like money laundry or the shifting of the boundaries between active and passive corruption, e.g. when the taker is instrumental to the further distribution of bribes[148].

Finally, the enforcement of interim measures staying or ordering to the host State to refrain from initiating criminal investigations and proceedings represents raise questions on its own. Apart from those cases in which the Respondent State voluntarily complied, provided (also in advance on the issuance of the measure) appropriate assurances or acknowledged in third State's court to be bound by the order, much is open to guesses. Little attention has been devoted to the aspect of the enforcement of such orders. Whilst the enforcement of a decision awarding damages against the host State could follow the private enforcement model, the enforcement of a "stay" of a criminal proceeding fits in an entirely different dimension. The enforcement of interim measures, if not complied by the concerned judicial authority seems to be best suited by traditional common law writs (as the writ of *mandamus* or the writ of prohibition), injunctions and/or declaratory relief established in the legal order of the host State.

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141 P. COHEN, *When Worlds collide: How International Arbitration Deals With Corruption*, cit.. The award is reprinted in reprinted in J. GILLIS WETTER, *Issues of Corruption Before International Arbitral Tribunals: the Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 Arbitration International, pp. 277, 282-94 (1994).

142 P. COHEN, *When Worlds collide: How International Arbitration Deals With Corruption*, cit..

143 *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, Oct. 4, 2006.

144 On the decision, See A.B. SPALDING, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, cit., p. 443. At this purpose, *See* also D. SCHIMMEL - A. MIRENDAY – S. TEWARIE, Bridging *the Cultural Gap in International Arbitrations Arising from FCPA Investigations*, *Fordham Int. Law Jr.,* Vol. 39 (2016), p. 829ff.

145 On the decision, See A.B. SPALDING, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, cit., p. 444.

146 B. GREENWALD, *The Viability of Corruption Defenses in Investment Arbitration When the State Does Not Prosecute*, *EJIL Talk!*, available at https://www.ejiltalk.org/the-viability-of-corruption-defenses-in-investment-arbitration-when-the-state-does-not-prosecute/. The A. relies on *World Duty Free Co. v. Republic of Kenya*, 180 – 181, and on Metal-Tech LTD v. The Republic of Uzbekistan, (ICSID Case No. ARB/10/3), Award, October 4, 2013, 308, 336.

147 *Strategic Infrasol and Thakur Family Trust v. India*, Notice of arbitration, unpublished.

148 The aspect mentioned in the text are the subject of a study analyzing the prospects of the repression of international corruption within the fight against international organized crime, J. P. PIERINI, *La corruzione passiva del pubblico ufficiale straniero. Repressione nell'ambito del contrasto della criminalità organizzata*, Giappichelli, Turin, 2016.

6. Towards a conclusion

The area in which the protection of foreign investment may entail the issuance of measures in some way interfering with criminal proceedings has shown to be wide and potentially widening.

Looking at the practice of host State it may be guessed that such area abstractly could stretch further to couple with the potentially abuse of instruments supporting the enforcement of domestic criminal law to exercise leverage over investors.

It is no wonder that abuse of prosecutions for further or other ends than the establishment of the rule of law is the daily question of most attempts to prevent extradition and judicial cooperation as such. Accordingly, it is no wonder too that host States sometimes rely on criminal proceedings to reinforce their positions in an arbitration proceeding or their determinations towards foreign investors. In this perspective, interim orders issue to prevent prejudice to the rights of investors, shareholders, executives, lawyers and so on, may be welcomed as an exercise of supervisory jurisdiction, keeping the criminal jurisdiction within their natural boundaries.

Although such supervisory jurisdiction may be praised and represent nowadays a choice to brief clients about, its legal base remains questionable and its assertions, once unconstrained be legal mantras, inchoate and substantially unconvincing[149].

From a strictly legal viewpoint the asserted insufficiency of the "exclusivity" of arbitration, which is now part of the usual strings of authorities relied upon in decisions, is surprising as the above provision in the ICSID Convention apparently provided the less vague legal argument. On the other side, it would have allowed for a distinction within different legal sources for under which ISDS is dealt. As observed in the previous paragraph, the integrity of the arbitral proceedings is endangered where a criminal proceeding closely related with the arbitration and specifically aimed at interfering with it or to harass or intimidate the claimant or its witnesses, although misconduct alone does not appear to be a sufficient jurisdictional basis[150]. If it was, by sure the protection of human rights wouldn't so often fail on jurisdictional grounds.

Nor the search for balances and boundaries for the exercise of the power to interfere with the criminal jurisdiction of host State, through the definition and setting of a threshold and corresponding requirements appears to suffice to legitimate the relevant jurisdiction. This doesn't prevent such measures from being nowadays ordinarily considered when foreign businesses involve threat or risk of criminal proceedings against individuals somehow related to the investor.

The circumstance that the exploitation of the potential of investment arbitration and interim measures have become part of the legal arsenal investors rely on - as a one of those moments in which practice develops and consolidates with unexpected speed - does not exclude the need for a further consideration of its legal implications and rather underlines the need for a rationalization.

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149 For an analysis on the use of interpretative arguments by ICSID tribunals, See K. FAUCHALD, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, in *EJIL*, Vol. 19 no. 2 (2008), p. 301ff..

150 M. WILLEMS, *ICSID Arbitrators - The World's Policemen?, cit.*