ECONOMIC CRIMES IN INTERNATIONAL INVESTMENT LAW

YARIK KRYVOI*

Abstract The protection of foreign investment by treaties often clashes with the State's sovereign right to investigate economic crimes committed by investors. This article examines the different approaches taken by tribunals to questions concerning admissibility and jurisdiction, applicable law, the standard of review, the burden and standard of proof and deference to actions taken by domestic courts and regulators related to economic crimes. It concludes that investors should not automatically be deprived of treaty protections and their access to investment arbitration blocked. The arbitration agreement, being autonomous from the main contract (or the relevant treaty), should, as a rule, remain valid even if the conduct of investors is tainted by economic crimes. The article calls on investment tribunals to reflect in their awards on the contributory fault of the parties when representatives of States and investors are both complicit in economic crimes. To achieve greater legal certainty and procedural efficiency, a new generation of investment treaties and the practice of investment tribunals should draw on not only applicable domestic law but also existing sources of international law concerning economic crimes or national best practice.

Keywords: Public international law, bribery, corruption, ICSID, international investment law, investor–State disputes, jurisdiction.

I. INTRODUCTION

When economic crimes are alleged to have occurred in an investor–State dispute, the State is not only a party to the arbitration but is also the entity which regulates, investigates, adjudicates and enforces in relation to such crimes within its territory.[1] Investigating and prosecuting economic crimes might, however, breach a State's international obligations, giving rise to a legal claim against it

* Senior Research Fellow in Investment Law and Director of the Investment Treaty Forum, British Institute of International and Comparative Law, y.kryvoi@biicl.org. The author wishes to thank Andrea Bjorklund, Jean Ho and Noah Robins for their comments on earlier versions of the paper as well as Anna Lanshakova, Caroline Balme and Anna Khalfaoui for their excellent research assistance as well as participants of the Twenty Eighth ITF Public Conference "Economic Crime and International Investment Law" for stimulating discussions.

[1] A United Nations specialized agency gives a broad definition of the term 'economic and financial crime' as any non-violent crime that results in a financial loss, see United Nations, Office on Drugs and Crime, 'Economic and Financial Crimes: Challenges to Sustainable

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from investors. Moreover, State representatives may themselves be involved in committing economic crimes such as bribery or money laundering.[2]

Although it is not the task of investor–State tribunals to prosecute investors for crimes, allegations of economic crime may have a profound impact on the disputes before them. Arbitration tribunals may decline jurisdiction or the admissibility of claims due to the investor's alleged involvement in economic crimes.[3] On the other hand, the largest ever investor–State award, of $50 billion in *Yukos v Russian Federation*, primarily concerned a criminal investigation of alleged tax evasion, fraud and embezzlement by the then largest Russian oil company.[4] The tribunal held that Russia's main objective was not to collect taxes but to bankrupt the investor and appropriate its valuable assets.[5]

The types of economic crimes which arise in investor–State disputes include bribery, tax evasion, bank, accounting and securities fraud, and other forms of misconduct.[6] Allegations of money laundering occur in the context of claims concerning the proceeds of crime, fake asset sales, intentional selling of overpriced goods, and reimbursement scams.[7] States can also initiate criminal proceedings as a defensive measure (eg to avoid jurisdiction or as a form of retaliation) and illegality may only be unearthed when a claim is asserted against the State.[8]

The initiation of criminal investigations is a sovereign act, but if such proceedings breach international legal standards, the State can be liable to pay damages.[9] Investor–State tribunals need to decide at the outset whether they have jurisdiction in cases where the underlying investment was acquired by illegal means, how far they should go in examining allegations of

Development' The Eleventh UN Congress on Crime Prevention and Criminal Justice (Bangkok, April 2005), available at <http://www.unis.unvienna.org/pdf/05-82108_E_5_pr_SFS.pdf> 7.

[2] An economic crime usually involves deviant behaviour not directed against individual interest, but against individual sectors of the economy and involves misuse of trust and power, see HJ Schneider, 'Economic Crime and Economic Criminal Law in the Federal Republic of Germany' in Hideo Utsuro (ed), *Report for 1986 and Resource Series No. 31: The United Nations Asia and Far East Institute, UNAFEI* (April 1987) 128–58 <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=115314>.

[3] *Metal-Tech Limited v Uzbekistan*, ICSID Case No ARB/10/3; *World Duty Free Company Limited v Kenya*, ICSID Case No ARB/00/7; *Inceysa Vallisoletana SL. v Republic of El Salvador*, ICSID Case No ARB/03/26; *Fraport AG Frankfurt Airport Service Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25; *Phoenix Action Limited v Czech Republic*, ICSID Case No ARB/06/5.

[4] *See Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA, UNCITRAL, Award (18 July 2014) para 778.

[5] ibid, para 579.

[6] R Bosworth-Davies and G Saltmarsh, 'Definition and Classification of Economic Crime' in J Reuvid (ed), *The Regulation and Prevention of Economic Crime Internationally* (Kogan Page 1995) 5–50.

[7] *The Rompetrol Group N.V. v Romania*, ICSID Case No ARB/06/3, Final Award (6 May 2013) para 46; *Dawood Rawar v the Republic of Mauritius*, UNCITRAL, Notice of Arbitration and Statement of Claim (9 November 2015) paras 59–60; *Hydro S.r.l and others v Republic of Albania*, ICSID Case No ARB/15/28, Order on Provisional Measures (3 March 2016) para 1.4.

[8] *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 (26 February 2010) para 122.

[9] ibid paras 271–272.

economic crimes, and what are the limits of their deference to proceedings and decisions of domestic courts.[10] Tribunals may also need to interfere with domestic criminal processes by recommending provisional measures which can be difficult to enforce.[11]

Domestic criminal proceedings may result in indirect expropriation,[12] denial of justice[13] or breach of the fair and equitable treatment standard.[14] But without the investigatory machinery of domestic law enforcement agencies, tribunals face challenges in obtaining evidence related to economic crimes. When the commission of an economic crime is proved, either by the investor or the State, how should this affect a tribunal's decision? Overall practice is inconsistent, ranging from exonerating the State from its responsibility for involvement in an economic crime to awarding investors significant amounts of compensation.

Corruption remains a major rule of law concern for investors deciding where to invest.[15] Over the last two decades, the international community has paid increasing attention to tackling economic crimes, including in the context of foreign investment at the regional[16] and global levels.[17] In addition to multilateral international conventions combating economic crimes, some States have recently concluded bilateral investment treaties with provisions expressly aimed at the prevention of economic crimes.[18]

[10] See Pt II.

[11] See Pt III.

[12] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA, UNCITRAL, Award (18 July 2014); *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No ARB/07/6; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN3467.

[13] See *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Award (26 July 2007) para 133.

[14] See *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, SCC Case No V (116/2010).

[15] British Institute of International and Comparative Law (BIICL) and Hogan Lovells, 'Risk and Return: Foreign Direct Investment and the Rule of Law' (3 June 2015) <https://www.biicl.org/newsitem/6112>.

[16] The draft 2016 Pan-African Investment Code includes innovative language combating bribery. United Nations. Economic Commission for Africa (2016-03). Draft Pan-African investment code. UN. ECA Committee of Experts (35th: March 31–April 2, 2016: Addis Ababa, Ethiopia), <https://repository.uneca.org/handle/10855/23009>.

[17] The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; Criminal Law Convention on Corruption 1999; United Nations Convention against Transnational Organized Crime and the Protocols Thereto 2001 (art 6 'Criminalization of the laundering of proceeds of crime' and art 8 'Criminalization of corruption'); United Nations Convention against Corruption 2004 (UNCAC) (art 15 'Bribery of national public officials', art 16 'Bribery of foreign public officials and officials of public international organizations', art 21 'Bribery in the private sector', art 14 'Measures to prevent money-laundering' and art 23 'Laundering of proceeds of crime').

[18] See for instance the 2016 Slovakia–Iran BIT whose preamble states that the parties are determined 'to prevent and combat corruption, including bribery, in international cooperation and investment and to promote corporate social accountability'. Art 14.2 further provides that the Tribunal shall dismiss a claim if the investor has committed fraud, tax evasion, corruption and bribery, or if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process. In a similar vein, the 2016 Morocco–Nigeria BIT (art 17) and the 2016 Brazil–Peru Economic and Trade Expansion Agreement (arts

Despite the international consensus that corruption, bribery, and money laundering constitute economic crimes, some tribunals have held that international regulations lack necessary detail or binding force.[19] As a result, tribunals often rely solely on national law to determine the impact of economic crimes on investor–State disputes. This article argues that treaty-makers and investment tribunals should rely not merely on domestic law but also on international law when determining the rights and obligations of States and investors. This would strengthen the legitimacy and predictability of the system of investor–State disputes.

This article explores the different approaches found in international investment law towards economic crimes and examines them in light of the public international law rules of State responsibility. Part II focuses on procedural questions, including issues of jurisdiction and admissibility, the standard of review and the standard of proof, as well as the issue of applicable law. Part III analyses the interaction between domestic criminal proceedings and international arbitration, with a particular focus on provisional measures. Parts IV and V look at States' international legal obligations concerning economic crimes, the attribution of misconduct to State officials and the contributory fault of investors. Part VI concludes by calling for treaty-makers and international tribunals to place greater reliance on international law relating to economic crimes to make the system of investor–State disputes more coherent and predictable.

II. PROCEDURAL ASPECTS OF ECONOMIC CRIMES IN INVESTOR–STATE DISPUTES

A. Issues of Jurisdiction and Admissibility

The boundary between jurisdiction and admissibility has become a controversial topic. Some tribunals have highlighted that allegations of economic crimes, such as corruption and money laundering, require close examination at the merits rather than dealing with them at the jurisdictional phase.[20] Other tribunals, struggling with the distinction between jurisdiction and admissibility, have avoided distinguishing between them at all. As one tribunal explained, there was 'no need to go into the possible—and somewhat controversial—distinction between jurisdiction and admissibility'

2.14 and 3.11) require each Party to ensure that measures are taken to combat corruption and entitle States to deny substantive protection to investments established or operating by way of illicit means, corruption, or other form of illegality. The 2015 Burkina Faso–Canada BIT expressly recognizes in its preamble 'the undertakings in the United Nations Convention against Corruption' and encourages corporate social responsibility through *inter alia* anti-corruption principles (art 16); so does the 2013 Colombia–Panama FTA (art 14.15).

[19] *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) para 607.

[20] *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims 2 (1 June 2012) para 99.

because the tribunal would, in any event, need to resolve the case on the basis of the objections raised by one of the parties.[21]

Another tribunal, in response to a challenge by the respondent to the admissibility of the claim, emphasized that it had no express power to dismiss a claim on the grounds of 'inadmissibility' under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or Chapter 11 of the North American Free Trade Agreement (NAFTA).[22] This approach has its merits, since arbitration regulations do not mention expressly the term 'admissibility' when referring to the claims of the parties. References to admissibility in arbitration rules usually relate to admissibility of evidence.[23] The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles on State Responsibility) provide that claims may be inadmissible if they are not brought in accordance with applicable rules relating to the nationality of claims, or if the rule concerning the exhaustion of local remedies applies and is available and effective local remedies have not yet been exhausted.[24]

Some authors distinguish between jurisdiction and admissibility, arguing that jurisdiction concerns the scope of the tribunal's authority,[25] based on the State's consent to arbitrate, while admissibility concerns 'the power of a tribunal to decide a case at a particular point of time in view of possible temporary or permanent defects of the claim'.[26] According to this view, admissibility refers to the question of whether the claim is ready for decision at this stage. This approach to admissibility appears similar to *ratione temporis* jurisdiction requirements in some investment treaties, which impose certain preconditions for the commencement of the arbitration.[27]

[21] *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 54. A similar approach was also followed in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, para 59.

[22] *Methanex Corporation v United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005) para 129.

[23] See art 34 of ICSID Arbitration Rules ('The Tribunal shall be the judge of the admissibility of any evidence and of its probative value').

[24] Responsibility of States for Internationally Wrongful Acts 2001, art 44 (Arbitral tribunals deciding on their own jurisdiction have generally allowed investors to bypass local remedies even under treaties lacking an explicit or implicit waiver of the exhaustion rule, although this trend seems to be changing with States reintroducing a mandatory requirement to pursue or exhaust local remedies), <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>. See IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law (The International Institute for Sustainable Development, 2017), <https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf>.

[25] See I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 475; Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) para 293.

[26] M Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Cambridge Legal Studies Research Paper Series, Paper No 9/2014 (February 2014).

[27] Such requirements may include notification of the host State of the dispute, compulsory negotiations before the commencement of the arbitration proceedings ('cooling-off' period) and exhaustion of domestic legal remedies.

Timing is important when distinguishing between jurisdiction and admissibility. Several tribunals have suggested that if fraud arose at the stage of acquiring an investment in a host State, investors might be barred from seeking protection before an investment arbitration tribunal as a jurisdictional matter.[28] The logic of this approach is that the State would never have approved the investment if it had known the facts which were misrepresented by the investor.[29] For example, in *Inceysa v El Salvador*, the tribunal determined that the investor had made a fraudulent misrepresentation by presenting false financial information during the initial bidding process.[30] It concluded that the 'investment' did not meet the condition of legality established in the articles setting out the scope of protection of the relevant bilateral investment treaty (BIT) and therefore declined jurisdiction.[31]

The distinction between jurisdiction and admissibility becomes less controversial if the alleged economic crime occurred after the investment had been made. According to the logic of the *Yukos* tribunal, if the investor acted illegally after making the investment, the host State can respond by using domestic law sanctions.[32] If the investor challenges the legality of such sanctions, it must have the possibility of doing so in accordance with the relevant investment treaty:

> It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.[33]

In other words, if the relevant misconduct occurs after the establishment of the investment, or if the relevant instrument contains no legality requirement, then the matter as a question of admissibility is decided at the merits phase rather than the jurisdictional phase.[34] For example, in *Plama v Bulgaria*, the tribunal did not rely on a legality requirement in the Energy Charter Treaty to exclude the investor's application on jurisdictional grounds and decided to hear the allegation of fraudulent misrepresentation on the merits.[35] Similarly, the tribunal in *Europe Cement v Turkey* dealt with allegations of fraud concerning an ownership interest in the investor companies at the merits phase.[36] In *Churchill Mining v*

[28] See eg *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, ICSID Case No ARB/03/26; *Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No ARB/03/24.

[29] *Inceysa Vallisoletana SL* (n 28) para 202.

[30] ibid paras 103, 109, 236.

[31] ibid paras 190–207, 332.

[32] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA, Award (18 July 2014) paras 1354–1355.

[33] ibid.

[34] Z Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (Winter 2014) 29(1) ICSID Review 155; CA Miles, 'Corruption, Jurisdiction and Admissibility in International Investment Claims' (2012) 3(2) JIDS 329.

[35] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008).

[36] *Europe Cement Investment & Trade S.A. v Republic of Turkey*, ICSID Case No ARB (AF)/07/2, Award (13 August 2009) (concluding that refusal to produce the originals of the share agreements meant that the claim that the investor had shares in relevant business enterprises was fraudulent.)

Indonesia,[37] all claims relating to obtaining mining rights were found to be inadmissible because a fraudulent scheme of forged documents permeated the investments.[38]

When the relevant treaty is silent on the issue of the investment's legality, tribunals tend to consider allegations of economic crimes at the merits rather than jurisdictional phase. In some cases, tribunals have ruled that there was an implicit requirement of 'clean hands' in order to benefit from treaty protection,[39] or that some economic crimes, such as bribery, constitute a breach of international public policy[40] or 'breach of public policy'.[41] In other cases, tribunals concluded that the 'clean hands' doctrine had not crystallized into a general principle of international law which would bar an investor's claim in the absence of treaty provisions.[42]

Even if the relevant treaty contains a legality requirement which has been breached, this does not automatically lead to a lack of jurisdiction. In *Al Warraq v Indonesia*, the tribunal concluded that the investor had breached its obligations under a regional investment agreement,[43] which explicitly established an obligation to refrain 'from all acts that may disturb public order or morals or that may be prejudicial to the public interest', by committing 'acts prejudicial to the public interest'.[44] Therefore, the investor was not entitled to recover damages in respect of the host State's breaches of the fair and equitable treatment standard.[45] The tribunal found that the investor's conduct fell within the scope of application of the 'clean hands' doctrine. Therefore, the investor's claim was inadmissible rather than was outside the tribunal's jurisdiction, making the investor unable to benefit from the protection afforded by its investment agreement with the State.[46]

Tribunals considering allegations of economic crimes often seem to fail to apply the concept of the separability of the arbitration agreement from the treaty or investment contract. This principle is recognized in many international treaties, arbitral rules and in the practice of investor–State tribunals.[47] According to this principle, the invalidity of the main contract

[37] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Award (6 December 2016). [38] ibid paras 530–532.

[39] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) para 140.

[40] *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No ARB/00/7, Award (October 2006) para 157.

[41] *Société d'Investigation de Recherche et d'Exploitation Minière v Burkina Faso*, ICSID Case No ARB/97/1, Award (19 January 2000) paras 5.26–5.33, 5.41.

[42] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA, Award (18 July 2014).

[43] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, 1981.

[44] *Hesham T. M. Al Warraq* (n 19) para 683. [45] ibid. [46] ibid paras 645–647.

[47] See eg UNCITRAL Model Law on International Commercial Arbitration 1985, art 16(1); UNCITRAL Arbitration Rules (1976), art 21(2); ICSID Additional Facility Arbitration Rules, art 45(1); CH Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009)

does not lead to the invalidity of the arbitration agreement, which is regarded as separate and autonomous. In other words, the arbitration clause survives, thereby enabling the tribunal to determine the parties' rights and obligations under the arbitration agreement, including the consequences of the invalidity of the main contract.[48] Investment treaties contain an offer to arbitrate disputes with eligible investors rather than the arbitration agreement (after all, investors cannot be parties to international treaties). The arbitration agreement is perfected only when the eligible investor accepts the offer, creating a separate arbitration agreement between the State and the investor. Denying jurisdiction even when the relevant treaty contains provisions on legality may breach the principle of separability.

The separability principle means that the arbitration agreement will be invalid, leaving the tribunal without jurisdiction, only if the agreement itself has a fundamental defect (eg because of a forged signature, incapacity of one of the parties or mistaken identity).[49] If the arbitration agreement is valid, the tribunal should have jurisdiction to determine the consequences of an economic crime or other illegal activities, including when calculating any award of damages.

To sum up, the language of the treaty, or other instrument, in which the parties consent to arbitration, plays an important role in distinguishing jurisdiction from admissibility. If such an instrument includes a 'legality requirement' as a condition of the tribunal's jurisdiction, it will usually be considered as a jurisdictional issue. Otherwise, the commission of economic crimes when acquiring the investment may lead to the claim being inadmissible at the merits phase. It appears, however, that the autonomous nature of the arbitration agreement means that tribunals should assert their jurisdiction, even if the investor breached its obligations when acquiring the investment.

B. The Standard of Review

The standard of review concerns the measure of deference given by international tribunals to the decisions of domestic courts in criminal proceedings. The standard of review in investment arbitration may vary from full deference, where the substantive determinations of the decision-makers are not questioned, to no deference, which amounts in effect to a new trial in which the reviewing body re-examines and revaluates the evidence, and takes

para 622; *Plama v Bulgaria*, para 212 (pointing to the separability concept to explain the non-application of MFN clauses to dispute settlement provisions of a treaty).

[48] One of the notable exceptions to this rule was Judge G Lagergren's 1963 Award, which has been criticized by many commentators for appearing to dispose of the case on jurisdictional grounds despite the separability principle. See JG Wetter, 'Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award' (1994); ICC Award No 1110.

[49] See for instance UNIDROIT Principles art 3.2.5 on fraud.

the decision anew.[50] Treaties are usually silent on the standard of review and, accordingly, tribunals must determine this for themsleves.[51]

1. *Raising economic crimes sua sponte*

One of the most controversial issues is whether investor–State tribunals ought to raise and investigate allegations of economic crimes on their own motion (*sua sponte*), in the absence of any allegations made by the parties. On the one hand, the arbitrators have a duty to render an enforceable award.[52] If they overlook the possibility of corruption, the award may face challenges based on public policy violations[53] or even charges for aiding a criminal offence.[54]

Domestic law related to economic crimes constitute a part of the mandatory law which tribunals cannot ignore. However, raising such issues *sua sponte* as a matter of international public policy may also lead to allegations that the tribunal is going beyond its mandate and consequently opening the door to annulment proceedings[55] or challenges to the award.[56]

Investor–State tribunals take different approaches to raising economic crimes *sua sponte*. In *World Duty Free v Kenya*, the investor itself submitted the necessary materials which enabled the tribunal to find there had been corruption.[57] In *Metal-Tech v Uzbekistan*,[58] the tribunal noted that during a pre-hearing phase facts of which it had not been aware had come to light and which apparently raised suspicion.[59] The Metal-Tech tribunals' decision to order the parties to submit further evidence and to examine the possibility of

[50] S Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review through Comparative Public Law' SIEL Working Paper No 33/2012, 9.

[51] V Vadi and L Gruszczynski 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonwealth' (2013) 16(3) JIEL 613.

[52] See, for instance, ICC Rules of Arbitration (1 March 2017) art 42 (the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law).

[53] See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) art V(2)b.

[54] For example, under the UK Proceeds of Crime Act 'criminal conduct' also includes conduct aiding and abetting a criminal offence in the United Kingdom and outside the United Kingdom, if that would have constituted an offence in the United Kingdom. Proceeds of Crime Act 2002, Sections 327, 328 and 329 <https://www.legislation.gov.uk/ukpga/2002/29/contents>.

[55] Art 52 of the ICSID Convention.

[56] See New York Convention, art V(1)(c); 1985 UNCITRAL Model Law on International Commercial Arbitration, art 34(2) (iii); United States Federal Arbitration Act, section 10(a)(4); Swiss Federal Statute on Private International Law, art 190(1)(c).

[57] The investor's key witness admitted both making the payment and considering it a bribe. See at 38 which refers to para 19 of Mr Nasir Ibrahim Ali's witness statement. He states, *inter alia*, that he 'felt uncomfortable with the idea of handing over this "personal donation" which appeared to [him] to be a bribe'. The tribunal further stated that its conclusion as to the existence of bribe is grounded on the 'circumstances' as described by Mr Ali himself (see para 136).

[58] *Metal-Tech Ltd. v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013).

[59] The tribunal stated that the relevant facts 'were not alleged by the Respondent; they emerged during the Hearing in the course of the examination of the Claimant`s principal witness'; see *Metal-*

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economic crimes having been committed was therefore its own initiative[60] resulting from circumstantial evidence,[61] unlike the decision in *World Duty Free* where the findings emerged from the investor's own evidence.

When raising the issues of economic crimes on their own initiative, tribunals need to balance, on the one hand, the risk of ignoring important domestic law and public policy considerations relating to economic crimes and, on the other hand, the risk of potential challenges for going beyond their mandate.[62]

2. *Approaches to the standard of review*

In general, investor–State tribunals are not meant to determine issues of criminal liability as neither the ICSID Convention nor investment treaties regulate these matters.[63] Tribunals do not have the necessary expertise, powers and resources to conduct independent criminal investigations. In *Tecmed v Mexico*, the tribunal held that due deference to the State did not prevent the tribunal from examining whether measures taken 'were reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation'.[64]

Tribunals have preferred not to engage in what they consider to be purely domestic, general law disputes. For example, *Amco Asia v Indonesia*—one of the oldest ICSID awards—distinguished between 'general law' disputes, which should be decided by the relevant domestic authorities, and disputes falling under the ICSID Convention, which should be decided by arbitration.[65] The tribunal regarded the obligation not to engage in tax fraud as clearly a general legal obligation in the host State, which was not specially contracted for in the

Tech, para 70. It went on to mention that 'the evidence of payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments'; see para 243.

[60] The tribunal did so by invoking art 43 of the ICSID Convention, which provides that a tribunal may, if it deems it necessary at any stage of the proceedings, call upon the parties to produce documents or other evidence.

[61] For an analysis of the case and the evidence see also C Rose, 'Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v The Republic of Uzbekistan' (2014) 15 The Journal of World Investment & Trade 747.

[62] According to the art V(1)(c) of the New York Convention, recognition and enforcement of the award may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Awards rendered under the ICSID Convention can be annulled if the Tribunal has manifestly exceeded its powers (art 52 of the ICSID Convention).

[63] *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No ARB (AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014) para 21; *Abaclat v The Argentine Republic*, ICSID Case No ARB/07/5, Procedural Order No 13 (27 September 2012) paras 39 and 45 ('Arbitral Tribunals can in principle not prohibit a Party from conducting criminal court proceedings before competent state authorities').

[64] *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2 Award (29 May 2003) para 135.

[65] *Amco Asia Corporation and others v Republic of Indonesia*, Decision on Jurisdiction in Resubmitted Proceeding, ICSID Case No ARB/81/1 (10 May 1988) para 125.

investment agreement.[66] The claim of tax fraud did not arise directly out of the investment and, therefore, was beyond the tribunal's jurisdiction.

When it comes to crimes related to corruption, it seems useful to distinguish between petty corruption, grand corruption and political corruption.[67] Petty corruption refers to everyday abuse of powers exercised by low and mid-level public officials in their interactions with ordinary citizens, who are often trying to access basic goods or services in places such as hospitals, schools, police departments and other agencies.[68] Petty corruption issues, as a matter of general law, should be decided by appropriate domestic authorities, in accordance with the *Amco Asia v Indonesia* logic.

Grand corruption involves acts committed at high levels of government that distort policies or the central functioning of the State, enabling leaders to benefit at the expense of the public good.[69] Political corruption is the manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision-makers who abuse their position to sustain their power, status and wealth.[70] It is not surprising that a number of investor–State disputes involve allegations of grand corruption or political corruption.[71]

Tribunals often emphasize that they do not function as courts of final review over a host State's criminal justice system.[72] They often defer to decisions of domestic authorities and refrain from finding States liable when investors allege an improper use of criminal proceedings, in the absence of a malicious campaign against the investor.[73] For instance, in *Tokios Tokelés v Ukraine*, the tribunal did not find a denial of justice in a situation where criminal charges for

[66] ibid paras 126–127. [67] Transparency International, Official Website <https://www.transparency.org/what-is-corruption/#define>. [68] ibid. [69] ibid. [70] ibid.

[71] *World Duty Free Co Ltd v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) (the tribunal held that a payment of $2 million made by the investor to the then-President of Kenya was a bribe and thus declared the investment contract void); *Metal Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) (the tribunal found that payments of approximately $4 million made by Metal-Tech to several individuals, including an Uzbek government official and the brother of the then-Prime Minister of Uzbekistan, while presented as remuneration for various consultancy services, in fact constituted corruption and were illegal under Uzbek law); *Methanex Corporation v United States of America*, UNCITRAL, Award (3 August 2005) (the allegations concerned political campaign contributions made by an investor's competitor to the former Governor of the state of California, allegedly to secure an executive order favourable to the competitor. The Tribunal in that case was willing to agree that corruption could occur even when the payments are made through facially legal campaign contributions, provided that there was a true quid pro quo wherein campaign contributions were given in exchange for favourable government action. Eventually, the Tribunal found such allegations unproven).

[72] *The Rompetrol Group N.V. v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013) para 238; see also *Lemur v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) para 283 (concluding that the arbitrators were not superior regulators and they did not substitute their judgment for that of national bodies applying national laws); *SD Myers Inc v Canada*, UNCITRAL/NAFTA, Partial Award (13 November 2000) para 261 (confirming that the tribunal did not have 'an open-ended mandate to second-guess government decision-making').

[73] See eg *Tokios Tokeles v Ukraine*, ICSID Case No ARB/01/18; *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1; *Jan Oostergetel and Theodora Laurentius v The Slovak*

tax evasion were discontinued, then twice revived and remained pending three years after the alleged misconduct.[74] The tribunal did not rule out the possibility that the charges were intended to put pressure on the investor to settle an expensive arbitration and yet still did not find that there had been a denial of justice.[75]

The decision in *Kim v Uzbekistan* proposed a three-step test to determine whether illegal acts, such as corruption, deprive the investor of the BIT protection. The tribunal examined the importance of the law allegedly breached, the seriousness of the alleged breach, and whether the combination of these two elements would compromise a significant interest of the host State and, hence, justify the harshness of moving the investment outside the BIT protection as a proportionate consequence.[76]

This analysis suggests that tribunals usually remain deferential to the decisions taken by domestic authorities in criminal proceedings, but are not completely deferential in their approach.[77] Tribunals typically review 'the totality of alleged conduct' to see if the investor has proved that the host State breached its treaty obligations[78] and whether the actions of the State should follow a certain underlying pattern or malicious purpose rather than being 'a scattered collection of disjointed harms'.[79]

In deciding whether the investor's claim should be outside the BIT protection, either as a matter of jurisdiction or admissibility, it is submitted that the importance of the law breached, the seriousness of the breach and the proportionality of depriving the investor of treaty protection should be the key considerations.

C. The Standard and Burden of Proof

Economic crimes, such as bribery, are very difficult to prove. The legal concept of the burden of proof helps resolve uncertainty and induces parties to present

Republic; *Micula v Romania*, ICSID Case No ARB/05/20; *Rompetrol v Romania*, ICSID Case No ARB/06/3.

[74] *Tokios Tokelés v Ukraine*, ICSID Case No ARB/01/18, Award (26 July 2007) para 133.

[75] ibid.

[76] *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) para 408.

[77] V Vadi and L Gruszczynski, 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonwealth' (2013) 16(3) JIEL 626.

[78] ibid para 238, *RosinvestCo UK Ltd. v The Russian Federation*, SCC Case No V079/2005, Final Award (12 September 2010) para 599 (an assessment of whether Respondent breached the IPPA can only be effectively conducted if the conduct as a whole is reviewed, rather than isolated measures); *Spyridon Roussalis v Romania*, paras 602–610 (the tribunal examined whether the length of criminal proceedings was reasonable considering the complexity and significance of the case as well as severity of the measures taken against the investor).

[79] *The Rompetrol Group N.V. v Romania*, para 271.

evidence in support of their claims.[80] Compared to domestic courts, investor–State tribunals lack the tools and powers to properly investigate crimes and rely upon the submissions of the parties. Some tribunals avoid examining in detail allegations of economic crimes, such as money laundering, because of the lack of evidence.[81] Others look at the 'probative and substantial evidence' of the investor's active involvement in an alleged economic crime, to decide whether the claim may be defeated because 'investment protection is not intended to benefit criminals or investments based on, or pursued by, criminal activities'.[82]

In a typical breach of contract situation, the burden of proof rests with the aggrieved party.[83] In criminal law, however, the prosecution usually must prove the suspect's guilt.[84] This is further complicated when both the investor and the State representative have participated in an alleged economic crime such as bribery. Tribunals seem to adopt the approach that the party asserting the fact has the burden of proof as a general principle of law.[85] However, this rule is not set in stone and investment arbitration decisions reveal that the burden of proof may shift from one party to the other,[86] or even vanish altogether for the claimant.[87] One tribunal highlighted that if the State, with all its resources and powers, failed to prove allegations of economic crimes in its domestic courts, tribunals would tend to be sceptical about considering such obligations in the context of international arbitration, unless the evidence presented was 'concrete and decisive'.[88]

[80] MA Carreteiro, 'Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability' (2016) 49 *Revista Brasileira de Arbitragem* Ano XIII 84–5.

[81] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 509.

[82] *Valeri Belokon v Kyrgyzstan*, PCA, UNCITRAL Award (24 October 2014) para 158.

[83] See S Vogenauer and J Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2009) 884.

[84] See The UK Criminal Justice and Public Order Act 1994.

[85] See *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) para 56; *Tradex Hellas v Republic of Albania*, ICSID Case No ARB/94/2, Award (29 April 1999) paras 73–75; *Valeri Belokon v Kyrgyzstan*, PCA, UNCITRAL, Award (24 October 2014) para 161 (in this case, the tribunal empathized that it ultimately remained for the host State to prove that money laundering was actually carried out and that the measures taken were in accordance with its international obligations).

[86] The burden of proof shifts when the tribunal decides that the respondent should disprove the claimant's assertions which may be warranted by the existence of 'special circumstances or good reasons' (*Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt* (Siag & Anor v Egypt), ICSID Case No ARB/05/15, Award (11 April 2007) para 318).

[87] For instance, in the *Yukos* awards, the tribunals initially found that the investors bore the burden of proving their claim that Russia had unlawfully expropriated their investment, but then seemed to discard the burden of proof resting on the investors regarding the unlawfulness of the alleged expropriations (*Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA226, Final Award (28 July 2014); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA227, Final Award (28 July 2014); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA228, Final Award (18 July 2014).

[88] *Getma International and others v Republic of Guinea*, ICSID Case No ARB/11/29, para 163.

When it comes to the standard of proof relating to economic crimes, tribunals have applied both a 'reasonable certainty' standard to suspected corruption,[89] a 'clear and convincing evidence'[90] standard or ruled that both standards were equivalent.[91] Because national law is often the main source of obligations of foreign investors, allegations of economic crimes, including issues of burden of proof and standard of proof, are often dealt with in accordance with national laws.[92] However, in the case of a conflict between domestic law and international law, international law should prevail.[93] In other words, although evidence in domestic criminal proceedings may be relevant to proving facts in arbitration, determinations of domestic courts are not binding on international tribunals.[94]

For example, States may invoke privileges, such as cabinet privileges, secret diplomatic negotiations, State secrets or the secrecy of law enforcement investigations.[95] In one case, the tribunal rejected a State's invocation of its domestic law on evidentiary privileges by relying on the general international law principle that a State may not invoke its own internal law to avoid international responsibility.[96] Tribunals also appear reluctant to accept political sensitivity as a justification not to produce evidence.[97]

III. DOMESTIC CRIMINAL PROCEEDINGS AND PROVISIONAL MEASURES

Domestic criminal proceedings may adversely affect arbitral proceedings, in particular by complicating the availability of evidence and witnesses. Investors may request provisional measures to protect their procedural rights. Under the ICSID regime, provisional measures maintain the *status quo* between the parties and prevent the aggravation of the dispute.[98] In the

[89] *Metal-Tech v Uzbekistan*, para 243.

[90] *EDF (Services) Limited v Romania*, para 221.

[91] *Getma International and others v Republic of Guinea*, ICSID Case No ARB/11/29.

[92] See eg Kazakhstan–Uzbekistan BIT (1997) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5009> art 11; India–Nepal BIT (2011) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1583> 12,; Australia–India BIT (1999) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/154> 14.

[93] See eg art 32 of the ILC Articles on State Responsibility ('The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.'); art 27 of the 1969 Vienna Convention on International Law of Treaties ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.').

[94] *Teinver SA - Transportes de Cercanias SA - Autobuses Urbanos del Sur SA v Argentine Republic*, ICSID Case No ARB/09/1, Award (21 July 2017) para 365.

[95] B Legum and G Vannieuwenhuyse, 'Document Disclosure in Investment Arbitration' in AW Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Nijhoff Publishers 2013).

[96] See eg *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 2 (23 May 2006) paras 8–9.

[97] A Sheppard, 'The Approach of Investment Treaty Tribunals to Evidentiary Privileges' (2016) 31(3) ICSID Review 670.

[98] A Parra, *The History of the ICSID Convention*, Vol II, Pt I (ICSID 1968) 216, 'Unless the parties specifically preclude it from doing so, the Tribunal would have the power to prescribe

context of economic crimes, provisional measures play a particularly useful role in protecting the arbitral process where the investor finds itself subject to a criminal investigation which interferes with its claim.

ICSID tribunals have the power to recommend provisional measures to preserve the respective rights of the parties.[99] As one tribunal put it, 'criminal investigations may not be totally excluded from the scope of provisional measures'.[100] In the context of ICSID arbitration, tribunals are also expected to protect the exclusivity of ICSID proceedings.[101] Although criminal proceedings as such do not threaten this exclusivity,[102] a breach of the ICSID Convention may occur if a claim, or if a right forming part of the subject matter of proceedings, also constitutes the object of parallel proceedings in another forum.[103]

Tribunals readily acknowledge a State's inherent prerogative to conduct domestic criminal proceedings against foreign investors suspected of criminal activity.[104] Conscious of interfering with domestic criminal proceedings, tribunals will only stay criminal proceedings if it is necessary, urgent and meant to protect certain existing rights[105] and if it meets the criteria for the

provisional measures designed to preserve the *status quo* between the parties pending its final decision on the merits.'

[99] ICSID Convention, art 47, 'Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.' ICSID Arbitration Rules art 39(1) supplements art 47 regarding the procedure and requires that '[t]he request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures'.

[100] *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures (31 July 2009) paras 134–136.

[101] ICSID Convention, art 26 ('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.').

[102] *Churchill Mining PLC and Planet Mining Pty Ltd. v the Republic of Indonesia*, ICSID Case No ARB/12/14, Procedural Order No 9 (8 July 2014) para 85; *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Decision on Provisional Measures (6 February 2010) para 128.

[103] *Churchill Mining PLC and Planet Mining Pty Ltd. v the Republic of Indonesia*, ICSID Case No ARB/12/14, Procedural Order No 9 (8 July 2014) para 86.

[104] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Procedural Order No 2 (16 October 2002) para 36; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) para 297; *Churchill Mining PLC and Planet Mining Pty Ltd. v the Republic of Indonesia*, ICSID Case No ARB/12/14, Procedural Order No 14 (22 December 2014) para 72; *Teinver S.A. et al v the Argentine Republic*, ICSID Case No ARB/09/1, Decision on Provisional Measures (8 April 2016) para 190; *Italba Corporation v Oriental Republic of Uruguay*, ICSID Case No ARB/16/9, Decision on Claimant's Application for Provisional Measures and Temporary Relief (15 February 2017) paras 115–116.

[105] *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18 (29 April 2004) para 8; *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 (19 November 2007) para 54; *Lao Holdings*, *Holdings N.V. v the Law People's Democratic Republic*, ICSID Case No ARB (AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014) para 9;

issuance of provisional measures.[106] According to a recent order for provisional measures, tribunals evaluate the severity of the impact of domestic proceedings on the arbitral process and tend to only recommend 'the minimum steps necessary to meet the objective set out in the [ICSID] Convention'.[107] The threshold for considering provisional measures to be necessary includes cases where the investor was the victim of harassment or intimidation, or was directly prevented from presenting its case to the tribunal.[108]

Domestic criminal proceedings may also overlap or interfere with the presentation of evidence in international arbitration.[109] In several cases, tribunals have ordered the stay of criminal proceedings for the purpose of preserving important evidence.[110] In one case, a tribunal ordered the suspension of proceedings relating to money laundering because of the risk that key individuals and witnesses on the investor's side might be incarcerated, which would have affected the investor's ability to adequately present their evidence and participate in the arbitration.[111] In contrast, if the measures taken by the State do not hamper the arbitration process, the tribunal will not grant the investor's request to stay the domestic proceedings.[112]

Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case No ARB/12/14 and 12/40, Procedural Order No 9, Provisional Measures (8 July 2014) para 69.

[106] *Amco Asia Corporation v Indonesia, Provisional Measures* (1983) 1 ICSID Reports 410, 412; *City Oriente v Ecuador*, ICSID Case No ARB/06/21, Provisional Measures (19 November 2007) 54–5; *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case No 2009, First Interim Award on Interim Measures (25 January 2012) 23; G Born, *International Commercial Arbitration* (Kluwer 2014) Ch 17; CA Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017) Ch 4 and 6.

[107] *Nova Group Investments, B.V. v Romania*, ICSID Case No ARB/16/19, Procedural Order No 7 (29 March 2017) para 227.

[108] *Hydro S.r.l. and others v Republic of Albania*, ICSID Case No ARB/15/28, Order on Provisional Measures (3 March 2016) paras 3.14 and 3.16. The tribunal granted the measures sought reasoning that the State's threat to incarcerate the claimants would affect their ability to participate in the arbitration.

[109] See E Wong, 'Procedural Issues Resulting from a Fraud Claim in International Commercial Arbitration: An English Law Perspective' Kluwer Arbitration Blog (24 January 2014) <http://kluwerarbitrationblog.com/2014/01/24/procedural-issues-resulting-from-a-fraud-claim-in-international-commercial-arbitration-an-english-law-perspective/>; F De Ly, 'ILA Final Report on Lis Pendens and Arbitration' (2009) 25 ArbIntl para 1.18.

[110] *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 (26 February 2010) 46; *Lao Holdings v The Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014).

[111] *Hydro S.r.l and others v Republic of Albania*, ICSID Case No ARB/15/28, Order on Provisional Measures (3 March 2016) para 3.4.1.; *Lao Holdings N.V. v the Law People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014) paras 73–76.

[112] *Italba Corporation v Oriental Republic of Uruguay*, ICSID Case No ARB/16/9, Decision on Claimant's Application for Provisional Measures and Temporary Relief (15 February 2017). Uruguay had started investigations against two of the claimant's witnesses which the claimant sought to suspend. Uruguay ensured that it intended to honour its commitment to respect the claimant's rights in this arbitration. The tribunal was convinced by these assurances, in addition to finding that there was no risk of the dispute being aggravated by the investigations, and declined to stay the latter.

Extradition proceedings may also jeopardize the participation of key witnesses. In *Nova v Romania*, the investor requested provisional measures to guarantee the participation of its key witness in the arbitral proceedings.[113] The tribunal acknowledged that an arbitral tribunal could enjoin domestic proceedings but did not find the circumstances required it to do so, bearing in mind the need for necessity, urgency and proportionality.[114] The tribunal eventually imposed a series of requirements to ensure that the witness did not flee to a jurisdiction from which he could not be extradited to Romania.[115]

In other cases tribunals have denied provisional relief, despite an apparent connection between the submission of arbitration claims and the initiation of subsequent criminal investigations.[116] Those decisions stand in contrast with the approach taken in *Quiborax v Bolivia*,[117] where the tribunal concluded that the initiation of criminal proceedings for alleged forgery amounted to a 'defence strategy'.[118] It instructed the State to execute its prosecutorial powers 'in good faith and respecting Claimants' rights, including their *prima facie* right to pursue this arbitration'[119] The tribunal highlighted that these proceedings threatened the procedural integrity of the arbitration, in particular, the investor's right of access to evidence through witnesses.[120] However, the tribunal rejected the investor's contention that criminal proceedings threatened the exclusivity of the arbitration or aggravated the dispute.[121]

Orders for provisional measures can be seen as imposing an international obligation upon the host State which would be violated by a failure to comply.[122] However, in practice provisional measures may lack teeth. Under the ICSID Convention and the New York Convention, interim measures do not enjoy the same enforceability as final awards.[123] As a result, investors

[113] *Nova Group Investments, B.V. v Romania*, ICSID Case No ARB/16/19, Procedural Order No 7 (29 March 2017). [114] ibid paras 309, 339, 353–354, 357–358. [115] ibid.

[116] See eg *Churchill Mining PLC and Planet Mining Pty Ltd. v the Republic of Indonesia*, ICSID Case No ARB/12/14, Procedural Order No 14 (22 December 2014). *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures (31 July 2009).

[117] *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 (26 February 2010).

[118] ibid para 122. [119] ibid para 123. [120] ibid para 148. [121] ibid para 306.

[122] CA Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017) 113, 136; See also, N Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law' (2011) (Preprints of the Max Planck Institute for Research on Collective Goods) 1 <http://www.coll.mpg.de/pdf_dat/2011_04online.pdf>.

[123] Dispute Settlement, ICSID, 2.9 Binding Force and Enforcement, UNCTAD, 11: 'The obligation to recognize and enforce only applies to final awards. Decisions preliminary to awards such as decisions upholding jurisdiction under Art. 41, decisions recommending provisional measures under Art. 47 and procedural orders under Arts. 43 and 44 are not awards and are therefore not subject to recognition and enforcement. But if these preliminary decisions are later incorporated into an award, they become part of the award and are subject to recognition and enforcement.'; art I of the 1958 New York Convention does not define 'arbitral awards' in terms of content.

face various practical hurdles in enforcing provisional measures, whether they seek enforcement from the respondent State[124] or from a foreign State not involved in the dispute.[125]

Although the debate surrounding the legal authority of provisional measures has resurfaced, ICSID decisions have emphasized that orders of provisional measures are as binding as final awards, despite the use of the term 'recommend'.[126] The underlying binding power of provisional measures derives from the general obligation not to frustrate the object of the arbitral proceedings.[127]

The drafters of the ICSID Convention consciously rejected a proposal to empower tribunals to 'prescribe' provisional measures, fearing that this would make those measures binding and would lead to complications in case of conflict with domestic law.[128] During the debates, Aron Broches, chairman of the drafting committee, noted that there was 'no way for a private investor to obtain [the] specific enforcement [of provisional measures] against the government'.[129] Therefore the drafters decided that the tribunal's

[124] See *Ceskoslovenska Obchodnı Banka, AS v Slovak Republic*, ICSID Case No ARB/97/4, Procedural Order No 4 (11 January 1999) and Procedural Order No 5 (1 March 2000), as summarized in 24 May 1999 Decision). The Tribunal recommended the suspension of certain bankruptcy proceedings, but the national courts of the Respondent did not accept that they were bound by this recommendation.

[125] Compare English decisions *Bechetti*, relating to the *Hydro v Albania* case (Hydro Srl v Republic of Albania, ICSID Case No ARB/15/28), where the Judge upheld the order on provisional measures (*Government of Albania - Judicial Authority v Francesco Becchetti and Mauro De Renzis*, UK Magistrates Court (20 May 2016) at <https://www.italaw.com/sites/default/files/case-documents/italaw7644.pdf>), and *Adamescu*, relating to the *Nova v Romania* case, where the Judge refused to grant a stay of the extradition proceedings, a stay ordered by the arbitral tribunal (also in the Westminster Magistrates Court and unavailable to the public). E Gonin, 'How Effective Are ICSID Provisional Measures at Suspending Criminal Proceedings before Domestic Courts: The English Example?' Kluwer Arbitration Blog (30 September 2017) <http://arbitrationblog.kluwerarbitration.com/2017/09/30/effective-icsid-provisional-measures-suspending-criminal-proceedings-domestic-courts-english-example>.

[126] *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Procedural Order No 2 (28 October 1999) para 9; Maffezini; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Provisional Measures (25 September 2001) para 2; *Tokios Tokele s v Ukraine*, ICSID Case No ARB/02/18, Procedural Order No 1 (1 July 2003) paras 2 and 4; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Claimant's Request for Provisional Measures (17 May 2006) para 32; *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petró leos del Ecuador*, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) paras 66–77; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Claimant's Request for Provisional Measures (13 December 2012) para 120; *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21, Decision on Provisional Measures (9 November 2007) para 92.

[127] C Schreuer *et al.*, *The ICSID Convention. A Commentary* (Cambridge University Press 2009) 764.

[128] Parra (n 98) 515, 518, 655, 813.

[129] ibid 516.

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power would be limited to 'recommending' provisional measures.[130] The drafters also rejected a proposal explicitly granting tribunals the power to reflect non-compliance with provisional measures in final awards.[131] The chairman 'assumed the majority was opposed to any specific mention of the effect of non-compliance with the recommendation, but that naturally the Tribunal would normally have to take account of this fact when it came to make its award'.[132]

Practice shows that arbitral tribunals may draw adverse inferences from non-compliance with provisional measures. Higher monetary compensation may be allocated to the aggrieved party[133] or tribunals may find that the non-complying party breached its obligations under the ICSID Convention.[134] However, at the merits phase of arbitral proceedings, tribunals are not required to reflect non-compliance in the amount of compensation. For example, in *Quiborax v Bolivia*, Bolivia had failed to comply with the recommended measures but 'under the facts of this case this breach did not entail a violation of the duty to arbitrate in good faith'.[135] The tribunal added that although provisional measures are binding *per se*, a failure to comply with them necessarily gives rise to a breach of the underlying right that the measures seek to preserve.[136]

As the above analysis demonstrates, investor–State tribunals seek to protect the integrity of the arbitration process without intruding on the sovereign right of States to conduct criminal proceedings. The practical enforcement of provisional measures in relation to economic crimes, much like any kind of provisional measure, faces its own difficulties. Despite this, tribunals may factor non-compliance with these measures into the calculation of damages.

IV. INTERNATIONAL LAW OBLIGATIONS OF STATES RELATED TO ECONOMIC CRIMES

A. Sources of International Law Obligations of States

International investment agreements are typically silent on economic crimes generally and specific offences. It is only in recent years that some countries

[130] ibid 815 'By a large majority the Committee also accepted to use the word "recommend" as opposed to "prescribe" or "indicate."'

[131] ibid.

[132] ibid.

[133] In *MINE v Guinea*, the Tribunal warned the claimant, who was the non-compliant party, that it would take the non-compliance into account in the final award: 'Pursuant to Article 47 and the applicable ICSID regulations and rules the Tribunal will take into account in its award the effects of any non-compliance of MINE with its recommendations.'; *MINE v Guinea*, 4 ICSID Report 35, *Order for Interim Measures* (4 December 1985) para 77. In *AGIP v Congo*, 1 ICSID Report 306, Award (30 November 1979) para 329, the Congo failed to preserve documents as ordered. The tribunal took note of the non-compliance in the reparations owed to AGIP as part of the final award by ordering the Congo to pay all the tribunal's costs.

[134] In *City Oriente v Ecuador*, ICSID Case No ARB/06/21, Decision on Provisional Measures (19 November 2007) para 53, the tribunal held that 'a failure to comply with orders given to Respondents by the Tribunal in accordance with Article 47 of the Convention will entail a violation of Article 26 thereof, and engage Respondents' liability'.

[135] *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 583.

[136] *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 583, fn 743.

have started to include provisions relating to economic crimes in international investment agreements.

For example, Japan includes provisions in its newly-concluded treaties imposing an obligation on States to 'ensure that measures and efforts are undertaken to prevent and combat corruption … in accordance with its laws and regulations'.[137] In the same vein, Canada includes in its BITs anti-corruption principles as an element of corporate social responsibility which should be encouraged by the contracting parties.[138] Some BITs also mention money laundering, terrorism financing and general criminal law offices in the context of restrictions which the State can impose on the investor's transfer of funds.[139] Preambles of several recently concluded BITs emphasise 'the necessity for all governments and civil actors alike to adhere to United Nations and Organisation for Economic Cooperation and Development (OECD) anticorruption efforts, most notably the 2003 UN Convention against Corruption.'[140]

When it comes to practice, international investment tribunals, despite being created by investment treaties, usually rely on domestic law rather than on international law reflecting an international consensus on economic crimes.[141] Tribunals have only referred to the UN Convention against

[137] See, for example the same text in art 8 of the 2015 Japan–Oman BIT, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3481>; art 9 of the 2008 Japan–Uzbekistan BIT, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1737>; art 9 of the 2010 Iraq–Japan BIT <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1663>.

[138] See eg Canada–Mali BIT (2014) art 15(3) ('Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as
labour, the environment, human rights, community relations, and anti-corruption'), similar provisions can be found in other BITs and agreements with investment provisions recently concluded by Canada, such as art 8.16 of the 2014 Canada–Korea Free Trade Agreement, art 16 of the 2014 Canada–Serbia BIT and art 16 of the 2014 Canada–Senegal BIT.

[139] See art 9 of the 2010 Austria–Kazakhstan BIT; art 9 of the 2013 Austria–Nigeria BIT; art 12 of the 2013 Japan–Saudi Arabia BIT; art 8 of the 2008 Belarus–Mexico BIT.

[140] See 2013 Austria–Nigeria BIT; 2010 Austria–Tajikistan BIT; 2010 Austria–Kazakhstan BIT. See also references to the UN Convention against Corruption in the preamble of the 2015 Burkina Faso–Canada BIT and art 17 of the 2013 Guatemala–Trinidad and Tobago BIT.

[141] See, for instance, art 7 of the 2006 Southern African Development Community Protocol on Finance and Investment which contains an investor–State dispute resolution clause that imposes an obligation on States to 'become members of and liaise with the International Organization of Securities Commissions and International Association of Insurance Supervisors and International Association of Insurance Supervisors'. See <www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf>; *Valeri Belokon v Kyrgyz Republic*, PCA, UNCITRAL, Award (24 October 2014) para 153, the tribunal used the definition of money laundering proposed by Financial Task Force on Money Laundering (FAFT), 'processing of these criminal proceeds to disguise their illegal origin, [which] enables the criminal to enjoy these profits without jeopardizing their source' citing Financial Action Taskforce, 'What is Money Laundering' <http://www.fatf-gafi.org/faq/moneylaundering/>.

Corruption[142] and the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in a handful of cases.[143] One example is the decision in *Kim v Uzbekistan,* which referred to the OECD Convention and the UN Convention against Corruption when ascertaining the content of an international public policy rule against corruption and concluded that domestic criminal law followed the same approach.[144] In *Al Warraq v Indonesia*, the investor advanced several arguments based on the alleged failure of Indonesia to implement the UNCAC.[145] The tribunal held that the convention only established a general obligation on State parties to adopt legislation criminalising the bribery of public officials and bribery in the private sector, rather than setting out elements of corruption and money laundering.[146] The tribunal did not examine other international law sources in order to determine the State's international obligations.

Tribunals which primarily decide on the compliance of States with their international obligations should pay more attention to sources of international law relating to economic crimes. This is particularly important in the disputes involving States in which the rule of law is weak and in which the general environment is conducive to economic crimes. Tribunals could also rely on the detailed guidance of instruments developed by various international organizations, provided these instruments reflect international consensus on best practices.

One universally accepted instrument concerning money laundering are the 40 recommendations issued by Financial Task Force on Money Laundering (FATF) covering the use or concealment of funds from all criminal offences.[147] The FATF developed a detailed methodology to test compliance

[142] United Nations Convention Against Corruption (UNCAC), 9 December 2003, in Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, GA Res 58/4, UN GAOR, 58th Sess, 50th and 51st plenary mtgs, Annex, Agenda Item 108, UN Doc A/58/422 (2003). See ratification status at <https://www.unodc.org/unodc/en/corruption/ratification-status.html>). States are parties to the UNCAC, which, *inter alia*, imposes an obligation on States which are expected to encourage their nationals and residents to report the commission of acts of corruption to the law enforcement authorities, and to consider establishing measures and systems to facilitate the reporting by officials of acts of corruption to the appropriate authorities when such acts come to their notice in the performance of their functions; see UNCAC, arts 8(4) and 39(2).

[143] See *Sistem Mühendislik In aat Sanayi ve Ticaret A. v Kyrgyz Republic*, ICSID Case No ARB (AF)/06/1, Award (9 September 2009) para 42 (the tribunal found reasonable and useful definition of bribery in the OECD Convention); *Metal-Tech Limited v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) para 291, (the tribunal mentioned the OECD convention and several other anti-corruption conventions to emphasize the international consensus on combating corruption).

[144] *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) paras 594 and 598–596 (highlighting that international public policy against corruption focuses on corruption of government officials rather than private individuals).

[145] ibid paras 197, 208, 212, 218–224. [146] *Hesham T. M. Al Warraq* (n 19) para 607.

[147] Financial Action Task Force, FATF 40 Recommendations, October 2003. <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>.

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with the recommendations.[148] Subsequently, States adopted other conventions and initiatives to combat money laundering covering the use or concealment of funds from all criminal offences.[149]

The United Nations Convention against Transnational Organized Crime promotes cooperation to prevent and combat transnational organized crime and provides measures to combat money-laundering.[150] Regional conventions also contain specific obligations on combating money laundering.[151] Efforts on the international level have recently resulted in an important convention relating to tax evasion.[152] Other notable instruments relevant to economic crimes, and which are accompanied by detailed methodological documents, relate to banking supervision,[153] securities regulation[154] and insurance supervision[155] and which also includes instructions on countering fraud and money laundering.[156]

To sum up, tribunals usually analyse domestic law and rarely refer to the public international law obligations of States to combat economic crimes.

[148] Financial Action Task Force, Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations (Paris February 2017) <www.fatf-gafi.org/publications/mutualevaluations/documents/4th-round-procedures.html>.

[149] See European Parliament and Council, Directive 2001/97/EC (4 December 2001) (amending Council Directive 91/308/EEC of 10 June 1991) on Prevention of the Use of the Financial System for the Purpose of Money Laundering, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0097>; UN Convention against Transnational Organized Crime, 2001, <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_ PROTOCOLS_THERETO.pdf>.

[150] United Nations Convention against Transnational Organized Crime, adopted 8 January 2001, UNGA Res (A/55/383), <http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf>.

[151] Warsaw Convention: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (16 May 2005) <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198>; Strasbourg Convention: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (8 November 1990) <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141>; Directive 2005/60/EC: European Parliament and Council Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

[152] Organisation for Economic Cooperation and Development, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2017) <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>.

[153] Basel Committee on Banking Supervision, 'The Core Principles for Effective Banking Supervision' (2012) <http://www.bis.org/publ/bcbs230.htm> (supplemented with detailed methodology for compliance assessment).

[154] International Organisation of Securities Commissions, 'Objectives and Principles of Securities Regulation' (2003) <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> with detailed compliance assessment methodology <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD155.pdf>.

[155] Insurance Core Principles (ICP) (2011) adopted by the International Association of Insurance Supervisors of the International Association of Insurance Supervisors (IAIS) <https://www.iaisweb.org/page/supervisory-material/insurance-core-principles//file/58067/insurance-core-principles-updated-november-2015>. IAIS is a voluntary membership organization of insurance supervisors and regulators from more than 200 jurisdictions in nearly 140 countries.

[156] ibid principles 21 and 22.

Alternatively, they argue that international law lacks sufficient detail to determine the rights and obligations of the parties. However, several important international instruments (both binding and non-binding) related to economic crimes reflect an international consensus and include detailed guidance for regulators which could be used by tribunals.

B. Attribution of Contributory Fault to States

Investors can assert claims against States for breaches of their international obligations when State representatives themselves participate in committing economic crimes, for example by taking bribes or being accomplices to other crimes. The general principle for determining compensation for breaches of international law obligations is full reparation, which can take the form of restitution, monetary compensation, and satisfaction. [157] The ILC Articles on State Responsibility provide that:

> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[158]

The ILC Articles provide that a State commits an internationally wrongful act when conduct consisting of an act or omission is attributable to the State under international law, and constitutes a breach of that State's international obligations.[159] Under international law, the conduct of such an organ is considered as the conduct of the State.[160] Although 'the conduct of private persons is not as such attributable to the State', the ILC Articles[161] regulate situations of excess of authority or contravention of instructions:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[162]

These provisions suggest that when officials are involved in committing economic crimes such as corruption, the responsibility for such unlawful actions should be attributed to the State. However, international investment tribunals rarely follow this logic. Some tribunals take the view that if economic crimes involve misconduct both of the State and the investor (for example, in case of bribery), this should lead to the dismissal of the case rather than to the responsibility of the State.[163]

[157] Y Kryvoi, 'Counterclaims in Investor-State Disputes' (Spring 2012) 21(2) Minnesota Journal of International Law 216.

[158] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Report of the International Law Commission on the work of its fifty-third session (2001) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> art 39.

[159] ibid art 2. [160] ibid. [161] ibid Ch II. [162] ibid art 7.

[163] *Word Duty Free v Kenya* (n 40).

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The *World Duty Free v Kenya* case is perhaps the most well-known case criticized for exonerating States from their responsibility for corrupt practices and unfairly leaving investors without the protection which is owed to them under international law.[164] In that case, the tribunal concluded that a payment to the President of Kenya was 'a covert bribe and, accordingly, its receipt is not legally to be imputed to Kenya itself'.[165] This approach differs from the usual approaches to State responsibility under general public international law and human rights law, pursuant to which international law governs the characterization of an act of a State as internationally wrongful;[166] this characterization is unaffected by whether the same act is characterized as lawful or unlawful under internal law.

It must be noted that tribunals usually do not link the exercise of their jurisdiction to the requirement of domestic prosecution of the State representative for the crime committed[167] although one tribunal did suggest this.[168] This is despite the fact that States are under an obligation to combat financial crime, bribery and some other economic crimes under international law, as discussed above.

However, investor-State tribunals have recently started to take into account the involvement of the host State representatives in committing economic crimes. One tribunal explained that a State could, in principle, be held responsible for its organs soliciting bribes, but found that the allegation was unclear and unconvincing.[169] In *Metal Tech v Uzbekistan*, the tribunal declined jurisdiction over a claim which involved the corruption of officials but it did reflect, in the allocation of costs, the role of the State in the corruption.[170] In another dispute

[164] See AB Spalding, 'Deconstructing Duty-Free: Investor-State Arbitration as Private Anti-Bribery Enforcement' (September 2016) University of Richmond School of Law, <https://ssrn.com/abstract=2829351>.

[165] *World Duty Free v Kenya* (n 40) para 169.

[166] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Report of the International Law Commission on the work of its fifty-third session (2001) art 3, <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (citing 47 Caire, UNRIAA, vol V (Sales No 1952.V.3) 516 at 531 (1929) and Maal, UNRIAA, vol X (Sales No 60.V.4) 732–3 (1903)); La Masica, ibid vol XI (Sales No 61.V.4) 560 (1916); *Velásquez Rodríguez v Honduras* Case, Inter-American Court of Human Rights, Series C, No 4, para 170 (1988).

[167] See *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/03/25 ('*Fraport I*'); *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12 ('*Fraport II*'); *Metal-Tech Limited v Uzbekistan*, ICSID Case No ARB/10/3; *World Duty Free Company Limited v Kenya*, ICSID Case No ARB/00/7.

[168] *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December. 2000) para 116.

[169] *EDF (Servs.) Ltd. v Republic of Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para 221.

[170] *Metal-Tech Ltd. v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) para 422. ('The law is clear – and rightly so – that in such a situation [of an investment tainted by corruption] the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs']).

involving Uzbekistan, treaty claims were dismissed at the merits stage due to 'red flags' of corruption surrounding the investment. Nevertheless, the tribunal did stress the State's own role in the corruption at issue and 'urged' it to make a substantial ($8 million) donation to a United Nations anti-corruption fund.[171]

The State's arguments on the illegality of an investment as a bar to jurisdiction or admissibility may also be rejected where the State has itself relied on the misconduct in question.[172] One tribunal emphasized that when a State was aware, knowingly overlooked and endorsed an investment which breached its domestic law, fairness would require that the government be estopped from raising it as a jurisdictional defence.[173] Another award rejected the respondent's arguments concerning the illegality of the investment on the basis that the State representatives, prior to the commencement of the arbitration, had declared the contracts in question to be valid.[174]

Summing up, the international law on State responsibility suggests that the conduct of officials, even if it exceeds or contravenes instructions or violates internal law, should be attributable to the State. If this conduct breaches international law, it should result in compensation. However, in practice most tribunals prefer not to award compensation to investors for the involvement of State representatives in economic crimes and deny jurisdiction or the admissibility of claims. This, however, has begun to change as tribunals pay more attention to the obligations of States to combat economic crimes and to general international law principles of State responsibility.

V. CONTRIBUTORY FAULT OF INVESTORS

The contributory fault of investors in committing economic crimes can affect their claims. As discussed above, under the general principles of State responsibility, fault can manifest itself in wilful or negligent action or omission.[175] Although international investment treaties typically do not impose obligations on investors, they have certain obligations under national law as well as international law.[176]

Some investment tribunals have rejected investor's claims because of the investor's negligence, even when the State was also at fault. In one case, the

[171] E Peterson and V Djanic, 'In an innovative award, arbitrators pressure Uzbekistan – under threat of adverse cost order – to donate to UN Anti-Corruption Initiative; also Propose Future Treaty-Drafting Changes that would Penalize States for Corruption' IAReporter <https://www.iareporter.com/articles/in-an-innovative-award-arbitrators-pressure-uzbekistan-under-threat-of-adverse-cost-order-to-donate-to-un-anti-corruption-initiative-also-propose-future-treaty-drafting-changes-that-woul/> .

[172] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction (8 March 2010) para 140.

[173] *Fraport I* (n 167) para 347.

[174] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction (8 March 2010) para 140.

[175] See art 39 of the ILC Articles on State Responsibility (n 24).

[176] See ILC Articles (n 24).

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tribunal concluded that despite deficiencies in the government's conduct, such conduct did not breach the provisions of the BIT because the investor was also at fault.[177] In another case, despite serious shortcomings in the domestic legal system and in the functioning of various State agencies, the tribunal rejected the investor's claims on the basis that the investor should have been aware of this situation in the host State.[178] It was therefore unreasonable for it to seek compensation for losses suffered when making a speculative, or, at best, an imprudent investment.[179]

In several disputes the investor's fault has prompted tribunals to reduce damages. In *MTD v Chile*, the tribunal found that whilst the respondent's conduct was contrary to the fair and equitable treatment standard, the investor had contributed to its own injury.[180] The tribunal thought the investor's failure to properly consider domestic law regulations before making its investment constituted contributory fault and reduced its award of damages accordingly. In the *Azurix v Argentina* case, the Tribunal also reduced damages because of the investor's negligent business decision to overpay for the concession.[181]

The tribunal in *Occidental v Ecuador* reduced the damages awarded by 25 per cent due to contributory negligence.[182] The tribunal stated that a proportionality test meant that 'any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences'.[183] As in cases of mitigation of damages and contributory negligence, the proportionality test considers the conduct of the investor and, whether its conduct is sufficiently wrong to justify the measures taken by the State.

In investment arbitration, the proportionality test has also been repeatedly applied in cases of expropriation.[184] Although the cases above did not necessarily involve the commission of economic crimes, their logic can also apply to the determination of contributory fault. This approach was taken in *Yukos v Russian Federation*: having extensively cited the ILC Articles on

[177] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001).

[178] *Eudoro Armando Olguín v Republic of Paraguay*, ICSID Case No ARB/98/5, Award (26 July 2001) para 65(b); *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para 52 (the tribunal dismissed the claim because by choosing to invest in a transition economy, the investor took the business risk that laws may change with a detrimental effect to the investment); *Waste Management, Inc. v United Mexican States* ('Number 2'), ICSID Case No ARB (AF)/00/3, Award (30 April 2004) Pt IV (the claims for the loss of the investment were attributed to the investor's bad business planning and realization of commercial risks).

[179] ibid.

[180] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004).

[181] *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) 432.

[182] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012).

[183] ibid para 416.

[184] See *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2; *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12; *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v Libya and others*, Unified Agreement for the Investment of Arab Capital in the Arab States (Cairo 22 March 2013).

State Responsibility and Commentary, the tribunal took account of the investor's tax evasion schemes and apportioned responsibility between the investor (25 per cent) and the State (75 per cent).[185]

It must be noted that host States have also submitted counterclaims, arguing that an investment has been tainted by bribery, embezzlement or money laundering.[186] Counterclaims by States typically fail because the identity of the parties in domestic and international proceedings does not coincide,[187] or because the issues raised in counterclaims should be considered by domestic courts rather than international tribunals.[188]

This analysis suggests that tribunals are keen to reduce damages or even to dismiss the claim altogether where the investor is at fault, including by having committed an economic crime. In so doing, tribunals consider the level of the investor's awareness of the situation in the host State, its negligence in business decisions and apply a proportionality test to apportion responsibility between the State and the investor.

VI. CONCLUSIONS AND RECOMMENDATIONS

The system of investor–State disputes has recently been subject to criticism for lacking predictability, legitimacy and for excessively intervening with the exercise of the sovereign powers of States.[189] States use their criminal law to deal with the most serious economic misconduct and, understandably, want more predictability when international tribunals review their conduct. Investors would also benefit from greater consistency when tribunals deal with issues related to economic crimes.

To facilitate legal certainty concerning the effect of bribery, money laundering and other economic crimes in international investment law, treaties need to include provisions on the effect of economic crimes. States can also issue joint interpretative statements on previously concluded treaties, or replace old treaties with modern bilateral treaties, either one at a time or through regional agreements.[190]

[185] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA (18 July 2014) paras 1592, 1596–1598, 1633 and 1637.

[186] *Lao Holdings v The Lao People's Democratic Republic*, ICSID Case No ARB (AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (30 May 2014) para 3.

[187] *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) para 669. ('It is a "cardinal principle" that the necessary parties to the counterclaim must be the same as the parties to the primary claim, and while this might be formally so in the present case there are many other entities that are either primarily or jointly responsible for the alleged frauds').

[188] *Hamester v Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) para 356 see also, Kryvoi (n 157) 236–239.

[189] See European Commission Staff Working Document, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (Brussels 13 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>.

[190] S Hindelang and Y Kryvoi, *Consolidating the IIA network*, UNCTAD Annual High-Level IIA Conference: Phase II of IIA Reform (10 October 2017). <http://investmentpolicyhub.unctad.org/Upload/Documents/BoS%203_agenda%20and%20report%20back.pdf> 8.

The new generation of investment treaties would do well to reference the specific international law instruments which address economic crimes. Examples of instruments which reflect an international consensus and which could inform both treaty-making and the decisions of tribunals include the ILC Articles on State Responsibility, as well as instruments adopted by the UN, OECD and specialized bodies such as FATF. As discussed above, these non-binding instruments contain detailed guidance for regulators to which many States have voluntarily committed themselves and which often reflect customary international law.

If the treaty or the arbitration agreement includes a requirement that the investment be made in accordance with law, tribunals tend to consider economic crimes at the jurisdictional stage. Otherwise, committing an economic crime when acquiring an investment may result in the claim being inadmissible at the merits phase. It is argued that the commission of economic crimes should not automatically deprive tribunals of jurisdiction and block investors' access to arbitration. The arbitration agreement, being autonomous from the main contract or treaty, should remain valid even if the main contract is tainted by an economic crime. The task of the tribunal is to determine the effect of such crimes on the rights and obligations of the parties at the merits stage.

It appears that investment tribunals should pay more attention to the principle of contributory fault when representatives of both the State and the investor are complicit in an economic crime. For example, bribery usually entails misconduct of both parties—one party making an illicit payment and the other accepting it. Penalizing only the investor by rejecting its claims or only the State would seem unfair and contradict generally accepted principles of international law, such as those reflected in the ILC Articles on State Responsibility. This approach also ignores the failure of a State to comply with its international obligations, such as the obligation to effectively combat bribery and corruption.[191] Similarly, the commission of an economic crime by an investor should be reflected in damages awards, as the *Yukos* tribunal did recently.

It must be noted, however, that investor–State tribunals prefer to examine the obligations of investors in the context of economic crimes on the basis of applicable internal law, and pay little attention to the obligations of States under international law. However, international arbitrators are rarely experts in the domestic laws of the particular State concerned.[192] The combined effect of the silence of investment treaties on the consequences of economic crimes and the inconsistent application of internal law results in increased

[191] See discussion of obligations of States in Section IV.

[192] For example, none of the three arbitrators who awarded $50 billion against Russia were Russian-qualified or spoke the Russian language.

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uncertainty, excessively expensive proceedings and decisions which are perceived as unfair.

In deciding on the admissibility of claims tainted by economic crimes, tribunals could draw inspiration from national best practices, such as the UK Bribery Act.[193] While not introducing strict liability on businesses for bribery, the Act reverses the burden of proof and establishes an offence of failing to prevent bribery for all companies, including parent companies.[194] The Bribery Act also introduces an 'adequate procedures' defence to avoid liability for bribery. Thus, under the Act organizations would not be liable for bribes paid on their behalf if they can prove on the balance of probabilities[195] that they had 'adequate procedures' in place to prevent them.[196] The Act's official guidance on the defence of adequate procedures includes engagement by senior management, risk assessment procedures, due diligence, communication and training as well as monitoring and review of existing procedures.[197] Even if not binding, the Act's logic could help tribunals approach issues not properly regulated in other domestic legal systems and help build consensus on the 'adequate procedures' to be expected of States and investors when it comes to bribery, corruption and other economic crimes.

To achieve greater legal certainty and procedural efficiency, a new generation of investment treaties and the practice of investment tribunals should not only draw on applicable domestic law but also on existing sources of international law concerning economic crimes or national best practice. This would help bring more legal certainty to the investor–State dispute resolution system, consistent with the latest UN efforts to reform investment agreements.[198] It would also help reconcile the combating of economic crime with the protection of foreign investors, as well as improving the legitimacy and predictability of the system of investor–State disputes.

[193] United Kingdom Bribery Act 2010, <https://www.legislation.gov.uk/ukpga/2010/23/contents>.

[194] Since its adoption, several British companies and individuals were successfully prosecuted for bribery or corruption overseas. (The UK House of Lords and House of Commons Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability (29 March 2017) <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> 57.)

[195] P Alldridge, 'The UK. Bribery Act: The Caffeinated Younger Sibling of the FCPA' (2013) 73 OhioStLJ 1181, 1202.

[196] ibid section 7(2).

[197] Ministry of Justice UK, 'Bribery Act 2010: Guidance to Help Commercial Organisations Prevent Bribery'. The official guidance on the adequate procedures defence within the UK's Bribery Act includes engagement by senior management, risk assessment procedures, due diligence, communication and training as well as monitoring and review of existing procedures. See Guidance at 23, 25, 27, 29 and 31.

[198] United Nations Conference on Trade and Development, 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties' (2017), IIA Issues Note, <http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf>, which emphasized that referencing global standards is an important part of reforming international investment agreements.