DMYTRO GALAGAN*

When Foreign Investors Sue Host States for Fighting Crime: Investor-State Dispute Settlement and Global Governance

This Article concentrates on the role of investor-state dispute settlement as a system of global governance with particular emphasis on the impact of investment arbitration on the enforcement of criminal law by sovereign states. First, this Article describes the

* LL.B., National University of Kyiv-Mohyla Academy; LL.M. in International Business Law, Central European University; LL.M., University of Victoria. Dmytro Galagan is a lawyer in British Columbia, Canada. This Article is based on chapter two of a master's thesis prepared under the supervision of Andrew Newcombe at the University of Victoria. The views and opinions expressed in this Article are those of the author and do not represent the opinion of his past or present employers.

architecture of the international investment protection and investor-state dispute settlement regime. Second, it explains that international investment agreements (IIAs) may be used as a way for developing countries to make credible commitments to liberal economic and trade policies in order to attract foreign investment and then considers four different critical approaches to investment arbitration as a system of global governance: (i) hegemonic international law, (ii) new constitutionalism, (iii) global administrative law, and (iv) humanity's law. Third, it gives a brief overview of cases where an investor was allegedly harassed or mistreated in the context of a criminal investigation or prosecution. Finally, it concludes that investor-state dispute settlement (ISDS), as a form of global governance, allows private arbitral tribunals to review the inherently public function of criminal law in sovereign states. Consequently, private arbitral review of public functions may have long-reaching implications for state sovereignty and democratic accountability.

I
THE RISE OF INTERNATIONAL ARBITRATION

Legal practitioners and academic commentators usually define arbitration as a private and consensual dispute resolution system where two or more parties agree to submit their current or possible future dispute to a neutral third party (either an individual or a panel of several individuals) whose decision will be final and binding on the parties, subject to limited judicial review.[1] The objectives of international arbitration agreements are multifold and include: providing a neutral and centralized dispute resolution forum, freeing the parties from the influence of their respective national governments, avoiding jurisdictional complications accompanying international civil litigation, ensuring enforceability of awards, benefiting from the commercial competence and expertise of the tribunal, avoiding lengthy appeals, tailoring the dispute resolution procedure to the parties' needs, increasing speed and reducing costs of dispute resolution, ensuring confidentiality during the proceedings, facilitating amicable settlements, and removing concerns about state immunity and the partiality of state courts in disputes involving states and state entities.[2]

1 NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶¶ 1.04–.05 (6th ed. 2015).

2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 73–93 (2d ed. 2014).

While lawyers and legal scholars predominantly view international arbitration as a private, consensual, and nonpolitical system for resolution of economic disputes, some international relations and law and society scholars argue that the proliferation of international arbitration removes politically sensitive matters from public supervision and judicial oversight.[3] National governments increasingly embrace the idea of allowing arbitration of claims arising out of concession and public-private partnership agreements, government procurement, and licensing, as well as disputes involving allegations of antitrust violations, bribery, corruption, or fraud.[4] According to these scholars, such an "expansion of arbitrable subject-matter, when combined with the secretive, closed, and highly discretionary and informal nature of international commercial arbitration, forms a powerful challenge to democratically accountable institutions."[5] In this regard, the rise of ISDS—a system that allows foreign investors to arbitrate their claims in international tribunals without recourse to domestic courts—is of particular concern.

Depending on the source of state consent, international investment arbitration may be contract-based, statute-based, or treaty-based.[6] A sovereign state may give consent to have its disputes with foreign investors arbitrated either (i) directly in a contract (for instance, in an investment, joint venture, production sharing, or concession agreement) concluded with an individual foreign investor; (ii) in national legislation governing foreign investment; or (iii) in an international investment agreement (IIA) concluded between two or more states.

A web of numerous IIAs, including bilateral investment treaties (BITs) and other treaties with investment provisions (TIPs), such as regional trade agreements (RTAs) and free trade agreements (FTAs) containing investment chapters, provide a fertile ground for the

---

3 *See* A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 26–29 (2003).

4 *See* Karim Abou Youssef, *The Death of Inarbitrability*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 47, 47 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

5 CUTLER, *supra* note 3, at 223.

6 RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 254–60 (2d ed. 2012); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 44–46 (2009). For more on international investment arbitration see CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶¶ 2.76–.88, 3.41–.49 (2d ed. 2017).

proliferation of international treaty-based investment arbitrations. In 2018, forty new IIAs were concluded (thirty BITs and ten TIPs), bringing the total number of IIAs to 3,317 (2,932 BITs and 385 TIPs) by the end of the year.[7] In particular, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-United States-Mexico Agreement (CUSMA) were signed on March 8, 2018, and November 30, 2018, respectively.[8]

Usually, IIAs contain obligations that one state party (as the "host state") undertakes with respect to investments made by investors of the other state party (the "home state"). Among the most important obligations included in IIAs are (i) the host state's obligation to accord foreign investors and investments treatment no less favorable than the host state accords to its own investors and investments (so-called national treatment) and to investors and investments of any third state (so-called most-favored-nation treatment); (ii) the obligation to treat foreign investors and investments fairly and equitably (FET) and accord them full protection and security (FPS); and, (iii) the prohibition to expropriate or nationalize foreign investments, either directly or indirectly (through measures having an equivalent effect), except for a public purpose, in a nondiscriminatory manner, in accordance with due process of law, and upon payment of a prompt, adequate, and effective compensation.[9]

Furthermore, IIAs frequently contain provisions governing the settlement of investor-state disputes. If a dispute between the host state and an investor from the home state arises and cannot be settled amicably, the investor may submit the dispute to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), other designated arbitration institutions (usually the International Chamber of Commerce (ICC)), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA), or the Stockholm Chamber of Commerce (SCC)), or to *ad hoc*

---

7 U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2019: SPECIAL ECONOMIC ZONES, at xii, 99–102, U.N. Sales No. E.19.II.D.12 (2019).

8 Glob. Affs. Can., *Statement by Minister Champagne on Signing of Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, GOV'T OF CAN. (Mar. 18, 2018), https://www.canada.ca/en/global-affairs/news/2018/03/statement-by-minister-champagne-on-signing-of-comprehensive-and-progressive-agreement-for-trans-pacific-partnership.html [https://perma.cc/DW37-C9LB]; Glob. Affs. Can., *Canada Signs New Trade Agreement with United States and Mexico*, GOV'T OF CAN. (Nov. 30, 2018), https://www.canada.ca/en/global-affairs/news/2018/11/canada-signs-new-trade-agreement-with-united-states-and-mexico.html [https://perma.cc/GT6Z-9WVD].

9 NEWCOMBE & PARADELL, *supra* note 6, at 147–398.

arbitration pursuant to the United Nations Commission on International Trade Law's (UNCITRAL) arbitration rules.[10] In 2018, seventy-one publicly known investment treaty-based arbitrations were initiated against forty-one countries and, as of January 1, 2019, the total number of such claims reached 942, with 117 countries being named as a respondent at least once.[11]

Another important element of the international investment protection regime is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which establishes the ICSID as part of the World Bank Group, delineates its jurisdiction,[12] and sets out the parameters of ICSID arbitration and conciliation proceedings.[13] In particular, the conduct of ICSID arbitrations is governed by the ICSID Convention, not national law;[14] ICSID arbitral awards can be challenged only in accordance with the annulment procedure the ICSID Convention provides;[15] and arbitration of investment disputes under the ICSID Convention excludes diplomatic protection.[16] Thus, unlike arbitral tribunals that derive their powers from national legal orders and adjudicate disputes in accordance with UNCITRAL or other arbitration

---

10 *Id.*, at 70–73.

11 U.N. CONF. ON TRADE & DEV., *supra* note 7, at xii, 102–04.

12 *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25(1), Mar. 18, 1965, 575 U.N.T.S. 159 ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").

13 *See id.* arts. 28–55.

14 *See id.* art. 44 ("Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.").

15 *See id.* arts. 50–52, 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.").

16 *See id.* art. 27(1) ("No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.").

rules, the ICSID Convention creates a "delocalized" and "entirely self-contained" system that excludes the application of any national procedural rules.[17] Ibrahim Shihata, ICSID Secretary-General (1983–2000), described ICSID as a "forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to 'depoliticize' the settlement of investment disputes."[18]

The ISDS system thus appears to be a neutral, nonpolitical system for the settlement of disputes arising between foreign investors and host states with respect to investments made by such foreign investors. The next two sections of this Article will look at the international investment agreements as a way to increase inward foreign direct investment (FDI) and then challenge the "depoliticization" hypothesis by looking at investment arbitration as a possible instrument of global governance.

II
INTERNATIONAL INVESTMENT AGREEMENTS AS AN INSTRUMENT TO INCREASE INWARD FOREIGN DIRECT INVESTMENT

Foreign direct investment (FDI) necessarily implies a contribution of capital over a period of time and involves the creation or acquisition of certain fixed assets that cannot be easily moved without significant loss to their value. Accordingly, under the "obsolescing bargain" model, the bargaining power of the host state's government increases once the foreign investor has completed its investment, thus giving the government an incentive to secure greater benefits for itself by changing the original terms of the investment.[19] And while direct expropriation was the main concern of foreign investors until the 1970s, in modern times, host states' governments may rely on increases of taxes and fees, changes in regulations, or even selective law enforcement to reap greater benefits from a successful investment made

17 LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 14 (2011); TOMÁŠ FECÁK, INTERNATIONAL INVESTMENT AGREEMENTS AND EU LAW 400, 414–15 (2016).

18 Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.- FOREIGN INV. L.J. 1, 5 (1986).

19 *See* Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI Through International Trade Agreements?*, 52 AM. J. POL. SCI. 741, 743 (2008) [hereinafter *Politics of FDI*].

by a foreign person or entity.[20] Therefore, to encourage incoming FDI flows, host states must reassure foreign investors that not only will their investments not be expropriated but also that the state's regulatory framework will remain stable.

In this regard, Tim Büthe and Helen Milner argue that whereas domestic policies usually can be modified relatively easily, especially if such changes come at the expense of foreigners, international agreements that bind host states to liberal economic policies favorable to foreign investors constitute "a more credible commitment regarding present and future economic policies."[21] On the basis of FDI statistical data for 122 developing and transitioning countries for the period from 1971 to 2007, Büthe and Milner reached the conclusion that preferential trade agreements (PTAs), as well as the General Agreement on Tariffs and Trade (GATT) and other World Trade Organization (WTO) agreements, help developing countries increase incoming FDI flows precisely because such agreements have political (as opposed to purely economic) effects. Consequently, the agreements indicate a commitment to liberal economic and trade policies and make it harder for host states' governments to backpedal on their promises to foreign investors.[22]

Further statistical analysis indicates that three features of international treaties make host states' commitments to foreign investors more credible: (i) when the treaty has actually entered into force; (ii) when the treaty contains investment provisions; and, (iii) when the treaty provides for a dispute settlement mechanism (especially if the agreement contains specific provisions governing the treatment of foreign investors and their investments and provides for third-party adjudication of disputes). When a treaty includes these features, the treaty constitutes a more credible commitment than a PTA that has been signed, but not ratified, and does not address foreign investment or dispute settlement.[23] Importantly, the informational effects of international economic agreements and dispute resolution mechanisms embodied in such agreements make it possible, not only

---

20 *Id.* at 741, 743–44; Tim Büthe & Helen V. Milner, *Foreign Direct Investment and Institutional Diversity in Trade Agreements: Credibility, Commitment, and Economic Flows in the Developing World, 1971-2007*, 66 WORLD POL. 88, 92–93 (2014) [hereinafter *FDI and Institutional Diversity*].

21 *Politics of FDI*, *supra* note 19, at 742.

22 *Id.* at 745–47, 757; *FDI and Institutional Diversity*, *supra* note 20, at 89, 93–94.

23 *FDI and Institutional Diversity*, *supra* note 20, at 91–92, 105, 108, 110, 112, 115.

for sovereign states but also for private entities, to exert costly pressure on host states' governments that default on their promises and thus increase the role of transnational actors in governing the world economy.[24]

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

> ICSID should not be solely regarded as a mechanism for the settlement of investment disputes. Its paramount objective is to promote a climate of mutual confidence between investors and States favorable to increasing the flow of resources to developing countries under reasonable conditions. Like the World Bank . . . or the Multilateral Investment Guarantee Agency . . . ICSID must be regarded as an instrument of international policy for the promotion of investments and of economic development. The main features of the system ICSID's founders devised for this instrument include its voluntary character, its flexibility, and its effectiveness.[25]

In sum, developing countries may seek to increase inward FDI and achieve economic growth if they commit to liberal economic policies by entering into international agreements,[26] especially those with detailed provisions promoting and protecting foreign investment and effective dispute settlement mechanisms.[27] However, these institutionalized commitments have "important implications for democratic governance"[28] because "governments pay for this increased inward FDI with a loss in policy autonomy."[29] As explained below, the implantation of arbitration (i.e., a private law instrument) into the realm of investor-state relations, which concerns the exercise of public authority, coupled with the large number of IIAs that often contain vague language and give arbitrators considerable interpretative powers,

---

24 *Politics of FDI*, *supra* note 19, at 743, 758; *FDI and Institutional Diversity*, *supra* note 20, at 94, 115–16.

25 Shihata, *supra* note 18, at 4.

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

27 *Politics of FDI*, *supra* note 19, at 758; *FDI and Institutional Diversity*, *supra* note 20, at 115.

28 *FDI and Institutional Diversity*, *supra* note 20, at 115–16.

29 *Politics of FDI*, *supra* note 19, at 758.

leads commentators to consider investment arbitration a system of global governance.

III
INTERNATIONAL INVESTMENT ARBITRATION AS GLOBAL GOVERNANCE

This Part analyzes four different approaches to investment arbitration as governance. Namely, this Part analyzes the views that consider ISDS to be an embodiment of (a) hegemonic international law, (b) new constitutionalism, (c) global administrative law, and (d) "humanity's law."

A. Hegemonic International Law

Some critics characterize the international investment protection regime as a species of hegemonic international law (HIL)[30] that discards the sovereign equality of states.[31] According to this approach, norms of international law should recognize power inequalities in the real world where weaker states pledge loyalty to the hegemon in exchange for security or economic assistance.[32] Binding international legal regimes and potent international organizations may impose constraints on the hegemon and thus endanger its status. In practice, therefore, the hegemons support the position that treaties lack a legally binding effect and that a hegemon's abstention is enough to prevent an emerging rule from being general and consequently becoming a part of customary international law.[33] Overall, HIL embraces a shift from a rule-based system toward a vague international legal order based on the hegemon state's demonstrations of military force and its routine intervention in internal affairs of weaker states.[34]

---

30 Jose E. Alvarez, *Is the International Investment Regime a Form of Global Governance?*, *in* ARBITRATION: THE NEXT FIFTY YEARS 137, 150 (Albert Jan van den Berg ed., 2012) [hereinafter *Global Governance*].

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

32 Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 845 (2001); Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873 (2003) [hereinafter *Hegemonic International Law Revisited*].

33 Vagts, *supra* note 32, at 846–47.

34 *Hegemonic International Law Revisited*, *supra* note 32, at 873.

However, to conclude that hegemonic powers function in the absence of the law would oversimplify reality. In some areas, including international trade and investment, the hegemon may benefit from having a body of suitably adapted norms of international law.[35] After all, "[t]he hegemon is also a trading party and the world of trade needs rules."[36]

For instance, although the United States is generally skeptical toward international institutions and lags behind other states in ratifying international treaties (such as the Vienna Convention on the Law of Treaties, the United Nations Convention on the Law of the Sea, and the Rome Statute of the International Criminal Court), this skepticism does not apply to trade and investment norms.[37] In particular, the United States actively participated in the multilateral trade negotiations conducted within the framework of the GATT, as well as in establishing the WTO, completing the North American Free Trade Agreement (NAFTA), and negotiating the Multilateral Agreement on Investment (MAI) between members of the Organisation for Economic Co-operation and Development (OECD).[38] Because formal equality with respect to trade and investment matters usually produces more favorable results for a superior economic power, the hegemon's general skepticism toward binding international law and its particular skepticism toward binding adjudication of international disputes is much less evident in the areas of international trade and investment.[39] Krisch points out that "[i]n matters of trade, the equality of the rules is hardly a threat to the powerful."[40]

Furthermore, dominant states prefer to use international law in ways that put fewer constraints on their behavior and provide more space for non-egalitarian elements and unequal power relations.[41] For instance, the United States is active in negotiating, entering into, and enforcing *bilateral* treaties on trade, investment, tax, and mutual legal assistance because bilateral negotiations are prone to being influenced by the superior bargaining power of one party. In contrast, multilateral

35 Vagts, *supra* note 32, at 845.

36 *Id.*

37 Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16:3 EUR. J. INT'L L. 369, 384 (2005) (It.).

38 Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 717–19, 722, 757 (2002).

39 Krisch, *supra* note 37, at 384–85.

40 *Id.* at 385.

41 *Id.* at 389.

negotiations allow weaker states to pull together their resources and counterbalance the dominant state's power.[42] Former President of the United States Donald Trump has endorsed this approach: on his first day in office, he issued a memorandum directing the United States Trade Representative to withdraw from the CPTPP, a trade agreement between twelve states, and instead "to begin pursuing, wherever possible, bilateral trade negotiations to promote American industry, protect American workers, and raise American wages."[43]

Guzman points out that developing countries that actively opposed the rule requiring "prompt, adequate and effective" compensation for expropriated investments in favor of a more relaxed standard ended up entering into BITs that provide for a stronger protection of foreign investments than required by the minimum standard of treatment under the customary international law.[44] He argues that developing countries face a prisoner's dilemma. Developing countries *as a group* would benefit more from entering into agreements that leave more flexibility for host states vis-à-vis foreign investors and do not allow foreign investors to enforce such agreements in international forums. But, in the race to attract foreign investments, *individual* developing countries enter into BITs that give foreign investors enforceable rights and provide investors with access to international investor-state arbitration mechanisms.[45] In sum, BITs give *individual* developing countries an ability to make enforceable promises to potential investors, making these countries more attractive to foreign investors and allowing them to attract a higher volume of foreign investments. But, BITs may not be an appropriate tool to increase the overall welfare of developing countries *as a group* and can even cause them to suffer an overall welfare loss.[46]

In summary, HIL scholars view the investment protection as a legal regime imposed by certain hegemonic powers with the aim to limit, through investment treaties and their subsequent interpretations by

---

42 *Id.* at 389–90.

43 Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017).

44 Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 643 (1997).

45 *Id.* at 643, 666–69.

46 *Id.* at 674, 688.

arbitral tribunals, the range of policy options available to developing countries.[47]

B. Global Administrative Law

Other commentators, who speak in "less loaded terms"[48] than "hegemonic international law," describe investment regime as a species of "global administrative law" (GAL).[49] Kingsbury, Krisch, and Stewart defined GAL as "the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make."[50] They argue that GAL encompasses the spectrum of actions, including rulemaking, adjudication, and other decision-making, that lies between making international treaties and simply settling disputes between states.[51] Moreover, they argue that investment arbitration is a powerful tool for investors to challenge administrative actions of host states, thus imposing both procedural and substantive limitations on domestic regulators.[52]

Similarly, Kingsbury and Schill argue that investment arbitration serves as a review mechanism where the arbitral tribunal examines whether the government has duly balanced investor protection and other important public goals.[53] Furthermore, when interpreting broadly worded standards of investment protection set out in various BITs, tribunals define the standards of good governance and rule of law that are enforceable by foreign investors against host states. Thus, the awards rendered in investment arbitration affect more than the parties in a particular dispute.[54]

---

47 *Global Governance*, *supra* note 30, at 150–51.

48 *Id.* at 151.

49 Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68:15 L. & CONTEMP. PROBS. 15, 15–61 (2005); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 121–50 (2006) (It.); BENEDICT KINGSBURY & STEPHAN W. SCHILL, INVESTOR-STATE ARBITRATION AS GOVERNANCE: FAIR AND EQUITABLE TREATMENT, PROPORTIONALITY AND THE EMERGING GLOBAL ADMINISTRATIVE LAW (2009).

50 Kingsbury et al., *supra* note 49, at 17.

51 *Id.*

52 *Id.* at 36–37; Van Harten & Loughlin, *supra* note 49, at 122.

53 KINGSBURY & SCHILL, *supra* note 49, at 1.

54 *Id.*

For instance, although the Tribunal in *Glamis Gold v. United States* noted that its mandate was "similar to the case-specific mandate ordinarily found in international commercial arbitration"[55] (i.e., to resolve a particular dispute arising out of or in connection with a particular commercial contract), the Tribunal acknowledged that it had to take into account implications of the decisions on the "significant public system of private investment protection" contained in Chapter 11.[56] The Tribunal then stated that in deciding an investor-state dispute, it had to take into account systematic implications of the Tribunal's award:

> The fact that any particular tribunal need not live with the challenge of applying its reasoning in the case before it to a host of different future disputes (the challenge faced by standing adjudicative bodies) does not mean such a tribunal can ignore that challenge. A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.[57]

Kingsbury and Schill argue that investment arbitration jurisprudence on the host state's obligation to accord "fair and equitable treatment" to foreign investors constitutes part of jurisprudence on modern public administration. Hence, the role of investment arbitration is to develop a body of standards for the exercise of public powers in administrative, judicial, and legislative proceedings.[58]

In turn, Van Harten and Loughlin write that if GAL is understood as a system similar to a judicial review mechanism, which is tasked with keeping the exercise of public authority within the bounds of legality and providing enforceable remedies to those negatively affected by government's unlawful actions, then treaty-based investment arbitration appears to be "the *only* case of global administrative law in the world today."[59] Van Harten and Loughlin outline four characteristics of investment arbitration that highlight its resemblance to GAL: (i) the absence of a duty to exhaust local remedies as a precondition to bringing a claim before an international arbitral tribunal (the principle of individualization); (ii) availability of damages as a

---

55 Glamis Gold, Ltd. v. United States, UNCITRAL, Final Award, ¶ 3 (June 8, 2009).

56 *Id.* ¶ 5.

57 *Id.* ¶ 6.

58 *See* KINGSBURY & SCHILL, *supra* note 49, at 8–9.

59 Van Harten & Loughlin, *supra* note 49, at 149.

public law remedy (the damages principle); (iii) enforceability of arbitral awards with limited supervision by national courts (principle of direct enforceability); and (iv) the possibility to make use of a favorable BIT by incorporating a holding company in a desirable jurisdiction (the forum-shopping principle).[60]

C. New Constitutionalism

Some scholars observe that IIAs play a constitutional function as they provide a framework for the global rule of law and expansion of transnational investment activities.[61] New constitutionalism scholars criticize the system of investor-state dispute resolution as an instrument of "disciplinary neoliberalism."[62] Neoliberalism may be defined as "a theory of political economy that hypothesizes that human well-being will be advanced by the practices associated with free markets,"[63] and relegates the state to "creat[ing] and preserv[ing] an institutional framework appropriate to such practices,"[64] including defining and protecting property rights, guaranteeing the enforceability of contractual obligations, and providing security and policing so as to ensure stable functioning of free markets.[65] David Schneiderman considers globalization to be a "cultural project with the normative object of actively suppressing alternatives"[66] and notes that, in the context of economic globalization, "[l]egal disciplines erect barriers that cabin political possibilities and suppress alternative futures."[67] Globalization, therefore, "represents the institutionalization of neoliberalism on a global scale."[68]

Schneiderman analyzes the interplay between transnational legality and "local agency" (nation-states) in what he calls "an age when

---

60 *Id.* at 122, 127–39.

61 A. Claire Cutler, *Human Rights Promotion Through Transnational Investment Regimes: An International Political Economy Approach*, 1 POL. & GOVERNANCE 16, 18 (2013) (Port.) [hereinafter *Human Rights Promotion*]; STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 17 (2009).

62 *Global Governance*, *supra* note 30, at 152.

63 David Schneiderman, *Transnational Legality and the Immobilization of Local Agency*, 2 ANN. REV. L. & SOC. SCI. 387, 390 (2006) [hereinafter *Immobilization of Local Agency*].

64 DAVID HARVEY, A BRIEF HISTORY OF NEO-LIBERALISM 2 (2005).

65 *Immobilization of Local Agency*, *supra* note 63, at 390.

66 *Id.*

67 *Id.*

68 *Id.*

powerful economic actors seek to supplant national state authority."[69] Schneiderman suggests that while transnational economic law distrusts local rulemaking, it necessarily relies on various state institutions and legal forms as support structures that preserve the legitimacy of transnational legality over time.[70] In other words, democratic national states are paramount to the success of the neoliberal project,[71] and "[s]tate actors, indeed, have been energetically working to maintain neoliberalism's supremacy."[72] In the age of economic globalization, sovereign states do not exercise their governance powers to the least possible extent, as proponents of the Chicago school of economics suggest.[73] Instead, Schneiderman argues neoliberalism no longer operates solely with the aim of "mobilization and extension of markets (and market logics)." Rather, neoliberalism also focuses on reconstruction of state functions along the line preferred by powerful market players, as well as on disciplining those who were marginalized by the neoliberalization of the economy.[74] The role of states in the neoliberal project is thus twofold. State involvement is necessary to, first, "erec[t] the scaffolding upon which the rules and structures of economic globalization operate" and, second, to "restructure domestic legal relations to augment the norms of transnational legality."[75] Stephen Gill identified three "dimensions," or "sets of 'productive constraints,'" of new constitutionalism, including measures to (i) reconfigure the state apparatuses, (ii) construct and extend capitalist markets, and (iii) deal with dislocations and contradictions.[76] The new constitutionalism project thus isolates large sectors of the economy from the influence of politicians or citizen groups by placing binding

---

69 *Id.* at 388.

70 *Id.*; David Schneiderman, *How to Govern Differently: Neoliberalism, New Constitutionalism and International Investment Law*, *in* NEW CONSTITUTIONALISM AND WORLD ORDER 165, 165–66 (A. Claire Cutler & Stephen Gill eds., 2014) [hereinafter *Govern Differently*].

71 *Immobilization of Local Agency*, *supra* note 63, at 394. For a more in-depth discussion, see STEPHEN GILL, POWER AND RESISTANCE IN THE NEW WORLD ORDER (2003) and ULRICH BECK, POWER IN THE GLOBAL AGE: A NEW GLOBAL POLITICAL ECONOMY (2005).

72 *Govern Differently*, *supra* note 70, at 165.

73 *Id.* at 166.

74 *Id.* at 171.

75 *Immobilization of Local Agency*, *supra* note 63, at 394.

76 Stephen Gill, *Market Civilization, New Constitutionalism and World Order*, *in* NEW CONSTITUTIONALISM AND WORLD ORDER 29, 38–42 (Stephen Gill & A. Claire Cutler eds., 2014) [hereinafter *Market Civilization*].

constraints, both internal and external, on the making and execution of financial, trade, and investment policies.[77]

In turn, the international investment protection regime is, in Schneiderman's opinion, an "institutional partner" of neoliberalism and a "superconstitution" that seeks to impose a set of binding constraints on sovereign states to isolate economic policy-making from democratic process.[78] Substantive standards of investment protection, contained in various IIAs, prohibit a range of state actions interfering with foreign investment, and international investment arbitration mechanisms effectively remove foreign investment disputes from host states' courts. Consequently, IIAs "elevate" foreign investment disputes to a "depoliticized" dispute resolution forum.[79] In sum, the emergence of the global investment protection framework may be equated to the "arrival of new transnational legal rules and institutions intended to entrench constitution-like limits on the exercise of local political authority far into the future."[80]

D. Humanity's Law

Teitel and Howse proposed a more optimistic framework for analyzing the development of international dispute settlement in the context of discussing "tribunalization."[81] Tribunalization is a recent trend toward the proliferation of international courts and tribunals, coupled with the increasing use of such adjudicative bodies to interpret the rules of international law and to settle disputes between states and other actors.[82] Teitel and Howse argue that both the optimistic hypothesis, which praises tribunalization as depoliticization and a shift from a power-based to a rule-based system of international relations, and the pessimistic hypothesis, which characterizes tribunalization as a threat to integrity and legitimacy of the international legal order, are too simplistic and misleading.[83] Instead, Teitel and Howse point out

---

77 *Immobilization of Local Agency*, *supra* note 63, at 391. For more information, see Stephen Gill, *Globalisation, Market Civilisation, and Disciplinary Neoliberalism*, 24 MILLENNIUM: J. INT'L STUD. 399, 412 (1995) (U.K.) [hereinafter *Globalisation*] and GILL, *supra* note 71.

78 DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 2–3 (2008).

79 *Govern Differently*, *supra* note 70, at 172.

80 *Immobilization of Local Agency*, *supra* note 63, at 387–88.

81 *Global Governance*, *supra* note 30, at 153.

82 Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959, 959–60 (2009).

83 *Id.* at 961–62.

that some tribunals "become the most evident sites of the new global politics of contestation between diverse actors,"[84] including not only sovereign states but also private individuals, business corporations, nongovernmental organizations (NGOs), and local communities. This emerging legal order, informed by human rights law, centers on persons and peoples, rather than states and state interests.[85] Teitel defines this new, normative regime as "humanity's law."[86]

With respect to international investment law and tribunalization, Teitel and Howse argue that the forms and functions of investment protection differed during four historic periods.[87] First, traditionally, foreign investors had to rely on their home states to exercise diplomatic protection, premised on the sovereign equality of states and that a harm caused to a foreign state's national was an injury caused to the foreign state itself.[88] Second, during decolonization and the Cold War, arbitral tribunals played depoliticizing and de-escalating functions in investment disputes between corporations from the North and West and governments from the East and South.[89] Third, with the emergence of the Washington Consensus and the end of the Cold War, IIAs and ISDS mechanisms allowed developing countries to make a credible commitment to foreign investors, providing them with enforceable rights, reducing the political risk, and allowing them to attract larger volumes of foreign investment.[90] The arbitrators acknowledged this role of investment protection regime in *Tecmed v. Mexico*, where the Tribunal stated that, by entering into the applicable BIT, Spain and Mexico "intended to strengthen and increase the security and trust of foreign investors that invest in the member States, thus maximizing the use of the economic resources of each Contracting Party."[91] Similarly, Thomas Wälde in *Thunderbird v. Mexico* noted that "international

84 *Id.* at 961.

85 *Id.* at 968–69.

86 Ruti Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 357 (2002); Teitel & Howse, *supra* note 82, at 969.

87 Teitel & Howse, *supra* note 82, at 977–81.

88 *Id.* at 977; NEWCOMBE & PARADELL, *supra* note 6, at 1–10.

89 Teitel & Howse, *supra* note 82, at 977–78.

90 *Id.* at 978.

91 Técnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, ¶ 156 (May 29, 2003).

investment law is aimed at promoting foreign investment by providing effective protection to foreign investors."[92]

Finally, Teitel and Howse argue a fourth historic period began with cases where foreign investors filed claims against governments that backpedaled on their commitments to privatization and economic liberalization due to high human costs and political or economic crises.[93] Such claims by foreign investors sparked sharp criticism from NGOs and civil society groups, and this criticism of investment arbitration forced the tribunals to function more transparently and devote more attention to human rights and legitimate public policy interests in assessing the host state's conduct. For instance, in *Methanex v. United States*, the Tribunal declared that, because there was "undoubtedly public interest in this arbitration" and the "substantive issues extend[ed] far beyond those raised by the usual transnational arbitration between commercial parties,"[94] the arbitrators had the power to consider *amici curiae* submissions from the NGOs.[95] Most recently, in *Philip Morris v. Uruguay*, the arbitrators acknowledged that "investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health."[96]

Overall, Teitel and Howse suggest that if investment arbitration tribunals consider human rights law in their decisions, the outcome of the tribunalization process would be a "new international investment law that embodies what is perceived as a just, humanity-oriented balance of rights and obligations."[97]

IV
INTERNATIONAL INVESTMENT ARBITRATION AND THE EXERCISE OF CRIMINAL POWERS BY SOVEREIGN STATES

However broadly the boundaries of arbitral tribunals' adjudicative powers and jurisdiction are pushed, international arbitration remains a dispute resolution mechanism for controversies arising out of

92 Int'l Thunderbird Gaming Corp. v. Mexico, UNCITRAL, Separate Opinion of Thomas Wälde, ¶ 4 (Dec. 1, 2005).

93 Teitel & Howse, *supra* note 82, at 979.

94 Methanex Co. v. United States, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*," ¶ 49 (Jan. 15, 2001).

95 *Id.* ¶ 53.

96 Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 399 (July 8, 2016).

97 Teitel & Howse, *supra* note 82, at 981.

international trade and investment, even if the adjudication of such disputes requires arbitral tribunals to consider the state's regulatory or criminal laws. Hence, two concerns arise with respect to parallel international arbitration and criminal proceedings: first, the fear that states may initiate criminal investigations in bad faith, to expropriate the investment, or to harass or intimidate the investor; and, second, even legitimately initiated criminal proceedings may adversely affect the integrity of ongoing arbitration proceedings, hamper access to evidence, or tamper with witnesses.[98]

Before analyzing how different conceptualizations of investment arbitration as a system of global governance capture the tensions arising between the resolution of economic disputes in ISDS and the enforcement of criminal law by host states, this Part gives a brief overview of cases where the dispute concerned alleged mistreatment or harassment of an investor in the context of criminal proceedings. First, this section looks at early arbitral jurisprudence, from *Benvenuti v. People's Republic of the Congo*[99] to *Hamester v. Ghana*.[100] Next, it considers the *Rompetrol v. Romania*[101] decision and subsequent jurisprudence.

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

The first modern investor-state arbitration cases concerning alleged irregularities and improprieties in criminal investigations, searches, seizures, and arrests arose as early as the 1970s. For instance, in *Benvenuti v. Congo*, the Tribunal held that the host state violated a joint venture agreement with an investor, in particular, through their military occupation of the investor's property and by initiating criminal proceedings against the Italian manager of the company, prompting him to leave the Congo.[102] The Tribunal noted that the host state had

---

98 Ruslan Mirzayev, *International Investment Protection Regime and Criminal Investigations*, 29 J. INT'L ARB. 71, 71 (2012) (U.K.).

99 S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, ¶¶ 4.41–.46, 4.56–.65 (Aug. 8, 1980) 8 Y.B. Comm. Arb. 144, 148–49 (1983).

100 Gustav F. W. Hamester GmbH v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶¶ 292–300 (June 18, 2010).

101 Rompetrol Grp. N.V. v. Romania, ICSID Case No. ARB/06/3, Award, ¶¶ 3, 38–39 (May 6, 2013).

102 *S.A.R.L. Benvenuti & Bonfant*, 8 Y.B. Comm. Arb. at 148–49. *See* Karel Daele, *Investment Arbitration Involving African States*, *in* ARBITRATION IN AFRICA: A PRACTITIONER'S GUIDE, 403, 426 (Lise Bosman ed., 2013).

not provided "any document that would enable [the Tribunal] to determine the merits of this criminal proceeding."[103]

In *Mitchell v. Democratic Republic of the Congo*, the dispute arose when the Democratic Republic of the Congo (D.R.C.) military forces raided Mr. Mitchell's legal consulting firm under the suspicion that his firm was holding money for a company with ties to an anti-government rebel group.[104] The D.R.C. sealed the firm's premises, seized documents, and imprisoned two lawyers for more than eight months.[105] The Tribunal concluded that the D.R.C. expropriated the claimant's investment in violation of the Congo-USA BIT.[106] This award was subsequently annulled on the grounds of manifest excess of powers and failure to state reasons.[107]

Similarly, in *Ahmonseto v. Egypt*, the Tribunal considered whether Egypt violated the Egypt-USA BIT by initiating "groundless, unfair and unreasonable" criminal investigations against the claimants and imprisoning one of them.[108] First, the arbitrators noted that although criminal prosecutions are "to a large extent" outside the scope of the applicable BIT, the Tribunal had the authority to assess whether the host state acted arbitrarily.[109] The Tribunal then set out the framework for such an assessment: a breach of the BIT occurs only when a criminal investigation is "fundamentally unjustified and groundless" and prevents the investors from managing their business.[110] A breach also occurs when a detention of an investor amounts to a "measure that gravely violates the rights of the person placed in custody" and excessively impairs the investment.[111] The Tribunal then acknowledged that it was not an international court of human rights or a public authority entrusted to apply criminal law, but rather a panel charged with adjudicating disputes over investments.[112] Ultimately, the majority of the Tribunal concluded that the conduct of the criminal

---

103 *S.A.R.L. Benvenuti & Bonfant*, 8 Y.B. Comm. Arb. at 148.

104 Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Award, ¶¶ 1, 62–66, 71–72, 74 (Feb. 9, 2004). *See* Daele, *supra* note 102, at 428.

105 *See Mitchell*, ICSID Case No. ARB/99/7, ¶¶ 62, 72.

106 *Id.* ¶ 102(2).

107 *Id.* Decision on the Application for Annulment of the Award, ¶ 67 (Nov. 1, 2006).

108 Ahmonseto, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/15, Award, ¶¶ 250, 262 (June 18, 2007), 23:2 ICSID Rev. 352, 354 (2008). *See* Daele, *supra* note 102, at 423–34.

109 *Ahmonseto*, ICSID Case No. ARB/02/15, Award, ¶ 254.

110 *Id.* ¶ 255.

111 *Id.* ¶ 262.

112 *Id.*

investigations and the detention of one of the claimants did not lead to direct impairment of the investment and thereby did not amount to inequitable treatment under the BIT.[113]

Later, in *Tokios Tokelés v. Ukraine*, the claimant alleged that Ukrainian state agencies had targeted the claimant's wholly owned Ukrainian subsidiary, Taky Spravy, with a lasting campaign of oppression prompted by persons in high authority. The claimant asserted that the state tax administration and the prosecutor's office unjustifiably interfered on numerous instances with Taky Spravy's business activities and management and that the agencies disguised this interference as lawful investigations into violations of Ukrainian economic laws.[114]

The claimant further argued that the state agencies' actions constituted an intentional and premeditated campaign of destruction of Taky Spravy's business as retaliation for supporting an opposing politician. Additionally, the claimant contended that the state agencies' overall interference with Taky Spravy's business constituted an unlawful expropriation of the claimant's investment and breached Ukraine's fair and equitable treatment obligation under the Ukraine-Lithuania BIT.[115] In particular, Mr. Oleksandr Danylov, Taky Spravy's general director, had been subject to criminal investigation for tax evasion since May 2002 and had been officially indicted in July 2002.[116]

The claimant filed a request for arbitration with the ICSID in August 2002 and resubmitted the request in November 2002.[117] Meanwhile, Mr. Danylov left Ukraine for Lithuania, where he was granted refugee status in May 2003, and he did not return to Ukraine until March 2005, after mass protests and a runoff presidential election pushed the existing regime out of power.[118] Although in April 2005 the state tax administration notified Mr. Danylov that the case against him had been closed for lack of evidence, the case was subsequently reopened and closed again several times.[119] At the hearing on the merits, Mr. Danylov

---

113 *Id.* ¶¶ 264–67.

114 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, ¶¶ 2, 4, 12 (July 26, 2007).

115 *Id.* ¶¶ 4, 12–13.

116 *Id.* ¶¶ 2, 58.

117 *Id.* ¶¶ 16, 18–19.

118 *Id.* ¶¶ 9, 58–59.

119 *Id.* ¶¶ 59–60.

testified that during his meetings with high-level officials at the Prosecutor General's Office and the Head of the State Police, the officials linked the criminal case to the ICSID claim.[120]

The Tribunal acknowledged that "a manifest and gross failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed towards an investor in the operation of his investment," may constitute a breach of an investment treaty.[121] However, the Tribunal was not persuaded that the claimant was a target of a politically motivated campaign of harassment.[122] Some facts appeared to weigh in favor of Taky Spravy's claim: the state's actions against Taky Spravy began just days after the company published campaign materials for the opposition party; the tax authorities issued public statements that Taky Spravy was suspected of crimes that those authorities had already decided not to pursue further; and the character and duration of the investigation were consistent with the claimant's theory.[123] The Tribunal also noted that "it is difficult to reconcile the criminal proceeding against O. Danylov, which the State has opened and closed a total of five times, with general principles of due process."[124] But, the Tribunal also noted the investigation into Taky Spravy was the result of a separate investigation into Taky Spravy's contractors that had begun before Taky Spravy produced materials for the opposition party, due to signs of being sham enterprises.[125] Ultimately, the Tribunal concluded that the claimant failed to furnish sufficient evidence that measures implemented by the state agencies were part of a politically motivated conspiracy designed to put the claimant's Ukrainian subsidiary out of business.[126]

Lastly, in *Hamester v. Ghana*, the claimant alleged the host state started a police investigation against the managing director of the joint venture company as a part of a scheme to expropriate the claimant's investment.[127] However, the Tribunal determined from documentary evidence that the criminal proceedings did not appear, prima facie, to lack a foundation.[128] Furthermore, the legality of the criminal

120 *Id.* ¶ 60.

121 *Id.* ¶ 133.

122 *Id.*

123 *Id.* ¶ 114.

124 *Id.*

125 *Id.* ¶ 115.

126 *Id.* ¶¶ 134–37.

127 Gustav F. W. Hamester GmbH v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 292 (June 18, 2010). *See* Daele, *supra* note 102, at 431.

128 *Gustav F. W. Hamester GmbH*, ICSID Case No. ARB/07/24, Award, ¶ 298.

proceedings was irrelevant because the managing director himself admitted that "the matter was not pursued by the police."[129] Therefore, the investigation was not in violation of the host state's obligations under the Germany-Ghana BIT.[130] The arbitrators also noted that "[a] State may obviously exercise its sovereign powers to investigate and prosecute criminal actions."[131]

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

In the cases summarized above, arbitral tribunals had to address the claimants' submissions that their investments were harmed by the conduct of the host states' law enforcement agencies. In turn, *Rompetrol v. Romania* appears to be the first case where allegations of the host state's misconduct in the context of a criminal investigation were at the center of the investment dispute.[132] This case required the Tribunal to elaborate on the interrelationship between protection of foreign investment and enforcement of domestic criminal law.[133]

The dispute in *Rompetrol v. Romania* arose from the purchase of shares by the claimant (TRG) in RRC, a privatized Romanian oil and petrochemical company.[134] The claimant alleged that government-ordered investigations of RRC and its management, as well as arbitrary treatment of the company, violated the Netherlands-Romania BIT.[135] The host state answered that the investigations were merely part of the implementation of the national anti-corruption strategy.[136]

The Tribunal noted that the specific nature of the dispute "originate[d] in and focus[ed] on measures taken by authorities of the Respondent state in the area of investigation and possible prosecution of criminal offences."[137] These measures, however, were not directly aimed at the investor (TRG) or its investments in the host state. Instead, these measures were directed against two former TRG officers, Mr.

---

129 *Id.*

130 *Id.* ¶¶ 297, 300.

131 *Id.* ¶ 297.

132 Rompetrol Grp. N.V. v. Romania, ICSID Case No. ARB/06/3, Award, ¶¶ 3, 38–39, 46, 50, 82 (May 6, 2013).

133 *See id.* ¶¶ 3, 38–39.

134 *Id.* ¶¶ 1–3.

135 *Id.* ¶¶ 3, 38–39.

136 *Id.* ¶ 39.

137 *Id.* ¶ 151.

Dan Patriciu and Mr. George Stephenson, and concerned their role in the affairs of the claimant's Romanian subsidiary and management of the Dutch holding company.[138] The tribunal thus set out three categories of state actions that would fall within the scope of protection under the BIT, namely the actions that target the investment or the investor itself, the investor's executives for their activities on behalf of the investor, or the investor's executives personally, but with the aim to harm the investor.[139] At times, the Tribunal appeared hesitant to make pronouncements on the conduct of criminal investigations by the authorities of the host state.[140] The outcome of the case, however, necessarily depended on the claimant's ability to prove that the investigations against the persons associated with the investor had breached the claimant's rights itself, i.e., that these criminal investigations were incompatible with the treatment the claimant was entitled to expect under the terms of the applicable BIT.[141]

On the one hand, the arbitrators declared that they

> would be acutely sensitive to any well-founded allegation that the investment arbitration process was intended to (or was in fact operating in such a way as to) block or inhibit the legitimate operation of the State's inherent function in the investigation, repression and punishment of crime, including economic crime and corruption.[142]

The Tribunal also confirmed several times that its role was not to second-guess the decisions of the Romanian law enforcement agencies.[143] First, the Tribunal noted that the parties shared an understanding that:

> [T]he Tribunal is not called upon to act as Romanian judge of final instance, either to pronounce on the rightness or wrongness of the pending criminal charges or to substitute a view of its own for the decisions of the competent Romanian instances on individual steps in the prosecutions or preliminary investigations, or on any other internal process.[144]

Second, the Tribunal disclaimed any supervisory function over the criminal investigation conducted by national law enforcement agencies:

---

138 *Id.*

139 *Id.* ¶ 200.

140 *Id.* ¶ 151.

141 *Id.*

142 *Id.* ¶ 152.

143 *Id.* ¶¶ 174, 233, 237–38.

144 *Id.* ¶ 174.

> There was at a certain stage in the proceedings some debate between the Parties as to whether the criminal investigations were so devoid of substantial merit (i.e. of real and grounded suspicion of the possible commission of criminal offences) that they had to be presumed to have been initiated and then pursued out of improper motives. But the Parties were in the event agreed that it was not for this Tribunal to determine whether adequate grounds ('probable cause') did or did not exist under Romanian law to justify the opening of an investigation, and by so doing either to supervise or to supplant the decisions of the competent organs of the Romanian judicial system. The Tribunal can only agree.[145]

The Tribunal discussed the indictment and its charges as follows:

> The indictment would thus appear . . . to offer the necessary basis on which each of the accused can then set about preparing his defence. To note that is of course wholly without prejudice to whether the factual allegations are indeed accurate and sustainable, and the legal argument correct. As already noted however, those assessments are not for this Tribunal to make, but are a matter for the Romanian courts. The Parties are in agreement . . . that it is not for this Tribunal to determine whether or not there was a substantial basis for the criminal charges against Mr. Patriciu and his associates.[146]

Third, the Tribunal emphasized that it was not a court of final appeal deciding on the operation of the host state's criminal justice system:

> The Claimant advances a whole series of actions by the State prosecutors in charge of the PNA and DIICOT investigations which it says were unjustified or wrongful, and which it asks the Tribunal to find were part of a pattern of deliberately oppressive conduct against Mr. Patriciu and the others under investigation. It would be impossible for the Tribunal to investigate all of these accusations in detail—and indeed to do so would contradict the underlying proposition . . . that it is not for an investment tribunal to set itself up as a court of final review over the criminal justice systems of host States.[147]

On the other hand, the Tribunal agreed with the claimant that "the pursuit of crime—or even its mere invocation—cannot serve on its own as a justification for conduct that breaches the rights of foreign investors under applicable treaties."[148] The Tribunal examined the formal indictment against Mr. Patriciu and Mr. Stephenson and was satisfied that the indictment laid the charges, facts, and evidence

---

145 *Id.* ¶ 233.

146 *Id.* ¶ 237.

147 *Id.* ¶ 238.

148 *Id.* ¶ 152.

against them in sufficient detail, so that the indictment did not, "on its face, bear out any argument that it embodies a trumped-up set of criminal allegations that are accordingly only explicable as stemming from bias or improper motive."[149] Then, to address the claimant's allegations that persistent irregularities in the course of the criminal investigation constituted a pattern of intentionally oppressive conduct, the Tribunal addressed the following: the attachment of RRC shares, the arrest and attempted imprisonment of Patriciu and Stephenson, the press releases issued by the Romanian law enforcement authorities, Patriciu's and RRC's intercepted telephone conversations, and the requests for information from banks and the tax controls.[150] While some law enforcement activities did not raise concerns, the Tribunal noted that the continued prosecutorial delay evidenced "prosecutorial animus" toward the claimant.[151] The attempts to imprison Mr. Patriciu "reflect[ed] no credit on the . . . prosecutors"[152] and, together with the attempts to wiretap his phones,[153] "suggest[ed] that there were elements in the State apparatus determined to pin something on Mr. Patriciu, if they could."[154]

In the end, even though the Tribunal dismissed the claimant's contention of a politically motivated campaign of harassment, the Tribunal concluded that procedural irregularities during the criminal investigation, in the absence of any evidence that the respondent attempted to avoid or minimize the possibility of harming the foreign investor, amounted to a breach of the host state's fair and equitable treatment obligation.[155] However, because the claimant failed to prove that it suffered economic loss or damage from the host state's breach of the BIT, no compensation was awarded.[156]

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

---

149 *Id.* ¶ 237.
150 *Id.* ¶ 238.
151 *Id.* ¶ 248.
152 *Id.* ¶ 251.
153 *Id.* ¶¶ 255–61.
154 *Id.* ¶ 261.
155 *Id.* ¶¶ 277–79.
156 *Id.* ¶ 299.

> [I]n this Tribunal's view, a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment to a protected investor by a pattern of wrongful conduct during the course of a criminal investigation or prosecution, even where the investigation and prosecution are not themselves wrongful. The provisos are however that the pattern must be sufficiently serious and persistent, that the interests of the investor must be affected, and that there is a failure in these circumstances to pay adequate regard to how those interests ought to be duly protected. In the Tribunal's considered view, it is part of the legitimate expectations of a protected investor—without in any way trenching upon the sovereign right of the host State to prescribe and enforce its criminal law—that, if its interests find themselves caught up in the criminal process either directly or indirectly, means will be sought by the authorities of the host State to avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects.[157]

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

> [T]he Tribunal wishes to make it plain that it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and equitable treatment. All will depend on the nature and strength of the evidence in the particular case, on the impact of the events complained about on the protected investor or investment, and on the severity and persistence of any breaches that can be duly proved, as well as on whatever justification the respondent State may offer for the course of events. The Tribunal's finding is based entirely on the facts of the present case.[158]

In turn, in the *Yukos Cases*, the dispute concerned various measures, including criminal prosecutions and tax reassessments, taken by the Russian Federation against OAO Yukos Oil Company (Yukos) and related persons and entities between July 2003 and November 2007.[159] In February 2005, three controlling shareholders in Yukos (Hulley, YUL, and Veteran Petroleum) initiated parallel arbitration

---

157 *Id.* ¶ 278.

158 *Id.* ¶ 279.

159 Yukos Universal Ltd. (Isle of Man) v. Russia, No. AA 227, PCA Case Repository, Final Award, ¶ 63 (Perm. Ct. Arb. 2014) (The parallel arbitrations—Hulley Enters. Ltd. (Cyprus) v. Russia, No. AA 226, PCA Case Repository, Final Award, ¶ 63 (Perm. Ct. Arb. 2014) and Veteran Petroleum Ltd. (Cyprus) v. Russia, No. AA 228, PCA Case Repository, Final Award, ¶ 63 (Perm. Ct. Arb. 2014)—will not be cited going forward because the cited portions of the three arbitrations are identical to each other.).

proceedings, arguing that the Russian Federation breached the Energy Charter Treaty[160] by expropriating the claimants' investments and failing to treat them in a fair and equitable manner.[161]

The claimants alleged that a series of criminal investigations and prosecutions, as well as accompanying searches and seizures, constituted a campaign of harassment against the executives, employees, auditors, and lawyers of Yukos. These harassment allegations were thought to be aimed at expropriating Yukos's assets and removing Mr. Mikhail Khodorkovsky, the then principal shareholder and CEO of Yukos, as a political threat.[162] Mr. Khodorkovsky and Mr. Platon Lebedev, the then directors of Hulley and YUL, were arrested in 2003 on charges of fraud, embezzlement, and tax evasion and sentenced to nine years in prison in May 2005.[163] The Russian Federation brought new charges against them in February 2007 resulting in further convictions in December 2010.[164]

The respondent maintained that its law enforcement actions were legitimate, nondiscriminatory law enforcement measures undertaken in compliance with Russian law in response to illegal acts committed by Yukos's executives and shareholders.[165] Furthermore, the respondent argued that the treatment of Mr. Khodorkovsky, Mr. Lebedev, and other individuals was mostly irrelevant in the context of the investor-state dispute because the ECT protections cover investments, not physical persons. Hence, the respondent argued its law enforcement actions did not impair the claimants' investments.[166]

While the Tribunal noted that "it is not a human rights court," the arbitrators nevertheless found themselves competent to "consider the allegations of harassment and intimidation as they form part of the factual matrix of Claimants' complaints that the Russian Federation violated its obligations under . . . the ECT."[167] The Tribunal then considered the conduct of criminal investigations, and the searches and seizures involving Yukos's executives, employees, lawyers, and

160 Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95 (entered into force Apr. 17, 1998).

161 *Yukos*, No. AA 227, Final Award, ¶¶ 1, 10, 63, 110.

162 *Id.* ¶¶ 5, 81, 83, 761.

163 *Id.* ¶ 82.

164 *Id.*

165 *Id.* ¶¶ 81, 83–86, 763.

166 *Id.* ¶¶ 764, 795, 1556.

167 *Id.* ¶ 765.

advisers, as well as the arrest and trial of Mr. Khodorkovsky.[168] The Tribunal then proceeded to scrutinize the credibility of the claimants' allegations about the campaign of harassment.[169] The arbitrators concluded that the respondent's actions were not justified as legitimate law enforcement measures:

> The Tribunal accepts that the Russian Federation had the power to conduct searches and seizures in Yukos' premises during the ongoing criminal investigations. Nevertheless, having reviewed the record, the Tribunal finds that the investigation of Yukos was carried out by the Russian Federation with excessive harshness. Respondent's counsel acknowledged that in the context of the large-scale fraud investigation "not everything is pretty in those circumstances, and we may each of us have circumstances that we would regret or have done differently." The Tribunal considers "not pretty" to be an understatement in this case. The treatment of Yukos senior executives, mid-level employees, in-house counsel, external lawyers and related entities as described in this chapter support Claimants' central submission that the Russian authorities were conducting a "ruthless campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent."[170]

Having reviewed the evidence, the Tribunal decided that the respondent's aggressive law enforcement actions significantly affected Yukos's management, disrupted its operations, contributed to its demise, and thus damaged the claimants' investment.[171] Ultimately, the arbitrators concluded that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets,"[172] thus, the respondent had breached the non-expropriation guarantee under the ECT.[173] While the Tribunal was primarily concerned with the USD $13 billion VAT assessments against Yukos and the auction of Yukos's major subsidiary at a significantly deflated price,[174] there is no doubt that overzealous conduct of criminal investigations played a role in the finding of liability.

In *Al-Warraq v. Indonesia*, the dispute concerned the bailout of Bank Century, a banking institution indirectly owned by the claimant in

168 *Id.* ¶¶ 766–93.
169 *Id.* ¶¶ 795–804.
170 *Id.* ¶ 811.
171 *Id.* ¶¶ 819–20.
172 *Id.* ¶¶ 756, 1579.
173 *Id.* ¶¶ 1579–85.
174 *Id.* ¶ 1579.

November 2008, and the subsequent criminal investigation and prosecution of the claimant.[175] In December 2010, an Indonesian court held a trial *in absentia* and convicted the claimant of theft, corruption, and money laundering, and confiscated his assets.[176] In August 2011, Al-Warraq commenced arbitration proceedings under the Organisation of the Islamic Conference (OIC) Agreement.[177] Al-Warraq alleged, *inter alia*, that the respondent breached the claimant's basic rights under Article 14 of the ICCPR[178] by prejudging his guilt, pursuing the criminal investigation for nefarious motives, failing to inform him about the nature and cause of the criminal charges, failing to properly summon him to attend the criminal trial, trying him *in absentia*, barring him from being represented by counsel, and not allowing him to appeal the conviction.[179] The claimant argued that throughout the criminal investigation and prosecution, the respondent committed a number of procedural irregularities and corrupt practices and imposed arbitrary and discriminatory measures that impaired his investment.[180] Thus, the respondent breached its obligation to accord fair and equitable treatment to the claimant's investment.[181] The claimant also alleged that the respondent's pre-bailout measures amounted to expropriation and that the illegal conduct of the respondent's investigatory and prosecutorial authorities breached the claimant's right to adequate protection and security.[182]

In the context of the claimant's expropriation claim, the Tribunal concluded that the words "basic rights" in Article 10(1) of the OIC Agreement[183] are properly understood as a reference to "basic property

---

175 Al-Warraq v. Indonesia, UNCITRAL, Final Award, ¶¶ 88, 96–98, 108–09, 123–25 (Dec. 15, 2014).

176 *Id.* ¶¶ 139–41, 161.

177 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, June 5, 1981 (entered into force Sept. 23, 1986) [hereinafter OIC Agreement].

178 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

179 *Al-Warraq*, UNCITRAL, Final Award, ¶¶ 10, 177, 184–93, 202, 206–07, 213, 217–18, 224–28, 238–39, 247–50.

180 *Id.* ¶¶ 391–92.

181 *Id.* ¶¶ 391–92.

182 *Id.* ¶¶ 291, 427–30, 622.

183 OIC Agreement, *supra* note 177, art. 10(1) ("The host state shall undertake not to adopt or permit the adoption of any measure—itself or through one of its organs, institutions or local authorities—if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights or the exercise of his authority on the ownership, possession or

rights," and not as a general reference to civil and political rights such as the right to a fair trial guaranteed by Article 14 of the ICCPR.[184] Furthermore, because the adequate protection and security obligation covers only the investment, not the investor personally, the Tribunal found the respondent's measures that affected the claimant's due process rights, without any detrimental effect to the investment, could not result in a breach of this standard of protection.[185] Because the criminal investigation and prosecution of the claimant occurred after the bailout, these actions did not deny adequate protection and security to the investment.[186]

The Tribunal, however, also examined the alleged breaches of the claimant's rights under the ICCPR as part of his fair and equitable treatment claim.[187] The arbitrators concluded that the respondent had failed to properly examine the claimant and inform him of the criminal charges, and the conduct of the claimant's trial *in absentia* contravened Article 14 of the ICCPR and Indonesian law.[188] Ultimately, although the Tribunal held that the claimant's trial and conviction *in absentia* amounted to a denial of justice and a breach of the fair and equitable treatment standard,[189] the claimant's "unclean hands" rendered his claims inadmissible.[190]

Another case decided in 2014, *Belokon v. Kyrgyz Republic*,[191] also involved the banking sector. The dispute concerned conduct of the Kyrgyz National Bank and Kyrgyz prosecutors, which began in April 2010. Namely, the conduct involved the imposition of a temporary administrative regime in Manas Bank (in which the claimant was the sole shareholder), criminal investigations into money laundering, and other criminal offenses allegedly committed by the claimant, his bank,

---

utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth.").

184 *Al-Warraq*, UNCITRAL, Final Award, ¶¶ 521–22.

185 *Id.* ¶ 629.

186 *Id.*

187 *Id.* ¶¶ 522, 556–621.

188 *Id.* ¶¶ 581, 584, 588, 601–05, 621.

189 *Id.* ¶¶ 618, 621 ("Failure to comply with the most basic elements of justice when conducting a criminal proceeding against an investor amounts to a breach of the investment treaty.").

190 *Id.* ¶¶ 645–48.

191 Belokon v. Kyrgyz Republic, No. AA 518, PCA Case Repository, Award, ¶¶ 2–7 (Perm. Ct. Arb. 2014).

and its employees.[192] The claimant alleged, in particular, that the criminal investigations instituted by the respondent breached the fair and equitable treatment standard and the prohibition of unreasonable interference with the investment as provided for in the Latvia-Kyrgyz Republic BIT.[193]

The Tribunal found that the applicable BIT required the FET to be accorded to "investments of investors of either contracting party" and did not encompass the host state's treatment of the former directors or managers of Manas Bank.[194] The arbitrators thus decided that they lacked authority to "consider the criminal proceedings, however abusive they may be, in its analysis under the FET standard . . . except insofar as they form a pattern which may be relevant in assessing the context as a whole."[195] Instead, the Tribunal inquired whether the respondent's measures were unreasonable or discriminatory and whether those measures impaired the claimant's ability to manage his investment.[196] On the one hand, the Tribunal acknowledged that it could not award damages to the former Manas Bank officials, who were not investors within the meaning of the applicable BIT,[197] and that the respondent, a sovereign state, was "of course entitled to charge the Claimant with a violation of any crime they have the evidence to support."[198] On the other hand, the arbitrators affirmed that persistent pursuance of groundless criminal investigations constitutes a breach of the BIT:

> Criminal allegations pursued against the Claimant in the absence of evidentiary support (or even cogent explanations) infringe on his rights to enjoy the benefits of his investment. A particular enjoyment of property is the right to be associated with that investment. Where that association is improperly characterised as criminal, the impairment is evident. The perfunctory but persistent allegations against the Claimant have curtailed his ability to manage his investment.
>
> . . . .
>
> Where such criminal proceedings have consequences of depriving the investor of the management, use, and enjoyment of property, then the BIT requires that the underlying charges not be "unreasonable, discriminatory or arbitrary". [sic] The Tribunal recalls that Kyrgyz

192 *Id.* ¶¶ 4–9, 50–54, 122, 126–34.
193 *Id.* ¶ 216.
194 *Id.* ¶ 245.
195 *Id.*
196 *Id.* ¶¶ 246, 261–62, 267–72.
197 *Id.* ¶ 267.
198 *Id.* ¶ 271.

> courts have twice remanded the case against the Claimant back to the Kyrgyz prosecutor. Further, the Respondent has not provided evidence to this tribunal of money laundering committed by Mr. Belokon, nor has it provided the reasoning of the prosecutor's office that justified the criminal proceedings. Whether under Kyrgyz law or under international law, Mr. Belokon has a right to know the case against him. The conclusion in light of the record is inescapable, to the effect that his investment was arbitrarily destroyed and that compensation is accordingly due.[199]

Ultimately, the Tribunal awarded the claimant USD $15 million, deciding that the respondent had indirectly expropriated Manas Bank by imposing a number of arbitrary and unjustified administrative measures, failing to accord FET to the claimant's investment, and acting in a manifestly arbitrary and unreasonable manner.[200]

This arbitral award was, however, subsequently set aside in France.[201] The Court of Appeal emphasized that prohibition of money laundering is part of French international public policy. Further, while the Court was not called upon to decide the criminal liability of Mr. Belokon, it ruled that recognition and enforcement of this arbitral award would violate international public order in a "manifest, effective and concrete" way because of the circumstances in which the claimant acquired its investment in the Kyrgyz bank.[202] And although criminal proceedings remained pending in the Kyrgyz Republic, and Mr. Belokon has not been convicted of any crime, the French Court was persuaded by state evidence that Mr. Belokon acquired Manas Bank by virtue of his close ties with the Kyrgyz authorities in order to conduct "money laundering operations that could not have flourished in the less favourable Latvian environment."[203]

---

199 *Id.* ¶¶ 270, 272.

200 *Id.* ¶ 335.

201 Nataliya Barysheva & Valentine Chessa, *Kyrgyz Republic v. Mr. Belokon*, *Court of Appeal of Paris, 21 February 2017*, A Contribution by the ITA Board of Reporters, WOLTERS KLUWER, http://www.kluwerarbitration.com/document/kli-ka-ons-17-25-005 (last visited Oct. 7, 2020).

202 *Id.*

203 Damien Charlotin, *BIT Award Against Kyrgyzstan Is Annulled in Paris, with Court Giving Weight to Money-Laundering Allegations That Had Earlier Failed to Persuade Arbitrators*, INV. ARB. REP. (Feb. 23, 2017), https://www.iareporter.com/articles/bit-award-against-kyrgyzstan-is-annulled-in-paris-with-court-giving-weight-to-money-laundering-allegations-that-had-earlier-failed-to-persuade-arbitrators/.

V
ISDS AS A SYSTEM OF GLOBAL GOVERNANCE AND ITS IMPACT ON DOMESTIC ENFORCEMENT OF CRIMINAL LAW

Overall, the global investment regime privatizes, denationalizes, and decentralizes cross-border investment and thus "transnationalizes" the investor-state dispute settlement.[204] Philip Jessup articulated this conception of transnational law more than sixty years ago,[205] in a series of lectures that anticipated the ways in which globalization forces "break the frames" of the historic unity between law and state.[206] Transnational relations are often defined as "regular interactions across national boundaries when at least one actor is a non-state actor,"[207] and Claire Cutler suggests that the "transnational is, ontologically and epistemologically, not a level of analysis, distinct from the national or domestic levels," but "extends across and thereby links as well as transcends, different (territorial) levels," and brings together local and global orders through privatized dispute resolution procedures.[208] Similarly to Philip Jessup, Harold Koh views transnational law as a "hybrid body of private and public, domestic and international law"[209] involving a multiplicity of public and private legal actors and sources of law.[210] What makes transnational law unique, according to Harold Koh, is

> its melding of two conventional modes of litigation that have traditionally been considered distinct. In traditional domestic litigation, private individuals bring private claims against one another

---

204 *Human Rights Promotion*, *supra* note 61, at 17, 20.

205 PHILIP JESSUP, TRANSNATIONAL LAW 2 (1956) (defining "transnational law" as "all law which regulates actions or events that transcend national frontiers . . . . [and includes] [b]oth public and private international law . . . . [in addition to] other rules which do not wholly fit into such standard categories.").

206 A. Claire Cutler, *Legal Pluralism as the "Common Sense" of Transnational Capitalism*, 3(4) OÑATI SOCIO-LEGAL SERIES 719, 723 (2013) (Spain) [hereinafter *Common Sense*]; Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5(2) EUR. J. SOC. THEORY 199, 206 (2002) (U.K.).

207 Thomas Risse-Kappen, *Bringing Transnational Relations Back in: Introduction*, *in* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 3, 3–7 (Thomas Risse-Kappen ed., 1995); *Human Rights Promotion*, *supra* note 611, at 20.

208 *Human Rights Promotion*, *supra* note 611, at 20 (quoting Bastiaan van Apeldoorn, *Theorizing the Transnational: A Historical Materialist Approach*, 7(2) J. INT'L RELS. & DEV. 142, 144 (2004)).

209 Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.9 (1991) [hereinafter *Transnational Public Law Litigation*]; Harold Hongju Koh, *Why Transnational Law Matters*, 24(4) PENN STATE INT'L L. REV. 745, 745 (2006).

210 *Common Sense*, *supra* note 206, at 725.

> based on national law before competent domestic judicial fora . . . In traditional international litigation, nation-states bring public claims against one another based on treaty or customary international law before international tribunals of limited competence.[211]

This Article analyzed four different approaches to investment arbitration as a form of global governance; each of these positions looks through a different lens at the way arbitrators decide investor-state disputes. HIL critics are likely to emphasize North-South inequalities in investment relations; GAL scholars may prioritize the need for greater transparency, accountability, and democratic participation in investment arbitration; new constitutionalism scholars warn that an investment protection regime imposes quasi-constitutional binding constraints on host states' freedom to regulate; and advocates of humanity's law would argue for greater consideration of human rights norms in interpreting IIAs.[212] This Article also discussed arbitral jurisprudence on the interaction between protecting foreign investment and states' power to conduct criminal investigations and prosecutions. Ultimately, this jurisprudence evidences several trends that highlight the role of investment arbitration as a system of global governance.

First, while tribunals have repeatedly noted that they do not play the role of a human rights court,[213] arbitrators have nevertheless regularly accepted competency to rule on allegations of mistreatment and harassment in the context of criminal investigations and prosecutions where such actions significantly affected investors' ability to manage or benefit from their investments.[214] Arbitrators have readily applied human rights norms, such as the provisions of the ICCPR,[215] in assessing the treatment of investors or those sufficiently close to them. In other words, investment tribunals are willing to act as quasi-human rights courts for capital exporters. Paradoxically, both HIL critics and

---

211 *Transnational Public Law Litigation*, *supra* note 209, at 2348.

212 *Global Governance*, *supra* note 30, at 160.

213 *See, e.g.*, Ahmonseto, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/15, Award, ¶ 262 (June 18, 2007) 23:2 ICSID Rev. 352 (2008); Yukos Universal Ltd. (Isle of Man) v. Russia, No. AA 227, PCA Case Repository, Final Award, ¶ 765 (Perm. Ct. Arb. 2014).

214 *See Ahmonseto*, ¶¶ 255, 262; Belokon v. Kyrgyz Republic, No. AA 518, PCA Case Repository, Award, ¶¶ 270, 272 (Perm. Ct. Arb. 2014); Rompetrol Grp. N.V. v. Romania, ICSID Case No. ARB/06/3, Award, ¶¶ 151, 200 (May 6, 2013); Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, ¶ 133 (July 26, 2007); *Yukos*, No. AA 227, PCA Case Repository, ¶ 765.

215 *See, e.g.*, Al-Warraq v. Indonesia, UNCITRAL, Final Award, ¶¶ 556, 621 (Dec. 15, 2014).

humanity's law advocates may invoke this trend in support of their theoretical positions. The former would emphasize the danger that investment arbitration may insulate wealthy individuals from legitimate law enforcement and thus hinder the fight against crime and corruption in developing countries. The latter, however, would see such cases as a sign that investment arbitration is becoming more receptive to human rights arguments and may serve as a mechanism to advance human rights, at least with respect to the interaction between foreign investors and host states' coercive law enforcement apparatus.

Second, tribunals create a quasi-constitutional framework for the exercise of states' power to prosecute and investigate crimes. While arbitrators have repeatedly acknowledged that every state is entitled to exercise this sovereign power,[216] arbitral tribunals have also formulated limits on the manner in which states enforce their criminal laws. For instance, the Tribunal in *Al-Warraq v. Indonesia* set out the following framework for the conduct of criminal trials *in absentia*:

> The Tribunal agrees with the Claimant that, for the extreme measure of trial in absentia to be permissible under international law, the Respondent must provide evidence that the Claimant:
>
> 1) was notified of the trial, i.e. proper service of process;
> 2) had unequivocally and explicitly waived his right to be present at trial;
> 3) had the legal right to be represented at trial and that he was actually represented;
> 4) is able subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge.[217]

Also, in *Tokios Tokelés v. Ukraine*, the Tribunal pointed out that repeatedly opening and closing criminal proceedings is irreconcilable with general principles of due process,[218] and in *Rompetrol v. Romania* the arbitrators found that the "legitimacy of a criminal investigation cannot depend on the source from which the responsible investigating authority receives the information leading it to suspect that criminal offences may have been committed."[219]

---

216 *See, e.g.*, *Belokon*, No. AA 518, PCA Case Repository, ¶ 271; Gustav F. W. Hamester GmbH v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 297 (June 18, 2010); *Rompetrol*, ICSID Case No. ARB/06/3, ¶ 278; *Yukos*, No. AA 227, PCA Case Repository, ¶ 811.

217 *Al-Warraq*, ¶ 595.

218 *Tokios Tokelés*, ICSID Case No. ARB/02/18, ¶ 114.

219 *Rompetrol*, ICSID Case No. ARB/06/3, ¶ 232.

Furthermore, in *Rompetrol v. Romania*, the Tribunal expressly stated that foreign investors have a legitimate expectation that the host state would engage in a balancing exercise, weighing the public goal of investigating crime against the private investor's interests and seeking to "avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects."[220] Similarly, in *Yukos Cases*, the arbitrators found that "the investigation of Yukos was carried out by the Russian Federation with excessive harshness."[221] Taken together, these cases support the new constitutionalism theory that investment arbitration puts quasi-constitutional limits on the exercise of sovereign power.

Third, the tribunals have maintained that applying domestic criminal law norms to a particular set of facts or assessing whether the domestic law enforcement authorities had probable cause to charge an individual is outside the tribunals' jurisdiction.[222] Neither should the tribunal function as a court of final review for a host state's criminal justice system;[223] however, tribunals have found that a host state committed a breach of the applicable IIA where the respondent pursues criminal allegations against the investor "in the absence of evidentiary support (or even cogent explanations)"[224] or fails to provide "any document that would enable [the tribunal] to determine the merits of this criminal proceeding."[225] Similarly, in *Hamester v. Ghana*, the claimant did not satisfy the burden of proof because, considering certain documents submitted to the tribunal, the criminal proceedings did "not appear, *prima facie*, to have lacked a foundation."[226] The standard of review for a host state's decision to commence a criminal investigation thus appears to be cursory, akin to a patently unreasonableness standard, where the host state is required to establish only that it had some reasonable basis to put coercive state apparatus in motion. These cases might point to investment arbitration being a species of GAL, although

---

220 *Id.* ¶ 278.

221 *Yukos*, No. AA 227, PCA Case Repository, ¶ 811.

222 *Rompetrol*, ICSID Case No. ARB/06/3, ¶¶ 174, 233, 237–38.

223 *Id.* ¶¶ 174, 233, 238.

224 Belokon v. Kyrgyz Republic, No. AA 518, PCA Case Repository, Award, ¶ 270 (Perm. Ct. Arb. 2014).

225 S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, ¶ 148 (Aug. 8, 1980) 8 Y.B. Comm. Arb. 144 (1983).

226 Gustav F. W. Hamester GmbH v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 298 (June 18, 2010).

"administration" here refers to the administration of criminal justice rather than issuance of permits or licenses.

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