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Henry G. Burnett

Jessica Beess und Chrostin

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ARTICLE

Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host States in Parallel with Investment Arbitration Proceedings

HENRY G. BURNETT AND JESSICA BEESS UND CHROSTIN[†]

INTRODUCTION

Bilateral investment treaties (“BITs”) provide important protections to investors conducting business in foreign countries (“Host States”). These protections often include the right to have potential claims against the Host State heard in international investment arbitration (“investor-state arbitration” or “investment arbitration”), as opposed to domestic courts. At the same time, however, the Host State retains its fundamental right to prosecute individuals and entities, including foreign investors and their employees, for criminal wrongdoing, where the State sees fit. These dual spheres of authority may overlap and sometimes, in practice, form concentric circles that raise difficult questions regarding the appropriate limits on the prosecutorial power of the State and the jurisdictional reach of the arbitral tribunal. Where an investor might see a violation of international law and its right to protection under a BIT, the Host State may see an investor’s conduct as a violation of its

[†] Henry G. Burnett is a Partner at King & Spalding LLP. Jessica Beess und Chrostin is an associate at King & Spalding LLP. The views expressed herein do not necessarily represent those of King & Spalding LLP or its clients.

domestic criminal laws.

A variety of issues arise at the intersection of domestic criminal law and international investment arbitration. In some instances, the State may use criminal prosecution of an investor or its corporate employees as retaliation for the investor's institution of an investor-state arbitration; criminal prosecution—even where justified—may aggravate the investment dispute. In other cases, the State's pursuit of criminal charges may overlap with the arbitral tribunal's jurisdiction to determine the merits of the investment dispute and may require determination of issues that the tribunal has been asked by the investor to resolve. Elsewhere, the State's criminal prosecution of an investor may form part of the State's defense in the investment arbitration itself, *i.e.*, where the State alleges that the investment was illegally obtained. Yet another possibility is that criminal prosecutions may constitute an element of the Host State's allegedly illegal conduct as, for instance, in the case of a creeping expropriation.

When faced with criminal prosecution by a Host State where an investor already has instituted investor-state arbitration, the investor may, in appropriate circumstances, seek redress in the form of a request for interim relief from the arbitral tribunal. But how do we determine the proper boundaries of these potentially overlapping systems of dispute resolution? What is the proper limit on the State's right to prosecute allegedly criminal conduct while an investment arbitration is pending? What is the proper limit on the arbitral tribunal's power to order a State to desist from exercising its inherent right as sovereign State to conduct criminal investigations and prosecutions?

This article attempts to distill some answers to these questions from a review and analysis of recent case law in investor-state arbitrations. Section I provides an overview of interim measures in international arbitration generally, focusing on a discussion of the relevant institutional arbitration rules in investor-state arbitrations. Section II focuses on recent investment arbitrations in which investors have sought interim measures to prevent a State from instituting or continuing criminal prosecutions against the investors. Section III attempts to distill from this case law some general principles applicable to requests for interim measures seeking to enjoin States from exercising their investigative and prosecutorial powers against foreign investors. As the analysis of the case law makes clear, tribunals considering requests for interim measures that

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would limit a State's exercise of its sovereign powers impose a particularly high threshold on the moving party and require a showing of urgency and necessity, as well as a direct, tangible impact on the established rights of the parties to the arbitration.

I. INTERIM MEASURES

A. Overview

An interim measure ("IM")¹ is a grant of temporary relief awarded for the protection of a party's rights pending the final resolution of a dispute.² Most frequently, IMs have been granted to afford four types of relief: (i) to prevent publication to the media or to the public of matters disclosed in the course of the arbitration; (ii) to suspend or otherwise impact related litigation proceedings in a domestic forum; (iii) to preserve evidence that may be relevant to the conduct and outcome of the arbitration; and (iv) to order security for costs. Often, especially in the case of IMs aimed at protecting and conserving relevant evidence, the success of the arbitration process itself depends on the issuance and enforcement of IMs.³ Destruction of evidence or alienation of assets may render the final arbitral award meaningless and lacking in legitimacy. Thus, at their core, IMs are aimed at protecting the parties' rights, as well as the integrity of the arbitral process.

There are at least three distinct categories of rights that arbitral tribunals generally recognize as subject to protection through IMs:⁴ the right to prevent contractual and legal rights that are the subject of the arbitration from being impaired or eviscerated prior to a final determination by the tribunal;⁵ the right to have the dispute decided

1. Interim measures are also commonly referred to as conservatory or provisional measures or remedies. For purposes of this article, these terms will be used interchangeably. IMs are generally available in both international commercial and investment arbitration. Because this article is concerned with IM applications and grants to prevent the institution or continuance of criminal proceedings, the main focus will be on IMs in international investment arbitration.

2. See e.g., Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 123–24 (1999).

3. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 2426 (2d ed. 2001).

4. Caline Mouawad & Elizabeth Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 ARB. INT'L, no. 3, 2013, at 381–94.

5. *Id.* at 394; see, e.g., *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (Nov. 19, 2007); *Burlington*

by the international tribunal;⁶ and the right to protect a party's procedural rights, including the right to preserve the *status quo*, to prevent the aggravation or exacerbation of the dispute, and to preserve the integrity of the arbitral proceedings.⁷ As the discussion *infra* in Section II will illustrate, this last category is at the forefront of the discussion regarding IMs where parallel criminal proceedings are threatened or ongoing.

B. Authority to Grant Interim Measures

As L. Yves Fortier has observed, “[a] tribunal’s jurisdiction to order provisional measures is, like the parties’ arbitration agreement itself, a function of the parties’ consent.”⁸ When parties agree to resolve a dispute by recourse to arbitration, they are free to determine the parameters of the dispute resolution process and may adopt institutional arbitration rules that grant tribunals authority to issue IMs; alternatively, the parties may agree to restrict the tribunal’s authority to issue this form of relief. For purposes of the present discussion of IMs to prevent the institution or continuation of criminal proceedings, two sets of institutional arbitration rules are relevant: the International Centre for Settlement of Investment

Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (June 29, 2009); Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009); Tethyan Copper Company Pty Limited v. The Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Claimant’s Request for Provisional Measures (Dec. 13, 2012).

6. Mouawad & Silbert, *supra* note 4, at 394; *see also* Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Interim Measures of Protection, 1939 P.C.I.J. (ser. A/B) No. 79 (Dec. 5, 1939); Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Procedural Order No. 4 (Jan. 11, 1999) 5 ICSID Rep. 4 (2002).

7. *See* Mouawad & Silbert, *supra* note 4, at 394 (noting that that at least one case has held that “the general rights to attract foreign investment, regulate and promote foreign investment, enforce regulations, and protect its [the State’s] reputation are not ‘rights in dispute that could warrant the recommendation or provisional measures.’”) (citing Churchill Mining PLC v. Republic of Indonesia, ICSID Case No. ARB/12/14, Procedural Order No. 3, Provisional Measures, ¶ 50 (Mar., 4 2013)); *see also* Electricity Company; LaGrand Case (Germany v. United States of America), Request for the Indication of Provisional Measures, 1999 I.C.J. (Mar. 3, 1999); Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1 Claimant’s Request for Provisional Measures (July, 1 2003); *City Oriente*, *supra* note 5.

8. L. Yves Fortier, *Interim Measures: An Arbitrator’s Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation, 3 (June 16, 2008), available at http://www.arbitration.icca.org/media/0/1223295298920/1115_001.pdf.

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Disputes' Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"); and the United Nations Commission on International Trade Law Arbitration Rules of 1976 (the "1976 UNCITRAL Rules") and as revised in 2010 (the "2010 UNCITRAL Rules").⁹

1. The ICSID Convention

The ICSID Convention addresses IMs in Article 47, which provides as follows.

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.¹⁰

This provision expressly acknowledges the parties' right to restrict the arbitral tribunal's authority to award interim relief, but otherwise affords the arbitrators broad discretion, circumscribed only by the requirement that the tribunal consider that "the circumstances so require" interim relief. Rule 39 of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules") provides some further guidance and states that:

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional

9. IMs are available in both commercial and investor-state arbitration. Accordingly, most, if not all, institutional arbitration rules have provisions regarding IMs. *See, e.g.*, INT'L CHAMBER OF COMM. R. OF ARB. art. 28 ("Conservatory and Interim Measures"); ARB. R. OF THE STOCKHOLM CHAMBER OF COMM. art 32 ("Interim Measures"); INT'L CTR. FOR DISP. RES. P. art 24 ("Interim Measures"). As this article is not concerned with IMs in international commercial arbitration, a discussion of these rules is outside its scope.

10. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 47, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270.

measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
- (5) If a party makes a request pursuant to paragraph (1) before constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
- (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.¹¹

Under Rule 39 of the ICSID Arbitration Rules, a party may request IMs at any time after instituting the arbitration proceeding, even before the constitution of the arbitral tribunal. The request for IMs must include three elements: (i) a statement of the rights the party seeks to preserve by requesting the IMs; (ii) a statement of the measures it requests; and (iii) a discussion of the circumstances justifying and/or necessitating the grant of IMs.

If a party requests IMs before the tribunal is properly constituted, the Secretary-General of ICSID may, upon the parties' request, set a schedule for briefing the IM request and opposition, so that the tribunal may turn to this issue immediately upon its constitution. Further, Rule 39(3) clarifies that the tribunal is free to recommend IMs on its own initiative and to subsequently modify or revoke any IM it recommends.¹²

Importantly, the use of the word "recommend," as opposed to

11. *Id.* at r. 39.

12. *Id.*

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“order,” does not render the tribunal’s determination with regard to IMs under the ICSID Convention and Rules any less binding than IMs ordered under other institutional arbitration rules like the UNCITRAL Rules, discussed below. Redfern and Hunter explain that: “[t]he use of the word ‘recommend’ in this context stems from the concern of the drafters of the ICSID Convention to be seen as respectful of national sovereignty by not granting powers to private tribunals to order a state to do or not do something on a purely provisional basis.”¹³ Initially, as Schreuer confirms, “a conscious decision was made not to grant the tribunal the power to order binding provisional measures.”¹⁴ However, as investor-state tribunals continued to apply the ICSID Convention and Rules in adjudicating requests for IMs, tribunal determinations on IMs have emerged as binding. As the tribunal in *Maffezini* stated, “[t]he Tribunal’s authority to rule on provisional measures is not less binding than that of a final award. Accordingly, for the purposes of this order, the tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order.’”¹⁵

2. The 1976 and 2010 UNCITRAL Rules

Under the 1976 UNCITRAL Rules, the power of the arbitral tribunal to award interim relief is set forth in Articles 15(1), 26(1), and 26(2), which provide:

Article 15(1): Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

Article 26(1): At the request of either party, the arbitral tribunal may take any interim measures it

13. REDFERN AND HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 333 (Sweet & Maxwell, 4th ed. 2004).

14. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 758 (Cambridge University Press, 2001).

15. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, ¶ 9 (Oct. 28, 1999) 5 ICSID Rep. 11 (2002); see also Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1 Claimant’s Request for Provisional Measures, ¶ 4 (July 1, 2003) (“It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures ‘recommended’ by an ICSID tribunal are legally compulsory; they are in effect ‘ordered’ by the tribunal and the parties are under a legal obligation to comply with them.”).

deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Article 26(2): Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the cost of such measures.¹⁶

The 1976 UNCITRAL Rules, like the ICSID Convention and Rules, afford the arbitral tribunal broad discretion with regard to awarding IMs. However, the UNCITRAL Rules differ in many significant respects from the relevant provisions under the ICSID regime. Notably, it is unclear from the 1976 UNCITRAL Rules whether the arbitral tribunal has discretion to recommend IMs on its own initiative. On the one hand, Article 15(1) states that the tribunal is free to conduct the proceedings as it sees fit, subject only to the requirement to treat all parties equally and to give the parties a full opportunity to present their respective cases. On the other hand, Article 26 expressly grants the parties the right to request IMs, but omits to grant such a right to the tribunal. Under customary international law rules of interpretation, ordinarily, *expressio unius est exclusio alterius*,¹⁷ suggesting that a tribunal constituted under the 1976 UNCITRAL Rules may not have authority to recommend IMs at its own initiative. Further, the 1976 UNCITRAL Rules do not address the tribunal's power to amend an IM order after its initial issuance, nor do the rules address the timing of requests for IMs.

This lack of clarity in the 1976 UNCITRAL Rules meant that "little legal consensus existed as to the proper scope and implementation of interim measures in international arbitration[s]" conducted under these rules.¹⁸ IMs thus became one of the issues most heavily modified when the UNCITRAL Rules were revisited and revised in 2010. As one commentator notes, "[i]n particular, the new Arbitration Rules unify and clarify the function of interim measures in international arbitration and are intended for universal

16. UNCITRAL Arbitration Rules, G.A. Res. 31/98, UN DOC. A/RES/31/28 (Dec. 15, 1976).

17. "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 1913 (10th ed. 2014).

18. Lee Anna Tucker, Note, *Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty*, 1 INT'L COMM. ARB. BRIEF, no. 2, 2011, at 16.

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application.”¹⁹ Since the UNCITRAL Rules may be used in both commercial and investor-state arbitrations, the focus of the 2010 UNCITRAL Rules’ provision on IMs is both to make the rules applicable to all types of arbitration regardless of the subject matter of the dispute and to provide increased guidance on the circumstances, conditions, and procedures for granting IMs.²⁰

Unlike the 1976 UNCITRAL Rules, the 2010 revision provides extensive detail on the definition of interim measures under the UNCITRAL Rules, the purposes for which IMs may be granted, the test for granting a request for IMs, and the scope of the tribunal’s power to amend, suspend, or terminate a granted IM.²¹ Notably, the

19. *Id.*

20. UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Fifth Session*, ¶¶ 17–18, delivered to the General Assembly, U.N. Doc. A/CN.9/614 (Oct. 5, 2006) [hereinafter *2006 Working Group Report*].

21. Article 26 of the 2010 UNCITRAL Rules provides as follows:

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraphs 2(a) to (c) shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
4. With regard to a request for an interim measure under paragraph 2(d), the requirements in paragraphs 3(a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties on the arbitral tribunal’s own initiative.
6. The arbitral tribunal may require the party requesting an interim

2010 UNCITRAL Rules Working Group deleted the words “in respect of the subject-matter of the dispute” from the Arbitration Rules as being “overly restrictive” as to what circumstances may justify interim measures.²² Thus, while the 2010 UNCITRAL Rules are in many ways more detailed and specific than the earlier 1976 version, they are also broader in some respects. Since no requests for IMs to prohibit the institution or continuation of criminal proceedings against an investor and/or its corporate executives have been decided under the 2010 UNCITRAL Rules to date, it remains to be seen how, if at all, the revised rules will change the availability of IMs in these situations.

II. RECENT CASES INVOLVING INTERIM MEASURES TO PROHIBIT THE INSTITUTION OR CONTINUATION OF CRIMINAL PROSECUTIONS

Tribunals in at least seven ICSID and two UNCITRAL cases have addressed requests for protection in the face of a Host State’s pursuit of criminal charges.

A. *Tokios Tokelés v. Ukraine*

The arbitral tribunal in *Tokios Tokelés* was the first tribunal to hold that it had authority to grant a provisional measures request to enjoin a Host State from continuing criminal prosecution of an investor’s corporate executives.²³ In this case, the claimant was an investor company that carried on a “business in Ukraine in the advertising, printing, publishing and allied trades, under the control and management of two brothers, Mr. Oleksandr V. Danylov and Mr.

measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures address by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

UNCITRAL Arbitration Rules, G.A. Res. 65/22, UN Doc. A/RES/65/22 (Dec. 6, 2010).

22. 2006 Working Group Report, *supra* note 17, at ¶ 105.

23. See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, Claimant’s Request for Provisional Measures, ¶ 1 (July 1, 2003).

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Serhiy V. Danylov.”²⁴ Among other things, the claimant alleged that its company was the subject of a targeted and long-running campaign of oppression by State agencies, ultimately culminating in a wrongful expropriation of the claimant’s investment. During the pendency of the investment arbitration, the claimant filed a request for provisional measures, requesting the tribunal to order the respondent to “refrain from, suspend, and discontinue: (i) the criminal proceedings against O.V. Danylov, General Director of Claimant’s subsidiaries in Ukraine; (ii) the arrest of assets of Claimant’s subsidiaries in Ukraine; and (iii) tax investigations of Claimant’s subsidiaries in Ukraine.”²⁵ Only the first request is relevant to the present discussion.

In its Order No. 3, the tribunal discussed Article 47 of the ICSID Convention and Arbitration Rule 39, as well as prior investor-state arbitrations addressing requests for interim relief.²⁶ The tribunal concluded that: “[t]he circumstances under which provisional measures are required under Article 47 are those in which the measures are *necessary* to preserve a party’s rights and that need is *urgent*.”²⁷ IMs are necessary “where the actions of a party are capable of causing or of threatening irreparable prejudice to the rights invoked,”²⁸ and they are urgent where “action prejudicial to the rights of either party is likely to be taken before such final decision is taken.”²⁹ The tribunal proceeded to note that the respondent was incorrect in arguing that criminal proceedings against an employee of the investor cannot be the subject of a provisional measure because such proceedings are not part of a legal dispute arising directly out of the claimant’s investment. The tribunal stated that:

It is not necessary for a tribunal to establish that the actions complained of in a request for provisional measures meet the jurisdictional requirements of Article 25 [of the ICSID Convention]. A tribunal may order a provisional measure if the actions of the

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

25. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 3, ¶ 2 (Jan. 18, 2005) (internal quotation marks omitted).

26. *Id.* ¶ 6 et seq.

27. *Id.* ¶ 8 (citing CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 751–57 (Cambridge U. Press 2001)).

28. *Id.* ¶ 8 (citing Separate Opinion of President Jiménez de Aréchaga, Aegean Sea Continental Shelf Case (Greece v. Turk.), 1976 I.C.J. 3, 16.).

29. *Id.* ¶ 8 (citing Order of 29 Jul. 1991, Case Concerning Passage Through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, ¶ 23).

opposing party “relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.”³⁰

Having established that criminal proceedings may properly be the subject of IMs, however, the tribunal ultimately concluded that the request for IMs should not be granted in this instance to enjoin the criminal proceedings against O.V. Danylov.³¹ The tribunal reasoned that the claimant had failed to show that a provisional measure was either necessary or urgent to protect its rights. Importantly, the tribunal looked to the timing of the institution of the criminal proceedings and noted that they were initiated nine months before the claimant registered its ICSID claim, yet the claimant did not include the criminal proceedings in its prior request for provisional measures. Consequently, the claimant could not now credibly claim that IMs were urgent.

B. City Oriente v. Ecuador

In *City Oriente*, the claimant initiated ICSID arbitration proceedings against Ecuador following amendments to the Hydrocarbon Law purporting to unilaterally modify the parties’ hydrocarbon production-sharing contract.³² *City Oriente* refused to comply with the amended law, and in response, the State Attorney General of Ecuador announced that a criminal complaint against *City Oriente*’s representatives and managers would be filed on the basis of the investor’s non-compliance with the new Hydrocarbon Law. *City Oriente* requested interim measures to maintain the *status quo ante* after the State Attorney General of Ecuador made this announcement. And in fact, during the pendency of the IM request, two criminal complaints were filed against the claimant’s executives. In its Decision on Provisional Measures, the tribunal stated that a tribunal determining applications for IMs may and should take into consideration whether the adoption of the IMs is necessary to preserve the petitioner’s rights, whether their ordering is urgent, and whether each party has been afforded an opportunity to raise observations.³³

30. *Id.* ¶ 11 (citing Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, ¶ 23 (Oct. 28, 1999)).

31. *Id.* at ¶¶ 12–13.

32. *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶¶ 1–5 (Nov. 19, 2007).

33. *Id.* ¶ 54.

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The tribunal looked at each of these factors in turn and granted City Oriente's IM request, finding that City Oriente met all three considerations.³⁴ More specifically, the tribunal found that the main purpose of provisional measures in ICSID arbitrations is to preserve the *status quo ante*, and that this was precisely what the claimant sought to do:

In other words, it is the Tribunal's view that Article 47 of the Convention provides authorization for the passing of provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of the award or entails having either party take justice into their own hands. Where there is an agreement in place between the parties that has so far defined the framework of their mutual obligations, then the rights to be preserved are, precisely, those that were thereby agreed upon.³⁵

Although the tribunal noted that it had great respect for the Ecuadorian judiciary and acknowledged that Ecuador's sovereign authority included the right to prosecute and punish crimes perpetrated in its territory, the tribunal found that Ecuador was using the prosecution "as a means to coactively secure payment of the amounts allegedly owed by City Oriente pursuant to [the new Hydrocarbons Law]."³⁶ Since the legality of the new law and its application to City Oriente were precisely the subject of the arbitration, the tribunal found that Ecuador's prosecutions would violate the principle that neither party may aggravate or extend a dispute or take justice into its own hands. The tribunal therefore ordered the parties to abide by the contract as it was originally executed and ordered Ecuador to suspend the criminal proceedings against City Oriente's executives.

C. Caratube v. Kazakhstan

In *Caratube*, the claimant initiated ICSID arbitration proceedings against Kazakhstan after that State unilaterally terminated a contract for the exploration and production of hydrocarbons.³⁷ Despite the termination, Caratube continued to

34. *Id.* ¶ 83.

35. *Id.* ¶ 55.

36. *Id.* ¶ 62.

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

operate certain oil wells to avoid adverse technical consequences, and, in response, Kazakhstan initiated criminal proceedings against Caratube and its directors for the unlawful continued operation of the wells. The claimant requested interim measures ordering Kazakhstani authorities to refrain from acting upon any existing criminal complaints or to file any new criminal complaints against the claimant.

In its Decision Regarding Claimant's Application for Provisional Measures, the tribunal cited *Tokios Tokelés* with approval and pointed to the language of ICSID Article 47 and Rule 39, stating that the rule does not indicate that any specific state action must be excluded from the scope of possible provisional measures.³⁸ Rather, "this broad language can be interpreted to the effect that, in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings."³⁹ However, in recognition of the state's sovereign right to prosecute crime, "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state."⁴⁰ The tribunal held that the claimant did not meet this particularly high threshold. The claimant failed to show, according to the tribunal, that its procedural right to continue with the ICSID arbitration would be precluded by the criminal investigation, and further, since the claimant sought monetary damages rather than injunctive relief, any additional harm to the claimant could be examined and determined at a later stage in the proceedings.⁴¹ For these reasons there was neither necessity nor urgency supporting the claimant's IM application.

D. Quiborax v. Bolivia

In *Quiborax v. Bolivia*, Quiborax, alongside Non Metallic Minerals (NMM) and Allan Fosk Kaplún, instituted ICSID arbitration proceedings against Bolivia, seeking compensation for damages following the Host State's revocation of eleven mining concessions.⁴² Bolivia initiated criminal proceedings against the co-claimants and other related individuals on the ground that they had

38. *Id.* ¶ 54 et seq.

39. *Id.* ¶ 136.

40. *Id.* ¶ 137.

41. *Id.* ¶¶ 139–40.

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

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allegedly forged a document establishing that Quiborax and Mr. Fosk were NMM shareholders and thus protected investors under the Bolivia-Chile BIT.

Although the subject matter of the criminal proceedings was the prosecution of the investors' alleged crimes of forgery and fraud, the tribunal found that the criminal proceedings could properly be the subject of IMs since the crimes at issue were directly related to the arbitration. The subject matter of the criminal proceedings could be outcome determinative for the investors' access to the arbitration, and, in fact, "this access to ICSID arbitration is expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted."⁴³

After establishing its authority to grant IMs on the subject matter of the request, the tribunal proceeded to address the requirements for a successful IM application. In its Decision on Provisional Measures, the tribunal found that the ICSID Convention and Rules required the satisfaction of a three-pronged test before a tribunal could grant provisional measures: (i) the rights to be protected through the IM must exist and the IM must be both (ii) urgent and (iii) necessary.⁴⁴ The tribunal found all three requirements satisfied and granted the request for IMs.

Importantly, the tribunal expressly declared that it had full respect for Bolivia's sovereign right to prosecute crimes committed in its territory, but also found that the criminal prosecutions appeared to target the claimants in the arbitration *because* they had initiated the arbitration.⁴⁵ The tribunal reasoned that Bolivia's institution of the

43. *Id.* ¶ 120.

44. *Id.* ¶ 113.

45. *Id.* ¶ 121. ¶ 121 provides as follows:

In addition, although the Tribunal has every respect for Bolivia's sovereign right to prosecute crimes committed within its territory, the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants *because* they had initiated this arbitration. Indeed, the *Querrela Criminal* expressly states that the alleged irregularities in Claimants' corporate documentation were deterred in consideration of ("en atención a") the Request for Arbitration filed by Claimants against Bolivia. Lorena Fernández, one of the authors of Informe 001/2005, testified that the corporate audit was made at the request of the Ministry of Foreign Affairs in the context of an arbitration proceeding and was aimed at establishing whether the shareholders in NMM were Chilean nationals. Indeed, the very content of Informe 001/2005 suggests that the underlying motivation for the audit was to serve Bolivia in the defense of this arbitration claim, as it contained specific recommendations for

criminal proceedings in essence amounted to a “defense strategy”⁴⁶ and concluded that the State must execute its prosecutorial powers “in good faith and respecting Claimants’ rights, including their *prima facie* right to pursue this arbitration.”⁴⁷ Because the tribunal found that the criminal proceedings were directly related to the arbitration and that Bolivia’s investigation formed part of its defense to the arbitration claim, the tribunal ordered Bolivia to take appropriate measures to suspend the criminal proceedings, finding that they threatened the procedural integrity of the arbitration—in particular, the claimants’ right of access to evidence through witnesses.⁴⁸ However, the tribunal rejected the claimants’ contention that the criminal proceedings threatened the exclusivity of the arbitration, aggravated the dispute, or had modified the *status quo ante*.

E. Von Pezold, et al. v. Zimbabwe

In *Von Pezold*, the claimants held investments in three large estates that produced timber, tobacco, tea, coffee, and macadamia nuts in Zimbabwe.⁴⁹ The claimants instituted two ICSID arbitrations seeking restitution and damages for the alleged expropriation of those estates.

On June 11, 2012, the claimants received a letter from Zimbabwe’s Attorney General requesting that the claimants disclose certain documents in connection with the arbitrations and threatening to institute criminal proceedings if they refused.⁵⁰ The next day, on June 12, 2012, the claimants filed a request for provisional measures with the ICSID tribunal. One day later, the president of the tribunal, L. Yves Fortier, ruled on claimants’ application, directing Zimbabwe to refrain from taking any action in connection with its letter to the claimants of June 11, 2012.

Exceptionally, the decision provided no reasons supporting the tribunal’s grant of interim measures. The President of the tribunal

such defense.

See also id. ¶ 119 (“It is evident from the record that the criminal proceedings are related to, and may even be motivated by, the ICSID arbitration.”).

46. *Id.* ¶ 122.

47. *Id.* ¶ 123.

48. *Id.* ¶ 148.

49. *German Farmers Take Case to ICSID*, THE ZIMBABWEAN (July 20, 2010, 8:07 AM), <http://www.thezimbabwean.co/politics/33109/german-farmers-take-case-to-icsid.html>.

50. *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Directions Concerning Claimants’ Application for Provisional Measures of 12 June 2012, ¶ 3 (June 13, 2012).

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merely alluded to the “potential consequences that might result from [Zimbabwe’s] proposed actions.”⁵¹ The lack of reasoning may be explained by the apparent urgency of the threat and the short time between the request for interim measures and the issuance of the order granting the request.

F. Lao Holdings v. The Lao People’s Democratic Republic

In *Lao Holdings*, the claimant owned investments in various gambling establishments in Laos and brought an ICSID Additional Facility arbitration to seek damages for alleged expropriation of their investments through confiscatory taxation and other government measures.⁵² At the time of institution of the ICSID arbitration, there were ongoing court proceedings seeking to hold the claimant accountable for \$20 million in back taxes as well as an investigation into money laundering allegations against the claimant.⁵³ The investor sought provisional measures to prevent the government from continuing these proceedings.

In an unpublished decision, the tribunal granted the investor’s provisional measures request, prohibiting the respondent State from “taking any steps that would alter the *status quo ante* or aggravate the dispute.”⁵⁴ Notably, the respondent apparently consented to stay the proceedings as part of its “conciliatory efforts to allow the arbitration process to proceed in an environment conducive to timely action by the Tribunal.”⁵⁵

Subsequently, on the eve of the hearing on the merits, the respondent requested a modification of the tribunal’s Decision on Provisional Measures of September 17, 2013 to allow the respondent State to interview and depose potential witnesses and seek assistance from the government and courts of the U.S. and other countries to investigate the claimants’ alleged criminal activity.⁵⁶ The tribunal dismissed the respondent’s request, citing in support of its decision the respondent’s initial agreement to the terms of the Decision on Provisional Measures and noting that:

51. *Id.* ¶ 7.

52. *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, ¶ 2 (May 30, 2014).

53. *Id.* ¶¶ 4(i), 48.

54. *Id.* ¶ 1.

55. *Id.* ¶ 4(i).

56. *Id.* ¶ 1.

[C]riminal proceedings launched in the midst of final preparations for the arbitration, and running concurrently with the hearing would considerably broaden and aggravate the dispute between the parties, in threatening the integrity of the arbitral process; and the Respondent has not established a change of circumstances sufficient to justify its proposed modification of the PMO or the necessity and urgency for so doing on the eve of the merits hearing.⁵⁷

This case is different from those discussed heretofore, since the respondent State originally agreed to discontinue the criminal proceedings, but later requested an amendment of the tribunal's order to allow the State to re-launch the criminal investigation on the eve of the hearing on the merits. Under these circumstances, the tribunal found that the respondent had to show urgency and necessity in order to obtain an amendment to the original IM order.⁵⁸ Since the respondent failed to meet this burden, the tribunal denied the respondent's request.

G. Churchill Mining and Planet Mining v. Indonesia

In *Churchill Mining*, the claimants commenced an ICSID arbitration against Indonesia to dispute the revocation of four mining licenses.⁵⁹ According to the claimants, they obtained these licenses through their partnership with a local group of companies called the Ridlamata Group. On February 24, 2014, only days after the tribunal issued its decision upholding jurisdiction over the dispute, the Regent of East Kutai announced his intention to initiate criminal proceedings "against the Claimants and their witnesses."⁶⁰ On March 21, 2014, the Regent filed criminal charges against the Ridlamata Group on the ground of forgery of official documents.⁶¹

Churchill Mining promptly filed an application for IMs on March 27, 2014, requesting among other things that Indonesia refrain from threatening or commencing any criminal investigation or

57. *Id.* ¶ 4(iii).

58. *Id.* ¶ 9.

59. *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 3, Provisional Measures, ¶ 4 (Mar. 4, 2013).

60. *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, Provisional Measures, ¶ 5 (July 8, 2014).

61. *Id.* ¶ 84.

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prosecution against the claimants, their witnesses or any person associated with the claimants' operations in Indonesia, and that Indonesia suspend or stay any pending criminal investigation against the claimants' and their associates.⁶²

In deciding the claimants' application, the tribunal stated in its Procedural Order No. 9 that:

Various ICSID tribunals have interpreted these requirements [of ICSID Rule 39] to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) meet the requirement of urgency; and (iii) the requirement of necessity, which implies the existence of a risk of irreparable or substantial harm.⁶³

The tribunal refused the request for provisional measures because, *inter alia*, the Ridlamata Group was not a party to the arbitration; no investigations or prosecutions against the claimants or their current witnesses had been commenced; and the urgency and necessity requirements were not met since the claimants' rights were not affected by the proceedings against the Ridlamata Group, even though the claimants had business dealings with the Ridlamata Group. This case follows the line of precedent adopting a high threshold for imposing IM orders on States to prohibit the institution or continuation of criminal proceedings. Here, because the threat was exactly that—merely a threat—, the tribunal found that the requirements for IMs had not been satisfied.

H. Paushok v. Mongolia

In *Paushok*, an investment arbitration under the 1976 UNCITRAL Rules, the claimants alleged that the respondent State breached its international law obligations by passing laws that adversely impacted the ability of mining companies to do business in Mongolia.⁶⁴ Specifically, the claimants objected to the enforcement of a disputed windfall profit tax law. While the dispute was pending,

62. *Id.* ¶ 1.

63. *Id.* ¶ 69.

64. Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Order on Interim Measures, ¶¶ 1–6 (Sept. 2, 2008). *Paushok v. Mongolia* is the first of two UNCITRAL cases discussed in this article. Both of these cases apply the 1976 UNCITRAL Rules; as noted previously, there is no case to date under the 2010 UNCITRAL Rules in which an investor has sought IMs to prevent a State from exercising its right to institute or continue criminal proceedings.

the claimants filed a request for interim measures asking, among other things, that Mongolia be directed to suspend any criminal action against the claimants or their investments.⁶⁵

In its Order on Interim Measures, the tribunal held that it had authority to issue IMs only if a five-factor test was satisfied: (1) prima facie jurisdiction; (2) prima facie establishment of the case; (3) urgency; (4) imminent danger of serious prejudice (necessity); and (5) proportionality.⁶⁶ Carefully noting that, in spite of the first two factors, the tribunal was not prejudging the jurisdiction and merits of the case, it held that the claimants' request met these five requirements and granted the requested interim relief in full.⁶⁷ Notably, however, the tribunal did not specifically direct Mongolia to suspend the criminal prosecutions against the claimants, but rather directed both parties to refrain from actions that could further aggravate the dispute, which presumably included Mongolia's pursuit of criminal actions against the claimants.

I. Chevron v. Ecuador

The claimants in *Chevron* instituted an UNCITRAL proceeding upon the issuance of a domestic Ecuadorian court judgment holding Chevron liable for over US\$18 billion in environmental damages.⁶⁸ In this ongoing arbitration, the claimants argue, among other things, that the Ecuadorian judgment constitutes a denial of justice and that Ecuador has violated a host of protections to which the claimants are entitled under the Ecuador-United States BIT.⁶⁹

Starting before the commencement of the arbitration and continuing on and off throughout the proceeding, the respondent State pursued criminal investigation and charges against some of the claimants' attorneys, and certain witnesses now supporting the claimants, on the grounds of their involvement in the environmental remediation that forms part of the basis of the environmental judgment in Ecuador.⁷⁰ On multiple occasions and on many bases,

65. *Id.* ¶ 12.

66. *Id.* ¶ 45.

67. *Id.* ¶ 91 et seq.

68. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Claimants' Supplemental Memorial on the Merits, ¶ 1 (Mar. 20, 2012).

69. *See id.* ¶ 3 ("The evidence in this case proves that Ecuador has committed a denial of justice and various violations of Claimants' rights under the BIT.").

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

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the claimants have sought IMs, including requesting an order that Ecuador refrain from continuing the criminal proceedings against the claimants' counsel in Ecuador. This dispute is ongoing and the tribunal has issued no fewer than seven Interim Measures Orders and Awards directing both parties to maintain the *status quo ante*.⁷¹

III. DISTILLED PRINCIPLES

As the discussion above shows, the case law on IMs to enjoin a State from instituting or continuing criminal investigations or prosecutions against investors is far from uniform, but nevertheless, a few general principles can be distilled that may provide some useful guidance to parties facing parallel criminal prosecutions.

First, although some tribunals add other factors, all tribunals have required a showing that IMs will serve to protect certain identified, existing rights, and that such measures are both necessary and urgent. While this seems to be the core threshold test for granting IMs to enjoin criminal proceedings, tribunals retain discretion to consider a host of other factors, including, for example, *prima facie* establishment of the case.⁷²

Second, most tribunals expressly recognize the right of the State to conduct criminal investigations and institute criminal proceedings. As such, tribunals remain highly deferential to the State's rights and are reluctant to award IMs that might impinge on the State's prerogatives. In recognition of these dynamics, arbitral tribunals have stated that they impose a particularly high threshold on requests for IMs. Nevertheless, in the nine cases discussed above, four tribunals granted requests for IMs to enjoin the institution or continuation of criminal proceedings⁷³ and in one additional case, the tribunal denied in part and granted in part the request for IMs.⁷⁴ In only three of the nine cases did the tribunals deny a request for IMs to enjoin criminal proceedings.⁷⁵

71. See Mouawad & Silbert, *supra* note 4, at 389–92 (discussing each of these orders).

72. See *supra* Part II.H.

73. See *supra* Part II.B, E, H, and I.

74. See *supra* Part II.D.

75. See *supra* Part II.A, C, and G. Technically, the tribunal in *Lao Holdings* also denied the applicant's request regarding IMs, but since in that case, the respondent initially agreed to the IMs and later requested a modification thereof, which was denied, it does not properly belong in the category of cases denying requests for IMs to enjoin criminal proceedings.

Third, tribunals ordinarily will not grant requests for IMs where criminal proceedings are at issue unless a cognizable right of a party to the arbitration is *directly* affected.⁷⁶ The impact of the criminal proceedings must be felt by the party to the arbitration, not merely its affiliated entities.

Fourth, a mere threat of criminal prosecution or investigation without more usually will not be sufficient to warrant granting IMs to enjoin potential future criminal proceedings.⁷⁷

Fifth, IMs to enjoin the commencement or continuation of criminal proceedings are more likely to be granted where they are connected with evidentiary issues that may impact the tribunal's own deliberations.⁷⁸ In *Von Pezold* and *Quiborax*, for instance, the criminal proceedings directly impacted the investor's ability to gather, maintain, or gain access to evidence relevant to the international arbitration, thereby threatening the integrity of the arbitral process itself and the legitimacy of the ultimate arbitral award.

Finally, it appears that a State requesting a reversal or modification to an existing provisional measures award enjoining criminal proceedings will need to carry the same burden as a party seeking to obtain the protection to begin with.⁷⁹ Once the tribunal has found that the heightened threshold for awarding IMs in the criminal proceedings context is met, there is an apparently equally high threshold to show that the risk previously justifying the IMs no longer persists. There is, however, only one case for this proposition and it remains to be seen whether more requests of this kind emerge.

CONCLUSION

As is clear from the discussion above, the intersection between a sovereign's right to enforce its criminal laws and international investment arbitration is rife with possibilities for conflict. Admittedly, IMs to enjoin the institution or continuation of criminal proceedings pose a conceptual challenge: investment tribunals are granted limited powers by the disputing parties to decide essentially monetary disputes over investments; they have no jurisdiction to deliberate criminal allegations and yet IMs to enjoin criminal

76. *See supra* Part II.G.

77. *Id.*

78. *See supra* Part II.E and D.

79. *See supra* Part II.F.

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proceedings could be viewed as venturing into this territory. But while a tribunal's issuance of IMs that interfere with a State's sovereign power to prosecute crimes may *appear* to overstep the tribunal's proper powers, they are in fact a necessary corollary of the investor's right to access investment arbitration as an alternative forum to domestic courts and criminal prosecutions can be, and have been, used to try to prejudice this right.

One of the primary rationales underlying the investment arbitration regime is that foreign investors often fear the prospect of being at the mercy of potentially biased domestic courts. In Host States facing political tumult, which is a frequent contributing factor to the violation of an investor's rights, or in countries with a tradition of strong governmental influence over the judiciary, this risk is especially pronounced. This type of atmosphere is fertile breeding ground for abuses of prosecutorial power. Now that many investors have access to investment arbitration, the risk of being subjected to a biased domestic court, which is at times designed solely to wreak havoc on the arbitral process, must not be allowed simply to find another outlet in the form of the State's exercise of its prosecutorial power. It would also circumvent the purpose of having BITs to begin with as the investor would still be subject to foreign courts (and at risk of worse outcomes), and the unchecked exercise of the State's prosecutorial power may aggravate the investor-State dispute and taint the entire arbitration process, especially where evidentiary issues are impacted. Investment tribunals' recognition of their power to order IMs in the criminal prosecution context is thus essential to the integrity of investment arbitration and the protection of the investor's access to arbitration.

At the same time, as international investment arbitration is coming increasingly under fire,⁸⁰ it is important that the intersection with domestic criminal law should not become additional fuel to the flame. Investment tribunals are, as the discussion above demonstrates, careful to note their respect for the Host State's prosecutorial power, and yet about half of the tribunals granted investors' requests for IMs that impinge on precisely that power. This is not to say that those IMs were improperly ordered. On the contrary, it may be an indication that States are shifting the exercise of their power over investors to the prosecutorial branch. Whichever

80. A number of States are considering withdrawing from ICSID and some already have, including Bolivia and Ecuador, both of which were respondents in successful requests for IMs to enjoin criminal proceedings. *See supra* Part II.D, B, and I.

the case may be, given the proliferation of investment arbitrations we can expect to see many more requests for IMs to enjoin criminal prosecutions in the future and tribunals must be on guard to discern which requests are legitimate and which requests constitute attempts by investors to use investment arbitration to escape answering legitimate criminal allegations.