

ALLEGATIONS OF ILLEGALITY IN INVESTOR-STATE ARBITRATION AND THE PRESUMPTION OF INNOCENCE

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Abstract

*Allegations of illegality are raised relatively frequently in investor-State arbitrations, often as efforts by respondent States to have claims dismissed, either for lack of jurisdiction or on the merits. On other occasions the claims of illegality are made against State officials, either by the State itself in an attempt to, for example, have a transaction declared void, or by the investor as part of its merits claims. These accusations of illegality are often of a serious criminal nature and made where there has been no conviction, sometimes while criminal proceedings are ongoing. Under international law (applicable in most investor-State disputes), however, State officials are prohibited from giving the impression that they consider a person guilty of a crime prior to any conviction. This apparent conflict has been dealt with by a handful of investor-State tribunals. The prevailing response has been that where the cause of action in the domestic proceedings (domestic criminal law) is different to that in the investor-State proceedings (an “illegality” clause in an investment treaty, for instance), no issue arises. This article, making significant reference to decisions of the European Court of Human Rights, examines whether that response satisfactorily disposes of the issue.*

I. Introduction

There has been no shortage of instances in which criminal proceedings have intersected or been conducted in parallel with investor-State arbitrations. Such intersections have taken many forms. On a number of occasions investors have sought provisional measures to halt criminal proceedings, contending that the proceedings interfered with the arbitral proceedings and were indeed specifically motivated by them.<sup>1</sup> Other cases have involved allegations by investors that the conduct of criminal proceedings by States amounted to substantive breaches of investment treaty standards, such as fair and equitable treatment.<sup>2</sup> Criminal proceedings are also often invoked by respondent States, either as a defence to the merits of claims or in order to deny the jurisdiction of an arbitral tribunal.<sup>3</sup>

These intersections between criminal charges – either against investors or State officials – and investor-State arbitrations, have given rise to concerns about both the potential for the misuse of States’ police powers to gain tactical advantages in proceedings<sup>4</sup> as well as how accusations of criminal misconduct should be treated by investor-State arbitral tribunals. Specific questions that

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<sup>1</sup> See, e.g., Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3 (Jan. 18, 2005); 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 (Feb. 26, 2010).

<sup>2</sup> See, e.g., Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award (Dec. 7, 2011); Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/03, Award (May 6, 2013); Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, Final Award (Dec. 15, 2014) [*hereinafter* “Hesham v. Indonesia”].

<sup>3</sup> See, e.g., Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009) [*hereinafter* “Phoenix v. The Czech Republic”]; Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008); World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) [*hereinafter* “World Duty Free Company v. Republic of Kenya”].

<sup>4</sup> Ruslan Mirzayev, *International Investment Protection Regime and Criminal Investigations*, 29 J. INT’L ARB. 71, 72 (2012).

arise are what burden of proof should be required for a finding of, for example, corruption or fraud,<sup>5</sup> whether investor-State arbitral tribunals are properly equipped or qualified to conduct inquiries into criminal acts,<sup>6</sup> and how to ensure equality of arms when a State has at its disposal the full arsenal of its investigative and prosecutorial authorities.<sup>7</sup>

This article focuses on a related but narrower issue: can accusations of criminal conduct raised by a State and/or a tribunal's upholding of such accusations breach an investor's right to the presumption of innocence? After examining the status and nature of the presumption of innocence under international law (section II), this article will examine investor-State arbitrations where the issue has arisen (section III), before reviewing the consideration of the presumption of innocence principle by other international judicial bodies and considering the implications for investor-State arbitration (section IV).

## II. The status of the presumption of innocence principle under public international law

The right to the presumption of innocence is codified in a number of international agreements. Article 14(2) of the Convention of Civil and Political Rights ["ICCPR"] provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law", while Article 6(2) of the European Convention of Human Rights provides, almost identically, that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Numerous international tribunals and human rights bodies have also emphasized the importance of the right to the presumption of innocence, emphasizing – importantly for the current discussion – that it applies to public authorities in general. Indeed, the UN Human Rights Committee stated in a General Comment that "[n]o guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."<sup>8</sup>

The Inter-American Court of Human Rights similarly held that "[t]he right to presumption of innocence, as it is understood from Article 8(2) of the Convention, requires that the State should not convict an individual informally or emit an opinion in public that contributes to forming public opinion, while the criminal responsibility of that individual has not been proved."<sup>9</sup>

The application of the obligation to respect the presumption of innocence to public authorities in general has also been emphasised by the International Criminal Court,<sup>10</sup> in decisions of the

<sup>5</sup> Florian Haugeneder & Christoph Leibscher, *Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof*, in AUSTRIAN ARBITRATION YEARBOOK 2009, 546 *et seq.* (Christian Klausegger et al. eds., 2009).

<sup>6</sup> Cecily Rose, *Questioning the Role of International Arbitration in the Fight against Corruption*, 31 J. INT'L ARB. 183, 185 (2014).

<sup>7</sup> Thomas W. Wälde, *Chapter 8: "Equality of Arms" in Investment Arbitration: Procedural Challenges*, in KATIA YANNACA-SMALL, ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 176 (2010).

<sup>8</sup> UN Human Rights Committee, CCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), ¶ 7 (Apr. 13, 1984).

<sup>9</sup> Case of Lori Berenson Mejía v. Peru, Inter-Am. Ct. of H.R., Ser. C, No. 119 (2004), ¶ 161.

<sup>10</sup> The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, § 7 (Jan. 31, 2011) ("*allegations of prejudice to suspects on account of*

UN Human Rights Committee,<sup>11</sup> and as will be discussed in greater detail below, by the European Court of Human Rights [**ECtHR**].<sup>12</sup>

The investor-State arbitral tribunal in *Al-Warraq v. Indonesia*, after reviewing many of the above mentioned authorities, concluded that “[t]he presumption of innocence is one of the most established fundamental rights of individuals recognized by customary international law.”<sup>13</sup> Such finding was consistent with the characterization by other international tribunals of the presumption of innocence as part of *jus cogens*, which as discussed below in section IV, is of particular importance. Examples can be found in the decisions of international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia [**ICTY**], which found that Article 14 of the ICCPR “reflects an imperative norm to which the Tribunal must adhere”,<sup>14</sup> or the Special Court for Sierra Leone, which characterized the presumption of innocence as a “cardinal principle”.<sup>15</sup> In a similar vein, the Inter-American Court of Human Rights referred to the presumption of innocence as a “universally recognized general principle of law”,<sup>16</sup> while the UN Human Rights Committee has been noted to view the presumption of innocence as “as forming part of the category of peremptory norms from which no derogation can ever be made.”<sup>17</sup>

### III. Investor-State disputes dealing with the presumption of innocence

The issue of the presumption of innocence has arisen in a handful of investor-State arbitrations, on some occasions more directly than others. In the above mentioned *Al-Warraq v. Indonesia* case, the claimant alleged that the failure by Indonesia to respect his presumption of innocence

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*public statements suggesting their guilt before a conviction by a court[...] are primarily of relevance to the issue of presumption of innocence.”).*

- <sup>11</sup> Dimitry L. Gridin v. Russian Federation, HRC Communication No. 770 (July 18, 2000), U.N. Doc. CCPR/C/69/D/770/1997 (2000), § 8.4 (violation of the presumption of innocence by public statements made by high ranking law enforcement officials portraying the author as guilty); Francisco Juan Larranaga v. The Philippines, HRC Communication No. 1421/2005 (Jul. 24, 2006), U.N. Doc. A/61/40, Vol. II, at 406 (HRC 2006), ¶ 7.4 (statements made by senior officials portraying the author as guilty); Makhmadim Karimov and Amon Nursatov v. Tajikistan, HRC Communication Nos. 1108/2002 and 1121/2002 (May 3, 2007), U.N. Doc. CCPR/C/89/D/1108 & 1121/2002 (2007), ¶ 7.4 (A high ranked official publicly affirmed at the beginning of the trial that their handcuffs could not be removed because they were all dangerous criminals and could escape).
- <sup>12</sup> Lagardère v. France, ECtHR Application No. 18851/07, Judgment (Apr. 12, 2012), ¶ 55 (“it is not merely a procedural safeguard in criminal proceedings. Its scope is more extensive and requires that no representative of the State or a public authority should declare a person guilty of an offence before their guilt has been established by a “court””); *Allenet de Ribemont v. France*, ECtHR Application No. 15175/89, Judgment (Feb. 10, 1995), ¶ 36.
- <sup>13</sup> Hesham v. Indonesia, Final Award (Dec. 15, 2014), ¶ 571.
- <sup>14</sup> The Prosecutor v. Dusko Tadic, ICTY Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin (Feb. 27, 2001), at 3.
- <sup>15</sup> The Prosecutor v. Augustine Gbao, Case No. SCSL-2003-09-PT, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Augustine Gbao (Nov. 3, 2003), ¶ 11.
- <sup>16</sup> Case of Suárez Rosero v. Ecuador, Judgment of November 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (Nov. 12, 1997), ¶ 77.
- <sup>17</sup> Jessica Almqvist, *Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57 INT’L & COMP. L. Q. 303, 322 (2008), referring to UN Human Rights Committee, CCPR General Comment No. 29: States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), where the Committee stated at ¶¶ 11 & 16 that “The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). [...] Furthermore, the category of peremptory norms extends beyond the list of nonderogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.” Again, in 2006, the UN Human Rights Committee explained that “Although [...] the main elements of articles 9 and 14, such as habeas corpus, the presumption of innocence and minimum fair trial rights, must be fully respected even during states of emergency.”, see CCPR Report on Situation of detainees at Guantánamo Bay, E/CN.4/2006/120 (Feb. 15, 2006), ¶ 14.

amounted to a substantive treaty breach.<sup>18</sup> Other cases, more relevant to the current discussion, have involved allegations of failures to respect the presumption of innocence by the respondent State (or arbitral tribunal) in parallel to or through conduct during arbitral proceedings.

In *Caratube & Hourani v. Kazakhstan*, the claimants sought provisional measures from an ICSID tribunal on the basis that there had been direct accusations against one claimant's family, as well as protests and websites dubbing them as murderers, which were backed and encouraged by Kazakhstan.<sup>19</sup> It was alleged that the measures sought were required to preserve a right (the right to the presumption of innocence) and that the preservation of that right was urgent to prevent irreparable harm.<sup>20</sup> While the application was dismissed by the tribunal for lack of factual evidence that Kazakhstan was behind the complained of acts, it did state that it “wishes to again expressly stress the Parties’ general duty, arising from the principle of good faith, not to take any action that [...] could contravene the fundamental [principle] of the presumption of innocence of the Claimants.”<sup>21</sup>

An applicant in another ICSID annulment proceedings – *Empresas Lucchetti v. Peru* – sought to have the award in that case annulled by alleging that there had been a breach of the presumption of innocence and therefore a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. According to *Empresas Lucchetti*, the tribunal “permitted the mere fact of corruption allegations regarding pre-Treaty events to eliminate an investor’s access to ICSID, regardless of the truth or falsity of the allegations and in the face of the investor’s express request that it be permitted to clear its name if the corruption allegations had any bearing on the jurisdictional analysis.”<sup>22</sup> In this instance, the tribunal did not opine on whether the breach of the presumption of innocence principle in the context of arbitration proceedings was possible; rejecting this ground of annulment on the basis that the tribunal did not in fact examine the issue of the alleged illegalities.<sup>23</sup>

In *Fraport v. Philippines (I)*, Fraport sought to have an award annulled, like *Empresas Lucchetti*, on the basis that the tribunal had failed to respect its right to presumption of innocence when determining during the arbitration whether a criminal law had been violated, thereby committing a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.<sup>24</sup> Of factual relevance, the allegations of violations of the criminal law in question<sup>25</sup> were first raised in a private complaint, which was then investigated by the State prosecutor who ultimately rejected the complaint.<sup>26</sup> The tribunal nevertheless ruled that there

<sup>18</sup> Hesham v. Indonesia, Final Award (Dec. 15, 2014), section V.2.A.

<sup>19</sup> Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures (Dec. 4, 2014), ¶ 154.

<sup>20</sup> *Id.* section IV.A.1.a and b.

<sup>21</sup> *Id.* ¶ 154.

<sup>22</sup> *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as *Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru*), Decision on Annulment (Sept. 5, 2007), ¶ 32.

<sup>23</sup> *Id.* ¶ 124.

<sup>24</sup> *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010), ¶ 120 [*bereinafter* “*Fraport v. Philippines*”].

<sup>25</sup> The specific allegation of illegality at stake in this case was that Fraport had made its investment in violation of Philippine laws of foreign ownership and control legislation known as the Anti Dummy Law, in order to circumvent restrictions on foreign investment, *see id.* ¶ 4.

<sup>26</sup> *Id.* ¶ 368.

had indeed been a violation of the law, noting that certain documents were not available to the special prosecutor when he arrived at his decision.<sup>27</sup>

Fraport argued that the presumption of innocence (referred to in the decision as *in dubio pro reo*) was a general principle of due process even in cases when criminal laws are applied “*only incidentally in the context of international arbitral proceedings*.”<sup>28</sup> Fraport submitted expert legal evidence of a former president of both the ICTY and the first President of the Special Tribunal for Lebanon, stating that instances arise where international tribunals may need to determine issues relating to criminal liability when applying domestic criminal law for the purpose of ruling on preliminary issues.<sup>29</sup> Fraport contended that the presumption of innocence must be applied in any case where a court or tribunal applies criminal law, relying, *inter alia*, on the decision of the ECtHR in *Orr v. Norway* (discussed in detail below), to demonstrate that the presumption of innocence is applicable in civil proceedings where criminal law features are apparent in the court’s reasoning.<sup>30</sup> Fraport contended that in finding that it had infringed a criminal law statute, the tribunal had proceeded on the basis of a “*preconviction against Fraport, and did not entertain the possibility of doubt, in violation*”<sup>31</sup> of the presumption of innocence.

The Philippines countered that the right to the presumption of innocence was not a rule of procedure, but rather “*a standard of evidential proof applicable only to criminal cases*.”<sup>32</sup> In an expert opinion in support of the Philippines position, Professor Pellet, while accepting that the presumption of innocence was a general principle of law, disagreed with the proposition that it had a *jus cogens* character.<sup>33</sup> In the opinion of Professor Pellet, the task of the tribunal was not to sentence Fraport for a criminal offence, but to determine whether it had made its investment in accordance with the relevant provisions of Philippine law.<sup>34</sup> The Philippines further argued that in criminal proceedings, States have powers at their disposal, such as to compel the collection of evidence and the right to indict and also pointed to the fact that a person’s liberty is at stake in criminal proceedings. This was not the case in international arbitration and, the Philippines argued, applying the principle of the presumption of innocence would “*therefore serve to distort the equality of the parties*.”<sup>35</sup>

On these points the annulment committee sided with the Philippines, noting that while the presumption of innocence was an important human right, it is a principle that “*cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle in dubio has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the*

<sup>27</sup> *Id.* ¶ 369.

<sup>28</sup> Fraport v. Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010), ¶ 121.

<sup>29</sup> *Id.* ¶ 122.

<sup>30</sup> *Id.* ¶ 124.

<sup>31</sup> *Id.* ¶ 126.

<sup>32</sup> *Id.* ¶ 134.

<sup>33</sup> *Id.* ¶ 135.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶ 140.

*principle of equality of the parties.*<sup>36</sup> As addressed further below, the committee did not elaborate in its decision on exactly how the application of the principle in international arbitration would jeopardize the equality of the parties. It found that the essential interest protected by the presumption of innocence principle in arbitration was the right to be heard,<sup>37</sup> before going on to find that such right had been breached by the tribunal and annulling the award.<sup>38</sup>

The investment treaty case that has perhaps dealt with the principle of the presumption of innocence most directly is that of *Awdi & Ors v. Romania*, in which the authors acted as counsel for the claimants. In this case, Romania brought an objection to the admissibility of the claims based on illegality, lack of good faith and breach of workers' rights, which it claimed barred the claims under the principle of *nemo auditur propriam turpitudinem allegans*.<sup>39</sup> The allegations of illegality forming the basis of the admissibility objection (which was not upheld by the tribunal in its final award) included alleged looting and mismanagement of local companies, and human trafficking of persons for the purposes of forced labour.<sup>40</sup> At the time that the admissibility objection was raised by Romania, the allegations were the subject of ongoing criminal investigations and/or proceedings in Romania.<sup>41</sup> Moreover, evidence submitted in support of the admissibility objections included victim statements, investigation files and indictments from these ongoing criminal proceedings.<sup>42</sup>

On this basis, the claimants filed a motion to have the respondent's objection summarily dismissed on the grounds that, *inter alia*, it was in violation of Romania's obligation under international law to accord the claimants the presumption of innocence.<sup>43</sup> The claimants argued that the respondent in fact declared Mr. Awdi guilty by alleging that he was acting illegally and in bad faith on the basis of evidence taken from ongoing criminal proceedings, thereby asking the arbitral tribunal to rule upon criminal matters pending before the Romanian courts.<sup>44</sup> In support of this contention, the claimants pointed to the respondent's use of terms with criminal implications or characteristics to describe the alleged conduct such as "*modus operandi*", "embezzlement", "human trafficking", "criminal acts" and referring to "victims".<sup>45</sup> In this sense, according to the claimants, the subject matter of the objection was the same as that of the criminal proceedings, i.e. whether the above described acts had indeed been committed.<sup>46</sup>

<sup>36</sup> *Id.* ¶ 193.

<sup>37</sup> *Id.* ¶ 195.

<sup>38</sup> *Id.* ¶¶ 218-247.

<sup>39</sup> Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Award (Mar. 2, 2015), ¶142 [*hereinafter* "Awdi & Ors v. Romania"].

<sup>40</sup> *Id.* ¶ 212 ("In the Tribunal's view, in fact, there is no convincing evidence of what Respondent defines as a systematic looting of Rodipet's business and assets and non compliance by Claimants in relation to the rights of Rodipet's employees, let alone evidence at a level required to meet the threshold of inadmissibility, be it on the ground of misrepresentation and/or the principle of good faith in an investment arbitration. The diverging outcome of criminal investigations and proceedings brought to the Tribunal's attention does not permit to draw any final conclusions in that regard. The absence of convincing evidence leads accordingly the Tribunal to dismiss Respondent's inadmissibility objection.")

<sup>41</sup> Awdi & Ors v. Romania, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimant's Claims (July 26, 2013), ¶ 69.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* ¶ 32.

<sup>44</sup> *Id.* ¶ 34.

<sup>45</sup> *Id.* ¶¶ 15, 43.

<sup>46</sup> *Id.* ¶ 75.

It was argued that the respondent had violated its obligation to respect Mr. Awdi's right to the presumption of innocence by publicly pronouncing his guilt before any conviction was forthcoming and that this conduct rendered the objection inadmissible as it was in breach of a peremptory norm of international law.<sup>47</sup> In support of its motion, the claimants relied on the decisions of international courts and tribunals, including the ECtHR, to advance the position that the presumption of innocence applies not only to criminal proceedings but also extends to subsequent or parallel civil proceedings, including arbitration.<sup>48</sup>

Romania responded to the motion by arguing, *inter alia*, that its jurisdictional objection was based on international law within the jurisdiction of an international tribunal constituted under a BIT, at a different level to the relevant criminal proceedings, which were governed by Romanian criminal law courts and subject to the Romanian criminal courts.<sup>49</sup> While Romania accepted that there may have been factual overlap between the arbitral and criminal proceedings, it contended that the same facts gave rise to different consequences depending on the applicable law and the jurisdiction in question,<sup>50</sup> further noting that the parallel conduct of criminal proceedings and investment arbitrations was not unusual.<sup>51</sup> According to Romania, the presumption of innocence applied to criminal proceedings only, relying also on the case law of the ECtHR, and arguing that, in any event, it had not alleged in the proceedings that Mr. Awdi met the test for guilt under Romanian law.<sup>52</sup>

In ultimately dismissing the motion, the tribunal emphasized that evidence relied upon by the respondent, including that from the domestic criminal files, could be freely tested by the claimants, including through the calling of witnesses, and that this fact alone was sufficient reason to dismiss the motion "*since the latter requests that the entirety of the Respondent's admissibility objection be declared inadmissible even when that objection is founded on evidence unrelated to or not emanating from criminal proceedings.*"<sup>53</sup> It further agreed with the respondent that proceedings under Romanian criminal law have a different cause of action to those under the treaty, even if there were factual overlaps between the two.<sup>54</sup>

In addressing the respondent's argument that there had been many instances of criminal proceedings and ICSID cases being conducted in parallel, "*without any allegations such as those in the Motion being brought forward*",<sup>55</sup> the tribunal noted, after reviewing the case law, that "[t]he present case finds therefore no useful precedent in other investment treaty cases to the extent the Tribunal is invited by the Respondent to consider the evidence relating to or emanating from ongoing criminal proceedings in order to draw its conclusion regarding issues to be decided in this arbitration."<sup>56</sup> In specifically addressing the presumption of innocence principle under international law, the tribunal noted only that it "*is a rule of public international law under a number of international treaties to which also Romania is a party and has been applied*

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<sup>47</sup> *Id.* ¶ 36.

<sup>48</sup> *Id.* ¶ 34.

<sup>49</sup> *Id.* ¶ 55.

<sup>50</sup> *Id.* ¶ 56.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* ¶ 57 (Relying on *Šikić v. Croatia*, ECtHR Application No. 9143/08, Judgment (Jul. 15, 2010), ¶ 5.

<sup>53</sup> *Id.* ¶ 70.

<sup>54</sup> *Id.* ¶ 76.

<sup>55</sup> *Id.* ¶ 77.

<sup>56</sup> *Id.* ¶ 79.

by *international tribunals*”,<sup>57</sup> before finding that what mattered for it was not that the facts and information relied upon for the objection were subjected to ongoing investigations or criminal proceedings in Romania, but that the claimants had a right to challenge in the arbitral proceedings the evidence submitted by the respondent in support of its objection, which, according to the tribunal, was submitted to prove the illegality of claimants’ activities under public international law rather than criminal guilt.<sup>58</sup>

In concluding, the tribunal noted that the issue raised by the motion was the weight and probative value given to the evidence from the criminal proceedings in the arbitration, rather than its admissibility, and that it would be “*guided by consideration of the presumption of innocence as a rule of public international law*” when assessing the value of that evidence.<sup>59</sup> While the tribunal declined to directly address the majority of the claimants’ arguments on the status of the presumption of innocence principle under international law, including whether it was a peremptory norm and whether Romania’s statements in the proceedings had breached that norm, by stating that it would be guided by the rules of public international law in conducting its assessment of the evidence, it seemed to implicitly accept – as opposed to the annulment committee in *Fraport* – that the presumption of innocence was potentially applicable in investor-State arbitral proceedings.

#### IV. Other international courts and tribunals dealing with the presumption of innocence

The international court that has most often considered applications touching upon the issues dealt with in the above mentioned investor-State cases is undoubtedly the ECtHR. Indeed, the Court has directly addressed the applicability of the presumption of innocence principle *rationae personae* on a number of occasions. In the case of *Lagardère v. France*, the Court stated that the presumption of innocence “*is not merely a procedural safeguard in criminal proceedings. Its scope is more extensive and requires that no representative of the State or a public authority should declare a person guilty of an offence before their guilt has been established by a “court”*.”<sup>60</sup>

Another case before the ECtHR, *Allenet de Ribemont v. France*, involved a man arrested and placed in detention as part of a judicial investigation into homicide (which made him a person “charged with a criminal offence” within the meaning of Article 6 para. 2 of the ECHR). A few days after the arrest, at a press conference attended by the Minister of the Interior, the Director of the Paris Criminal Investigation Department, and the Head of the Crime Squad, Mr. de Ribemont was referred to as “*one of the instigators of the murder*.”<sup>61</sup> While France argued that the presumption of innocence could only be infringed by a judicial authority, whose reasoning suggested that it considered a defendant guilty in advance of a conviction, the Court found that “*the presumption of innocence may be infringed not only by a judge or court but also by other public authorities*.”<sup>62</sup> According to the Court, the statement by the officials “*was clearly a declaration of the applicant’s guilt which, firstly,*

<sup>57</sup> *Id.* ¶ 80.

<sup>58</sup> *Id.* ¶ 83.

<sup>59</sup> *Id.* ¶ 84.

<sup>60</sup> *Lagardère v. France*, ECtHR Application No. 18851/07, Judgment (Apr. 12, 2012), ¶ 55.

<sup>61</sup> *Allenet de Ribemont v. France*, ECtHR Application No. 15175/89, Judgment (Feb. 10, 1995), ¶ 11.

<sup>62</sup> *Id.* ¶ 36.

*encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.*<sup>63</sup>

The reference to a prejudgment of the assessment of the facts by the competent judicial authority is particularly instructive. It could certainly be argued that a statement in the context of an investor-State arbitration affirming that a person has committed an act, where that act is a criminal offence for which investigations or proceedings are ongoing (without necessarily stating that the person will eventually be found guilty by the criminal court), amounts to a prejudgment of facts that are yet to be assessed by the criminal court. This could be so for both the State party making the allegation and potentially the arbitral tribunal if it upholds that allegation. While it might be argued that the positive finding that the act has occurred only has consequences at the international plane, this does not negate the fact that there has been a prejudgment of the exact same facts that are yet to be determined by the criminal court.

Relevantly, statements made during an investor-State arbitration are usually made through counsel. It is true that the facts in *Allet de Ribemont v. France* are distinguishable from a situation where the authorities claimed to have breached the presumption of innocence principle are those involved in defending an investor-State claim, as in that case the public officials who had made the offending statements were directly involved in the prosecutorial activity and, being in a position to influence the prosecutorial process, their comments were particularly susceptible to allegations of prejudicing any criminal proceedings. Nevertheless, nothing in the above mentioned decisions indicates that the requirement that “*no representative of the State or a public authority should declare a person guilty of an offence before their guilt has been established*” is limited to officials involved in criminal prosecutions or proceedings.

Another question that arises is the applicability of the presumption of innocence *rationae materiae*, i.e. whether it is limited to criminal proceedings or also extends to parallel or subsequent civil proceedings. As stated above, the annulment committee in *Fraport* stated that the presumption of innocence was “*applicable only to criminal cases.*” A number of decisions of the ECtHR would seem to indicate otherwise. One notable example is the case of *Orr v. Norway*. This case involved a man who was acquitted of rape by a Norwegian criminal court but was ordered, in the same judgement, to pay damages to the victim under the civil law on tort.<sup>64</sup> The Court noted that its task was to “*examine whether the compensation proceedings in this case gave rise to a “criminal charge” against the applicant and, in the event that this was not the case, whether the compensation case nevertheless was linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2 [the provision of the ECHR containing the presumption of innocence obligation].*”<sup>65</sup> The Court found that the compensation claim was a “civil” and not “criminal charge” under the national law, noting that the Norwegian court’s decision to award compensation had its legal basis in a damage compensation act, which set out the general law on torts applicable to personal injuries. It was thus clear that criminal liability was not a prerequisite for liability.<sup>66</sup>

Interestingly, the Court set out the following passage from another of its relevant decisions:

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<sup>63</sup> *Id.* ¶ 41.

<sup>64</sup> *Orr v. Norway*, ECtHR Application No. 31283/04, Judgment (May 15, 2008), ¶¶ 6-9.

<sup>65</sup> *Id.* ¶ 47.

<sup>66</sup> *Id.* ¶ 48.

*“While the conditions for civil liability could in certain respects overlap, depending on the circumstances, with those for criminal liability, the civil claim was nevertheless to be determined on the basis of the principles that were proper to the civil law of tort. The outcome of the criminal proceedings was not decisive for the compensation case. The victim had a right to claim compensation regardless of whether the defendant was convicted or, as here, acquitted, and the compensation issue was to be the subject of a separate legal assessment based on criteria and evidentiary standards which in several important respects differed from those that applied to criminal liability.”*<sup>67</sup>

At this point it is interesting to recall the reasoning of the tribunal in *Aydi*, which found that, despite factual overlap, the different causes of action in the criminal proceedings and treaty claims were sufficient to preclude a violation of the presumption of innocence principle, as well as the *Fraport* committee’s distinguishing between the consequences of a finding of guilt in a criminal case (deprivation of liberty) and a finding of illegality in a treaty case (the dismissal of the claims).

The Court in *Orr v. Norway*, to the contrary, despite acknowledging the separate causes of actions, found that there had been a violation of the applicant’s right to the presumption of innocence. In doing so, it noted that the Norwegian court based its finding on liability to pay compensation “on a description of the facts giving details of such matters as the nature of the sexual contact, the applicant’s awareness of the absence of consent [...], the degree of “violence” [...] and his intent in this respect.”<sup>68</sup> In other words, the Court stated, “it covered practically all those constitutive elements, objective as well as subjective, that would normally amount to the criminal offence of rape” before stating that it “considers that, although the concept of “violence” may not have been exclusively criminal in nature, the use made of it by the High Court in the particular context did confer criminal law features on its reasoning overstepping the bonds of the civil forum.”<sup>69</sup>

Such finding again brings into question the proposition that the different causes of action or “planes of jurisdiction” are sufficient, in and of themselves, to dismiss claims of violation of the presumption of innocence principle. In *Aydi*, the claimants argued that what needed to be examined was whether the subject matter of the illegality objection was equivalent to the subject matter of the ongoing criminal proceedings. If a respondent State alleges that an investor has committed fraud or embezzlement, amounting to bad faith under international law, or has trafficked employees for forced labour in breach of internationally recognized labour rights, and claims are dismissed on such grounds, it could be argued based on the reasoning of *Orr v. Norway* that there have been conferred “criminal law features [...] overstepping the bonds of the civil forum.”<sup>70</sup>

In the above mentioned *Lagardère v. France* case, the Court also found that civil proceedings for victim compensation did not entail a new criminal charge, before assessing whether “there was a clear enough link between the criminal case and the compensation proceedings to justify extending the scope of the application of Article 6 § 2 to the latter.” After noting that “the presumption of innocence may be violated even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty”,<sup>71</sup> the Court found that in terms of both the language it had used and the reasoning it had given, the civil French court had made a declaration of guilt in breach of the

<sup>67</sup> *Id.* ¶ 49, citing the *Ringvold* case (*Ringvold v. Norway*, ECtHR Application No. 34964/97, Judgment (Feb. 11, 2003)).

<sup>68</sup> *Id.* ¶ 51.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Lagardère v. France*, ECtHR Application No. 18851/07, Judgment (Apr. 12, 2012), ¶ 56.

presumption of innocence.<sup>72</sup> Notably, the fact that the court's characterization only had civil and not criminal consequences was deemed irrelevant.<sup>73</sup>

If, as seems to have been suggested, all that needs to be examined by investor-State tribunals is whether the cause of action between the criminal proceedings and the arbitration is different, no breach of the presumption of innocence could ever arise in an investment arbitration, which could never involve a criminal cause of action. A similar issue has arisen with respect to the invocation of so-called “fork-in-the-road” clauses – which bar arbitral claims that have already been brought before national courts – as jurisdictional objections by States in investment arbitrations. A number of tribunals have applied the “triple identity test” when deciding whether such clauses apply – which require that there be identity of parties, object and cause of action.<sup>74</sup> As pointed out, however, the application of this test renders fork-in-the-road clauses effectively moot as there will very rarely be situations in which BITs are the cause of action before domestic courts.<sup>75</sup> Other tribunals, noting this deficiency, have preferred a test based on whether the “fundamental basis” of the claims before the national courts and investor-State tribunals are the same.<sup>76</sup> Given that it is highly debatable that investment arbitration is a forum in which the presumption of innocence principle cannot apply, the authors consider that something similar to a “fundamental basis” test should be applied when considering alleged breaches of the right to the presumption of innocence, one that examines the identity of the subject matter between the two proceedings and whether the arbitration include accusations or rulings with “*criminal law features*”.

Of course, the lack of a criminal conviction in commenced criminal proceedings (either by way of acquittal or lack of decision) does not, in and of itself, prevent a ruling in a parallel or subsequent civil proceedings based on overlapping or identical facts, such as a finding of civil liability, administrative misconduct or the inadmissibility of an investment treaty claim for illegality, bad faith or unclean hands. Again, ECtHR decisions provide helpful illustrations.

By way of example, the case of *Sikić v. Croatia* involved a police officer who was charged with the criminal offence of abuse of position and authority after allegedly participating in the cover up of a road accident involving fellow police officers.<sup>77</sup> While the criminal charges were dropped, the applicant faced disciplinary administrative proceedings on the basis that he had committed “a

<sup>72</sup> *Id.* ¶¶ 64 *et seq.*

<sup>73</sup> *Id.* ¶ 45 (“*In the eyes of the Court, by characterizing the elements constituting the offence that the deceased accused was charged with, in particular with regards to his behavior and his bad faith, and repeating this statement in the dispositive section, the judgment of the court of appeal declared him guilty post-mortem, in unambiguous terms.[...] It doesn't really matter, as argued by the Government, that this statement did not imply any criminal consequence for the deceased or the claimant [...]. Such a statement of guilt, at least pursuant to the meaning given under Article 6 of the Convention, appeared procedurally for the first time before the Court of Appeal without any adversarial debate or respect for the rights of the accused, as the accused had been deceased for more than two years.*”) (translation from French).

<sup>74</sup> *See, e.g.,* Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), ¶ 211; Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia, ICSID Case No. ARB/99/2, Award (Jun. 21, 2001), ¶ 332.

<sup>75</sup> Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador [II], Third Interim Award on Jurisdiction and Admissibility (Feb. 27, 2012), ¶ 4.76.

<sup>76</sup> Pantechniki S.A. Contractors & Engineers v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (July 30, 2009), ¶¶ 61-62.

<sup>77</sup> *Sikić v. Croatia*, ECtHR Application No. 9143/08, Judgment (July 15, 2010), ¶ 5.

*grave breach of work discipline*”,<sup>78</sup> that ultimately led to his dismissal and which reached the Constitutional Court.<sup>79</sup> In assessing whether Article 6(2) of the ECHR was applicable to the proceedings, the Court noted that while “*the findings of the administrative bodies had no influence or prejudicial effect on the criminal investigation*”, a lack of conviction in criminal proceedings that end without an indictment must be preserved in any subsequent proceedings of a different nature.<sup>80</sup> It would appear from a reading of this passage of the decision that, rather than seek to impose as a condition that the parallel or subsequent proceeding has a prejudicial effect on the criminal investigation or proceeding for there to be a breach of the presumption of innocence principle, the opposite is true. The Court merely makes a statement noting the lack of prejudicial effect before going on to say that this was not determinative. Indeed, if the presence of influence or prejudicial effect on a criminal investigation or proceedings was a requirement, then there could never be a violation of the presumption of innocence principle by public officials or judicial bodies if statements of guilt were made after the conclusion of criminal proceedings. As we have seen above, that is not the case.

In concluding that there had not been a violation of the presumption of innocence principle in this instance, the Court noted a number of factors, including that a different standard of proof was required in the disciplinary proceedings than for a criminal conviction, that the disciplinary proceedings resulted in a finding of breach of work discipline and not a criminal offence and that “*the administrative body was empowered to and capable of establishing independently the facts of the case before it.*”<sup>81</sup> If one were to stop at this stage in the Court’s reasoning it would appear that breach of the presumption of innocence principle in an investor-State arbitration was not possible, with different standards of proof, consequences of rulings and independent fact finding power, all present. The Court then continued, however, by stating that no statement by the administrative body “*was made that would call into question the applicant’s right to be presumed innocent.*”<sup>82</sup> Herein, perhaps, lies the key. Whether there is a breach of the principle obviously depends on the circumstances of each case, notably the nature of the offence in question as well as how it is described by public officials or judicial bodies in the parallel or subsequent proceedings. It is easier in the context of disciplinary proceedings regarding the handling of an accident scene to state that there has been a breach of work discipline without providing “*some reasoning to suggest that the official regards that person as guilty*”<sup>83</sup> of a crime than it is to conclude that someone should pay compensation to a victim of rape without being seen to make such a suggestion.

To take an extreme example, on the reasoning of the above mentioned ICSID tribunals and committees, it would be possible for a State to claim that an investor was precluded from the protection of an investment treaty because it had been acquired illegally through the intentional killing of the previous owner of the investment, even if there had been ongoing or previous criminal investigations or proceedings for murder. Indeed, there would still be a different cause of action in the two proceedings, which would be conducted at different planes of jurisdiction. A finding that the investor had intentionally taken the life of previous owner by the tribunal would

<sup>78</sup> *Id.* ¶ 50.

<sup>79</sup> *Id.* ¶¶ 6-9.

<sup>80</sup> *Id.* ¶ 46.

<sup>81</sup> *Šikić v. Croatia*, ECtHR Application No. 9143/08, Judgment (July 15, 2010), ¶ 55.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ¶ 52.

not be a finding of criminal guilt with the accompanying consequence of deprivation of liberty. The investor would likewise be able to freely challenge any evidence advanced to support the accusation of intentionally taking a person's life in the arbitration. It is difficult to imagine, however, how a respondent State could claim that an investor has intentionally taken the life of another person, amounting to an illegality that deprives it of the right to protection of an investment treaty, without giving the impression that it regards the investor as guilty of murder. Likewise, how can a tribunal reach a conclusion that the intentional killing precludes its jurisdiction without giving the impression that it also regards the investor as guilty of a crime?

A more realistic example involves an accusation that an investment has been acquired through bribery. If there exists criminal proceedings alleging the offense of bribery arising out of the exact same facts, how can the bribery accusation and any finding upholding the accusation not be said to give the impression that the investor is guilty of bribery?

While such decisions of the ECtHR seem to be relatively clear in what constitutes a violation of the presumption of innocence principle in parallel or subsequent proceedings, there remains the question of whether such cases are instructive for investor-State arbitral tribunals. The committee in *Fraport* did not appear to think so. It stated that cases in which international tribunals investigate whether national courts meet standards imposed by human rights treaty raise different issues than that which were at stake in the annulment application before it.<sup>84</sup>

Making specific reference to the above mentioned *Orr v. Norway* case, the committee stated that it was not of assistance because it “concerned the particular issue of the relevance of an acquittal in a criminal case for determination of a civil claim in the same proceedings.”<sup>85</sup> While it is true that the circumstances of that case are particular and certainly different to those of any investor-State arbitration, it is not clear that this is an accurate description of the main issue at stake in that case. It might equally be said that the issue at stake was more broadly the question of when language used in a judicial decision can give the impression of criminal guilt despite the absence of a prior conviction. In that sense it could be said to be of assistance.

It is, however, certainly correct that there is a distinction to be drawn between ECtHR cases, where the applicable treaty specifically provides that states are obliged to respect the presumption of innocence and the claims brought are for substantive breach of the treaty. In the scenario under consideration in this article, what is at stake is the potential breach of a principle of public international law by a State through its procedural conduct in proceedings, brought under an international treaty that does not explicitly make reference to any obligation to abide by the presumption of innocence principle.<sup>86</sup> It should also be remembered that, despite quite clear statements that the “principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state”,<sup>87</sup> the decision in the *Fraport* proceedings found that the principle was not a rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. It is

<sup>84</sup> *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010), ¶ 194.

<sup>85</sup> *Id.* n. 309.

<sup>86</sup> Though, as discussed above (*see supra* section II), the tribunal in *Al Warraq v. Indonesia* concluded that obligation to abide by the presumption of innocence principle fell under the obligation to provide fair and equitable treatment.

<sup>87</sup> *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010), ¶ 193.

somewhat unclear whether the committee meant to say that the presumption of innocence principle could never be breached in the context of investor-State proceedings, which would appear to run contrary to statements made by the tribunals in *Caratube* – which stressed the parties’ duties not to take actions that would contravene the claimants’ right to the presumption of innocence – and *Awdi* – which stated that it would take into account the public international law rule of the presumption of innocence when deciding what probative value to assign to evidence from the criminal proceedings.

A critical factor in assessing the role of the presumption of innocence in investor-State arbitration rests on whether it can be characterized as a *jus cogens* obligation and if so, what are the consequences that flow from such characterization. While the status of the principle as *jus cogens* was apparently contested by Professor Pellet in his capacity as expert witness in the *Fraport* annulment proceedings, the reasons for such conclusion are not set out in the decision. While identifying exactly which principles fall within *jus cogens* is an ambiguous exercise that is often contested,<sup>88</sup> international criminal tribunals and the UN Human Rights Committee (as noted above) have clearly stated that the presumption of innocence amounts to a peremptory norm that cannot be derogated from.<sup>89</sup>

While it is not clear from a reading of the *Fraport* annulment decision whether decisions from international criminal tribunals were relied upon by the applicant to support the position that the presumption of innocence was part of *jus cogens*, the relevance of such decisions were dismissed by the committee on the basis that “*the principles applicable to the procedure of international criminal tribunals [are inapposite], since such tribunals must, in view of their criminal function, respect the rights of the accused.*”<sup>90</sup> However, a strong argument could be made that rights of the accused – if those rights amount to *jus cogens* principles of international law – must also be respected in the context of investor-State arbitrations. Indeed, as noted by Professor Vadi, “*some interpretations of investment treaties may be incompatible with peremptory norms. Therefore, where such interpretation would lead to the incompatibility of the investment treaty with a jus cogens norm, it should be avoided.*”<sup>91</sup> Such an incompatibility would arise in the event that investment treaties and the ICSID convention allowed for objections to the admissibility of claims in breach of the presumption of innocence principle (accepting that such principle is indeed part of *jus cogens*).

Moreover, investment treaties often state that “*rules of international law*” are applicable to disputes submitted to arbitration,<sup>92</sup> while the ICSID Convention provides that in the absence of agreement to the contrary of the parties, tribunals shall apply, inter alia, “*such rules of international law as may be applicable.*”<sup>93</sup> It would appear that *jus cogens* rules are therefore clearly applicable in investor-State disputes brought pursuant to such treaties.

<sup>88</sup> Valentina Vadi, *Chapter 8: Jus Cogens in International Investment Law and Arbitration*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 46, 358 (M. den Heijer & H. van der Wilt eds., 2015).

<sup>89</sup> See *supra* section II.

<sup>90</sup> *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010), ¶ 194.

<sup>91</sup> Vadi, *supra* note 88, at 363.

<sup>92</sup> See, e.g., 2012 U.S. Model Bilateral Investment Treaty, art. 30(1).

<sup>93</sup> ICSID Convention, art. 42.

Indeed, whether under the guise of *jus cogens* or the related concept of “transnational public policy”, the applicability of general principles of international law to investment disputes has been invoked by investor-State tribunals to dismiss investors’ claims on the basis of acts of a criminal nature, even in the absence of explicit provisions requiring the legality of investments. In the well-known *World Duty Free Company Limited v. The Republic of Kenya* decision, claims were dismissed due the fact that the contracts upon which they were based were obtained through corruption, in breach of “*transnational public policy*”;<sup>94</sup> while in *Phoenix v. the Czech Republic*, the tribunal held that:

“*Nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.*”<sup>95</sup>

If such accusations of criminal conduct by States can be introduced into investor-State proceedings to prevent hearing claims, often on the basis of generally applicable international law principles not explicitly provided for in the treaty, it is difficult to understand why, as stated by the committee in *Fraport*,<sup>96</sup> international law principles regulating the rights of the criminally accused “*cannot be applied*” in such circumstances. Indeed, this would seem to result in an inequality of arms in favour of the State, the very reason the *Fraport* annulment committee provided in concluding that the presumption of innocence “*cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties.*”<sup>97</sup>

In arriving at this conclusion, the committee noted that the principle is applied in criminal proceedings as it “*counterbalances the coercive power of the state*”, such as the power to collect evidence and to indict.<sup>98</sup> Such powers, however, remain at the disposal of a State even in the event that it raises an admissibility objection on the basis of an alleged criminal illegality in an investor-State arbitration. The corresponding rights of defence may, however, not be available to the investor. For example, the State can use its evidence gathering powers to obtain any evidence it wishes as part of a criminal investigation, and then can choose to submit the evidence it wishes in support of its illegality objection.<sup>99</sup> The investor on the other hand, while being able to “freely challenge” such evidence, does not have corresponding coercive powers. Moreover, at the stage of investigation, the investor (as criminal defendant) may not have the right to be provided with the evidence collected against it and, depending on the national law of the country, certain evidence may be withheld from the investor by the State even in the event that the investigation proceeds to a formal charge. It is not clear how upholding the presumption of innocence principle in cases where domestic criminal investigations or proceedings have commenced results in an inequality of arms and this is not sufficiently explained in the *Fraport* annulment decision.

<sup>94</sup> *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 Award (Oct. 4, 2006), ¶ 157.

<sup>95</sup> *Phoenix v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), ¶ 78. *See also* Inceysa Vallisoletana SL v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), ¶¶ 263–264.

<sup>96</sup> *See* the committee’s decision in *Fraport v. Philippines* discussed in *supra* section III.

<sup>97</sup> *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of *Fraport AG Frankfurt Airport Services Worldwide* (Dec. 23, 2010), ¶ 193.

<sup>98</sup> *Id.* ¶¶ 140, 193.

<sup>99</sup> Wälde, *supra* note 7, at 176.

## V. Conclusion

While there are understandably diverging views as to whether the presumption of innocence principle has the status of *jus cogens*, it does appear clear that the principle prevents State officials from declaring a person charged with a crime guilty in the absence of a conviction. It is not clear why the international level of jurisdiction in an investor-State arbitration tribunal would somehow discharge State officials involved in the defence of claims in that forum from the obligation to respect the presumption of innocence. To find as such would provide States with additional encouragement to use domestic criminal proceedings as an advantageous tool within investor-State arbitrations.

Guidance can be found in decisions of the ECtHR, which has ruled that the presumption of innocence principle is breached when the accusation in question is clearly of a criminal nature and some reasoning suggests that the accused is considered as guilty. To limit the enquiry to one purely of whether there are different causes of action would clearly empty the protection of all effect at the international level. Indeed, such an approach would also allow for the breach of the presumption of innocence before domestic civil jurisdictions, which would run clearly counter to the case law of the ECtHR.

Taking such case law into consideration, as well as recent investor-State arbitral tribunal practice with respect to fork-in-the-road clauses or objections that claims are *prima facie* contract rather than treaty based, investor-State tribunals called upon to decide whether a particular allegation raised before it violates the presumption of innocence principle should examine whether the allegation of illegality placed before the arbitral tribunal is one of conduct that is fundamentally criminal in nature. In other words, it should determine whether the basis for seeking the dismissal of claims in the arbitral proceedings on the grounds of illegality is fundamentally the same as the domestic criminal charge, whether the illegality objection is wholly dependent on such charge and whether or not the criminal charge and the allegation of illegality can be meaningfully distinguished rather than differently labelled in a superficial fashion.