

# Provisional Measures in Investor-State Arbitration: States Playing Games in Local Courts by Invoking the Trump Card (Police Powers)

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ABSTRACT: This paper outlines arbitral tribunals’ power to order provisional measures under the auspices of I.C.S.I.D. Arbitration; that is, investor-state arbitration. The scope of a tribunal’s power is cumbersome to discern, especially when there are possible interferences with state sovereignty. More recently, tribunals have ordered provisional measures to suspend a domestic criminal investigation or proceeding. Is this an infringement on a states sovereign prerogatives or a response to, for example, dilatory tactics by a rogue state? The crux of the issue is this: a state will always be in a position to utilize its prosecutorial powers in order to frustrate the arbitration by putting immense pressure on the investor, its employees, or its witnesses, in other words: “playing games” in local courts. In order to guarantee procedural integrity of the arbitration and, as a corollary, the legitimacy of investor-state arbitration in its entirety, the provisional measure is a practical tool that can be used effectively. On a similar vein, “sovereignty” should not force tribunals to tie their hands when serious interference with the arbitral procedure is making the procedure unfair at best, or a nullity at worst. However, legal text both empowers and constrains the tribunal. The I.C.S.I.D. Convention only allows a tribunal to “recommend” provisional measures. As seen in light of investor-state case law, in an informal (perhaps de facto) stare decisis context, a number of tribunals seem to have justified the ordering of provisional measures. In the shadow of this construction lurks the de-legitimizing of the entire investor-state arbitration system. At the same time, rogue sovereigns playing games in local courts have the same de-legitimizing effect.

KEYWORDS: *Investment Treaty Arbitration; Interim Measures; Sovereign Immunity; Suspension of Criminal Procedures; Treaty Interpretation*

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## 1. INTRODUCTION

Investment treaties (bilateral and multilateral) offer significant protection to investors operating globally. When a state breaches the substantive protection offered through the investment treaties, an investor may bring a claim in investor-state arbitration. However, the precise scope of the tribunal's power is more cumbersome to discern. This paper will focus on the tribunals jurisdiction to order provisional measures under the I.C.S.I.D. regime. To illustrate the potential scope of interference with state sovereignty, this paper will highlight the recent development where tribunals' have ordered provisional measures to suspend a domestic criminal investigation or proceeding.

The host-state, in its capacity as a sovereign, can interfere with the arbitration in a myriad of ways. For example, a host-state can conduct criminal investigations or proceedings against individuals involved in the arbitration. A state can thus utilize its prosecutorial powers in order to frustrate the arbitration by putting immense pressure on the investor, its employees, or its witnesses. As a corollary, a variety of issues can arise at the intersection of domestic criminal law and investment-arbitration.<sup>1</sup> In essence, the respondent host-state will always have the power to “play games” in the local courts. The crux of the matter is what powers the tribunal has to guarantee the procedural integrity on an interim basis and whether those powers are explicit, implicit or not given at all.<sup>2</sup>

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<sup>1</sup> Henry G. Burnett & Jessica Beess und Chrostin, *Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings*, 30 MD. J. INT'L. L. 31, 32 (2015).

<sup>2</sup> In this paper “procedural integrity” includes a wider range of procedural guarantees, such as the right to a fair procedure, a good faith procedure, etc.

This paper will address the following questions. May an I.C.S.I.D. tribunal order a sovereign to refrain from certain conduct on a provisional basis? Does an I.C.S.I.D. tribunal have the authority to, for example, suspend domestic criminal procedures? How have previous tribunals justified an “order” that suspends criminal investigations or procedures under the I.C.S.I.D. framework?

## 2. PROVISIONAL MEASURES

A provisional measure may serve as a procedural safeguard which provides the tribunal with a mechanism that can help all parties to be “equally heard”.<sup>3</sup> It can be argued that a tribunal’s authority to order provisional measures is a corollary to the parties’ consent to arbitration.<sup>4</sup> Born writes that:

[P]rovisional measures rest on a simple premise: in order for a dispute resolution process to function in a fair and effective manner, it is essential that a tribunal possess broad power to safeguard the parties’ rights and its own remedial authority during the pendency of the dispute resolution proceedings. Unless the tribunal is able to grant the provisional measures, its ability to provide effective, final relief may be frustrated, one party may suffer grave damage, or the parties’ dispute may be unnecessarily exacerbated during the pendency of the dispute resolution process.<sup>5</sup>

<sup>3</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2425 (2nd ed. 2014).

<sup>4</sup> See Louis Yves Fortier, *Interim Measures: An Arbitrator’s Provisional Views*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 49 (Arthur W. Rovine ed., 2008).

<sup>5</sup> BORN, *supra* note 3, at 2425. Born also outlines some limitations on the arbitral tribunal’s power to order provisional relief, e.g. (a) lack of power to order provisional relief against third-parties; (b) lack of power to enforce such relief; (c) limited scope of power to subject-matter of the dispute; (d) lack of power to order relief until the tribunal is constituted; etc.

Arguably, provisional measures make the arbitration procedure more effective and can serve for various purposes. A provisional measure can facilitate the conduct of arbitral proceedings; preserve a right that is subject to the dispute; maintain or restore the status quo; protect the tribunal's jurisdiction; preserve evidence; facilitate the enforcement of a future award; etc.<sup>6</sup> Nonetheless, provisional measures can infringe on state sovereignty. Therefore, tribunal discretion should be exercised with special common sense, care and restraint.<sup>7</sup>

### 2.1. I.C.S.I.D. CONVENTION AND RULES

Both Articles 39 and 47 deal with the power to recommend provisional measures. Rule 39 of the I.C.S.I.D. Arbitration Rules reinstates the tribunal's power and discretion to recommend provisional measures. Article 47 of the I.C.S.I.D. Convention reads as follows: "Except as the parties otherwise agree, the Tribunal *may*, if it considers that the circumstances so require, *recommend* [emphasis added] any provisional measures which should be taken to preserve the respective rights of either party."

The Tribunal *may* "recommend" a provisional measure. Does this mean that the respondent state *may* accept the recommendation? On a similar footing, does this mean that the respondent state *may* refuse to comply with the recommendation? Is it a recommendation that the parties can agree to turn into an order? Has the language been interpreted to mean something else, and on what basis? Does the tribunal have the explicit or implicit power to order a provisional measure pursuant to another article in either the Convention or the rules? Why did the drafters

<sup>6</sup> See Munir Maniruzzaman, *Protection in International Investment Arbitration: Challenge to State Sovereignty?*, in INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION (Diora Ziyeva et al. eds., 2015). See also BORN, *supra* note 3, at 2483-2502.

<sup>7</sup> BORN, *supra* note 3, at 2502.

choose “recommendation” as opposed to “order”?<sup>8</sup> The question and its meaning has to be analyzed in the proper context; that is, within a legal framework dominated by respect for state sovereignty and textual interpretation? In its literal interpretation, the article does not offer to the tribunal the power to “order” a provisional measure. Schreuer wrote that “a conscious decision was made not to grant the tribunal the power to *order binding* [provisional measures].”<sup>9</sup> To reiterate this point, Redfern and Hunter explained that:

The use of the word “recommend” in this context stems from the concern of the drafters of the I.C.S.I.D. Convention to be seen as *respectful of national sovereignty* [emphasis added] by not granting powers to private tribunals to order a state to do or not do something on a purely provisional basis.<sup>10</sup>

However, the language and its original meaning is not always the entire story. Decisional law might offer a different interpretation of the statutory language. Born highlights an important fact in this respect: “[I]ts reference to ‘recommendations’ for provisional relief was originally motivated by concerns about interfering with state prerogatives and sovereignty, but I.C.S.I.D. arbitral awards have consistently interpreted [Article 47] as also permitting the ordering of binding provisional measures.”<sup>11</sup>

It can be argued that investment-arbitration has tangible and intangible features of safeguarding and guaranteeing procedural integrity. Therefore, in light of the I.C.S.I.D. Convention’s object and purpose, a tribunal may possess implicit tools to safeguard the procedural integrity of the arbitration.

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<sup>8</sup> Black’s Dictionary defines a “recommendation” as: (1) “[a] specific piece of advice about what to do . . .” and (2) as “[a] suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. See BRYAN A. GARNER, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>9</sup> CHRISTOPH H. SCHREUER ET AL., THE I.C.S.I.D. CONVENTION: A COMMENTARY 758 (2001).

<sup>10</sup> ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 333 (4th ed. 2004).

<sup>11</sup> BORN, *supra* note 3 at 2429.

When deciding on a request for a provisional measure, the tribunal is bound by the language of the articles or rules. Regardless of the considerable guidance it offers in investment-arbitration, decisional law cannot trump express language of the provision. The Tribunal in *Italba v. Uruguay* articulated this by stating that:

[T]he Parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to these provisional measures. The Tribunal has considered these documents carefully and may take into account the reasoning and findings of these and other tribunals. However, in coming to a decision on the matter of provisional measures and temporary relief requested by Italba, the Tribunal must perform, and in fact has performed, an independent analysis of the I.C.S.I.D. Convention, the Arbitration Rules, and the particular facts of this case.<sup>12</sup>

The exact scope of a tribunal's authority to order provisional measures is in dispute. Most jurisdictions have rejected the historic prohibitions against provisional measures, provided that the authority is expressly and firmly given.<sup>13</sup> Does I.C.S.I.D. expressly or firmly empower a tribunal operating under its auspices with the authority to order provisional measures? If not expressly given, is the power given firmly? A "firm power" can possibly be implied from either the convention as a whole or specific parts of it.

It is submitted that legal authority empowering a tribunal to render an order may exist. However, it is not to be found in the language of Article 47 or Rule 39. Rather, the justification might exist implicitly in the text; that is, in the overriding purpose of protection to procedural integrity of the arbitration. In *Maffezini v. Spain* the tribunal decided that a provisional measure should be binding. The tribunal observed as follows:

<sup>12</sup> *Italba Corporation v. Oriental Republic of Uruguay*, I.C.S.I.D. Case No. ARB/16/9, Claimant's Application for Provisional Measures and Temporary Relief, ¶107, (Feb.15, 2017).

<sup>13</sup> See BORN, *supra* note 3, at 2432.

While there is a semantic difference between the word “recommend” as used in Rule 39 and the word “order” as used elsewhere in the Rules to describe the Tribunal’s ability to require a party to take a certain action, the difference is more apparent than real . . . The Tribunal does not believe the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal’s authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word “recommend” to be of equivalent value as the word “order.”<sup>14</sup>

Subsequently, more tribunals followed suit. The Tribunal in *City Oriente v. Ecuador* held that “[f]rom a substantive view, the difference between a recommendation and an order is mainly a question of terminology. [And even] where named recommendation, a decision on provisional measures is substantially binding.”<sup>15</sup> The tribunal, furthermore, held that “[i]t is only if provisional measures are effective that they can achieve their purpose with respect to the outcome of the proceedings (citations omitted).”<sup>16</sup> This is nowadays the generally held view. However, there is some disagreement among scholars, arbitrators, and arbitration practitioners, especially when the provisional measure is interfering with a state’s sovereign prerogatives.

This line of cases can be questioned on a number of grounds. Is the role of a tribunal to determine the effectiveness of the I.C.S.I.D. regime? Can decisional law be a feasible evolutionary tool in international adjudication? Should a tribunal determine semantics without engaging in a consideration of language differences?

<sup>14</sup> Emilio Augustin Maffezini v. Kingdom of Spain I.C.S.I.D., Case No. ARV/97/7, Decision on Request for Provisional Measures, ¶15 (Oct. 28, 1999).

<sup>15</sup> *City Oriente Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, I.C.S.I.D. case No. ARB/06/2, Decision on Provisional Measures, ¶152, (Nov. 19, 2007).

<sup>16</sup> *Id.*

## 2.2. UNCITRAL MODEL LAW AND ARBITRATION RULES

Article 17 of the U.N.C.I.T.R.A.L. Model Law (hereinafter Model Law) grants a tribunal the power to order an interim measure, which can take the form of an award. In 2006 the language of the Model Law was revised to be more expansive.<sup>17</sup> This language might empower a tribunal to, among other things, suspend criminal investigations or procedures. A tribunal operating under the Model Law could justify such an order by arguing that they are seeking to maintain or restore the status quo. The Model Law seems to require an agreement withdrawing such power that potentially interferes with state sovereignty, and not the other way around, as with I.C.S.I.D.<sup>18</sup>

The U.N.C.I.T.R.A.L. Rules were amended in 2010. It was discussed whether interim measures should be applicable to procedural challenges and issues.<sup>19</sup> “The focus of the 2010 U.N.C.I.T.R.A.L. Rules’ provision on [interim measures was] 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 [interim measures].”<sup>20</sup> Article 26 of the 1976 version referred to the “subject-matter”, which provides protection for substantive issues but not for procedural ones. The amendment to Article 26 indicates that the prior language was undesirable for pragmatic and functional reasons. This change made it possible to order an interim measure for procedural irregularities; for example, in order to prevent “prejudice and aggravation to the arbitral process” due to inequality of arms or procedural “mala fides”.

The drafting parties explicitly chose “order” as opposed to “recommendation”. The choice of a text with such imperative character is reflective of the fact that interim measures in the context of

<sup>17</sup> *Id.*

<sup>18</sup> See BORN, *supra* note 3, at 2434.

<sup>19</sup> E.g. due to procedural fairness, procedural irregularity, lack of equality of arms, lack of good faith procedure, etc.

<sup>20</sup> Burnett et al., *supra* note 1, at 39.

U.N.C.I.T.R.A.L. arbitration are to be viewed as legally binding. This conception can easily be derived from the preparatory works and it is arguably closely connected with the notion of interim measures as a feature necessary to ensure the effectiveness of arbitral procedure, especially in the context of international commercial arbitration.<sup>21</sup> As expressed by the U.N.C.I.T.R.A.L. Commission in connection with the 2006 update of the Model Law: “[t]he provisions had been drafted in recognition not only that interim measures were increasingly being found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures.”<sup>22</sup>

Fortunately for U.N.C.I.T.R.A.L. arbitrations, the negotiating parties’ awareness of the importance of a binding interim measure will mitigate future ambiguity where states will try to invoke state sovereignty to justify non-compliance. It is clear that the negotiating parties were well aware that “recommendation” did not mean “order.” In sharp contrast with the I.C.S.I.D. Convention, both the 1976 and 2010 Rules will enforce an interim measure as a final award.<sup>23</sup>

### **3. TREATY INTERPRETATION IN LIGHT OF THE VIENNA CONVENTION ON THE LAW OF TREATIES**

The Vienna Convention on the Law of Treaties (hereinafter V.C.L.T.) is an essential part of understanding public international law. In the context of I.C.S.I.D. arbitrations, the V.C.L.T. has proved useful for the interpretation of bilateral investment treaties. As the I.C.S.I.D. Convention carries the legal status of a treaty, an interpretation in light of the V.C.L.T. is

<sup>21</sup> See THOMAS H. WEBSTER, *HANDBOOK OF UNCITRAL ARBITRATION* 391 (2nd ed. 2015).

<sup>22</sup> UNCITRAL Rep. of the United Nations Commission on the International Trade Law on its 39th Sess., June 19 – July 7, 2006, U.N. doc A/61/17. 15-16.

<sup>23</sup> See Maniruzzaman, *supra* note 6, at 17.

warranted in relation to the Convention itself.<sup>24</sup> Therefore, the V.C.L.T. could be important in shaping the meaning and solve the alleged ambiguity in the I.C.S.I.D. Convention. V.C.L.T. interpretation carries several advantages for legal uniformity; for example, foreseeability, clarity and predictability. As explained by one commentator:

To put it simply, Article 31 of the Vienna Conventions on the Law of Treaties (V.C.L.T.) offers clear guidance for the interpretation of treaties, and its rigorous application would bring more consistency and predictability in international investment law. These two ideas follow on from each other, and they have become central in the extensive literature already dedicated to the interpretation of investment treaties by arbitral tribunals (citations omitted).<sup>25</sup>

The V.C.L.T. was implemented after the I.C.S.I.D. Convention entered into force. As a corollary – and in accordance with Article 4 of the V.C.L.T. – it is not directly applicable to interpret the I.C.S.I.D. Convention. Nonetheless, many of the provisions of the V.C.L.T. are recognized as articulating principles of customary international law. This applies particularly with respect to the provisions regarding treaty interpretation.<sup>26</sup> For instance, the International Court of Justice (I.C.J.) has repeatedly expressed that Article 31 and 32 of the V.C.L.T. constitute part of customary international law.<sup>27</sup>

Article 31 of the V.C.L.T. provides the general rule of treaty interpretation; the first paragraph states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

<sup>24</sup> For a short and interesting article on the V.C.L.T. as reflective of international customary law, see ROBERTO CASTRO DE FIGUEIREDO, *Interpreting Investment Treaties*, Kluwer Arbitration Blog (Oct. 21, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/10/21/interpreting-investment-treaties>.

<sup>25</sup> Hervé Ascensio, *Article 31 of the Vienna Convention of the Law of Treaties and International Investment Law*, 31 I.C.S.I.D. REV. 366, 366 (2016).

<sup>26</sup> *Id.* at 367-368.

<sup>27</sup> See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 207 (3rd ed. 2013).

object and purpose.” The requirement to interpret treaty text in good faith derives from the principle of *pacta sunt servanda*, which attributes importance to the intention of the parties as expressed in the text of the treaty.<sup>28</sup> Accordingly, the most reliable evidence to support what the parties intended is the express, ordinary meaning of the text in light of its context, i.e. object and purpose.<sup>29</sup>

Article 32 of the V.C.L.T. establishes the secondary means of interpretation, mainly interpreting any ambiguity in light of preparatory works and other extrinsic sources of law. Article 31 and 32 is laid out systematically and in hierarchical order. This clearly indicates that recourse to supplementary means of interpretation are uncalled for unless the proper good faith interpretation is clouded – or tainted – by uncertainty, or if a textual interpretation leads to an unacceptable result. Nonetheless, if the preparatory works are indicative of the intentions of the parties to the treaty, the good faith requirement expressed in Article 31 may indirectly give them higher value than what Article 32 of the V.C.L.T. would otherwise suggest.<sup>30</sup>

In public international law, protection for an investor and its investment is usually outlined in a Bilateral Investment Treaty (hereinafter B.I.T.). Disputes between investors and the host-state are most often settled by arbitration according to a dispute settlement provision containing recourse to I.C.S.I.D. arbitration in the B.I.T. Therefore, these agreements generate disputes subsumed under the realm of public international law. The protection as well as jurisprudence creates a regime of international investment law. Therefore, understanding treaty interpretation is crucial when analyzing investor-state and investment treaty arbitration. Naturally, reflecting on the leading public international authority is highly relevant – for substantive as well as procedural guidance. As investment treaty

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<sup>28</sup> *Id.* at 208-209.

<sup>29</sup> *Id.* at 209.

<sup>30</sup> See *AUST*, *supra* note 27, at 218.

arbitration is still in the search for its turf upon which to stand,<sup>31</sup> analyzing best practices promulgated in the International court of Justice (hereinafter I.C.J.) might be necessary. That is not to say that a privately chosen tribunal has the same jurisdiction as a permanent court. Of particular importance in this context is the fact that: first, I.C.J. has interpreted similar vague language as the one in Article 47 of the I.C.S.I.D. Convention to have binding effect. Second, the I.C.J. has in that capacity ordered states to both refrain from taking positive actions.<sup>32</sup> This approach seems to have been based solely on preserving the status quo, and thus the I.C.J. seems to have adopted a functional/dynamic approach to safeguard the procedural fairness in adjudicating issues of public international law.

Choice of language in a treaty is seldom a stand-alone phenomenon. The way in which the I.C.J. has applied the V.L.C.T. in order to evaluate the binding force of provisional measures under the I.C.J. Statute proves this. Article 41 (1) of the I.C.J. Statute states that “[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.” The used language has an inherently similar issue of vagueness and ambiguity as that of the I.C.S.I.D. Convention.

In *LaGrand*,<sup>33</sup> the I.C.J. assessed the binding force of a provisional measure. In this case the provisional measures ordered the United States to stay the execution of a German citizen. The I.C.J. referred to Article 31 of the V.C.L.T. as reflective of customary law and underlined that its interpretation was directed towards establishing the “ordinary meaning to be given to [the] terms in their context and in light of the treaty’s object and purpose.”<sup>34</sup>

<sup>31</sup> Probably more so than ever considering E.U.’s proposal of a permanent Investment Court System.

<sup>32</sup> See KAJ HOBÉR, *SELECTED WRITINGS ON INVESTMENT TREATY ARBITRATION* 41–42 (2013).

<sup>33</sup> *LaGrand* case (Ger. v. U.S.), I.C.J. 2001/16, (Jun. 27, 2001).

<sup>34</sup> *Id.* at 501.

The U.S. denied that Article 41 had mandatory effect and underlined the choice of the words “indicate”, “ought”, and “suggested” in the English version. However, the French version of the text uses the verb “devoir”, which arguably is of more imperative character.<sup>35</sup> Subsequent to reaching the understanding that the French and English versions are of equal dignity, the court proceeded to establish the “meaning which best reconciles the texts, having regard to the object and purpose of the treaty”.<sup>36</sup> The court stated that the purpose of the Statute is to “enable the Court to fulfil the functions provided therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions”. The I.C.J. held that in order for it to effectively exercise its basic functions provided for in the treaty, interim measures must be attributed binding effect.<sup>37</sup>

The Court further stated that “[g]iven the conclusions reached . . . it does not consider it necessary to resort to the preparatory work to determine the meaning of that article”.<sup>38</sup> However, “[it] would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force”.<sup>39</sup> The Court stated that “[t]he preparatory work of Article 41 shows that the preference given in the French text to “indiquer” over “ordonner” was motivated by the consideration that the Court did not have means to assure the execution of its decisions.”<sup>40</sup> Thus, the I.C.J. ascribed the particular choice of the word “ordonner” not to the binding nature per se of interim measures, but to the fact that the Court does not have the power necessary to enforce a state’s compliance with an interim measure. The Court further stated that “[t]he fact that the Court does not itself have the means of execution of orders made pursuant to Article 41 is

<sup>35</sup> See John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 *YALE J. INT’L L.* 435, 439 (2002).

<sup>36</sup> *LaGrand case (Ger. v. U.S.)*, I.C.J. 2001/16, (Jun. 27, 2001), at 502.

<sup>37</sup> See *Id.* at 503.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 503-504.

<sup>40</sup> *Id.* at 505.

not an argument against the binding nature of such orders.” In other words, the I.C.J. argued that there is nothing in the preparatory works that seems to contradict the notion that interim measures have binding force.

The I.C.J. derived the binding force of its provisional order according to the treaty interpretation in light of the treaty’s text, object and purpose.<sup>41</sup> The conclusion of the Court has found scholarly support in the international law community. One commentator described the judgement as “consistent with long-held principles of international law” and further stated that “[t]he ICJ’s ruling in *LaGrand* . . . is sound as a matter of treaty interpretation [and] [i]f a court cannot, by issuing orders of an injunctive character, preserve its own ability to render a final, binding judgment, then its ability to render a final, binding judgment is illusory.”<sup>42</sup> This approach affirms a prevalent and concurrently pragmatic view exercised by the I.C.J. *vis-à-vis* the “object and purpose” of the I.C.J. Statute. The question may be posed, however, whether this approach is properly anchored in a good faith treaty interpretation; that is, *inter alia*, with sufficient consideration of what the negotiating parties had in mind (objectively) when the treaty was drafted. In this respect, the I.C.J.’s interpretation of the object and purpose of the Statute has received criticism; for example, due to a lack of nuance.<sup>43</sup> For instance, Hugh Thirlway stated:

[W]hen assessing the object and purpose of a treaty, it is in principle necessary to place oneself at the date of the conclusion of the treaty. In the case of the Statute of the ICJ, this would *prima facie* be 1946; but that statute was in effect no more than a re-enactment . . . . of the PCIJ Statute in 1920 . . . . The idea of a standing international tribunal has sprung from arbitral practice, and . . . it was not the concept of a body to

<sup>41</sup> See Hironobu Sakai, *New Developments of the Orders on Provisional Measures by the International Court of Justice*, 52 *JAPANESE Y.B. INT’L L.* 231, 237 (2009).

<sup>42</sup> Quigley, *supra* note 35, at 439.

<sup>43</sup> See Sakai, *supra* note 41, at 237.

which recourse could be had in order to *compel* other States to comply with their obligations (citations omitted).<sup>44</sup>

Thus, Thirlway accentuates that international tribunals as judicial bodies exercising compelling force towards states is a result of an arbitral practice not yet developed in 1920. As to the choice of language in Article 41 of the I.C.J. Statute, he further stated that “the inconsistencies and uncertainties reflect the uncertain extent to which a State could be told what it ought to do to preserve status quo.”<sup>45</sup>

Thirlway’s notes on *LaGrand* shed light upon what may appear as an obvious notion, namely that the choice of particular wording of a treaty text is not made arbitrarily. It is arguably more conceivable than not that when a treaty text does not explicitly express that a certain provision has legally binding effect, there are underlying reasons for it. This conception is substantiated by how provisions on interim measures have been formulated in other international treaties, such as the United Nations Convention on the Law of the Sea (hereinafter U.N.C.L.O.S.). For example, Article 290 (6) of the U.N.C.L.O.S. states that “[t]he parties to the convention shall comply promptly with any provisional measures prescribed in this article.” A textual interpretation aimed at establishing the ordinary meaning of this particular choice of wording hardly leaves any room for doubt as to the binding force of provisional measures in the context of international disputes under U.N.C.L.O.S.<sup>46</sup>

When giving proper consideration to *good faith*, it may be questionable whether focusing too much on “object and purpose” holistically is the right approach in determining what explicitly chosen words mean. The holistic approach, furthermore, seems to be derived from “the spirit of the treaty.” How do we know what that is, and does it change? This evolutionary approach, albeit effective, might not sit well with all states. This approach may be said to carry an inherent potential to

<sup>44</sup> Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Twelve*, 72 BRIT. Y.B. INT’L L. 37, 115-116 (2002).

<sup>45</sup> *Id.* at 116.

<sup>46</sup> *Id.* at 121.

impede clarity and foreseeability. In relation to *LaGrand*, it is, furthermore, disputable whether or not the I.C.J.'s interpretation of Article 41 complies with the good faith requirement pursuant to treaty interpretation. That assumption is underpinned by the fact that the signatory countries arguably did not enter into the treaty with the intention of giving the I.C.J. the power to issue legally binding provisional measures.

In *LaGrand*, the I.C.J. held that in order for the Court to effectively exercise its basic functions provided under the treaty, the power to render binding interim measure must be upheld.<sup>47</sup> By analogy, this argument can be applied by tribunals operating under the auspices of I.C.S.I.D.. However, there is a case to be made for the rejection of this approach, both in I.C.J. and I.C.S.I.D. proceedings.

When conducting textual interpretation, the “purpose” and “object” of a legal document is to be understood in the context in which the reader has to give the words meaning. On the one hand, the “presumption against ineffectiveness” may convince the interpreter that provisional measures in the context of investment-arbitration are in fact to be construed as orders. On the other hand, the interpreter may ascribe a very different meaning to the convention; that is, that the text means what it says, and says what it means, objectively.

Furthermore, Article 32 of the V.C.L.T. provides for reliance on supplementary means of interpretation in order to “confirm the meaning resulting from the application of article 31” or in other case “to determine the meaning when the interpretation according to Article 31 “. . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly absurd or unreasonable.” Schreuer wrote that “a conscious decision was made not to grant the tribunal the power to order binding [provisional measures]”.

We wish to follow-up with three questions: (1) did the drafters choose the terminology out of “courtesy,” thereby leaving the power to

<sup>47</sup> *LaGrand* case (Ger. v. U.S.), I.C.J. 2001/16, (Jun. 27, 2001), at 503.

demand compliance optional? (2) Did the drafters explicitly exclude an ordering power due to the possible interference with state sovereignty? Or (3) did the drafters intend to advise against interference but not limit its availability in case of extreme procedural irregularity or bad faith? The second is probably correct.

This ambiguity may “benefit” from tribunals shedding light upon the issue. Unfortunately for clarity and foreseeability purposes, this line of decisions has yielded mixed results. One stream of I.C.S.I.D. cases seem to have stretched the meaning of a recommendation based on jurisprudential and doctrinal evolution. This approach culminates in the theory that provisional measures in the context of I.C.S.I.D. arbitration have emerged to become “binding”.

Some limited judicial discretion is needed in the I.C.S.I.D. regime. Born wrote as follows *vis-à-vis* Tribunal discretion:

The granting of provisional measures is not a “discretionary” or arbitrary exercise, but must instead conform to principled standards and the evidentiary record. Although the standards applicable to the granting of provisional measures continue to develop, it is wrong to treat the subject as a matter of discretion or arbitration *ex aequo et bono*, and not of legal right. The better view is that statements about the arbitrators’ “discretion” refer to the [T]ribunal’s need to make pragmatic assessments of the risk, the extent of possible harm, the balance of hardships and the merits of the parties’ underlying positions in reaching a decision whether or not to issue provisional measures. These assessments are complex and require judgment and care, but they are not matters of pure discretion and must instead proceed in accordance with a principled legal framework and set of standards.

However, this seem to have slowly moved towards an acceptance for “judicial activism”. The latter is an unwelcomed feature in I.C.S.I.D.

arbitration. In response some may argue that investment arbitration is an institution that is “evolving” and with it widening the tribunal’s jurisdiction. This prudential theory welcomes the tribunal to consider various “procedural tools” needed due to the context in which they operate.

It is hoped that future Tribunals will err on the side of caution and take a more formalistic approach in interpreting treaties – V.C.L.T. textualism. The role of the Tribunal is not to speculate on what would be more or less effective (consequential thinking), but rather it is bound to give effect to the words of the text. The text empowers the Tribunal, but it also constrains it. When scholars write, they opine. When arbitrators interpret, they decide. This distinction is important. Academia has an intrinsic value to legal development (*de lege ferenda*), but scholarly thinking is not always compatible with legal interpretation (*de lege lata*).

In determining the preferred means to understand and interpret the I.C.S.I.D. Convention, we respectfully submit that an analogy can be made to the U.S. Constitutional debate, but with the opposite outcome. That is, do you think that the I.C.S.I.D. Convention is a living document, evolving jurisprudentially and doctrinally, making the convention a sort of “emergency convention”? If you think that the tribunal can interpret the I.C.S.I.D. Convention in the context of functionalism, then it is a living document. This pragmatism makes, among other things, a binding provisional order valid and legitimate. It makes the I.C.S.I.D. regime more “effective.” However, as outlined throughout, the formalistic method of interpretation has its justifications, too. Formalism in this context facilitates non-infringement on the sovereignty without textual support, it provides for clarity and foreseeability, and it provides for a framework of interpretation that is based on the actual agreement of the negotiating parties. We will leave you with one concern; that is, it is not completely unlikely that states will be pulling out of the I.C.S.I.D. regime or refrain from complying with awards. If they do, it may be on the basis of the tribunal having interfered with their sovereignty without textual support.

#### 4. CASE ANALYSIS – I.C.S.I.D.

A case study merits attention because although historically, arbitrators were hesitant to grant provisional relief, even when authorized by national law in recent years tribunals have shown greater willingness to do so.<sup>48</sup> The justification for the evolution is of interest. For instance, does the tribunal assess the damage a state suffers when a tribunal infringes on its sovereignty? What if the state refuses compliance? If a state refuse to comply with the provisional measure then the tribunal is really in between a rock and a hard place. Therefore, tribunals are hesitant to order provisional measures that risk interfering with state sovereignty. However, hesitant does not equal unwilling, as this part will demonstrate.

To illustrate this issue, this part will analyze the reasoning among tribunals in deciding whether to render a provisional measure ordering the suspension of a domestic criminal investigation or proceeding. In *Tokios Tokelés v. Ukraine*,<sup>49</sup> an investment-arbitration tribunal decided that a provisional measure ordering a host state to enjoin a criminal proceeding can be ordered.<sup>50</sup> This was the first decision of the kind and it was effectively established that criminal proceedings “may properly be the subject of [provisional measures].”<sup>51</sup> However, the order was not granted due to lack of urgency and necessity. This paper will not outline every I.C.S.I.D. arbitration where the tribunal has been requested to order the suspension of a criminal investigation or order.<sup>52</sup>

<sup>48</sup> BORN, *supra* note 3, at 2460.

<sup>49</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, (Jul. 1, 2003).

<sup>50</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, ¶11 (Jan. 18, 2005).

<sup>51</sup> Burnett et al. , *supra* note 1, at 42.

<sup>52</sup> See e.g. *Border Timbers Ltd. V. Republic of Zimbabwe*, ICSID case No. ARB/10/25, (Jun. 13, 2012); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, (Dec. 4, 2014); *City Oriente Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID case No. ARB/06/21, (Nov.19, 2017); *Italba v. Oriental Republic of Uruguay* ,ICSID Case No. ARB/16/9 , (Feb. 15, 2017); *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, (Mar. 29, 2017); *Teinver S.A., Transportes de Cercanías S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, (Apr. 8, 2016). For UNCITRAL Arbitration, see *Hesham T.M. Al Warraq v. Republic of, Indonesia, U.N.C.I.T.R.A.L.*, Award on Respondent’s Preliminary Objections to Jurisdiction and Admissibility of the Claims (June 21, 2012); *Chevron Corporation v. The Republic of Ecuador, U.N.C.I.T.R.A.L.*, P.C.A. Case No. 2009-23, Claimant’s Request for Interim Measures (Apr. 1, 2010); *China Heilongjiang International Economic &*

The pressing question is whether doctrinal and jurisprudential evolution in investment-arbitration has made the original language in Article 47 of the I.C.S.I.D. Convention null and void. Can procedural safeguard mechanisms trump express language? For instance, do the concepts of “equality of arms” and “procedural good faith” implicitly empower an I.C.S.I.D. tribunal to make a “recommendation” binding?

Notwithstanding the doctrinal and jurisprudential developments in investment-arbitration, right or wrong, the fact remains that tribunals most often apply deference when deciding whether to render provisional measures.<sup>53</sup> The deference is most likely a mixture of respecting state sovereignty and pure adherence to the V.C.L.T. and textualism.

#### 4.1. QUIBORAX V. BOLIVIA

The claimant claimed compensation for the revocation of eleven mining concessions.<sup>54</sup> The claimant brought a claim against Bolivia pursuant to the I.C.S.I.D. Arbitration Rules. Some years into the arbitration, Bolivia initiated criminal proceedings on the allegations that the main shareholders of Quiborax had forged documents in order to become “protected investors” under the Bolivia-Chile B.I.T. Bolivia’s Ministry for Foreign Affairs ordered an audit. The Bolivian authorities continued to review corporate documentation and “noted irregularities,” and as a result brought proceedings regarding “forged documents”.<sup>55</sup>

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Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, UNCITRAL, PCA Case No. 2010-20, (Jun. 30, 2017); Sergei Viktorovich Pugachev v. The Russian Federation, U.N.C.I.T.R.A.L., Interim Award (July 7, 2017).

<sup>53</sup> See Thomas W. Wälde, “Equality of Arms” in *Investment Arbitration: Procedural Challenges*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 161 (Katia Yannaca-Small ed., 2010).

<sup>54</sup> Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015). The Tribunal consisted of Marc Lalonde (Claimant appointee); Brigitte Stern (Respondent appointee); and Gabrielle Kaufmann-Kohler (Chair).

<sup>55</sup> 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, ¶¶22-45 (Feb. 26, 2010). Bolivia’s support for the allegations and the persons accused are further listed in these paragraphs.

The claimants alleged that the criminal proceedings were utilized as a defense strategy and litigation tactic in order to limit the claimant's access to important documents.<sup>56</sup> Claimants requested the Tribunal to order Bolivia or Bolivia's agencies or entities to:

- (1) . . . . refrain from engaging in any conduct that aggravates the dispute between the parties and/or alters the *status quo*, including any conduct, resolution or decision related to criminal proceedings in Bolivia against persons directly or indirectly related to the present arbitration;
- (2) . . . . discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which jeopardize the procedural integrity of these proceedings;
- (3) . . . . discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which threaten the exclusivity of the I.C.S.I.D. arbitration. . . .<sup>57</sup>

Pursuant to Article 47 of the I.C.S.I.D. Convention and Rule 39 of the I.C.S.I.D. Arbitration Rules, it was held that the tribunal generally has wide discretion to render provisional measures.<sup>58</sup> It then moved on to address the requirements to be met in order for the tribunal to suspend the criminal proceedings. The claimant satisfied all three requirements established; (1) an existence of rights requiring preservation; (2) existence of urgent protection; and (3) necessity of the provisional measure.<sup>59</sup>

<sup>56</sup> See Malcolm Langford et al., *Backlash and State Strategies in International Investment Law*, in *THE CHANGING PRACTICES OF INTERNATIONAL LAW* 70, 90 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018).

<sup>57</sup> *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶1(Feb. 26, 2010).

<sup>58</sup> *Id.* para. 105.

<sup>59</sup> *Id.* para. 113-165.

The “existence of rights requiring preservation” was determined by analyzing (a) rights that may be protected by provisional measures; (b) whether there is a right to exclusivity of the I.C.S.I.D. proceedings pursuant to Article 26 of the I.C.S.I.D. Convention; (c) whether there is a right to the preservation of the status quo and the non-aggravation of the dispute; and (d) whether there is a right to the procedural integrity of the arbitration proceedings.<sup>60</sup>

The tribunal held that rights

to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the *status quo* and the non-aggravation of the dispute . . . [but bears a relation to the dispute].<sup>61</sup>

It held that the criminal proceedings are “related to this arbitration due to conduct alleged and harm allegedly caused related closely to the Claimant’s standing as investors in the I.C.S.I.D. proceeding.”<sup>62</sup> The tribunal held that it has “every respect” for Bolivia’s sovereign right to prosecute crimes within its territory, but that the evidence suggests that the proceedings were initiated because of the arbitration. It also noted that the actions were taken after the inter-ministerial committee recommendation that Bolivia should try to find flaws in the mining concessions as a “defense strategy” in relation to the I.C.S.I.D. arbitration.<sup>63</sup>

The tribunal recognized that Bolivia has the sovereign power to investigate whether there is any criminal conduct and also to prosecute criminal conduct accordingly; however, such powers must be “exercised in good faith and respecting claimants’ rights, including their *prima facie*

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<sup>60</sup> *Id.* para. 116-148.

<sup>61</sup> *Id.* para. 117-18.

<sup>62</sup> *Id.* para. 120.

<sup>63</sup> *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶121-22 (Feb. 26, 2010).

right to pursue this arbitration.”<sup>64</sup> It was clear to the tribunal “that there [was] a direct relationship between the criminal proceedings and [the arbitration] that may merit the preservation of Claimants’ rights in the [proceeding].”<sup>65</sup>

To solve the “preservation of exclusivity”, the tribunal referred to Article 26 of the I.C.S.I.D. Convention: “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” The tribunal held that the right to exclusivity was “susceptible of protection by way of provisional measures” and it, furthermore, held that the criminal proceedings did not threaten the exclusivity as it does not extend to criminal proceedings (i.e. disputes not dealing with investments).<sup>66</sup>

In relation to the “preservation of the *status quo* and the non-aggravation of the dispute”, the tribunal noted that “the criminal proceedings do not deal with the same subject matter as [this arbitration, but are] sufficiently related to merit the protection of Claimants’ rights to the non-aggravation of the dispute and the preservation of the *status quo* . . . .”<sup>67</sup> However, for various reasons the tribunal did not consider the criminal proceedings to place “intolerable pressure” on the claimants to drop their arbitration claim, and in a similar vein the tribunal did not think that turning them into defendants in Bolivia changed the *status quo*.<sup>68</sup> “If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct in Bolivia.”<sup>69</sup>

The tribunal, however, found that it had the power to grant provisional measures to “preserve the procedural integrity” of the proceedings, and it opined that the criminal proceedings “may indeed be

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<sup>64</sup> *Id.* para. 123.

<sup>65</sup> *Id.* para. 124.

<sup>66</sup> *Id.* para. 127-29.

<sup>67</sup> *Id.* para. 132.

<sup>68</sup> *Id.* para. 138.

<sup>69</sup> *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶138 (Feb. 26, 2010).

impairing Claimants' right to present their case in particular with respect to their access to documentary evidence and witnesses."<sup>70</sup> For these reasons, the tribunal found that there was a threat to the procedural integrity of the arbitration.<sup>71</sup>

Second, the Tribunal looked to the "urgency" requirement, which it opined is satisfied when "a question cannot await the outcome of the award on the merits" (this is in line with the practice of the I.C.J.).<sup>72</sup> The parties agreed that urgency appears "when there is a need to safeguard rights that "are in imminent danger of irreparable harm before a decision is made on the merits."<sup>73</sup>

Third, having concluded that (1) the criminal procedure threatens the procedural integrity of the arbitration, and (2) a provisional measure is urgent, the tribunal turned to the third requirement; "necessity." The tribunal opined that "an irreparable harm is a harm that cannot be repaired by an award of damages."<sup>74</sup> The tribunal agreed with the Claimants and held that:

Regardless of whether the criminal proceedings have a legitimate basis or not (an issue which the Tribunal is not in a position to determine), the direct relationship between the criminal proceedings and this I.C.S.I.D. arbitration is preventing Claimants from accessing witnesses that could be essential to their case . . . . Under these circumstances, the Tribunal considers that Claimants' access to witnesses may improve if the criminal proceedings are stayed until this arbitration is finalized or this decision is reconsidered.<sup>75</sup>

The tribunal seems to have accepted the alleged view that the criminal proceedings were utilized as a defense strategy or litigation tactic.

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<sup>70</sup> *Id.* ¶141-142.

<sup>71</sup> *Id.* ¶148.

<sup>72</sup> *Id.* ¶149.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* ¶154-57.

<sup>75</sup> *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶163 (Feb. 26, 2010).

Therefore, pending the outcome in the arbitration, it ordered the suspension of the proceedings against the claimants and their witnesses.<sup>76</sup> The tribunal held as follows:

The Tribunal has been convinced that there is a very close link between the initiation of this arbitration and the launching of the criminal cases in Bolivia. It has become clear to the Tribunal that one of the Claimants is being subjected to criminal proceedings precisely because he presented himself as an investor with a claim against Bolivia under the I.C.S.I.D./B.I.T. mechanism. Likewise, the Tribunal has been convinced that the other persons named in the criminal proceedings are being prosecuted because of their connection with this arbitration (be it as Claimants business partners or counsel, or as authors of a report ordered by a state agency). Although Bolivia may have reasons to suspect that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the Tribunal suggest that the underlying motivation to initiate the criminal proceedings was their connection to this arbitration, which has been expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.<sup>77</sup>

The tribunal was “convinced” that a sovereign state engaged in highly criminal conduct and abuse of its sovereign powers. Accordingly, it was determined that suspending criminal proceedings – and ordering the state from initiating new actions – that would “jeopardize the procedural integrity of this arbitration” was an appropriate measure until the arbitration was completed.<sup>78</sup> Whilst the reasoning is quite controversial and infringing on state sovereignty, the tribunal did justify their

<sup>76</sup> See Langford et al., *supra* note 56, Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, . 1-2 (Feb. 26, 2010).

<sup>77</sup> Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶164 (Feb. 26, 2010).

<sup>78</sup> *Id.* 1-2.

discretion by common sense and did engage in an extensive and thorough legal analysis. However, the fundamental question remains; that is, does an I.C.S.I.D. tribunal have the jurisdiction to engage in this kind of exercise? Although the reasoning was sound, was it really supported by the legal framework? Another concern is whether states will allow this extensive interference from a tribunal appointed to litigate investment claims.

#### 4.2. HYDRO V. ALBANIA

The claimant initiated I.C.S.I.D. arbitration against Albania for alleged breaches of honoring commitments for their electricity generation enterprises in the host-state.<sup>79</sup> Subsequently, Albania sought to extradite two of the claimants from the U.K. on the alleged basis of money laundering and fraud. The claimants, in turn, sought an interim measure requesting Albania to desist its action. The tribunal recommended that Albania (a) suspend the criminal proceedings until the issuance of a final award and (b) take the necessary actions to suspend the extradition proceedings.<sup>80</sup> The “recommendation” was given under the heading “Tribunal’s Order.” Despite most provisional measures rendered as “orders”, it remains quite convoluted in light of the language in Article 47 and Rule 39.

Pursuant to the applicable legal framework the tribunal determined first whether there is a sufficient basis for the Tribunal to decide the questions subject of the request for a provisional measure.<sup>81</sup> It went on to assess the “appropriate test” to be applied (i.e. the requirements for a provisional measure); that is, whether the application is (1) necessary to protect the applicant’s rights; (2) urgent; and (3)

<sup>79</sup> Hydro S.r.l. and others v. The Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 3, 2016).

<sup>80</sup> Hydro S.r.l. and others v. The Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶5.1 (Mar. 3, 2016).

<sup>81</sup> *Id.* ¶3.9.

proportionate.<sup>82</sup> The tribunal has to establish the appropriate test when interfering with the exercise of a state's right to investigate and prosecute crimes.<sup>83</sup> The tribunal was satisfied that a real question arising from the respondent's conduct was the extent of interference with the "procedural integrity" of the arbitration proceedings. However, not all situations of incarceration may disrupt an arbitration. Therefore, not every request of this kind makes tribunal intervention proper. Despite this, when the requirements are met the tribunal "sees no difficulty in recommending an order."<sup>84</sup>

As a result of the particular circumstances, the tribunal took the view that it had the jurisdiction to – and was fully capable of – taking any measure to preserve status quo.<sup>85</sup> On the other hand, the tribunal was not persuaded by the argument that a provisional order be made in order to protect the exclusivity of the arbitration.<sup>86</sup> Recall the *Quiborax* discussion (see above).

First, in relation to the necessity requirement, the tribunal held that the claimants' ability to participate in this arbitration was extremely important, and thus the criminal proceedings could potentially cause irreparable harm to the integrity of the arbitration and hinder their ability to effectively present their case. Second, in relation to the urgency requirement, the tribunal considered that there was an imminent risk to the claimants' ability to effectively participate in the arbitration and that the measures sought were of an urgent nature.<sup>87</sup> Third, in relation to the proportionality requirement, the tribunal found the provisional measure warranted and held that "[t]he extradition and criminal proceedings concern or relate to the factual circumstances at issue in this arbitration."<sup>88</sup> The tribunal justified its decision as follows:

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<sup>82</sup> *Id.* ¶3.11.

<sup>83</sup> *Id.* ¶3.14.

<sup>84</sup> *Id.* ¶3.18-20.

<sup>85</sup> *Id.* ¶3.21-23.

<sup>86</sup> *Hydro S.r.l. and others v. The Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶3.21-23 (Mar. 3, 2016).

<sup>87</sup> *Id.* ¶3.29-30.

<sup>88</sup> *Id.* ¶3.41.

The effect of the provisional measures proposed would affect the Respondent's ability to proceed with the criminal prosecution in the immediate future. However a stay would not put an end to the criminal proceedings. They would be delayed but not terminated. The Respondent also adverts to the possibility of the Claimants dissipating assets if the criminal proceedings are stayed. Given that the investments are physically located in Albania, it is difficult to accept that this would be a major risk. The balance of proportionality comes down in favour of protecting the Claimants' rights.

In line with *Quiborax*, the tribunal seems to have assigned to itself the de facto discretion to stay domestic criminal proceedings.

#### 4.3. CHURCHILL MINING AND PLANER MINING V. INDONESIA

The claimant initiated I.C.S.I.D. arbitration as a result of Indonesia terminating their mining licenses.<sup>89</sup> The respondent initiated criminal proceedings on the basis that the licenses had been procured through forged documents. This was targeted at the Ridlamata Group, with which the claimant had a partnership and through which they gained their licenses. Furthermore, the Regent of East Kutai had expressed an intention to bring criminal proceedings against witnesses.<sup>90</sup> As a corollary, Indonesia raided the offices of the investors and confiscated numerous documents and computer hard drives.<sup>91</sup>

The claimant argued that the criminal proceedings were brought to cause surprise and disruption, namely that it was a defense strategy and litigation tactic directly connected with the investment arbitration.<sup>92</sup> In

<sup>89</sup> *Churchill Mining Plc and Planet Mining Pty Ltd v. The Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Award (Dec. 6, 2016).

<sup>90</sup> *Churchill Mining Plc and Planet Mining Pty Ltd v. The Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9 (Jul. 8, 2014).

<sup>91</sup> Langford et al., *supra* note 56, at 92.

<sup>92</sup> Jarrod Hepburn, *Arbitrators again decline to order Indonesia to desist with criminal investigation into alleged forgery of mining license in Churchill & Planet Mining case*, INVESTMENT ARBITRATION REPORTER, (Dec. 30, 2014),

other words, the claimant argued that Indonesia as a sovereign misused and abused its powers in contravention of the “equality of arms” principle.<sup>93</sup>

The claimant filed an application for a provisional measure, requesting Indonesia to refrain from threatening, commencing criminal investigations and proceedings and to suspend criminal proceedings (including investigations) against the claimant or any person associated with such.<sup>94</sup> However, the Tribunal pursuant to the legal framework (Article 47 and Rule 39) found no urgency nor necessity.

In relation to the rights requiring preservation, the tribunal looked at: (1) the exclusivity of the arbitration pursuant to Article 26 of the I.C.S.I.D. Convention; (2) the preservation of status quo and non-aggravation of the dispute; and (3) the right to procedural integrity of the arbitration.<sup>95</sup> The tribunal held that the claimant seeking provisional measures to ensure and secure their right in the present proceeding by not having their witnesses subject to criminal investigations is indeed acting within his rights pursuant to the legal framework in Article 47 and Rule 39.<sup>96</sup>

First, in relation to the exclusivity pursuant to Article 26, the tribunal determined that the threat of criminal investigations and proceedings against the claimants, their witnesses, and potential witnesses do not per se threaten the exclusivity of the I.C.S.I.D. proceedings; furthermore, the criminal charges against a non-party (Ridlamanta Group) did not threaten the exclusivity and did not undermine the Tribunal’s jurisdiction to resolve the claims.<sup>97</sup>

Second, in relation to the preservation of status quo and the non-aggravation, the tribunal opined that it is “undisputed that the right

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<https://www.iareporter.com/articles/arbitrators-again-decline-to-order-indonesia-to-desist-with-criminal-investigation-into-alleged-forgery-of-mining-license-in-churchill-planet-mining-case/>.

<sup>93</sup> Langford et al., *supra* note 56, at 92.

<sup>94</sup> Churchill Mining PLC v. Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9, at 1(Jul. 8, 2014).

<sup>95</sup> *Id.* at 72.

<sup>96</sup> *Id.* at 78-79.

<sup>97</sup> *Id.* at 87.

to the preservation of the *status quo* and the non-aggravation of the dispute may find protection by way of provisional measures . . . ., procedural rights may be preserved by provisional measures like substantive rights (citations omitted).”<sup>98</sup> In this case, the tribunal was of the opinion that the initiation of criminal charges did not alter the *status quo* nor did it aggravate the dispute.<sup>99</sup>

Third, in relation to the right to the procedural integrity of the arbitration proceedings, the parties did not disagree that the right to the integrity of the arbitration proceedings (including fundamental “due process” right to present their case) may be protected by provisional measures.<sup>100</sup> Both relied on *Quiborax*, but reaching opposite conclusions. The tribunal distinguished *Quiborax* since “[that arbitration] dealt with actual investigations against a co-claimant and persons involved in the setting up of the investment.”<sup>101</sup>

For the combined reasons, the tribunal denied the claimant’s application for a provisional measure.<sup>102</sup> Two practitioners opined the following:

This case follows the line of precedent adopting a high threshold for imposing [provisional measures] 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 [a provisional measure] had not been satisfied.<sup>103</sup>

*Churchill Mining* does, indeed, seem to suggest that a mere threat should not be enough for a tribunal to render a provisional measure. This reasoning is respectful of state sovereignty and aware that a lack of deference might be damaging to the tribunal and the I.C.S.I.D. system.

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<sup>98</sup> *Id.* at 90.

<sup>99</sup> *Id.* at 92.

<sup>100</sup> *Churchill Mining PLC v. Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9, at 98 (Jul. 8, 2014).

<sup>101</sup> *Id.* at 99.

<sup>102</sup> *Id.* at 106.

<sup>103</sup> Burnett et al. , *supra* note 1, at 49.

The threshold seems high and general tribunal discretion sound, but the contra-argument among commentators is not in concurrence only (arguing for a more stringent threshold), but in dissent too. The dissenting views wish to eliminate the binding power of a provisional order, especially those interfering with the sovereign powers of the state.

#### 4.4. LAO HOLDINGS V. THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

The claimant initiated I.C.S.I.D. arbitration for alleged expropriation of their investment.<sup>104</sup> Pre-dating the initiation of the arbitration, there were on-going court proceedings against the claimant for alleged back taxes and money laundering. The tribunal granted an interim measure and held that the respondent must not “[take] any steps that would alter the *status quo ante* or aggravate the dispute.”<sup>105</sup> The respondent consented to stay the criminal proceedings as part of a “conciliatory effort” and to let the arbitration proceed “in an environment conducive to timely action by the Tribunal.”<sup>106</sup> In the midst of the proceedings, the respondent sought to modify the decision on provisional measures, but the tribunal held that such action would threaten the integrity of the arbitral process and that the respondent had not established a change of circumstances as to justify such modification.<sup>107</sup>

The fact that the respondent “consented” to stay their proceedings seems to suggest that they saw the interim measure merely as a recommendation as opposed to an order. The fact that they respected the investment arbitration procedure seems to suggest that they were in full adherence to their duty to proceed in “good faith” as agreed between the parties. The fact that they later asked to modify the provisional measure seems to suggest that they would not, without the tribunal’s acceptance,

<sup>104</sup> See generally, Lao holdings N.V. v. Lao People’s Democratic Republic, ICISD Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (May 30, 2014).

<sup>105</sup> *Id.* § 1.

<sup>106</sup> *Id.* § 4(i).

<sup>107</sup> See *Id.* § 4(iii).

endanger the procedure or improperly misuse their prosecutorial powers to unbalance the “equality of arms” as agreed to in advance, not as inherent in the investment arbitration per se.

#### 4.5. CONCLUDING REMARKS – DOCTRINAL LEGACY?

The natural question is rather simple: what effects will the doctrinal developments in these (and related) cases have on the nature of provisional measures in I.C.S.I.D. arbitration? The answer is, however, cumbersome to distill due to two primary factors. First, there is generally no rule of binding precedents in international arbitration.<sup>108</sup> And second, the issue is intimately linked with interference with state sovereignty.

On the one hand, it can be argued that “recommendation” does not have binding force and that the legitimacy of the system benefits from a rules-based, certain approach to interpreting the meaning of the I.C.S.I.D. Convention. Generally speaking, *in dubio mitius* (the “restrictive principle”) means that treaties should be interpreted with deference to the sovereignty of the state (see discussion on state sovereignty below).<sup>109</sup> Moreover, Article 31 and 32 (as discussed above) mandate a textual interpretation. The provisional measure provision is part of a treaty, and therefore, should be interpreted accordingly. Like other clauses, its meaning depends on the particular language. A strict textual interpretation, in conjunction with deference for the sovereign, could lead to interpreting a recommendation as lacking binding force.

On the other hand, the jurisprudential developments seem to have established a doctrine that broadens an I.C.S.I.D. tribunal’s jurisdiction by adopting a flexible, dynamic, and value-based adjudicatory methodology and approach. These tribunals seem to have justified extensive arbitral powers. These cases appear to stand for the proposition that “functional adjudication” must sometimes move outside the legal rigidity in order to

<sup>108</sup> See generally HOBÉR, *supra* note 32, at 30–31.

<sup>109</sup> See *Id.* at 310–311.

produce substantive as well as procedural fairness and justice (see discussion on procedural safeguards below). The essence of the cases outlined above (which constitute a non-exhaustive selection of examples), is a development which puts pure legal theory somehow on its head. It is a value-added approach which supersedes certainty, i.e. the approach prevails over strict rules.

The policy unveiled in these cases can be understood as follows. The I.C.S.I.D. Convention should be interpreted in a dynamic manner and must be able to adopt to changing circumstances. This kind of reasoning is not limited to this procedural issue alone, and therefore has a larger encompassing legacy. Adding to this, arbitral case law in investment treaty arbitration has generally been recognized to have standing and currency as quasi-binding case law.<sup>110</sup> Investment treaty arbitration's future is different from that of its commercial counterpart because it implicates public international law. Therefore, the *status school of thought* which attributes some sort of quasi-judicial role on the arbitrator seems inevitable in investment treaty arbitration.

## 5. I.C.S.I.D. TRIBUNALS' JURISDICTION – PROCEDURAL SAFEGUARDS AND STATE SOVEREIGNTY

As discussed in the previous section, dynamic interpretation (e.g. allowing for procedural efficiency at the expense of rules-based interpretation) sometimes clashes with, for example, state sovereignty. Ultimately, the question on whether the provisional measure regime in I.C.S.I.D. arbitration can mandate a sovereign to refrain from exercising sovereign powers is one where the text (the rule) and the sovereign prerogatives clash with necessary, dynamic interpretation.

<sup>110</sup> Cf. Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 445-7 (2012). See also MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 133-4 (3rd ed. 2008).

It has been said that “equality of arms” is a key concept for a fair adjudication process.<sup>111</sup> The concept was developed through public international law. However, the concept can be traced back to ordinary principles of law; such as, “due process” and the “right to a fair trial.” I.C.S.I.D. arbitration is an adjudication system that operates under the auspices of public international law, and therefore an argument can be made that the tribunal has inherent – implicit and explicit – powers to restore the equality of arms.<sup>112</sup> Professor Wälde wrote as follows:

“Equality of arms” a foundation principle of investment arbitration procedure. A government sued on the basis of an investment treaty, signed to encourage foreign and private investment by promising effective protection, should prosecute its case vigorously but within the framework of the principles of “good faith” arbitration, the applicable arbitration rules, and with respect to “equality of arms”.<sup>113</sup>

Arguably, rendering a provisional measure is a means through which the tribunal can sanction procedural abuse and restore the equality of arms between the parties. For example, if a host-state abuses or misuses its prosecutorial powers to gain a litigation tactic, tribunals may have a duty to restore “equality of arms.”<sup>114</sup> Some stretch it so far that a breach of that duty can lead to annulment under Article 52 of the I.C.S.I.D. Convention.<sup>115</sup>

After all, “[p]rinciples of law that have received universal acceptance by frequent embodiment in international instruments bear heavily on, and are likely to be recognized by, domestic courts.”<sup>116</sup> The “equality of arms” principle might be one of the “universally accepted principles.” However, whether this principle can trump deference to state sovereignty or the pure text of the convention is debatable.

<sup>111</sup> See Wälde, *supra* note 53, at 161, 188.

<sup>112</sup> Wälde, *supra* note 53, at 182.

<sup>113</sup> Wälde, *supra* note 53, at 161–162.

<sup>114</sup> Wälde, *supra* note 53, at 180.

<sup>115</sup> Wälde, *supra* note 53, at 180.

<sup>116</sup> Rowland J.V. Cole, *Validating the Normative Value and Legal Recognition of the Principle of Equality of Arms in Criminal Proceedings in Botswana*, 56 J. AFR. L. 68, 85 (2012).

“Access to justice” is another broad, ambiguous, and loose concept upon which justification may be found. The International Covenant on Civil and Political Rights and the European Convention on Human Rights guarantee a fair trial to litigants. Arguably this should be mirrored in investment-arbitration. The right to a fair trial is central to, and a fundamental aspect of, the constitutional rule of law and any procedural well-being of a court or tribunal. Born makes a valid point in that:

[R]easonable parties cannot be presumed to intend that their chosen dispute resolution mechanism should lack important procedural protections, or should reward dilatory tactics by one party, or should require recourse to national courts for effective relief. Accordingly, absent explicit contrary indication in the parties' agreement, it is both sensible and necessary to presume that arbitration agreements impliedly include a grant of authority to order interim relief.<sup>117</sup>

Now, whether “judicialization” of investment-arbitration is inevitable or not is a discussion for another time. It suffices to say that more court-like procedures would mean that investment-arbitration would be more akin to the I.C.J. rather than modelled after an I.C.A. tribunal. That evolution has been going on for many years, probably leading towards the adoption of an investment court system (I.C.S.). Whether public policy concerns in investment-arbitration are stressing enough to press for this development has to be answered in the years to come.

As a final observation, many Tribunals that eventually end up denying the request for a provisional measure, still render a *de facto recommendation* in order to protect the “equality of arms” and “procedural fairness” but without interfering with state sovereignty or implying tribunal powers outside the text. For example, the tribunal in *Churchill Mining* observed as follows: “While the request for provisional measures must be denied, the Tribunal wishes to expressly stress the

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<sup>117</sup> BORN, *supra* note 3, at 2435.

Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration."<sup>118</sup>

The tribunals that still deny this evolution and proceed with extreme deference to state sovereignty have their reasons too. Many find their reasoning in pure textualism and others probably prefer a holistic view in order to preserve investment-arbitration. The latter agree that efficiency is needed but disagree in how their decisional law will affect the investment-arbitration system as a whole. We need to scratch beneath the surface and ask: how will provisional measures interfering with state sovereignty adversely affect the investment-arbitration regime in the long-term? When a tribunal refuses to order a provisional measure, it is either because (1) it thinks that they lack the authority to order it, (2) that negative inferences are a sufficient remedy, or (3) that rendering an order would damage the legitimacy of the tribunal and the investment-arbitration system due to the risk of non-compliance. Thus, many tribunals might be safeguarding against non-compliance while still stressing a particular point that needs to be made.

Therefore, I.C.S.I.D. tribunals' recognition of their power to order provisional measures in the criminal prosecution context may be based on the essential need to preserve the procedural integrity of investment-arbitration, in general, and for the protection of the investor's access to arbitration, in particular.<sup>119</sup> Notwithstanding this, the I.C.S.I.D. regime is constrained by the text of the convention and to deference for state sovereignty.

In the context of ordering provisional measures in investment-arbitration, a tribunal has to balance various considerations that may affect state sovereignty.<sup>120</sup> "It should be noted that in

<sup>118</sup> Churchill Mining PLC v. Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9, at 104 (Jul. 8, 2014).

<sup>119</sup> Burnett et al. , *supra* note 1, at 53.

<sup>120</sup> Maniruzzaman, *supra* note 6, at 2. *E.g.*, sovereign immunity, public interest, international obligations, etc.

negotiating and drafting [the I.C.S.I.D. Convention] the state parties were [directly] involved through their representations (hence sticking to the orthodox notion of sovereignty) unlike in other cases such as the U.N.C.I.T.R.A.L. Arbitration Rules.”<sup>121</sup> Maniruzzaman identified three different perspectives of sovereignty to be applied as a matter of course and practical exigency; that is, the classical perspective, the teleological perspective, and the objective perspective.<sup>122</sup>

First, the classical perspective is premised on the idea that provisional measures are not mandated to be binding on states. The drafters of the I.C.S.I.D. Convention (and the I.C.J. statute) had this in mind when drafting respective legal framework and the drafting history bears testimony to this fact.<sup>123</sup> The power in Article 47 of the I.C.S.I.D. Convention to “prescribe,” rather than “recommend,” was opposed (especially by China) and the “idea to authorize the Tribunal to make “interim awards“ on provisional measures (citations omitted) did not prevail.”<sup>124</sup> The choice of language, originates from the drafters intention to be respectful of State sovereignty. For example, by not granting a tribunal the power to order a state to do something provisionally.<sup>125</sup> Maniruzzaman identified the following in relation to the classical perspective: “It is thus clear that the sovereignty of the state party was considered to be a factor for not making I.C.S.I.D. provisional measures binding on it. However, the I.C.S.I.D. tribunal in its landmark decision in the *Maffezini* case in 1999 pronounced the binding character of provisional measures recommended by a tribunal.”<sup>126</sup>

Hence, despite the reason for choosing a particular language, jurisprudential and doctrinal evolution might have changed the meaning of a recommendation to become an order.

<sup>121</sup> Maniruzzaman, *supra* note 6, at 6-7.

<sup>122</sup> Maniruzzaman, *supra* note 6, at 8.

<sup>123</sup> Maniruzzaman, *supra* note 6, at 8-9.

<sup>124</sup> SCHREUER ET AL., *supra* note 9, at 746, 758.

<sup>125</sup> E.g., Zannis Mavrogordato & Gabriel Sidere, *The Nature and Enforceability of I.C.S.I.D. Provisional Measures*, 75 ARB. 38, 40 (2009).

<sup>126</sup> Maniruzzaman, *supra* note 6, at 10.

Second, the teleological perspective of State sovereignty offers another view; that is, although the choice of word is vague, it is based on the thought that the parties are obliged not to frustrate their agreement to arbitrate.<sup>127</sup> For example, in *Maffezini v. Spain* the tribunal noted that “the lack of precedent is not necessarily determinative of [its] competence to order provisional measures in a case where such measures fall within the purview of the Arbitration Rules and are required under the circumstances.”<sup>128</sup> A “lack of precedent” is not determinative in a regime without a doctrine of binding precedent. Albeit some argue that there is a *de facto* doctrine of binding precedent in investment arbitration. Notwithstanding, a lack of legislative intent is determinative; a notion which the interpretive framework provided in the V.C.L.T. substantiates. The general rule of treaty interpretation, as expressed by article 31 of the V.C.L.T. does include a teleological approach insofar as a treaty text must be read in light of its object and purpose. However, as stressed above, the interpretive framework gives precedence to the textual approach. As laid out by Anthony Aust:

The determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*. The latter concept, as we have seen in relation to reservations to treaties, can be elusive. Fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context. In practice, having regard to the object and purpose is more for the purpose of confirming an interpretation. If an interpretation is incompatible with the object and purpose, it may well be wrong. Thus, although paragraph (1) contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence.<sup>129</sup>

<sup>127</sup> Maniruzzaman, *supra* note 6, at 13.

<sup>128</sup> Emilio Augustin Maffezini v. Kingdom of Spain ICSID Case No. ARV/97/7, Decision on Request for Provisional Measures, para. 5 (Oct. 28, 1999).

<sup>129</sup> AUST, *supra* note 27, at 209.

Accordingly, although a teleological approach is central feature of treaty interpretation, it is the “object and purpose” that confirms the party intention as it is expressed in the “ordinary meaning” of the text, and not the other way around. Thus, in order to adhere to the principles of interpretation laid out in the V.C.L.T., the conclusions derived from a teleological approach have to be anchored in the treaty text. The sources of law upon which a teleological approach is based, are mainly extrinsic. Preparatory works are explicitly addressed as a supplementary means of interpretation in Article 32 of the V.C.L.T.. Notwithstanding the explicit hierarchy provided in the V.C.L.T., preparatory works are often important when applying the general rule of interpretation insofar as what can be derived therefrom is indicative of party intention and the “object and purpose” of a treaty. Therefore, a teleological method of interpretation is in many cases best performed by glancing at the preparatory work of the relevant convention or rules. To reiterate Schreuer’s comment: “a conscious decision was made not to grant the tribunal the power to *order binding* [provisional measures].”<sup>130</sup>

Third, the objective perspective of State sovereignty “allows the [tribunal] to delve into the objective application of the notion of sovereignty so that the state’s position as a sovereign is respected and is not impacted in a way that turns out to deprive it of its fundamental status of being a state.”<sup>131</sup> Certain powers should not be interfered with in accordance with the objective perspective; unless an agreement has been made. Exactly what those powers are is uncertain and possibly changing. A state’s prosecutorial powers might very well fit within those powers. Another question is exactly when and how an agreement has been made and whether provisions can be implied or evolved through doctrine and jurisprudence.

Scholars, arbitrators and practitioners are divided when it comes to the provisional measures binding character. The main concern being

<sup>130</sup> SCHREUER ET AL., *supra* note 9, at 758.

<sup>131</sup> Maniruzzaman, *supra* note 6, at 8.

interference with state sovereignty. For example, the Tribunal in *SGS v. Pakistan* opined that “[the tribunal] cannot enjoin a State from conducting the ordinary processes of criminal, administrative and civil justice within its own territory.”<sup>132</sup> The Tribunal in *Italba* stated that: “. . . Uruguay has the right to investigate alleged criminal conduct in its territory. There can be no legitimate expectation on the part of Claimant that the prosecution of an I.C.S.I.D. arbitration against Uruguay confers a blanket immunity upon its principals and witnesses from a criminal investigation in Uruguay.”<sup>133</sup>

The Tribunal in *Teinver v. Argentina* articulated a similar restrictive view but with a caveat for “exceptional circumstances”, opining as follows: “As has been held by a number of arbitral tribunals, Respondent clearly has the sovereign right to conduct criminal investigations and it will usually require exceptional circumstances to justify the granting of provisional measures to suspend criminal proceedings by a State.”<sup>134</sup>

As evident, there is no agreement and there are valid arguments on opposite sides. In *Hydro S.R.I. v. Albania*, the Claimants argued that the Respondent had accepted the Tribunal’s interference with its sovereign rights by signing the I.C.S.I.D. Convention.<sup>135</sup> However, the tribunal, sensibly, came down in the middle of the two extremes and opined as follows:

In the Tribunal’s view adherence to the I.C.S.I.D. Convention has some ramifications on the sovereign rights of a member state. The Tribunal also accepts the Respondent’s submission that when a State investigates a crime, particularly in circumstances where the State is under an international

<sup>132</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Order on Procedural measures No. 2, para. 36 (Oct. 16, 2002).

<sup>133</sup> *Italba v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Claimant’s Application for Provisional Measures and Temporary Relief, ¶118, (Feb.15, 2017).

<sup>134</sup> *Teinver S.A. and Transportes de Cercanías S.A. v. The Argentine Republic*, I.C.S.I.D. Case No. ARB/09/1, Decision on Provisional Measures, para 190 (Apr. 8, 2016).

<sup>135</sup> *Hydro S.r.l. v. Republic of Albania*, I.C.S.I.D. Case No. ARB/15/28, Order on Provisional Measures, ¶3.40 (Mar. 3, 2016).

obligation to do so, “[t]he strongest of reasons need to be shown for impeding such an investigation.”<sup>136</sup>

The Tribunal seems to have opined that the I.C.S.I.D. Convention interferes with states sovereign rights, but that some interference is justified and agreed to. However, the tribunal seems to have determined that a provisional measure enjoining criminal procedures is a kind of interference that carries a high burden and is not easily available.

The provisional measure is a holistic procedural tool and its outcome is highly determinative on specific facts. However, there are still pure textualists that adhere strictly to the V.C.L.T.. Pure textualists look strictly at words or lack thereof. The tribunal in *Quiborax S.A.* opined as follows vis-à-vis I.C.S.I.D. arbitration exclusivity: “Neither the I.C.S.I.D. Convention nor the B.I.T. contain any rule enjoining a State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors.”<sup>137</sup>

Tribunals have decided that they have extensive powers to, among other things, preserve the status quo and to take measures needed for the parties to not “aggravate” the dispute further. Despite the extreme deference for state sovereignty, the Tribunal in *Quiborax S.A.I.* opined the following concerning sovereignty:

[T]he Tribunal insists that it does not question the sovereign right of a State to conduct criminal cases. As mentioned in paragraph 129 above, the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors. However, the situation encountered in this case is exceptional [emphasis added] . . . [T]he Tribunal is of the opinion that a mere stay of the criminal proceedings would not affect Respondent’s sovereignty nor require conduct in violation of national law.

<sup>136</sup> *Id.* para 3.40.

<sup>137</sup> *Quiborax S.A. v. Bolivia*, I.C.S.I.D. Case No. ARB/06/2, Decision on Provisional Measures, ¶129 (Feb. 26, 2010).

Respondent's expert in criminal procedure . . . . notes that the prosecutor may request the competent judge to refrain from prosecuting a criminal action in certain cases, such as when the event is of little social relevance or judicial pardon is foreseeable . . . . In any event, the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course. Once this arbitration is finalized, Respondent will be free to continue the criminal proceedings, subject to the Tribunal terminating or amending this Decision prior to the completion of this arbitration.<sup>138</sup>

The tribunal decided that a stay would preserve the procedural integrity of the arbitration but not infringe on the sovereign's right to prosecute, the harm calculus makes sense in theory but it remains to be seen how well it will sit in practice.

As has been said in relation to international law, “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>139</sup> An obvious trap is that the tribunal lacks the power to enforce a provisional order.<sup>140</sup> The practical implication is that a non-complying states may be willing to sacrifice the “negative inferences” in exchange for a significant litigation or tactical benefit that will be arising out of the non-compliance.<sup>141</sup> Neither the I.C.S.I.D. Convention nor the institutional rules “carve out” the authority to “interfere with rights of a sovereign nature.” If this was so important to the drafting parties, it would have been ventilated and articulated with frequency.

If the tribunal lacks “explicit powers” to order provisional measures, it might have “implied powers” to, among other things,

<sup>138</sup> *Id.* para. 164-65.

<sup>139</sup> *E.g.*, LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2nd ed. 1979).

<sup>140</sup> BORN, *supra* note 3, at 2445. The court can draw “negative inferences” from a lack of compliance.

<sup>141</sup> *See* BORN, *supra* note 3, at 2447.

restore equality of arms, preserve the status quo, secure non-aggravation, and guarantee procedural fairness and integrity. If a provisional order is the only means of securing these procedural rights, then an order might be rendered with justification.

In summary, the debate on whether an I.C.S.I.D. Tribunal has jurisdiction to *order* a sovereign to refrain from exercising its sovereign powers is sensitive. Sovereign immunity and textual interpretation clashes with necessary procedural protection that has been in the making in public international law for many years. It is in this context that investment treaty arbitration differentiates the most with its commercial counterpart. It is also because of the sovereign element that investment treaty arbitration is becoming judicialized. Whether concepts such as “equality of arms” and “procedural good faith” should allow a privately appointed tribunal to restrain sovereign activity is hard to determine. The answer has to be determined whether I.C.S.I.D. Tribunals should have jurisdiction that is either value and approached based or whether the tribunal should be strictly limited to rules and constrained by deference towards the sovereign. In other words, should I.C.S.I.D. tribunals have the flexibility to respond to the dynamic changes necessary in order to provide substantive and procedural fairness or should the tribunals be constrained by rules, which at the same time have the benefit of establishing a certain regime? A certain regime has related virtues of predictability and uniformity. Either approach can be justified or de-justified on the basis of contributing to the legitimacy of the system.

## 6. CONCLUDING REMARKS

The provisional measure is a practical tool for a tribunal in order to guarantee procedural integrity, e.g. on the basis of “equality of arms” or “procedural good faith.” It can be said that the concept of “sovereignty”

should not force tribunals to tie their hands when serious interference with the arbitral procedure is making the procedure unfair at best, or a nullity at worst. However, pragmatic thinking does not alter the language explicitly adopted by the negotiating parties. Legal text both empowers and constrains the tribunal. Jurisdiction, powers, and duties are extracted from the legal authority.

Despite the unclear language of the I.C.S.I.D. Convention, tribunals seem to have justified “ordering” these measures. They have done so either by relying on doctrinal understanding developed in arbitral case law or by relying on their duty (perhaps “best efforts”) to facilitate for procedural fairness and good faith, perhaps attributing to themselves a quasi-judicial role in accordance with the *status school of thought*.

I.C.S.I.D. Tribunals seem to have relied on the justifications without major short-term implications. It is doubted, however, that this dynamic functionalism can continue without long-term repercussions. Tribunals have to balance two factors if states refuse compliance due to interferences with state sovereignty. First, tribunals have to consider the impact on the legitimacy of the I.C.S.I.D. tribunal itself and, second, the legitimacy of the entire regime of investment arbitration. If states eventually refuse to comply with provisional orders, it will inevitably de-legitimize investment arbitration. This would undermine an already fragile and perhaps overly politicized system. As a result, more states may refuse compliance, or worse, pull-out altogether.

Therefore, the great paradox in extending arbitral jurisdiction to maximize procedural fairness – albeit well intended and sensible – might be that there will eventually no longer be a system to safeguard. In this context, the coin of pragmatism triggers two questions, the answer of which will be crucial for the long-term sustainability of the investment-arbitration regime. These questions are: (1) what approach is “pragmatically the better” in order to safeguard procedural fairness in investment-arbitration, and (2) what approach is “pragmatically the better” in order to safeguard the regime of investment-arbitration

altogether? Hopefully the answer will be found in the amended I.C.S.I.D. Rules or in influential scholarly dissemination. Investment arbitration is not meant to be perfect, but it represents a successful experiment in international adjudication because it is workable and produces reasonable substantive and procedural justice as well as fairness. The regime has also been efficient in levelling the playing field to a reasonable standard. To promote longevity of the regime, perhaps greater precaution is merited in order to strike a workable balance between these two interests, which are both of utmost importance.