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THE INTERFERENCE OF ICSID PROVISIONAL MEASURES WITH NATIONAL CRIMINAL PROCEEDINGS

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Abstract

The purpose of the present article is to study the foundations of ICSID tribunals' power to issue interim measures aimed at stopping domestic criminal proceedings and the effects of these measures on ongoing litigations. Starting from an analysis of the arbitrators' power to issue binding provisional measures and of the requirements that ICSID case law has established for the issuance of orders aimed at suspending criminal domestic trials, the article then analyses the recent order for provisional measures issued in the Hydro case, a dispute concerning the alleged violation by Albania of certain standards of treatment set forth in the bilateral investment treaty of 1991 between Italy and Albania. This order, indeed, seems to have lowered the threshold for interfering with domestic criminal proceedings and its execution has shown the problems related to the enforcement of such measures. The article then discusses the effects of ICSID interim orders before the courts of recipient States and of third States.

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THE INTERFERENCE OF ICSID PROVISIONAL MEASURES WITH NATIONAL CRIMINAL PROCEEDINGS

Giovanni Zarra

ABSTRACT

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THE INTERFERENCE OF ICSID PROVISIONAL MEASURES WITH NATIONAL CRIMINAL PROCEEDINGS

GIOVANNI ZARRA*

Abstract

The purpose of the present article is to study the foundations of ICSID tribunals' power to issue interim measures aimed at stopping domestic criminal proceedings and the effects of these measures on ongoing litigations. Starting from an analysis of the arbitrators' power to issue binding provisional measures and of the requirements that ICSID case law has established for the issuance of orders aimed at suspending criminal domestic trials, the article then analyses the recent order for provisional measures issued in the Hydro case, a dispute concerning the alleged violation by Albania of certain standards of treatment set forth in the bilateral investment treaty of 1991 between Italy and Albania. This order, indeed, seems to have lowered the threshold for interfering with domestic criminal proceedings and its execution has shown the problems related to the enforcement of such measures. The article then discusses the effects of ICSID interim orders before the courts of recipient States and of third States.

Keywords: arbitral provisional measures; domestic criminal proceedings; State sovereignty; binding nature of provisional measures; enforceability of provisional measures before national courts.

1. INTRODUCTION

Interim measures in ICSID arbitration are regulated by Article 47 of the ICSID Convention.¹ They are issued by arbitral tribunals during the course of a contro-

* Adjunct Professor of Private International Law, University of Napoli "Federico II". The author is extremely grateful to Cameron A. Miles, Fulvio M. Palombino and the anonymous referees for their very meaningful comments. Any error, of course, is only mine.

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on 18 March 1965, entered into force on 14 October 1966. Article 47 of the ICSID Convention provides: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party". Due to their provisional nature, these measures are not issued in the form of awards and, as a consequence, do not acquire the force of *res judicata*. The procedure for granting the measure is set forth at ICSID Rule for Arbitration Proceedings No. 39. For a complete analysis of history, scope, purposes and application of these measures in international law see MILES, *Provisional Measures before International Courts and Tribunals*, Cambridge, 2017; and OELLERS-FRAHM, "Expanding the Competence to

versy either in order to preserve the rights of a party or to safeguard the *status quo* and the integrity of proceedings prior to the issuing of a final award.

Case law has shown a growing tendency with regard to the issuance of interim measures by ICSID tribunals with the primary scope of protecting the integrity of proceedings. Such a tendency culminated in the recent ICSID case *Hydro v. Albania*,² where the Tribunal issued provisional measures ordering the Respondent State to stay criminal proceedings in its national courts, to suspend arrest warrants and waive requests for extradition on foot before the courts of third States concerning some of the Claimants in the arbitration.³

Serious concerns emerge with regard to the legitimacy of the arbitral practice of ordering the Respondent State to stay criminal proceedings in its national courts because, despite the limited precedents described below, it imposes significant limitations on the sovereignty of the State subject to the measure.⁴ The power to interfere with national criminal proceedings goes far beyond the functions that the ICSID Convention intended to confer to arbitral tribunals. However, arbitration proceedings could become completely useless if their object is frustrated by concurrent criminal proceedings. A balance must therefore be struck between two competing interests: firstly, State sovereignty as manifested in the exercise of domestic criminal jurisdiction and, secondly, the necessity to ensure that arbitral proceedings are not frustrated through the exercise of said jurisdiction. Such a balance, in turn, is to be placed within the wider framework of the debate concerning the scope of the arbitrators' powers to issue binding interim measures and the enforceability of those orders, both before the courts of the disputing parties and before those of third States.⁵

Issue Provisional Measures – Strengthening the International Judicial Function”, German Law Journal, 2011, p. 1279 ff.

² *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon and Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures of 3 March 2016. The dispute is still pending.

³ As of today, the subject has only been analysed in MILES, *cit. supra* note 1, pp. 377-382. See also BURNETT and 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”, Maryland Journal of International Law, 2015, p. 31 ff.; and KALDERIMIS, “The Authority of Investment Treaty Tribunals to Issue Orders Restraining Domestic Court Proceedings”, ICSID Review, 2016, p. 549 ff.

⁴ On the interference of provisional measures with State sovereignty, see MANIRUZZAMAN, “Protection in International Investment Arbitration: Challenge to State Sovereignty?”, in ZIYAIEVA (ed.), *Interim and Emergency Relief in International Arbitration*, Huntington, 2015, pp. 183-197; GOLDBABER, “The Rise of Arbitral Power Over Domestic Courts”, Stanford Journal of Complex Litigation, 2013, p. 373 ff., pp. 394-402; and BENEDETTELLI, “Le *anti-suit injunctio*ns nell’arbitrato internazionale: questioni di legittimità e opportunità”, Rivista dell’arbitrato, 2014, p. 701 ff., pp. 707-711.

⁵ As we will briefly see in sections 2 and 3 below, ICSID provisional measures have been the object of intense debate. See SCHREUER et al., *The ICSID Convention: A Commentary*, Oxford, 2009, pp. 757-804; STERN, “Interim/Provisional Measures”, in KINNEAR et al. (eds.),

The purpose of this article is to analyse the foundations of ICSID tribunals' power to issue interim measures aimed at halting domestic criminal proceedings and the effects of these measures on ongoing litigation. The first logical step to be analysed is the arbitrators' authority to issue binding provisional measures, which is today undisputed and is the prerequisite for the discussion carried out in this article. We will then deal with the requirements necessary to grant ICSID interim measures in general and provisional orders influencing national criminal proceedings in particular, focusing on the approach usually assumed by arbitral tribunals in these cases. This article will then turn to the analysis of the recent *Hydro* dispute, which might constitute a conceptual break from previous case law and also shows great uncertainty surrounding the execution of ICSID provisional measures. Lastly, we will discuss the enforceability of interim measures and their effects both in the courts of States that are subject to such measures and in the courts of third States that are Contracting Parties of the ICSID Convention but did not take part in the relevant dispute.

2. THE BINDING NATURE OF ICSID PROVISIONAL MEASURES

The issue of the binding nature of ICSID interim measures has been subject to intense discussions and, for long time, there was no straightforward answer to it. The question arose mainly because both Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (setting forth the procedure for issuing the measure) provide that arbitral tribunals may “recommend” measures aimed at safeguarding the rights in dispute. In presence of such an ambiguous term, tribunals have initially struggled with the difficulty of issuing binding provisional orders, in particular in light of two circumstances. First of all, as explained in Professor

Building International Investment Law: The First 50 Years of ICSID, The Hague, 2015, pp. 627-640; MALINTOPPI, “Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order”, in BINDER et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, 2009, pp. 157-184; LUTTRELL, “ICSID Provisional Measures ‘in the Round’”, *Arbitration International*, p. 393 ff.; BROWER and GOODMAN, “Provisional Measures and the Protection of ICSID Jurisdiction Exclusivity Against Municipal Proceedings”, *ICSID Review*, 1991, p. 431 ff.; BISMUTH, “Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration”, *Journal of International Arbitration*, 2009, p. 773 ff.; MOUAWAD and SILBERT, “A Guide to Interim Measures in Investor-State Arbitration”, *Arbitration International*, 2013, p. 381 ff.; SAROOSHI, “Provisional Measures and Investment Treaty Arbitration”, *Arbitration International*, 2013, p. 361 ff.; FRIEDLAND, “Provisional Measures and ICSID Arbitration”, *Arbitration International*, 1986, p. 335 ff.; KAUFMANN-KOHLER and ANTONIETTI, “Interim Relief in International Investment Agreements”, in YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to Key Issues*, Oxford, 2010, pp. 507-550; and LENCI, *Provisional Measures in International Investment Arbitration*, PhD Thesis available at: <https://air.unimi.it/retrieve/handle/2434/250993/342844/phd_unimi_R09746.pdf>, Milan, 2014, pp. 247-273.

Schreuer's Commentary reporting the legislative history of the ICSID Convention, some of the drafters imposed this formulation with the principal aim of avoiding that ICSID tribunals may intrude upon State sovereignty by means of mandatory provisional measures.⁶ Secondly, the debate concerning the application of Article 47 of the ICSID Convention was strictly related to the discussions on Article 41 of the ICJ Statute, the wording of which – stating that the ICJ may “indicate” provisional measures – was almost exactly replicated by the drafters of the ICSID Convention.⁷ As we will see below, at least until 2001, there was great uncertainty regarding the ICJ's power to issue compulsory interim measures and this indirectly also affected the analogous authority of ICSID tribunals that often have used to refer to the ICJ's practice in cases of uncertainty.⁸

However, as happened for other international courts and tribunals,⁹ ICSID arbitrators successively settled the debate and interpreted the verb “to recommend” as synonymous of “to order”. The *Maffezzini* Tribunal was the first to state that it did “not believe that the parties to the Convention meant to create a substantial difference in the effect of these two words” and it therefore dictated the binding nature of provisional measures.¹⁰ Shortly thereafter, the Tribunal in *Tokios Tokeles* referred to “a well-established principle laid-down by the jurisprudence of the ICSID tribunals” setting forth the compulsory nature of interim measures recommended by ICSID arbitrators.¹¹ This line of precedents,¹² which does not take into account the *travaux préparatoires*,¹³ has been applied consistently until today. Indeed, it is to-

⁶ SCHREUER et al., *cit. supra* note 5, p. 764. Preparatory works of the ICSID Convention are also analysed in BROWER and GOODMAN, *cit. supra* note 5, pp. 441-442. For the reasons behind such an approach see MANIRUZZAMAN, *cit. supra* note 4, p. 186.

⁷ See, for all, MILES, *cit. supra* note 1, p. 285 ff.

⁸ See PELLET, “The Case Law of the ICJ in Investment Arbitration”, *ICSID Review*, 2013, p. 223 ff. For an analysis of the practice of international courts concerning the binding nature of interim measures until the end of the 20th century see GAETA, *La giustizia cautelare nel diritto internazionale*, Padova, 2000, pp. 135-200.

⁹ See the discussion below in this section.

¹⁰ *Emilio Agustín Maffezzini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 of 28 October 1999, para. 9.

¹¹ *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 of 1 July 2003, para. 4.

¹² It is worth clarifying, in this regard, that there is no binding precedent in investment arbitration, but arbitrators usually make reference to what has been done by previous tribunals. It is possible, in this regard, to talk about a functional duty to take into account what has been done by previous tribunals. See PALOMBINO, *Il trattamento giusto ed equo degli investimenti stranieri*, Bologna, 2012, p. 187 ff.; and VADI, “Towards Arbitral Path Coherence and Judicial Borrowing: Persuasive Precedent in Investment Arbitration”, *Transnational Dispute Management*, 2008, p. 1 ff.

¹³ See *Victor Pey Casado et al. v. Chile*, ICSID Case No. ARB/98/2, Decisión sobre la adopción de medidas provisionales solicitadas por las partes of 25 September 2001, para. 18. The legal basis of this approach is Art. 32 VCLT on supplementary means of treaty interpretation, on which see GARDINER, *Treaty Interpretation*, Oxford, 2008, pp. 141-300. See also SBOLCI,

day undisputed that the parties who have given their consent to ICSID arbitration are bound by provisional measures issued by ICSID arbitral tribunals.¹⁴

The main argument used to find out this power has been called the “functional”¹⁵ or “*effet utile*”¹⁶ argument and is strictly related to the purpose of the ICSID Convention, which is to establish an appropriate framework for *effectively* solving investment disputes in order to promote economic development.¹⁷ It is worth mentioning, in this regard, an *obiter dictum* of the *City Oriente* Tribunal, which stated:

“The Tribunal may only order [interim] measures if their adoption [...] *guarantee[s] that the award will fulfil its purpose of providing effective judicial protection. [This goal] may only be reached if the measures are binding*, and they share the exact same binding nature

“Supplementary Means of Interpretation”, in CANNIZZARO (ed.), *The Law of Treaties beyond the Vienna Convention*, Oxford, 2011, p. 145 ff.

¹⁴ See *United Utilities (Tallinn) B.V. et al. v. Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent’s Application for Provisional Measures of 12 May 2016, para. 109. For an historical precedent of this approach, see also the 1925 decision of the Romanian-Hungarian Mixed Arbitration Tribunal, *Ungarische Erdgas A-G v. Romania*, ILR, 1925, p. 412 ff., p. 413.

¹⁵ BISMUTH, *cit. supra* note 5, p. 795 ff.

¹⁶ KOLB, “Note on New International Case-law Concerning the Binding Character of Provisional Measures”, *Nordic Journal of International Law*, 2005, p. 117 ff., p. 129. This article is not the place to discuss all the theories developed in order to give a legal foundation to the binding nature of interim orders. Several works are devoted to this goal: see, inter alia, SACCUCCI, *Le misure provvisorie nella protezione internazionale dei diritti umani*, Torino, 2006, p. 508 ff. It suffices here to mention that, both with regard to the ICSID system and concerning other courts and tribunals, some authors tried to found such power on the doctrine of inherent powers of international adjudicators. See, e.g., BISMUTH, *cit. supra* note 5, pp. 797-799 (concerning ICSID); and CROCKETT, “The Effects of Interim Measures of Protection in the International Court of Justice”, *California Western International Law Journal*, 1977, p. 348 ff., pp. 354-355 (concerning the ICJ). In short, they argue that international decision-makers should have the *inherent power to issue binding interim measures* in order to ensure the effectiveness of their final decision and the good administration of justice before them. However, this approach is not entirely convincing: while inherent powers may surely play a role in determining the possibility of adjudicators to issue provisional measures in the absence of a rule attributing such a power (as it happened before the Iran-US Claims Tribunal under the 1976 UNCITRAL Rules in *E-Systems, Inc. v. The Islamic Republic of Iran and Bank Melli Iran*, Award of 4 February 1983, Iran-US Claims Tribunal Reports Vol. 2, 1984, p. 51 ff., p. 57), it seems that inherent powers may barely work as a means to be used in order to change the reading of an already existing rule. See, in this regard, BROWN, *A Common Law of International Adjudication*, 2007, p. 119 ff., p. 127 ff. See, on inherent powers in general, PALOMBINO, “Il potere inerente di riesame dei tribunali internazionali: in margine al caso Celibici”, *CI*, p. 707 ff., pp. 714-715; and GAETA, “Inherent Powers of International Courts and Tribunals”, in VORAH et al. (eds.), *Man’s Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese*, The Hague, 2003, p. 353 ff.

¹⁷ See SCHREUER et al., *cit. supra* note 5, p. 9 (commenting the ICSID Convention Preamble).

as the final arbitral award. Therefore, it is the Tribunal's conclusion that the word 'recommend' is equal in value to the word 'order'.¹⁸

Like in other legal fields, in international investment law the indication of binding provisional measures can be vital for the preservation of the economic activity involved in the litigation. In fact, a party's behaviours *pendente lite* could otherwise irremediably undermine such business and frustrate the effectiveness of the final award. Indeed, if a party irremediably jeopardizes the disputed right, the entire proceedings risk becoming useless (at least in cases where the investment in question is still an ongoing business). Moreover, in recent times the necessity for the protection offered by provisional measures has even raised, considering that the number of investment treaty arbitrations has drastically intensified¹⁹ and that this has, of course, determined the growth of tactics aimed at frustrating the purpose of arbitration proceedings.²⁰

The approach which links the binding nature of provisional measures to the final purpose of awards and to the effective exercise of judicial functions is not peculiar to the ICSID system only. It is possible to refer, first of all, to an *obiter dictum* in the ICJ *LaGrand* judgment, very often quoted by ICSID arbitrators in support of their orders for provisional measures. Here the ICJ – in order to justify the interpretation of the word “indicate” contained in Article 41 of its Statute as a synonymous of “order” – said:

“[T]he power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article”.²¹

¹⁸ *City Oriente v. Ecuador and Petroecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and other Procedural Matters of 13 May 2008, para. 52 (emphasis added).

¹⁹ See GIARDINA, “Il diritto degli investimenti e l'arbitrato”, in BENACCHIO and GRAZIADEI (eds.), *Il declino della distinzione tra diritto pubblico e diritto privato*, Napoli, 2016, p. 213 ff., p. 221.

²⁰ See HORVATH, LEINWATHER and WILSKE, “Countering Guerrilla Tactics at the Outset, Throughout and at the Conclusion of the Arbitral Proceedings”, in HORVATH et al. (eds.), *Guerrilla Tactics in International Arbitration*, The Hague, 2013, p. 33 ff.

²¹ *Vienna Convention on Consular Relations (LaGrand) (Germany v. United States)*, Judgment of 27 June 2001, ICJ Reports, 2001, p. 466 ff., para. 102. The Court's decision was mainly based on the rule of pluri-lingual interpretation set forth in VCLT Art. 33(4). On this issue see MILES, *cit. supra* note 1, p. 288 ff.; and FORLATI, “Il contenuto degli obblighi imposti dalle misure cautelari indicate nel caso *LaGrand*”, RDI, 2001, p. 711 ff. The binding nature of ICJ interim measures was sustained, prior to such decision but on the basis of a functional approach,

Reference can also be made to the practice of the Iran-US Claims Tribunal,²² the European Court of Human Rights (ECtHR), and of the UN Human Rights Committee (UNHRC).²³ Contrariwise, similar problems did not occur in the practice of the International Tribunal for the Law of the Sea (ITLOS), where interim measures are “prescribed” (and are therefore binding by definition) according to Article 290 of the United Nations Convention on the Law of the Sea (UNCLOS).²⁴

In conclusion, should a State Party to the ICSID Convention refuse to comply with a provisional measure, it will be considered in breach of the international obligation set forth in Article 47.²⁵ Moreover, and from a broader perspective, such a State might also violate the international obligation to execute a treaty in good faith as set out in Article 26 of the 1969 Vienna Convention on the Law of Treaties, which, in the present context, imposes to the States Parties not to frustrate the purpose of arbitral proceedings through behaviours (such as non-compliance with interim measures) that would render the final award ineffective.²⁶ A violation of

by DANIELE, *Le misure cautelari nel processo dinanzi alla Corte internazionale di giustizia*, Milano, 1993, p. 150.

²² See, e.g., *E-Systems*, *cit. supra* note 16, p. 57. The practice of the Iran-US Claims Tribunal is very relevant for ICSID, due to the fact that such a Tribunal also judged on business disputes and (as it happens in ICSID cases) the Tribunal had to protect the exclusivity of its jurisdiction from the risk of being rendered ineffective by several ongoing parallel domestic litigations. See CARON, “Interim Measures of Protection: Theory and Practice in Light of the Iran-U.S. Claims Tribunal”, *ZAÖRV*, 1986, p. 465 ff., pp. 509-510.

²³ See ECtHR, *Mamatkulov v. Turkey*, Application No. 46827/99, Judgment of 4 February 2005, paras. 105-111; UNHRC, *Dante Piandong et. al. v. Philippines*, Communication No. 869/1999 of 19 October 2000, para. 5.4; KELLER and MARTI, “Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights”, *ZAÖRV*, 2013, p. 325 ff., pp. 344-346; and SACCUCCI, *cit. supra* note 16, p. 447 ff.

²⁴ See MILES, *cit. supra* note 1, p. 98 ff.; and VIRZO, “Le misure cautelari nell’affare dell’*Incidente dell’Enrica Lexie*”, Osservatorio costituzionale, 2016, available at: <<http://www.osservatorioaic.it/download/kKn2YYEjuzohEvS2KLATehs3h66hUu6wmGgK2EejcNY/04-virzo-le-misure-cautelari-nellaffare-dellincidente-della-enrica-lexie.pdf>>, pp. 5-8.

²⁵ See, in general terms, SACCUCCI, *cit. supra* note 16, p. 555; and LANDO, “Compliance with Provisional Measures Indicated by the International Court of Justice”, *Journal of International Dispute Settlement*, 2015, p. 1 ff., p. 3. PALCHETTI (“Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function”, *RDI*, 2017, p. 5 ff., p. 13 ff.) analysed the (im)possibility to make recourse to counter-measures in cases of non-compliance with interim measures issued by the ICJ.

²⁶ SCHREUER et al., *cit. supra* note 5, pp. 764 and 766; GAETA, *cit. supra* note 8, p. 192. See also SALMON, “Art. 26”, in CORTEN and KLEIN (eds.), *The Vienna Convention on the Law of Treaties*, p. 660 ff., p. 678 ff.; SCHMALENBACH, “Article 26”, in DÖRR and SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin, 2012, p. 427 ff., p. 446; MITCHELL, “Good Faith in WTO Dispute Settlement”, *Melbourne Journal of International Law*, 2006, p. 339 ff., p. 346; ZICCARDI CAPALDO, “Il principio di buona fede nell’esecuzione dei trattati. Il caso Battisti: un esempio emblematico di *mala fides*”, in VASSALLI DI DACHENAUSEN (ed.), *Atti del convegno in memoria di Luigi Sico*, Napoli, 2011, p. 509 ff., p. 511. See, with specific regard to the relationship between good faith and interim measures *Electricity Company*

interim measures might therefore theoretically expose such a State to the risks of reactions, especially by the State of nationality of the investor whose rights have been prejudiced.²⁷

3. ICSID PROVISIONAL MEASURES AND THE SPECIFIC REQUIREMENTS FOR THE ISSUANCE OF PROVISIONAL MEASURES INVOLVING LIMITATIONS OF DOMESTIC CRIMINAL PROCEEDINGS

3.1. *The Requirements for the Issuance of Provisional Measures in ICSID Case Law*

Moving on from the binding nature of provisional measures, let us turn to the requirements for these measures to be issued in investment arbitration. Article 47 of the ICSID Convention merely says that they should be granted to preserve the respective rights of either party. This vague formulation and the lack of any indication in the preparatory works of the Convention²⁸ have given broad discretion to arbitral tribunals in determining the circumstances in which interim measures may be ordered. However, the subject of the requirements for the issuance of interim measures has been subject to the analysis of ICSID tribunals since the beginning of the activity of the Centre.²⁹ Indeed, as we will briefly recall below, a survey of the case law and of the literature on the subject reveals that there has been broad uniformity among arbitrators in the individuation of such requirements.

First of all, it is common ground that interim measures shall be aimed only at preserving rights that are the subject matter of the arbitration.³⁰ The reference applies both to substantial rights of a disputing party and to rights related to the regular continua-

of Sofia and Bulgaria (Belgium v. Bulgaria), Judgment of 5 December 1939, PCIJ Series A/B N. 79, p. 194 ff., p. 199.

²⁷ Generally speaking, compliance with interim measures is only owed between the disputing parties. Accordingly, under Art. 48 of the ILC Articles on State Responsibility, third parties cannot invoke State responsibility for non-compliance with provisional measures. See LANDO, *cit. supra* note 25, p. 8.

²⁸ SCHREUER et al., *cit. supra* note 5, p. 775.

²⁹ Interim measures have been requested since the very first ICSID arbitration. See *Holiday Inns S.A. v. Morocco*, ICSID Case No. ARB/72/1, Decision on Provisional Measures of 2 June 1972. On this case see LALIVE, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems”, BYIL, 1980, p. 123 ff.; and FRIEDLAND, *cit. supra* note 5, p. 340 ff. Provisional orders were also requested, inter alia, in *Atlantic Triton v. Guinea*, ICSID Case No. ARB/84/1, Decision on Provisional Measures of 18 December 1984.

³⁰ For a survey of the kind of interim measures that can be issued by international tribunals see BROWN, *cit. supra* note 16, pp. 121-123; with specific reference to ICSID see SCHREUER et al., *cit. supra* note 5, pp. 778 ff.; and KAUFMANN-KOHLER and ANTONIETTI, *cit. supra* note 5, p. 514 ff.

tion of arbitral proceedings.³¹ This last category of measures has been largely issued by ICSID tribunals³² and is very relevant for provisional orders aimed at stopping domestic criminal proceedings. Indeed, Claimants requesting such interim measures usually only rely on procedural rights, such as: (i) the exclusivity of ICSID proceedings in relation to investment disputes brought before the Centre (set forth by Article 26 of the ICSID Convention); (ii) the right of preservation of the *status quo* and non-aggravation of the proceedings, consisting in the necessity to preserve the factual and legal background existing when the arbitration was commenced; and (iii) the right to maintain the integrity of the proceedings, dictating that the parties' right to present their case and to produce their evidence shall not be impaired during the arbitration.³³

In addition to the above, tribunals have been unanimous in saying that provisional measures may be issued if their issuance meets the requirements of *urgency* and *necessity*, provided that the tribunal is *prima facie* competent to hear the merits of the case.³⁴

³¹ The possibility of adopting provisional measures also for protecting procedural rights is supported also by the ICJ and – prior to it – the PCIJ. See PALCHETTI, “The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute”, Leiden JIL, 2008, p. 623 ff. See also DONOVAN, “Provisional Measures in the ICJ and ICSID: Further Dialogue and Development”, in ROVINE (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Leiden, 2012, p. 100 ff., pp. 101-102. According to Donovan, while in the ICSID system procedural rights are considered “self-standing rights” autonomously sufficient to justify the issuance of provisional measures, the ICJ still adopts an approach requiring that procedural rights may be protected through interim measures only if such measures had also the purpose of preserving specific rights in dispute. The question is, nonetheless, debated: see OELLERS-FRAHM, “Article 41”, in ZIMMERMAN et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford, 2012, p. 1026 ff., pp. 1036-1037. For a more detailed analysis of the ICJ approach, see PALCHETTI, *ibid.*, pp. 625-626 and 632-634. The recourse to provisional measures aimed at safeguarding the integrity of arbitration proceedings is, indeed, supported by scholarship. See LEVY, “Anti-Suit Injunctions Issued by Arbitrators”, in GAILLARD (ed.), *Anti-Suit Injunctions in International Arbitration*, Huntington, 2005, p. 115 ff., p. 123.

³² See MILES, *cit. supra* note 1, p. 111, stating that Art. 47 of the ICSID Convention was largely used in order to restrain national parallel proceedings (first of all commercial) and, in this sense, the evolution in its application has been different from other forms of provisional measures, such as, e.g., ICJ measures under Art. 41 of the Statute.

³³ Provisional measures related to procedural rights (also affecting ongoing criminal domestic litigations) have also been issued in cases arising from the UNCLOS. See MILES, *cit. supra* note 1, p. 98 ff.; VIRZO, *cit. supra* note 24, pp. 5-8. It is worth noting, in this regard, ITLOS, *The “Enrica Lexie” Incident (Italy v. India)*, Order on Provisional Measures of 24 August 2015, para. 108; *The “Enrica Lexie” Incident (Italy v. India)*, PCA Case No. 2015-28, Order on the Request for the Prescription of Provisional Measures of 29 April 2016, para. 132; ITLOS, *The “Arctic Sunrise” Case (The Netherlands v. Russian Federation)*, Order of Provisional measures of 22 November 2013, paras. 93-97. With regard to these cases, which involved serious concerns for the limitations on Russian and Indian sovereign power to pursue criminal proceedings, see MILES, *cit. supra* note 1, pp. 313-316.

³⁴ See *Millicom International Operations BV and Sentel GSM SA v. Senegal*, ICSID Case No. ARB/08/20, Decision on the application for provisional measures of 9 December 2009,

The requirement of urgency shall be ascertained by arbitrators on a case-by-case basis and, as explained in *Azurix*,³⁵ is satisfied if the circumstances reveal that a certain decision shall be taken immediately, prior to the issuance of an award. In this regard, however, it has to be noted that ICSID tribunals have developed the concept of “axiomatic urgency” for the cases of threats to the procedural integrity: when the issue is to protect the jurisdictional powers of the Tribunal and the integrity of the arbitration and of the final award, then the urgency requirement is considered to be met by the very nature of the issue and is, therefore, *in re ipsa*.³⁶

The requirement of necessity is met, as illustrated in *Phoenix*,³⁷ in the cases where – if a provisional measure is not issued – the harm occurred³⁸ is not likely to be reparable by an award of damages (irreparable harm).³⁹

3.2. Specific Requirements concerning ICSID Provisional Measures Affecting Domestic Criminal Proceedings

Having outlined the requirements for the issuance of ICSID provisional measures in general, we will now analyse the matter with particular regard to interim measures affecting the course of national criminal proceedings. In this regard, usually tribunals also put a particular emphasis on the requirement of *proportional-*

para. 39; *Hydro*, *cit. supra* note 2, para. 3.24. It is worth noting that *prima facie* jurisdiction, urgency and necessity are the only three requirements *always* mentioned in orders on provisional measures. See also, *inter alia*, *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures of 6 September 2005, para. 38; and *Bywater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 1 of 31 March 2006, paras. 30 ff. For an analysis of these requirements see SAROOSHI, *cit. supra* note 5, p. 366 ff.

³⁵ *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Provisional Measures of 6 August 2003, para. 33. For an analysis of the ICJ power to issue interim measures in cases of extreme urgency, see PALCHETTI, “L’indicazione di misure cautelari da parte della Corte internazionale di giustizia in situazioni di estrema urgenza”, RDI, 1999, p. 719 ff.

³⁶ See *City Oriente*, *cit. supra* note 18, para. 69; and *Bywater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 1 of 31 March 2006, para. 76. See also MILES, *cit. supra* note 1, pp. 268-269; and LUTTRELL, *cit. supra* note 5, p. 402.

³⁷ *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures of 6 April 2007, para. 33.

³⁸ Or, as explained in *Occidental v. Ecuador* (ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007, para. 61), the harm is going to imminently occur.

³⁹ Such a high threshold is set forth in Art. 17A of the UNCITRAL Model Law and is almost always cited by arbitral tribunals, such as *Hydro* (*cit. supra* note 2, para. 3.31 ff.), or *City Oriente* (*cit. supra* note 18, para. 72). However, in *PNG v. Papua Nuova Guinea* (ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures of 21 January 2015, para. 109), the Tribunal merely referred to a serious harm and not to a “literally irreparable” harm. Similarly, for the ICJ framework, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judge Buergenthal’s Declaration of 23 January 2007, ICJ Reports, 2007, p. 21, para. 11. To date, however, this remains a minority view.

ity, which has been developed in the case law and imposes a balance between the rights of the disputing parties. Decision-makers therefore will have to ascertain whether the issuance of provisional measures does not generate an excessive burden on the party which will suffer their effects in light of the gravity of the violation complained of by the requesting party.⁴⁰ Hence, in the specific case of provisional measures ordering the stay of domestic criminal proceedings, tribunals will have to “balance the harm caused to the Claimants by the criminal proceedings and the harm that would be caused to the Respondent if those proceedings were stayed”.⁴¹ This balance also requires them to have particular regard for the special characteristics of the Respondent State, which exercises its criminal functions in the name of its sovereign powers.⁴²

Until recently, arbitrators have traditionally been extremely reluctant in ordering measures interfering with national criminal proceedings.⁴³ Only in rare cases, and pursuant to a very careful analysis of the reasons at the basis of the orders, have these measures been issued.⁴⁴ In the majority of the available precedents the Claimant’s request has been refused.⁴⁵

⁴⁰ For a meaningful analysis of proportionality in the context of provisional measures, as well as for references to previous cases see MILES, *cit. supra* note 1, pp. 305-306. This author explains that, with regard to other kinds of interim orders, often the proportionality analysis is carried out within the discussion on urgency and irreparable harm. Concerning, more generally, proportionality in international investment law see PALOMBINO, *cit. supra* note 12, p. 149 ff.; HENCKELS, *Proportionality and Deference in Investor-State Arbitration*, Cambridge, 2015; BUCHELER, *Proportionality in Investor-State Arbitration*, Oxford, 2015; CANNIZZARO, *Il principio di proporzionalità nell’ordinamento internazionale*, Milano, 2000; and VADI, “Proportionality, Reasonableness, and Standards of Review in Investment Treaty Arbitration”, *Yearbook of International Investment Law and Policy*, 2013/2014, pp. 201-228.

⁴¹ *Hydro*, *cit. supra* note 2, para. 3.37.

⁴² MANIRUZZAMAN, *cit. supra* note 4, p. 183. Contrariwise see FORTIER, “Interim Measures: An Arbitrator Provisional Views”, available at: <http://www.arbitration-icca.org/media/4/01137866264927/media0122329529899201115_001.pdf>, 2008, pp. 14-15. This author stated that there is no justification for tailoring the arbitration process on the basis of the State’s particular status. On this subject see also BENEDETTELLI, *cit. supra* note 4, p. 707 ff. On the concept of sovereignty, see BESSON, “Sovereignty”, in WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford, 2011, paras. 69-73 (online). It is worth noting that, according to the PCIJ (*SS Lotus (France v. Turkey)*), Judgment of 7 September 1927, PCIJ Reports, Series A, No. 10, p. 1 ff., pp. 18-21), States enjoy a high level of discretion in determining when and how to exercise their jurisdiction on internal matters.

⁴³ See, inter alia, STERN, *cit. supra* note 5, pp. 630-631.

⁴⁴ See *City Oriente*, *cit. supra* note 18, Decision on Provisional Measures of 19 November 2007; and *Quiborax SA et al. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures of 26 February 2010. The case *Lao Holdings NV v. Lao People’s Democratic Republic* (ICSID Case No. ARB(AF)/12/6, Ruling on the Motion to Amend the Provisional Measures Order of 30 May 2014) is noteworthy because it concerned a request by the Respondent to be authorised to start criminal proceedings and the refusal by the Tribunal to grant such a request.

⁴⁵ See, inter alia, *Churchill Mining et al. v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Provisional Order No. 9 of 8 July 2014; *EuroGas and Belmont Resources v. Slovak*

Three circumstances explain the restrictive approach adopted by tribunals. First, they have unanimously affirmed that the exclusivity of ICSID proceedings is not impaired by the existence of a concurring national criminal dispute.⁴⁶ Article 26 of the ICSID Convention is clear in forbidding only a parallel litigation involving the same investment dispute and, obviously, criminal proceedings cannot fall into this category.⁴⁷

Second, arbitrators have always rigidly applied the proportionality balance described above and have always repeated that, *in principle*, a tribunal can prohibit a State Party from conducting criminal court proceedings before competent authorities only if such a heavy burden on States is the only possible means to protect the rights for the protection of which the measure is issued. Indeed, issues of criminal liability, by definition, fall outside the scope of ICSID jurisdiction.⁴⁸ Neither the ICSID Convention nor bilateral investment treaties (BITs) impose a prohibition to States to enjoin criminal jurisdiction. Tribunals have rejected “any suggestion that ordinary domestic criminal law of general application [are] intended to be or [are] constrained by the initiation of ICSID proceedings under [BITs]”.⁴⁹ Such a presumption may only be overcome in exceptional circumstances, i.e. in those cases where a very high threshold is met, consisting in the demonstration that the State commenced criminal proceedings in bad faith, after the initiation of the arbitration and *with the sole goal* of generating a prejudice to the ongoing proceedings. Even in the cases where the initiation of criminal proceedings has, among its various purposes, that of enabling the Respondent State to develop evidence to be used in the arbitration proceedings, this may be considered insufficient in order to halt domestic criminal proceedings.⁵⁰ As an example of State conduct sufficient to justify the

Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3 of 23 June 2015; *Teinver SA et al. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Provisional Measures of 8 April 2016; and *PNG*, *cit. supra* note 39, para. 128 ff.

⁴⁶ See, e.g., *Lao Holdings*, *cit. supra* note 44, paras. 21-26.

⁴⁷ A different approach has been sustained only in *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 of 18 January 2005, para. 11. More generally, see LEVY, *cit. supra* note 31, p. 120, stating that “arbitrators should not enjoin the parties from bringing an action in a court [...] on the sole ground that they retain jurisdiction”.

⁴⁸ ICSID jurisdiction is regulated by Art. 25 of the ICSID Convention and extends only to investment disputes. See, on this subject, SAVARESE, *La nozione di giurisdizione nel sistema ICSID*, Napoli, 2012, p. 57 ff.

⁴⁹ *Lao Holdings*, *cit. supra* note 44, paras. 21 and 35; *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 13 of 27 September 2012, para. 39. See also *Eurogas*, *cit. supra* note 45, para. 82; and *Teinver*, *cit. supra* note 45, para. 190. For a similar approach, see the abovementioned *Enrica Lexie*, Order of 24 August 2015, *cit. supra* note 33, Judge Paik’s appended declaration, para. 6.

⁵⁰ *Lao Holdings*, *cit. supra* note 44, paras. 28-29. In *PNG*, *cit. supra* note 39, para. 141, the Tribunal requested, in order to grant provisional measures, the “credible evidence that either party had made, directed or encouraged threats of physical harm against employees, officers or agents of the other party”. In addition, the timing of the commencement of the criminal proceedings has also received particular weight in tribunals’ analysis in order to demonstrate the “strong

issuance of an order imposing to stop criminal proceedings in the Respondent State, it is possible to mention the *Quiborax* decision, where, according to the Tribunal's opinion, Bolivia started criminal prosecutions against one of the Claimants' key witnesses with the sole aim of obtaining a confession against the same Claimants to be used in the course of the arbitration proceedings.⁵¹ The requirement of strict proportionality received particular weight also in the cases where other international courts and tribunals had to consider the possibility to interfere with national criminal proceedings. It is worth recalling, in this regard, Judge Paik's declaration appended to the ITLOS order of 24 August 2015, issued within the well-known *Enrica Lexie* dispute. According to this Judge, the "[e]xercise of criminal jurisdiction is a duty of the State. It is indispensable to the maintenance of law and order, a fundamental basis of any society, which no State can take lightly if it is not to neglect its duty as a State". As a consequence, restrictions to such a sovereign right of States "should be approached with utmost caution".⁵²

Third, arbitral tribunals have only ordered temporary stays of domestic criminal proceedings and never their definitive interruption.⁵³ This circumstance has been sometimes highlighted by arbitral tribunals in order to say that their provisional measures only slightly interfered with domestic criminal proceedings.⁵⁴

Hence, arbitrators have usually been aware of the special sovereign functions of State Parties and have accepted to issue an interim measure ordering the mere suspension of criminal proceedings only in the very special circumstances where this measure appeared to be the only means aimed at protecting the Claimant's rights at stake. Authors have traditionally welcomed such an approach and the sensibility shown by decision makers towards the sovereign prerogatives of State Parties seems, indeed, convincing.⁵⁵

4. THE PROVISIONAL MEASURES IN THE *HYDRO* CASE: A BREAKING POINT?

4.1. *The Interim Order Issued by the ICSID Tribunal*

The *Hydro*⁵⁶ case concerns a dispute started by six claimants (two companies and four individuals) for the alleged violation of several standards of treatment pro-

linkage" between the commencement of criminal proceedings and the ongoing arbitration. See, inter alia, *Churchill Mining*, *cit. supra* note 45, para. 56.

⁵¹ *Quiborax*, *cit. supra* note 44, para. 163.

⁵² *Enrica Lexie*, Order of 24 August 2015, *cit. supra* note 33, Judge Paik's appended declaration, para. 6.

⁵³ *Ibid.*, para. 165. This is, of course, obvious, given that provisional measures automatically lapse with the termination of the proceedings.

⁵⁴ See, e.g., *Hydro*, *cit. supra* note 2, para. 3.20.

⁵⁵ See, e.g., STERN, *cit. supra* note 5, pp. 630-631; and LEVY, *cit. supra* note 31, p. 126.

⁵⁶ *Cit. supra* note 2.

vided by the bilateral investment treaty between Italy and Albania.⁵⁷ The Claimants own, directly or indirectly, a number of Albanian entities working in the energy sector. According to the available information, it is the Claimants' case that Albania violated its treaty obligations by: (i) launching abusive tax audit proceedings and money laundering investigations against their controlled entities; (ii) granting preferential treatment to Albanian entities working in the same field; and (iii) seizing their bank accounts and assets.

After the filing of the arbitration (and, according to the Claimants, in response to it) Albania commenced a number of criminal (and administrative) proceedings against some of the Claimants and, in relation to such proceedings, issued certain arrest warrants and requested the extradition of two Individual Claimants (Mr. Becchetti and Mr. De Renzis) residing in the United Kingdom. It is the Claimants' case that such proceedings prevented them from being able to pursue their rights in the arbitration, and that they consisted in violations of the rights: (i) to non-aggravation of the dispute; (ii) to maintain the procedural integrity of the arbitration; and (iii) to settle the dispute exclusively through arbitration according to Article 26 of the ICSID Convention. Hence, the Claimants requested the Tribunal to issue a provisional order aimed, *inter alia*, at suspending the pending criminal proceedings and the related arrest warrants and withdrawing the requests for extradition.

The Tribunal, having pointed out that "criminal law and procedure are a most obvious and undisputed part of a State's sovereignty"⁵⁸ and that it was "reluctant to interfere with the sovereignty of the Respondents",⁵⁹ concisely granted the requested order. The Tribunal said that serious concerns arose with regard to the procedural integrity of the arbitration, because the incarceration of Becchetti and De Renzis "would prevent them from effectively managing their business and fully participating in [the] arbitration".⁶⁰ In the Tribunal's opinion, an order that merely postpones criminal proceedings is a tolerable intrusion in the Respondent's sovereignty in light of the necessity of ensuring the integrity of the arbitration.

However, it should be noted that, apparently, the *Hydro* decision does not seem to have met the high threshold for paralyzing domestic criminal disputes imposed by previous Tribunals and analysed in section 3. While the incarceration of individual Claimants can, of course, impair the integrity of the proceedings, it appears that, given the circumstances of this dispute, the Claimants' strategy in the arbitration would not have suffered a prejudice so heavy as to justify a limitation of the Albania's sovereign function to carry on criminal proceedings. Indeed, even if Becchetti and De Renzis would have been arrested, two other individual claimants

⁵⁷ Signed 12 September 1991, entered into force 29 January 1996. The BIT terminated on 1 April 2009, but according to Art. 13 of the same Treaty it applied to investments made during its period of validity for further 5 years.

⁵⁸ *Ibid.*, para. 3.16.

⁵⁹ *Ibid.*, para. 3.20.

⁶⁰ *Ibid.*, para. 3.18.

and two corporations representing identical interests would have been able to take part in the proceedings, thus ensuring the respect of the right of defence. In this regard, it is suggestive that the Tribunal did not explain how the physical absence of two out of six Claimants from the arbitration proceedings could have impaired the integrity of the proceedings.

It is therefore arguable that, if the approach taken in the *Hydro* decision should be followed in the future,⁶¹ this could determine a lowering of the threshold set forth by past Tribunals, with the risk of reducing the legitimacy of investor-State arbitration, increasingly perceived by certain authors as an undesired limitation to State sovereignty.⁶² This article is not the place to discuss the ongoing intense debate on the legitimacy of investment arbitration as a mechanism for resolving disputes involving essential public interests.⁶³ However, it suffices here to mention that the interference of ICSID tribunals with national criminal proceedings led a well-known Pulitzer Prize-winner journalist to talk about ICSID arbitration as “a get-out-of-jail-free card” and as “a shield for criminals and the corrupt”.⁶⁴ This statement demonstrates the existence of a negative perception of investment arbi-

⁶¹ According to YONG and PERRY, “ICSID Panel Asks Cyprus to Suspend Arrest Warrants for Greek Bankers”, *Global Arbitration Review*, 2016, available at: <<http://globalarbitrationreview.com/article/1068578/icsid-panel-asks-cyprus-to-suspend-arrest-warrants-for-greek-bankers>>. Such an eventuality already occurred in an unpublished decision relating to the case *Marfin Investment Group Holdings SA et al. v. Cyprus*, ICSID Case No. ARB/13/27. The issue was about to be squarely addressed in *Nova Group v. Romania*, ICSID Case No. ARB/16/9, in the altogether new context of a situation where the individual whose release was being sought (Dan Adamescu) had already been convicted. However, he tragically died in prison, so that question will not be answered. See ROSS, “Bribery Prosecution in Romania Triggers ICSID Claim”, *Global Arbitration Review*, 2016, available at: <<http://globalarbitrationreview.com/article/1067320/bribery-prosecution-in-romania-triggers-icsid-claim>>. On the persuasive role of precedent in investor-State arbitration see *supra* note 12.

⁶² On the legitimacy crisis affecting investment arbitration see FRANCK, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions”, *Fordham Law Review*, 2005, p. 1521 ff. With specific regard to the concerns related to interim measures affecting sovereignty see GOLDHABER, *cit. supra* note 4, p. 394 ff.

⁶³ In this regard see, e.g., MUIR WATT, “The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal”, available at: <<https://halshs.archives-ouvertes.fr/hal-00972976/document>>, 2012, p. 3 ff.

⁶⁴ See HAMBY, “The Court that Rules the World”, *Buzzfeed*, 28 August 2016, available at: <https://www.buzzfeed.com/chrishamby/super-court?utm_term=.ihnQKWqE#.kjlBmpd7>. On the other hand, it could be argued that a risk exists that States abuse of their criminal competences in order to frustrate pending investment arbitrations. In the present author’s opinion, while it is obviously impossible to rule out this risk, it is to be acknowledged that investment arbitration is based on the consent of States, which however have never renounced to their criminal jurisdiction. Moreover, as noted above, it is possible and legitimate for arbitral tribunals to interfere with national criminal proceedings in the cases where such proceedings are manifestly started in bad faith. Arbitrators, therefore, on the one hand have the power to avoid abuses and, on the other hand, shall exercise such a power trying to avoid to limit States’ sovereign prerogatives more than how States accepted when giving their consent to ICSID.

tration in the public opinion and the necessity to issue awards which, contrary to what happened in *Hydro*, appear founded on solid legal and factual basis.

4.2. *The Post-Order Phase*

The *Hydro* dispute is not only noteworthy for the apparently lower threshold applied by the Tribunal, but also for what happened pursuant to the issuance of the order by the Tribunal.

Albania did not, in fact, comply with the interim measure. Arguing that the Albanian criminal code lacks of any rule allowing the withdrawal for a request for extradition,⁶⁵ the State went on with the English proceedings and only asked for their adjournment *sine die* until the end of the arbitration. However, Judge Tempia of the Westminster Magistrates' Court clarified that a suspension *sine die* would have been contrary to the right of the involved individuals not to remain on bail for an indefinite period of time and, on 20 May 2016, decided on the request.⁶⁶ During the English proceedings, Albania pointed out that its conduct was dictated by the principle of separation of powers, which obliged the Ministry of Justice to comply with the judgment of the Tirana Court requiring the arrest and, in the case where the same Ministry did not, he would be subject to sanctions.⁶⁷ Judge Tempia rejected Albania's arguments and accepted Becchetti's and De Renzis' contention that the ICSID order is binding on Albania (which is a Contracting Party to the ICSID Convention) and, therefore, the criminal proceedings and the extradition request should have been suspended.⁶⁸ The Court then stated that it could not grant the extradition request because the ICSID provisional measure is binding on Albania and, as a consequence, the continuance of proceedings *before English judges* "would be in breach of an international law obligation".⁶⁹ Judge Tempia, however, did not explain

⁶⁵ In this regard it is to be noted that, considering that there is an international obligation burdening on Albania and imposing to comply with ICSID interim measures, according to Art. 3 (and Art. 32) of the ILC Articles on State Responsibility, a State may not invoke its national law to shield against its international obligation. Hence Albania's justification appears meritless.

⁶⁶ *Government of Albania v. Francesco Becchetti and Mauro De Renzis*, Judgment of 20 May 2016, available at: <<http://www.italaw.com/sites/default/files/case-documents/italaw7644.pdf>>. Albania's request for adjournment *sine die* is located at para. 34, while the Judge's findings on the point are at para. 55

⁶⁷ *Ibid.*, paras. 13 and 33. Also these justifications presented by Albania are, in principle, meritless in light of Art. 3 of ILC Articles on State Responsibility.

⁶⁸ *Ibid.* para. 43.

⁶⁹ *Ibid.* para. 54. It is worth noting that, following Judge Tempia's decision, the Hydro Tribunal issued a Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures (1 September 2016). As pointed out at para. 4.16, the Tribunal stated that the aim of its provisional measures (i.e. to ensure that the Claimants were able to take part to the proceedings) was ensured by the refusal of the request for extradition and, as a consequence, revoked the previous order and requested Albania to "take

what such a breach would consist of. It could be argued that, starting from the binding nature of the ICSID provisional order, she considered herself somehow bound by such measure, which was – however – only directed to Albanian judiciary.

The above scenario is quite contradictory. On the one hand, Albania's reluctance to comply with the measures raises questions related to the effectiveness of arbitral interim measures. On the other hand, Judge Tempia's decision seems to assume that not only are ICSID provisional measures binding on the disputing parties, but they potentially have also *ultra partes* effects, consisting in the imposition of certain limitations on judges of States which are not directly involved in the arbitration. The rest of this article will, therefore, try to find an explanation for these very different approaches to the issue of the enforceability of ICSID interim orders.

5. THE ENFORCEABILITY OF ICSID PROVISIONAL MEASURES BEFORE NATIONAL COURTS OF RECIPIENT STATES

The fact that interim measures are considered binding does not mean that they are self-executing or that tribunals dispose of instruments aimed at ensuring the effective compliance with such orders by recipient States. What happens, therefore, when a State fails to comply with an ICSID interim order, as Albania did in the *Hydro* dispute?

A first solution in cases of unfulfillment of provisional measures by States could consist, as said above, in a reaction by the State of nationality of the investor. However, within the ICSID framework, as of today, there has never been an inter-State complaint related to this kind of violation and, therefore, the practical relevance of this argument remains scarce.⁷⁰

A second solution, not very much applied by ICSID arbitrators, is the issuance of a declaration of non-compliance, as occasionally happens in the ICJ.⁷¹ In this

no steps in the proceedings identified as Criminal Proceeding No. 1564 to recommence extradition proceedings in the UK against Mr. Becchetti and Mr. De Renzis until the issuance of a Final Award in this proceeding". From the substantial point of view, therefore, nothing has changed.

⁷⁰ According to LANDO, *cit. supra* note 25, p. 7, the reason for this lack of reactions to non-compliance with provisional measures could be that countermeasures to such unfulfillment would further aggravate the existing dispute. Similarly, OELLERS-FRAHM, *cit. supra* note 31, pp. 1068-1069.

⁷¹ Satisfaction through declaratory relief (i.e. statements of non-compliance) is today a very often applied remedy in case of unfulfillment of provisional measures ordered by the ICJ. See PALCHETTI, *cit. supra* note 25, p. 14 ff.; MAROTTI, "Plausibilità dei diritti e autonomia del regime di responsabilità nella recente giurisprudenza della Corte internazionale di giustizia in tema di misure cautelari", RDI, 2014, p. 761 ff., p. 780; and LANDO, "The Road Along the San Juan River Is Paved with Good Intentions: Provisional Measures and the Quest for Compliance in the Costa Rica/Nicaragua Joined Cases", RDI, 2016, p. 179 ff., p. 180. Seldom, declaratory

regard, however, those statements of non-compliance do not have any practical effect except the public recognition of the unfulfillment of the provisional measure by a party.⁷²

Finally, the most common approach within the ICSID system for reacting to non-compliance with interim measures consists in the possibility that tribunals take into account such unfulfillment in final awards.⁷³ This could happen in two ways. Tribunals could award additional damages to the losing party, in the cases where the party who obtained the provisional measures finally wins the arbitration.⁷⁴ In this regard, even if one accepts the possibility of additional damages as a form of procedural sanction in international law,⁷⁵ it is to be highlighted that the possibility of awarding damages for the non-compliance of measures which – by definition – are issued in order to avoid an irreparable harm (i.e. not replaceable by damages) is quite contradictory and rather unsatisfactory.⁷⁶ It is not by chance, indeed, that international case law reveals that this remedy has not usually been utilized.⁷⁷ On the other hand, tribunals have often made recourse to their discretion to allocate the costs of the procedure in order to penalize the party who did not comply with provisional measures.⁷⁸ This is, however, an informal means used by arbitrators in

relief was applied in ICSID arbitration: see *Quiborax*, *cit. supra* note 44, Award of 16 September 2015, paras. 576-583.

⁷² On this aspect, however, see MCINTYRE, “The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?”, *Leiden JIL*, 2016, p. 177 ff.

⁷³ See, in this regard, *AGIP v. Congo*, ICSID Case No. ARB/77/1, Award of 30 November 1979, para. 42; and *Pey Casado*, *cit. supra* note 13, para. 24. See also MALINTOPPI, *cit. supra* note 5, p. 181. Such a solution was envisaged also with regard to ICJ provisional measures since the beginning of the activity of the Court and is still applied. See BARILE, “Osservazioni sulla indicazione di misure cautelari nei provvedimenti davanti la corte internazionale di giustizia”, *CS*, 1952, p. 145 ff., p. 153; and LANDO, *cit. supra* note 25, p. 14.

⁷⁴ This circumstance constitutes an evident lacuna for the cases where the unfulfilling party is finally successful. This is the reason why certain authors have proposed the possibility of sanctions issued by international courts to deal with these cases. See the discussion in MAROTTI, *cit. supra* note 71, pp. 781-785. See, however, PALCHETTI, *cit. supra* note 25, p. 17. This author, on the one hand, expressly excludes the possibility of penalties and punitive damages in the lack of a statutory basis and, on the other hand, states (with regard to the ICJ framework) that in the cases where the party non-complying with a provisional measure finally wins the dispute, “it may be expected that the Court will take this circumstance into account when considering the form and extent of reparation”. Such an outcome is desirable also with regard to the ICSID framework.

⁷⁵ The occurrence of such a power is, however, unlikely. See CARON, *cit. supra* note 22, p. 511.

⁷⁶ LENCI, *cit. supra* note 5, p. 268.

⁷⁷ LEE-IWAMOTO, “The Repercussions of the LaGrand Judgment: Recent ICJ Jurisprudence on Provisional Measures”, *Japanese Yearbook of International Law*, 2012, p. 237 ff., pp. 255-256.

⁷⁸ The reference applies, inter alia, to *LETCO v. Liberia*, ICSID Case No. ARB/83/2, Award of 31 March 1986, ICSID Reports, 1986, p. 370 ff., p. 378. Other cases are mentioned in MILES,

order to obtain compliance with interim measures, but does not amount to a direct instrument for reacting to non-fulfillment.⁷⁹

The above confirms the common opinion whereby, generally speaking, the enforceability of international decisions (both final judgments⁸⁰ and provisional measures⁸¹) before domestic courts is anything but an undisputed question. Indeed, with specific reference to the cases where there is an overlap of proceedings pending before national and international courts, save for some exceptions,⁸² international courts do not usually dispose of direct coercive means in order to limit the powers of national judges to pursue domestic law proceedings contrary to an international judgment or provisional order. Concerning ICSID tribunals, the silence of the ICSID Convention on the enforceability of interim measures is an implied confirmation of the absence of such a power.⁸³ Furthermore, despite what is said above regarding the allocation of costs, it is usually said that arbitrators do not even dispose of means

cit. supra note 1, p. 338, footnote 366. See also, with regard to the ICJ framework, PALCHETTI, *cit. supra* note 25, pp. 19-20.

⁷⁹ MILES, *cit. supra* note 1, p. 336 ff.

⁸⁰ For an in-depth analysis of this problem see PALOMBINO, *Gli effetti della sentenza internazionale nei giudizi interni*, Napoli, 2008, p. 20 ff.; SCHULTE, *Compliance with Decisions of the International Court of Justice*, Oxford, 2004; HUNEEUS, “Compliance with Judgments and Decisions”, in ROMANO et al. (eds.), *The Oxford Handbook of International Adjudication*, Oxford, 2015, p. 437 ff., pp. 449-451; and JONES, “Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua”, Chicago – Kent Journal of International and Comparative Law, 2012, p. 58 ff. The clearest example of this issue is represented by US Supreme Court, *Medellin v. Texas*, Judgment of 25 March 2008, para. II, available at: <<http://www.scotusblog.com/wp-content/uploads/2008/03/06-984.pdf>>. In this regard see CRUZ, “Defending U.S. Sovereignty, Separation of Powers, and Federalism in *Medellin v. Texas*”, Harvard Journal of Law and Public Policy, 2010, p. 25 ff.; MARKS, “The Problem of Self-Execution: *Medellin v. Texas*”, Duke Journal of Constitutional Law & Public Policy Sidebar, 2009, p. 191 ff.; and GAMBLE and GIULIANO, “US Supreme Court, *Medellin v. Texas*: More than an Assiduous Building Inspector?”, Leiden JIL, 2009, p. 151 ff. Similarly, it is possible to consider the judgment No. 238/2014 of the Italian Constitutional Court: see the comments by PISILLO MAZZESCHI (p. 9 ff.), BOTHE (p. 25 ff.), CATALDI (p. 37 ff.) and PALCHETTI (p. 53 ff.), IYIL, 2014.

⁸¹ See LANDO, *cit. supra* note 25, p. 5 ff.

⁸² The reference applies, e.g., to the Court of Justice of the European Union (the reference applies both to judgments, according to Art. 299 TFEU, and provisional measures, according to Art. 279 TFEU as interpreted by the Advocate General in Joined Cases C-31/77 R and 533/77 R, *Commission v. United Kingdom*, ECR, 1977, p. 921 ff., p. 934), to final awards issued by ICSID tribunals (Art. 54 ICSID Convention), to judgments issued by the Inter-American Court of Human Rights (Art. 68(2) of the American Convention on Human Rights), and to the International Tribunal for the Law of the Sea (Art. 39 ITLOS Statute). In these cases, the constituent treaties provided for direct enforceability of decisions in domestic systems.

⁸³ In this regard, it has to be noted that – within the ICSID system – the level of compliance is higher than with regard to other international courts and tribunals. See BISMUTH, *cit. supra* note 5, p. 799.

which may indirectly force self-compliance, such as contempt of court⁸⁴ and moral/punitive damages.⁸⁵ With regard to the subject of the present article, this means that interim measures imposing the suspension of domestic criminal proceedings might, potentially, be simply ignored by the courts of recipient States. This is exactly what happened in the *Quiborax* case mentioned at section 3 above, where Bolivia neglected the ICSID provisional measures ordering the suspension of parallel criminal proceedings.⁸⁶

This is not a new phenomenon. This kind of reaction is a common feature regarding all measures in which a tribunal tries to interfere with the jurisdiction of another adjudicator.⁸⁷ The reference applies, e.g., to so-called anti-suit injunctions, viz. interim measures issued by tribunals with the purpose of forcing a party either to not initiate or to interrupt parallel commercial (arbitral or domestic) proceedings.⁸⁸ Anti-suit injunctions have commonly been ordered by ICSID tribunals⁸⁹ and the Iran-US Claims Tribunal,⁹⁰ and have usually been perceived by States as “an unwelcome intrusion into [their] domestic affairs”⁹¹ with consequent risks of non-compliance. Indeed, often these orders have not been taken into account by the

⁸⁴ See MENDELSON, “State Responsibility for Breach of Interim Protection Orders of the International Court of Justice”, in FITZMAURICE and SAROOSHI (eds.), *Issues of State Responsibility before International Judicial Institutions*, Oxford, 2004, p. 35 ff., p. 41. The issue has been recently analysed by MAROTTI, *cit. supra* note 71, pp. 781-785.

⁸⁵ As to moral and punitive damages in international law see IOVANE, *La riparazione nella teoria e nella prassi dell'illecito internazionale*, Milano, 1990, pp. 157-166.

⁸⁶ This also initially happened in the above-mentioned *Arctic Sunrise* case, *cit. supra* note 33. See MILES, *cit. supra* note 1, p. 313. According to a recent statement appeared on the web, it seems that also Romania has refused to withdraw an arrest warrant against Mr. Alexander Adamescu, notwithstanding the fact that on 29 March 2017 an ICSID Tribunal had ordered it to do so (due to the fact that, if arrested, Mr. Adamescu would be unable to effectively give evidence for the ICSID hearing). According to the aforementioned statement, it is understood that this refusal was expressed in a letter from the Romanian Ministry of Justice, which said that the warrant could only be withdrawn on the basis of Romania's Criminal Proceedings Code. The statement is available at: <<http://globalarbitrationreview.com/article/1140053/romania-wont-withdraw-arrest-warrant>>.

⁸⁷ Also other authors drew this kind of analogy, such as KALDERIMIS, *cit. supra* note 5, pp. 559-565.

⁸⁸ On anti-suit injunctions issued by arbitrators see CARLEVARIS, *La tutela cautelare nell'arbitrato internazionale*, Padova, 2006, p. 416 ff.; LEVY, *cit. supra* note 31, p. 115 ff.; and GAILLARD, “Reflections on the Use of Anti-Suit Injunctions in International Arbitration”, in MISTELIS and LEW (eds.), *Pervasive Problems in International Arbitration*, The Hague, 2006, p. 203 ff.

⁸⁹ Several ICSID cases involving this form of interim measures are mentioned by SCHREUER et al., *cit. supra* note 5, pp. 784-793; see also CARLEVARIS, *cit. supra* note 88, pp. 422-429.

⁹⁰ See the case law and comments reported by CARLEVARIS, *cit. supra* note 88, pp. 429-435.

⁹¹ KALDERIMIS, *cit. supra* note 5, p. 559.

national courts (and arbitral tribunals), the jurisdiction of which was affected by the injunction,⁹² just as Albania did in the *Hydro* case.

In conclusion, as things stand today, it is possible to say that – notwithstanding the perception of aversion that provisional measures may generate among international lawyers – their concrete effects are not to be seen as dramatic by States. Should this kind of orders occur more frequently without a prior careful proportionality balance, the only actual reason why a State should fear going on with criminal proceedings is the (low) risk that this non-compliance will somehow be taken into account in the final award. In this regard, the high level of unfulfillment with interim measures shown by the ICJ case law demonstrates that this circumstance has never been considered as a serious obstacle by States unwilling to comply with provisional orders.⁹³

6. ICSID PROVISIONAL MEASURES BEFORE THE NATIONAL COURTS OF THIRD STATES

The *Hydro* post-provisional orders scenario outlined in section 4.2 above poses also the question of understanding what is the effect of ICSID provisional measures before the national courts of States which are Contracting Parties to the ICSID Convention but are not involved in the dispute within which the interim order has been issued.

As a preliminary remark, it is worth recalling that, as a general principle, “an arbitral tribunal does not have authority to make any orders affecting persons who

⁹² It is possible to mention, in this regard, *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 of 16 October 2002, ICSID Review, 2003, p. 293 ff., and the related decision by the Supreme Court of Pakistan, *Société Générale de Surveillance S. A. v. Republic of Pakistan*, Judgment of 3 July 2002, Arbitration International, 2003, p. 179 ff. See also *Salini v. Ethiopia*, ICC Arbitration No. 10623/AER/ACS, Award Regarding the Suspension of Proceedings and Jurisdiction of 7 December 2001, para. 124, available at: <http://www.italaw.com/documents/Salini_v_Ethiopia_Award.pdf>. See, in this regard, TAN, “Anti-Suit Injunctions and the Vexing Problem of Comity”, *Virginia Journal of International Law*, 2005, p. 285 ff., p. 305. Similarly, BENEDETTELLI, *cit. supra* note 4, p. 732.

⁹³ This article is not the place where discussing the issue of non-compliance with interim measures issued by the ICJ. In this regard, it is possible to refer to LANDO (*cit. supra* note 25, p. 15), stating that “[o]verall, the fact that the Court may consider non-compliance in the judgment on the merits does not seem an effective means to secure compliance with provisional measures”. See also LEONHARSDEN (“Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures When Non-Compliance Is To Be Expected”, *Journal of International Dispute Settlement*, 2014, p. 306 ff., p. 309), stating that “non-compliance with provisional measures indicated by the ICJ is the norm”. Concerning compliance with provisional measures ordered by the ECtHR, see FORLATI, “Misura cautelari adottate dalla Corte europea dei diritti umani e ordinamento italiano”, DUDI, 2010, p. 634 ff.

are not parties to the arbitration. This follows from the fundamental principle that the jurisdiction of an arbitral tribunal is based on the consent of the parties".⁹⁴

In addition, with regard to provisional measures, the ICSID Convention does not set forth a regulation comparable to the one concerning arbitral awards, on which Article 54 states that *each Contracting State* shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State. The logical consequence of the above is that, in principle, third parties are indifferent to interim measures not directed to them and there is no legal basis to force such parties to comply with these orders. Not even it is possible to argue that Article 54 may be interpreted extensively in order to include provisional measures within its scope of application. Article 47 is included in Section 3 of the ICSID Convention, regulating the "Powers and Functions of the Tribunal", while Article 54 is part of Section 6, entitled "Recognition and Enforcement of the Award". Such a rule, therefore, applies only to awards as defined and regulated in Section 4 ("The Award") and there is no possibility to even imagine that the drafters of the Convention intended to apply Article 54 to other kind of decisions (such as interim measures). It is not by chance, indeed, that to the knowledge of the present author there has never been one single attempt to argue that Article 54 could apply to provisional orders.

However, it might be conceivable that a different type of obligation burdens on third States, descending from the duty to loyally cooperate in the achievement of the already mentioned purposes of the ICSID Convention through the assumption of all behaviours which can be necessary in order to reach such purposes. Such a duty would consist in a corollary of the general obligation of good faith set forth in Article 26 of the Vienna Convention on the Law of Treaties,⁹⁵ which would also require States to abstain from acts which are likely to have detrimental effects on the achievement of the goals of a treaty.⁹⁶ This approach has found support by those who stated that the invocation of international decisions issued according to the

⁹⁴ WERBICKI, "Arbitral Interim Measures; Fact of Fiction?", in *AAA Handbook on International Arbitration & ADR*, Huntington, 2010, p. 89 ff., p. 95. The same conclusions have been reached with regard to ICJ judgments and provisional measures: see HELFER ("The Effectiveness of International Adjudicators", in ROMANO et al, *cit. supra* note 80, p. 464 ff., p. 471) and LANDO (*cit. supra* note 25, p. 8), respectively.

⁹⁵ The duty of loyal cooperation, typical of EU law, has been perfectly described as a corollary of the international law principle of good faith. See, also for a rich bibliography, DE BAERE and ROES, "EU Loyalty as Good Faith", *ICLQ*, 2015, p. 829 ff., p. 834 ff., 838. Obligations of loyal cooperation are not uncommon in international treaties. Suffices here to mention Art. 3 of the Statute of the Council of Europe and Art. 2(2) of the UN Charter. All these obligations are usually described as consequential to the general duty of good faith.

⁹⁶ See *supra* note 26. According to Art. 18 VCLT, a similar obligation burdens on States even prior to the entry into force of a treaty that has been signed or ratified. In this regard see PALCHETTI, "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?", in CANNIZZARO, *cit. supra* note 13, p. 25 ff.

provisions of an international treaty before the courts of other Contracting States is often essential in order to grant the achievement of the purposes for which the decision was issued. Hence, according to this opinion, there would be no reason why the court of these States should not facilitate the achievement of such purposes.⁹⁷ On the other hand, however, this could be seen as an overly broad reading of Article 26 of the Vienna Convention that could lead to an undesirable multilateralization of otherwise bilateral treaty relations.

Within the context of ICSID interim measures – probably due to the lack of precedents – this argument has only (but, of course, influentially) been advanced by Professor Schreuer, who stated that all State Parties to the ICSID Convention are under an obligation to ensure, in good faith, the achievement of the goals of the Convention, by facilitating compliance with provisional orders issued by arbitral tribunals.⁹⁸ In support of his opinion, Schreuer mentions the approach of the Court of First Instance of Geneva in the framework of the ICSID case *MINE v. Guinea*.⁹⁹ In this case, the arbitral tribunal recommended that MINE withdraw and terminate any and all judicial proceedings commenced before national jurisdictions and refrain from commencing any further proceedings in connection with the dispute. However, MINE went on with proceedings in Switzerland aimed at granting certain attachments. The Swiss court refused MINE's request and lifted said attachments. In doing so, the court largely quoted the Tribunal's provisional order and this circumstance is mentioned in support of the fact that "while domestic courts may not be in a position to enforce ICSID provisional measures, they can be strongly influenced by them".¹⁰⁰

At a closer look, however, this *MINE v. Guinea* arose in the context of a parallel *commercial* litigation forbidden by the already mentioned Article 26 of the ICSID Convention. This means that – should the Swiss court have refused to lift the attachments – Switzerland would have directly violated an international obligation weighing on it. Indeed, as noted by other authors, Article 26 played an important role in the court's reasoning.¹⁰¹ Therefore, it is not possible to say with certainty that the decision of the Swiss court was mainly dictated by the ICSID tribunal's provisional measure. On the other hand, as said above, a violation of Article 26 of the ICSID Convention is not conceivable in the cases of domestic criminal proceedings and, then, it is unlikely that the Swiss decision may be a relevant precedent for the purpose of the present article.

⁹⁷ See SCHREUER, *Decisions of International Institutions Before Domestic Courts*, London, 1981, pp. 146-150.

⁹⁸ SCHREUER et al., *cit. supra* note 5, p. 797.

⁹⁹ *MINE v. Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988, ICSID Reports, Vol. 4, Cambridge, 1997, p. 61 ff. The reference also goes to Tribunal de Première Instance, Geneva, *MINE v. Guinea*, Judgment of 13 March 1986, ICSID Reports, Vol. 4, Cambridge, 1997, p. 41 ff., p. 43.

¹⁰⁰ SCHREUER et al., *cit. supra* note 5, p. 767.

¹⁰¹ BROWER and GOODMAN, *cit. supra* note 5, p. 436.

The English decision concerning the *Hydro* case might be considered as an expression of the above approach within the context of domestic criminal proceedings. Certainly, Judge Tempia was influenced by the ICSID interim order when she said that by granting the extradition she would have acted contrary to an international obligation. Unfortunately, as said above, this judgment lacks any explanation concerning the type of legal duty that the English court would have violated by granting the request for extradition and how such a duty would have been infringed. Moreover, the express reference by Judge Tempia to a supposed international obligation let us to exclude that her reasoning was based on the doctrine of international comity according to which – as a matter of self-respect – a court may be deferent towards the decisions of another decision-maker.¹⁰² Indeed, English judges are extremely familiar with the concept of comity and it is likely that Judge Tempia, had she intended to apply this doctrine, would have made express reference to it. The judgment, therefore, represents a missed opportunity for understanding the rationale behind the decision of a domestic criminal judge to suspend its proceedings in order to comply with an ICSID interim measure not directed to it. As it is, therefore, the judgment appears incoherent given the bilateral character of the arbitral bargain.

In conclusion, due to the newness of the *Hydro* scenario and the absence of relevant case law, it is not possible to foresee how third States will behave in situations such as the one analysed in this article. Indeed, even if it is *in abstracto* conceivable to draw a form of responsibility for third States refusing to promote the purposes of the ICSID Convention through compliance with provisional measures, it is also realistic to imagine that – as for the case of non-compliance by States recipient of interim orders – there will never be a reaction by the other Contracting Parties in the cases where third States simply ignore these orders. Hence, it is impossible to figure out with certainty what could happen in the cases where courts of third States do not take into consideration measures not directed to them.

At the present stage, therefore, one possible solution concerning the effects of provisional measures on third parties could be to say that, with regard to courts of such Countries, interim measures have the effect to render licit any conduct held in compliance with such orders (and for their period of validity). This argument is not entirely new: at the time when interim measures issued by the ICJ were not considered to be binding, Professor Villani advanced the idea that the only indisputable effect of such orders was to render licit the conduct of recipient States complying with them, at least for the period of validity of the measure.¹⁰³ It would be contradictory, he said, to imagine that the behaviour of a State abiding by the prescrip-

¹⁰² On the doctrine of international comity see (also for other authorities) ZARRA, *Parallel Proceedings in Investment Arbitration*, Turin/The Hague, 2017, p. 90 ff.

¹⁰³ VILLANI, “In tema di indicazione di misure cautelari da parte della corte internazionale di giustizia”, RDI, 1974, p. 657 ff., pp. 679-681. This approach has been recently re-discussed by PALCHETTI, “Effetti giuridici e conseguenze indirette derivanti da misure cautelari della Corte

tion of a provisional order could be considered as an internationally wrongful act. *Mutatis mutandis*, it would be nonsensical to qualify, for whatsoever reason, as an internationally wrongful act the conduct of a third State that indirectly facilitates the respect of a provisional order with the aim of not frustrating the purpose of the ICSID Convention.

7. CONCLUSIONS

The present article has analysed the issue of the interference of ICSID interim orders with national criminal proceedings, by highlighting the strong axiological tension existing between the necessity to ensure a smooth prosecution of arbitral proceedings and the respect for State sovereignty. The discretionary power enjoyed by tribunals in deciding when and how issuing provisional measures should therefore be exercised very carefully, giving particular weight to the proportionality of the required measure. Otherwise, if such orders are granted pursuant to a shallow analysis, this can lead to induce a “sovereign backlash” by recipient States, which could decide not to comply with them and, finally, to undermine the legitimacy of investment arbitration.

On the other hand, the States’ contradictory reactions to the order for provisional measures in *Hydro* has also shown that there is still uncertainty on the effects of provisional measures in national proceedings (both before the courts of the State recipient of the measure and before the courts of third countries). Hence, it has been demonstrated that, at the present stage, interim orders in international law are not self-executing and are often ignored by recipient States. This is mainly because the only means that tribunals have to sanction unfulfillment with these measures is to take such default into account in the final decision, something that is not usually perceived by national judges and, more generally, by States as a serious obstacle to non-compliance.

Finally, the analysis moved to the effects of ICSID provisional measures before the courts of States not involved in the relevant dispute. In this regard, it emerged that arbitral tribunals do not have the power to bind parties who have not consented to their jurisdiction and that there is no provision in the ICSID Convention providing for *erga omnes partes* effects of interim measures. On the other hand, it might be possible to envisage an obligation to loyally cooperate to the achievement of the purposes of the Convention as a consequence of the general duty of executing treaties in good faith.

Due to the scarcity of precedents, however, such obligation (if any) is, as of today, relevant only from the theoretical point of view. It has, therefore, been argued

internazionale di giustizia”, in TRIGGIANI et al. (eds.), *Dialoghi con Ugo Villani*, Vol. 1, Bari, p. 19 ff.

that a possible solution concerning the effects of provisional measures on third parties could be to say that, with regard to courts of such Countries, interim measures have the effect to render licit conducts held by States with the aim of complying with such orders.