The Binding Nature of Provisional "Recommendations" in ICSID Arbitration

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Introduction

Pursuant to Article 47 of the ICSID Convention, an ICSID Tribunal may "recommend any provisional measures which should be taken to preserve the rights of either party". The use of "recommend" is concerning. Its lack of imperative character triggers a debate on whether ICSID provisional measures have legally binding effect, i.e. require mandatory state compliance. Quite controversially, numerous ICSID tribunals have rendered binding provisional measures to suspend domestic criminal investigations or proceedings.[fn]*See* following cases for discussions on suspending criminal procedures through provisional measures: Border Timbers Ltd. V. Republic of Zimbabwe, ICSID CASE NO. ARB/10/25, Directions Concerning Claimants' Application for Provisional Measures of 12 June 2012 (June 13, 2012); Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, (Dec. 4, 2014); City Oriente Ltd *v.* Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Ecuadoran) ICSID case No. ARB/06/21; Italba v. Oriental Republic of Uruguay ICSID Case No. ARB/16/9 Decision on Claimant's Application for Provisional Measures and Temporary Relief (Feb. 15, 2017); Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19; and Teinver S.A., Transportes de Cercanías S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Provisional Measures (Apr. 8, 2016). [/fn] Thereby, some arbitrators have designated to themselves an implicit or *de facto* authorization to render orders, even such that extensively interfere with state sovereignty.

The issue of whether these orders are binding in nature rests upon an inherent give-and-take conflict between (1) honoring state sovereignty, and (2) making investor-state arbitration investor-friendly and an effective dispute resolution mechanism. A perfect illustration of this tension comes to light when a tribunal orders a provisional measure to suspend a criminal investigation or procedure.

However, at the outset it should be known that since *Maffezini v. Spain* (ICSID Case No. ARB/06/21, Decision on Request for Provisional Measures (Oct. 28, 1999) 5 ICSID Rep. 387 para 9. (2002)), there is a generally held view that provisional measures in ICSID are binding. For example, 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."[fn]City Oriente Ltd *v.* Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Ecuadoran) ICSID case No. ARB/06/21 Decision on Provisional Measures (Nov. 19, 2007), para. 52.[/fn] The crux of the matter is, however, that these orders are not explicitly supported in the relevant text.

Provisional measures can secure the efficiency and fairness of the arbitration proceeding

In general, provisional measures lie on the premise that the proceedings should be fair and efficient. Accordingly, the use of provisional measures may be connected to the due process requirements of equal treatment and the right to be heard. This is a natural result of the "judicialization" of investor-state arbitration. And whether – and why – judicialization of arbitration is a bad thing, we can leave for another day. Nonetheless, the tribunal's authority to render binding provisional measures have oftentimes been described as indispensable in order to uphold arbitration as a fair and efficient way of dispute resolution.[fn]*See* Gary Born, International Commercial Arbitration 2425 (2d ed. 2014).[/fn]

To illustrate the complicated balance between state sovereignty and efficiency we wish to address whether an ICSID tribunal has the authority to suspend domestic criminal procedures. How have previous tribunals justified an "order" suspending criminal investigations or procedures under the ICSID framework?

In *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), the Tribunal stated that Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules give the tribunal wide discretion to render provisional measures. (para. 105) The Claimant claimed compensation for the revocation of eleven mining concessions. 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 BIT. Bolivia's Ministry for Foreign Affairs ordered an audit. The Bolivian authorities reviewed corporate documentation and "noted irregularities," and brought proceedings regarding "forged documents." (paras 22-45) The Claimants alleged that the criminal proceedings constituted litigation tactics aiming towards limiting their access to important documents.

The Tribunal concluded that the Claimant had met the requirements for suspending the criminal proceedings, *viz.* had managed to prove: (1) an existence of rights requiring preservation; (2) existence of urgent protection; and (3) necessity of the provisional measure.(paras 113-165)

In *Hydro S.r.l. v. Republic of Albania* the Claimant initiated an ICSID arbitration against Albania for alleged breaches of commitments relating to electricity generation enterprises in the host-state. Subsequently, Albania sought to extradite two of the Claimants from the UK on the alleged basis of money laundering and fraud. The Claimants sought an interim measure requesting Albania to desist its action. The Tribunal recommended Albania to (a) suspend the criminal proceedings until the issuance of a final award and (b) take necessary actions to suspend the extradition proceedings.[fn]*Hydro S.r.l. v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 3, 2016), para 5.1.[/fn] The Tribunal first determined whether there was a sufficient basis for it to decide the questions subject of the request for a provisional measure.(para. 3.9) It went on to assess the "appropriate test" to be applied i.e. whether the application was (1) necessary to protect the applicant's rights; (2) urgent; and (3) proportionate. (para 3.11) The Tribunal was satisfied that the conditions were met and, therefore, saw "no difficulty in recommending an order". (para. 3.18-20)

Is the word "recommendation" coincidental?

The non-binding language in Article 47 of the ICSID Convention reflects that investor-state arbitration is tainted with issues of state sovereignty. Schreuer wrote that "a conscious decision was made not to grant the tribunal the power to order binding [provisional measures]."[fn]Christoph H. Schreuer, The ICSID Convention: A Commentary 758 (2001)[/fn] Furthermore, Redfern and Hunter wrote that: "[t]he use of the word 'recommend' in this context stems from the concern of the drafters of the ICSID Convention to be seen as respectful of national sovereignty by not granting powers to private

tribunals to order a state to do or not do something on a purely provisional basis".[fn]Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 333 (4th ed. 2004).[/fn]

This sheds light upon what should be an obvious notion of textual legal understanding; namely, that the text is supreme and prevails. The explicit choice of words in the convention indicates that provisional measures were not meant to have legally binding effect.

However, it is not inconceivable that a tribunal may render binding provisional measures in order to safeguard the procedural integrity or the parties' duty of "good faith". Allegedly, this should be implied from the text of the ICSID Convention, in part and in whole. In a similar vein, it may be argued that the concept of "state sovereignty" should not force tribunals to tie their hands when serious interference with the arbitration is making the procedure unfair at best, or a nullity at worst. How convincing this argument is – and how far a tribunal can go – should be left for the arbitration community to decide. Nevertheless, decisional law is not binding in investor-state arbitration and, therefore, the decision should be reflected in rules or statute form.

Concluding remarks

The host-state, in its capacity as a sovereign, can interfere with the arbitration in a myriad of ways. For example, a state can utilize its prosecutorial powers in order to frustrate the arbitration by putting immense pressure on the investor. However, it is questionable whether an ICSID tribunal may redress such behavior by "ordering" a provisional measure that interferes with state sovereignty.

Mechanisms that secure procedural efficiency and due process are essential for maintaining investor-state arbitration as the dominant forum for adjudicating investment disputes. As a corollary, it is arguably necessary to grant the arbitrators some scope of authority to make compulsory decisions throughout arbitral proceedings. Nonetheless, the authority of the tribunal to render provisional measures in investor-state arbitration is dependent on the state giving up some traditionally sovereign features.

The drafting states to the ICSID Convention did not attribute a legally binding effect to provisional measures. Therefore, ICSID tribunals treating provisional "recommendations" as binding orders may undermine textual interpretation and state sovereignty. Above all, a lack of textual adherence may impede clarity, consistency and foreseeability.

As a result, provisional "orders" may carry a risk of causing states to question the legitimacy of investor-state arbitration as a valid regime for resolving investment disputes. Moreover, decisions lacking textual authority might discourage states from compliance. Eventually, the lack of textual adherence and interpretation may prove damaging for the sustainability of investor-state arbitration.