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Criminal Proceedings and Provisional Measures in ICSID Arbitrations: The Legitimate Exercise of a State's Police Powers Versus the Ability to Advance Claims in Arbitration

Anees Naim (Herbert Smith Freehills LLP) · Saturday, April 30th, 2016

In two recent cases, ICSID tribunals have been asked to consider applications for provisional measures relating to criminal proceedings initiated against the claimants. On 3 March 2016, the tribunal in *Hydro S.r.l and others v. Republic of Albania* (ICSID Case No. ARB/15/28) (the *Hydro* case) partly granted a request to recommend the suspension of criminal proceedings. On 8 April 2016, the tribunal in *Teinver S.A. and others v The Argentine Republic* (ICSID Case No. ARB/09/1) (the *Teinver* case) reached the opposite decision, declining to recommend the suspension of such proceedings.

Under Article 47 of the ICSID Convention, tribunals may, if they consider that the circumstances so require, recommend any provisional measures which should be taken to preserve the rights of either party. Under Rule 39 of the ICSID Arbitration Rules, a party may request that provisional measures for the preservation of its rights be recommended by the tribunal. Rule 39 also provides that a tribunal may recommend provisional measures on its own initiative or recommend measures other than those specified in a request.

The orders in the *Hydro* and the *Teinver* cases are interesting given the particularly high threshold that must be overcome before an ICSID tribunal can recommend provisional measures which impact upon criminal investigations conducted by the state. Deciding such applications involves a tribunal trying to strike a fine balance between the investor's various procedural rights and a respondent state's sovereign right to investigate and prosecute crime. This piece briefly discusses and explores how this balance was achieved in the orders and what this means in the context of previous rulings in this developing area of law.

The Hydro Case

The six claimants in the *Hydro* case are four individuals and two corporate claimants engaged in investments in Albania in the media, electrical generation and waste management sectors. They commenced an arbitration under the Italy-Albania bilateral investment treaty in June 2015 claiming that the Albanian authorities had failed to honour prior commitments to grant value-added tax exemptions and that they faced various discriminatory and retaliatory measures in the form of criminal and administrative proceedings.

In December 2015, the claimants applied for provisional measures requesting the suspension of

criminal, extradition and insolvency proceedings started by Albania. The claimants submitted that those proceedings were brought in response to the arbitration in retaliation against the claimants to prevent them from being able to pursue their rights in the arbitration. The claimants argued that this violated their rights to non-aggravation of the dispute, the right to procedural integrity of the arbitration and Albania's consent to settle the dispute through arbitration exclusively.

The parties were in agreement as to the fundamental standards applicable to a request for provisional measures: such measures should be necessary to protect the applicant's rights, urgent and proportionate. In considering the application, the tribunal stated that there was a high threshold to be reached in order for it to recommend the making of provisional measures. Furthermore, in relation to criminal proceedings (an exercise of state sovereignty), provisional measures should only be recommended where absolutely necessary.

In terms of the claimant's rights that needed protection, the tribunal was satisfied that a real question arose in relation to the procedural integrity of the arbitral proceedings and that there was a "grave concern" in relation to that integrity. Criminal proceedings had been brought against one of the claimants who was central to the arbitration. The possible incarceration of two of the claimants in Albania would also prevent them from fully participating in the arbitration.

The tribunal considered that the measures sought were urgent because there was an imminent risk to the claimants' ability to effectively participate in the arbitration. The tribunal also found that it was necessary to protect the procedural integrity of the proceedings as the claimants' ability to effectively participate in the arbitration cannot be adequately remedied by damages. The tribunal found that staying the criminal proceedings would, on balance, be proportionate in favour of protecting the claimants' rights.

The tribunal therefore recommended that Albania stay criminal proceedings and take all actions necessary to suspend the extradition proceedings. The tribunal also invited the parties to confer and to seek appropriate measures to be taken to preserve the seized assets and the contents of the frozen bank accounts of certain companies and the current shareholdings in those companies.

The tribunal refused the claimant's request to recommend a measure that Albania would refrain from initiating other proceedings directly or indirectly related to the arbitration and to refrain from engaging in any other course of action that may aggravate the dispute. The tribunal found that the terminology of the request was too broad, vague and uncertain in scope and was in any event premature.

The Teinver Case

The claimants in the *Teinver* case are three companies incorporated in Spain and part of the Marsans group. They brought claims in 2009 under the Spain-Argentina BIT based on allegations that Argentina has unlawfully expropriated their investments in two Argentinian airlines.

Following the merits hearing on the case in March 2014, the Argentinian authorities started criminal investigations into the claimants and various parties related to the case. This evolved into criminal complaints in early 2015. In July 2015, the claimants made an application to the tribunal for provisional measures in relation to the criminal complaints and the publicity surrounding them.

The claimants' application for provisional measures in this case was unusual. Unlike similar applications in other cases, the request came near the end of the proceedings. In the application, the

claimants submitted that the criminal complaints and investigation, together with the publicity that the respondent has given to these have affected or threatened to affect rights related to the arbitration which are entitled to protection despite the late stage of the proceedings.

The claimants' request for provisional measures centred on obtaining an order from the tribunal that Argentina should cease and desist from the criminal investigation against the claimants, their representatives, lawyers and their funder. Argentina argued that the claimants had not met the necessary burden of proof for such measures; merely claiming that being the subject of a criminal investigation is intimidating should not be enough to obtain protection through provisional measures.

The tribunal found that the criminal complaints were closely connected to the arbitration proceedings and that they could be seen as the motivation, at least in part, for the filing of the complaints by the respondent. The tribunal went on to consider each of the rights cited by the claimants and apply the tests of urgency and necessity to the provisional measures requested with respect to those rights. Most of the rights cited by the claimant failed the test. The tribunal noted that as the taking of evidence had been completed in the case, there was only a limited possibility that the criminal proceedings and investigation could have affected the procedural integrity of the proceedings. The tribunal denied recommending most of the measures requested by the claimant except two.

In relation to the actions against the claimants' lawyers, the tribunal considered that the right to counsel even at a late stage in the proceedings is a fundamental right and the threat to it by way of criminal proceedings while the arbitration is ongoing may give rise to harm or necessity sufficient to justify the suspension of the criminal proceedings against counsel. The tribunal added that the claimant's access to counsel of their choice is a critical element of the integrity of the arbitral proceedings. However, it was not clear to the tribunal if the scope of the criminal investigation included counsel. The tribunal therefore decided that it was unable to determine if it could justify granting the provisional measure in that regard.

The tribunal found that a press conference by representatives of Argentina in relation to the details of the arbitration, the criminal complaints and the allegations made in them amounted to an aggravation of the dispute and threatened the claimants' right to the preservation of the status quo and the non-aggravation of the dispute. The tribunal ordered Argentina to refrain from publicizing the criminal complaints or the investigations and any relation they have to the arbitration.

Points to Note

Criminal proceedings in the context of investor-state treaty arbitration may in certain circumstances be retaliatory in nature. They may be commenced to circumvent an arbitration and impact the integrity of the evidence and even, as argued in some cases, the respect for the tribunal itself as the organ freely chosen by the parties for the binding settlement of their dispute in accordance with the ICSID Convention.

However, criminal proceedings may also be validly commenced in the light of a party's actions. As expressed by the tribunal in *Quiborax S.A. and others v. State of Bolivia* (ICSID Case No. ARB/06/02): "the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of them being investors".

The *Hydro* and the *Teinver* cases show that it is widely agreed that provisional measures ordering

the suspension of related domestic criminal proceedings are an extraordinary remedy and should not unduly encroach on a state's sovereignty. They also show that it is widely agreed that requests for such measures require particular caution from a tribunal.

The analysis and conclusions of the tribunals in both the *Hydro* and the *Teinver* cases seem to suggest that arguments about rights connected to the procedural integrity of the arbitration proceedings could be more persuasive in the context of requests for provisional measures to suspend criminal proceedings. For example, the obtaining of evidence and the possible intimidation of witnesses or counsel are matters that would impede the procedural progress of an arbitration. The timing, clarity and scope of the provisional measure requests are other critical factors which the tribunal in both cases also emphasised.

It is worth noting that the *Hydro* case addresses proportionality as a separate test to the provisional measure that is sought. In contrast, the *Teinver* case mentions the proportionality test in the context of whether a provisional measure is necessary or not. It would be interesting to see if tribunals in the future will follow the approach laid out in *Hydro* and start to analyse the proportionality of provisional measures separately.

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