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Barton Legum

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
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Chapter 8

PROVISIONAL MEASURES

Jonathon Redwood SC and Boxun Yin[1]

I INTRODUCTION

Provisional measures can serve as a critical device in protecting the rights of a party – whether procedural or substantive – during an investment treaty dispute. They can be as important as the final protection of those rights, especially considering the increasing duration of investment treaty disputes.[2] They can have a significant impact on whether, and the extent to which, substantive investment treaty rights can be vindicated.

Over the past decade or so, there has been a significant increase in the number of requests for provisional measures sought by both claimant-investors and respondent-states.[3] This begs the question of the practical utility, or enforceability, of provisional measures, as well as whether the enforceability of provisional measures should be improved and, if so, how that might be done.

This chapter is structured as follows: Section II sets out a high-level overview of the tests for provisional measures in investment treaty disputes[4] and the different types of provisional measures that might be sought before an arbitral tribunal. Part III discusses the question of enforceability of provisional measures, drawing from recent national law examples of when provisional measures were sought to be enforced. Part IV raises key issues of principle to consider in future possible reforms. Part V raises for consideration a few high-level proposals for reform.

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1 Jonathon Redwood SC is a barrister at Banco Chambers and Twenty Essex. Boxun Yin is a barrister at Banco Chambers.

2 Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', British Institute Of International and Comparative Law (BIICL) and Allen & Overy 2021, pp. 5 and 32.

3 David Goldberg, Yarik Kryvoi and Ivan Philippov, 'Empirical study: Provisional measures in investor-state arbitration (2023)', BIICL and White & Case, 2023, pp. 4 and 17.

4 This chapter is intended to set out general principles rather than the particular position under particular sets of rules. Nonetheless where required or helpful, we refer to the 2022 International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and the 2021 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

II WHAT ARE PROVISIONAL MEASURES?

Provisional measures are intended to protect a substantive right (*pendente lite*) or to prevent the further aggravation of the dispute and damage to the status quo,[5] pending the resolution of the proceedings. They can include measures such as requests to preserve investments and non-aggravation of the dispute,[6] requests to stay parallel proceedings[7] and security for costs.[8]

Five basic requirements need to be satisfied before a tribunal will consider granting provisional measures: prima facie jurisdiction, prima facie merits, urgency, irreparable harm and balance of convenience or proportionality.

i Prima facie jurisdiction

A tribunal must be satisfied that it has prima facie jurisdiction. There is a low threshold for the application of this standard: it is satisfied when 'the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal'.[9]

Regarding the facts alleged by the claimant to establish jurisdiction, there is no need 'at this stage to verify them and analyse them in depth'.[10]

ii Prime facie merits: plausibility standard

Tribunals must be satisfied that the substantive rights prima facie exist, but not to the standard of 'actual proof'.[11] The claimant has the burden of establishing that it has a right susceptible to protection. It must show that 'there is a prima facie case on the merits of its claims'.[12]

The tribunal's analysis of the prima facie strength of the parties' claims does not prejudge the merits of the case.[13] Tribunals 'need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of [the] Claimants'.[14]

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5 Cameron A Miles, *Provisional Measures Before International Courts and Tribunals*, Cambridge University Press, 2017, p. 174.

6 Goldberg, Kryvoi and Philippov, p. 21.

7 ibid. See, e.g., *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Claimant's Request for Provisional Measures), 19 September 2019 (*Ipek*), Paragraph 95.

8 See, e.g., Rule 53, 2022 ICSID Arbitration Rules.

9 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008 (*Paushok*), Paragraph 55.

10 *Gerald International Limited v. Republic of Sierra Leone,* ICSID Case No. ARB/19/31, Procedural Order No. 2 (Decision on the Claimant's Request for Provisional Measures), 28 July 2020 (*Gerald International*), Paragraph 168.

11 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (*Burlington*), Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, Paragraph 53.

12 *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, Paragraph 120.

13 *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, Paragraph 120.

14 *Ipek*, Paragraph 7.

iii Urgency of requested measures

The requirement of urgency is met when 'a question cannot await the outcome of the award on the merits'.[15] This arises 'when the party requesting the measures would otherwise suffer imminent harm or at least harm that would arise before the award is rendered'. [16] Urgency is sometimes linked with the necessity requirement, such that requested measures are urgent if they are necessary to prevent 'irreparable' harm as well as 'imminent' harm.[17] The degree of urgency required will vary depending on the circumstances.[18]

iv Necessity to avoid irreparable harm

The necessity requirement generally entails consideration of whether the actions in question will cause 'irreparable harm'.[19] Some tribunals have propounded a lower threshold of 'serious', 'significant' or 'material' harm.[20] The characterisation of the harm will also be fact-specific.

v Balance of convenience

Arbitral tribunals will consider whether the parties' respective interests are 'balanced' in assessing the urgency and necessity of a claim [21] – in other words, 'the positive effects [of any provisional measure] must outweigh the negative ones'.[22] The importance of this requirement varies depending on the nature of the provisional measures sought. For example, applications to prevent or suspend domestic laws or criminal investigations are generally more closely examined given the particular sovereignty-related considerations involved.

III ENFORCEABILITY OF PROVISIONAL MEASURES

i Are provisional measures binding?

Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) is the textual source for the power of an ICSID tribunal to recommend interim relief. Under Rule 39(1) of the ICSID Arbitration Rules, 'a party may request that provisional measures . . . be recommended by the Tribunal'. Notwithstanding the language of recommendation, the authority of ICSID tribunals to order

15 *Quiborax SA, Non-Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (*Quiborax*), Decision on Provisional Measures, 26 February 2010, Paragraph 150.

16 *Gerald International*, Paragraphs 178–179.

17 *Quiborax*, Decision on Provisional Measures, 26 February 2010, Paragraph 153; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, Paragraph 59.

18 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (Provisional Measures), 31 March 2006, Paragraph 76.

19 See, e.g., *Occidental Petroleum*, Paragraph 59.

20 *Gerald International*, Paragraph 176; *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Procedural Order No. 2 (Decision on the Claimants' Request for Provisional Measures), 9 May 2022, Paragraph 80; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009 (*Perenco*), Paragraph 43.

21 *Burlington*, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, Paragraph 81.

22 *IBT Group, LLC and IBT, LLC v. Republic of Panama (II)*, ICSID Case No. ARB/20/31, Decision on Provisional Measures, 5 February 2021, Paragraph 150.

binding provisional measures is widely acknowledged, at least by those tribunals.[23] The basis in principle for this view is that the object and purpose of the ICSID Convention as a whole is to enable the resolution of disputes through binding awards, and that binding provisional measures are required to prevent the tribunal's functions from being hampered and to preserve the parties' rights;[24] however, there is a minority view that the power to 'recommend' is to be read literally such that it does not give rise to a binding obligation.[25]

A tribunal has a range of options available to it if a party has failed to comply with provisional measures that have been recommended. An adverse inference might be drawn, especially where the provisional measure relates to the preservation of evidence.[26] There may be costs consequences that can be taken into account in a final award, such as where a party did not voluntarily comply with a provisional measure to lift attachments against assets obtained under domestic law and was put to the cost of lifting them.[27] Sometimes the provisional measures themselves state that the tribunal will take into account in the award the effects of any non-compliance.[28] In cases involving security for costs, a failure to provide security exposes the claimant to the risk that the proceedings might be dismissed.[29]

Alternatively, where the underlying right sought to be protected by the provisional measure was ultimately not impaired, there may be no real consequence, notwithstanding a failure to comply with those provisional measures.[30]

It is difficult to envisage a situation in which the degree of non-compliance with provisional measures itself constitutes a breach of substantive rights. In *Burlington v. Ecuador*, the tribunal held that non-compliance with an order for provisional measures, which deals only with procedural rights during the arbitration, could not amount to expropriation,[31] unlike in *Saipem v. Bangladesh*[32] where a domestic court purported to annul a final award.

Outside the ICSID regime, tribunals dealing with investment treaty claims subject to the UNCITRAL Rules may, at the request of a party, grant interim measures pursuant to Article 26 of those Rules.[33] This more unequivocal wording largely eliminates the textual concerns associated with the language of 'recommendation' in the ICSID Convention; otherwise, the rationale underlying the ICSID decisions relating to the object and purpose

23 See, e.g., *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (*Tokios Tokelés v. Ukraine*), Procedural Order No. 1 (Provisional Measures), 1 July 2003, Paragraph 4.

24 *Perenco*, Paragraph 69.

25 *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009 (*Caratube*), Paragraph 67.

26 *AGIP SpA v. People's Republic of the Congo*, ICSID Case No. ARB/77/1, 1 ICSID Reports 306, Paragraph 317.

27 *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision on Provisional Measures, 4 December 1985, Paragraphs 77–79.

28 ibid., Award, 6 January 1988, Paragraph 41.

29 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings, 8 April 2015, Paragraph 68.

30 *Quiborax*, Award dated 16 September 2015, Paragraph 582–583.

31 *Burlington*, Decision on Liability, 14 December 2012, Paragraph 481.

32 *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009.

33 Tarcisio Gazzini and Robert Kolb, 'Provisional Measures in ICSID Arbitration from "Wonderland's Jurisprudence" to Informal Modification of Treaties', *The Law & Practice of International Courts and Tribunals*, Vol. 16, Issue 1, 2017, p. 171.

of resolving disputes in a binding way applies equally to tribunals dealing with investment treaty claims under the UNCITRAL Rules, although ultimately the question is governed by the treaty or other instrument containing the basis and terms of consent.

ii Are decisions on provisional measures awards?

The status of a decision on provisional measures may have some bearing on whether it is capable of being recognised and enforced; therefore, if it is an award, it is more likely to fall within regimes for enforcement under the ICSID Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

There are two reasons why a decision on provisional measures by an ICSID tribunal may not be an award: (1) it is temporary by nature and without the requisite characteristic of finality;[34] or (2) only 'pecuniary obligations' are stated to be enforceable under Article 54 of the ICSID Convention. Most provisional measures do not involve the imposition of pecuniary obligations.

The lack of finality of a decision on provisional measures is also likely to be a barrier to enforcement under the New York Convention. The position may well be different in respect of jurisdictions that have adopted the interim measures regime under the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).

iii National law examples regarding enforcement of provisional measures

In scrutinising how domestic courts deliberate over the enforceability of orders on provisional measures issued by ICSID tribunals, two judgments in the English courts of *Albania v. Franseco Becchetti* and *Romania v. Bodgan-Alexander Adamescu* may be contrasted.[35] The court in *Becchetti* recognised the provisional measures issued by the ICSID tribunal and stayed the extradition proceedings against the claimants, whereas the court in *Adamescu* held that the provisional measures were unenforceable.[36]

The *Becchetti* judgment concerned the ICSID decision in *Hydro and others v. Albania*, which recommended provisional measures that the respondent, Albania, suspend criminal and extradition proceedings against two of the six claimants in the ICSID proceedings.[37] When Albania sought the claimants' extradition from the United Kingdom, the claimants relied on the order for provisional measures to request the arrest warrant's withdrawal. [38]

The court ordered that the extradition proceedings be stayed. This was largely on the basis that Albania accepted that it was bound by the ICSID decision on provisional measures.[39]

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34 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 54(1), which requires Member States to recognise an award 'as if it were a final judgment of a court in that State'.

35 Emilie Gonin, 'How Effective are ICSID Provisional Measures at Suspending Criminal Proceedings before Domestic Courts: The English Example?', Kluwer Arbitration Blog (web blog), 30 September 2017, https://arbitrationblog.kluwerarbitration.com/2017/09/30/effective-icsid-provisional-measures-suspending-criminal-proceedings-domestic-courts-english-example (accessed 15 May 2023).

36 ibid.

37 *Hydro Srl, Costruzioni Srl, Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016 (*Hydro*), Paragraph 5.1.

38 *Albania v. Francesco Becchetti and Mauro de Renzis*, Westminster Magistrates Court, 20 May 2016, Paragraph 8.

39 ibid., Paragraphs 43 and 54.

The court also found that Albania had a discretion under Albanian law to withdraw the arrest warrant.[40] In the circumstances, no real conflict arose between domestic and international law, so the extradition proceedings were stayed.

While superficially similar, the decision in *Adamescu* was made in a very different legal setting. In *Adamescu*, the ICSID tribunal had recommended provisional measures against Romania to the effect that it should withdraw a European arrest warrant (EAW) issued against the officer, key representative and witness of the claimant, Mr Adamescu, then resident in the United Kingdom.[41] Both the United Kingdom and Romania were members of the European Union at the time, so the EAW was directly applicable under British law. Additionally, Romania did not accept that it was appropriate for the ICSID tribunal to have issued provisional measures in respect of ongoing domestic criminal proceedings.[42] Other distinctions were said to be that Mr Adamescu was not a party in the arbitration and that Romania had commenced its extradition proceedings prior to the ICSID proceedings.[43] The court held that the ICSID decision on provisional measures was not binding on it[44] and that (after taking into account other relevant factors) the stay application was dismissed.

The way in which the ICSID regime interacts with domestic law (and EU law) is likely to have a significant bearing on the extent to which it is binding. Domestic courts subject to a monist regime are more likely to find ICSID decisions on provisional measures directly applicable and binding under international law (and, therefore, domestic law) of their own force. Domestic courts in a dualist regime are less likely to come to that conclusion, since ICSID decisions (short of awards) do not carry force of themselves, at least insofar as they relate to a third state that is not a party to the dispute. The ICSID Convention is silent on the enforceability of decisions on provisional measures, and there is unlikely to be a domestic law provision that renders those decisions enforceable under domestic law.

IV CONSIDERATIONS RELEVANT TO ANY PROPOSALS FOR REFORM

Even though the preponderance of opinion is that provisional measures are binding at the level of international law, what is lacking is an international enforcement mechanism that ensures adherence to those measures. It is not clear the extent to which provisional measures are voluntarily adhered to. The divergent outcomes in *Beccheti* and *Adamescu* – both decisions within the same domestic jurisdiction – demonstrate this highly unsatisfactory state of affairs. Neither decision contained much detailed analysis of the role or place of ICSID decisions on provisional measures under international law (or UK law); much depended on concessions made or not made by the respondent-state that was resisting the stay application. Neither judgment appears to have progressed further in the UK appellate hierarchy.

There, therefore, is a real risk that the party against which provisional measures are issued – usually the respondent-state – would succeed in circumventing the entire arbitral

40 ibid., Paragraphs 46–47.

41 *Nova Group Investments, BV v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 (Decision on Claimant's Request for Provisional Measures), 29 March 2017, Paragraph 365(a).

42 *Romania v. Bogdan-Alexander Adamescu*, Westminster Magistrates Court, 23 August 2017, Paragraph 45.

43 ibid., Paragraph 86.

44 ibid., Paragraph 94 et seq.

process simply by ignoring provisional measures ordered against it. That might well defeat the purpose of obtaining provisional measures in the first place and prejudices the international rules-based order of which the international investment dispute system forms a part.

This issue is particularly significant in circumstances where there is no concurrent jurisdiction with domestic courts to order provisional measures,[45] or where the conduct of those domestic courts is expressly in issue in the arbitration, such that the prospects of obtaining relief from that court might be expected to be slim.

Any reform of the present system must carefully take into account at least the following considerations.

i State sovereignty

The fact that a decision by a tribunal to issue provisional measures risks interfering with state sovereignty in circumstances where jurisdiction often has not been established. The legal basis and legitimacy of rulings of an investment arbitration tribunal is premised on that tribunal having jurisdiction pursuant to an investment treaty entered into between two or more states; in other words, it is the consent, embodied in the treaty, that gives a tribunal the authority to decide a particular dispute. Under the principle of *Kompetenz-Kompetenz*, where that authority to decide is itself in dispute, it is for the tribunal (at least in the first instance) to decide whether it has jurisdiction.

A request for provisional measures, however, can be brought at any time during the course of the arbitration. Very often, it is made before the tribunal has decided whether it has jurisdiction, including where objections are made to jurisdiction on the basis of 'abuse of rights' and denial of benefits clauses.

It is often not practical to bring forward a decision on the question of jurisdiction in light of the urgent circumstances that are alleged to give rise to the need for provisional measures. Tribunals, therefore, are faced with the invidious choice of issuing provisional measures and risking a situation where it might later decide that it never had jurisdiction to do so, or not issuing provisional measures with the consequence that a party's substantive rights, or the arbitral process more generally, are effectively defeated.

This aspect brings to bear, in acute fashion, the ongoing and evolving debate on legitimacy in investment arbitration.

When deciding requests for provisional measures, the balance struck by tribunals to date has been to decide jurisdiction to the prima facie standard, in the sense of not being obviously outside the tribunal's competence. Without entering the debate regarding whether that threshold is appropriately struck, it might be said that the present, relatively low threshold by which tribunals are invariably satisfied of their jurisdiction to issue provisional measures tends against the creation of an internationally recognised system for enforcement or automatic execution of those provisional measures. It might also be said that the seriousness of ordering provisional measures might justify a more detailed assessment of the jurisdiction question. On the other hand, applicants are required to satisfy the other principal factors (urgency, necessity and proportionality) to a much stricter standard.

It might be said that this balance sufficiently takes into account the impact on state sovereignty. There is a rough equivalence between the proportion of requests for provisional

45 See the 2010 UNCITRAL Arbitration Rules, Article 26(9) and the 1976 UNCITRAL Arbitration Rules, Article 26(3). The availability of interim relief in domestic courts is also frequently addressed in the relevant treaty.

measures sought by a claimant in investment arbitration disputes that were granted in full or in part (39.5 per cent of cases)[46] and the proportion of ICSID claims that have been upheld on the merits in full or in part (48 per cent of cases).[47]

The impact of improving the enforceability of decisions on provisional measures on the present balance between investors and states must, therefore, be carefully considered in the context of any proposals for reform.

ii Principle and practicality

There are considerations of principle and practicality arising out of the automatic enforcement of non-pecuniary provisional measures.

Regarding principle, it might be said that an incongruity arises if a non-pecuniary provisional measure can be enforced, while a non-pecuniary final award cannot be enforced under Article 54 of the ICSID Convention.[48] There might well be a broader principle (favoured traditionally by common law jurisdictions in the private international law context[49]) generally confining recognition to pecuniary awards only. Conversely, it might be said that there is a need to enforce a non-pecuniary provisional measure, especially where that measure is directed to protecting an investor's substantive treaty rights or the integrity of the arbitral process. This may require a broader inquiry to be undertaken into the enforceability more generally of non-pecuniary decisions, whether they be decisions on provisional measures or final awards (or something in between).

It might also be said that the non-final nature of provisional measures – *a fortiori* where the measures are issued before any final determination by the tribunal of its jurisdiction – tends against its enforceability. Even in Canada (which has expanded the traditional common law rule to permit recognition of both pecuniary and non-pecuniary foreign judgments) there is a requirement for the foreign judgment sought to be recognised to be final in nature before it will be enforced. The common law rules for the enforcement of foreign judgments arise in a very different context from investment treaty arbitrations, with its focus on mitigating sovereign risk and encouraging private international investment.

As a matter of practicality, there may be difficulties in enforcing many common types of provisional measures. At one level, there is the practical difficulty of converting provisional measures issued by an investment arbitration tribunal into a domestic law remedy capable of enforcement against the respondent-state; this, however, ought not to be insurmountable, in principle.[50] A more macro-level difficulty involves the respondent-state having sufficient systems in place to ensure that provisional measures are capable of automatic enforcement by one arm of the state against another arm of the state. These difficulties are even more acute in federal constitutional structures, where investment treaty claims are based on the conduct at

46 Goldberg, Kryvoi and Philippov, p. 18.

47 ICSID, *The ICSID Caseload – Statistics*, Issue 2023-1, p. 14.

48 For a discussion of the drafting history of Article 54, see Christoph H Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration', *Arbitration International*, Vol. 20, Issue 4, 2004, p. 326.

49 *Pro-Swing Inc v. Elta Golf Inc* [2006] 2 SCR 612.

50 The three most requested types of provisional measures are a request to refrain from aggravating the dispute, a stay of parallel proceedings in the respondent-state's courts and the preservation of investments or the status quo. See Goldberg, Kryvoi and Philippov p. 20.

the subsidiary level of government. That requires not just independence between those arms of government, but also acceptance of the principle that the ruling of an investment arbitral tribunal be respected and enforced, potentially in preference to domestic law.

Finally, in practical terms, there are, in any event, very limited ways in which a non-pecuniary provisional measure could be enforced against a sovereign-state. Whereas there may be scope for the execution of a pecuniary award against the assets of a sovereign state (subject to principles of state immunity), no recourse of a similar nature is available in relation to the enforcement of a non-pecuniary provisional measure. Moral, diplomatic and international legal opprobrium might be brought to bear against a respondent-state that fails to comply with provisional measures ordered against it; however, that is the case regardless of whether provisional measures are enforceable.

iii Domestic criminal proceedings

There are special considerations that relate to provisional measures with respect to domestic criminal proceedings.

A respondent-state might seek to exploit its dual role as a sovereign, and a party, to an arbitration. It might, for example, use its domestic law enforcement processes to improperly gather evidence or to intimidate or threaten witnesses and employees of the claimant-investor to frustrate the arbitration.[51] Consequently, common types of provisional measures that investors have sought for an investment tribunal to recommend are stays of criminal investigations until the finalisation of the arbitration,[52] cease and desist,[53] withdrawal of state requests for extradition[54] and state-issued arrest warrants.[55]

To date, tribunals have consistently indicated a reluctance to interfere with domestic criminal investigations;[56] only in exceptional circumstances have tribunals intervened. Applicants must, therefore, overcome a particularly 'high threshold' for provisional measures to be granted.[57] In *Tokios Tokelés v. Ukraine*, the first case to grant provisional measures from continuing domestic criminal proceedings, the tribunal emphasised the importance that the

51 Henry G Burnett and Jessica Beess und Chrostin, 'Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings', *Maryland Journal of International Law*, Vol. 30, Issue 1, 2015, p. 32.

52 *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Provisional Measures, 30 April 2015 (*Gavrilovic*), Paragraph 29; *Hydro*, Paragraph 1.5, *Quiborax*, Decision on Provisional Measures, 26 February 2010, Paragraph 1.

53 *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016 (*Teinver*), Paragraph 111.

54 *Hydro*, Paragraph 1.5; *Nova Group Investments, BV v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 – Decision on Claimant's Request for Provisional Measures, 29 March 2017, Paragraph 232.

55 *Hydro*, Paragraph 1.5.

56 *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007 (*City Oriente*), Paragraphs 61–67.

57 *Teinver*, Paragraph 185; *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, Paragraph 85; *Gavrilovic*, Paragraph 211; *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Procedural Order No. 6 (Decision on the Claimant's Application for Interim Measures), 19 December 2019, Paragraph 51.

measures be both necessary and urgent in the circumstances.[58] In *Quiborax v. Bolivia* and *Lao Holdings v. Laos* in staying criminal proceedings, the tribunals stated that (1) there must be a 'strong linkage' between the criminal proceedings and the legal dispute before arbitration and (2) the situation would threaten the procedural integrity of the arbitration.[59] The tribunal in *Quiborax* was satisfied that the crimes at issue were directly related to the arbitration and that the criminal proceedings appeared to target the claimants because they had initiated the arbitration, given that formal charges barred persons from freely testifying in arbitration.[60]

Tribunals must, therefore, weigh the legitimate right, duty and interest of a respondent-state in investigating, pursuing and prosecuting the commission of crimes[61] against the impact of that pursuit on the arbitral process itself.[62] Different tribunals have come to different conclusions on where that balance should be struck. Overall, however, tribunals remain 'highly deferential' to the state's rights.[63]

Any mechanism for the enforcement of provisional measures must, therefore, take into account the special characteristics associated with a state's prerogative to pursue domestic criminal investigations and proceedings insofar as they do not risk the integrity of the arbitral process itself.

V OPTIONS FOR REFORM

Any model for reform would likely need to be bespoke and take into account at least the considerations in Part IV; however, it may be useful to consider the following options as a starting point for discussion, drawn from the existing regime or from related contexts.

Within the ICSID regime, the most straightforward way to permit enforceability of decisions on provisional measures would be to amend the ICSID Convention. That could be achieved through the amendment of Articles 53 and 54 to encompass provisional measures, whether by adding a reference to 'provisional measures' or by amending the definition of an 'award'. This would also need to address the problem of finality of awards and the enforceability of non-pecuniary obligations more generally.

The regime could be fortified through a mechanism for the international monitoring of provisional measures ordered, as adopted by the International Court of Justice in 2020;[64] however, there may be significant practical obstacles to this course, in the absence of a standing international investment court.

58 *Tokios Tokelés v. Ukraine*, Procedural Order No. 3, 18 January 2005, Paragraphs 2 and 8. See also *City Oriente*, Paragraph 54.

59 *Quiborax*, Decision on Provisional Measures, 26 February 2010, Paragraphs 113, 117, 118, 121 and 148; *Lao Holdings NV v. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Paragraphs 30 and 37.

60 *Quiborax*, Decision on Provisional Measures, 26 February 2010, Paragraph 121.

61 ibid., Paragraphs 117 and 123; *Abaclat and others (formerly Giovanna A Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 13, 27 September 2012, Paragraph 39; *Caratube*, Paragraph 136; *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Procedural Order No 14, 22 December 2014, Paragraph 77.

62 *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, Paragraph 79.

63 Burnett and Beess und Chrostin, p. 51.

64 International Court of Justice, Resolution concerning the Internal Judicial Practice of the Court, Article 19, adopted on 12 April 1976.

Regarding decisions on provisional measures outside the ICSID regime, the most straightforward way would be to amend the New York Convention so that the reference to 'arbitral awards' in Article 1(1) includes provisional measures. That would effect a significant change to the generally accepted view that arbitral awards must have the requisite degree of finality. The implications of that change in respect of other kinds of awards outside the investment arbitration sphere would need to be considered.

Alternatively, to the extent that the decisions are interim measures within the meaning of Article 17 of the 2006 amendments to the Model Law, the regime for the recognition and enforcement of interim measures in Articles 17H and 17I can already be invoked in jurisdictions that have adopted those provisions of the Model Law; however, to date the adoption of those provisions has not been widespread.[65]

Finally, domestic courts can potentially assist further in supporting the investment arbitration process. This is already the case in many institutional rules.[66] Investment treaties also sometimes allow national courts to order interim measures (or at least allow parties to elect to invoke the jurisdiction of national courts to order interim measures prior to the tribunal being constituted), although interesting questions may arise regarding whether those measures are permissible or appropriate in support of a prospective investment arbitration.

Domestic courts are not expressly provided for in the ICSID regime. Indeed, the English High Court in *ETI Euro Telecom International NV v. Bolivia*[67] considered that the English courts did not have jurisdiction to grant a freezing injunction in support of ICSID arbitration in circumstances where the parties had not consented. This could be remedied directly through domestic law or (depending on the monist or dualist nature of the jurisdiction) by treaty.

VI CONCLUSION

Provisional measures serve a critically important purpose of protecting and preserving a party's rights during an investment treaty dispute; however, there remain real questions (as yet unresolved) regarding their legitimacy, especially when sought prior to a decision on jurisdiction. The other considerations arising out of interference with state sovereignty would seem to be less significant as long as jurisdiction is established. If these considerations can be overcome, there would appear to be good reason to improve the enforceability of any provisional measures made. In these circumstances, we have outlined several possibilities for reform to provoke discussion and comment.

65 For a list of jurisdictions that have adopted the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration, see UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006', https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed 15 May 2023).

66 For example, Article 26(9) of the UNCITRAL Rules provides: 'A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.'

67 *ETI Euro Telecom v. Bolivia* [2008] EWHC (Comm) 1689; [2009] 1 WLR 665 at [102]–[109] per Lawrence Collins LJ.