

## Deciding The Provisional Measures Regarding the Suspension of Criminal Procedure by International Centre for Settlement of Investment Disputes (ICSID)<sup>(\*)</sup>



*Uluslararası Yatırım Anlaşmazlıkları Çözüm Merkezi'nin (ICSID) Ceza Muhakemesinin Durdurulmasıyla İlgili İhtiyati Tedbir Kararı Vermesi*

**Murat BALCI**



Professor Doctor

*Fatih Sultan Mehmet Vakıf University Faculty of Law  
Department of Criminal Law and Criminal Procedure Law*

**Hüseyin AYDIN**



Associate Professor Doctor

*Fatih Sultan Mehmet Vakıf University Faculty of Law  
Department of Criminal Law and Criminal Procedure Law*

**Kerim ÇAKIR<sup>(\*\*)</sup>**



Associate Professor Doctor

*Marmara University Faculty of Law  
Department of Criminal Law and Criminal Procedure Law*

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*ICSID,  
Arbitration,  
Criminal Proceedings,  
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### Abstract

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereafter referred to as the Convention), as well as the International Centre for Settlement of Investment Disputes (ICSID) was established within the framework of the Convention, aims to resolve disputes encountered in international investments in a prompt and facilitated manner under an independent credible judicial mechanism. ICSID tribunals can order provisional measures in a dispute presented before them to protect the parties' mutual rights as mentioned in Article 47 of the Convention. The *raison d'être* for these measures is to ensure the integrity of the proceedings and exclusivity of the ICSID arbitration by preserving the *status quo* and preventing aggravation of the dispute. However, no explicit statement occurs in the Convention which suggests that the possibility of rendering a decision regarding provisional measures against a national criminal proceeding. Criminal proceedings are perhaps the most indisputable component of state sovereignty. Hence, the tribunals acknowledge a high threshold shall be required to justify an intervention in national criminal proceedings. Therefore, any intervention related to criminal proceedings that conflict with the sovereignty of a state authority should be evaluated case by case and kept at a minimum.

In this context, the current paper will address the provisional measures that are orderable by ICSID tribunals, the impact these measures have on pending criminal proceedings in domestic law. ICSID's authority to impose sanctions on state parties if they do not comply with the measures in relation to the criminal proceedings. In addition, the article will evaluate requests for provisional

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<sup>(\*\*)</sup> Sorumlu Yazar.

measures to comprehend whether or not they intervene in the sovereign authority of a state party. We should also point out that, arbitration is a multidisciplinary subject, it has connections with International law, Constitution and other legal disciplines. However, the issue will only be handled within the scope of ICSID and criminal procedure.

### Anahtar Kelimeler

ICSID,  
Tahkim,  
Cezai İşlem,  
İhtiyati Tedbir,  
Egemenlik.

### Öz

Uluslararası uyuşmazlıklarda yaşanan artış geleneksel çözüm yollarına kıyasla uygulamada sağlanan kolaylıklar sebebiyle yeni uyuşmazlık çözüm yollarının önemini artırmıştır. Türkiye'nin 1987'de imzaladığı "Devletler ve Diğer Devletlerin Uyrıkları arasındaki Yatırım Anlaşmazlıklarının Çözümü için Sözleşme" (*Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*) ve bu sözleşme esasları çerçevesinde kurulan Uluslararası Yatırım Anlaşmazlıkları Çözüm Merkezi (*International Centre for Settlement of Investment Disputes-ICSID*) uluslararası yatırımlarda karşılaşılan uyuşmazlıkların bağımsız ve güvenilir bir yargı alanında, kolay ve hızlı bir şekilde çözülmesini amaçlamaktadır. Sözleşmenin 47'nci maddesinde belirtildiği üzere ICSID hakem heyeti tarafların karşılıklı haklarını korumak için uyuşmazlıkla ilgili ihtiyati tedbirlere başvurabilir. Bu tedbirlerin özü, mevcut durumu muhafaza etmek ve uyuşmazlığın ağırlaştırılmasını engellemek suretiyle yargılamanın bütünlüğünü ve ICSID tahkiminin münhasırlığını korumaktır. Buna karşın cezai işlemlere ilişkin ihtiyati tedbir kararı verilebileceğiyle ilgili Sözleşmede net bir ifade bulunmamaktadır. Cezai işlemler, Devletin egemenliğinin en tartışılmaz kısmını oluşturur. Hakem heyeti, cezai işlemlere müdahale için yüksek bir eşğin gerektiğini kabul etmektedir. Bununla beraber, devletin egemenlik yetkisiyle çatışan, cezai işlemlere ilişkin bu tür müdahalelerin ayrıca değerlendirilmesi ve asgari düzeyde tutulması gerekir.

Bu kapsamda çalışmada, ICSID tarafından alınabilecek ihtiyati tedbirler, bu tedbirlerin iç hukukta derdest olan ceza yargılamalarına etkisi ve cezai işlemlerle ilgili tedbir taleplerinin yerine getirilmemesi halinde ICSID'in taraf devletlere yatırım uygulayıp uygulama(ya)mayacağı izah edilecektir. Ayrıca ihtiyati tedbir taleplerinin taraf devletin egemenlik yetkisine müdahale niteliği taşıyıp taşımadığı değerlendirilecektir. Ayrıca belirtelim ki tahkim multidisipliner bir konu olduğu için çalışmanın Uluslararası hukuk, Anayasa ve diğer hukuk disiplinleri ile de irtibatı vardır. Ancak konu sadece ICSID ve ceza muhakemesi kapsamında ele alınacaktır.

## INTRODUCTION

Globalization and developments in the global economy have increased the number of international investment projects that also give rise to international disputes. Dispute settlement methods for investments can be grouped under three categories: litigation, arbitration, and other alternative dispute settlement methods. Among these, arbitration appears to be a frequently preferred dispute resolution method. The fact that parties can choose applicable laws for their merits and the dispute resolution method as opposed to conventional resolution methods, as well as the advantages in recognition and enforcement procedure, promotes an investment friendly environment for investors that has made investment arbitration popular.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, also known as the Washington Convention and referred to henceforth as the Convention, entered into force in 1966, as well as the International Centre for Settlement of Investment Disputes (ICSID) that was established within the framework of the Convention and activated by the World Bank<sup>1</sup>. The Convention aims to resolve disputes encountered in international investments easily and promptly with a credible independent jurisdiction<sup>2</sup>. In addition, bilateral agreements are instruments that are formed to protect international investments. Most of the time, these agreements reference the Convention and ICSID, which demonstrates the ICSID framework to be mainly chosen for resolving interna-

<sup>1</sup> EXELBERT, Jeremy Marc: "Consistently Inconsistent: What Is a Qualifying Investment under Article 25 of the ICSID Convention and Why the Debate Must End", *Fordham Law Review*, 2016, Volume 85, Issue 3, p. 1243; DASKALOPOULOU, Katerina: "International Centre for Settlement of Investment Disputes (ICSID)", *Jus Mundi*, 2012 (<https://jusmundi.com/en/document/publication/en-icsid>, AD: 26.10.2022); TORUN, Yalçın: *Uluslararası Yatırım Uyuşmazlıklarının Çözüm Merkezi (ICSID) Hakem Kararlarına Karşı Hukuki Başvuru Yolları*, Seçkin Yayıncılık, Ankara, 2011, p. 15.

<sup>2</sup> EXELBERT, p. 1245; FRIEDLAND, Paul D.: "Provisional measures and ICSID arbitration", *Arbitration International*, 1986, Volume 2, Issue 4, p. 335.

tional investment disputes. The Convention specifies two methods (i.e., mediation and arbitration) for settling disputes. The function of the ICSID is to provide an opportunity for settlement between the contracting states and the citizens of states through these methods. The ICSID assures the proper application of arbitration rules and the completion of arbitration proceedings in accordance with its purpose<sup>3</sup>.

ICSID arbitration regulates arbitration procedures according to the ICSID Arbitration Rules. While parties can mutually agree on a different arbitration body, ICSID arbitration is nevertheless one of the most selected options. ICSID arbitration is more advantageous compared to others due to its procedures for facilitating the execution of decisions and being the prominent central arbitration body with extensive expertise in foreign investment disputes<sup>4</sup>. Moreover, the fact that arbitral decisions benefit from automatic recognition and enforcement in the signatory states also makes it one of most preferred options<sup>5</sup>.

ICSID arbitration can be applied to a dispute when the three conditions set forth in Article 25 of the Convention are satisfied. First of all, mutual written consent of the parties to arbitration should exist; the fact that the state is party to the Convention does not in itself mean that the state has consented to ICSID's jurisdiction. Secondly, the subject of dispute must be a legal investment. Lastly, the dispute must be between a state that is party to the Convention and an investor who is a national of another state<sup>6</sup>.

This paper focuses on the provisional measures an ICSID tribunal can decide and the extent of their impact on pending national criminal proceedings. In view of this, the article will first explain the provisional measures and their limits in ICSID proceedings. The article will then expand the discussion on the provisional measures regarding the suspension of criminal procedure during an ICSID proceeding. Afterward, the paper will discuss whether provisional measures regarding criminal proceedings are in contradiction with states' sovereign authority. Lastly, the article will explain the sanctions for non-compliance with provisional measures. It will mostly address arbitral awards to reveal how provisional measures regarding criminal proceedings are ordered and the reasons behind these decisions are from the perspective of the tribunals.

The tribunals can recommend provisional measures under ICSID<sup>7</sup> arbitration rules. Decisions related to provisional measures differs from a final decision due to their temporary nature and the competence of the tribunal who ordered the decision in the first place to annul or change it at any time<sup>8</sup>.

<sup>3</sup> KARAYEL, İsmail Emrah: *ICSID Tahkimi ve ICSID Tahkiminin Kötiye Kullanılması Bakımından Türkiye Örneği*, Adalet Yayınevi, Ankara, 2021, p. 107.

<sup>4</sup> KUĞUOĞLU, Dilşad / DEMİRKOL, Elit Meviza: "ICSID Tahkiminde Onay", *Türkiye Adalet Akademisi Dergisi*, 2018, Volume 9, No 34, p. 516.

<sup>5</sup> KUĞUOĞLU / DEMİRKOL, p. 516.

<sup>6</sup> EXELBERT, p. 1250.

<sup>7</sup> Article 47 of the Convention on "Provisional Measures":

*"(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:*

*(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;*

*(b) maintain or restore the status quo pending determination of the dispute; or*

*(c) preserve evidence that may be relevant to the resolution of the dispute.*

*(2) The following procedure shall apply:*

*(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;*

*(b) the Tribunal shall fix time limits for submissions on the request;*

*(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and*

*(d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.*

*(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including:*

Provisional measures lose their effectiveness once the decision is executed and are not considered *res judicata*<sup>9</sup>. In order to give a provisional measure decision, the following conditions must be reviewed first:

- The tribunal must have *prima facie* jurisdiction,
- The requested measure must intend to preserve the rights for which the protection was sought,
- The measure must be urgent, and
- The measure must be necessary for preserving the *status quo* or avoiding irreparable harm, damage, or prejudice<sup>10</sup>.

Firstly, whether an ICSID tribunal has *prima facie* jurisdictions over the dispute for which provisional measures have been requested should be investigated<sup>11</sup>. Urgency is another requirement for ordering a provisional measure (i.e., the request before an ICSID tribunal should be of the nature to such an extent that it cannot be delayed until the decision on the merits has been rendered)<sup>12</sup>. In fact, urgency can be deemed to exist if a legitimate concern is found where the rights for which the protection was sought by one of the parties could be seriously harmed or entirely destroyed by the opposing party of the dispute prior to the declaration of the final decision on its merits. Therefore, the provisional measures are designed to ensure the protection of the efficiency and integrity of the proceeding and to prevent the current dispute from aggravating<sup>13</sup>.

Another requirement to satisfy in order to have provisional measures in an ICSID investment arbitration proceeding is referred to as necessity. Provisional measures must be necessary for maintaining the *status quo* or avoiding any irreparable damage to current rights<sup>14</sup>. In other words, a request for provisional measures should be proportional to the damage the party is trying to avoid. The condition of necessity is fulfilled in most of the cases where the possible damage that might be incurred by one of the parties due to an unlawful act of the other party is not reparable. In the case *Burlington v. Ecuador*, the tribunal stated that provisional measures can be recommended in situations where investment activity is ongoing, where income potentials are at risk of being devastated, and where an obvious economically delicate situation exists that could make the claimant halt all operations<sup>15</sup>.

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(a) whether the measures are urgent and necessary; and

(b) the effect that the measures may have on each party.

(4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.

(5) A party shall promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request.

(7) A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties' consent to arbitration."

<sup>8</sup> ICSID Arbitration Rules, Article 39(3).

<sup>9</sup> ICSID, *Ioan Micula, Viorel Micula and Others v. Romania*, Case No: ARB/05/20, D. 11.11.2013, § 1307. See. SINCLAIR, Anthony C. / REPOUSIS, Odysseas G.: "An Overview of Provisional Measures in ICSID Proceedings", *ICSID Review*, 2017, Volume 32, Issue 2, p. 434, footnote 24; GAZZINI, Tarcisio / KOLB, Robert: "Provisional Measures in ICSID Arbitration from 'Wonderland's Jurisprudence' to Informal Modification of Treaties", *The Law and Practice of International Courts and Tribunals*, 2017, Volume 16, Issue 1, p. 161; WANG, Chao / ZHUOXIN, Lin: "An overview of Macao's new arbitration law: provisional measures and recognition of arbitral awards", *China-EU Law Journal*, 2023, Volume 8, Issue 1, p. 113.

<sup>10</sup> YEŞİLIRMAK, Ali: *Provisional Measures in International Commercial Arbitration*, Dissertation Thesis, Queen Mary College University of London, London, 2003, p. 235; SINCLAIR / REPOUSIS, p. 435; GALAGAN, Dmytro: *Provisional Measures in International Arbitration as a Response to Parallel Criminal Proceedings*, Master Thesis, University of Victoria, Victoria, 2019, p. 87.

<sup>11</sup> GAZZINI / KOLB, p. 162.

<sup>12</sup> GAZZINI / KOLB, p. 161; WANG / ZHUOXIN, p. 114.

<sup>13</sup> SINCLAIR / REPOUSIS, p. 434; GAZZINI / KOLB, p. 161.

<sup>14</sup> YEŞİLIRMAK, p. 239; SINCLAIR / REPOUSIS, p. 438; FRIEDLAND, p. 337.

<sup>15</sup> SINCLAIR / REPOUSIS, pp. 438, 439.

Once the parties to the arbitration have submitted a controversy related to the investment, they are obliged to refrain from aggravating or extending the dispute or undermining the execution of the award. In the case *Churchill Mining v. Indonesia*, the claimants sought an order from the arbitral panel to compel the respondent to return all documents and other materials the respondent's police had seized in a raid. However, an order regarding confidentiality of documents should not harm the integrity of the ICSID proceedings<sup>16</sup>. Tribunals found they had the power to recommend such measures with respect to criminal investigations, but only under the exceptional circumstances. The requested measures should correspond to the right to protection of the integrity of the arbitral proceedings<sup>17</sup>.

## I. ICSID PROCEEDINGS AND PROVISIONAL MEASURES REGARDING THE SUSPENSION OF CRIMINAL PROCEDURES

Article 47 of the Convention contains no explicit statement that clarifies whether the tribunal can recommend provisional measures with respect to criminal proceedings<sup>18</sup>. The aim of provisional measures is to protect one of the parties. By approving the Convention, state parties accept the arbitral tribunal's ability to order provisional measures under certain situations that are seen necessary, despite the reference to interfering with a sovereign power and executive functions of a state. However, this shouldn't be understood as if the state had provided a legitimate basis for provisional measures to such an extent that they had allowed for the suspension of the criminal proceedings. It instead implies that the independent and impartial national courts that have jurisdiction in criminal proceedings may cause irreparable damage through their decisions by undermining the performance of the final outcome of the arbitral proceedings. The state whose criminal proceedings are attempting to be suspended should be guaranteed with regard to the continuity of its criminal proceedings after the arbitration process. For example, by suspending criminal proceedings during the arbitration process, an accused may not be subjected to an international travel ban order, even though they normally would be had this been a normal course of national criminal proceedings. Given that no alternative mechanism exists in investment arbitration that would substitute for such an order, the accused may flee the country to undermine the outcomes of the domestic criminal proceeding by abusing the provisional measure as decided by the arbitral tribunal.

An arbitral tribunal's authority to recommend a provisional measure is limited to the measures that must be taken without delay to ensure due process with regard to the claims that had been made beforehand<sup>19</sup>. This is particularly the case if the people who have to provide evidence related to the dispute are extradited and therefore prevented from providing evidence. A similar situation is when a witness or a representative of one party is intimidated by a criminal proceeding initiated against a close family member in order to make them withdraw their statements or to discourage them from properly providing evidence. However, in order to successfully argue that a potential act of intimidation exists, these threats should be deemed reasonably imminent. Provisional measures are meant to preserve the party who requested the provisional measures from a reasonably imminent harm, not from a speculative or hypothetical harm that may emerge based on uncertain conditions<sup>20</sup>. In order for the tribunal to recommend a decision on this issue, reasonable concern should exist that necessitates a

<sup>16</sup> ICSID, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, Case No: ARB/12/14 and 12/40, D. 22.12.2014, § 10-29. Also see ICSID, *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, Case No: ARB/14/14, D. 23.06.2015, § 48-58, 62. See SINCLAIR / REPOUSIS, p. 440, footnote 89.

<sup>17</sup> Some of the tribunals stated that the right of non-aggravation of the dispute also means that the tribunal have the authority to recommend provisional measures to prevent the parties to from taking measures that could have an adverse effect on the making or executing of the final decision. ICSID, *Tokios Tokelés v. Ukraine*, Case No: ARB/02/18, D. 18.01.2005, § 2; ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, Case No: ARB/03/24, D. 06.09.2005, § 38. See. SINCLAIR / REPOUSIS, p. 441, footnote 99.

<sup>18</sup> GALAGAN, p. 175.

<sup>19</sup> ICSID, *Ipek Investment Limited v. Republic of Türkiye*, Case No: ARB/18/18, D. 19.09.2019, § 41.

<sup>20</sup> ICSID, *Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador Respondent*, Case No: Arb/06/11, D. 17.08.2007, § 89.



serious intervention<sup>21</sup>. The tribunal should refrain from recommending a provisional measure if the concerns are merely speculative in nature.

The parties can request the arbitral tribunal to recommend a provisional measure that includes the suspension of an ongoing criminal proceeding or an obligation to refrain from initiating a new one. The party's request for a provisional measure to suspend criminal proceedings would be based on reasons such as preserving the integrity of the arbitration and avoiding any possible disruption to the *status quo*<sup>22</sup>. Restrictions to the current or potential witnesses' statements or using the criminal proceedings as a retaliation instrument can exemplify the methods that are used for impeding the arbitration process<sup>23</sup>. If concrete instances of intimidation, harassment, or abusive behavior are absent, solely depriving evidence from potential witnesses is insufficient for justifying provisional measures. For an example in this context, the case of *Quiborax v. the Plurinational State of Bolivia* stated that concrete intimidation had occurred when one of the witnesses for the claimant had been prevented in the arbitrations from giving a statement and testifying in favor of the claimant<sup>24</sup>.

The concern that a party's ability to present its case fairly will be adversely affected is the motivation behind the request for suspending criminal proceedings. Hence, the arbitral tribunal can request the suspension of criminal proceedings. A party to the arbitration being detained or convicted in a country may significantly affect the course of proceedings. The tribunal has stated that a person may be deemed under some situations to have been prevented from presenting their evidence or from the right to have a fair trial because of domestic criminal proceedings against them. Again, even though people have volunteered to give statements before the arbitrators or evidence exists that can be presented through witnesses, maintaining criminal charges on these people (e.g., a sword of Damocles) may affect the arbitration process according to the tribunal. The continuation of criminal proceedings while arbitration is still in progress may have an adverse effect on people who have critical roles in the arbitration, such as the attorney representing the party or other important witnesses<sup>25</sup>.

Issuing an indictment against an attorney or a witness to a party of the arbitration raises concerns regarding the ability to profit from legal assistance. In the case *Ipek Investment Limited v. Türkiye*, issuing another indictment against the lawyers who represented the Koza Group was stated to be able to cause serious concerns regarding the claimant's ability to access effective legal assistance in Türkiye<sup>26</sup>.

The principle of equality of arms would be jeopardized if a State party takes the advantage of the instruments of criminal law while the arbitration process is pending<sup>27</sup>. The ICSID tribunal became aware of the respondents possibly gaining an unfair advantage in the arbitral proceedings through evidence they would have gathered due to the investigation techniques that were enforceable under the Indonesian Criminal Procedural Law; this would have allowed the respondents to circumvent the appropriate procedures for producing and obtaining documents during arbitration. Indonesia undeniably could have requested to present the evidence obtained through the criminal investigation file. In accordance with Article 39(2) of the Arbitration Rules, the tribunal at its own initiative may recommend provisional measures other than those specified in the application. In order to prevent the above-mentioned risk, the tribunal was of the opinion that the respondent should have sought the permission from the tribunal before presenting the evidence obtained from a domestic court through a criminal investigation for the alleged forgery charge. This view implies that any differences that amount to an

<sup>21</sup> *Ipek Investment Limited v. Republic of Türkiye*, § 46.

<sup>22</sup> GAZZINI / KOLB, p. 161.

<sup>23</sup> *Ipek Investment Limited v. Republic of Türkiye*, § 51.

<sup>24</sup> *Churchill Mining v. Republic of Indonesia*, § 87.

<sup>25</sup> *Churchill Mining v. Republic of Indonesia*, § 87.

<sup>26</sup> *Ipek Investment Limited v. Republic of Türkiye*, § 65.

<sup>27</sup> *Ipek Investment Limited v. Republic of Türkiye*, § 67.

unfair advantage are to be prevented to level both sides of the playing field<sup>28</sup>, because continuing the criminal proceeding in tandem with the arbitration process may cause irreparable damage.

In the case of an ongoing criminal proceeding against one of the parties to arbitration proceedings, any conduct that could directly or indirectly affect the legal and physical integrity of the parties should be avoided. As mentioned in *Ipek Investment Limited v. Türkiye*, States make an official commitment to the legal integrity of Article 22 by signing the Convention. Therefore, legal protections need to be provided for the parties, witnesses, and representatives to arbitration proceedings in terms of the activities they carry out while fulfilling their duties<sup>29</sup>. Providing appropriate and humanitarian conditions are necessary, such as allowing parties to work with witnesses in a prison or with their lawyers in private and giving them the opportunity to present witness statements for arbitration. When no threat exists to physical integrity, an examination is made in terms of legal integrity to ensure the party's ability to prepare and present the evidence on matters relevant to the arbitration.

The right to preserve the integrity of the proceedings should also be evaluated while identifying the limit of the ICSID proceedings and ICSID's recommendations regarding provisional measures. Protections in this area are often requested against domestic criminal cases. The principle underlying these requests is the protection of the integrity of the proceedings; it is not to aggravate or exacerbate the dispute<sup>30</sup>. The provisional measures that are recommended to prevent aggravating a dispute are always based on how the parties approach the dispute (i.e., whether parties request the necessary measures to preserve or restore peace between them, or if one party initiates or conducts parallel proceedings such as in domestic courts to avoid international proceedings)<sup>31</sup>. ICSID tribunals have clearly recognized that respondent states have the sovereign right to conduct criminal investigations and exceptional circumstances are usually required to justify provisional measures for suspending criminal proceedings. Such exceptional circumstances emerge when the integrity of the arbitration proceedings and the principle of due process are in peril<sup>32</sup>. For example, in *Convial Callao v. Peru*, the tribunal ordered the respondent to refrain from taking any action that could interfere with the claimant's employees' participation in the arbitral proceedings until the final award had been rendered<sup>33</sup>. According to the tribunal, preventing one of the claimant's witnesses from giving statements in front of the arbitral tribunal due to domestic criminal proceedings similarly caused interference in the integrity of the proceedings<sup>34</sup>. Therefore, the tribunal recommended the respondent suspend certain criminal proceedings against the claimants, as these were causing serious concern with regard to the procedural integrity of the proceedings<sup>35</sup>. However, criminal proceedings are distinct from criminal investigations, and the decision was made not to grant a request for suspending such investigations in the particular circumstances of that case. This paper must emphasize that the mere presence of a criminal investigation without a demonstration of intimidation and malfeasance does not justify provisional measures in and of itself. In relation to this, the tribunal in the case *Churchill v. Indonesia* underlined that being a suspect in a criminal investigation does not provide grounds for relying on such as being intimidation, harassment, or malfeasance so as to justify provisional measures<sup>36</sup>. Conducting searches and seizing evidence on the spot is common practice in criminal law systems regarding a dispute for the purposes of a criminal investigation. The tribunal evaluated whether there was a concrete fact showing one of the parties to have been exposed to undesirable treat-

<sup>28</sup> *Churchill Mining v. Republic of Indonesia*, § 81, 82.

<sup>29</sup> *Ipek Investment Limited v. Republic of Türkiye*, § 74.

<sup>30</sup> GALAGAN, p. 176.

<sup>31</sup> *Occidental v. The Republic of Ecuador*, § 97.

<sup>32</sup> *EuroGas v. Slovak Republic*, § 77, 82. See SINCLAIR / REPOUSIS, p. 443, footnote 121.

<sup>33</sup> SINCLAIR / REPOUSIS, p. 443.

<sup>34</sup> SINCLAIR / REPOUSIS, p. 443.

<sup>35</sup> SINCLAIR / REPOUSIS, p. 443; GALAGAN, p. 156.

<sup>36</sup> SINCLAIR / REPOUSIS, p. 443.

ment such as intolerable pressure, intimidation, abuse, ill-treatment, harassment, or threats<sup>37</sup>. Again, the tribunal in the case *Italba Corporation v. Oriental Republic of Uruguay*<sup>38</sup> stated that Uruguay had the right to investigate criminal activities that had been carried out in its own territory and that the claimant could not legitimately expect general immunity from Uruguay, which the ICSID tribunal could provide to witnesses in a criminal investigation there. According to the tribunal, Uruguay had to fulfil its commitment to respect the claimant's procedural rights; this includes the right to collect the evidence in Uruguay that would be subsequently presented before the tribunal. The tribunal inhibited Uruguay from taking any action to prevent witnesses from attending scheduled trials and giving their statements freely. Similarly, the tribunal ordered that the state should not have interfered with or recorded conversations between the claimant and their lawyer and obliged the respondents to instruct the police as well as all other security forces not to harm the claimants, their families, or their employees and to provide them full protection and security<sup>39</sup>. The tribunal was aware that the claimants had the right to present their case and the right to access the evidence through the potential witnesses. According to the tribunal, no indication was shown despite their findings that any of the claimants or potential witnesses had been intimidated or harassed<sup>40</sup>. The tribunal was of the view that the claimants were trying to assure their right to bring evidence through witness testimony. For this reason, they tried to protect the right to present their evidence and the potential witnesses properly, something that might be hindered by the criminal investigations against them. The tribunal mentioned that the claimants' attempts to protect their right to present evidence through potential witnesses did not turn this right into a hypothetical one<sup>41</sup>. The tribunal stated that no criminal proceedings had yet been initiated against the claimants, witnesses, or potential witnesses.

Within the framework of the provisional measures ordered in ICSID arbitration, the right to exclusivity of the proceedings under Article 26 of the Convention should be considered. This right relates to the exclusivity of ICSID proceedings and implies that the ICSID arbitration shall be the sole recourse for the dispute by excluding any other national or international judicial or administrative dispute settlement method. Criminal proceedings wouldn't necessarily jeopardize the exclusivity of the ICSID *per se*. However, criminal proceedings might be able to violate the right to preserve the *status quo* and integrity of the proceedings. In any case, preserving the exclusivity of the proceedings is limited to the parties to the dispute. The tribunal cannot deprive third parties from the right to take legal action<sup>42</sup>.

## II. ICSID PROCEEDINGS AND STATES' SOVEREIGN AUTHORITY

The issue of recommending provisional measures regarding criminal proceedings in arbitration proceedings is in conflict with states' sovereign authority. Criminal law and criminal procedural law have been firmly established as constituting the most obvious and inalienable component of state sovereignty<sup>43</sup>. The arbitral tribunal in the case of *Eurogas v. The Slovak Republic* underlined that the right and duty to conduct criminal procedures was a special privilege for all sovereign states and that only exceptional circumstances can justify provisional measures that involve interfering with criminal proceedings<sup>44</sup>. Case law of emphasizes the right and duty of conducting criminal investigations and pro-

<sup>37</sup> ICSID, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, Case No: ARB/12/40 and 12/14, D. 08.07.2014, § 108.

<sup>38</sup> ICSID, *Italba Corporation v. Oriental Republic of Uruguay*, Case No: ARB/16/9, D. 15.02.2017, § 118.

<sup>39</sup> ICSID, *Bernhard von Pezold and others v. Republic of Zimbabwe*, Case No: ARB/10/15, D. 6.11.2010; ICSID, *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v. Republic of Zimbabwe*, Case No: ARB/10/25, D. 03.04.2013. SINCLAIR / REPOUSIS, p. 446, footnote 150.

<sup>40</sup> *Eurogas v. Slovak Republic*, § 107.

<sup>41</sup> *Churchill v. Republic of Indonesia*, § 79.

<sup>42</sup> YEŞİLIRMAK, p. 45; SINCLAIR / REPOUSIS, p. 442.

<sup>43</sup> ICSID, *Hydro S.r.l. and Others v. Republic of Albania*, Case No: ARB/15/28, D. 03.03.2016, § 3.16.

<sup>44</sup> *Eurogas v. Slovak Republic*, § 77.



ceedings to be a privilege for every sovereign state. The tribunal ought to evaluate the proportionality of the request before recommending provisional measures. In particular, the tribunal must balance the damage the claimant would suffer as a result of the criminal proceedings with the damage the respondent would suffer were the prosecution to be suspended. Provisional measures requested by claimants shouldn't be aggravative, because criminal proceedings that are suspended, despite being claimed as proportionate, will continue after the ICSID proceeding finishes. In particular continuing to prosecute a crime from where it had been suspended after the arbitration process has concluded should be assured or at least taken into account. The arbitral tribunal should be pointed out as giving no guarantee that irreparable damage may occur in terms of carrying out a prosecution after the suspension of criminal proceedings.

Interfering with the sovereignty of a state should be specifically indicated as being beyond the tribunal's jurisdiction in a dispute. The jurisdiction of the arbitral tribunal is limited to the settlement of the dispute. Although the tribunal does have jurisdiction to take measures necessary for the arbitration process to work properly, it has no right to extend this authority to a far-reaching intervention in criminal proceedings. In *Eurogas v. the Slovak Republic*, the tribunal underscored that an "especially high threshold" must be reached before an ICSID tribunal can recommend provisional measures that may interfere in criminal proceedings, because the responsibility for and right to conduct such proceedings is a privilege for each sovereign state<sup>45</sup>. Unless the parties agree otherwise, both rules are expected to be applied to the dispute, and judicial activities that are elements of sovereignty should be conducted independently<sup>46</sup>. The tribunal's jurisdiction is generally based on an investment contract, not on public law<sup>47</sup>. The international protection granted to investors engaged in investment activities does not exempt them from criminal prosecution in spite of their titles as investors<sup>48</sup>.

The case of *Hydro v. Albania* accepted that the suspension of criminal proceedings as a provisional measure was an extraordinary remedy, and that the sovereignty of a state should not be violated unfairly. Along with this reason, factors such as the timing, certainty, and extent of the measures were critical in recommending these measures. *Hydro v. Albania* also discussed proportionality of provisional measures, stating that the tribunal should evaluate carefully the criteria for provisional measures<sup>49</sup>. The criminal proceedings could conceivably be suspended in order to ensure the integrity of the arbitration and preserve the parties' procedural rights. Obtaining evidence by circumventing the rules of arbitration and intimidating witnesses or lawyers exemplified situations that were deemed would restrain the progress of the arbitration<sup>50</sup>. In the case *Teinver v. The Argentine Republic*, proportionality was indicated within the necessity requirement analysis of the provisional measure<sup>51</sup>.

ICSID case law contains decisions that have evaluated states' sovereign authority regarding the suspension of criminal proceedings and the implementation of provisional measures. The case *Ipek Investment v. Türkiye* stated that the tribunal would not examine evidence related to the criminal pro-

<sup>45</sup> *Eurogas v. Slovak Republic*, § 82.

<sup>46</sup> YEŞİLOVA, Bilgehan: "Milletlerarası Tahkimin Hukuki Niteliği Üzerine Düşünceler ve Güncel Gelişmeler", *Türkiye Barolar Birliği Dergisi*, 2008, No 76, p. 87.

<sup>47</sup> KARAN, Hakan: "Milletlerarası Ticarî Tahkimin Hukukî Mahiyeti ve Bu Alandaki Kanunlaştırmalara Etkisi", *Prof. Dr. Mahmut Teyfik Birsel'e Armağan*, Dokuz Eylül Üniversitesi Yayınları, İzmir, 2001, p. 214.

<sup>48</sup> NAIM, Anees: "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", *Kluwer Arbitration Blog*, 2016 (<http://arbitrationblog.kluwerarbitration.com/2016/04/30/criminal-proceedings-and-provisional-measures-in-icsid-arbitrations-the-legitimate-exercise-of-a-states-police-powers-versus-the-ability-to-advance-claims-in-arbitration/>, AD: 26.09.2022).

<sup>49</sup> GALAGAN, p. 139.

<sup>50</sup> SINCLAIR / REPOUSIS, p. 443.

<sup>51</sup> NAIM, Anees: "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", *Kluwer Arbitration Blog*, 2016 (<http://arbitrationblog.kluwerarbitration.com/2016/04/30/criminal-proceedings-and-provisional-measures-in-icsid-arbitrations-the-legitimate-exercise-of-a-states-police-powers-versus-the-ability-to-advance-claims-in-arbitration/>, AD: 26.09.2022).

ceedings and given that the tribunal is not a criminal court, only the part of the allegations regarding the crime related to the arbitration proceedings would be subject to examination. However, the case stated that the tribunal would not address the charges against individuals; it instead would only address the consequences of these criminal proceedings that might hinder the fair conduct of the arbitration proceedings<sup>52</sup>.

The decision in *Burlington Resources v. Ecuador* rightfully stated the following:

*“In making this finding, the Tribunal understands Ecuador’s arguments about its duties to enforce its municipal law, in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties”*<sup>53</sup>.

In the case *Hydro v. Albania*, the claimant alleged that Albania had agreed to the tribunal’s ability to interfere with its sovereign rights by signing the Convention. According to the tribunal, the sovereign authority of party states that are bound by the Convention accrue certain consequences. In addition, the tribunal agreed with the respondent’s argument that suggested “The most powerful reasons must be given for the suspension of the investigation.”<sup>54</sup> For this reason, requesting provisional measures or the suspension of criminal proceedings that may cause serious consequences regarding criminal proceedings related to international crimes, such as establishing an organization for the purpose of committing a crime, financing terrorism, or committing crimes against the constitutional order, is not in accordance with the arbitration rules. In fact, provisional measures that are requested and recommended have been stated to be able to affect the respondent’s ability to conduct the criminal proceedings, whether in the present proceedings or in the near future. Even so, suspension does not end the criminal proceedings. The respondent implied the possibility of the claimant being able to dispose their property by abusing the suspension of the criminal proceedings. The tribunal stated difficulty in accepting that this could be a serious risk due to the investment being physically located in Albania. The balance of proportionality was struck in favor of protecting the claimant’s rights<sup>55</sup>.

In the case *Quiborax v. Bolivia*, Bolivia claimed that criminal proceedings didn’t negatively affect the claimant’s rights regarding the dispute under arbitration. However, the tribunal approved the claimant’s defense regarding the subject matter of the measure and their argument that suggested making a distinction to be unnecessary. The tribunal stated that the rights that are preserved by provisional measures are not limited to the subject matter of the dispute. Procedural rights such as preserving the *status quo* and non-aggravation of the dispute are also covered within the framework of these measures<sup>56</sup>. According to the court, the criterion regarding provisional measures has a relationship between the right to be protected by the measure and the dispute. While Bolivia has the sovereign authority to take actions against criminal activities that take place on its territory, the tribunal underlined that the criminal proceedings Bolivia would conduct must comply with the principle of good

<sup>52</sup> *Ipek Investment Limited v. Republic of Türkiye*, § 56, 59, 60.

<sup>53</sup> ICSID, *Burlington Resources Inc v. Republic of Ecuador*, Case No: ARB/08/5, D. 29.06.2009, § 66. Similarly, ICSID, *Quiborax v. Bolivia* decision; “The probable effect of criminal proceedings on the possible witnesses is especially considered.” In *Loa Holdings v. Lao* decision; “It is found that the criminal investigation targeted the subjects and people directly in the arbitration process which made claimant to be hindered to prepare and present her/his case in a serious way.” In *Hydro v. Albania* decision; “It is found that conducting the criminal proceedings against the most central person on the claimant’s side (which included extradition and possible imprisonment) raises serious concern over the procedural integrity of the arbitration proceedings... This measure was proportionate because the suspension of the criminal proceedings wouldn’t hinder the prosecution of it. It would just keep them on hold while they wait for the outcome of the arbitration.”. Was pointed out and showed the reason for provisional measures. In this way, the tribunal, requested to suspend the criminal proceedings in mentioned decisions.

<sup>54</sup> *Hydro v. Albania*, § 3.40.

<sup>55</sup> *Hydro v. Albania*, § 3.40.

<sup>56</sup> GALAGAN, p. 152.

faith<sup>57</sup>. Violation of the article 26 of the Convention occurs only when a claim or right that is the subject matter of proceedings is subjected to another parallel proceeding in another jurisdiction. In this case, the subject matter of the criminal proceeding (i.e., penalizing the act of forgery of the alleged document) and the subject matter of the current arbitration proceeding (i.e., financial compensation for the alleged breach of the investment agreement) did not overlap<sup>58</sup>.

The court's recommended measures regarding the criminal proceedings should be evaluated according to the answers to the questions of whether the criminal proceedings really were aggravating the dispute and whether it had changed the *status quo*. If Bolivia had a legal basis for criminal proceedings, the claimant should bear the consequences of being subjected to those proceedings<sup>59</sup>. The investors can be sheltered under international protection mechanisms; however, that does not mean that the claimant who is a suspect will be exempted from criminal proceedings<sup>60</sup>. Indeed, criminal proceedings can raise the possibility of a claimant being prevented from the right to present its case and from accessing written evidence as well as witnesses. However, in such cases, the claims need to be investigated with a case-by-case analysis<sup>61</sup>.

In the case *Quiborax v. Bolivia*, the examination was made with regard to the potential witnesses. Accordingly, those who were likely to testify in the arbitration (even though there wasn't so much pressure on them) were foreseen to perhaps be hesitant about taking part in the arbitration should Bolivia carry out criminal proceedings against them<sup>62</sup>. This situation was determined to threaten the procedural integrity of the arbitration<sup>63</sup>. As for the respondent party, Bolivia's commitment to cooperate was noted to provide no assurance that the people, who would have contributed to the arbitration proceeding as witnesses would be protected from undue pressure by enabling the claimant to participate in this arbitration. Therefore, the tribunal thought the ability to access the witnesses would improve if the criminal proceedings were suspended until the end of this arbitration or a revision of the decision<sup>64</sup>. In addition, the court determined a close relationship between the criminal cases in Bolivia and the arbitration and was convinced that other people who had been subjected to criminal proceedings had also been prosecuted because of their roles in arbitration<sup>65</sup>. Consequently, the court agreed that the requested measures regarding criminal proceedings were necessary in order to ensure the procedural integrity of the arbitration as a result of the issue of being able to access all evidence and witnesses<sup>66</sup>.

As mentioned in *Quiborax v. Bolivia*, although recommended measures can be foreseen regarding criminal proceedings in order to ensure procedural integrity, one shouldn't overlook that this situation interferes with state sovereignty. Therefore, when considering the necessity of minimal interference, applying other measures recommended for criminal proceedings besides suspension would be more appropriate in order to properly carry out the arbitration process<sup>67</sup>.

The tribunal in the case *Teinver v. The Argentine Republic* stated that the claimants had the right to be protected regarding the arbitration and that this situation could affect or threaten to affect

<sup>57</sup> ICSID, *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplu'n v. Plurinational State of Bolivia*, Case No: ARB/06/2, D. 26.02.2010, § 116-123.

<sup>58</sup> *Churchill Mining v. Republic of Indonesia*, § 86.

<sup>59</sup> *Quiborax v. Bolivia*, § 137,138.

<sup>60</sup> *Quiborax v. Bolivia*, § 164.

<sup>61</sup> *Quiborax v. Bolivia*, § 142.

<sup>62</sup> *Quiborax v. Bolivia*, § 146.

<sup>63</sup> *Quiborax v. Bolivia*, § 148.

<sup>64</sup> *Quiborax v. Bolivia*, § 156.

<sup>65</sup> *Quiborax v. Bolivia*, § 164.

<sup>66</sup> *Quiborax v. Bolivia*, § 153.

<sup>67</sup> For example, "Respondent's expert in criminal procedure, Dr. Mary Elizabeth Carrasco Condarco, notes that the prosecutor may request the competent judge to refrain from prosecuting a criminal action in certain cases, such as when the event is of little social relevance or judicial pardon is foreseeable." See *Quiborax v. Bolivia*, § 165.

the arbitration even though they were in the final stage of the proceedings<sup>68</sup>. In *Teinver v. The Argentine Republic*, the requests for provisional measures were noted to require satisfying the following conditions:

- Demonstrate a right that deserves to be preserved in connection with the arbitration,
- Demonstrate an irreparable danger or harm if the precaution is not taken,
- Demonstrate the urgent need to enforce the requested provisional measures<sup>69</sup>.

In the case *Teinver v. The Argentine Republic*, the arbitral panel found that the threat of criminal proceedings against the claimant's attorney had put pressure on them and also affected the claimant's right to be represented by an attorney of their choice. Moreover, the likelihood of a court-appointed proceeding against the curator was also stated to be able to force them to choose between continuing their claims in arbitration and withdrawing from their responsibilities or waiving their client's claims<sup>70</sup>.

The court also pointed out that, until the arbitration process concluded the claimants and court-appointed curator/guardian may be in need of an attorney. Given that this is a fundamental right, the court emphasized that threatening the attorney with criminal proceedings in the arbitration process necessitated the suspension of criminal proceedings, thus providing the legitimate premise for its decision. According to the tribunal, the party's right to access an attorney of their choice is a critical element with regard to the integrity of the arbitration proceedings<sup>71</sup>.

As mentioned in the case *Burlington v. Ecuador*, procedural rights such as preserving the *status quo* and non-aggravation of the dispute are deemed as rights to be preserved within provisional measures. These rights are independent and self-evident. The rights that are preserved through provisional measures are not limited to the subject matter of the dispute or rights on merits. In the arbitration process, the parties should avoid attitudes such as aggravating or expending the dispute or undermining the execution of a decision<sup>72</sup>.

### III. SANCTIONS FOR NON-COMPLIANCE WITH PROVISIONAL MEASURES

ICSID's request for provisional measures in criminal cases during the arbitration process is not practically binding on the state party<sup>73</sup>. Countries that have been directed to carry out provisional measures should be noted to not have the tools for ensuring their effective compliance<sup>74</sup>. This brings this study to the following pertinent point. What happens if a country does not comply with ICSID's provisional measures? What kind of legal consequences arise for the signatory country? Within the current framework of ICSID, such an interstate complaint system has yet to be formed regarding such a violation. Therefore, no practical sanctions can be said to exist in the case of non-compliance with provisi-

<sup>68</sup> "These rights are said to be: the right to enforce Claimants' rights under the BIT through ICSID arbitration conducted in good faith; the right to the integrity of the proceedings, including the right of exclusivity of the Tribunal's jurisdiction under Article 26 of the ICSID Convention; the right for the Tribunal to determine its own jurisdiction and the merits of the case; the right of immunity of Claimants, their counsel, representatives and funder; and the right to an enforceable award under Article 53 of the ICSID Convention." See ICSID, *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentine Republic*, Case No: ARB/09/1, D. 08.04.2016, § 165.

<sup>69</sup> *Teinver v. Argentine*, § 174.

<sup>70</sup> *Teinver v. Argentine*, § 205.

<sup>71</sup> *Teinver v. Argentine*, § 235.

<sup>72</sup> *Burlington v. Ecuador*, § 62, 63.

<sup>73</sup> ZARRA, Giovanni: "The Interference of ICSID Provisional Measures With National Criminal Proceedings", *The Italian Yearbook of International Law Online*, 2016, Volume 26, Issue 1, p. 99; MAVROGORDATO, Zannis / SIDERE, Gabriel: "Nature of Enforceability of ICSID Provisional Measures", *Romanian Arbitration Journal / Revista Romana de Arbitraj*, 2009, Volume 3, Issue 4, p. 37 ff.

<sup>74</sup> PALCHETTI, Paolo: "Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function", *Revista de Direito Internacional*, 2017, Volume 1, p. 7. "The fact that the parties did not include the subject of the dispute in their views won't prevent the court from addressing this issue on its own."

onal measures. In addition, situations where a state party does not comply with provisional measures could be the response of a state party whose citizen is an investor or claimant<sup>75</sup>.

Another result of non-compliance with provisional measures involves publishing a non-compliance notice; this notice would be requested from the International Court of Justice, even though ICSID tribunals does not generally prefer this<sup>76</sup>. In accordance with the Court of Justice's discretion, however, statements of non-compliance regarding a party's non-compliance with provisional measures will have no significant impact in practice other than to create a public perception. The court simply declares the state party to be in non-compliance with the measures.

The overall approach relating to non-compliance with provisional measures suggests that the tribunal should take into account this non-compliance during the final decision stage. The tribunal can do this through two ways. If the state that had been recommended provisional measures concerning domestic proceedings wins the case, the other party could be granted additional compensation<sup>77</sup>. Nonetheless, this is not a preferred way among scholars in general. On the other hand, tribunals are frequently seen in practice to use their discretion regarding sharing litigation expenses against the non-compliant party as a procedural punishment. Still, this must also be stated as not being in accordance with the law. Forcing one party to comply with provisional measures is obviously an inappropriate instrument due to its illegality and thus cannot be deemed a proper response to non-compliance with provisional measures<sup>78</sup>. As can be seen, discussions should be had on enforcing ICSID decisions in domestic proceedings and non-compliance with provisional measures<sup>79</sup>.

In fact, ICSID tribunals implicitly agree that the Convention has no compelling power to enforce provisional measures<sup>80</sup>. Furthermore, ICSID tribunals are well aware of their lack of jurisdiction in deciding a punitive compensation against courts that do not comply with recommended measures<sup>81</sup>. From this point of view, the ultimate conclusion is that the respondent states that have been ordered to suspend criminal proceedings regarding provisional measures can ignore these requests<sup>82</sup>. This conflict is a common feature for all decisions where one jurisdiction attempts to rule over another judicial body. The case *Quiborax v. Bolivia* exemplifies this situation, as ICSID's provisional measures to suspend Bolivia's pending criminal proceedings had been rejected. The provisional measures regarding domestic proceedings were also argued in the arbitration proceedings between Iran and the USA, with the state parties describing it as an unwanted interference in their internal affairs<sup>83</sup>.

## CONCLUSION

An ICSID tribunal can apply provisional measures to preserve the integrity of the arbitration process and to conduct it appropriately. Although no apparent statement exists regarding criminal proceedings in the Convention, tribunals claim they have the authority to recommend provisional measures, even if they affect the state's criminal law authority, and this situation also relates to the parties' right to due process. Even though criminal proceedings are stated to not threaten the exclusivi-

<sup>75</sup> PALCHETTI, p. 7. "The issue of non-compliance of provisional measures is generally brought up to the court by the request of the party."

<sup>76</sup> ZARRA, p. 99.

<sup>77</sup> ZARRA, p. 100; YEŞİLIRMAK, p. 312.

<sup>78</sup> ZARRA, p. 100, 101.

<sup>79</sup> PALCHETTI, p. 5.

<sup>80</sup> ZARRA, p. 101.

<sup>81</sup> MAVROGORDATO / SIDERE, p. 38; PALCHETTI, p. 17. "In the absence of a clear basis in the statute, the possibility of imposing penalties or punitive damages should be eliminated."

<sup>82</sup> ZARRA, p. 101, 102.

<sup>83</sup> ZARRA, p. 103.



ty of ICSID proceedings in principle, criminal proceedings are also considered able to violate the right to preserve proceedings' *status quo* and integrity.

Furthermore, as an ICSID tribunal said in its Lao Holding decision, "Criminal proceedings alone will not aggravate the dispute."<sup>84</sup> Whether a criminal investigation will affect the exclusivity of current proceedings is a question for arbitral tribunals to discuss. The tribunals must also determine whether the threat of criminal investigation and prosecution against the claimant, witnesses and potential witnesses violates Article 26 of the Convention<sup>85</sup>. In such a case, arbitral tribunals are stated to be able to recommend provisional measures regarding criminal proceedings. Tribunal are claimed to have the authority regarding criminal proceedings and to not be able to be prevented from exercising this right.

In spite of all this, states specify that recommending provisional measures is unnecessary for preserving the status quo, especially in cases where the criminal proceedings preceded the arbitration process. In addition, many criteria are evaluated while deciding on criminal proceedings, and tribunals agree to impose a high threshold for satisfying the pertinent requirements. Although states are said to accept that their sovereign rights can be interfered by the tribunals by signing the ICSID Convention, this interference should be kept to a minimum. When considering the close relationship between criminal proceedings and state sovereignty, a tribunal's intervention in a state's authority regarding criminal proceedings, and *ergo* its sovereignty, should be imposed within limits. ICSID tribunals also accept that a recommendation to suspend criminal proceedings can only be made under exceptional circumstances.

Even though provisional measures can be recommended for criminal proceedings, the tribunal should evaluate whether criminal proceedings will restrict the arbitration process to such extent that it would require provisional measures. The tribunal's authority is limited to the subject matter of the dispute. In addition, procedural rights, which are rights to be protected by provisional measures, are not limited to the subject matter of the dispute; preserving the *status quo* and non-aggravation of the dispute are included in this context. Tribunals can only recommend provisional measures for matters related to the dispute and solely for conducting an appropriate arbitration process. A relationship should exist between the provisional measures and the dispute. Therefore, tribunals should evaluate the relationship between criminal proceedings for which provisional measures are requested, the arbitration proceeding, and the effect on the integrity of the proceedings. In this study's opinion, extending a tribunal's authority to the extent that it can suspend criminal proceedings is inappropriate.

A tribunal can recommend provisional measures in order to ensure due process regarding the claims that have been brought before it if the tribunal considers the criminal proceedings to affect due process. In this context, if the tribunal considers criminal proceedings to undermine the integrity of the arbitration proceedings in terms of their effects on the parties, such as inability to access or present evidence especially regarding the refusal of witnesses to testify, then measures should therefore be taken against these criminal proceedings. However, measures that can preserve the integrity of the arbitration proceedings should be preferred over measures that suspend criminal proceedings. Such interventions that conflict with a state's sovereign authority should be kept at a minimum.

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#### **Author Contribution Statement:**

Prof. Dr. Murat BALCI, Assoc. Prof. Dr. Hüseyin AYDIN and Assoc. Prof. Dr. Kerim ÇAKIR contributed equally to the study.

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<sup>84</sup> *Eurogas v. Slovak Republic*, § 89; GALAGAN, p. 131.

<sup>85</sup> *Churchill v. Republic of Indonesia*, § 84.

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