EXPERT STATEMENT OF STEPHEN M. SCHWEBEL

3 July 2017

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I. INSTRUCTIONS

1. Corker Binning, solicitors for the Defendant, have requested that I supply an expert opinion on two questions concerning the character of provisional measures issued by ICSID tribunals:

> "*(a) Whether, as a matter of international law, provisional measures recommended by a Tribunal under Article 47 of the ICSID Convention give rise to a legal obligation on the part of the State to which those measures are directed, such that a failure to comply with those measures amounts to an internationally wrongful act of that State?*
>
> *(b) Whether, as a matter of international law, any such obligation (i) applies to the judiciary of the State in question, or (ii) is vitiated if the provisional measures seek to restrain domestic criminal proceedings?*"

2. These questions give rise to four discrete issues:

   a) Whether, as a matter of international law, provisional measures issued by an ICSID tribunal under Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[1] (the "**ICSID Convention**"):

      i) are binding on the parties to the arbitration; and

      ii) if so, give rise to a legal obligation on the part of the State to which those measures are directed, such that a failure to comply with those measures amounts to an internationally wrongful act of that State?

   b) Whether, as a matter of international law, any such obligation:

      i) applies to the judiciary of the State in question; or

      ii) is vitiated if the provisional measures in question seek to restrain domestic criminal proceedings?

II. QUALIFICATIONS

3. I was graduated with highest honors in government from Harvard College in 1950. As Harvard's Frank Knox Memorial Fellow, I studied international law at

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[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 195.

Cambridge University with the then Whewell Professor of International Law, Hersch Lauterpacht, from 1950 to 1951.

4. In 1954, I received an LLB from Yale Law School. I engaged in law practice in New York City from 1954 to 1959 as an associate of White & Case, concentrating on litigation and international arbitration. In 1959, I was appointed Assistant Professor at Harvard Law School, where I taught international law, commercial law and contracts.

5. I joined the Office of the Legal Adviser of the US State Department in 1961, and served some 14 years as Assistant Legal Adviser for United Nations Affairs, Counselor on International Law and a Deputy Legal Adviser (one of the four senior career attorneys for the Department). I was elected a member of the International Law Commission ("**ILC**") of the United Nations in 1977.

6. I was elected a judge of the International Court of Justice ("**ICJ**" or "**the Court**") in 1980 and served for nineteen years. From 1997 to 2000, I was President of the Court.

7. After retiring from the Court in 2000, I was appointed as a member or chairman of numerous arbitrations between States, between States and foreign investors, and in international commercial arbitration. I am a member of the Permanent Court of Arbitration, of the panel of arbitrators of ICSID, and of the Institute of International Law; of the Bars of the State of New York, the District of Columbia and the Supreme Court of the United States; an Honorary Bencher of Gray's Inn, London and an Honorary Fellow of Trinity College, Cambridge. I am the author or editor of six books and some 200 articles and book reviews on questions of international law, international relations and international arbitration.

III. EXECUTIVE SUMMARY

8. In light of the length of this opinion, I provide the following summary of my views.

9. As to the first question (**paragraph 2(a)(i)** above), there is no doubt in my mind that provisional measures issued pursuant to Article 47 of the ICSID Convention are binding on the parties to the arbitration. This conclusion has two bases:

   a) First, the text of Article 47 itself. Application of the rules of interpretation of treaties found in Articles 31 to 33 of the Vienna Convention on the Law of Treaties ("**VCLT**")[2] leads to the conclusion that interim relief ordered under this provision possesses mandatory effect. The same conclusion was reached by the ICJ in *LaGrand*[3] in respect of the very similar text of Article 41 of the ICJ Statute. This finding has proved extremely influential and has been referred to and relied upon frequently by ICSID tribunals, including tribunals that had Lords Bingham and Hoffmann as members. Consequently, ICSID

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2 Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

3 *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466.

tribunals, almost without exception, have considered provisional measures issued under Article 47 of the ICSID Convention to be binding. The sole decision that takes a different view is characterized by perfunctory, unpersuasive reasoning.

b) Second, the inherent power of international courts and tribunals (including ICSID tribunals) to protect their jurisdiction, and to render their ultimate judgments effective, via the ordering of binding interim relief that regulates the behavior of the parties. Recognition of this inherent power has given rise to a general principle of law, including a principle of public international law, which permits the granting of binding interim relief. This principle, in turn, informs the interpretation of powers such as Article 47 under Article 31(1)(c) of the VCLT, permitting this argument to reinforce the textual one set out above at paragraph 9(a).[4]

10. As to the second question (**paragraph 2(a)(ii)** above), the binding quality of provisional measures issued under Article 47 of the ICSID Convention means that when ordered, these measures generate independent obligations in international law. Breach of these obligations will give rise to an internationally wrongful act. An internationally wrongful act gives rise to corollary obligations: to immediately cease that act, make reparation for the damage caused by the wrongful act, and, if appropriate, offer guarantees of non-repetition. The obligation to comply is in no way affected by the breach.

11. As to the third question (**paragraph 2(b)(i)** above), it is uncontroversial that as an organ of a State, the judiciary of a State that is subject to ICSID provisional measures is as bound by them as the State itself. Consequently, if such orders are breached through an act of the judiciary, the State will be responsible for the breach in international law and may be subject to sanction by the ICSID tribunal in question.

12. As to the fourth question (**paragraph 2(b)(ii)** above), ICSID tribunals are capable of ordering binding provisional measures that restrain the domestic criminal proceedings of a State. Although ICSID tribunals recognize the special character of a State's criminal jurisdiction, where such measures are ordered, they are to be considered as binding as any other.

13. I now proceed to elaborate on my answers to each of the above.

IV. PROVISIONAL MEASURES IN THE ICSID CONVENTION

14. I turn first to the question posed in **paragraph 2(a)(i)** of my instructions.

15. Article 47 of the ICSID Convention provides: "*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*"

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4 See in this latter regard the analyses of Sir Gerald Fitzmaurice and Lord Collins at paragraphs 49-55 below.

16. Rule 39(1) of the ICSID Arbitration Rules likewise refers to "*provisional measures for the preservation of its rights [...] recommended by the Tribunal.*" [5]

17. Article 47 reflects the actual consent of the States parties and is therefore the textual source of an ICSID tribunal's power to award interim relief. As with all treaty provisions, it must be interpreted in accordance with Articles 31 to 33 of the VCLT.[6] The most important is Article 31, which provides the general rule of interpretation as follows:

> *(1) "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
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> *(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
>
> *(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *(3) There shall be taken into account, together with the context:*
>
> *(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

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5 For the sake of context, the full text of Rule 39 reads as follows:

(1) "At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

6 These are universally seen as reflective of customary international law and are thus binding on all states, including those—like Romania—which are not parties to the VCLT: J Crawford, *Brownlie's Principles of Public International Law* (8th edn: OUP 2012) at page 380.

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended."

18. Article 31(1) of the VCLT thus requires the interpreter of a treaty provision to look at not only the meaning of the ordinary words of the provision to be interpreted, but also their context within the treaty and their object and purpose. No one element has primacy over the others.

V. ORIGINS OF ICSID PROVISIONAL MEASURES IN WORLD COURT STATUTES

19. The origin of Article 47 of the ICSID Convention may be traced to the Statute of the Permanent Court of International Justice adopted in 1920, transposed with only inconsequential changes in 1945 to the Statute of the International Court of Justice (the "**ICJ Statute**"), an appendix to the Charter of the United Nations. Article 41(1) of the Statute provides: "*The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought be taken to preserve the rights of either party.*"

20. The preparatory work for the ICSID Convention confirms that the drafters of the treaty deliberately drew on Article 41 of the ICJ Statute in drafting Article 47. The provision first entered the Convention as Draft Article 50, in relation to which the UK delegation made a suggestion that the text of the section "*follow more closely the words used in Article 41 of the Statute of the International Court of Justice*".[7] That suggestion was later adopted.[8]

21. As a consequence, ICSID tribunals have often drawn on the jurisprudence of the ICJ concerning Article 41 of its Statute when interpreting Article 47 of the ICSID Convention. As the tribunal in *Victor Pey Casado & President Allende Foundation v Chile* noted at paragraph 2, Article 47 of the Convention:

> "*is not an innovation in the history of international jurisdiction; it is directly inspired by Article 41 of the Statute of the International Court of Justice, hence the particular importance that can be accorded to the judgments given in the past by that court and its predecessor, the Permanent Court of International Justice.*"[9]

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7 *History of the ICSID Convention*, vol II-2 (World Bank 1986) at page 668.

8 Ibid at pages 813–815.

9 *Victor Pey Casado & President Allende Foundation v Republic of Chile*, Provisional Measures (2001) 6 ICSID Rep 373, paragraph 2.

22. To that end, any consideration of the binding force (*vel non*) of provisional measures ordered under Article 47 of the Convention must commence with a discussion of the question under Article 41 of the Statute.

VI. BINDING FORCE OF ICJ PROVISIONAL MEASURES

23. The question of whether provisional measures ordered under Article 41 of the ICJ Statute were binding was controversial for much of the history of the ICJ and the Permanent Court of International Justice ("**PCIJ**"). Until the 21st century, the Court did not squarely address the issue, and commentators on the Court's practice were divided on the question.[10]

24. When faced directly with the question of the nature of provisional measures in *LaGrand*,[11] the Court determined that provisional measures were binding. Its reasoning deserves careful consideration.

25. *LaGrand* was a case of the utmost gravity. It concerned two German nationals, Karl and Walter LaGrand, who had been raised in the United States, who had been arrested in, and tried and sentenced to death by the courts of Arizona in relation to several criminal offences arising out of a botched bank robbery. However, throughout this process, the LaGrand brothers had not been extended by the Arizonan authorities the rights afforded to them by Article 36 of the Vienna Convention on Consular Relations ("**VCCR**")[12] viz. that they were afforded consular assistance "*without delay*" in preparing their defence. After diplomatic protests by Germany failed, Karl LaGrand was executed. This prompted Germany to bring a claim against the US under the dispute settlement protocol to the VCCR and to seek provisional measures preventing the execution of Walter LaGrand while the matter was sub judice.

26. The Court granted these measures in circumstances of extreme urgency, Germany having filed its claim hours before Walter LaGrand was due to be executed (despite its knowing the facts of the matter for two years before so doing).[13] The US, however, did not effectively observe the measures indicated, and Walter LaGrand was put to death as scheduled and in breach of the Court's order. This prompted Germany to amend its case to include a declaration that (a) the Court's provisional measures were binding on the parties; and (b) in executing Walter LaGrand, the US had breached them.[14] This brought the question of the mandatory effect of Article 41 measures squarely into focus.

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10 A summary of the debate may be found in C Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017) at pages 275–288.

11 *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466 at pages 501–506.

12 Vienna Convention on Consular Relations, 24 April 1963, 500 UNTS 95.

13 *LaGrand (Germany v United States of America)*, Provisional Measures [1999] ICJ Rep 9.

14 The new ground of complaint read (*LaGrand (Germany v United States of America)* [2001] ICJ Rep 466 at page 473):

"[T]*he United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3*

27. The debate over the binding force of Article 41 was in large part a textual debate. Those who doubted the mandatory character of provisional measures pointed to the equivocal nature of the words "*indicate*" and "*ought to be taken*" as they appeared in the provision. It was said that this equivocation gave rise to the conclusion that provisional measures were not binding. Other voices, however, pointed to the equally authoritative French version of Article 41, wherein the equivalents of the latter words, "*doivent être prises*", bore a more mandatory character. The French text was the original version of Article 41 in the PCIJ Statute. It was argued that the language reflected the language of diplomacy, rather than qualifying the binding nature of the measures themselves.

28. In the *LaGrand* case, the Court sided with the latter view, using the rule on the interpretation of plurilingual treaties contained in Article 33(4) of the VCLT to find that the French text of Article 41 was to be preferred on the basis that it best cohered with the object and purpose of the Statute as a whole. The Court reasoned at paragraphs 102-104:

> *"102. The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.*
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> *103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of*
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> > *"the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79, p. 199).*

March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending."

Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented (see Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 106; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 142; Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 9, para. 18, and p. 11, para. 32, point 1 A; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 23, para. 48, and p. 24, para. 52 B; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993. I.C.J. Reports 1993, p. 349, para. 57, and p. 350, para. 61 (3); Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I), pp. 22-23, para. 41, and p. 24, para. 49 (1)).

104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article. The Court would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force."

29. The Court has affirmed the correctness of the conclusions in the *LaGrand* case on multiple occasions since the decision was handed down,[15] most recently when awarding provisional measures in the *Jadhav Case.*[16]

30. Following *LaGrand*, numerous international tribunals have confirmed that their provisional measures are binding as a matter of international law. For example, a Chamber of the European Court of Human Rights in *Mamatkulov & Abdurasulovic v Turkey*, overturned previous jurisprudence on whether its provisional measures were binding, referring in part to *LaGrand* and noting that the Court's reasoning *"stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the*

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15 See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures [2008] ICJ Rep 353, at page 392; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Provisional Measures [2011] ICJ Rep 6, at pages 26–27; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Provisional Measures [2013] ICJ Rep 230, at page 240; *in passim*, Provisional Measures [2013] ICJ Rep 354, at page 368; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Provisional Measures [2014] ICJ Rep 147, at page 160; *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, ICJ General List No 163 (Provisional Measures, 7 December 2016) at paragraph 97.

16 *Jadhav Case (India v Pakistan)*, ICJ General List No 168 (Provisional Measures, 18 May 2017) at paragraph 59.

effectiveness of decisions on the merits".[17] Its approach was later affirmed by the Grand Chamber.[18]

31. I should note that, while I was President of the Court when it first indicated provisional measures in *LaGrand*, my resignation from the Court had taken effect by the time of the adoption of the foregoing judgment on the merits. That judgment crowned—and resolved—decades of dispute about whether or not provisional measures were binding under the Statutes of the World Court.

32. In my view, the Court's analysis sustaining the binding nature of provisional measures, the essence of which is quoted above, is cogent and convincing. It has been so treated by the international community. This is no doubt in large part due to the great authority with which the Court speaks on matters of international law, not least when those matters concern the interpretation of its own Statute. Although there is no formal hierarchy between international courts and tribunals, the ICJ is the only permanent court of plenary subject matter jurisdiction, and is furthermore the principal judicial organ of the United Nations. As successor to the PCIJ, whose Statute and jurisprudence it inherited, it is the oldest international court in existence. It therefore sits at the informal apex of the wider system of international courts and tribunals, and its pronouncements are given appropriate weight as a consequence.[19]

VII. THE TREATMENT OF PROVISIONAL MEASURES IN ICSID PRACTICE

33. The practice of the ICJ with respect to Article 41 of its Statute has had a determinative influence on ICSID tribunals understanding of Article 47 of the ICSID Convention. These tribunals have applied or referred to the reasoning in *LaGrand* in reaching the same result as the Court in that case *vis-à-vis* Article 47—that is, that interim relief ordered under that provision is binding.

34. One ICSID tribunal actually anticipated some of the ICJ's reasoning in *LaGrand* in holding that provisional measures under Article 47 of the ICSID Convention are binding.[20] In *Emilio Augustin Maffezini v Kingdom of Spain*, the tribunal held provisional measures orders binding by reference to Rule 39 of the ICSID Rules:

> "*While there is a semantic difference between the word 'recommend' as used in Rule 39 and the word 'order' as used elsewhere in the Rules to describe the Tribunal's ability to require a party to take a certain action, the difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word 'dictación'. The Tribunal does not believe that the*

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17 *Mamatkulov & Abdurasulovic v Turkey*, ECtHR App 46827/99 & 46951/99 (Judgment, 6 February 2003) at paragraphs 101-103.

18 *Mamatkulov & Askarov v Turkey*, ECtHR App 46827/99 & 46951/99 (Judgment, 4 February 2005) at paragraph 117.

19 See e.g. J Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365 *Recuiel des Cours 9* at paragraphs 365-369.

20 Judge Thomas Buergenthal was a member of the tribunal, and formed part of the ICJ's bench in the later phases of *LaGrand*. This perhaps accounts for some of the similarity.

parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal's authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word 'recommend' to be of equivalent value as the word 'order'."[21]

35. Since then, *LaGrand* has exercised decisive influence on ICSID practice. The first ICSID decision to touch on the question post-*LaGrand*, *Pey Casado v Chile*,[22] invoked *LaGrand's* reasoning to reach the conclusion that provisional measures ordered under Article 47 of the Convention are binding. The Tribunal approvingly quoted *LaGrand*, and further held "*the conclusion of this decision is particularly relevant, even more so because it seems manifestly to apply by analogy to Article 47 of the ICSID Convention [...]*".[23]

36. Perhaps the best explanation of the applicability of *LaGrand* in the ICSID context occurred in *Perenco Ecuador Ltd v Republic of Ecuador*.[24] There, a distinguished tribunal, chaired by Lord Bingham, undertook a *tour de horizon* of the question from paragraph 67 *et seq*, noting if the binding character of provisional measures issued under Article 41 of the ICJ Statute was ever in doubt, the Court in *LaGrand* "*explicitly eliminated any thoughts to the contrary*".[25] Applying the reasoning in *LaGrand* to Article 47 of the ICSID Convention, the *Perenco* tribunal noted that "[t]*he parallels between 'recommend' in the ICSID Convention and 'indicate' in the ICJ Statute are quite clear, suggesting that one cannot rightly assume that a 'request' is comparatively weaker than a 'recommendation', or that neither is binding*".[26]

37. The tribunal then squared this reasoning with that of the European Court of Human Rights—which (as noted above) in *Mamatkulov & Askarov v Turkey*, used the reasoning in *LaGrand* to declare the binding nature of provisional measures awarded by international courts and tribunals to be a general principle of international law—and the Iran–United States Claims Tribunal before citing multiple ICSID arbitrations where the same conclusion was reached, including *Maffezini* and *Pey Casado*. It concluded: "*It is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed [...].*"[27]

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21 *Emilio Augustin Maffezini v Kingdom of Spain*, Procedural Order No 2 (1999) 5 ICSID Rep 393 at paragraph 9.

22 *Victor Pey Casado & President Allende Foundation v Republic of Chile*, Provisional Measures (2001) 6 ICSID Rep 373.

23 Ibid at paragraph 20.

24 *Perenco Ecuador Ltd v Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6 (Decision on Provisional Measures, 8 May 2009).

25 Ibid at paragraphs 67-70.

26 Ibid at paragraph 69.

27 Ibid at paragraph 74.

38. A similar conclusion was reached in *Tethyan Copper Company Pty Limited v Pakistan*.[28] This tribunal—which included Lord Hoffmann as Pakistan's party-appointed arbitrator—noted (by reference to *LaGrand*) at paragraph 120 that:

> "*Although Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules use the word 'recommend', it is generally recognized that arbitral tribunals are empowered under these provisions to order provisional measures with binding force and that the parties are obliged to comply with such orders.*"

39. A large number of other tribunals have reached similar conclusions. A sample of these decisions include the decisions in: *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18 (Procedural Order No 1, 1 July 2003) at paragraph 4; *City Oriente Limited v Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21 (Decision on Provisional Measures, 19 November 2007) at paragraphs 51 and 52; *Quiborax SA, Non-Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 (Award, 16 September 2015) at paragraphs 577 to 582; *Hyrdo Srl & Ors v Republic of Albania*, ICSID Case No ARB/15/28 (Order on Provisional Measures, 3 March 2016) (where the binding character of provisional measures appears to have been assumed but not addressed expressly); and *United Utilities (Tallinn) BV & Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24 (Decision on Respondent's Application for Provisional Measures, 12 May 2016) at paragraph 109.

40. These decisions evidence the *jurisprudence constante* that has formed around the mandatory force of provisional measures ordered under Article 47 of the ICSID Convention.

41. By contrast, there is only one decision in which a tribunal has positively held that measures ordered under Article 47 are not binding: that of *Caratube International Oil Company LLP v Kazakhstan*.[29] At paragraph 67, the tribunal there said "*it should be noted that, according to Rule 39, the Tribunal cannot order, but can only recommend provisional measures*".

42. In my opinion, the *Caratube* tribunal's decision does not seriously call into question the conclusion that, under international law, an ICSID tribunal's provisional measures are binding. The tribunal's brief and simplistic reasoning is unpersuasive. It is expressed as an aside, refers only to the bare wording of Rule 39 of the ICSID Rules (and not to the proper source of Article 47 of the ICSID Convention), does not grapple with any ICSID case law concerning the binding quality of Article 47 and does not refer to the interpretive canons of Articles 31 to 33 of the VCLT. Moreover, it does not take account of the ICJ's decision in *LaGrand* and the significance of that decision for the understanding and

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28 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1 (Decision on Claimant's Request for Provisional Measures, 13 December 2012).

29 *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12 (Decision on Provisional Measures, 31 July 2009).

development of international law. Furthermore, as the *Caratube* tribunal went on to deny interim relief, its remarks were *obiter*.

43. For similar reasons, I consider the dissenting opinion of Arbitrator Nottingham in *RSM Production Corporation v St Lucia*[30] to be unpersuasive .The arbitrator there said at paragraph 16 that "*No matter how many times it is repeated, an order is not a recommendation. Only in the jurisprudence of an imaginary Wonderland would this make sense*". The ICJ did not consider itself to be operating in an "*imaginary Wonderland*" when in *LaGrand* it indicated that the US should not execute Walter LaGrand while the dispute concerning the alleged denial of the prisoners' consular rights was being adjudicated. The interpretive tools of the VCLT exist to provide rigor and consistency in making sense of treaty language, which is often the product of negotiation and compromise. A simplistic reading of treaty terms, without consideration of their object and purpose and the context in which they are found, is inconsonant with the VCLT.

VIII. TREATY INTERPRETATION AND THE PROPER ROLE OF *TRAVAUX PRÉPARATOIRES*

44. When discussing the proper interpretation to be given to Article 47 of the ICSID Convention, a minority of commentators refer to the *travaux préparatoires* of that provision as supporting the conclusion that provisional measures ordered by ICSID tribunals are not binding. Professor Christoph Schreuer, for example, while accepting the consensus position outlined above, tempers his endorsement of it on the basis of Article 47's preparatory work. He says:

> "*The legal authority of decisions on provisional measures was a central question in the drafting history of Art. 47. The Working Paper, the Preliminary Draft and the First Draft foresaw the power of an ICSID tribunal to prescribe rather than merely recommend provisional measures (History, Vol. I, p. 206). This power was opposed especially by the delegate from China, who objected to binding measures particularly against the State party which might be unable to comply for reasons on 'necessity on national policy' (History, Vol. II, 515, 518, 655, 813). An idea to authorize the tribunal to make 'interim awards' on provisional measures (at pp. 516, 523) did not prevail. Eventually, the word 'prescribe' was replaced by the word 'recommend' by a large majority (at pp. 814 et seq.).*
>
> *The Convention's legislative history suggests that a conscious decision was made not to grant the tribunal the power to order binding provisional measures [...] Despite the apparently clear restriction to recommendations, tribunals have developed a doctrine under which provisional measures have binding effect on the parties.*"[31]

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30 *RSM Production Corporation v St Lucia*, ICSID Case No ARB/12/10 (Dissenting Opinion on Security for Costs, 13 August 2013).

31 C Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn: CUP 2009) at page 764.

45. A *travaux*-based skepticism about provisional measures' binding force is not persuasive under international law for two principal reasons.[32] The first is that it does not follow the method of analysis set out in Articles 31 to 33 of the VCLT Those provisions set out a series of steps. If a clear answer can be produced at the first step, the interpreter cannot then move onto the second in the hope of finding a different answer. To that end, Article 32 by its terms provides that a treaty's preparatory work can be used to determine a provision's meaning only where interpretation according to Article 31 of the VCLT "*leaves the meaning ambiguous or obscure; or [...] leads to a result which is manifestly absurd or unreasonable*".

46. In each of the key cases examined above—*LaGrand, Pey Casado and Perenco*—the Court or ICSID tribunal in question was able to find the clear meaning of Article 41 of the ICJ Statute and Article 47 of the ICSID Convention without needing to resort to the *travaux* of either treaty. In the case of *LaGrand*, while the Court found it was not necessary to examine the *travaux*, it found that the preparatory work of the ICJ Statute confirmed that the Court's interpretation was correct in any case.[33] In essence, the interpreters concerned determined that the object and purpose of the relevant treaties was best served by attributing binding effect to provisional measures, and the words, read in their context in light of their object and purpose, meant to produce that outcome. The enquiry effectively ended there without needing to give particularly great weight to the *travaux*.

47. In my view with respect to both the ICJ Statute and the ICSID Convention, interpreting the wording of the treaties in light of their object and purpose and context, establishes that provisional measures are binding. Moreover, the rule of effectiveness in the interpretation of treaties, which the jurisprudence of the ICJ supports, provides further reason to reach this conclusion.

48. One can appreciate the gravamen of this reasoning by reference to Fitzmaurice's argument set out above at paragraphs 53 and 54 below, that unless provisional measures are binding, they are effectively useless and the court or tribunal will have no way of defending its jurisdiction, even in potentially vital respects.

49. The second reason concerns the *travaux* in question. I am not convinced that the substitution of the word "*prescribe*" with "*recommend*" is sufficient to establish the conclusion that the drafters of the ICSID Convention did not intend Article 47 measures to be binding. The constitutive instruments of international courts and tribunals often contain precatory wording to—in the words of the late PCIJ Judge Manley O. Hudson, commenting on the word "*indicate*" in Article 41—provide a "*diplomatic flavor*" designed to avoid offending "*the susceptibilities of states*".[34]

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32 In this, the view of the *Victor Pey Casado & President Allende Foundation v Republic of Chile*, Provisional Measures (2001) 6 ICSID Rep 373, which referred somewhat derisively at paragraph 381 to "*the questionable method of interpretation which consists of referring to the travaux préparatoires where the term 'prescribes' was eventually replaced by 'recommend'*", is to be preferred.

33 *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466 at paragraphs 105 to 107.

34 MO Hudson, *The Permanent Court of International Justice*, 1920–1942 (Macmillan 1943) at pages 425 *et seq*.

The same observation has been made in respect of the *travaux* of the ICSID Convention by Judge Charles N. Brower and Ron Goodman.[35]

50. As a consequence, the *travaux* of Article 47 are not themselves sufficiently clear to allow any determinative conclusion to be drawn. It is for this reason that Richard Gardiner, the author of a leading text on treaty interpretation, attributes little utility to a simple change of language during negotiation of a treaty.[36]

IX. PROVISIONAL MEASURES AND THE INHERENT POWERS OF INTERNATIONAL COURTS AND TRIBUNALS

51. While I consider the textual considerations set out above to resolve the matter, an additional justification for the position that ICSID provisional measures are binding derives from the consideration that the ordering of mandatory interim relief is an inherent power of all international courts and tribunals, unless the contrary is specifically established in the constitutive instrument of the court or tribunal in question (i.e. as a *lex specialis*).[37]

52. In general, inherent powers derive from an international court or tribunal's capacity to regulate its own jurisdiction. International judicial and arbitral bodies share these qualities with many domestic courts. On this view, the inherent powers of international adjudicatory bodies arise from their judicial character, with parties that accede to the jurisdiction of such bodies assumed also to accede to the exercise of certain implied powers deployed to guarantee the integrity of the dispute settlement process.

53. Sir Gerald Fitzmaurice, a former Legal Adviser to the British Foreign and Commonwealth Office and subsequently judge of the ICJ, encapsulated the role of these powers in the context of the ICJ in his separate opinion in *Northern Cameroons*:

> "*Although much of this [...] incidental jurisdiction is specifically provided for in the Court's Statute, or in the Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or of any court of law—being able to function at all.*"[38]

54. The idea that international courts and tribunals possessed an inherent power to award binding interim relief was the principal alternative justification for the mandatory force of Article 41 of the ICJ Statute pre-*LaGrand*. Fitzmaurice was again a prominent proponent of this view, arguing extra-curially that binding

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35 CN Brower & REM Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings* (1991) ICSID *Review—Foreign Investment Law Journal* 431 at page 440.

36 RK Gardiner, *Treaty Interpretation* (2nd edn: OUP 2015) at page 391.

37 A summary of the concept of inherent powers may be found in C Brown, *Inherent Powers in International Adjudication*, in CPR Romano et al (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) at page 829 *et seq*.

38 *Northern Cameroons* (*Cameroon v United Kingdom*), Preliminary Objections [1963] ICJ Rep 15 at page 103 (Judge Fitzmaurice, sep op).

force was a logical corollary of provisional measures, "*for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court.*"[39] With respect to other courts and tribunals, Fitzmaurice maintained that the capacity to award binding interim relief was a general principle of international law, such that the textual debate surrounding Article 41—which was to Fitzmaurice the sole source of doubt on the question (an observation that would apply equally to Article 47 of the ICSID Convention)—assumed an "*iron*[ic] *and unsatisfactory character.*"[40]

55. For Fitzmaurice (and others), the interpretation of a power to award provisional measures had to be consistent with this principle, i.e. that absent clear and strong language to the contrary, provisional measures were to possess binding force.[41] As such, for Edvard Hambro, the first Registrar of the ICJ—another prominent voice in the pre-*LaGrand* debate—Article 41 of the ICJ Statute was merely a reflection of the inherent power and did no more than "*in effect give life and blood to a rule that already exists in principle.*"[42]

56. This rationale has been acknowledged in the ICSID context as valid with respect to Article 47. As the tribunal in *Biwater Gauff (Tanzania) Ltd v Tanzania* said at paragraph 135:

> "*It is now settled in both treaty and international commercial arbitration that a tribunal is entitled to direct parties not to take any step that might (1) harm or prejudice the integrity of proceedings, or (2) aggravate or extend the dispute. Both may be seen as a particular type of provisional measure [...] or simply as a facet of the tribunal's procedural powers and its responsibility for its own process.*" [43]

57. In a similar vein, the *Perenco* tribunal spoke of parties to investor-state arbitrations as being "*inherently [...] under an international obligation to comply with provisional measures*", and further highlighting the significant role played by interim relief in the administration of public international law.[44]

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39 G Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 2 (Grotius 1986) at page 548.

40 Ibid at page 549.

41 Pursuant to Art 31(3)(c) of the VCLT, providing that, in interpreting treaties, account must be taken of "[a]*ny relevant rules of international law applicable in relations between the parties*", which would include any general principle of international law.

42 E Hambro, *The Binding Character of Provisional Measures Indicated by the International Court of Justice*, in W Schätzel & H-J Schlochauer (eds), *Rechtsfragen der international Organisation: Festschrift für Hans Wehberg zu seinem 70 Geburtstag* (Vittorio Klostermann 1956) at page 167.

43 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22 (Procedural Order No 3, 29 September 2006) at paragraph 135.

44 *Perenco Ecuador Ltd v Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6 (Decision on Provisional Measures, 8 May 2009) at paragraphs 67-70.

58. Lawrence Collins (now Lord Collins, a former member of the Supreme Court), in his lectures before The Hague Academy of International Law in 1992 on *Provisional and Protective Measures in International Litigation* declared:

> *"The interim protection of rights is no doubt one of those general principles of law common to all legal systems, and therefore to use the language of Article 38(1)(c) of the Statute of the International Court of Justice [...], 'the general principles of law recognized by civilized nations'. As President Jimenez de Arechaga put it in the Aegean Continental Shelf case (Greece v. Turkey):*
>
> *'The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party* pendente lite*... According to general principles of law recognized in municipal systems, and to the well established jurisprudence of this Court, the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision...is that the action of one party* pendent lite *causes or threatens a damage to the rights of the other, of such a nature that it would not be possible full to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour.* '"[45]

59. Lord Collins today is the Rapporteur of the Institute of International Law on provisional measures. He has submitted a draft resolution to the Institute for adoption in 2017 that in part provides:

> *"Considering that the availability of provisional and protective measures is a general principle of law in international law and in national law*
>
> *[...]*
>
> *Adopts the following guiding principles*
>
> > *(1) It is a general principle of law that international and national tribunals may provide discretionary remedies to maintain the status quo pending the determination of disputes or to preserve the ability to grant effective relief.*
> >
> > *[...]*
> >
> > *(11) Provisional measures in international tribunals are binding on the parties and States are under an obligation to give effect to provisional measures addressed to them by international courts and tribunals."*[46]

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45 Lawrence Collins, *Provisional and Protective Measures in International Litigation*, in *Recueil des cours*, Volume 234 (1992-III), at page 23.

46 *Institute of International Law Yearbook*, Volume 77-I, 2016-2017, pages 342-343.

X. STATE RESPONSIBILITY AND CONSEQUENCES OF A BREACH OF ICSID PROVISIONAL MEASURES

60. With the above analysis in mind, I now develop further my answer to the question (posed in **paragraph 2(a)(ii)** of my instructions) of whether provisional measures orders generate independent obligations under international law, such that a failure to comply with those measures amounts to an internationally wrongful act of the State.

61. This question must be answered in the affirmative. When the comment is made that provisional measures are binding or mandatory in character, what is meant is that the making of the order creates an independent obligation in international law, of which a breach by the State against which the order is made is an internationally wrongful act. The set of rules surrounding the identification of such acts and their consequences is the customary international law of state responsibility, as largely codified in the ILC's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**").

62. Decisions of the ICJ and other international courts and tribunals post-dating *LaGrand* support this conclusion. In *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, for example, the Court found that Nicaragua had breached obligations generated by provisional measures ordered earlier in the proceedings.[47]

63. The award of the tribunal empaneled under Annex VII of the UN Convention on the Law of the Sea,[48] in the case of the *Arctic Sunrise (Netherlands v Russian Federation)*, further articulated this conclusion at paragraph 337, where it said in relation to Russia's failure to comply with provisional measures ordered by the International Tribunal for the Law of the Sea ("**ITLOS**") that:

> "*The failure of a State to comply with provisional measures prescribed by ITLOS is an internationally wrongful act. According to the Commentary to the Articles on State Responsibility, where a binding judgment of an international court or tribunal imposes obligation on one State party to the litigation for the benefit of another State party, that other State party is entitled, as an injured State, to invoke the responsibility of the first State.*"[49]

64. This conclusion applies equally to provisional measures ordered by ICSID tribunals.[50] Although such provisional measures are not directly enforceable at the municipal level (in that they are not subject to the system of enforcement set out

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47 *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, ICJ General List Nos 150 & 152 (Judgment, 16 December 2015) at paragraphs 121-129.

48 United Nations Convention on the Law of the Sea, 19 December 1992, 1833 UNTS 3.

49 *Arctic Sunrise (Netherlands v Russian Federation)*, PCA Case No 2014-02 (Award, 14 August 2015) at paragraph 337.

50 *Quiborax SA, Non-Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 (Award, 16 September 2015) at paragraphs 576 *et seq.*

in Chapter IV, Section 6 of the ICSID Convention) ICSID tribunals have the power to censure breaches of provisional measures and other procedural orders through a variety of mechanisms, including drawing adverse inferences on the merits and awarding costs on the indemnity basis.[51] However, these sanctions are usually ordered as part of the final award. A tribunal may reaffirm, modify or strengthen its provisional measures orders over the course of the arbitral proceedings, but, where the party in question refuses to comply, harm is still likely to occur. As the measures were originally granted because they were deemed necessary and urgent to prevent irreparable harm pending a final award, one can assume that the consequences of non-compliance are significant.

65. The commission of an internationally wrongful act by a State entails consequences under international law. If it is a continuing breach, as in the case of non-compliance with provisional measures, the State must cease the wrongful act in question (ARSIWA, Article 30). All States are under an obligation to make full reparation for the damage caused by their internationally wrongful acts (ARSIWA, Article 31), and, if appropriate, give guarantees of non-repetition (ARSIWA, Article 30). The negative consequences are not only limited to the injured party. It affects the efficacy and legitimacy of the underlying instrument. Further, "*the rule of law requires compliance by the state with its obligations under international law as in national law*".[52]

66. A subsidiary question (as posed in **paragraph 2(b)(i)** of my instructions) is the precise modality of how a State may breach an international obligation such as that generated by an order for interim relief—and, more particularly, whether a State may be held to breach an obligation through the acts of one of its organs, such as the judiciary.

67. The ARSIWA are clear in providing that any state organ can breach an international obligation, resulting in state responsibility accruing to the State as a whole. This is often referred to as the doctrine of the unity of the State. To that end, ARSIWA Article 4(1) provides:

> "*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, judicial or other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*"

68. The customary character of this rule—and its application to the judiciary as a principal organ of the state—was confirmed by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the ICJ considered whether the actions of the Malaysian

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51 See e.g. *Liberian Eastern Timber Corporation v Republic of Liberia*, Award (1986) 2 ICSID Rep 370 at page 378; *Maritime International Nominees Establishment v Republic of Guinea*, Award (1988) 4 ICSID Rep 3 at pages 69 and 77.

52 Lord Bingham's Eight Principles on the Rule of Law.

courts could give rise to an internationally wrongful act on the part of Malaysia.[53] It stated:

> *"the conduct of an organ of a State - even an organ independent of the executive power - must be regarded as an act of that State."*[54]

69. In this context, the ICJ in *LaGrand* considered (a) that provisional measures ordered against the US were also binding on the state of Arizona, and (b) that if Arizona breached the provisional measures, this would result in the US incurring international responsibility as a consequence.[55]

70. The conclusions of the ICJ in this respect are, again, equally applicable in the ICSID context.[56]

XI. PROVISIONAL MEASURES AND THE RESTRAINT OF DOMESTIC CRIMINAL PROCEEDINGS

71. The final question to be answered (per **paragraph 2(b)(ii)** of my instructions), is whether the binding quality of ICSID provisional measures is vitiated if provisional measures ordered under Article 47 of the ICSID Convention seek to restrain domestic criminal proceedings.

72. The answer to this question is, unequivocally, "*no*". International courts and tribunals have a relatively unfettered power to order whatever interim relief they consider necessary to protect the rights under adjudication—including the claimant's procedural right to pursue arbitration free from domestic harassment qua criminal prosecution. Consequently, ICSID tribunals have regularly awarded provisional measures aimed at restraining domestic criminal proceedings where those proceedings would prejudice the arbitration.[57]

73. In his leading treatise on provisional measures, Cameron Miles lists among the typology of provisional measures ordered "*suspension or cessation of parallel proceedings before domestic courts or arbitral tribunals (including criminal proceedings against individuals involved in the dispute).*" He states: "*The case law on this subject as vast*" and by way of example cites a number of judgments and awards of the Iran-United States Claims Tribunal, ICSID, and the Permanent

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53 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62 at page 87.

54 Ibid at page 88.

55 *LaGrand (Germany v United States of America),* Provisional Measures [1999] ICJ Rep 9 at page 16; *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466 at page 516.

56 *Quiborax SA, Non-Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia,* ICSID Case No ARB/06/2 (Award, 16 September 2015) at paragraph 582.

57 See e.g. *Quiborax v Bolivia,* ICSID Case No ARB/06/2 (Provisional Measures, 25 February 2010) at paragraphs 121-123; *Lao Holdings NV v Lao People's Democratic Republic,* ICSID Case No ARB(AF)/12/6 (Ruling on the Motion to Amend the Provisional Measures Order, 30 May 2014) at paragraph 76; *Hydro Srl & ors v Republic of Albania,* ICSID Case No ARB/15/28 (Order on Provisional Measures, 3 March 2016) at paragraph 4.1.

Court of Arbitration.[58] Among those cases is *Tokios Tokeles v. Ukraine*,[59] where the Respondent argued against a request for interim relief on the basis that the relief sought was to suspend and discontinue criminal proceedings and that these proceedings did not fall within the jurisdiction of an ICSID Tribunal. The Tribunal found that "*[i]t is not necessary for a tribunal to establish that the actions complained of in a request for provisional measures meet the jurisdictional requirements of Article 25. A tribunal may order a provisional measure if the actions of the opposing party relate to the subject matter of the case before the tribunal [...].*"[60]

74. The current ICSID proceedings in *Hydro v. Albania* are strikingly apposite.[61] The Claimants, Italian nationals, include two principals resident in the United Kingdom, whose extradition is sought by Albanian authorities. The Tribunal has issued provisional measures that include suspension of extradition proceedings pending the conclusion of the arbitration. The Order on Provisional Measures adopted by the Tribunal affirms that the extradition of the principal claimants and their incarceration in Albania would not be consistent with their ability to pursue arbitral disposition of their claims against Albania.

75. ICSID tribunals have recognized that criminal jurisdiction is a special domain of the State, such that it should not be interfered with lightly. As a result, a *sui generis* test has evolved which must be met if such orders are to be considered to be warranted.[62] Where that test is met, however, the orders that result are as binding as any others.

XII. CONCLUSIONS

76. I have set out my conclusions in more detail by way of an executive summary at **§III** above.

77. In short, however, in the light of the analysis of the ICJ in *LaGrand*, and in view of the consistent jurisprudence of ICSID arbitration tribunals, I conclude that:

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58 C Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017) at page 302, footnote 179: "*see e.g. E-Systems Inc v Iran (1983) 2 Iran—US CTR 51, 57; Fluor Corporation v Iran (1986) 11 Iran—US CTR 296, 298; Societe Generale de Surveillance SA v Pakistan, Procedural Order No 2 (2002) 8 ICSID Reports 388, 391-7; Tokios Tokeles v Ukraine, ICSID Case No ARB/02/18 (Procedural Order No 1, 1 July 2003) §3; Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplan v Bolivia, ICSID Case No ARB/06/2 (Provisional Measures, 26 February 2010) 116-24; Millicom v Senegal, ICSID Case No ARB/08/20, §45; Chevron Corporation and Texaco Petroleum Company v Ecuador, PCA Case No 2009-23 (First Interim Award on Interim Measures, 25 January 2012) 16.*"

59 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (Procedural Order No. 3, 18 January 2005).

60 Ibid at paragraph 11.

61 *Hydro S.r.l. and Others v. Republic of Albania*, ICSID Case No. ARB/15/28 (Order on Provisional Measures, 3 March 2016).

62 See e.g. *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6 (Ruling on the Motion to Amend the Provisional Measures Order, 30 May 2014) at paragraph 76; *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No ARB/33/3 (Provisional Measures, 21 January 2015) at paragraphs 142-147.

a) *First*, under international law a recommendation of provisional measures made by an ICSID Tribunal is binding upon the parties to the proceeding.

b) *Second*, as a consequence of their binding character, breach of such measures by the State will constitute an internationally wrongful act.

c) *Third*, provisional measures may further be breached by any organ of the State—including its judiciary.

d) *Fourth*, ICSID tribunals have the authority, where the circumstances require it, of issuing binding interim relief compelling the restraint of domestic criminal proceedings.

I confirm that I have read and understood Part 19 of the Criminal Procedure Rules of October 2015.

I also confirm that the contents of this report are true to the best of my knowledge and belief and that I make the report knowing that, if it were tendered in evidence, I would be liable to prosecution if I wilfully stated in it anything which I know to be false or do not believe to be true.

Stephen M. Schwebel

South Woodstock, Vermont

July 3, 2017