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Chapter 20

Interim Relief in International Investment Agreements

*Gabrielle Kaufmann-Kohler and Aurélia Antonietti**

Arbitration rules applicable in the context of investor-state disputes usually provide that arbitral tribunals may grant interim relief under certain conditions. This chapter will review the requirements for a party to obtain interim relief from an arbitral tribunal, the measures that can be ordered, their nature, and effects. It will also consider whether the parties to the dispute can seek interim relief from domestic courts rather than from the arbitral tribunal.

A vast majority of investor-state arbitrations are initiated today on the basis of an investment arbitration agreement (IAA), either a bilateral investment treaty (BIT) or a multilateral investment treaty (MIT), such as the North American Free Trade Agreement (NAFTA). These arbitrations are most often governed by the Arbitration Rules of ICSID, the ICSID Additional Facility, or UNCITRAL. Some BITs or MITs also refer to arbitration under the auspices of the Stockholm Chamber of Commerce (SCC) or the International Chamber of Commerce (ICC). This chapter will exclusively focus on interim measures in the context of proceedings governed by the ICSID Arbitration Rules, the ICSID Additional Facility Arbitration Rules (both referred to as the ICSID system), and the UNCITRAL Arbitration Rules, because these are the arbitration rules most commonly used in the context of investor-state disputes.¹

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1 The majority of the decisions on interim relief in the context of investor-state disputes that have been made public are Iran-U.S. Claims Tribunal decisions or ICSID decisions, other decisions rarely being in the public domain. Unless otherwise stated, all the ICSID decisions or orders quoted in this chapter are available on the ICSID Website or on the ITA Website.

THE POWER TO GRANT INTERIM RELIEF

The power of an arbitral tribunal to grant interim relief² is to be sought in the legal rules that govern each proceeding.

Interim Relief in the ICSID System

ICSID Convention cases. For proceedings that are governed by the ICSID Convention, provisions on interim relief are to be found both in the ICSID Convention and in the ICSID Arbitration Rules.

Article 47 of the ICSID Convention allows an arbitral tribunal to recommend provisional measures. It reads:

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.

This Article, said to have been directly inspired by Article 41 of the Statute of the International Court of Justice (ICJ),³ makes clear that the parties can agree not to allow the tribunal the power to grant interim relief or can restrict such power (see below for an example under NAFTA).

More details are found in ICSID Arbitration Rule 39 on Provisional Measures, which reads:

(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 This chapter will refer to interim relief as a general expression encompassing both the “provisional measures” of the ICSID system and the “interim measures” of the UNCITRAL Rules. When addressing each particular set of rules, the chapter will refer to the designated terms.

3 CHRISTOPH SCHREUER WITH LORETTA MALINTOPPI, AUGUST REINISCH AND ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY*, Article 47, para. 1 (Cambridge 2nd ed. 2009) [hereinafter Schreuer et al.]. See also Victor Pey Casado and Presidente Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, September 25, 2001, para. 2, French and Spanish original, English translation in 6 ICSID Reports 2004, p. 375 [hereinafter *Pey Casado*]. Article 41 of the Statute of the Court reads: “1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.” Article 41 is completed by Articles 73 to 78 of the 1978 Rules of Court. See generally *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY*, Article 41, p. 923ff. (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm eds., OUP 2006) [hereinafter Zimmermann et al.] and SHABTAI ROSENNE, *PROVISIONAL MEASURES IN INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* (OUP 2005) [hereinafter S. Rosenne].

(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.

Arbitration Rule 39 was last modified in April 2006 with the introduction of paragraph 5.⁴ It had previously been amended in 1984 when the current paragraph 6 (formerly Article 39(5)) was added.

Additional Facility cases. Cases which fall outside of the scope of the ICSID Convention can be administered by the Centre under the Additional Facility (AF) Rules under certain conditions set forth in Article 4 of those rules. Interim relief in AF proceedings is governed by Article 46 of the AF Arbitration Rules, which contains a provision similar but not identical to ICSID Arbitration Rule 39. Article 46 reads:

(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.

(2) 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.

(3) The Tribunal shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.

(4) The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.

The tribunal's power under the AF Arbitration Rules is also subject to potential restrictions agreed by the parties. Generally speaking and except for differences that will specifically be mentioned in the following discussion, the regime of interim relief

⁴ Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations*, 21 ICSID REV.-FILJ (2006).

under the AF Arbitration Rules follows the regime of the ICSID Arbitration Rules. For example, in the case of *Metalclad v. Mexico*, governed by the AF Rules and AF Arbitration Rules, the tribunal considered that the reasoning applicable under Article 47 of the ICSID Convention was relevant in the context of these AF proceedings and, more particularly, said that it was “no less applicable to the wording of Article 1134 of the NAFTA.”⁵

The powers of a tribunal under the AF Rules are subject to mandatory rules of the law of the seat of arbitration since the AF Arbitration Rules, pursuant to their Article 1, will not apply when “in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate.”

Interim Relief Under the UNCITRAL Arbitration Rules

The original 1976 UNCITRAL Arbitration Rules are currently undergoing a significant revision, following the 2006 revision of the 1985 UNCITRAL Model Law. The 2006 revision replaced former Article 17 on interim measures with a new Chapter IV bis, establishing a comprehensive legal regime on interim measures in support of arbitration. The UNCITRAL Working Group on Arbitration and Conciliation had drafted a revised version of the interim measures provision of the UNCITRAL Arbitration Rules, Article 26.⁶ At the time of the finalization of this chapter, the Working Group had not adopted the second version of Article 26.⁷ The present chapter

5 *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision on a request by the respondent for an order prohibiting the claimant from revealing information regarding ICSID Case No. ARB(AF)/97/1, October 27, 1997, para. 8, http://www.economia.gob.mx/work/sncl/negociaciones/Controversias/Casos_Mexico/Metalclad/decision/decision_interlocutoria.pdf [hereinafter *Metalclad*].

6 The Working Group considered that the UNCITRAL Arbitration Rules were to be harmonized with the corresponding provisions of the Model Law only where appropriate and not as a matter of course (Report of Working Group II (Arbitration and Conciliation) on the work of its 45th Session, September 11–15, 2006, Vienna, A/CN.9/614, para. 104). Although it was generally of the view that a revision of Article 26 was needed to take into account the new provisions of the Model Law, the view was also expressed that the controversial provisions of Chapter IV should not be included in the Arbitration Rules, in order not to endanger their acceptability (*ibid.*). Subsequently, the Working Group met in New York in February 2007, in Vienna in September 2007, in New York in February 2008 for its 48th Session (see Report A/CN.9/646), in Vienna on September 15–19, 2008 for its 49th Session where it considered the revised version of Articles 1 to 17 (see Note A/CN.9/WG.II/WP.151, Note A/CN.9/WG.II/WP.151/Add.1, Note A/CN.9/WG.II/WP.154 and Report A/CN.9/665) and in New York on February 9–13, 2009 for its 50th Session where it considered the second reading of the draft version of Articles 18 to 26 (see Report A/CN.9/669). It then met in Vienna from September 14–18, 2009 for its 51st Session for the second reading of the draft version of Articles 27 to 39 (annotated provisional agenda, A/CN.9/WG.II/WP.155, Report A/CN.9/684). The final review and adoption of the revised Rules should take place at the 42nd Session of the Commission in 2010 (see Report A/CN.9/684, para. 10). All the Working Group's documents are available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

7 See Report of the Working Group on the work of its 47th Session, A/CN.9/641, pp. 10–12; Note by the Secretariat, 46th Session, New York, February 5–9, 2007, A/CN.9/WG.II/WP.145/

examines the draft revised Article 26 as it stood in September 2009, since it represents a significant departure from the original UNCITRAL Rules. The new Rules, if and when adopted, will be applicable to arbitration agreements concluded after the date of adoption of the revised version of the Rules⁸; whereas the 1976 Arbitration Rules will continue to apply to pending cases and, if the parties so wish, to cases initiated after the entry into force of the new Rules.⁹ The two sets of Rules will be applicable to investor-state proceedings as long as no new set of rules specifically designed for this type of arbitration is elaborated.¹⁰

The 1976 UNCITRAL Rules. Article 26 of the 1976 UNCITRAL Arbitration Rules, entitled "Interim Measures of Protection," reads:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

While the 1976 version of Article 26 does not mention it, parties to UNCITRAL proceedings can limit the scope of the tribunal's power if they so wish. Article 26 was adopted by the Iran-U.S. Claims Tribunal without modification. Hence, the jurisprudence of the Iran-U.S. Claims Tribunal is an important benchmark when analyzing the power of an arbitral tribunal to grant interim relief under the 1976 UNCITRAL Rules and provides good guidance in the application of the Rules.¹¹

Add.1, p. 12; Note by the Secretariat, 48th Session, New York, February 4–8, 2008, A/CN.9/WG.II/WP.149, p. 8; Note by the Secretariat, 51st Session, Vienna, September 14–18, 2009, A/CN.9/WG.II/WP.154/Add.1, pp. 7–10. For an alternative drafting proposal made by the Government of Switzerland, see Note by the Secretariat of September 9, 2008, A/CN.9/WG.II/WP.152 and Report on the work of its 50th Session, A/CN.9/669, pp. 19–20. See also the alternative proposals suggested by Jan Paulsson and Georgios Petrochilos in "Revision of the UNCITRAL Rules" presented at the ICCA in Dublin in June 2008, pp. 110–11.

⁸ See draft Article I, Note by the Secretariat of August 6, 2008, A/CN.9/WG.II/WP.151.

⁹ *Ibid.*

¹⁰ See the conclusions reached by the UNCITRAL Working Group at its 48th Session, during which it was decided that no specific provisions would be inserted in the revised Rules for treaty-based arbitration and that the Working Group would "seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take" (Report of the 48th Session, A/CN.9/646, para. 69). Also in Report of the 50th Session, A/CN.9/669, para. 8.

¹¹ Although the Iran-U.S. Claims Tribunal applied Article 26, it must be noted that it placed great emphasis on its inherent power to issue interim measures "as may be necessary to conserve the respective rights of the Parties and to ensure that the tribunal's jurisdiction and authority are made fully effective." For example, when the tribunal first addressed a request for interim

The draft UNCITRAL Rules. The 2009 draft of Article 26 reads as follows¹²:

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to, including without limitation:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraph 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraph 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
5. Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.

relief, it based the measures it ordered not on Article 26 but on its inherent power. See GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 137–38 (Clarendon Press 1996) [hereinafter G. Aldrich]. Also *Rockwell International Systems Inc. and The Islamic Republic of Iran, Ministry of Defence, Award No. ITM20-430-1* (June 6, 1983) at 4–5, *reprinted in* 2 *Iran-USCTR* 369, 371 (1983-I); *RCA Global Communications Disc, Inc. and The Islamic Republic of Iran, Award No. ITM 30-160-1* (October 31, 1983) at 5, *reprinted in* 4 *Iran-USCTR* 9, 11–12 (1983-II). For a discussion on the inherent power of the Iran-US Claims Tribunal, see also DAVID CARON, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE INTERNATIONAL ARBITRAL PROCESS* 216–23 (Leiden 1990) [hereinafter D. Caron, Leiden].

¹² Note by the Secretariat, 48th Session, New York, February 4–8, 2008, A/CN.9/WG.II/WP.149, pp. 7–8. Note by the Secretariat, 49th Session, Vienna, September 15–19, 2008, A/CN.9/WG.II/WP.151/Add.1, pp. 8–9. At the 50th Session, it was suggested to place draft article 26 before the provisions on evidence, hearings and experts (Note A/CN.9/WG.II/WP.154/Add.1, para. 23).

6. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

7. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure or the order.

8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

9. The party requesting an interim measure shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

10. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Paragraphs 1 to 4 and 6 to 9 of draft Article 26 mirror the revised wording of the Model Law. Paragraph 5, on temporary orders, contains a different wording and is subject to strong controversy.¹³ Paragraph 10 corresponds to the original text of Article 26(3), which the Working Group agreed to retain.

Finally, the authority of a tribunal to order interim relief under the UNCITRAL Rules is subject to any mandatory rules of the national law applicable to the arbitration. The submission to the relevant national law is confirmed by Article 1(2) of the 1976 UNCITRAL Rules and of the draft Rules, which provides:

These rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Thus, the power of a tribunal to grant interim relief depends on the *lex arbitri*. It is worth noting that some jurisdictions, such as Italy and Greece, reserve this power to domestic courts.

Other Relevant Provisions

In addition to the preceding provisions referred to, one must consider the specific provisions that a BIT, a MIT or even a free trade agreement may contain and which

¹³ In its 2008 version, para. 5 read: "If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from temporarily ordering that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the request." See Report A/CN.9/669, paras. 107 to 112 for the reasons underlying the change. Paragraph 5 might be placed immediately before paragraph 10 (See Note A/CN.9/WG.II/WP.154.Add.1, para. 23.)

may supplement and amend the applicable arbitration rules. For example, Article 1134 of the NAFTA prohibits attachment orders and orders that enjoin the application of the challenged measures in the following terms:

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 [claim by an investor of a party on its own behalf claiming *inter alia* for a breach of an obligation under section A (investment)] or 1117 [claim by an investor of a party on behalf of an enterprise claiming *inter alia* for a breach of an obligation under section A (investment)]. For purposes of this paragraph, an order includes a recommendation.

For further examples, one may cite Article 10.20(8) of the United States-Peru Trade Promotion Agreement signed on April 12, 2006, as well as Article 28 of the U.S. Model BIT (2004), both of which contain wording similar to the NAFTA provision just quoted. Another example may be found in the provisions of the Central America Free Trade Agreement (CAFTA), Article 10.20.8.¹⁴

PURPOSE OF THE MEASURES: PRESERVING THE RESPECTIVE RIGHTS OF THE PARTIES

Interim measures are temporary in nature and are traditionally intended to “preserve the respective rights of the Parties pending the decision”¹⁵ of a tribunal.

ICSID System

Article 47 of the ICSID Convention allows a tribunal to grant provisional measures “if it considers that the circumstances so require [. . .] to preserve the respective rights of either party.” Arbitration Rule 39(1) requires that the applicant specify in its request the right(s) to be preserved. The AF Arbitration Rules also refer to the preservation of the parties' rights. Absent any further guidance, it is accepted that provisional measures in the ICSID system are left to the appreciation of each tribunal,¹⁶ provided that they aim at the preservation of a right of a party. This begs the question of what rights

¹⁴ See, for an illustration, *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures, October 15, 2008, in which the tribunal denied the claimant's request for interim measures to preserve certain documents.

¹⁵ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Interim Protection Order, July 5, 1951, I.C.J. Reports 1951, p. 93.

¹⁶ *Pey Casado*, para. 15.

can be preserved (which will be examined below) and whether the rights to be preserved are limited to the rights in dispute.¹⁷ Few tribunals have addressed this issue.

The tribunal in *Amco v. Indonesia*¹⁸ concurred with Amco that the rights that can be preserved are the rights in dispute. In that case, Indonesia requested that the claimant take no action which “might aggravate the dispute” and abstain from “promoting, stimulating or instigating the publication of propaganda presenting their case selectively outside this tribunal or otherwise calculate[d] to discourage foreign investment to Indonesia” following the publication of an article in a Hong Kong newspaper. The tribunal found that the publication of the article did not do any actual harm nor aggravate or exacerbate the legal dispute. Saying so, the tribunal noted that “no such right [in dispute] could be threatened by the publication of articles like”¹⁹ the one in dispute.

A restrictive approach of the notion of “right to be preserved” was later adopted in *Maffezini*.²⁰ In this case, the respondent requested that the claimant post a guarantee or bond in the amount of the costs expected to be incurred in the arbitration. The tribunal denied the request for two main reasons: one related to the existence of a right to be preserved, a topic that will be addressed below, and the other was that the request did not relate to the subject matter of the case before the tribunal, i.e., to the investment made in Spain but that it related to separate or extraneous matters.²¹

This restrictive approach has not been confirmed since and could be viewed as too limitative. Indeed, the rights to be preserved ought not to be limited to the rights which form the subject matter of the dispute on the merits. It is admitted that other rights which relate to the dispute can also be protected, such as procedural rights²² or the more general right to the non aggravation of the dispute. The applicable criterion is thus that the right to be preserved bears a relation with the dispute. This latter approach was adopted by the *Plama* tribunal:

The rights to be preserved must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief

17 For the ICJ, the rights to be preserved are the rights which are the subject of dispute in the proceedings (see Great Passage Belt Case mentioned below). In the Arbitral Award of July 31, 1989 Case (Guinea-Bissau v. Senegal) which concerned the validity of a previously rendered arbitral award on the determination of a maritime boundary, the Court dismissed a request for provisional measures that the parties refrain from all acts in the disputed maritime territory that was the subject of the arbitral award at stake but not of the ICJ proceedings (1990 I.C.J. Reports, pp. 69–70, Order, March 2, 1990).

18 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, December 9, 1983, para. 1, ICSID Reports 1993, p. 410 [hereinafter *Amco*].

19 *Amco*, para. 3.

20 *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Request for Provisional Measures, October 28, 1999, para. 10 [hereinafter *Maffezini*].

21 *Maffezini*, para. 23.

22 See *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, March 31, 2006 [hereinafter *Biwater*], which stated: “The type of rights capable of protection by means of provisional measures are not only substantive rights but also procedural rights,” para. 71.

it seeks to be effective and able to be carried out. *Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.*²³

In *Plama*, the rights relating to the dispute were the rights deriving from the Energy Charter Treaty, to wit, *Plama's* rights to fair, equitable, and nondiscriminatory treatment for its investment. The tribunal observed that *Plama's* claims and requests for relief were limited to damages under the Energy Charter Treaty. It concluded that "the scope of the 'rights relating to this dispute' which deserve protection by provisional measures is necessarily limited to the damage claims."²⁴ On that basis, the tribunal did not see how local proceedings, the stay of which was requested, could affect the ICSID arbitration. Whatever the fate of the local proceedings, *Plama* could still pursue its claims for damages before the ICSID tribunal.

A similar approach was adopted in *Burlington v. Ecuador*²⁵ in which the tribunal stated:

In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

The rights to be preserved thus do not need to be the rights in dispute but must relate to the dispute as it is defined by the claims and the relief sought.

NAFTA Proceedings

NAFTA Article 1134, already quoted, provides for interim relief to preserve the rights of a disputing party. However, in contrast to the ICSID system, it makes it clear that the rights in dispute cannot be the subject matter of the provisional measures. The reason for this appears to be that "Articles 1134 and 1135 permit a state to implement and maintain a measure even if it breaches substantive rights contained in Chapter 11A. Thereafter, even if restitution is ordered, a State Party may choose to pay monetary damages instead."²⁶ In proceedings conducted in accordance with the AF Arbitration Rules as modified by the provisions of NAFTA, Chapter 11, Section B, a tribunal

23 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, September 6, 2005, para. 40 (emphasis added) [hereinafter *Plama*].

24 *Plama*, para. 41.

25 *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, June 29, 2009, para. 60 [hereinafter *Burlington*].

26 Henri Alvarez, *Arbitration under the North American Free Trade Agreement*, 16(4) ARB. INT'L 417 (2000).

rejected a request for ordering the respondent to cease and desist from any interference with the claimant's property whether by embargo or by any other means. The tribunal considered that an order in the terms requested by the claimant would not be consistent with the limitations imposed by Article 1134 "since such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117."²⁷

UNCITRAL Arbitration Rules

The revision on the UNCITRAL Rules will bring significant changes as to the purpose for which a tribunal may grant interim measures.

The 1976 UNCITRAL Rules. The heading of Article 26 of the 1976 UNCITRAL Arbitration Rules reads "Interim Measures of Protection." The text, however, merely relates to "measures [the tribunal] deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods." This text, which elicited discussions over the years, has generally been understood not to restrict the power of the arbitral tribunal to order any type of interim measure it deemed appropriate.²⁸ According to leading authors, Article 26(1) should not be seen as an exhaustive list and was only meant to give examples.²⁹ In other words, measures could aim at any type of protection as long as it is necessary.

The practice of the Iran-U.S. Claims Tribunal is of limited interest in this respect, given the commercial nature of many of the cases and the numerous applications to stay duplicative proceedings. In addition to the stay of proceedings, measures ordered have dealt with the conservation of goods,³⁰ the prohibition of the sale of goods, and the return of goods.³¹

The draft Rules. Article 17(1) of the Model Law was originally drafted against the background of Article 26 of the 1976 UNCITRAL Arbitration Rules. It was modified

27 Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Procedural Order No. 2 concerning request for provisional measures and the schedule of the proceeding, May 3, 2000, http://www.economia-snci.gob.mx/sphp_pages/importa/sol_control/consultoria/Casos_Mexico/Marvin/ordenes/Order_2.pdf. Also in MEG N. KINNEAR, ANDREA K. BJORKLUND, JOHN F. G. HANNAFORD INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 8-1134 (Kluwer) [hereinafter M. Kinneare et al.] who also refer to Pope & Talbot Inc. v. Canada (UNCITRAL), Award on Interim Measures Motion, January 7, 2000.

28 UNCITRAL Working Group, Doc. A/CN.9/WG.II/WP.119—Settlement of commercial disputes—Preparation of uniform provisions on interim measures of protection, para. 41.

29 DAVID CARON, LEE CAPLAN, MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES, A COMMENTARY 539 (OUP 2006) [hereinafter Caron et al.].

30 E.g., Behring International, Inc. and the Islamic Republic of Iran Air Force et al., Interim Award No. 46-382-3 (February 22, 1985), reprinted in 8 Iran-USCTR 44 [hereinafter Behring International].

31 See G. Aldrich, pp. 151–55.

in 2006 to provide a generic definition of interim measure. Article 17(1) of the Model Law now reads, “[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures”. Observing that the ICC or the AAA Arbitration Rules gave a broader discretion to the arbitrators and did not make any reference to the subject matter of the dispute, the UNCITRAL Working Group deleted such reference expressly in the Model Law and listed the different purposes of a measure, namely, maintaining or restoring the *status quo* pending determination of the dispute; taking action that would prevent; or refraining from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself, providing a means of preserving assets out of which a subsequent award may be satisfied or preserving evidence that may be relevant and material to the resolution of the dispute.

Draft Article 26 further confirms this evolution. The heading only reads “Interim Measures,” and the text contains the same generic wording as Article 17(1) of the Model Law to the effect that the “tribunal may grant interim measures.” Thus, there is no specific limitation set to the general power of a tribunal to grant interim measures awarded under draft Article 26(1) in terms of scope of the measure or rights to be protected. A close look at the various revised drafts shows that draft Article 26(2) could have been construed to contain an exhaustive list of interim measures. In the context of the revision of the Model Law, which contains the same list, the Working Group considered that “to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), it was no longer necessary to make that list non-exhaustive.”³² The list contained in Article 17(2) of the Model Law and in draft Article 26(2) of the Rules has been described as “reasonably accurately reflect[ing] reality in that it lists the types of interim measures most commonly requested.”³³ However, to avoid any doubt, the terms “including, without limitation” were added in paragraph 2 of draft Article 26 at the Fiftieth Session. This made clear that the list contained therein is non exclusive and that the definition of interim measures is to be construed widely.³⁴

TYPES OF MEASURES

In practice, it can be said that measures can be granted in order to (i) preserve the right of a party which is the subject matter of the dispute, (ii) maintain or restore the status quo, (iii) protect the jurisdiction of the tribunal, (iv) preserve evidence, and (v) prevent the frustration of the forthcoming award.³⁵

32 Report of the Working Group on the work of its 39th Session, A/CN.9/545, para. 21.

33 Kaj Hobér, *Interim Measures by Arbitrators*, ICCA Congress series No. 13, International Arbitration 2006: Back to Basics?, p. 734 [hereinafter K. Hobér].

34 Report A/CN.9/669, paras. 92–94, Note A/CN.9/WG.II/WP.154.Add.1, para. 25.

35 For the protection of the confidentiality of ICSID proceedings, see SCHREUER ET AL., paras. 148–51 and Loretta Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties request and What Tribunals Order*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 170–71 (OUP 2009).

Preservation of a Right

A party may seek to preserve a right to which it claims to be entitled. In this respect, two closely connected questions of procedure arise, i.e., whether the applicant must prove that the right exists and whether a *prima facie* case on the merits must be shown. The latter question will be discussed below in the more general discussion of the requirements to obtain interim relief. The former one is reviewed in the following paragraphs.

ICSID system. In *Maffezini*, Spain requested the posting of a bond to protect its alleged right to obtain reimbursement of its legal costs in the event that the claimant failed in its case, and the tribunal ordered it to pay the costs. In its analysis, the *Maffezini* tribunal stated that, under Arbitration Rule 39, the “rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.”³⁶ As an example of an existing right, the tribunal cited an interest in a piece of property, the ownership of which is in dispute.³⁷ It concluded that Spain’s alleged right was hypothetical and could thus not be protected. Indeed, “[e]xpectations of success or failure in an arbitration or judicial case are conjectures.”³⁸ Accordingly, protecting a right that did not exist at the time of the order would have prejudged the merits of the case in an undue manner. Similarly in an unreported case, a tribunal, referring to *Maffezini*, observed that ordering the requested provisional measures, namely security for costs, would constitute a prejudgment of the underlying rights and obligations in a case that had not been yet heard, resulting in a denial of justice for the claimants.

Other ICSID tribunals have also sought to clarify this issue. The tribunal in *Pey Casado* elaborated on whether a right must exist to be protected. It noted that the tribunal must reason on the basis of assumptions and that “[i]t results from the very nature of this mechanism that the tribunal cannot require [. . .] evidence of the existence, the reality or the present nature of the rights which the measure sought aims to safeguard or preserve.”³⁹ In addition, to demand that the right that one seeks to preserve must be existing would oblige the tribunal to prejudge the substance of the case at a time when it is not in a position to do so.⁴⁰ Such prejudgment is not required under the ICSID Convention⁴¹ and is contrary to the very nature of provisional remedies, which by essence can only assess the likelihood of the rights at issue.

This approach was further validated by the *Occidental* tribunal with respect to a request for an order for specific performance.⁴² The tribunal held that the right to be

36 *Maffezini*, para. 13.

37 *Ibid.*, para. 14.

38 *Ibid.*, para. 20.

39 *Pey Casado*, para. 46 (italics in the original).

40 *Ibid.*, para. 48, referring to the ICJ case of *LaGrand* (discussed below) in para. 49.

41 *Ibid.*, para. 45.

42 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007 [hereinafter *Occidental*]. In this case, a participation contract was entered into by Occidental Exploration Petroleum Company (OEPC), Ecuador and Petroecuador, a State-owned petroleum company in connection with the exclusive exploration and exploitation of oil. After the State’s

preserved need not be proven to exist in fact.⁴³ It is sufficient that it be asserted as “a theoretically existing right,” the tribunal only dealing with the nature of the right and not its merits.⁴⁴ A theoretically existing right was defined as “an actual right or legally protected interest, by opposition to a simple interest which does not entail legal protection.”⁴⁵ The tribunal then further found that, at the stage of the request, the claimants had not established that “there exists a right to specific performance where a natural resources concession agreement has been terminated or cancelled by a sovereign State.”⁴⁶ It thus examined the existence of a right in theory. For that purpose, it reviewed whether a principle of law existed providing for a right to specific performance in petroleum contracts. It concluded that such a right did not exist.

By contrast, the tribunal in *City Oriente* concluded that the claimant had proven the appearance of a right, namely that under Ecuadorian Law, a contractor may demand that the public entity it contracted with be ordered to fulfill its commitments, while making sure it distinguished the facts of the case from the *Occidental* case.⁴⁷ In doing so, it observed that “at this stage, the sole decision to be made by the Arbitral Tribunal is whether the party requesting the provisional measures, City Oriente, has been able to prove *fumus boni iuris*, an appearance of a good right.”⁴⁸ The same finding of an appearance of a contractual right to specific performance under national law was also made in *Burlington*.⁴⁹

It is also worth noting that some ICSID tribunals have taken a stricter approach and refused to grant a relief that would coincide with the final remedy sought. In *TANESCO*,⁵⁰ the respondent applied for the payment by the claimant of a sum allegedly due under the disputed contract, i.e., for specific performance. It argued that, absent a payment, there was a risk that its lenders would foreclose on the facility, which could have

nullification of the contract, OEPC and its mother company (Occidental Petroleum Company) initiated an ICSID proceeding under the U.S.-Ecuador BIT alleging that their exploration rights had been illegally nullified and their assets had been expropriated. The claimants requested that the tribunal order the respondents (i) to invest a minimum amount in the development and operation of the area; (ii) to give a notice prior to entering into a contract with another party to carry out exploration and exploitation activities in the area; (iii) to produce reports regarding production and expenditures and; (iv) to enter into a contract with the claimants for the shipment of a certain amount of barrels of crude oil. The claimants presented their request as necessary to preserve their rights to obtain specific performance and restoration of their rights. The request was rejected.

43 *Occidental*, para. 64.

44 *Occidental*, para. 64.

45 *Occidental*, para. 65.

46 *Ibid.*, para. 86.

47 Among those, was the fact that the claim in *Occidental* was based on a BIT, while City Oriente requested the performance of a contract subject to Ecuadorian law.

48 City Oriente. Limited v. The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador), ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, May 13, 2008, para. 45 [hereinafter *City Oriente*].

49 *Burlington*, paras. 70–71.

50 Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures (Appendix A to the Award), December 20, 1999.

resulted in the deprivation of the ownership of the facility. The tribunal noted that the right to be preserved in that case was the right to enjoy the benefit of the agreement. The tribunal observed:

We do not go as far as to conclude that “provisional measures” under Rule 39 can *never* include recommending the performance of a contract in whole or in part: it is not necessary for us to go that far. But where what is sought, is, in effect, performance of the Agreement, and where the only right said to be preserved thereby is the right to enjoy the benefits of that Agreement, we consider that the application falls outside the scope of Rule 39, and therefore is beyond our jurisdiction to grant.⁵¹

In the same spirit, the *Phoenix* tribunal recalled that the “[p]rovisional measures are indeed not deemed to give to the party requesting them more rights than it ever possessed and has title to claim.”⁵² It concluded that “the requested provisional measure concerning the ownership of the land cannot be granted as it is equivalent to the final result sought.”⁵³

UNCITRAL Rules. A request to preserve a right most often aims at maintaining or restoring the *status quo*. In spite of this, it does not appear that the existence of the right which is the subject matter of the measure has been discussed as such by UNCITRAL tribunals. It probably has been addressed in the more general discussion as to whether a *prima facie* case on the merits is necessary, which will be examined below.

Finally, one should note that the Iran-U.S. Claims Tribunal has been reluctant to grant interim relief tantamount to the final relief requested.⁵⁴

Preservation of the Status Quo /Non aggravation of the Dispute

ICSID system. The *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the *status quo* between the parties pending [the] final decision on

51 Para. 16 (emphasis in the original). The respondent’s position was found to be too speculative as the risk of foreclosure was not supported and TANESCO’s alleged incapacity to face a possible award for costs was uncertain. For the tribunal, there was “a distinction to be drawn between the protection of rights and the enforcement of rights”, para. 13. It further noted that ICSID interim measures should not be recommended “in order, in effect, to give security for the claim”, para. 14, referring to *Allantic Triton v. Guinea*. It found that rather than preserving the *status quo*, the respondent’s request was “plainly directed to affect a fundamental change to it”, para. 15.

52 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007, para. 37 [hereinafter *Phoenix*].

53 *Ibid.*

54 See *Behring International*, Where Chamber three stated: “The Tribunal, however, determines that the granting of the full interim relief requested by Respondents, in particular, the transfer to Respondents of possession, custody and control of the warehoused goods (Respondent’s title to which is not disputed by Claimant), would be tantamount to awarding Respondents the final relief sought in their counterclaim. The Tribunal decides that, under the circumstances of this particular case, it cannot award such relief prior to determining as a final matter that it has jurisdiction.” para. 3.

the merits.” This expression has not been widely embraced by ICSID tribunals which, rather, refer to the non aggravation of the dispute. This is a principle of international law well embedded since the case of the *Electricity Company of Sofia and Bulgaria*.⁵⁵ The commentary of the 1968 edition of the ICSID Arbitration Rules stated that the non aggravation of the dispute was a valid concern. It explained that Article 47 of the Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.”⁵⁶

The principle was first affirmed in the first ICSID case *Holiday Inns v. Morocco*⁵⁷ and reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged “the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.”⁵⁸

It was reaffirmed in *Pey Casado*. The tribunal had to decide whether there existed a risk of aggravation or extension of the dispute “or of a development likely to make the execution of an eventual judgment more difficult (in the hypothesis, again, that the tribunal recognises itself as having jurisdiction) and in consequence a compromise of the rights recognised therein for one or other of the Parties.”⁵⁹ The tribunal acknowledged that there were tensions between the parties and thus invited them, under the heading of a provisional measure, to take into account the various possible hypotheses and each to ensure—to reproduce the expression used by the International Court of Justice in the *Anglo-Iranian Oil Company Case*—“that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of [the judgment] which the [Arbitration Tribunal] may subsequently render” and “that no action of any kind is taken which might aggravate or extend the dispute.”⁶⁰

The *Plama* tribunal adopted a somewhat more limited approach. While acknowledging that the local proceedings which the claimant sought to discontinue could aggravate the dispute between the parties, it considered,

that the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult. It is a right to maintenance of the status quo, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.⁶¹

55 *Electricity Company of Sofia and Bulgaria* (Belgium v. Bulgaria), Judgment of December 5, 1939, P.C.I.J. series A/B, No 79, p. 199. See also *LaGrand Case* (Germany v. United States), Judgment of June 27, 2001, para. 103, I.C.J. Reports 2001, p. 466 [hereinafter *LaGrand Case*].

56 1 ICSID Reports 99.

57 *Holiday Inns S.A. and others v. Kingdom of Morocco*, ICSID Case No. ARB/72/1, Order of July 2, 1972, not public but commented in Pierre Lalive, *The First “World Bank” Arbitration* (*Holiday Inns v. Morocco—Some Legal Problems*, BYIL 1980 [hereinafter P. Lalive].

58 *Amco*, p. 412.

59 *Pey Casado*, para. 73.

60 *Ibid.*, para. 77.

61 *Plama*, para. 45.

In that case, as already mentioned, the resolution of the dispute was to be effected through monetary relief. In other words, the resolution was not rendered more difficult by the alleged action of the respondent. This approach of the non aggravation of the dispute mirrors the tribunal's vision of the rights to be preserved examined above. On that basis, an aggravation of a dispute, the consequences of which could be compensated by an award of monetary damages, might not be deemed a sufficient ground for granting interim relief. This aspect will be discussed further below in the context of the requirement of irreparable harm.

The *Occidental* tribunal appears to have confirmed this approach. It recalled that when granted, provisional measures have always been directed at the behavior of the parties to the dispute and that "[p]rovisional measures are not designed to merely mitigate the final amount of damages."⁶² The tribunal held that the measures requested aimed at the non aggravation of the monetary damages but not of the dispute *per se*.⁶³ The *Burlington* tribunal adopted a somewhat different approach. It considered that the continuation of the seizures was bound to aggravate the dispute, because there was "a risk that the relationship between the foreign investor and Ecuador may come to an end."⁶⁴ In other words, it held that the continuation of the contractual cooperation between the parties represented the *status quo* to be protected.⁶⁵

UNCITRAL Rules. It is clear that the non aggravation of the dispute can be a ground to obtain interim relief under the 1976 UNCITRAL Rules. The maintenance or restoration of the *status quo* also appears in draft Article 26(2)(a) as an explicit ground for granting interim relief.

It is interesting to note that the Iran-U.S. Claims Tribunal does not appear to have relied on the concept of non aggravation of the dispute when assessing requests for interim relief. However, references to maintaining the *status quo* can be found in concurring opinions.⁶⁶

Protection of the Tribunal's Jurisdiction

The ICSID Convention, the ICSID, AF, and UNCITRAL Arbitration Rules are silent as to whether interim relief can be used for the purpose of protecting the tribunal's

⁶² *Occidental*, para. 97. In addition, the *Occidental* tribunal observed "[I]n any situation resulting from an illegal act, the mere passage of time aggravates the damages that can be ultimately granted and it is well known that this is not a sufficient basis for ordering provisional measures," para. 97.

⁶³ *Ibid.*, para. 98.

⁶⁴ *Burlington*, para. 65. In that case, PetroEcuador initiated local proceedings to collect amounts allegedly due under an amendment to the Hydrocarbon Act, which the claimants considered to unilaterally modify their rights under two production sharing contracts for the exploration and exploitation of oil fields in the Amazon Region.

⁶⁵ *Ibid.*, para. 67.

⁶⁶ See concurring opinion of Judge Holtzmann and Judge Mosk to the interim award rendered in *E-systems v. The Islamic Republic of Iran and Bank Melli* (February 4, 1983), *reprinted in* 2 Iran-USCTR 51 [hereinafter *E-systems*].

jurisdiction, while NAFTA 1134, for example, specifically mentions this purpose as a reason for interim relief. This said, it is accepted that this is one of the purposes of interim relief.

ICSID Convention cases. Article 26 of the ICSID Convention provides that ICSID proceedings are of an exclusive nature.⁶⁷ On that basis, tribunals have been asked to enjoin parties from seeking interim relief in domestic courts or continuing proceedings on the merits in another forum.

In *Atlantic Triton*, the ICSID tribunal was reluctant to affirm that, pursuant to Article 26 of the ICSID Convention, the parties should refrain from preserving their rights by filing action in domestic courts.⁶⁸ By contrast, the tribunal in *MINE v. Guinea* recommended that Guinea terminate any proceedings in connection with the dispute and any provisional measures pending in national courts.⁶⁹

In *SGS Société Générale de Surveillance v. Pakistan*, the tribunal was presented with a request for provisional measures, including the stay of a concurrent arbitration proceeding in Pakistan. The tribunal first found that SGS had “a *prima facie* right to seek access to international adjudication under the ICSID Convention.”⁷⁰ It considered that it was its duty to protect this right of access. It thus recommended that Pakistan inform all the relevant domestic courts of the current standing of the ICSID arbitration and ensure that no action be taken to hold SGS in contempt of court. In parallel, the tribunal also recommended that local arbitration proceedings be stayed until the tribunal decided on its jurisdiction.⁷¹ By contrast, it rejected a broad request aiming at an injunction refraining from commencing or participating in proceedings relating in any manner to the ICSID arbitration. This request was deemed to restrain the ordinary exercise of Pakistan’s normal process of justice.⁷²

In *Tokios Tokeles*, the tribunal also addressed Article 26 of the ICSID Convention in the context of provisional measures. It stated that “[a]mong the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the

67 See Charles N. Brower & Ronald E.M. Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings*, 6 ICSID REV.-FILJ (1991) [hereinafter C. Brower and R. Goodman].

68 *Atlantic Triton Company Limited v. People’s Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, decision unreported, [hereinafter *Atlantic Triton*] cited in Paul Friedland, *Provisional Measures and ICSID Arbitration*, 2(4) ARB. INT’L 347 (1986) [hereinafter P. Friedland].

69 *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Provisional Measures, December 4, 1985 [hereinafter *MINE*]. For an analysis of *Atlantic Triton* and *MINE*, see P. Friedland, pp. 335–57 and also in *ICSID and Court-Ordered Provisional Measures Remedies: An Update*, 4(2) ARB. INT’L 161–65 (1988); see also Antonio R. Parra, *The Practices and Experience of the ICSID*, in ICC BULLETIN 37, 1993, No. 519, [hereinafter A. Parra], and C. Brower and R. Goodman.

70 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No 2, October 16, 2002, 18 ICSID REV.-FILJ (2003), p. 299 [hereinafter *SGS v. Pakistan*].

71 *Ibid.*, p. 304.

72 *Ibid.*, p. 301.

ICSID Arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy [. . .].⁷³ On that basis, the tribunal had already decided in relation to an earlier application that once the parties had consented to ICSID arbitration, they were under a duty to refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID. Accordingly, the tribunal recommended in its first procedural order that both parties refrain from, suspend, or discontinue any judicial or other domestic proceedings concerning Tokios Tokeles or its investment in Ukraine which may affect the issuance or enforcement of a future award or aggravate the dispute.⁷⁴

In *CSOB v. Slovak Republic*, the tribunal also recommended that the local bankruptcy proceedings be suspended as they could have included determinations on issues at stake in the ICSID arbitration.⁷⁵ Similarly, the *Holiday Inns* tribunal⁷⁶ considered that the Moroccan courts were to refrain from making decisions until it had itself decided the questions in dispute, although no interim measure was recommended as such.

More recently, the *Perenco* tribunal recommended that Ecuador refrain from pursuing any actions before local courts.⁷⁷ In its words,

[u]nless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration.⁷⁸

AF cases. In cases governed by the AF Rules, Article 26 of the Convention does not apply. Nevertheless, an AF tribunal could very well consider that there is a necessity to protect its jurisdiction under the circumstances. This is certainly beyond doubt in AF NAFTA proceedings since NAFTA Article 1134 expressly provides for interim relief to preserve the tribunal's jurisdiction.

UNCITRAL Rules. Most of the interim relief granted by the Iran-U.S. Claims Tribunal concerned stays of proceedings brought in other fora pending the tribunal's determination. In doing so, the tribunal sought to ensure that its jurisdiction and authority were

73 Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18 [hereinafter *Tokios Tokeles*], Procedural Order No. 3, January 18, 2005, para. 7. For a similar position, see *Burlington*, para. 57.

74 *Ibid.*, Procedural Order No. 1, July 1, 2003.

75 Československa Obchodní Banka a.s. v. Slovak Republic, ICSID Case No. ARB/97/4, Orders No. 4 and No. 5, January 11, 1999 and March 1, 2000. See also *Plama*, where the tribunal dismissed the claimant's request to discontinue local proceedings and noted that, at least with regard to local bankruptcy proceedings, the parties were not the same since the proceedings were brought by private parties and not by the state, see *infra*.

76 Holiday Inns v. Kingdom of Morocco, ICSID Case No. ARB/72/1, Order of July 2, 1972, quoted in *Pey Casado*, para. 54.

77 Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/16, Decision on Provisional Measures, May 8, 2009, para. 62 [hereinafter *Perenco*]. That case arose under the same factual circumstances as *Burlington*, i.e., the amendment by Ecuador of its Hydrocarbon Act.

78 *Ibid.*, para. 61.

fully effective,⁷⁹ notwithstanding the silence of the 1976 UNCITRAL Arbitration Rules.

The Claims Settlement Declaration provided in Article VII (2) that the claims referred to the Iran-U.S. Claims Tribunal were excluded from the jurisdiction of the courts of Iran, of the United States, or any other courts. Stays decided by the tribunal were contingent upon a showing that the parties were identical or closely related in both proceedings and that the same subject matter was involved.⁸⁰ The latter requirement was interpreted as implying that the two proceedings presented common issues of law and facts currently or in the future without requiring an identity of claims, the main concern of the tribunal being to avoid inconsistent decisions. However, the mere exclusive jurisdiction of the tribunal was not deemed a sufficient ground for preventing a similar claim from being filed in another forum.⁸¹ Indeed, the tribunal was cautious to preserve rights which might otherwise have been time-barred.

Draft Article 26(2)(b) also allows interim measures to prevent a party from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself. This wording was meant to encompass preserving the jurisdiction of the tribunal through anti-suit injunctions. However, because they infringe upon the principle of the competence-competence of courts and tribunals, which is a general principle of procedure, anti-suit (and anti-arbitration) injunctions by an arbitral tribunal should only be granted to prevent grossly abusive conduct.⁸² The same should hold true for anti-arbitration injunctions issued by courts.

Preserving Evidence

Interim relief can aim at preserving evidence. The same purpose could in reality also be achieved in reliance on the general procedural powers of a tribunal, for example under Article 44 of the ICSID Convention.

79 See, for example, *E-Systems; Rockwell International Systems Inc. and The Islamic Republic of Iran, Ministry of Defence*, Interim Award No. 20-430-1, June 6, 1983, *reprinted in* 2 IRAN-USCTR 369.

80 CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 231-32 (Martinus Nijhoff Publishers 1998) [hereinafter C. Brower]. See, e.g., *RCA Global Communications Disc., Inc. and the Islamic Republic of Iran*, Interim Award No. 30-160-1, October 31, 1983, *reprinted in* 4 IRAN-USCTR 9.

81 C. Brower, p. 234. Also *Fluor Corporation and The Islamic Republic of Iran*, Interim Award No. 162-333-1, para. 6 (August 6, 1986), *reprinted in* 11 IRAN-USCTR 296, wherein the request to enjoin claimant from instituting an ICC proceedings was denied especially since substantial questions as to the jurisdiction of the tribunal existed and given the fact that the "filing elsewhere might be necessary to preserve rights which might otherwise be time-barred" (at 297). The claimant had also undertaken to commence the arbitration but not to pursue it. For a detailed analysis of the stay of proceedings granted by the Iran-U.S. Claims Tribunal, see G. Aldrich, pp. 142-49.

82 *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objections, Judgement of November 18, 1953, I.C.J. Reports 1953, pp. 119-20.

ICSID system. ICSID tribunals have granted measures aiming at the protection of evidence. The *Biwater* tribunal, for example, recommended that the respondent preserve certain documents and make an inventory of given categories of documents.⁸³ In a previous case, *Agip v. Congo*,⁸⁴ the tribunal had granted the claimant's request for measures requiring the government to collect all the documents that had been kept at Agip's local office, furnish a complete list of these documents to the tribunal, and keep them available for presentation to the tribunal at Agip's request. In another case, *Vacuum Salt v. Ghana*,⁸⁵ the claimant sought an order to preserve its corporate records. The government gave a voluntary undertaking that it would not deny the claimant's access to its records, which was acknowledged by the tribunal.

UNCITRAL Rules. The need to protect evidence that is relevant and material to the resolution of the dispute is one of the grounds on which an UNCITRAL tribunal may grant interim measures under draft Article 26(2)(d). The draft requirements for an interim measure aimed at preserving evidence are less stringent than those for interim relief with other purposes, which will be discussed. Indeed, the tribunal would appreciate in its discretion to what extent the applicant needs to show a reasonable likelihood of success on the merits. Similarly, it is only if the tribunal would consider it appropriate that the applicant would need to show that "harm not adequately reparable by an award of damages" would be likely to result if the measure is not ordered.

Non-Frustration of the Award

Can interim measures be used to preserve assets out of which a subsequent award may be satisfied or to guarantee the payment of an award?

ICSID system. ICSID tribunals have been reluctant to acknowledge that the avoidance of the frustration of the award can be a valid purpose of provisional measures. This purpose has mainly been discussed in the context of requests for security to cover

⁸³ *Biwater*, paras. 84 to 98. The applicant was also seeking the production of various categories of documents. The *Biwater* tribunal noted that "actual production is catered for by other rules (in particular Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules)", para. 100. It concluded "[a]lthough there may be instances in which document production could be ordered pursuant to Article 47, this would in the Arbitral Tribunal's view be exceptional", para. 101. In that particular instance, it found that the requirements of Article 47 were not established and that there was no right threatened, but went on to examine the request pursuant to Article 43 of the Convention. The *Phoenix* tribunal also declined to grant a provisional measure related to the opening of secret services archives under Article 47 of the Convention as the request appeared overly broad and unspecific and could be dealt with under Article 43 if needed, see para. 46.

⁸⁴ *Agip SpA v. People's Republic of Congo*, ICSID Case No. ARB/77/1, Decision, January 18, 1979, reported in the Award of November 30, 1979, 1 ICSID Reports 310 [hereinafter *Agip v. Congo*].

⁸⁵ *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, ICSID Case No. ARB/92/1, Decision No. 3 on request for recommendation of provisional measures, June 14, 1993, 4 ICSID Reports 323.

the amount in dispute or the legal costs. In *Atlantic Triton*, it was decided that such a request for security for the amount of the claim fell within the ambit of Article 47 of the Convention.⁸⁶ The tribunal, however, rejected the request on the grounds that “there is no reason to suppose that the Government of Guinea would not perform any obligations for which the final award might hold it responsible.”⁸⁷

All other requests for security for costs presented to ICSID tribunals appear to have been denied or granted upon stringent conditions. In *Maffezini v. Spain*, the tribunal dismissed the request for security for the two main reasons already explained, i.e., the non existence of a right to be preserved and the fact that the request was not linked to the subject matter of the case. In *Pey Casado*, the respondent applied for a guarantee of the payment of the costs. The tribunal considered that granting a *cautio judicatum solvi* for the payment of costs was not an ordinary measure⁸⁸ and that the circumstances did not justify an extraordinary one. It noted that such a measure was not mentioned in the ICSID texts, which entailed “a certain presumption that such a measure is not authorized or included,”⁸⁹ and deduced that the drafters of the Convention appeared to have evaluated and accepted the risk of non payment of a party’s allocated costs.⁹⁰

It is submitted that an order for security for costs in favor of the respondent should only be granted if the claimant’s case appears abusive, frivolous, or extravagant.

UNCITRAL Rules. It has been argued that Article 26 in its 1976 version did not allow orders for security for costs because such orders were not made in respect of the subject matter of the dispute.⁹¹ This opinion is too restrictive and, in any event, appears obsolete in view of the deletion of the subject matter requirement in draft Article 26(2) (c). Draft Article 26(2)(c) specifically envisages the need for an interim measure to preserve assets out of which a subsequent award may be satisfied. Security for costs is encompassed by the words “preserving assets”⁹² as costs that can be awarded in the award.

REQUIREMENTS FOR INTERIM RELIEF

It is accepted that “[t]he imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal.”⁹³ Specific circumstances

86 *Atlantic Triton*, cited in P. Friedland, p. 347 and in Schreuer et al., pp. 785–86; also cited in *Pey Casado*, para. 88.

87 Cited in P. Friedland, p. 347.

88 *Pey Casado*, para. 86.

89 *Ibid.*, para. 86.

90 See also, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para. 46.

91 Noah Rubins, *In God we trust, all others pay cash: Security for costs in international commercial arbitration*, 11 AM. REV. INT’L ARB. 343–44.

92 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 48.

93 See, e.g., *Maffezini*, para. 10. Also *Plama*, para. 38.

must prevail under which the measure(s) cannot await the tribunal's determination on the merits. This being said, tribunals have not necessarily articulated a uniform test when dealing with requests for interim relief, and the approaches adopted tend to vary with the facts of the case. Amongst the tribunals that have articulated a clear test, one can refer to the *Occidental* tribunal, for which "the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are *necessary* to preserve a party's right and where the need is *urgent in order to avoid irreparable harm*."⁹⁴

In the view of the *Encana* tribunal, "three conditions ought in principle to be met before interim measures are established whether under Article XIII(8) of the BIT or Article 26 of the UNCITRAL Rules. First, there must be an apparent basis of jurisdiction. Second, the measure sought must be urgent. Third, the basis for establishing provisional measures must be that otherwise irreparable damage could be caused to the requesting party."⁹⁵

This section will review (i) the initiative to request interim relief, (ii) whether the tribunal must have jurisdiction, (iii) whether there must be a *prima facie* case on the merits, (iv) whether the measure must be urgent, and (v) whether it must be necessary for a tribunal to grant interim relief.

94 *Occidental*, para. 59, emphasis in the original. See for another ICSID illustration in *City Oriente*: "[t]he requirements that the tribunal can take into consideration in ordering provisional measures are (A) that the adoption of such measures be necessary to preserve petitioner's rights, (B) that their ordering be urgent, and (C) that each party has been afforded an opportunity to raise observations.", Decision on Provisional Measures, November 19, 2007, para. 54. See also *Burlington*: "provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures", para. 51.

95 *Encana Corporation v. Republic of Ecuador*, Interim Award of January 31, 2004 [hereinafter *Encana*], para. 13. This case was brought under the 1996 Canada-Ecuador BIT, which contains, in Article XIII(8) specific provisions on interim measures. *Encana* sought measures to prevent freezing of assets of *Encana's* subsidiaries and of its legal representative pending resolution of the dispute by the tribunal. The tribunal rejected the request for provisional measures. In passing, the tribunal stated that, as a specific provision, Article XIII (8) of the BIT was to prevail over the general power in Article 26 of the UNCITRAL Rules. Nonetheless for the sake of the present section, the findings of the tribunal are useful to shed some light on Article 26.

See also Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Mongolia [hereinafter *Paushok*], Order on Interim Measures, September 2, 2008, an UNCITRAL case under the Russian-Mongolian BIT in which the tribunal granted the claimants' request. Doing so, the tribunal noted that Article 26(1) of the UNCITRAL Rules left it a wider discretion than under the ICSID Convention (para. 36). It set forth the following requirements: "(1) *prima facie* jurisdiction, (2) *prima facie* establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality" (para. 45). For an analysis of this case, see Joe Matthews and Karen Stewart, *Time to Evaluate the Standards for Issuance of Interim Measures of Protection in International Investment Arbitration*, 25(4) ARB. INT'L 529-52 (2009).

The Initiative to Request Interim Relief

ICSID system. ICSID Arbitration Rule 39(1) and Article 46(1) of the AF Arbitration Rules start from the premise that either party may present a request to the tribunal, at any time during the proceedings. In addition, Arbitration Rule 39(3) allows a tribunal to “recommend” provisional measures “on its own initiative” or to recommend measures “other than those specified in a request.” Article 46(1) of the AF Arbitration Rules contains the same rule, although it allows a tribunal to “order” rather than “recommend” provisional measures. This leaves the tribunal with a wide discretion.⁹⁶ There is no information publicly available on any measures recommended by ICSID tribunals *proprio motu*. Indeed, this would appear as an extremely rare occurrence in practice.

Under the applicable rules, a tribunal is also free to recommend a different measure than the one requested. An illustration can be found in *Holiday Inns*, in which the tribunal declined to recommend a series of measures sought in the request and chose to recommend instead that both parties “abstain from any measure incompatible with the upholding of the contract.”⁹⁷

UNCITRAL Rules. Article 26(1) of the UNCITRAL Arbitration Rules provides that measures may be granted at the request of either party. Accordingly, on the face of Article 26(1) and of the *travaux préparatoires*,⁹⁸ an UNCITRAL tribunal would not be empowered to order interim measures of its own motion.⁹⁹ The same applies under the draft Rules that provide that the measures can be granted upon the request of a party.

Jurisdiction of the Tribunal?

It is accepted that a tribunal does not need to assess that it has jurisdiction prior to ruling on a request for interim relief. By its very nature, interim relief requires a prompt determination that cannot await a full and final determination on jurisdiction. It is thus sufficient for a tribunal to be satisfied that it has a *prima facie* jurisdiction. Investor-state tribunals consistently rely on decisions of the International Court of Justice to support this view.¹⁰⁰ Since the case of *Military and Paramilitary Activities in and*

⁹⁶ *Pey Casado*, paras. 15–16.

⁹⁷ P. Lalive, p. 137.

⁹⁸ Report of the Secretary-General on the Revised Draft Set of Arbitration, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), <http://www.uncitral.org/uncitral/en/commission/sessions/9th.html>, p. 176 under art. 23.

⁹⁹ See in this sense, D. Caron et al., pp. 533–34. See also C. Brower in footnote 1029.

¹⁰⁰ This question elicited strong controversy over the years in the ICJ's jurisprudence. See for example for supporters of a jurisdiction clearly established, the dissenting opinion of Judge Forster in the *Nuclear Tests* (Australia v. France/New Zealand v. France), Order of June 22, 1973, I.C.J. Reports 1973, p. 173, or Judge Morozov in his separate opinion in the *Aegean Sea Continental Shelf* (Greece v. Turkey), Order of September 11, 1976, I.C.J. Reports 1976, p. 22 [hereinafter *Aegean Sea Continental Shelf Case*].

against Nicaragua (*Nicaragua v. United States of America*),¹⁰¹ the ICJ has adopted a consistent line of reasoning according to which it need not finally satisfy itself that it has jurisdiction over the dispute, but its *prima facie* jurisdiction must be established.

ICSID practice. ICSID tribunals have also accepted that measures can be recommended before the tribunal has ruled on all the objections to jurisdiction or on the admissibility of the claims.¹⁰² An argument to this effect was found in the text of Arbitration Rule 39, which mentions that a request may be made at any time. However, the practice is not consistent as to whether and how *prima facie* jurisdiction ought to be established. Older decisions either overlooked this issue or brushed it away. The tribunal in *Tokios Tokeles*¹⁰³ simply mentioned that a determination on interim relief did not prejudice jurisdiction:

It is finally to be recalled that, as ICSID tribunals have repeatedly stated, the 'recommendation' of provisional measures does not in any way prejudice the question of jurisdiction. It is, therefore, independently of the present Order on provisional measures that this Tribunal will have to rule on the jurisdictional objections raised by the Respondent.

The majority of the tribunals appear now to resort to the *prima facie* test in line with the jurisprudence of the ICJ, as recently illustrated by the *Occidental* tribunal. The latter stated that it would "not order such measures unless there is, *prima facie*, a basis upon which the tribunal's jurisdiction might be established."¹⁰⁴

How can a tribunal be satisfied that it has *prima facie* jurisdiction? It has been suggested that the determination made by the Secretary-General of the Centre when registering the request for arbitration pursuant to Article 36 of the ICSID Convention (i.e., unless the Secretary-General finds that the dispute is manifestly outside of the jurisdiction of the Centre) was sufficient for the purpose of establishing

101 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Provisional Measures, Order of May 10, 1984, I.C.J. Reports 1984, p. 169, para. 24. S. Rosenne defines jurisdiction in this context as "jurisdiction both *ratione personae* and *ratione materiae* over the merits of the claim, as well as jurisdiction to determine whether the provisional measures requested are compatible with the principal claim and do not change the nature of the claim as advanced in the application instituting the proceedings", p. 92 (footnotes omitted, italics in the original).

The ICJ's position can also be illustrated by the Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), in which the Court stated: "57. Whereas in dealing with a request for provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but will not indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established (see Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Provisional Measures, Order of July 10, 2002, I.C.J. Reports 2002, p. 241, para. 58)", Order of July 13, 2006, also reiterated in Order of January 23, 2007, para. 24 [hereinafter *Pulp Mills on the River Uruguay*].

102 See, e.g., *Pey Casado*, para. 5.

103 *Tokios Tokeles*, Order No. 1, July 1, 2003.

104 *Occidental*, para. 55.

prima facie jurisdiction.¹⁰⁵ Certain authors have indeed put forward that “although the tribunal is, of course, in no way bound by this preliminary examination of jurisdiction [made by the Secretary General], it provides a useful basis for its power to recommend provisional measures.”¹⁰⁶

Most of the tribunals do not limit themselves to referring to the Secretary-General’s positive assessment but carry out their own review. In practice, tribunals either examine whether there is no manifest reason for excluding their jurisdiction (the “unless approach” leaving the benefit of the doubt to the claimant) or whether a provision confers *prima facie* jurisdiction upon them. The *Occidental* tribunal, for example, reviewed the grounds invoked for its jurisdiction and concluded that *prima facie* there was a basis for jurisdiction.¹⁰⁷ Some tribunals have proceeded to a more thorough *prima facie* analysis than others. For instance, in an unpublished decision, an ICSID tribunal not only reviewed the grounds invoked for jurisdiction but also satisfied itself that the conditions of Article 25 of the ICSID Convention were *prima facie* met.

In any event, the tribunal’s *prima facie* determination does not prejudice its later decision on jurisdiction. Neither does it preclude any jurisdictional objections raised within the relevant period of time.

UNCITRAL practice. The UNCITRAL Arbitration Rules are silent as to whether the jurisdiction of the tribunal needs to be established for purposes of an order for interim relief. The early decisions of the Iran-U.S. Claims Tribunal did not consistently require an express finding of *prima facie* jurisdiction.¹⁰⁸ However, following the ICJ’s reasoning in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* mentioned earlier, the tribunal also required that *prima facie* jurisdiction over the merits be shown.¹⁰⁹ The *Encana* tribunal referred to “an apparent basis of jurisdiction,”¹¹⁰ although it did not need to enter into that discussion, having found that there was no necessity for the measures.

105 See C. Brower & R. Goodman, p. 455. It was also noted in *Pey Casado* that the criterion under Article 36 of the ICSID Convention (unless the Secretary-General finds that the dispute is manifestly outside the jurisdiction of the Centre) resembles to a certain extent to the *prima facie* test of the ICJ (para. 8). This said, one must keep in mind that the determination of the Secretary General under Article 36 of the ICSID Convention is only made on the basis of the information contained in the request for arbitration, without having heard the other party.

106 Schreuer et al., para. 48 and P. Friedland.

107 *Occidental*, para. 55. See also *SGS v. Pakistan*, p. 299.

108 C. Brower, p. 218.

109 C. Brower, p. 220; see Ford Aerospace and Communications Corporation and the Air Force of the Islamic Republic of Iran, Interim Award No. 39-159-3, June 4, 1984, reprinted in 6 IRAN-USCTR 104, which discussed jurisdiction over counterclaims. Also Bendone—Derossi International and the Government of the Islamic Republic of Iran, Interim Award No. 40-375-1, June 7, 1984, reprinted in 6 IRAN-USCTR 130.

110 *Encana*, para. 13.

Prima Facie Case on the Merits?

Showing a *prima facie* case on the merits is generally required in commercial arbitration where tribunals are allowed to make an overall assessment of the merits of the case to establish whether the party's case is "sufficiently strong to merit protection."¹¹¹ Whether the applicant must establish that it has a *prima facie* case on the merits in an investor-state arbitration in order to obtain interim relief is debatable. As observed by authors,

[a]lthough the likelihood of success on the merits of the underlying claim is required for injunctive relief in many municipal systems, it rarely is articulated in public international arbitration as a factor to be considered in the granting of interim measures. It is a factor nonetheless, albeit *sotto voce*. It certainly is appropriate that when a case manifestly lacks merit, necessarily costly and disruptive interim measures to protect such dubious rights should not be granted. A tribunal must determine *prima facie* not only whether it possesses jurisdiction but also whether the question presented by the case is frivolous. The reluctance of tribunals to openly voice their consideration of this factor probably reflects in large part a desire to avoid embarrassment to a *sovereign* state party to the arbitration or accusations of pre-judging the case.¹¹²

UNCITRAL Rules. Under the 1976 UNCITRAL Rules, doubt was permitted on the need to establish a *prima facie* case. However, and in line with the general practice in commercial arbitration, it has been suggested that under the 1976 UNCITRAL Rules, "[a]lthough at the interim measures stage an arbitral tribunal should not be overly concerned with the merits of the case, a party whose case is clearly without merit should not be granted a request for interim measures. There can be no prejudice if there is little or no prospect that the alleged right threatened will be recognized as a right."¹¹³ Draft Article 26(3)(b) makes it clear and requires "a reasonable possibility that the requesting party will succeed on the merits of the claim," except in relation with requests for preservation of evidence.

The tribunal in the *Paushok* case made the *prima facie* establishment of the case one of the requirements to be met to grant interim relief. Doing so, it noted that:

... the Tribunal need not go beyond whether a reasonable case has been made, which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favour of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing

111 See ALI YEŞİLIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 5–29 (Kluwer 2005); see also K. Hobér, p. 735. It is also a common feature in the jurisprudence of the Court of Justice of the European Communities under the *fumus boni juris* doctrine.

112 D. Caron, Leiden, pp. 237–38 (footnotes omitted, emphasis in the original).

113 D. Caron et al., p. 537.

on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.¹¹⁴

ICSID system. Showing a *prima facie* case is not an express requirement under the ICSID Convention, in line with the ICJ's practice.¹¹⁵ This said, depending on the nature of the request, an ICSID tribunal examines the *prima facie* merits of the case to a certain extent, when it appreciates the rights for which interim protection is requested. Indeed, one can ponder whether the test for asserting a theoretically existing right or showing the appearance of a right as mentioned above, is fundamentally different from a showing of a *prima facie* case on the merits. It is submitted that it is not, provided the *prima facie* test is understood as a demonstration that the applicant's case is not entirely without merit, in other words, not devoid of any chance of prevailing. With this understanding, the tests are not different in essence. Be this as it may, the question appears to be limited to cases where the relief aims at protecting a specific right, such as specific performance. In other cases, such as cases aiming at the preservation of evidence or the protection of the tribunal's jurisdiction, there seems to be no requirement to establish a *prima facie* case on the merits.

Urgency

Beyond the issue of whether urgency is a requirement for the granting of interim relief in investor-state arbitration, which will be examined first, the concept of urgency has a practical impact on the way proceedings are conducted and will be reviewed thereafter.

Is urgency a requirement? Although none of the arbitration rules addressed here expressly mentions urgency, it appears to be one of the requirements for the granting of interim relief. Indeed, unless there is urgency in the situation presented to the tribunal, the relief sought can await the determination on the merits.

ICSID system. A leading author observed that "an attempt to have reference to urgency and imminent danger was defeated" in the preparation of the Convention.¹¹⁶

¹¹⁴ *Paushok*, para. 55, footnote omitted.

¹¹⁵ While Article 41 of the ICJ Statute is silent on this issue and the Court has not set any clear standards in this regard, it has been suggested that "as there must be at least a *prima facie* basis for the substantive jurisdiction, there must also be some prospects of success on the merits of the case, for otherwise there would not be any necessity to indicate provisional measures" (Zimmermann et al., para. 35). "The aspects concerning the prospects of success of the application do not play an important role in the practice of the Court because inter-State disputes are usually complex so that the prospects of success are not easily evaluated (*ibid.*, para. 36); but see *contra* S. Rosenne ("It is arguable that this [if the Court considers that circumstances so require] also can imply some assessment by the Court of the nature of the decision on the merits and the chances of each party on the merits. But speculation of that nature is hardly compatible with the international judicial function" referring to *Maffezini*, *op. cit.*, p. 72).

¹¹⁶ Schreuer et al., para. 63 under Article 47.

Rather, the criterion is whether “a question cannot await the outcome of the award on the merits.”¹¹⁷ Some tribunals, when dealing with a request for provisional measures, have not discussed the matter of urgency at all.¹¹⁸ Others have found guidance in the test applied by the ICJ¹¹⁹ and have characterized urgency as one of the requirements for interim relief. The tribunal in *Pey Casado* stated that it is “in the very nature of the institution of provisional measures that they are not only provisional, but also and above all urgent, that is to say that they must be or be able to be decided quickly.”¹²⁰ For its part, the *Plama* tribunal declared “[t]he need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage.”¹²¹ The latter part of the requirement is examined later in this section. The *Occidental* tribunal recalled that “[i]t is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost.”¹²² Or, in the words of the *Perenco* tribunal, “[p]rovisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them.”¹²³

UNCITRAL Rules. There is no requirement of urgency in the Rules or in the draft Rules. The Iran-U.S. Claims Tribunal does not seem to have referred to it as a necessary requirement either. It must be said however that the Iran-U.S. Claims Tribunal focused instead on the notion of irreparable harm, which will be examined shortly. By contrast, the *Encana* and *Paushok* tribunals emphasized that urgency was an important requirement in the context of investor-state arbitration.¹²⁴

What is urgency? Urgency is usually considered on a case-by-case basis, depending on the facts of the case and on the rights to be protected. According to the ICJ, “[a] measure is urgent where ‘action prejudicial to the rights of either party is likely to be

117 *Ibid.*

118 See, for example, *Maffezini* and *Tokios Tokeles*.

119 In the words of the ICJ, “Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of July 29, 1991, I.C.J. Reports 1991, p. 17, para. 23. *Certain Criminal Proceedings in France* (Republic of the Congo v. France), Provisional Measure, Order of June 17, 2003, I.C.J. Reports 2003, p. 107, para. 22; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Preliminary Objections, Order of January 23, 2007, p. 11, para. 32); and whereas the Court thus has to consider whether in the current proceedings such urgency exists.”, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Order of October 15, 2008, para. 129 [hereinafter *Case Concerning Application of the Convention on the Elimination of Discrimination*].

120 *Pey Casado*, para. 5.

121 *Plama*, para. 38.

122 *Occidental*, para. 59.

123 *Perenco*, para. 43.

124 *Encana*, para. 13; *Paushok*, para. 45.

taken before [a] final decision is given.”¹²⁵ Few tribunals, however, have elaborated on the notion of urgency and on the level of urgency required. The *Biwater* tribunal noted that “whilst it was a common ground that this is a requirement, for its own part the Arbitral Tribunal considers that the requirement needs more elaboration.”¹²⁶ It then observed that the notion of urgency can vary:

In the Arbitral Tribunal’s view, the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to “urgency” in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.¹²⁷

The tribunal in *City Oriente* made the following assessment on the issue of urgency:

In the Tribunal’s opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the Tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very nature of the issue.¹²⁸

The circumstances of the case are thus critical in assessing the level of urgency of a request. For example in *Burlington*, the tribunal found that urgency lied with the non-aggravation of the dispute¹²⁹: “[. . .] when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition”¹³⁰ or by the very nature of the objective sought.

As a general proposition, it appears reasonable to consider that the urgency requirement is met as soon as the decision over the provisional measures cannot wait until the

125 *Passage Trough the Great Belt Case*, in which Finland submitted that the rights of passage through the Great Belt of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards was threatened by the construction of a fixed bridge over the Great Belt by Denmark. The ICJ considered that there was no need to indicate Denmark to freeze construction work of the East Channel Bridge since the Passage was only to be hindered with the installation of cable works not before the end of 1994, by which time the Court would have disposed of the case (Order of July 29, 1991, I.C.J. Reports 1991, p. 12). Cited in *Occidental*, para. 59. See also, *Case Concerning Application of the Convention on the Elimination of Racial Discrimination*, para. 129.

126 *Biwater*, para. 76.

127 *Biwater*, para. 76.

128 *City Oriente*, Decision on Provisional Measures, para. 69.

129 *Burlington*, para. 74

130 *Ibid.*, with a reference to *City Oriente*.

final award. This said, the degree of urgency can also be higher and may influence when and how a tribunal will deal with an application for provisional measures.

Urgency and the procedural aspects of an ICSID or AF case. Pursuant to ICSID Arbitration Rule 39(2) and Article 46(1) of the AF Arbitration Rules, the tribunal must give priority to the consideration of the request for interim relief, thus reflecting the urgency of the matter. To expedite the process, Arbitration Rule 39(5) was introduced in April 2006 in order to allow the presentation of a request whilst the tribunal is being constituted.¹³¹

Tribunals can prioritize the request in different ways. In practice, tribunals can convene a hearing or take a decision by correspondence. Before making a decision, they must give both parties the opportunity of presenting their observations. Unlike other arbitration regimes, the ICSID system contains no provisions on *ex parte* measures. If a party does not avail itself of the opportunity to present its observations, this failure will of course not be viewed as an obstacle to the issuance of an order.¹³²

To what extent should the parties be offered the opportunity to present their observations when there is a matter of urgency?

In *City Oriente v. Ecuador*, the claimant requested that the respondents refrain from collecting on a claim of over US\$28 million that was in dispute before the ICSID tribunal but had already been enforced locally. It also asked that the respondents refrain from initiating proceedings seeking a declaration of termination of the concession on the ground of nonpayment as well as criminal complaints. In other words, the claimant requested the maintenance of the *status quo* as a matter of urgency. In a letter to the parties, the tribunal ordered the respondents to refrain *inter alia* from instituting or prosecuting any judicial action and from demanding payment pending the tribunal's determination on provisional measures, which was in effect equivalent to granting *ex parte* measures. It then called a hearing one month after the filing of the request. The respondents requested a three-month postponement to select outside counsel. The tribunal accepted to defer the hearing, provided that Ecuador undertook to neither initiate or procure judicial action nor to demand payment. Ecuador having failed to do so by the required date, the tribunal held the hearing on the date initially scheduled. It in particular noted that the respondents had in-house counsel with sufficient knowledge to adequately defend their interests.¹³³ Emphasizing the urgency of the measures, the tribunal granted the claimant's request within two months of its presentation.

131 This amendment although modest is considered to represent "an important contribution to the availability of prompt provisional measures," Carolyn B. Lamm, Hansel T. Pham and Chiara Giorgetti, *Interim Measures and Dismissal Under the 2006 ICSID Rules*, in *THE FUTURE OF INVESTMENT ARBITRATION* 106 (OUP 2009). A similar provision was not deemed necessary in the AF Arbitration Rules since the parties can resort to domestic courts if urgency requires it.

132 *City Oriente*, Decision on Provisional Measures, para. 70. The tribunal underlined the need for affording both parties the opportunity to provide their observations. It concluded that when this had been done, and even if one of the parties has failed to provide its observations, a measure can be recommended.

133 *City Oriente*, Decision on Provisional Measures, para. 81.

Similarly, the *Perenco* tribunal requested the parties not to alter the *status quo* until “it had an opportunity to further hear from the parties on the question of provisional measures.”¹³⁴ It later added that such request had the same authority as a recommendation.¹³⁵ It also noted in its Decision on Provisional Measures that it had not issued the request without having received submissions from both parties.

Urgency and the administration of an UNCITRAL case. Article 26 of the UNCITRAL Arbitration Rules contains no provisions specifically addressing the procedure to be followed in connection with a request for provisional measures. This being so, Article 15(1) stipulates generally that the parties must be treated with equality and given a “full opportunity” to present their case at any stage of the proceedings.

There have been instances, though, in which the Iran-U.S. Claims Tribunal issued orders without first hearing the opposing party. These orders were given pending further determination of the request for interim measures. They were rendered because there was an urgent compelling need to stay local proceedings¹³⁶ or to prevent the sale of goods.¹³⁷ Whether the power to issue such *ex parte* orders is an inherent procedural power of the tribunal or is encompassed in the 1976 version of Article 26(1) has been discussed, with a preference being expressed for the latter solution.¹³⁸

The question whether an UNCITRAL tribunal can issue a temporary order upon request of a party without notice of the request to the other party was subject to extensive discussion during the revision of the UNCITRAL Model Law.¹³⁹ Article 17B and C of the Model Law now provides for “preliminary orders” granted *ex parte* for a maximum duration of 21 days when it is likely that harm not adequately reparable by an award on damages would occur if the order is not granted. Article 17E of the Model Law further considers the provision of a security by the applicant. Draft Article 26(5) of the Arbitration Rules also envisages the possibility of a “temporary order” without prior notice to the other party when prior disclosure of the request for interim measures to the party against whom it is made would risk frustrating the purpose of the measure in question. This power would be conditional upon a prohibition contained in the *lex arbitri*.¹⁴⁰ Indeed, the 2009 version of draft Article 26(5) makes it clear that the admissibility of preliminary orders is governed by the law applicable to the arbitration proceedings.¹⁴¹

134 *Perenco*, para. 28.

135 *Perenco*, para. 76.

136 Teledyne Industries Incorporated and the Islamic Republic of Iran, Order, September 9, 1983, Case No. 10812, Chamber Two, *reprinted in* 3 IRAN-USCTR 336.

137 Shippside Packing Company, Incorporated and the Islamic Republic of Iran, Interim Award No. 27-11875-1, September 6, 1983, *reprinted in* 3 IRAN-USCTR 331.

138 D. Caron, Leiden, p. 228.

139 Gabrielle Kaufmann-Kohler, *Mesures ex parte et injonctions préliminaires*, in LES MESURES PROVISOIRES DANS L'ARBITRAGE COMMERCIAL INTERNATIONAL, ÉVOLUTIONS ET INNOVATIONS, DÉBATS ET COLLOQUES, No. 14 (LexisNexis 2007).

140 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 59.

141 Note A/CN.9/WG.II/WP.154.Add.1, para. 28.

The Working Group reported that this provision elicited concerns especially in the context of investor-state disputes,¹⁴² although it gave no reasons for such concerns in its report.

Urgency usually interrelates with other factors that call for the necessity of the measures.

Necessity or Risk of Irreparable Harm

Article 26 of the 1976 UNCITRAL Rules refers to any measures that the tribunal deems necessary. The word “necessary” does not appear in the new draft Rules. It is not mentioned in the ICSID provisions either. Necessity appears nonetheless to be an indispensable feature. The need to grant a measure is assessed by balancing the degree of harm suffered by the applicant but for the measure. In other words, on a “balance of convenience” basis, the necessity of a measure is assessed against the consequence for the applicant of the absence of the measure. Tribunals have routinely assessed these consequences in light of the irreparable harm the applicant would suffer if the measure were not granted.

International precedents. The International Court of Justice consistently conditions the indication of provisional measures upon a showing of “irreparable prejudice.” It is commonly said that the notion of irreparable harm or prejudice derives from the common-law concept of irreparable injury. This said, the exact meaning of the “irreparable harm” standard of international law appears uncertain. Irreparable harm or prejudice was first defined by the Permanent Court of International Justice as one that cannot be compensated by way of damages or restitution in some other material form.¹⁴³ This narrow test has been abandoned in the ICJ’s subsequent practice,¹⁴⁴ except for the *Aegean Sea Continental Shelf Case*.¹⁴⁵

¹⁴² Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 55. Report of the Working Group on the work of its 50th Session, New York, February 9–13, 2009, A/CN.9/669, para. 104.

¹⁴³ Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China), also known as the Sino Belgian Treaty Case, 1927 P.C.I.J. Series A, No. 8, p. 7 (Order of February 21, 1927).

¹⁴⁴ The ICJ’s order on provisional measures rendered in the Pulp Mills on the River Uruguay case illustrates the Court’s recent practice. The Court stated in its Order of July 13, 2006: “62. Whereas the power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision (see Passage through the Great Belt (Finland v. Denmark), provisional Measures, Order of July 29, 1991, I.C.J. Reports 1991, p. 17, para. 23; Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of June 17, 2003, I.C.J. Reports 2003, p. 107, para. 22).”

¹⁴⁵ *Aegean Sea Continental Shelf Case*, para. 33. “Whereas, in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that

ICSID system. ICSID practice refers routinely to ICJ precedents and to the notion of irreparable harm. The *Tokios Tokelés* tribunal considered that, under Article 47, a provisional measure had to be urgent and necessary and that it was necessary if "there is a threat or possibility of irreparable harm to the rights invoked."¹⁴⁶ Similarly, the *Occidental* tribunal recalled that, according to the ICJ, "a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked.'"¹⁴⁷ The tribunal assessed irreparable harm in light of the existence of a monetary relief. The *Occidental* tribunal found that there was no irreparable harm since the claimants' harm, if any, could be compensated by a monetary award.¹⁴⁸

In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages¹⁴⁹ but did not discuss the matter further. Similarly, the tribunal in *Metalclad v. Mexico* denied the request and underlined that the measures must be required to protect the applicant's rights from "an injury that cannot be made good by subsequent payment of damages."¹⁵⁰

By contrast, the *City Oriente* tribunal favored the urgency requirement over the need for irreparable harm. It considered that the *Tokios Tokelés* decision was isolated¹⁵¹ and had adopted too strict an approach to Article 47 of the ICSID Convention. Turning to the existence of irreparable harm, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought by the claimants is damages, while *City Oriente* was seeking contract performance.¹⁵² The tribunal recalled in its decision not to revoke the measures granted that it had verified that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 "require that provisional measures be ordered only as means to prevent irreparable harm."¹⁵³

might be capable of reparation by appropriate means; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation". The test was criticized by Judge Elias in his Separate Opinion in which he stated "It means that the State which has the ability to pay can under this principle commit wrongs against another State with impunity, since it discounts the fact that the injury by itself might be sufficient to cause irreparable harm to the national susceptibilities of the offended State. The rightness or wrongness of the action itself does not seem to matter. This is a principle upon which, contemporary international law should frown: might should no longer be right in today's inter-State relations." p. 30

146 *Tokios Tokelés*, Procedural Order 3, para. 8.

147 *Occidental*, para. 59, quoting President Jiménez de Aréchaga in the *Aegean Sea Continental Shelf Case*.

148 *Occidental*, para. 92.

149 *Plama*, para. 46.

150 *Metalclad*, para. 8.

151 *City Oriente*, Decision on Revocation, para. 82.

152 *Ibid.*, para. 86.

153 *Ibid.*, para. 70.

The *Burlington* tribunal for its part referred to the standard of "harm not adequately reparable by an award of damages" used by the UNCITRAL Model Law¹⁵⁴ (see below). It stressed that its decision sought to avoid "the destruction of an ongoing investment and of its revenue producing potential which benefits both the investor and the State."¹⁵⁵ Unlike *Occidental*, it was not a case of avoidance of the increase of existing damage due to the passage of time; it was a case of avoidance of a different damage.

Be this as it may, tribunals established under the ICSID Convention or the AF Rules have generally adopted a rather strict approach to the definition of irreparable harm, which departs from the ICJ's current practice. One could think of explaining this difference by the fact that in an investor-state dispute, the claimants usually seek monetary relief, while in State-to-State disputes the relief sought can differ considerably.¹⁵⁶ This would not be a convincing explanation. In commercial arbitrations, the claimants most often seek monetary relief, and the harm standard is more relaxed (see UNCITRAL Rules below). In reality, one should rather ask whether investment tribunals may not over time adopt a less strict standard under the influence of the practice of the ICJ and commercial arbitration.

Irreparable harm does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of either party. Specifically, it stated that "provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State,"¹⁵⁷ namely its sovereign rights to dispose freely of its lawfully held property. In the same spirit, the *City Oriente* tribunal stressed the need to weigh the interests at stake against each other. Referring to Article 17A(1)(c) of the UNCITRAL Model Law, it emphasized the balance of interests that needed to be struck, stating:

It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby.¹⁵⁸

UNCITRAL Rules. It has been debated whether the 1976 UNCITRAL Arbitration Rules required the applicant to show a risk of irreparable harm. One author has submitted that

154 *Burlington*, para. 82.

155 *Burlington*, para. 83.

156 Indeed, one must take into account the nature of the cases brought before the ICJ and the risk of irreparable harm to persons which may motivate provisional measures. See, e.g., the *LaGrand* Case, wherein the ICJ observed "[w]hereas the execution of Walter LaGrand is ordered for March 3, 1999; and whereas such an execution would cause irreparable harm to the rights claimed by Germany in this particular case", *LaGrand*, Provisional Measures, Order of March 3, 1999, para. 24, I.C.J. Reports 1999, p. 9.

157 *Occidental*, para. 93.

158 *City Oriente*, Decision on Revocation, para. 72. A similar approach was followed by the *Burlington* tribunal, para. 82. That tribunal noted that "provisional measures are in the interest of both sides if they are adequately structured", para. 85. In order to preserve each party's right, it ordered the establishment of an escrow account.

no such requirement was implied and that it was sufficient that the act to be enjoined would substantially prejudice the rights in dispute. To wit,

[t]hat article 26 does not require irreparable prejudice is evident from the example in that article of an appropriate interim measure: 'the sale of perishable goods.' Surely the loss of goods, the sale price of which is ascertainable, is not irreparable.¹⁵⁹

This said, the Iran-U.S. Claims Tribunal has largely endorsed the requirement of irreparable harm. The notion of irreparable harm was discussed for the first time in 1984 in the case of *Boeing and the Islamic Republic of Iran*.¹⁶⁰ In this case, Chamber One denied a stay of execution since it was not necessary to protect a party from irreparable harm. In passing, it observed that "monetary damages are not irreparable harm" and that the tribunal had the power to compensate any harm caused by the execution. Faced with a subsequent application in the same case, Judge Holtzmann noted in a concurring opinion that showing that the execution of a judgment would cause grave or irreparable monetary harm to Iran could not be the only test, as "[t]he loss of a treaty right to be free of litigation in another forum may itself be irreparable."¹⁶¹ A subsequent case embraced a more flexible approach. In *Behring International*, the tribunal considered that the concept of irreparable prejudice in international law is broader than the Anglo-American law concept of irreparable injury and that the availability of monetary remedy was not a bar to granting interim relief.¹⁶² Nonetheless, the review of the decisions of the Iran-U.S. Claims Tribunal shows that the admission of irreparable harm is closely linked to the nonexistence of monetary relief. Indeed,

... [o]n balance, it has been the practice of the Tribunal to conclude that, except where unique property is involved, irreparable prejudice is difficult to establish

159 D. Caron, Leiden, pp. 241-42.

160 *Boeing et al. and the Islamic Republic of Iran*, Interim Award No. 34-222-1 at 4, February 17, 1984, reprinted in 5 IRAN-USCTR 152.

161 Concurring Opinion of Judge Holtzmann dated August 27, 1984, attached to the Interim Award No. 38-222-1, May 25, 1984, reprinted in 6 IRAN-USCTR 43.

162 *Behring International*, where the tribunal stated: "A definition of 'irreparable prejudice' is elusive; however, the concept of irreparable prejudice in international law arguably is broader than the Anglo-American law concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (i.e., where there is no certain pecuniary standard for the measure of damages, 43 C.J.S. Injunctions § 23), the former does not necessarily so require. See *Anglo-Iranian Oil Co. Case* (U.K. v. Iran), 1951 I.C.J. 89, 94 (Interim Protection Order of July 5) (ordering, *inter alia*, joint control of contested oil company with profits to be deposited in escrow account. Arguably, rights sought to be protected susceptible to reparation by award of damages); *Fisheries Jurisdiction Case* (U.K. v. Ice.), 1972 I.C.J. 12, 13 (Interim Protection Order of 17 Aug.) (ordering Iceland not to enforce extension of exclusive fishing zone beyond pre-existing 12 mile limit. Arguably, any damage to U.K. fishing industry reparable by damages); Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258, 269 (1974) ('the [I.C.J.] test is not whether adequate compensation can ultimately be provided but whether "irreparable prejudice" would be occasioned to the rights of the applicant if interim protection is refused')."

since monetary damages generally are considered adequate to compensate the requesting party for any actual damages.¹⁶³

The tribunal in the UNCITRAL case of *Paushok v. Mongolia* took a different approach. Distinguishing itself from the *Plama*, *Occidental*, and *City Oriente* ICSID tribunals¹⁶⁴ and relying on the *Behring* case, it concluded that “‘irreparable harm’ in international law has a flexible meaning.”¹⁶⁵ It also referred to Article 17A of the UNCITRAL Model Law, which only required that “harm not adequately reparable by an award of damages is likely to result if the measures are not ordered.”¹⁶⁶ It found that the claimants faced substantial prejudice, namely possible insolvency and bankruptcy of one of the claimants, and the complete loss of their investment. The tribunal concluded “[w]hile it is true that Claimants would still have a recourse in damages and that other arbitral tribunals have indicated that debt aggravation [in *City Oriente*] was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion.”¹⁶⁷ The tribunal further weighed the balance of inconvenience in the imposition of interim measures and found that it was in the interest of both parties to issue an order.¹⁶⁸ It is submitted that the risk of bankruptcy present in this case certainly constituted a risk of harm not compensable by monetary damages.

A different approach has also been adopted in draft Article 26(3), which provides that the requesting party shall satisfy the arbitral tribunal that if the measure is not ordered, the likely result is a “harm not adequately reparable by an award of damages.” In its discussion of the Model Law, the UNCITRAL Working Group adopted a similar wording. The words “harm not adequately reparable by an award of damages” were seen as not presenting a threshold as high as the “irreparable harm” test and leaving some discretion to the tribunal in deciding upon the issuance of an interim measure.¹⁶⁹ The concept of “not adequately reparable” is indeed less demanding than the requirement

163 C. Brower, p. 229.

164 The *Paushok* tribunal stated: “The Tribunal is aware of preceding awards concluding that even the possible aggravation of a debt of a claimant did not (‘generally’ says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused [referring to *Plama*, *Occidental* and *City Oriente* in its decision on revocation]. And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion, although it might have expressed reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the UNCITRAL Rules,” para. 62.

165 *Paushok*, paras. 68–69.

166 *Ibid.*, para. 69.

167 *Ibid.*, para. 78.

168 *Paushok*, para. 84. The tribunal found that the respondent had an interest that its second largest gold producer continued its operations (para. 83). On that basis, the tribunal ordered inter alia the suspension of the payment of the windfall profit tax (the validity of which under the BIT was the subject matter of the dispute) owing by one of the claimants and that claimants provide a security of US\$ 2 million, either through an escrow account or through a bank guarantee, until a final award is rendered.

169 Note by the Secretariat, 43rd Session, A/CN.9/WGII/WP.138.

of an “irreparable harm.”¹⁷⁰ Thus, the draft Arbitration Rules, consistent with Article 17A(1)(c) of the Model Law, have moved away from too strict a test. As already mentioned, in the context of a request for preserving evidence, this requirement would only apply to the extent the tribunal considers it appropriate. It remains to be seen whether this trend toward a less demanding standard in commercial and UNCITRAL investor-state arbitration will influence the practice of tribunals in the ICSID system.

Finally, draft Article 26(3), in line with the Model Law, highlights the need to balance the interests at stake. The likelihood of irreparable harm to the requesting party must “substantially outweigh” the harm which the measures sought are likely to cause to the other party.

AGAINST WHOM CAN THE MEASURES BE ORDERED?

The measures are usually recommended against the other disputing party. One leading author has suggested that an ICSID tribunal could recommend a measure to be carried out by a third party, especially a court of a third State.¹⁷¹ One has difficulty, however, identifying the source of the tribunal’s authority vis-à-vis a non party.

The *Plama* tribunal dismissed the claimant’s request to discontinue local proceedings and noted that, at least with regard to local bankruptcy proceedings, the parties are not the same since the proceedings were brought by private parties and not by the state. The tribunal then explained that it was “reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and [was] not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary.”¹⁷²

The Iran-U.S. Claims Tribunal also considered that a request for interim relief directed against a non party to the case could not be granted.¹⁷³

EFFECT OF INTERIM MEASURES

While the measures so ordered will lapse upon the issuance of the award, their effect in the meantime is disputed. There are two distinct issues when it comes to the effect of interim measures: to which extent is the recommendation or order binding on the parties and is it enforceable? These issues are linked to the nature of the decision rendered. As a related issue, the conditions upon which an order or recommendation can be modified or terminated will also be discussed below.

170 As mentioned earlier, this standard was adopted by the ICSID tribunal in *Burlington*, para. 82.

171 Schreuer et al., para. 153.

172 *Plama*, para. 43.

173 *Atlantic Richfield Co. and the Islamic Republic of Iran et al.*, Interim Award No. 50-396-1, May 8, 1985, reprinted in 8 *IRAN-USCTR* 181. In that case, the request was directed at the United States which were not a party to the specific proceedings.

Nature of the decision. Pursuant to Article 47 of the ICSID Convention and Arbitration Rule 39, unless the parties agree otherwise, a tribunal can only “recommend” provisional measures. The use of the word “recommend” has stirred discussions as to the binding character of the measures. The *travaux préparatoires* show that the drafters first envisaged the word “prescribe,” which was ultimately replaced by the term “recommend” in order “to indicate that there was no direct sanction for not following the recommendation of the Tribunal.”¹⁷⁴ This decision was adopted in the context of a strong division about the binding nature of the measures and the tribunal’s power to impose sanctions for non compliance.

Nonetheless, ICSID tribunals have ruled that the term “to recommend” has the same meaning as the term “to order.”¹⁷⁵ The *Maffezini* tribunal considered that the difference is more apparent than real and that the authority of the tribunal to rule on provisional measures “is no less binding than that of a final award.”¹⁷⁶ One reason could be that the parties are under an obligation to conduct themselves so as to avoid rendering the award impossible of execution.¹⁷⁷ The *Tokios Tokeles* tribunal further “recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures ‘recommended’ by an ICSID tribunal are legally compulsory; they are in effect ‘ordered’ by the tribunal, and the parties are under a legal obligation to comply with them.”¹⁷⁸ This approach was reiterated by the *Perenco* tribunal.¹⁷⁹

174 Aron Broches, Chairman of the Legal Committee, II (2) HISTORY OF THE ICSID CONVENTION 813.

175 *Maffezini*, para. 9. In the same vein, Article 41 of the ICJ Statute states that the ICJ indicates measures. The ICJ decided in its judgment *LaGrand Case* in 2001 that its orders have a binding effect, albeit in a different jurisdictional context. The Court stated: “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.” Judgment of June 27, 2001, para. 102, I.C.J. Reports 2001, p. 466.

176 *Maffezini*, para. 9.

177 Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 RECUEIL DES COURS 218 (1992-III) [hereinafter L. Collins].

178 *Tokios Tokeles*, Order No. 1, para. 4.

179 *Perenco*, paras. 67–76 referring to the above cases and to *Occidental*, para. 58, *City Oriente* (“it is the Tribunal’s decision that the word ‘recommend’ is equal in value to the word ‘order.’” Decision on Provisional Measures, italics in the original, para. 52) and to Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/01, Decision on provisional measures, July 2, 2009, unreported, para. 21 cited in Zannis Mavrogordato and Gabriel Sidere, *The Nature and Enforceability of ICSID Provisional Measures*, (2009) 75 ARBITRATION 1, p.42. See for a critical approach, CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (OUP 2007), who considers that the above mentioned decisions by relying on ICJ’s cases “thus represent a dramatic example of how common features in the practice of international courts with respect to

It is beyond doubt, however, that a recommendation under Arbitration Rule 39 cannot be enforced through the ICSID Convention since it does not qualify as a final award.¹⁸⁰ Section 6 of the ICSID Convention, which deals with recognition and enforcement, indeed only concerns awards as defined by the Convention. Moreover, the beneficiary of the measures is not allowed to seek enforcement of the measure before a domestic court during the course of the proceedings as a result of Article 26 of the ICSID Convention.

Nevertheless, one should not underestimate the authority attached to a recommendation of an ICSID tribunal. It is undoubtedly at least morally binding upon the parties, not to speak of tactical considerations inciting a party not to disregard directions given by persons who will ultimately decide on the merits. In addition, a tribunal can draw adverse inferences from the non compliance with its recommendations.¹⁸¹ It is indeed beyond cavil that a tribunal can take into account the behavior of the parties and their failure to observe the provisional measures in its final award.¹⁸²

Modification or revocation of the measures. Pursuant to Arbitration Rule 39(4), an ICSID tribunal may at any time modify or revoke the measures, after giving each party an opportunity of presenting observations.¹⁸³ Such power reflects the provisional character of the measures. Indeed, by nature, interim relief is temporary but the duration of the validity of the measure can extend over the entire duration of the proceedings. In that respect, one could consider that there is a general duty of the parties to inform the tribunal of any changes in the circumstances that were relevant at the time of the granting of the measures. This duty would be the corollary of the absence of any limitation of the period for which the measure is granted.

a procedural issue can do more than merely fill a gap or influence the interpretation of an ambiguous provision. Rather, a common practice with respect to a question of procedure can even prevail over a clearly expressed provision in a constitutive instrument, such as that in article 47 of the ICSID Convention." p. 150.

180 In passing, one should note that the ICSID Convention does not recognise the concept of interim award that could be enforced while the proceedings are not terminated yet.

181 See Aron Broches *in* II (I) HISTORY OF THE ICSID CONVENTION 815; Note B to Arbitration Rule of 1968, 1 ICSID Reports 99.

182 *Agip v. Congo*, 311; *MINE*, Decision on Provisional Measures, December 4, 1985. See also *Pey Casado*, para. 24. This principle was also acknowledged by a tribunal constituted under the ASEAN Agreement for the Promotion and Protection of Investments 1987, *Yaung Choo Trading v. Myanmar*, Procedural Order, February 27, 2002, 8 ICSID Reports 2005, p. 456. The tribunal rejected a request for presentation of evidence but stated "in any event, the Tribunal could draw reference from the nonproduction of evidence."

183 Or in the words of the *Pey Casado* tribunal, "provisional measures, which are provisional by nature and by definition (as the Respondent has observed), can be modified or cancelled at any time by the Tribunal, do not benefit from the force of *res judicata*, will only last for the duration of the proceedings and automatically fall if the Tribunal decides that it lacks jurisdiction to decide the case" (para. 14). See also *SGS v. Pakistan*, Procedural Order No. 2, October 16, 2002. For an example of a request for revocation that was dismissed, see *City Oriente*, Decision on Revocation.

Additional Facility cases

Nature of the decision. By contrast to ICSID Convention cases, an arbitral tribunal constituted under the AF Rules renders an “order” when it rules on interim relief requested by a party and makes a recommendation when it does so on its own initiative.

The recognition and enforcement of decisions rendered by a tribunal established pursuant to the AF Rules does not follow the regime of the ICSID Convention. AF decisions are enforceable through the regular mechanisms. This said, whether procedural orders may be enforced under the New York Convention is debated. The majority view is that the New York Convention applies only to awards. Enforcement is subject to more favorable provisions of domestic law, such as, for example, Section 1041(2) of the German ZPO or Article 183(2) of the Swiss PIL Act.¹⁸⁴ It follows that an AF order could be enforced by a local court in accordance with the procedural requirements of local law. Doubts may remain about the enforcement of a simple recommendation. However, no AF tribunal appears to have issued a recommendation so far.

Modification or revocation of the measures. Pursuant to Article 46(3) of the AF Arbitration Rules, a tribunal can modify or revoke its order or recommendation after giving each party an opportunity of presenting its observations.

NAFTA Proceedings

In proceedings conducted pursuant to NAFTA Chapter 11, the tribunal may “order” an interim measure. Article 1134 specifies in its last sentence that “[f]or purposes of this paragraph, an order includes a recommendation.” This was allegedly meant to ensure “that interim measures have the same effect in NAFTA Chapter 11 proceedings governed by the ICSID Convention as in proceedings governed by the UNCITRAL or ICSID (Additional Facility) Arbitration Rules.”¹⁸⁵ Concerns regarding enforcement similar to those just reviewed will arise here as well.

UNCITRAL Rules

Nature of the decision. Pursuant to Article 26(2) of the 1976 version of the UNCITRAL Arbitration Rules, a tribunal may render an order or an interim award.¹⁸⁶ The possibility of issuing an interim award was included in order to attempt to facilitate

184 GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, *ARBITRAGE INTERNATIONAL: DROIT ET PRATIQUE À LA LUMIÈRE DE LA LDIP* 260 (Berne/Zurich 2006) with citations. See generally on this matter, Donald F. Donovan, *Provisional Measures: Proposals for Moving Forward*, ICCA Congress series no. 11, London 2002, pp. 132-149, and Andrea Carlevaris, *Enforcement of Interim Measures in International Arbitration*, in 9 *YEARBOOK OF PRIVATE INTERNATIONAL LAW* 503 (2007).

185 M. Kinneer et al., 6-1134.

186 See *Perenco* on how the Iran-U.S. Claims Tribunal also issues requests, instead of orders, in its interim awards, thus imposing provisional measures that it regards as binding (paras. 71-73).

the enforcement of the measures. Nonetheless, the same question arises here in terms of enforcement as for an order rendered under the AF Rules or NAFTA Article 1134. Indeed, the label on the decision will not modify its true nature, which is decisive for enforcement purposes.

As a consequence, draft Article 26 only refers to orders. Under the draft Rules, an UNCITRAL arbitral tribunal could thus not order interim measures in the form of an award. It was indeed submitted that there was no purpose in issuing interim awards on provisional measures given that the revised version of the UNCITRAL Model Law contained express provisions permitting the enforcement of interim measures regardless of the form in which they are ordered.¹⁸⁷ Indeed, Article 17H of the Model Law provides for the enforcement of an interim measure issued by an arbitral tribunal except if very few limited grounds for refusal of recognition or enforcement are met. In addition, the Working Group noted that “issuing an interim measure in the form of an award could create confusion particularly in light of article 26(5) [preliminary order] which permitted the arbitral tribunal to modify or suspend an interim measure.”¹⁸⁸ Be this as it may and pending the adoption of Article 17 of the amended Model Law by national legislators, the enforcement of an order granted by an UNCITRAL tribunal is far from evident and would follow the same regime as an order rendered under the AF Rules or NAFTA Article 1134.

Draft Article 26(9) provides for the applicant’s possible liability for costs and damages if the tribunal later determines that the measures should not have been granted. This provision mirrors Article 17G of the UNCITRAL Arbitration Model Law. It was noted that this paragraph “might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met but the requesting party lost the arbitration.”¹⁸⁹ However, it appears from the discussions at the time of the adoption of Article 17G that the final decision on the merits is not an essential element in determining whether the interim measure should have been granted.¹⁹⁰

Modification or revocation of the measures. An arbitral tribunal may review or alter the interim relief ordered if the circumstances or the progress of the arbitral proceedings so require. Strictly speaking, given that an UNCITRAL tribunal cannot act *proprio motu*, it is not supposed to modify, suspend, or terminate the measure on its own initiative. The draft Rules modify this and allow a tribunal to act not only upon the request of a party but also on its own initiative “in exceptional circumstances and upon prior notice to the parties.” Any modification, suspension, or termination of the measure could be effected by a subsequent order.

If the interim relief had initially been granted not by way of an order but in the form of an interim award as provided in the 1976 version of Article 26(2), any reconsideration

187 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 51.

188 *Ibid.*, para. 51.

189 Report of the Working Group on the work of its 50th Session, New York, February 9–13, 2009, A/CN.9/669, para. 116; Note A/CN.9/WG.II/WP.154.Add.1, para. 32.

190 Note A/CN.9/WG.II/WP.154.Add.1, para. 32.

may arguably infringe the principle of *res judicata*. This difficulty will no longer exist under the draft Rules, since the latter only provide for interim relief by way of procedural orders.

CONCURRENT JURISDICTION OF DOMESTIC COURTS

Can a party seek interim relief from domestic courts, for example, if the tribunal is not yet constituted or if it is constituted but has no jurisdiction to grant the requested measures, or when a measure is directed at a third party, or a court-ordered measure is deemed more efficient?

ICSID Convention Proceedings

Interim relief under the ICSID Convention proves to be specific when it comes to the interaction with local courts. As already mentioned, Article 26 of the ICSID Convention provides that, unless otherwise stated, consent to ICSID arbitration is given to the exclusion of any other remedy. It was debated whether this exclusion applied to interim relief.¹⁹¹ As indicated, the tribunal in *MINE* recommended, in clear contrast to the tribunal in *Atlantic Triton*, that the respondent withdraw and terminate any proceedings in connection with provisional measures pending in national courts.

In 1984, Arbitration Rule 39(6) (formerly Rule 39(5)) was introduced to clarify that, except when otherwise stipulated, the parties waive their right to seek interim measures of protection in domestic courts, whether before or after the institution of the ICSID proceedings. For this rule not to apply, the parties must have stipulated so in the agreement recording their consent, namely in the arbitration clause, be it in a contract¹⁹² or in a treaty. An illustration of such a stipulation in an IAA can be found in NAFTA Article 1121 (see below). Arbitration Rule 39(6) is a further illustration of the insulated nature of ICSID proceedings.

Additional Facility Rules

By contrast, Article 46 of the AF Arbitration Rules expressly authorizes the parties to request assistance from local courts to obtain interim relief. Article 46(4) specifies

191 See A. Parra, p. 37. Some authors suggested that since an ICSID tribunal can only recommend measures, "the Contracting States did not intend to deprive national courts of the power to prescribe provisional measures" in L. Collins, p. 99. See also on this issue C. Brower and R. Goodman, *op. cit.*

192 The parties can for example insert in their agreement ICSID Model Clause 14, which reads as follows: "Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests."

that, by doing so, the parties are not infringing upon the agreement to arbitrate or affecting the powers of the tribunal. This feature has been explained by the absence of an insulated mechanism in the AF Rules and the fact that AF arbitration is generally subject to a national legal order.¹⁹³

UNCITRAL Rules

Similarly, Article 26(3) of the 1976 UNCITRAL Arbitration Rules and draft Article 26(10) allow the parties to seek interim relief from domestic courts. Such action is not seen as a breach or waiver of the agreement to arbitrate.

NAFTA Proceedings

Parties to NAFTA proceedings governed by the UNCITRAL Rules or the ICSID AF Rules can seek interim relief from domestic courts. Article 1134 does not contain any specific guidance in this respect. However, Article 1121 (entitled "Conditions Precedent to Submission of a Claim to Arbitration") complements the existing arbitration rules and limits the nature of the relief sought and the courts from which such relief may be requested. It states that, by consenting to arbitration under Chapter 11, a party (an investor on its behalf or on behalf of an enterprise) waives its right to resort to domestic courts "except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

CONCLUSION

The scope of the interim relief available in the context of investor-state disputes is broad enough to meet the parties' legitimate needs for temporary protection, subject to limitations which may be found in a relevant treaty, such as the one contained in NAFTA Article 1134, barring attachment or enjoining actions alleged to constitute a breach of NAFTA protections. This said, applicants are faced with a high threshold when seeking to establish that the interim relief requested is urgent and needed. This may explain the reluctance of the vast majority of the tribunals to grant interim relief in the context of investor-state arbitration, whether in the ICSID system or under the UNCITRAL Rules. Indeed, most tribunals seem to have rejected the requested measures with the recent exceptions of *City Oriente*, *Perenco*, and *Burlington*, as well as *Paushok*. Whether these recent developments signal a change in attitude of tribunals toward more leniency in the assessment of the requirements for interim relief remains to be seen.

193 A. Parra, p. 40.